IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1366/4/12/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP
(Remote Hearing)

Tuesday 20 October 2020

Before:

HODGE MALEK QC
(Chairman)
TIM FRAZER
TIMOTHY SAWYER CBE
(Sitting as a Tribunal in England and Wales)

BETWEEN:

(1) FACEBOOK, INC.
(2) FACEBOOK UK LIMITED

Applicants

v

COMPETITION AND MARKETS AUTHORITY

Respondent

A P P E A R AN C E S

Robert O'Donoghue QC, Gerard Rothschild, Tom Pascoe (instructed by Latham & Watkins (London) LLP on behalf of the Applicants)
Marie Demetriou QC and Brendan McGurk, Emma Mockford. (instructed by the Competition and Markets Authority on behalf of the Respondent)

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Tuesday 20 October 2020

(10.15 am)

THE CHAIRMAN: Yes, Mr O'Donoghue?

Submissions by MR O'DONOGHUE (continued)

MR O'DONOGHUE: Chairman and members of the Tribunal, good morning. In the short time available this morning I wanted to do three things. First, we obviously had a lot of questions yesterday from the Tribunal which were extremely welcome and helpful, but I do want to make sure that nothing is lost in translation in terms of our essential points. So that's the first topic.

THE CHAIRMAN: Okay.

MR O'DONOGHUE: I will then move on to the information requests and very briefly on proportionality.

In terms of recapitulation, Facebook entirely agrees with the Tribunal's statement yesterday that the question of principle under ground 1 is what is the risk of pre-emptive action and how does the derogation sought potentially adversely affect the CMA's ability to frame or implement an effective remedy at the end of the day if an SLC is found.

We did add parenthetically that the central question must be assessed bearing in mind the provisions in the IEO which would be retained.

That is essentially question 1 in the decision tree set out in our skeleton.

We made three main points in this context. First, this is not the question the CMA asked itself when it refused the derogation requests. Instead, it asked itself that so long as there was any overlap between Facebook and GIPHY, it would not consent to the derogations.

Now, I gave the Tribunal two key references, let me just give those again for the

avoidance of doubt. The first is the CMA letter of 2 July, paragraph 19(b), that is row 23 in the hyperlink chronology, and F22 of the hearing bundle.

The quotation is:

"... the CMA would not consent to remove Facebook ... from the scope of ... the IEO, unless it were satisfied that the activities of Facebook ... are unrelated to GIPHY's pre-merger activities, whether horizontally, vertically or otherwise, such that there is no prejudice to the outcome of a reference ..."

The second reference to the CMA's letter of 7 August, paragraph 35, that's in row 41 of the hyperlink chronology, and it's in F32. And there the CMA says, and I quote:

"... [it is] still in the early stages of its Merger investigation and does not yet have sufficient evidence to rule out horizontal concerns."

We made the point that this is a clear misdirection. Section 72(2) of the 2002 Act does not say that the mere existence of overlaps itself gives rise to a risk of pre-emptive action, rather the only thing which can be prohibited by way of an interim order is action which might prejudice the reference concerned or impede the taking of action under this part which may be justified by the CMA's decision on the reference.

We also submit that this point shows why the information requests are irrelevant in principle, because if the test is the existence of overlaps, which we say it isn't, then it is common ground that there are vertical overlaps at least between Facebook and GIPHY and no amount of information requests is going to change this.

The CMA is keen to backtrack on the position as set out before the application for understandable reasons. Paragraph 52(c)(iv) of its skeleton now says that

the CMA will not necessarily refuse a derogation simply because of the existence of links between the exempted part of the business and the target.

But we do make the point that the CMA before the application was issued was addressing the wrong question under section 72, and if that is correct, then the application should be allowed. This is after all judicial review.

Secondly, this is not simply a forensic point, that the CMA has changed its mind. It is that the CMA has fundamentally misdirected itself from the get-go and this is why it pursued the information request so vigorously without examining Facebook's proposed derogations one by one as it should have done.

As we shall see in a moment, it is clear that the CMA's requests for information all go to the extent of overlap between the different parts of Facebook and GIPHY.

Second, the Tribunal has our point that insofar as the CMA in Romney 1 identified what pre-emptive action the CMA is concerned with, it has no rational connection with the issue of principle concerning pre-emptive action. This was the issues of the dowry, the source code, the winding down of the alignment contracts and behavioural remedies.

I took the Tribunal yesterday to each of these points and they do not even begin to address what is the risk of pre-emptive action and how did the derogation in question potentially adversely affect the CMA's ability in respect of remedial action.

In particular, Mr Romney does not explain at all how the derogations would affect remedial action to do with the dowry, source code and so on, and we say it is quite obvious that they would not.

Finally, even if it is the case that the CMA might, in the context of remedies, do something unprecedented in the form of a divestiture of certain elements of

Facebook, along with divestiture of the target GIPHY, it is neither reasonable nor proportionate to freeze the entire global Facebook business on this basis. We say that would be the tail wagging the dog.

So that's the first topic.

The second topic is the question of the information requests. We have five points in this connection. First, just to tie in what I have just said with the information requests. Our central answer to the CMA's information request is that they are irrelevant in principle to deciding the question which the CMA should have directed its mind to, which is do the derogation requests give rise to a risk of pre-emptive action. What the CMA should have done was to consider the derogation requests one by one and decide if each of them, or any of them, gave rise to a risk of pre-emptive action, bearing in mind the provisions of the IEO which would continue to apply to GIPHY and Facebook.

The CMA did not do this. Instead it fell back essentially on a blanket request for a whole host of information derived from paragraph 3.44 of its guidance, which I will come to in a minute. But this is irrelevant to the question which the CMA should have been asking, and in any event utterly disproportionate.

Of course if in that context of conducting a proper derogation by derogation enquiry, referable to the question of pre-emptive action, there were one or two pieces of information that were missing that were required to answer the statutory question, the CMA could have asked for them. But it didn't do that, as we clearly see.

The second point on the information requests is the CMA's essential complaint seems to be that it needs to know which parts of the Facebook business would and would not be covered by the carve-out requests. But in our

submission, there is no mystery at all here. If we can go back to the marked-up IEO which Facebook had prepared -- it's in the miscellaneous bundle, B1 -- just to remind ourselves again of the archaeology of this.

In the amended paragraph 4, nothing apart from the deletion in 4(b) would change.

Paragraph 5 will continue to apply in full to GIPHY. Paragraph 5 will continue to apply in full to Facebook, save for the derogation sought under (c), (e), (i) and (k) and the part of derogation under (d).

The remainder of the paragraphs, except for (d) and 8, would not apply to Facebook at all.

Now, in its skeleton, the CMA has suggested there is some confusion about the scope of paragraph 5(d), but in our submission there is no confusion. As I explained to the Tribunal yesterday, we have offered to apply paragraph 5(d) to the supply and procurement of GIFs and stickers. Since paragraph 5(d) relates to the introduction and withdrawal of products and services, the practical effect is that we cannot bring out new GIF products or discontinue existing ones under the carve-out derogation requests.

We submit it could not be clearer, and in fact strictly speaking Facebook has gone further under paragraph 5(d), because it would, for practical purposes, be applied globally as opposed to simply in the UK as set out in paragraph 5(d). And it is common ground that Facebook itself as a social media platform, Instagram, Messenger, WhatsApp, Oculus, News Feed and Workplace, have API connections with GIPHY for the supply of GIFs.

The CMA already knows that; it even has the contracts in question.

Now, the CMA may say --

THE CHAIRMAN: On 5(d), that's different from the original version that you gave

me for the purposes of the CMC, isn't it?

MR O'DONOGHUE: Yes, Sir, there is a slight tweak.

THE CHAIRMAN: Is it a slight tweak? It's quite a big change, isn't it?

MR O'DONOGHUE: Well, Sir, we say in substance no. Obviously the wording in relation to the UK is formally maintained but we have made clear that practically that would be global in any event.

THE CHAIRMAN: But it's the last bit. You have added in:

"... and the nature, description, range and quality of goods and/or services supplied in the UK by those parts of the Facebook business relating to the procurement or supply of GIFs and stickers is maintained."

That's new, isn't it?

MR O'DONOGHUE: Yes. If we go to the hearing bundle at 367.

THE CHAIRMAN: Yes.

MR O'DONOGHUE: This is the original request made back in June. So it's essentially the same wording as we have always been putting forward, so to that extent it is not new.

THE CHAIRMAN: Okay, I was just thinking that it looked different than the annotated IEO that you provided before, but you're saying it's still consistent with what you originally proposed, and I accept that.

MR O'DONOGHUE: Yes, we've always been saying this, Sir, yes.

THE CHAIRMAN: You just tidied up the wording. That's fine.

MR O'DONOGHUE: Yes, that's a fair way of putting it.

So it does appear what the CMA is now saying is that this isn't good enough because it wants the derogations to be worded very specifically so that each department, business unit or employee knows whether he or she is in or out

of the IEO.

But this ignores the fundamental point that the whole IEO is centred around self-assessment, in particular by the provision of fortnightly compliance statements.

Just to give the Tribunal a few references in this regard, if we go to Mr Romney's statement in hearing 1, D1, page 246, paragraph 55, he says, and I quote:

"... the CMA expects parties to a merger who are subject to an IEO to self-assess (with appropriate legal advice) the extent to which their actions may infringe any IEO that the CMA has imposed. In making that assessment, merging parties, and their lawyers, should of course take into account the overriding statutory purpose for which IEOs are imposed (namely to prevent pre-emptive action)."

So it is self-assessment, that is common ground.

THE CHAIRMAN: It's common ground it's self-assessment but it has to be done in a way and in a form that the CMA is able to understand what the limits are and what's going on, so they can satisfy themselves when they see a certificate that that complies with what they expect to happen.

MR O'DONOGHUE: Well, Sir, yes, but --

THE CHAIRMAN: Both sides need to know what the parameters are.

MR O'DONOGHUE: Sir, yes, but I mean from that perspective, in our submission, paragraph 5(d) is not fundamentally different to other parts of the IEO. So for example, the terms "key staff" and "organisational changes" in other paragraphs are critical and they are not clearly defined. If we look at paragraph 4 in the main body, it requires the parties, and I quote, not to take any:

"... action which might prejudice ... a reference."

And it says, including action, under (c), which may:

"... otherwise impair the ability of the [GIPHY business] or [Facebook] business to compete independently ..."

This does not exhaustively list either what exactly is required. It calls for judgment and self-assessment.

We submit that paragraph 5(d) is not fundamentally different to other provisions of the IEO which also call for self-assessment and judgment. Of course, in this context, we do make the point that Facebook and the CMA will be assisted by the monitoring trustee, as the CMA says in its defence, if there are grey areas that the monitoring trustee and/or the CMA can assist. So this does not arise in a vacuum.

THE CHAIRMAN: Has the monitoring trustee been giving advice to the parties as to what they think the proper scope of the IEO should be rather than just merely looking at compliance?

MR O'DONOGHUE: Sir, I think the answer is essentially yes, but I will have to come back on the question of detail.

THE CHAIRMAN: Yes, because I think the natural place is to look at the two reports we have in the bundle, but I can look at that for myself, don't worry.

MR O'DONOGHUE: Sir, I'm grateful. In any event, in my submission the point remains good, that it certainly will be open to the parties or to the CMA to engage with the monitoring trustee or perhaps directly with the CMA itself in the event that there were some ambiguity.

THE CHAIRMAN: Yes.

MR O'DONOGHUE: Just to come back to a practical example you raised yesterday

of an employee within Facebook who spends, say, 5 per cent of his or her time on GIF related activities, and, Sir, you made the point yesterday that changing or removing such an employee would probably not give rise to a risk of pre-emptive action, and we respectfully agree with that.

But what about someone who spends more than 5 per cent of their time on GIFs? We submit that the answer to this question must be in the first instance a question of self-assessment by Facebook under the supervision of the monitoring trustee in the individual circumstances of the case.

It may be, with no disrespect to the individual concerned, that he or she is simply a cog in a machine doing routine tasks that have a weak relation to GIFs, and it seems highly unlikely that the hiring or firing of such an individual in such a position would prejudice the CMA's investigation or remedies.

By contrast, an example I gave to Mr Frazer yesterday: if Facebook went on a campaign of dismissing all of GIPHY's former management with a view to crippling it, that clearly would be pre-emptive action covered at least by paragraph 4 of the IEO. But the critical point is that these are not distinctions that can or should be drawn within the four walls of the IEO itself. They are matters for judgment, interpretation and self-assessment, and ultimately, if Facebook gets this wrong, on its head be it.

The practical point we make is that the answer to the CMA's questions about individual employees and work streams cannot therefore return any answers which would conceivably be relevant to the terms of the IEO which, as I noted, already prohibit Facebook from taking pre-emptive action and integration steps in particular under paragraph 4.

The third point -- the issue which on the Facebook side is causing the greatest

difficulty is the CMA's insistence that to even consider the carve-out derogation requests it needs the information set out in paragraph 3.44 of the Interim Measures Guidance.

We can pick this up directly in Mr Romney's statement at 97(b). It's in hearing 1, D1/270.

THE CHAIRMAN: Just going back and looking at (i), though, no changes are made to the key staff point. You accept the GIPHY business. I think you probably accept that there will be people within the Facebook business that there shouldn't be any changes to. But what you are saying is that, in respect of those, they will be covered in any event by the general prohibition further up on the document and you say it's unnecessary to have them there specifically covered in (i). That must be your case?

MR O'DONOGHUE: Sir, yes.

THE CHAIRMAN: Just speaking for myself, I would much rather have an IEO which says no changes made to key staff at the GIPHY business, probably executives of the Facebook business and certain levels of employees, or managers, that one would have to work out, but it's very difficult for me to work that out without the sort of engagement. I would have expected Facebook and the CMA to have sat down and negotiated and gone through each of these clauses to work out where they should be.

The problem I have with your submission, Mr O'Donoghue, at this stage is that a lot of the stuff you are saying I have a lot of sympathy with, and I made it clear yesterday that I thought that this IEO, in the circumstances, in the light of the points that you are making and the development of the investigation, and the information that you so far provided, I thought that some aspects of this IEO

are too broad, and a derogation is needed.

It's how we get there. As I said, there are a number of outcomes which -- I went through the three possible outcomes yesterday.

But I do want, as a result of this hearing, Facebook and the CMA to engage with each other to get this worked out. We will have to, as a Tribunal, sit down together after this and decide whether your first point is right, which is it's basically you should have the derogations as sought. But it may be that when we sit down together and, having taken into account what everyone has said and all the evidence, that we feel that may be too extreme a step and that something else needs to happen.

MR O'DONOGHUE: I understand that and I'm grateful. I mean, can I just say two things.

THE CHAIRMAN: Yes, of course.

MR O'DONOGHUE: I mean, first of all, as matters stand, the IEO, on the face of it, applies globally to the 50,000 plus employees and 250 subsidiaries and so on. That is manifestly a problem. At the very least we are entitled to have that cut back to something which is sensible. So that --

THE CHAIRMAN: The problem I have is how do we get the cutting back done? Because it clearly needs the CMA and Facebook to engage with each other and that I am not impressed at the moment with the argument that it's for you, CMA, just to grant our derogation requests without any further information.

I think that there is an information asymmetry between both of you and you both need to sit down and work it out. I am not trying to cop out on answering and dealing with all the important points you are raising, but there are practical considerations.

MR O'DONOGHUE: Sir, I see that. The second point I wanted to make is that the reason we put forward paragraph 5(d) in particular and fully maintained paragraph 4, subject to the one excision you see. That was put forward at all stages in the spirit of compromise, so we certainly feel from our perspective we have shifted the ground significantly.

THE CHAIRMAN: Both parties need to shift. Look, the thing is that if you know me well enough, I'm a very practical Tribunal. I am looking at results, I am not particularly impressed by technical points and people making jury points. I'm interested in getting this sorted out and getting the right result for everyone involved, and there should be a practical way of doing it.

MR O'DONOGHUE: I'm very grateful for that. As you said yesterday, which is absolutely true, virtually everyone at this hearing has far better things to be doing than arguing about this application. I mean, Facebook wants to get on with running its business; the CMA wants to get on with this merger review. So we are not here essentially out of choice.

I take the pragmatic point and I hear that loud and clear and I am extremely grateful.

THE CHAIRMAN: What I am making clear is that, to me -- and it's not my decision, it's the CMA's decision -- the ideal is not necessarily to have a broad restriction at 4 and then say, well, everything else is going to be covered within that. When I looked at, say, 5(i), I think it is desirable to have something more than just the general provision in 4 or at the top of 5, and something in (i) which deals with key employees and managers and executives, so you do know what's expected of you on both sides.

I understand your point, which is, CMA, you don't need to worry, it's going to be covered by 4 in any event, but that to me is a recipe for problems further down

the line and misunderstandings. I would much rather have something that's clear, that you, the monitoring trustee, the HSM and the CMA know what's going on.

MR O'DONOGHUE: Well, Sir, I understand, that's very fair.

So, Sir, I have made the point that --

THE CHAIRMAN: The other point you made, which is that everyone has more important things to deal with, I do regard this application as important in itself and that this is something worth doing, because we cannot have a situation whereby we have you providing compliance statements, which clearly in my view do not comply with the IEO, and you have explained why and I understand why. We need to have you in a position whereby you will be issuing compliance statements which comply with an IEO which you can live with and that works. That's where we should come to.

MR O'DONOGHUE: Well, Sir, we very much endorse that. Look, Sir, it sounds like what I said came out wrong. Of course the application is important but the point I was making is that we had tried repeatedly to resolve this with the CMA. That has not been possible. If it could have been resolved, it would have been resolved, so therefore it was with some reluctance we issued the application. Because it is diverting a lot of resources from the merger review by both sides. That is certainly clear.

THE CHAIRMAN: It is clear, but I am not happy that we have a situation that you are issuing compliance statements with the qualifications they are there and I am not happy that you are carrying on dealing with your copyright and patents and all that and changing things without having notified the CMA what's going on.

Because, you know, on its face, you have got those obligations, and I said you have three options on development and those aspects.

One is not to make any changes.

The other is to notify the CMA and get individual derogations, and you say that's impractical because of the time point.

The third is what you are doing at the moment, and that is a very unsatisfactory position.

MR O'DONOGHUE: Well, Sir, it's unsatisfactory for both sides because of course --

THE CHAIRMAN: Yes, it is, yes, yes.

MR O'DONOGHUE: -- we are very much running the risk of these repeated threats of fines because of the difficulties we have in complying with the order in its current form.

THE CHAIRMAN: Yes. We are going round in a circle.

MR O'DONOGHUE: We are.

THE CHAIRMAN: The circle has not been broken despite I thought I gave both parties a clear indication at the CMC of what I thought I wanted to happen. It hasn't happened. We will give a ruling on all these points, but I think that whatever happens in this ruling the parties do need to sit down together and engage and work this one through.

MR O'DONOGHUE: Well, Sir, we hear that loud and clear and of course we are willing to do that.

THE CHAIRMAN: Carry on. Sorry, I keep stopping you.

MR O'DONOGHUE: Just to sort of highlight some of the extremities, we do say that doing this for tens of thousands of employees is unrealistic.

Even in relation to key staff, I mean that is still a very large number of people, it's

a five-figure sum, and, again, that is obviously unrealistic.

So it is clear the IEO in some respects, in our submission, goes much too far. And then the $64,000 question is, well, if it's not across those parameters, what should it be?

THE CHAIRMAN: Exactly. And that needs to be worked out. I can't tell either you or the CMA, because it's not my job and I don't have the jurisdiction, as to where that line needs to be drawn. But I am satisfied, just looking at it from my point of view without binding either party, that it's neither what you are saying at the moment, which is it's no one within Facebook, and it's not what's currently in the IEO, but it's got to be somewhere in between.

But it's not for me to define that and it's for you and the CMA to work together, and the CMA will need information from you, to find out where that line should be drawn.

MR O'DONOGHUE: Sir, yes. Well, Sir, can I just run through what they have asked us to provide --

THE CHAIRMAN: Yes, of course you can.

MR O'DONOGHUE: -- and explain the issues. We were in Mr Romney's statement at 97(b), it's on page 270. You will see under (b) he makes a reference to paragraph 344 of the Interim Measures Guidance and then we have essentially a shopping list of information that he says has to be provided to consider these requests.

If I can ask the Tribunal quickly to look at that.

THE CHAIRMAN: Yes.

(Pause)

Just (b), yes? I've read that, thank you.

MR O'DONOGHUE: Thank you. So a number of points if I may. First of all, going back to where I started this morning, these questions are all directed to the issue of links between Facebook, its very subsidiaries, business departments and employees on the one hand, and GIPHY on the other hand. As I have explained, that is not the statutory test under section 72(2).

THE CHAIRMAN: But it's a relevant consideration, isn't it? You look at those to help you frame what the IEO should look like or the derogation request? It helps as a starting point.

MR O'DONOGHUE: Well, to be clear --

THE CHAIRMAN: I understand the point which you are saying is that if there is a link, it doesn't necessarily follow that there should be no derogation granted. I understand that.

But if there is a link, isn't that information that the CMA will need in order to consider the derogation request to see to what extent the derogation request should be granted?

MR O'DONOGHUE: Well, Sir, the point we would make, and let me develop that, is -- I mean, paragraph 3.44 is not the statutory deed and it cannot be applied in an unthinking way to the circumstances of this case.

Now, we perfectly understand that the existence of links would be relevant in a situation where the acquirer is seeking to integrate aspects of the target business within its own business pending the CMA's review.

Indeed, if one looks at paragraph 3.47 of the guidance -- it's in authorities, tab 78, bundle 5, page 4361 -- you will see the start at 3.47 where integration is permitted. Now, the meaning of the guidance is obviously a question of interpretation. It's not for the CMA to tell us what it means, it's a question of

law. And we say that what paragraph 3.44 is driving at is the integration situation.

As I said yesterday, and as is common ground, Facebook is not seeking to integrate GIPHY in any way.

THE CHAIRMAN: Not at this stage anyway.

MR O'DONOGHUE: Not at this stage. The derogations we seek concern the Facebook side on a global basis.

So we say there has been an unthinking application of paragraph 3.44, which is really concerned with integration and not with the requests we have made.

The next point we make is we would respectfully submit that it only takes a moment's thought to realise how impractical it would be to apply this catalogue of information requests to the entirety of Facebook's global business and its 250 subsidiaries.

If you look, for example, at page 271, (iii):

"How staff in the various areas of the Facebook business interact and any dual responsibilities of staff in respect of both the 'related' and 'non-related' businesses."

If you were asking this question in respect of a company which owned a factory in the UK that had bought another company, that might well be a sensible question.

If the acquirer wanted to integrate to a limited extent with a target, the acquirer could say, for example, that Mr Bloggs in the accounting department had some input into the setting of prices in the acquiring business and therefore should not come into contact with the target's operations, but Mrs Smith in the same department can because she is insulated from other parts of the acquiring

business.

But we would respectfully submit that this question returns nonsensical answers in the context of a business with 50,000 plus employees and where the request is not to integrate with GIPHY but simply to disapply provisions of the derogation request that we have made.

Just to put a bit of flesh on the bone, if we can go to Del Rosario 2, please. It's in hearing 1, C5.

It starts on page 219, and in view of the time I would ask the Tribunal in its own time to read paragraphs 14, 15 and 16 because it goes through each aspect of paragraph 3.44 of the guidance.

But just to pick up on a small handful of points, she makes the point at the end of 15:

"... Facebook is not to be equated with (for example) a manufacturing business with functionally separate plants and business teams, which operate only in a particular country or region."

And then you will see what she goes on to say.

Then at the end of 15 she notes the interconnectedness of the different parts of Facebook.

Then at 16(b), over the page, under (b)(i), she says:

"This means that all of its more than 250 subsidiaries are 'related' by virtue of a common senior leadership ..."

And then (ii) she talks about the interactions between the different parts of the business.

THE CHAIRMAN: On the 250 subsidiaries, is it that you quite often have a separate subsidiary for a different country or different region so there may be a Facebook UK, a Facebook Australia; is that why you have so many

subsidiaries?

MR O'DONOGHUE: We did make the point in the application that most of them are in fact operational subsidiaries as opposed to holding companies or shell companies. So, yes, I mean they are effectively local operations in the context of global services.

THE CHAIRMAN: Okay, that's what I thought it would be but I didn't see that in the evidence.

MR O'DONOGHUE: The essential point we make based on Ms Del Rosario's evidence is that paragraph 3.44 can't be applied in an unthinking way. It may make sense in the context of --

THE CHAIRMAN: Before you forget, can you send us a list of the 250 subsidiaries with where they relate to?

MR O'DONOGHUE: Sir, yes, we can do that. But just to be clear, what exactly is the Tribunal looking for?

THE CHAIRMAN: Just to get a sense of how Facebook operates and what we are really talking about. That's all.

MR O'DONOGHUE: Sir, yes, we will do that.

THE CHAIRMAN: Carry on. Yes?

MR O'DONOGHUE: Then, Sir, at 16(e) and (f) she makes further points about the levels of seamless integration within the company.

So for example at (f), page 223:

"... there are material links between all of Facebook's businesses, including common reporting lines, funding links, employees, customers, suppliers, IT systems, back-office services. This reflects the nature of Facebook's complex and global business operations."

So, in my submission, what Ms Del Rosario is saying which has not been contradicted by any other evidence, is that it would be difficult, if not impossible, to apply the information requirements set out in Mr Romney 97(b) to a seamless global company such as Facebook if the idea is to show that almost any part of its business is not in some way connected to GIPHY.

Sir, in case this assists on your question, the first Del Rosario statement at paragraph 8, which is page 189 of the bundle, has a description of the subsidiaries by sector.

THE CHAIRMAN: That's good, let me just quickly look at that.

(Pause)

I am not sure if it does have the information I was looking for but you will send me the schedule anyway, so that's fine.

MR O'DONOGHUE: Sir, yes.

THE CHAIRMAN: Okay.

MR O'DONOGHUE: Sir, just to go back to your example yesterday, in our submission, the CMA might, or certainly should, have no truck with Facebook releasing or hiring an employee who spends, say, 5 per cent of his time working on work streams that are directly or indirectly related to GIFs. What we cannot do, obviously, is go through each of the 50,000 employees to work out what proportion of their time each one of them spends on activities that are in some sense related to GIFs.

Indeed, we would say that any answer to that question would, with respect, be nonsensical.

One could perhaps make an analogy with the current Covid restrictions. As things stand, we cannot meet socially in groups of more than six and it would not be

proportionate to ask everyone in the country to give the police a complete list of their friends in order to enforce that rule, all the more so where the police are receiving regular reports from a monitoring detective, as in this case, and there is no record of past breaches and the police would have fining powers.

THE CHAIRMAN: But you should be able to be able to send a message to your staff and say, "Anyone who spends more than a certain percentage on GIPHY aspects please email us back and say what you are doing", if you don't already have that information.

MR O'DONOGHUE: Well, Sir --

THE CHAIRMAN: You are a global business. You are in the whole business of technology and the ability to communicate with people.

MR O'DONOGHUE: The practical problem is these reports have to be submitted bimonthly, so you would have to ask 50,000 people every two weeks what percentage of that time they spent on something directly or indirectly related to GIFs. That would obviously vary from time to time. And what would the answer tell you? In my submission, nothing useful.

A couple of final points before I wrap up.

If we go back to Mr Romney's statement at 97(c) at page 271, you will see under (c) -- the information doesn't just stop with paragraph 3.44, he says the CMA also needs:

"... a description of the typical actions undertaken by the 'non-related' parts of the Facebook business which would otherwise be caught by the IEO."

This really, in our submission, takes the request at subparagraph (b) of his statement to even further extremes by not only asking Facebook to specify the links with GIPHY at a department by department or employee by employee level, but

also at an activity by activity level. We would respectfully submit that that is even more unrealistic and equally irrelevant to the requests in subparagraph (b).

Indeed, how can Facebook break down by activities of each of its 250 subsidiaries and explain whether they relate to GIPHY and, if not, whether they relate to some other activities which themselves relate to GIPHY.

Finally on the information requests, in our submission the real issue is what derogations are we asking for and the reasons for them.

As I emphasised yesterday and this morning, our primary case is that there is no rational basis for saying the carve-out requests would give rise to a risk of pre-emptive action because the GIPHY business will continue to be held separate, and if we can just pick this up briefly in the monitoring trustee report. This is the most recent report, it's in hearing bundle 3, tab 42.

THE CHAIRMAN: What page is it on?

MR O'DONOGHUE: 2545, Sir. You will see on the top left --

THE CHAIRMAN: This is the fifth one, yes?

MR O'DONOGHUE: Sir, yes, I think this is the most recent one but I will be corrected if -- this relates to early September, I think it's the most recent one.

You will see the conclusion:

"Subject to the points highlighted in the principal observations, we consider that the GIPHY business is being held separate from Facebook."

THE CHAIRMAN: Yes?

MR O'DONOGHUE: If the Tribunal goes to the next line, I think this is confidential but if I can just ask you to read the first three bullets.

THE CHAIRMAN: On the next page?

MR O'DONOGHUE: Sir, yes.

(Pause)

The monitoring trustee in its most recent report doesn't question in any way the independence and separateness of GIPHY. That's the starting point, and an important starting point.

Facebook will continue to be subject to extensive restrictions, including of course paragraph 4 of the IEO, not to integrate and not to take any further action which could fall within the definition of pre-emptive conduct.

THE CHAIRMAN: There are caveats obviously because on one level it's saying the businesses are being operated separately, and it does that, but it does make other points in relation, for example, to the dependency of GIPHY on certain aspects of Facebook.

MR O'DONOGHUE: Sir, yes, I have addressed the integrated --

THE CHAIRMAN: A load of caveats, yes. I've got --

MR O'DONOGHUE: -- (inaudible) in some detail.

THE CHAIRMAN: The conclusion is subject to various caveats and I think you need to look at the whole report, which I have done now, to see there is an element of integration and there is an element of dependence and there are certain relationships, but by and large the businesses are being operated separately.

MR O'DONOGHUE: Sir, yes. I did spend some time yesterday on integration, maybe I need to come back to it at some point in reply, but I did deal with that to some extent at least.

THE CHAIRMAN: Of course. And look, you are not asking us to make any findings of fact in the sense that they are in dispute, but we know what the steps are, we can see what elements of integration have already taken place and what

the protections are in place and there's a difference between you as to how significant that is. I am not sure whether we need to have a complete resolution as to who's right and who's wrong on that, apart from noting what level of integration has already taken place.

MR O'DONOGHUE: Sir, yes, the facts of what has taken place are not in dispute. What gloss you put in them people may reasonably disagree. But in my submission, you're right, Sir, one does need to get into that.

THE CHAIRMAN: Good.

MR O'DONOGHUE: Our case in a nutshell is that the carve-out provisions are essentially surplus to requirements given what would survive in the IEO.

We say because of these two points, the fact that there may be direct or indirect links between individual employees of Facebook and GIPHY, or direct or indirect links between various work streams in the Facebook business and GIFs, doesn't really meet either of those two points.

Finally, Sir, to wrap up with a small handful of points on proportionality.

First on the question of the relevance of proportionality. So the CMA says that the test for whether it acted lawfully in requiring the information is one of rationality. But we say it is also one of proportionality, for a couple of reasons.

First of all, we made the point in our notice of application, and in our skeleton, that the IEO interferes with property rights under A1P1 and prolonging that interference by declining to consider the derogations, absent further information, must therefore be proportionate.

THE CHAIRMAN: Or the main point, the guidance itself at paragraph 1.8.

MR O'DONOGHUE: Correct. 1.8 of the guidance says --

THE CHAIRMAN: Exactly.

MR O'DONOGHUE: We will be bound by proportionality.

THE CHAIRMAN: You can assume we will proceed on the basis, unless Ms Demetriou persuades me otherwise, that they will act in a proportionate manner in relation to both the implementation of the IEOs and the wording of the IEOs, and in relation to how it deals with derogation requests.

MR O'DONOGHUE: Sir, I'm grateful.

The second point, Sir, again at the risk of teaching you to suck eggs, I mean obviously proportionality is a fact-intensive and sensitive issue, and I have shown you the Del Rosario evidence, which goes into some considerable detail on this question, and we do make the point that none of that evidence has been challenged and you are not invited to disregard it in any shape or form.

If I can just go to one quick authority, the BAT case. It's in authority 3, tab 43, paragraph 246.

THE CHAIRMAN: What page is that in the electronic bundle?

MR O'DONOGHUE: It's 2128, Sir.

THE CHAIRMAN: Sorry, it's page what?

MR O'DONOGHUE: 2128.

The CMA said it would be exceptional for the court to be drawn into the resolution of factual disputes in judicial review. But it's the next sentence that is relevant for these purposes. It says:

"It is not in doubt that the court is required to make its own assessment of whether a measure satisfies the proportionality test and that, as Lord Sumption put it in Bank Mellat at [paragraph] 20, 'the question depends on an exacting analysis of the factual case advanced in defence of the measure'."

So it is a factual point and it is a question for the Tribunal.

On the facts the Tribunal has my key submissions and I do not intend to repeat those.

The final point really touches more on ground 3. We do say that the burdens on Facebook are exacerbated by poor drafting of the IEO. The definition of "ordinary course of business" as matters connected to the day-to-day supply of goods and services, and so on, is circular in the context of paragraph 5(c).

So if we look for example at 5(c), the exception has the puzzling effect of allowing substantive changes to the organisational structure so long as they are not significant changes. It's not clear to us what entirely this means.

The other paragraph of the IEO is 5(e). Again, day to day hardly helps you if you have a lot of assets disposed of or acquired on a daily basis or regular basis.

Then in 5(k) it is not clear what taking all reasonable steps to encourage key staff to remain would require in circumstances where there are tens of thousands of such staff.

So just to clarify, I mean the CMA has suggested that we have effectively abandoned ground 3, which is legal certainty. We haven't. We simply say that certain parts of the IEO are not very well drafted and that that places Facebook in a pretty invidious position when it comes to the question of compliance.

MR FRAZER: Mr O'Donoghue, is your case that these phrases, "ordinary course of business" and "all reasonable steps" et cetera, are unclear in themselves or only unclear because of the special circumstances of Facebook's organisation?

MR O'DONOGHUE: Sir, I think it is more the latter than the former. I mean, obviously, the question of reasonableness is sometimes used in contractual

and other documents, but it's the mapping of that on to essentially quite a flat organisation that has seamless integration which creates a difficulty.

There's also, of course, the question of scale. I mean we have seen the numbers of employees, we have seen the numbers of patents, the number of copyrights and design rights, so the question of scale and scope is also a significant one.

THE CHAIRMAN: For my own part, the definitions are fairly clear as to what they mean. There may be arguments about where the actual parameters are but I think your point is you are really addressing -- you look at Facebook's business, the size, the scope and that it's actually very difficult to apply because you are continuingly having to make judgments on a point.

Because I think you may have a situation where you and I can look at it and we can think about it for a while and we can come up with a view and say, yes, that's in the ordinary course of business and that isn't, but when you have so many transactions and so much going on with such a big business, it becomes quite difficult.

MR O'DONOGHUE: Indeed, Sir, and in particular if this has to be done every couple of weeks. I mean, this is a continuously moving target.

Whether one cuts the cookie in terms of total number of employees, total number of managerial staff or some other metric, it's an enormous undertaking.

So just to wrap up, Sir, I mean, I've gone through the information and proportionality in a reasonable amount of detail.

THE CHAIRMAN: You have, yes.

MR O'DONOGHUE: But in our submission, it is critically important to link this back to where we started, which is section 72(2) of the Enterprise Act. We do reiterate that the only permissible purpose of freezing any part of Facebook

would be to preserve a remedial option. We do say in that context that the notion of identifying individual employees who have links with GIPHY is simply not aimed at that statutory test. It is addressing a different test and it's not even touching upon the question of remedial action.

So we do emphasise that this is, for our purposes, a bit of a rabbit hole, and one has to go back to the statutory test and apply it to that test rather than the other way round, which is what the CMA is advocating for.

So the final point before I hand over to Ms Demetriou, I did say yesterday that the clock had been restarted. That in fact is incorrect. There is, I think, an outstanding issue in relation to an e-discovery issue between the parties, so the clock is currently stopped. I want to correct that and I apologise for having misstated the position.

THE CHAIRMAN: Right, okay, thank you very much, Mr O'Donoghue, very helpful.

Ms Demetriou, just to say insofar as I have said anything over the last day or two, it doesn't mean I have any fixed views or I have decided anything. It's just that I start off with the proposition that, looking at it, there should be some element of derogation, but I am not in a position to decide what those derogations should look like, and it may be that your case is that you don't know either.

But I do hope, in the long run, that this has worked out in a way that the parties get together and work through in the normal way. You are dealing with mergers all the time and this whole process of dealing with derogations is generally dealt with relatively quickly and smoothly and people move ahead in a pragmatic way, but something has happened here that means that what normally happens hasn't worked, and at the end of the day I am not likely to say that the system, as outlined in the guidance, is wrong or that it's wrong in

principle to have a template, but we do need to move ahead from where we are and you do need to answer the case that's been put so clearly on behalf of Facebook by Mr O'Donoghue.

When do you want to start? Because we can either start at, say, 11.30, or you may want to open for ten minutes and then we have a ten-minute break. It's up to you.

MS DEMETRIOU: Sir, may I just respond to the observation you have just made and then perhaps we could make a start after the break.

THE CHAIRMAN: Yes, of course, yes.

MS DEMETRIOU: So, Sir, in response to that, I am grateful for that observation and I would just like to say that the CMA respectfully agrees. So the Tribunal has observed that the parties need to engage to refine the scope of the IEO and arrive at a reasonable derogation which fits with the statutory purpose and which is proportionate.

We respectfully agree with that, and that is very much what the CMA would like to do. But what's gone wrong, Sir, in this case is that Facebook has not engaged. So where the CMA has sought the further information it needs, Facebook, rather than engaging and providing information, or even providing some information, and saying, well, it's disproportionate to provide X, Y and Z but we are going to give you A, B and C; it just hasn't done that.

What it's sought to do in this case is adopt a principled stance in saying, "No, we are not going to provide this further information, it's all very difficult". It's irrational for the CMA not to grant the wide derogation we are seeking at the very outset in the absence of further information.

So, Sir, that's what we say has gone wrong. The CMA would very much like to sit

down at the table with Facebook and it doesn't have, hasn't been provided with the material to do that. We say that the principled stance adopted by Facebook is misguided. We should not be here before the Tribunal. Facebook should have engaged with the CMA and the parties could have sat down and refined the IEO and arrived at a derogation that suited everybody.

But because of the information asymmetry, which is profound, not to say complete, complete information asymmetry at the outset of an investigation, the CMA was simply unable to accept this very wide-ranging carve-out request at the outset, and that's why it said, "We need further information".

The CMA would have liked nothing more than to have sat down and discussed what practically could have been meant by "key staff" in this context and in the context of Facebook's business, but it simply did not know what Facebook's business comprised.

So that's the position the CMA was in, and it's very interesting, Sir, that the Tribunal has asked for -- so Mr O'Donoghue took you to Ms Del Rosario's second statement, paragraph 8, you will recall that half an hour ago, and said, "Look, this is why it's all very, very difficult, there are 250 subsidiaries, and the Tribunal asked Facebook to provide a list of those 250 subsidiaries". But that's never been provided to the CMA. That's precisely the kind of information that the CMA would have needed, but instead, Facebook simply shut up shop and said, "You are not entitled".

So, Sir, in our respectful submission that's what's gone wrong in this case and the CMA, as we have said in our defence and as we have said in our skeleton argument, has not refused to grant a derogation request, except that in formulating and refining and considering derogations it needs to act

proportionately, as the Tribunal has observed, and wants to carry out that process of engagement to end up with something that suits everybody, but it hasn't been given the material on which to do it.

So that's what's gone wrong in this case, in our respectful submission. It's simply not good enough for Facebook to say, "Oh, well it's all self-assessment, you can take our word for it", because that would be a complete dereliction of the CMA's statutory functions.

That's the problem, that's what's gone wrong and it's not an error of the CMA's making, I'm afraid. That really, in a nutshell, is where I am heading with my submissions, but I do want to, after the break, obviously make that good by reference to the statutory context and what's happened in terms of the dealings between the parties.

THE CHAIRMAN: Okay. Ms Demetriou, let's say there's a clause in an IEO that clearly you can't justify on any conceivable basis, as I think one of the examples, saying, "You must not employ anyone with red hair".

It would be incumbent upon you, having had an objection to it, to look at it and say, "We are removing that on grounds of proportionality, it's not right".

MS DEMETRIOU: Absolutely.

THE CHAIRMAN: When we look at this IEO, they're saying, as a matter of principle, there are things in here which on no conceivable basis you can tie in to section 72 and they say they have to be removed. So they are saying, "Look, we don't need to give you this information, you just look at the clause", and they say, how can that be conceivably relevant or necessary for the purposes of achieving the objective?

Obviously the objective is set out in the interim guidance, it's set out in the statute,

it's set out in paragraph 220 of the ICE Trayport judgment. And I think that's one of the issues we are going to have a have to look at: are they right, when we look at these individual clauses, that there is no conceivable basis that these relate to the statutory purpose of an IEO?

MS DEMETRIOU: I agree that that's how they have put their case and I will, after the break, be dealing with that. We say that that's not right.

Obviously as a matter of legal analysis, Sir, you are correct. So if the IEO said something about "You can't sack any member of staff with red hair", then that would be an irrational provision which the CMA would not need further information to be able to exercise. So I understand that is a matter of principle. Our position is that none of these carve-out requests fall into that category.

The test for the Tribunal is: on the basis of the information asymmetry, was it irrational for the CMA to find that there was no risk? That's really the test and I am going to explain why after the break.

To put it in reverse, what Mr O'Donoghue requires the Tribunal to find is that it was irrational for the CMA to take the view that it needed further information to test out to assess the risk. That's what they have to say and it's a very, very high threshold and they don't come anywhere near to satisfying it.

I am going to hopefully impose a coherent order in my submissions to take you through to show you how I get there.

THE CHAIRMAN: No one can ever accuse you of being incoherent.

MS DEMETRIOU: Thank you.

THE CHAIRMAN: We will come back at 11.30.

MS DEMETRIOU: Thank you.

(11.20 am)

(A short break)

(11.30 am)

THE CHAIRMAN: Ms Demetriou, before you start, one of the points being made by Mr O'Donoghue, and he referred to the letter of 7 August and an earlier email, was that the stance of the CMA is that if there is any link or interlink between Facebook and GIPHY in respect of that area, that automatically means that it's not prepared to consider a derogation in relation to that.

I hadn't read the letter of 7 August actually saying that. Am I right or not?

MS DEMETRIOU: Yes, you're right that that's not the CMA's -- there are two answers, essentially, Sir, to Mr O'Donoghue's point.

1. The first is that the CMA doesn't take that extreme position. So it hasn't anywhere said that it will not grant a derogation if there are any horizontal links.

But the letters, the correspondence -- and this is the second point -- need to be seen in context, because as I will show you, and this is one of the points I am going to come on to in a little bit more detail, Facebook's request was premised on there being no links. And you can see perhaps why it did that, because when you go back to the guidance, there are various categories of derogations that are set out as typical categories of derogations that people ask for and one of them is where there's no horizontal overlap.

So what Facebook did, and we will see this in their request, is they submitted the request on that premise. So the premise of their request was, look, we come within this bit of the guidance because there are no horizontal links.

In those circumstances, of course the CMA, when faced with a request made on that

basis, and on that premise, really had to examine whether or not they were right to say that and what that meant in practice. That's why it needed further information.

But, Sir, the other point to make in this context is that Mr O'Donoghue accepted that horizontal overlaps are relevant where you have horizontal theories of harm. So he said, if you have got two competitors that are merging, well, then it's obvious that you can see horizontal overlaps are relevant but they are not relevant in this case.

Sir, the reason why he asserts why they are not relevant in this case is because of their assertion that this is a merger that only has vertical effects. As I am going to come on to show you, that's not a conclusion that the CMA has been able to reach yet.

I say that in a deliberately nuanced way because we are still at a very early stage of this investigation, so I am certainly not saying that that's a conclusion that the CMA won't come to, but at the moment it hasn't yet formed the view that this is a merger with only vertical effects.

So in those circumstances, it has to proceed on the basis that there may be horizontal effects, and I will show you by reference to Mr Romney's witness statement how that might materialise.

So those really are the two answers to the point in a nutshell.

THE CHAIRMAN: That's fine. Mr O'Donoghue, can you put your camera on, thank you.

It's just normally that I expect both leading counsel to be on the camera unless, obviously, you have something you need to take instructions on.

MR O'DONOGHUE: Sir, of course.

THE CHAIRMAN: Thank you.

MS DEMETRIOU: Sir, are you happy for me to proceed with my submissions --

THE CHAIRMAN: Yes, of course.

MS DEMETRIOU: -- or are there any other questions --

THE CHAIRMAN: Don't worry, there will be plenty of questions.

Submissions by MS DEMETRIOU

MS DEMETRIOU: Sir, I think I have explained that the CMA's case in a nutshell is that, contrary to what Facebook alleged, it has not refused this derogation request and it hasn't failed to grant it.

What it has said is that it requires further information in order to consider it. It actively wishes to engage with Facebook.

THE CHAIRMAN: You accept that is a decision, so is it fair to say that your decision, if there is a challengeable decision, is one whereby we are saying we are not going to grant this derogation request in the absence of further information? Is that a fair -- or am I being unfair?

MS DEMETRIOU: Well, can I put it this way: the analysis is as follows. The CMA has a very wide discretion in determining what information it requires in order to fulfil its statutory functions. The case law, as I will show you, establishes that it has a very wide margin of discretion and that the Tribunal will only intervene on that score if the CMA has acted irrationally.

So if it was irrational for the CMA to seek further information, then Mr O'Donoghue would be correct that that would in a sense amount to a constructive refusal of the request. But we say that the CMA has not acted irrationally in seeking the information it has, in seeking further information.

So in those circumstances, there is no constructive refusal of the request. We are

simply -- because of Facebook's stance -- at a very early stage in considering the request. Effectively, we are at an impasse because Facebook have not engaged; have taken, as I say, a "principled" stance and not provided any information or engaged at all.

So I don't think it's right to say that the CMA has decided in principle not to grant this without further information. It's not in a position to assess the risks, unless it's given further information, and that's what it's been seeking.

THE CHAIRMAN: Isn't that the same practical result though? Their case is that you look at the IEO, you look at the derogation requests, you look at section 72 and what the objective is.

MS DEMETRIOU: Yes.

THE CHAIRMAN: You look at the nature of their business insofar as you are informed of it, and they say, on that basis, you should, as a matter of law, grant the request without the need for any further information. I think that's what their case is.

MS DEMETRIOU: That's what they are saying.

THE CHAIRMAN: Your case seems to be that we accept that there may need to be some adjustments, but in order to determine the nature and the extent of those adjustments, you need further information. And it's not a too big leap from that to say that in the absence of that further information, these derogation requests are not going to be complied with. When you look at the Act, it says the failure to make a decision in itself can amount to a decision, a reviewable decision, and you can see why, in a case like this where you have practical implications of not determining this issue in the form of compliance statements, ongoing potential breaches of the IEO, that this is

a decision that the Tribunal should have jurisdiction to review.

MS DEMETRIOU: Sir, I accept that entirely and I am not seeking to make a technical point along the lines of, well, there's no reviewable decision, because I accept that in principle, if the CMA had acted irrationally in seeking this information, there would be a reviewable decision.

But I think the important -- I also accept the way that you have just put it, Sir, but what we do say, and this is a point which we say is clear on the case law, is that the standard of review in these circumstances is one of rationality.

So we accept entirely the comments that the Tribunal has been making in exchanges with Mr O'Donoghue to the effect that the CMA must act proportionately when imposing an IEO, and you see that in the guidance, and we accept that.

But the situation here is that the CMA wishes to act proportionately and wishes to assess risk and has sought further information in order to put itself into a position to do that, and the question whether or not it's entitled to seek further information is, as I say, one in relation to which it enjoys a very wide margin of discretion. And you can see why that's so, because it's the expert regulator who's looking at all of this and knows what sort of information it typically requires. It obviously determines lots of mergers cases. In determining -- we will see this in the authorities -- what material it requires, it enjoys a very wide margin of discretion such that the Tribunal will only intervene if it's acted irrationally.

We do say that that legal point is an important one. We would say in any event, if the Tribunal were not persuaded of that and if the Tribunal thought this were a proportionality issue, it really does in the circumstances of this case make

no difference, but it's important we say -- may be important for other cases. But in the circumstances of this case, we say, as I will come on to explain, it's plain the CMA has acted proportionately in seeking this information and in adopting the stance it has because on any view, it must have a wide margin of discretion even if one applies a proportionality standard as to what material it needs in order to make the risk assessment.

So, Sir, our primary position is, yes, this is a reviewable decision but one needs to be careful about what the decision is, and we say that it's a reviewable decision to request information. That's really the stage the CMA is at.

So, Sir, we say that the CMA, in a nutshell, has not acted unlawfully in this case because the way --

THE CHAIRMAN: Can we go back one stage.

MS DEMETRIOU: Yes.

THE CHAIRMAN: They obviously do not want to fight the case on the grounds of their being under an obligation to provide further information to get their request through or considered properly. But their main ground of challenge is that we don't get there. We don't get to the stage of you seeking further information because they say you look at the IEO and the statutory objectives and, when you go through each clause you can't justify at this stage what's in there. I think that's what they're saying.

MS DEMETRIOU: That is.

THE CHAIRMAN: And looking at the information, that clearly will come into the whole equation if they are wrong on their fundamental point.

MS DEMETRIOU: Yes.

THE CHAIRMAN: So we have to address their fundamental point at some stage

and go through each of these clauses. I know it's a laborious exercise but it's got to be done, and certainly we as a Tribunal will want to go through each clause and see where we are.

MS DEMETRIOU: Sir, I will do that later on in my submissions.

THE CHAIRMAN: Yes, I don't want to take you out of your order.

As regards the authorities on information requests and irrationality, I think they are worth going through.

MS DEMETRIOU: Sir, I'm grateful. I want to in a sense construct some of the building blocks first and then I will go through the IEO, the particular paragraphs of the derogation, in due course.

But in a nutshell, we say that the CMA has not acted unlawfully in this case because the legislation provides for it to take a precautionary approach in imposing IEOs so as to preserve the integrity of the merger reference and any remedy that might be imposed.

It's important, we say, in this regard to note that Facebook itself has proceeded on the basis that it's necessary to distinguish those parts of its business that relate to the procurement and supply of GIFs and those which are unrelated. So that's the premise for its derogation request.

That's how it's formulated its carve-out request.

In those circumstances, it's critical for the CMA to understand, first of all what Facebook itself understands by that distinction, what it's intending by that distinction, and, secondly, how that maps on to Facebook's business.

We say that the CMA doesn't understand that, those two things, because Facebook has refused to provide the CMA with any information in those regards.

Essentially, as I have said, Facebook's position is that at the very outset of the

merger enquiry, where there is a complete asymmetry of information between the parties on the one hand and the CMA on the other, and the CMA is just beginning its investigation, Facebook's position is that at that stage the only lawful response for the CMA was to accept the carve-out request and accept this distinction drawn by Facebook itself, without drilling down into it any further.

We say that that can't be right and we say that the CMA did not, as Mr O'Donoghue submits, misdirect itself as to the statutory test. It didn't misdirect itself at all. And what I want to do in, really, making my submissions is develop my submissions as follows.

I want to take the Tribunal back first to the relevant legislation and to the guidance.

Then I want to deal with some of the key facts, including the carve-out request as formulated at the outset and the CMA's position, and I just want to go back to some of the letters that Mr O'Donoghue took you to, in particular the August letter.

Then I want to make my submissions by explaining first of all the basis on which the CMA contends that it acted lawfully, we say rationally, in seeking the further information.

Then I am going to address Facebook's main arguments, including by going through the carve-out request.

So, Sir, members of the Tribunal, starting with the legislation, can we pick up, please, the Act in the first volume of the authorities. So it's behind tab 3. I want to look first at section 22 on page 17.

Section 22, of course, imposes a duty -- so this is tab 3 of the first volume, page 17 -- on the CMA to make a reference, and this is the phase II reference. So it's

a duty to:

"... make a reference to its chair for the constitution of a group ... if the CMA believes that it is or may be the case that -

"(a) a relevant merger situation has been created; and.

"(b) the creation of that situation has resulted, or may be expected to result, in [an SLC]."

So that's the duty on the CMA. The purpose of the phase I investigation, which the CMA has not yet commenced because of the various clock stopping, is so that the CMA can put itself in that position of (a) determining whether it believes that there may be a merger situation, and (b) whether it believes that that may have resulted in an SLC.

So no, even at the end of phase I, a firm conclusion on those things is not required, and phase I is there in order for the CMA to decide whether or not it's under an obligation to make a reference.

Then, if you move forward to section 25, which is on -- no, sorry, I have the wrong reference.

With completed mergers -- let me just find the reference. I will come back to that.

THE CHAIRMAN: Okay.

MS DEMETRIOU: The point being that with completed mergers, the CMA is under -- let's go to remedies, I can make the point better.

Sorry, I have my reference now. So section 35 -- apologies for this -- on page 43. So "Questions to be decided in relation to completed mergers", does the Tribunal have that on page 43?

THE CHAIRMAN: Yes.

MS DEMETRIOU: "Subject to subsections (6) and (7) and section 127(3), the CMA

shall, on a reference under section 22, decide the following questions -"

So at phase II, the Tribunal has to decide whether the relevant merger situation has been created and, if so, whether that situation has resulted, or may be expected to result, in an SLC.

Then moving on to remedies, and section 41 on page 50, there is then a duty to remedy the effects of completed or anticipated mergers. You see the mandatory language. So at sub-section 2 of 41:

"The CMA shall take such action ... as it considers to be reasonable and practicable -

"(a) to remedy, mitigate or prevent the [SLC]; and

"(b) to remedy, mitigate or prevent any adverse effects which have resulted from ... the [SLC]."

Then you see at sub-section 4 that:

"In making such a decision ... the CMA shall ... have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the [SLC] and any adverse effects resulting from it."

So it's a mandatory duty. Just pausing there and moving on -- we are going to come back to the Act -- but if you could pick up bundle 5 of the authorities and look at the remedies guidance. So that's tab 77 of bundle 5 of the authorities. It's page 4273 and it's paragraph 3.5.

This is to do with effectiveness of remedies, and you can see there that:

"The CMA will assess the effectiveness of remedies in addressing the SLC and resulting adverse effects before going on to consider the costs likely to be incurred by the remedies. Assessing the effectiveness of the remedy will involve several distinct dimensions:

"(a) Impact on SLC and resulting adverse effects. The CMA views competition as a

dynamic process of rivalry between firms seeking to win customers' business over time. Restoring this process of rivalry through structural remedies, such as divestitures, which re-establish the structure of the market expected in the absence of the merger, should be expected to address the adverse effects at source. Such remedies are normally preferable to measures that seek to regulate the ongoing behaviour of the merging parties …"

But you see that what the CMA has to look at is the dynamic process of competition in the market and so if it sees adverse effects resulting from an SLC to that dynamic process of competition, then it's under a duty to put in place a remedy.

Now, going back to the Act, please, in the first authorities bundle behind tab 3 and focusing for a moment again on section 72, which you have seen already, and this is at page 102, it's important to see at what stage this applies.

These are initial enforcement orders and you can see that sub-section 2 applies where:

"(a) the CMA is considering whether to make a reference ..."

So that's in phase I, not before phase I. And where:

"(b) the CMA has reasonable grounds for suspecting that it is or may be the case that two or more enterprises have ceased to be distinct or that arrangements are in progress or in contemplation which, if carried into effect, will result in two or more enterprises ceasing to be distinct."

So (b) is the only condition and that's a very important point, in my respectful submission, because what is notable here for its absence is any reference to SLC or believing that there may be -- it may be the case that there's an SLC.

All the CMA has to have reasonable grounds for suspecting is that there's a relevant

merger situation. The reason for that is obvious. It's because it's the very outset of the process, no information has yet been provided, the CMA is just beginning its investigation and the phase I investigation is designed to put it in a position that at the end of phase I it can reach a view, amongst other things, on whether there may be an SLC and whether it's under a duty to make a reference. But it's very important that it does not need to have reached that view at this stage, or even to have identified any theories of harm, and that's because it's much too early.

So pausing there, you can see as well that these powers, the powers in 72(2) are broad. So:

"The CMA may by order, for the purpose of preventing pre-emptive action -"

And then you have a series of very broad powers.

You see also at (3B) that the CMA also has the power to take action to unwind steps that have already been taken, and of course those broad powers have to be exercised in accordance with the statutory purpose. The statutory purpose is for the purpose of preventing pre-emptive action, and you see at 8 -- we have seen it already -- what pre-emptive action means.

There are two limbs to this definition and it's a point that Mr Frazer put to my learned friend yesterday, with which he did not grapple. So Facebook has concentrated only on the second limb because no doubt that's the point it finds easiest to answer.

The CMA, when it's approaching this, has to have regard to the entire statutory purpose.

The first limb is: action which might prejudice the reference concerned. That's very broad. Might prejudice the reference concerned. Might prejudice the adverse

effects that result from the dynamic nature of competition. Then you have the second limb: or impede the taking of any action under this part which may be justified by the CMA's decision on the reference.

The reason why the purpose is framed in this way and the powers are so broad is because what the IEO does, its function, is essentially to hold the ring in order that the CMA can effectively fulfil its statutory duties.

At this very early stage of the process, the CMA will not know, will be unable to form a view, on whether there's an SLC, what that might look like, what the potential theories of harm are, which ones are likely to hold true in the CMA's view. It's too early to form a view on any of those things and the CMA is not required to form a view on those things, as we see from section 72(1A) and (B).

Now, of course these provisions represent amendments made by the Enterprise and Regulatory Reform Act. If I can just take you back to our defence, because we say that this is an important contextual point. So that's in volume 1 of the hearing bundle, behind tab 2, and it's page 87, paragraphs 31 to 34 of our defence.

We see there, and this is really underlining the point I made about section 72(1), we see at paragraph 31 that prior to those amendments, the OFT was only permitted to impose an interim order if it had reasonable grounds for suspecting that (a) a relevant merger situation has been created; and (b) pre-emptive action is in progress or in contemplation.

Those words, that requirement, was repealed. So even then the CMA did not need to identify the SLC. But the requirement that they established, that pre-emptive action is in progress or in contemplation, was repealed to make

the power much broader.

We see at 32 reference to the explanatory notes, and you see that the changes were intended to strengthen the interim measures powers available to the CMA by making it easier for the CMA to suspend the integration for companies involved in a merger during a phase I investigation.

And then if you look at the citation from the notes, at the bottom part of it:

"This section changes the mechanism through which, at Phase 1, the CMA can prevent pre-emptive action from taking place in completed and anticipated mergers. At the moment, in completed mergers, merging parties are often unwilling to sign up to initial undertakings ... until they have agreed with the OFT derogations from its standard template undertakings. This process can take time and integration can continue until undertakings are in place. This section enables the CMA to pause integration of companies involved in a merger immediately and then consider with the parties whether any further integration should be allowed through derogations."

Just pausing there, that's precisely how the CMA has attempted to operate the statutory provisions in this case. It's Facebook that has not played its part.

So then we see, at 33, we say that that shows that Parliament's intention was to enable the CMA to intervene swiftly and by way of standard form order in the case of completed mergers.

A similar point was made by -- just, in fact, perhaps we could turn over the page and just note for a moment, at paragraph 36, what's meant by the Stericycle case, which is cited at paragraph 36, which deals with what's meant by pre-emptive action, so the threshold. Mr O'Donoghue kept saying the CMA have to show that pre-emptive action will take place. And that is not the statutory test and

maybe that error has underpinned Facebook's misguided approach here.

What you see there from the Tribunal's ruling in Stericycle is:

"Moreover, the word ... used in section 80(10) implies a relatively low threshold of expectation that the outcome of the reference might be impeded. At the time the CC is considering whether to exercise its powers ... it necessarily cannot be sure whether any action being taken (or proposed) by the merging/merged parties will ultimately impede any action being taken by the CC as a result of the reference. The power ... enables the CC to intervene where it considers that there is at least some risk of that happening."

So the threshold is lower and it's a point Mr O'Donoghue constantly and consistently glossed over, both in his written and oral submissions.

We say a similar point was made by this Tribunal, including by the Chairman, in the ICE Trayport case at paragraph 220. For your note it's tab 44 of the authorities, page 2235.

Again, a similar point was made by the Tribunal in Electro Rent. For your note that's tab 46. It starts at 2341. It's paragraph 120, which is 2373.

So moving, if I may, to the Interim Measures Guidance, between tab 78 of the authorities, which is volume 5. So it starts at page 4331 in the bundle, behind tab 78. I would just like to show you some further paragraphs in this guidance.

If we can start on page 4335 at paragraphs 1.5 to 1.6, this is a point that Mr Romney has made in his witness statement, that the UK's unusual in having a voluntary non-suspensory mergers regime, which, unlike most other jurisdictions, allows merging parties to self-assess whether to complete a merger without first seeking clearance.

That obviously has benefits for the parties. But then at 1.6:

"However, the purpose of merger control is to regulate in advance the impact of mergers on the competitive structure of markets. If the CMA decides that a merger does require scrutiny, it is essential to the functioning of the UK's voluntary, non-suspensory merger regime that Interim Measures to preserve the pre-merger competitive structure of markets should be effective. The CMA's ability to impose Interim Measures on merging parties, and to impose penalties where these have not been complied with, are the necessary corollary of having a voluntary regime."

That's an important point, in the CMA's submission, because it's the breadth of these powers which really enables the UK to maintain the mergers regime that it has and not require, as in many other jurisdictions, the parties to pre-notify mergers and have a competitive assessment before the merger is allowed to progress.

One can see exactly why, in the circumstances where the UK has adopted a regime which is beneficial to parties, it needs this quid pro quo in order to hold the ring and avoid any lasting competitive damage to the market that might result from the merger.

That's why we have the first limb that Mr Frazer highlighted yesterday, which is prejudicing the merger reference. That's why that's an important part of the definition.

Now, moving on in the guidance to the next page, we see, at 1.7, why that is, why it's necessary to hold the ring.

At 1.8, that confirms that:

"The CMA will act proportionately in proposing interim measures whilst having regard

to the necessity of preventing pre-emptive action. What's necessary to achieve this in each case is judged on the basis of the facts available to the CMA at any given time. As the CMA's understanding and analysis evolves in a particular case it may be prepared to enact some of the requirements equally may impose more requirements."

But the critical feature there is that what's necessary to achieve this has to be judged on the basis of the facts available to the CMA.

So if no facts are available to the CMA then it has to act in a precautionary way. It's simply unable to carry out the risk assessment that Mr O'Donoghue's clients wish it to do.

Then if we move forward to paragraph 2.25, which is on page 4344, you see there that interim measures serve a particularly important function where the merger is completed before it's examined by the CMA.

At 2.26:

"At phase 1, an IEO has a precautionary purpose, and the CMA would therefore normally impose an IEO in completed merger cases which it is investigating (given the immediate risk of pre-emptive action). The only exceptions to this approach are likely to arise where the CMA has been provided with compelling evidence that demonstrates that there is no risk of pre-emptive action or there are sufficiently no competition concerns. Merging parties who believe that they might satisfy the criteria for either of these exceptions are encouraged to discuss this with the CMA prior to completing their transaction."

So what's being said there, and this is all apiece with paragraphs 1.5 and 1.6 and the explanatory notes, which explain the change to these provisions, the broadening of these provisions; what's being said is that where you have

a completed merger, then where the parties have already merged and commenced integrating, then that, almost by definition, presents a risk, a risk of pre-emptive action, a threat to the merger reference, because already, if integration has taken place, or has started to take place, the competitive structure of the market will have changed.

Of course, you have seen that the duty to remedy any SLC requires the CMA to restore the merging, insofar as it can, the pre-merger competitive structure of the market.

Then moving on to 2.29 on the next page, you see there the need to impose an IEO, and again this was contemplated in the explanatory notes. Because of the need to impose an IEO quickly in completed mergers, it almost always takes the form of the standard template. And then discussions would therefore almost always take the form of derogations, which the CMA may grant simultaneously with the IEO or after the IEO is imposed. This approach is intended to ensure that effective IEOs can be put in place as quickly as possible and to provide greater factual and legal certainty around the initial scope of an IEO.

Then at 2.30, in completed merger cases, where practicable, the CMA will consider submissions on derogations from the merging parties before imposing an IEO. Merging parties are encouraged to engage with the CMA as early as possible for this process. Where the merging parties have clearly demonstrated that some of the provisions are not relevant, the CMA will publish a derogation.

Then, accordingly, I am skipping further down, where the CMA is unable to establish that a derogation is justified, eg because there is insufficient time available to review the merging party's submissions or because insufficient information

has been provided to support the derogations, an IEO or IO may be imposed without prior discussion of possible derogations. The CMA therefore encourages the merging parties to provide fully specified, reasoned and evidenced submissions to facilitate early decisions if the merging parties consider it necessary to have derogations in place on completion.

What this does is it emphasises that evidence and reasoned requests are key, and that's because, as I have said, the CMA does not have this information. It doesn't know how the parties' businesses work, so that's what it's starting to find out.

And that the CMA is encouraging parties to come forward early so that it can, if possible, grant the derogations at the same time as imposing the IEO.

Now, moving forward to page 4347, you see a similar point is made there. So derogations are more likely to be -- this is 3.2 -- granted if requests are fully specified, reasoned and supported by relevant evidence, and then it includes some examples of what the CMA considers to be helpful.

Then over the page at 3.5, on page 4349, where the CMA's fact-finding remains at an early stage, ie particularly within phase I, we would say parenthetically a fortiori where phase I has not even commenced, the CMA is likely to adopt a cautious approach to granting derogations, typically granting narrow derogations that are closely calibrated to the justifications provided by the merging parties and which are sufficiently evidenced. The involvement of the monitoring trustee may enable the CMA to grant more complex derogation requests, as well as speed up the CMA's decision.

You can see at 3.7, and this really addresses a point made by Mr O'Donoghue, that merging parties should know that it's of the utmost importance that interim

measures be scrupulously complied with and that a merging party should not itself form judgments or reach decisions that are properly for the CMA.

One heard throughout my learned friend's submissions a theme which was, "Well, this is all about self-assessment, we can take pragmatic view of what's required", and that simply is not how the statutory scheme works. It's not for the parties to decide; it's for the CMA to adopt this precautionary approach and to hold the ring and ensure that its statutory functions are not prejudiced.

Then moving on to 3.8, again a reference to compelling evidence being required, and this is all because the CMA doesn't have any evidence at this stage.

Then you see at 3.10 this is not directly in play in this case. That even where a merger has not been completed, even if there are pre-merger discussions, the CMA adopts a precautionary approach in relation to pre-merger discussions.

And then moving on to page 4353, paragraph 3.22, this notes that this doesn't prevent, the IEO's don't prevent actions in the ordinary course of business.

So that's a way of ensuring that these IEOs are proportionate from the word go and are not directed to things which are unrelated to the competition or concerns that may arise from the merger.

Then what you have, and it's important to see the structure of this guidance, is a heading on the next page at 4354, so the heading is just above paragraph 3.24, "Derogations generally granted by the CMA in previous cases". What you see at 3.24 is a recognition that this is not meant to be exhaustive and the fact that a derogation has been granted in a previous case does not mean it's going to be granted in this case. But in order to be of assistance, you then see a list of derogations that have typically been

granted. So you can see the headings:

"Provision of certain essential services by the acquiring business to the target business."

Then if you work through, on the next page, "Delegations of authority for the target business". Then again, "Provision to the acquiring business of certain financial information ..."

Then you see, "Guidance on more complex derogations". Then you see some headings relating to that.

At 4359, you have seen these provisions but you see the heading. So, "Parts of one merging party's business that are not engaged in activities related to the other merging party's business".

The point here is that --

THE CHAIRMAN: Ms Demetriou, is it common ground that we are dealing with a complex derogation here?

MS DEMETRIOU: It is common ground that we are dealing with a complex derogation. The point I am going to make when I come to the documents, to the interactions between Facebook and the CMA, is that Facebook premised its request on coming within this section of the guidance. So this section of the guidance is dealing with a complex derogation which is made on the basis that there are no overlaps in their activities.

That's essentially what Facebook alighted on in making its derogation request.

Then you see that where a derogation request is made on that basis, you see at 3.43 that the CMA may be willing to grant a derogation; will only grant derogation on this basis, where it's able to establish clearly that this won't impede the CMA from taking any appropriate remedial action, and that it will be cautious

at the earlier stages of its investigation where the full scope of the merging party's activities may not yet have been fully analysed.

We rely on that because this was a very early stage and the CMA was seeking information precisely to analyse the full scope of the merging party's activities. I will come on in due course to give you some examples of showing you what the CMA didn't know, which were pertinent points which they simply didn't know.

Then you see what merging parties are required to do. So they have to delineate the parts of their businesses that respectively do and don't engage in activities related to each other. So derogation requests should include clear descriptions of all the relevant businesses and their functions. And then you have seen already the sorts and types of information that the CMA really wants to see in relation to derogation requests which rely on there not being an overlap.

You see at 3.46, while the examples described above relate to circumstances in which there is no horizontal overlap between the merging parties, the CMA will also take any potential vertical relationships between the merging parties' activities into account when assessing whether derogations can be granted on this basis.

THE CHAIRMAN: Sorry, what paragraph is that?

MS DEMETRIOU: 3.46, which is on page 4361.

THE CHAIRMAN: Okay.

MS DEMETRIOU: So it's not all about -- so Mr O'Donoghue, in answer to the Chairman's question, which was asking Mr O'Donoghue whether he accepted that horizontal overlaps are relevant to the question of pre-emptive action, he

accepted that they were relevant where you have a merger that results in horizontal harm. And the two points that we make in response to that are, well, it's not only about horizontal harm, look at paragraph 3.46, the CMA has to be astute to consider vertical relationships too.

But also, it's simply too early for the CMA to decide whether Mr O'Donoghue's client is right to say that this is a merger with only vertical effects. So those are the two responses to his point.

Those really are the points I wanted to take from the guidance.

I was going to turn to some of the documents and to the facts, but before I do, could I summarise the key facts which we seek to derive from the documents before we go to them.

THE CHAIRMAN: Can you just do that in one second, I am just making a note.

MS DEMETRIOU: Of course.

(Pause)

THE CHAIRMAN: Presumably you rely on 3.63 as well?

MS DEMETRIOU: If you just give me a moment, Sir.

THE CHAIRMAN: When I went through the Interim Measure Guidance myself I thought that 3.63 and 3.66 were relevant as well.

MS DEMETRIOU: Yes, I'm very grateful for that. We do say that they're relevant.

Yes, I am very grateful. We do say that they are relevant. What they really do is underline the point that the CMA is being asked to make a fact-sensitive assessment, a precautionary fact-sensitive assessment, at a time when it won't have formed any views on the SLC or the theories of harm and at a time when it doesn't have any information to speak of about how the parties' businesses work and what the competitive structure of the market is. That's

all in the future. The CMA is going to be using its compulsory powers to gain that information.

So in order to exercise the precautionary function, which is conferred on it by section 72, the CMA needs evidence. If it doesn't get that evidence, then it's entitled to not grant the derogations, because it has to act in a precautionary way.

That's really because apart from anything else, it has statutory duties to make a reference, if there's likely to be an SLC, and to remedy any SLC that's been found.

What it needs to ensure is that the ring is held to enable it to fulfil those duties. That's a precautionary exercise, as the amendments to the legislation show and the explanatory notes show. Sir, I am grateful, we do rely also on those paragraphs.

THE CHAIRMAN: Yes, okay.

MS DEMETRIOU: I was going to turn to the facts but I want to say just in advance of going to some of the documents what we say the four key facts are that we seek to derive from the documents.

We say that, first of all -- some of these are not controversial.

1. This is a completed merger in which, on any view, there have been integration steps already, they've already taken place.

As we have said several times now, including in our defence, and I think in Mr Romney's evidence, the CMA of course does not in any way criticise the parties for taking these integration steps, because that's the way in which the UK regime operates. So in having a voluntary non-suspensory regime, the premise is that there may well have been integration steps that have been

taken, there is no criticism that can be levied at parties for that, but --

THE CHAIRMAN: The only circumstances in which I think there would be a concern was if the parties know that there's a real risk of a reference and an SLC, and they deliberately integrate very quickly in a way that would sabotage any possible remedy that the regulator may wish to impose, but we are certainly not in that scenario in this case.

MS DEMETRIOU: Sir, we are not at all contending that we are in that scenario in this case. We do not make any criticism in this case. But the point that we do seek to make, and I have made it already by reference to paragraphs 1.5 and 1.6 of the guidance, is that the corollary of the parties' freedom to do that are the broad powers, IEO powers, which enable the CMA to hold the ring in terms of preserving the competitive structure of the market.

Where parties do take integration steps, that obviously gives rise to a risk of pre-emptive action, and that's why the guidance, which is not challenged in this case, provides, or states, that in most completed merger cases, the CMA will proceed by way of the standard template IEO, and that's because the fact that integration steps may have been taken just gives rise to an immediate risk, because immediately the market structure may have been changed.

So the second point that we make, factual point, is that Facebook made its carve-out request at the outset, as it was entitled to do, its derogation request. But it made it at a stage when the CMA had next to no information about the way in which the businesses were run or in which the market operated.

3. The third point we wish to make is that the premise for Facebook's derogation request was that its business is largely unrelated to GIPHY's. So that was the very premise for its own request. It said very few, if any, horizontal overlaps.

4. Fourthly, it's common ground that Facebook did not provide the CMA with further information, any of the further information contemplated by paragraph 3.44 of the guidance. Instead, it took a very black and white approach, stance, adopted a very black and white stance, which is to say that it should be clear to you now, CMA, that this carve-out should be granted, and it's irrational of you to take a decision not to grant it without interrogating us further, or seeking any further information.

So it's not a case in which Facebook provided some of the information and then said, "Well, you should have enough now, let's explain why, it would be disproportionate to provide what's in 3.4(c)". We just did not get into that kind of discussion. From the outset they said, "It's irrational for you not to grant this derogation, we are not going to give you anything more".

That's common ground, that's plainly common ground.

Now, with those four points in mind, I would ask you to turn up Mr Romney's witness statement, which is in the first bundle, behind D1, and if we could turn to paragraph 75 to 80, starting on page 252.

This is the section, and I know that the Tribunal will have read these paragraphs already, but this is the section that deals with the integration steps that were taken by Facebook and GIPHY. The Tribunal will have seen and heard Mr O'Donoghue say that in a sense there is no dispute as to what steps were taken. As he put it, the dispute is the gloss that's put on those steps. He said rational minds may differ as to that. The CMA takes the view that these are substantial steps, but in a sense nothing turns on that. What we do say is they are steps which indicate already a risk of pre-emptive action.

You have seen also paragraph 48 of Mr Romney's statement on page 244, where he

refers to the fact -- so as the Tribunal knows already, a monitoring trustee and a hold separate manager were appointed in this case. You can see that the appointment of a hold separate manager is relatively rare, so the CMA has made such a direction in 3 out of 56 cases, the 3 including the present case, in the past 12 months.

That really reflects the fact that in the CMA's view these integration steps are substantial and give rise to a risk of pre-emptive action.

The Tribunal has had evidence from Facebook --

THE CHAIRMAN: What are the statistics about how many cases we have had with both a monitoring trustee and an HSM? Do we have those statistics?

MS DEMETRIOU: I don't have them to hand but those instructing me will have heard the question and I am hopeful they will give me the answer and I will be able to relay that to the Tribunal.

THE CHAIRMAN: If I can have those statistics for the last three years, the number of cases where there's been both an HSM and a monitoring trustee.

MS DEMETRIOU: I am sure we can obtain that for you. We will do so as quickly as we can.

THE CHAIRMAN: Thank you.

MS DEMETRIOU: It's common ground that the Tribunal is not in a position and is not being asked to take a view as to the gloss to be put on the integration steps that have taken place, so in a sense I don't think we need to go any further into the evidence on these points.

One point that Mr O'Donoghue made yesterday was that because the CMA hasn't exercised its power under section 72(3B) to unwind, it must therefore have taken the view that there has not been any pre-emptive action taken so far.

We say that's not so at all. As the Tribunal noted yesterday, there's no duty to take action under section 72(3B), it's a power not a duty. Mr O'Donoghue in our submission has misread, misinterpreted the statutory provision and the CMA is entitled to take the view that it's sufficient to prevent more integration taking place.

Indeed, one can quite see that if the CMA decided that it would order some of these integration steps to be unwound, it would have ended up in the Tribunal again at the wrong end of the proportionality argument. So it's a power, it's not a duty. One cannot read anything into the fact, or certainly not what Mr O'Donoghue wants the Tribunal to read into it, which is that the CMA's perfectly satisfied that there has not been any pre-emptive action so far. That simply cannot be --

THE CHAIRMAN: You do not need to worry about that. I am not going to read that unless I am persuaded in a reply.

MS DEMETRIOU: I am very grateful.

Moving on, the third point that I wish to make is that this was a very early stage of the proceedings. I have already made the point about the profound asymmetry of information.

Now, as to the timing, on 5 June the CMA called in the transaction for review. You don't need to turn it up but you see that in Mr Romney's witness statement at paragraph 10, for your note. That's 5 June.

THE CHAIRMAN: I have it all in the agreed chronology.

MS DEMETRIOU: I am grateful.

THE CHAIRMAN: When you do refer to documents in the chronology, it's much easier to me that you take me to the references in the agreed chronology and

I click on to the hyperlink because that's how I've been working.

MS DEMETRIOU: So sorry, I will try and do that, I have not been using the chronology.

THE CHAIRMAN: It's a very helpful document. It's so easy to find anything.

MS DEMETRIOU: I am very glad that it's helpful. So looking at the chronology, we see at item 3 the 5 June date, and then we see at item 5, on 9 June the CMA imposes the IEO based on its standard template.

Then, the very next day, item 7, on 10 June, Facebook sends its list of five urgent derogation requests to the CMA, including the carve-out requests.

Of course, since then, things have proceeded slowly. The reason for this is explained -- turning up Mr Romney's statement again --

THE CHAIRMAN: Shall we just look at the letter of the 10 June.

MS DEMETRIOU: Yes, Sir, I was going to come back to these letters --

THE CHAIRMAN: No, no, if you are going to come back to it. But these letters are worth looking at because I think it's important to understand the genesis of the point about the businesses being distinct.

MS DEMETRIOU: Yes, Sir, we completely agree.

THE CHAIRMAN: We can come to it in due course.

MS DEMETRIOU: We can come to it now. I just wanted to finish up on this point, which is that Mr Romney explains in his statement, and you have seen it so we don't need to go back through it, why things have proceeded so slowly.

Essentially that's because the clock has stopped on various occasions because the CMA considers that Facebook has not responded on time and in a complete fashion to information requests.

THE CHAIRMAN: On that, the sort of two ways of looking at it, one is that Facebook

is a vast business overlapping and it has many subsidiaries and they want to make sure the answers are correct so they are going to take time to give proper answers.

On the other hand, you may say Facebook is a very large, well-resourced, sophisticated business with huge teams of people and proper systems, so they should be able to provide information quicker than they have.

I am not going to judge this case on the basis of how quick they have responded, or the adequacy of their responses, as regards the information requests. Obviously it's more important to look at the requests you are making in relation to the derogation request.

MS DEMETRIOU: Sir, we accept that entirely. I would say that Mr O'Donoghue started his submissions yesterday with a page count of how much Facebook has submitted to the CMA. We would ask you not to read anything into that because from the CMA's perspective, the difficulty with much of that page count is that it comprises advocacy rather than hard evidence, but again I accept that's not a point before the Tribunal.

THE CHAIRMAN: The number of pages and the number of words that have been written does not really help me because it depends on what information is being provided at the end of the day.

MS DEMETRIOU: No, exactly.

THE CHAIRMAN: Sometimes when you look at a judgment it's very long and it tells you very little, and a short judgment can tell you a lot more. So I am not impressed by the amount of words or pages; it's the quality of what's coming out.

MS DEMETRIOU: My Lord, we agree. I am now going to take you to the document

that you asked me to show you.

THE CHAIRMAN: Yes, okay.

MS DEMETRIOU: So we have the 10 June request on page 364 of the first bundle, so that's behind tab F7.

THE CHAIRMAN: Okay.

MS DEMETRIOU: It's the letter that starts "Richard, Anna"; do you have that?

THE CHAIRMAN: I've got that, yes.

MS DEMETRIOU: Just to take you through this in a little bit of detail, you see the first introductory paragraph says that they would like to request a number of urgent derogations.

The next paragraph accepts that a number of integration steps have already been carried out and "We are working to respond to your integration questionnaire". So at this stage the CMA doesn't even know precisely what integration steps have taken place.

Then we see at the next paragraph: as explained in the briefing memorandum, the transaction is vertical.

So you see GIPHY provides an input into Facebook's services and the parties are not competitors. Now, this is illustrative of the wider problem in Facebook's case, which is that it asserts this, and that's the premise for its application, but of course that very question is a question for the CMA to take a view on and the CMA is certainly not in a position where it can just accept the assertion made by the parties to that effect.

Then it says, as such, this is a vertical transaction. A number of the paragraphs of the IEO are not applicable to the Facebook business. The CMA's Guidance Paper notes the CMA's general willingness to grant derogations for

non-overlapping businesses. Taking into account the nature of the transaction, Facebook also requests that certain paragraphs of the IEO do not apply to the Facebook business in this case.

So what we say here is that two things are clear.

The first is that Facebook is asserting that the parties are not competitors and this is only vertical. Secondly, they say that's the basis for saying that the derogation request should be granted.

So Mr O'Donoghue kept criticising the CMA for focusing on overlap, but it's not a good submission, in our respectful submission, because what the CMA was doing was grappling with the case put to it by Facebook, and that's a very important point.

So then you see, over the page, that various derogation requests are made in the document. They are numbered 1 to 5. 1 to 4, you have seen they have already been determined so they are not the subject of this application, and that's explained -- you don't need to turn it up -- at paragraph 89 of Mr Romney's witness statement.

Then you get to request 5 on page 367.

You see the first introduction to it -- so Facebook requests that the obligations in each of the paragraphs of the IEO listed below no longer applies to the Facebook business on the basis that such a derogation is proportionate and in line with the aims of the IEO, particularly in circumstances where the parties' activities do not horizontally overlap and GIPHY generates zero UK revenues.

So there you see, again, reliance is placed directly on there being no horizontal overlap between the parties' businesses.

THE CHAIRMAN: They also assert that the fact that they say zero UK revenue seems to make a difference, but I am not sure how much difference that makes.

MS DEMETRIOU: Facebook contends that the CMA does not have jurisdiction over this merger and that's a point which obviously has to be investigated, so it's really illustrative of their approach, which is --

THE CHAIRMAN: If you are doing business in the UK that has an impact in the UK, you don't need to have revenues in order to found jurisdiction by the CMA.

MS DEMETRIOU: No, that's right, Sir, that's right. Obviously we are not talking about jurisdiction in this hearing.

THE CHAIRMAN: No, we are not.

MS DEMETRIOU: But that's obviously something which the CMA is considering as part of phase I.

So what you see is that the request is made in large part on the basis of no horizontal overlap. Then you see at 5(d) Facebook requests that paragraph 5(d) of the IEO only applies to the Facebook business as it relates to the procurement or supply of GIFs and stickers. Then you see a similar proviso to paragraph 8, and we have seen this, it is broadly mirrored in the marked-up IEO.

THE CHAIRMAN: Yes.

MS DEMETRIOU: There are two things, really, that leap out from this paragraph -- three things that leap out.

The first thing is that it's extremely brief. So this is the carve-out request, that's the extent of it. There's no information or evidence that is provided to substantiate any of these assertions. It really is just assertion, assertion that

there's no horizontal overlap.

That was obviously not a matter which the CMA was in a position to know at that early stage, and it's precisely the type of issue that the CMA would have to investigate as part of phase I, by seeking evidence.

So the first point is it's brevity. No supporting evidence.

The second point is the assertion that there's no horizontal overlap, and we say it can't be that the CMA simply has to accept that, that's what it has to investigate.

The third point is these provisos about the Facebook business relating to the procurement or supply of GIFs and stickers, and, again, at this stage the CMA has no idea what's meant by this. So no idea what's meant by -- in what respect does Facebook engage in the procurement of GIFs and stickers? Which parts of the Facebook business engage in this? How do those parts of the business relate to other parts of the business? This is all material which is outside the CMA's knowledge.

So you then have, at page 369, an email from CMA, two days later, of 12 June. If you turn to paragraph 370 --

THE CHAIRMAN: Sorry, tell me which --

MS DEMETRIOU: Sorry, behind the next tab, tab F8, and there's an email from the CMA dated 12 June -- entry 8 --

THE CHAIRMAN: Just tell me the entry number on the chronology, then it's easy.

MS DEMETRIOU: I will, I'm so sorry.

THE CHAIRMAN: Okay.

MS DEMETRIOU: So that's entry 8.

THE CHAIRMAN: 12 June?

MS DEMETRIOU: 12 June. So you see if you turn to the next page of that, which is in the bundle at page 370, but it's page 2 of the email, halfway down, the CMA are saying that -- so again, it's looking at the derogation request letter and saying that the CMA's view is that:

"... there has been substantial integration of the two businesses prior to implementation ... and that GIPHY is no longer a stand-alone business (see the risk factors ...)."

Then:

"During our telephone discussion ... you informed us that ... some integration had already taken place and that you anticipated sending a number of urgent derogation requests. As set out ... the involvement of a monitoring trustee may assist and enable the CMA to grant more complex derogation requests --"

THE CHAIRMAN: How has that been working? As I think I put it to Mr O'Donoghue, has the monitoring trustee been working with both parties to work out what derogation requests may be granted or is that something he's not doing because for one reason or another?

MS DEMETRIOU: Well, I think I'll get proper instructions on this point but what I can say is that there have been a number of derogation requests, quite a large number, that have been granted by the CMA.

THE CHAIRMAN: Yes.

MS DEMETRIOU: The reason that the monitoring trustee can't assist in relation to this derogation request is because the material has not been provided. So there's nothing that the monitoring trustee can do to help because Facebook hasn't provided the essential material.

You then have the second CMA email of 2 --

MR O'DONOGHUE: Before we leave this document, can we look at the questions at the bottom of page 370, please, and at 371.

MS DEMETRIOU: I don't know what point Mr O'Donoghue wants to make, he has his reply, but I am happy to wait a couple of moments while the Tribunal looks at those.

THE CHAIRMAN: Mr O'Donoghue, the heading "Derogation requests", is that the bit you want me to look at?

MR O'DONOGHUE: Yes. Certainly questions were asked.

THE CHAIRMAN: I will look at that.

MR O'DONOGHUE: You will note from the heading, Sir, the paragraphs they relate to.

THE CHAIRMAN: Yes. You want me to look at ... yes.

(Pause)

MS DEMETRIOU: These seem to be about data protection rather than the actual carve-out request, but perhaps rather than taking me out of course perhaps Mr O'Donoghue, if he wants to make a point, can come back to it in reply.

THE CHAIRMAN: That's fine. I think the point he is making is that the information being sought here is in relation to request number 5.

MS DEMETRIOU: I don't think it is, I think this is relating to -- that's number 2. This is request number 2.

THE CHAIRMAN: That's what I am saying. I think my point is I think his point is this does not relate to request number 5.

MS DEMETRIOU: Okay, I understand. That's fine, if that's his point, we accept that, there's no dispute.

So now there is a second CMA email of 12 June, which is on my page 372, I just want to see -- it's behind entry 8 in the chronology. But you will see there's a second email of 12 June from the CMA. Do you have that? For those working from the hard copy bundle, it's page 372, starts on 372.

THE CHAIRMAN: Yes, I've got it.

MS DEMETRIOU: Here you have, at 373, the heading "Request 5". So this does deal with request 5, the carve-out request, and it's saying we ask that you resubmit a fully specified reasoned and evidenced request taking into account the guidance, with particular relevance to the paragraphs there mentioned.

Then it refers to the guidance, to the points I have already taken the Tribunal to, and it sets out, overleaf, the type of information -- the information that the guidance says is likely to be of assistance to the CMA in this context.

So the CMA is here, very early on, indicating that that type of very brief request, which really just comprises assertion, isn't adequate. What it needs is some reasons and some evidence.

Then you have Facebook's response, which is at item 9 of the chronology. This is the response to the CMA saying: please provide proper evidence in line with the guidance. So that's on page 375.

You can see that, again -- with respect to derogation request item 5:

"Please note that the Facebook business is global, with 50k employees, and the vast majority do not interact with the GIPHY business."

So again, the basis, the premise, is that there's no horizontal overlap, or there's no interaction. Then you see: it would be impossible for Facebook to carry on its ordinary course business activities unrelated to GIPHY, or GIFs and stickers more generally.

Then, for example, under the terms of the IEO: Facebook globally would be prohibited from changing key staff or updating customer supplier contracts, with respect to operations entirely unrelated to the transaction, eg virtual reality software development in the US. I will come back to that point, the Oculus point:

"We assume that this is not the CMA's intention. As specified in the request, the IEO would continue to apply to the GIPHY business in its entirety."

Then they make the point about the hypothetical worst-case scenario being divestment of GIPHY:

"There is no corresponding business to sell on the Facebook side since its activities do not overlap with GIPHY's. In summary, by granting the derogations for the paragraphs requested and with the restrictions specified, this cannot conceivably result in pre-emptive action or otherwise prejudice the CMA's remedial options. It simply serves to enable Facebook to carry out its unrelated (non-overlapping) business activities in the ordinary course."

So what you see is, again, there is, throughout this document -- so two points from the document.

One, that Facebook has not engaged with the CMA. So the CMA said: please submit properly-reasoned, evidenced request. It's not doing that.

But the second point is that, again, its stance rests on this assertion that its business is unrelated to the GIPHY business.

Facebook's position in this appeal appears to be that the CMA was required simply to accept that at face value, simply because Facebook have said, in an email on 12 June, that our business is unrelated to GIPHY, the CMA is supposed to say: okay, thanks very much, we understand that, no risks at all. We will

grant your wide derogation. We say that that would be, as I have said, a dereliction of the CMA's statutory functions.

THE CHAIRMAN: Are they actually saying that all of their business is unrelated or are they saying that -- well, a significant part of it is unrelated, but then you don't know which is which?

MS DEMETRIOU: We don't know which is which. First of all, Sir, it rather looks like they are saying all of it's unrelated -- it's not clear, so there's a danger in reading these documents like statutes; I am not inviting you to do that. You see in the final paragraph: "Since its activities do not overlap with GIPHY." So that's not a qualifying statement. But insofar as they are accepting there is some overlap, the CMA simply doesn't know which is which.

As I have said, the CMA had no information as to what the respective businesses comprised, how they were operated, how the market worked, no understanding of what Facebook meant by "no overlap" or what was related or unrelated or, looking at -- yes, I mean, there's no -- the vast -- looking at the first sentence: "The vast majority do not interact with the GIPHY business."

Do they mean there -- are they talking about vertical -- presumably vertical as well as horizontal engagement, but what's meant by "vast majority"? Which bits of the Facebook business are they talking about? As I was saying --

THE CHAIRMAN: Ms Demetriou, if you look at, let's say, WhatsApp for example, you look at WhatsApp and you can see GIF in the bottom corner and then you can get those. Isn't that some sort of relationship? It may be a vertical relationship but it is a relationship.

MS DEMETRIOU: Well Sir, that's a very good point, and let me just deal with that. Because, yes, that is what the CMA would understand to mean a related -- or

interaction or related business. That's what the CMA would understand. Could you turn up Ms Blank's statement, her first statement, which is at bundle 1, tab 3, so first witness statement of Barbara Blank, and then paragraph 17 on page 201.

If you look at the last sentence of that: Facebook has at all times been clear that its core services, Facebook.com, Messenger, Instagram and WhatsApp, are vertically linked to GIPHY. But its position is that this has no rational connection to whether the carve-out request could result in pre-emptive action.

So, Sir, you raise a very important point, which is that Mr O'Donoghue is at pains to persuade you that the "compromise" that they have suggested in suggestion to paragraph 8 and paragraph 5(d) of the IEO is going to give the CMA a great deal of comfort. If one reads it -- I had, and I think the CMA had, the same reaction as you did, Sir, which is that where WhatsApp has a relationship with GIPHY, that what they mean by those provisos is that the WhatsApp services would remain within the IEO.

But Ms Blank is making clear that that's not what they mean at all. So this really highlights the problem that Facebook is using terms, and bandying these terms around, vertical relationship, no horizontal overlaps, and the CMA has no idea (A) what it means -- and we were surprised to see Ms Blank's statement saying that of course we didn't mean these core services are going to remain in the IEO; we were surprised to see that. So no idea what Facebook mean. But also no idea, practically, how these concepts in Facebook's minds map on to the practicalities of how their business works, such as to be able to arrive at an IEO.

We say that the question that you asked, Sir, illustrates the difficulty. Then if you could turn to --

THE CHAIRMAN: Does that not imply that what you need is a relatively complex wording for -- if you are going to amend the IEO, that it's going to be a bit more -- it could be quite complex?

MS DEMETRIOU: Sir, yes. I don't want to pre-empt what might be the outcome, but we say --

THE CHAIRMAN: Yes, I am not going to.

MS DEMETRIOU: -- sensibly, in circumstances where what's being said to us -- and we can see, I think this may be common ground, that Facebook's business is very complicated -- that that calls for a rather more nuanced and complex IEO, rather than, as Mr O'Donoghue was submitting, "Oh, well it's all okay because you have paragraph 4". We say that won't work at all because what you need -- in the context of a very complex business, you do need to actually spell out what these broad requirements actually mean in practice. Otherwise, there's a real danger that pre-emptive action would be taken and there's a real danger that the parties, who are supposed to have a common understanding of what's permitted -- the parties on the one hand and the CMA on the other, and we are supposed to have a common understanding of what's permitted, won't have a common understanding at all.

So we say, yes, where you have a more complex business, that would generally call for a more nuanced complex IEO, which is why the CMA were seeking further evidence.

Now, Facebook then wrote to the CMA on 15 June. I think that that's -- yes, that's the item 11 in the chronology. It's at F10 of the bundle.

The item at F10 was appended to an email on 15 June from Facebook. For the Tribunal's note, if you want to see the covering email, it's at bundle 3, page 1887 of the bundle behind tab H1, but I am not going to ask you to turn it up; it's just really showing this is what was appended to it.

So this is a document that Facebook have drafted, which is a derogation letter that it's hopeful that the CMA is going to adopt.

If you look at page 378, under paragraph 5, again you see the premise for this. So Facebook submitted that the Facebook business and GIPHY business do not compete. So, again, that's the premise; no horizontal overlap. That's the basis on which they are saying it should be granted.

THE CHAIRMAN: Where do I see this?

MS DEMETRIOU: Page 378, under the heading number 5, non-application -- do you see that? This is a document which is headed on CMA notepaper. The first page of it says "template derogation letter", but it's a document produced by Facebook. Do you have the document, Sir?

THE CHAIRMAN: I have that.

MS DEMETRIOU: On the third page, there's a heading 5 and you see Facebook submitted that the Facebook business and GIPHY business do not compete. So, again, you see a reiteration of the premise of their derogation request.

You see again the GIPHY business provides an input to the Facebook business services. The Facebook business is global and the vast majority of its business activities do not interact with the GIPHY business. Taking into account these submissions.

So, again, you have crystallised Facebook's stance, which is no horizontal overlap, there's a limited vertical overlap, much of it doesn't concern the vast majority

of the Facebook business.

Again, the fundamental difficulty with their approach is that the CMA -- this is really a job for the CMA to determine. At this stage, it does not have the evidence on which it can conclude that there's no horizontal overlap and it's unable to understand which parts -- when they say "vast majority", which parts of the Facebook business interact with GIPHY and which don't, because it's never been told.

Then you see -- so again, these are submissions, as they say, submissions which have never been substantiated with evidence.

Then you have the reference in 5(d) and 8 to only applying to those parts of the business that relate to procurement or supply of GIFs and stickers. Again, you have my point that the CMA had no idea what they were talking about, which parts of the business. The CMA still doesn't know.

Again, this is carried through. If you turn to the document -- there's a letter from Latham & Watkins which is behind tab F18, which is item 20 on the chronology, of 23 June.

Again you see assertions, again, about the businesses not overlapping in any meaningful sense. Now a slight proviso has been brought in -- this is page 404, so the bottom of page 2 of the letter:

"This is also in circumstances where the parties' activities do not overlap (in any economically meaningful sense)."

What's meant by that? That's the first time that that proviso has been introduced. In a hypothetical worst-case scenario, a sale of the GIPHY business would be preserved as a remedial option. There is no corresponding business to sell on the Facebook side.

So, again, this is all advocacy, but not backed up by any evidence. It's what Facebook's lawyers and Facebook are saying the position is, but they are not providing the CMA with the material to reach that view itself.

Mr O'Donoghue relied on the 2 July letter from the CMA. That's at item 23 behind tab 22. If we turn to page 433 and look at subparagraphs (b), (c) and (d). You see at (b) the CMA saying it's cautious about granting derogations which carve out activities at an early stage of its fact finding. And that the CMA would not consent to remove Facebook from the scope of certain provisions unless it were satisfied that the activities were unrelated --

THE CHAIRMAN: What paragraph number is this?

MS DEMETRIOU: This is paragraph 19(b).

THE CHAIRMAN: Okay.

MS DEMETRIOU: So this is one of the points that Mr O'Donoghue relied on. So he relied on the CMA saying there that it wouldn't consent to remove Facebook or any part of its business from the scope of certain provisions of the IEO unless it was satisfied that they were unrelated.

But Mr O'Donoghue was saying: aha, well the CMA has misdirected itself. But what he's omitted to say is that this was the basis on which Facebook was asking for the derogation. It was consistently asserting that there was no horizontal overlap. So what the CMA is saying here is: well, we need to be satisfied with that. It's not misdirecting itself in law, it's saying you've asserted that there is no horizontal overlap; we need to be satisfied of it and so you need to go on to read:

"The CMA does not have the necessary information at this stage of its investigation to make such a determination. This is particularly so where the parties have

failed to respond [to these particular questions] and have to date still not provided responses to these questions."

And then at (c): the parties have made no attempt to provide the necessary information set out at paragraph 3.44 of the Interim Guidance Measures, instead merely submitting that the merger does not give rise to any horizontal overlaps and that therefore Facebook does not operate a business which competes with GIPHY:

"We note in this context that the CMA has not excluded any particular theories of harm at this early stage of its investigation and, even if it were to consider that there are no relevant horizontal overlaps, which has not yet been determined, paragraph 3.46 of the Interim Measures Guidance explicitly states that the CMA will take the merging party's vertical activities into account when assessing whether derogations such as that requested by the parties can be granted."

So what you have here is that the CMA is not misdirecting itself at all, it's responding to Facebook's submissions. It's saying: in terms these are only submissions, you have submitted that there is no horizontal overlap, but we can't consent to removing Facebook unless we can determine, we the CMA can determine, that that's right, and you haven't provided us with the information.

Then you see at 20, a reiteration that it's essential to the functioning of the UK's voluntary non-suspensory merger regime that interim measures are effective.

We disagree, it says, with the CMA's mistake -- with their mistaken assumption that in applying the IEO only to the GIPHY business in its entirety, all the CMA's remedial options are preserved. So they make that point in terms.

That's because the CMA needs to hold the ring to preserve all remedial options, but

it's not only about remedial options, and this comes back to Mr Frazer's point; it's also about not prejudicing the reference and ensuring that the competitive structure of the markets in which these parties operate are maintained.

So that's --

THE CHAIRMAN: But that would mean that whether or not there is a horizontal aspect to it isn't conclusive either way.

MS DEMETRIOU: It's not conclusive.

THE CHAIRMAN: Because even if it's vertical, you may be concerned about preserving the competitive nature of the market.

MS DEMETRIOU: That's right. One of the examples I am going to come on to --

THE CHAIRMAN: The thing is, where you see submissions by Facebook saying there is no overlap, they are really talking about no horizontal overlap --

MS DEMETRIOU: They are.

THE CHAIRMAN: -- because it can't be really disputed that there's -- there's certainly a vertical overlap, for the reasons that we all know.

MS DEMETRIOU: That's right. So they are saying no horizontal overlap. CMA says: well, we haven't determined that yet. That's for us, thank you; we need the evidence. And then the CMA says: well, even if that were right, that's not the only point because we need to consider the vertical relationship too.

I am going to come on -- I have seen the time -- I am going to come on after lunch to explain -- just to put some flesh on those bones and explain why these points about horizontal overlap and vertical relationship have a translate into the risk of pre-emptive action, and specifically into the derogation, the carve-out requests, that they have made.

THE CHAIRMAN: You still have enough time to cover everything by 4.30?

MS DEMETRIOU: Yes, I will be fine.

THE CHAIRMAN: Okay, thank you very much.

MS DEMETRIOU: Thank you.

THE CHAIRMAN: Okay. So we will rise now until 2 o'clock.

MR O'DONOGHUE: Sir, for planning purposes, obviously I have a right of reply. Is the Tribunal's current intention that that would start not sooner than 4.30?

THE CHAIRMAN: If counsel for the CMA finishes before 4.30, then you start before 4.30. But I would have thought that half an hour would be enough. But if it's not enough, I am prepared to go on longer to make sure that you are not squeezed at the end of the day.

MR O'DONOGHUE: Sir, we will see how we go then.

THE CHAIRMAN: Yes, of course we will. I am not going to squeeze you though, don't worry.

MR O'DONOGHUE: Thank you.

THE CHAIRMAN: Okay, thank you.

(1.04 pm)

(The luncheon adjournment)

(2.01 pm)

THE CHAIRMAN: Yes, Ms Demetriou.

MS DEMETRIOU: May it please the Tribunal. I had taken the Tribunal to the CMA's letter of 2 July, and we had been through that, and I had made the point that the CMA had pointed to the fact that Facebook had made various submissions about overlaps but not provided any evidence.

So the CMA was clearly at that stage, as it had been since 10 June, seeking further evidence. Again, Facebook did not respond to this by making an evidence

request or by submitting any evidence. So their first response to the 2 July letter was some three weeks later, on 21 July, and that's behind tab F28 -- I am just trying to locate it on the chronology. So it's number 36.

THE CHAIRMAN: Okay, yes, thank you.

MS DEMETRIOU: You can see it's a letter dated 21 July from Latham & Watkins. It's essentially, for all intents and purposes, a letter before claim. You see that this letter doesn't either present the CMA with any substantive material or evidence, but just repeats the same advocacy points, the same submissions.

We see at the top of page 563, Facebook requests that the CMA take a decision on the carve-out derogation by 27 July.

Then, if you move on to page 566 --

THE CHAIRMAN: Remember, my page numbers are different.

MS DEMETRIOU: I am so sorry.

THE CHAIRMAN: The internal page is fine.

MS DEMETRIOU: At the top of internal page 3. Then moving on to internal page 6, you see there -- perhaps we go back a page to see the context -- that they are responding to something the CMA has said, that it's not in position at that stage to grant the request.

Then it says, over the page, internal page 6:

"However, the CMA has ignored the fact that under the carve-out derogation the IEO would continue to apply to Facebook's activities as they relate to the procurement or supply of GIFs and stickers, ie as they relate to GIPHY and its services (or similar services), which are just one small input into Facebook's service offerings."

Again, we make the point that they haven't provided the CMA with any information as

to what bits of Facebook's business relates to the procurement or supply of GIFs and stickers.

So there's no way in which that can be mapped on to the business, as it were, for the purposes of formulating a proper derogation.

Then you see, further down:

"The CMA's 2 July email also asserts that the parties have failed to provide the information set out in paragraph 3.44 ... which the CMA would require ... Again, the CMA is misunderstanding the scope of the carve-out derogation request."

They make first of all the point that Facebook is not requesting that the IEO no longer apply in its entirety to any part of its business, rather it only requests that it doesn't apply where there can be no conceivable pre-emptive action.

Again, they are sort of asserting there that there's no risk of pre-emptive action, but that's a decision properly for the CMA.

Then, second, the IEO would continue to apply to all of Facebook's activities as they relate to the supply of GIFs and stickers, ie to the vertical relationship.

So what you see, again, is that, again, Facebook has provided no information about what they mean by that. I have already made the point in relation to Ms Blank's statement, which is that the reader reading this might think: well, WhatsApp relates to the procurement of GIFs and stickers and so presumably they are saying the IEO should apply to WhatsApp.

But you can see from Ms Blank's statement that that's not at all what Facebook are saying. But none of that was clear at this point in time.

So the actual scope of this proviso was entirely at large.

THE CHAIRMAN: Do you accept that if they are right about their first point -- if

there's part of the IEO which falls within that definition, ie there's no conceivable pre-emptive action, ie there's no link between whatever is in that paragraph that they want to delete and no conceivable pre-emptive action, do you accept that that should go?

MS DEMETRIOU: Yes. So we do accept that because the statutory purpose frames what -- we do accept that but the point we make is that at this very early stage, the CMA does not -- there are two provisos to what I have said. We do accept that as a matter of principle, but the two provisos are these, which are that:

1) In judging whether there's conceivably pre-emptive action, the CMA has to act in a very precautionary manner because it doesn't have information at that stage and it's not at the stage of identifying the possible theories of harm. So it has to adopt a precautionary approach and that's why the powers to impose these IEOs are broad.

So that's the first point.

2) In order to determine that there's no conceivable pre-emptive action, the CMA needs information and it's certainly not right that the CMA should just accept the say-so of the parties.

So subject to that, yes, Sir. So if there were a part of the IEO and it were just obvious, even without information, that there couldn't be any conceivable pre-emptive action if that part of the business were carved out, then, yes, of course we would accept that it could be carved out and that the CMA might not require information depending on what was at stake, but that's not this case.

Partly it's not this case because, as Facebook says, its business is extremely

integrated and this is a very complex business. These tech businesses are very complex. So the CMA needed more before it could reach that view. I am going to come back to put a bit more flesh on those bones but that's our answer to your question.

THE CHAIRMAN: Okay.

MS DEMETRIOU: We can see the CMA's initial response to that, which is dated 23 July, so I think that's item 37. In the bundle, it's at tab H4, which is hearing bundle 3/H4/1918. You see there this is an email sent two days later referring to the letter of 21 July. Then you see in the middle:

"We note that this is an issue of considerable complexity and it's not appropriate for the parties to seek to force a decision from the CMA in relation to all of the points raised before it is in possession of all relevant facts and has had an opportunity to consider these ...

"We will of course continue to engage with the parties on their derogation requests (including the carve-out derogation request) ..."

So again, CMA signalling that it's not in possession of the relevant facts. It's now said that repeatedly.

Then you have the CMA's substantive response of 7 August, which is item 41 that Mr O'Donoghue relied on. That's at tab 32 of the hearing bundle, volume 1.

THE CHAIRMAN: Which tab is it for the chronology?

MS DEMETRIOU: It is 41. It's behind tab 32 of the hard copy.

What you see is at paragraph 4, first of all:

"We have not refused the carve-out derogation request ..."

That the fact-finding remains at a very early stage, and:

"In light of the broad nature of the ... request, the continuing absence of information

and evidence that we have requested from Facebook and having regard to the Interim Measures Guidance, we remain unable to fully consider [it] at this time."

So they have set their position out clearly there.

Moving forward, paragraph 14, the CMA notes there that it's very unusual for it to have stopped the clock so many times, and that really is indicative of a lack of information that's been forthcoming from Facebook.

Then moving on to paragraph --

THE CHAIRMAN: The thing is that it could be that these are quite detailed requests for information which take a long time to put together.

MS DEMETRIOU: Sir, that might be so, and obviously this particular issue is not an issue that the Tribunal has to determine, but you have seen what Mr Romney says about it, and of course the CMA does deal with complex mergers with very large companies, and it's simply making the point here that this, even by those standards, is unusual.

THE CHAIRMAN: Yes, okay.

MS DEMETRIOU: Then you see paragraph 28, on internal page 7, reiterating the point in the guidance, and the extent to which derogations might be granted depends on the circumstances of the case. So, again, they are emphasising the fact-sensitive nature of all of this.

And they say that clearly at 29:

"... more likely to be granted if requests are fully specified, reasoned and supported by relevant evidence."

Then you see when the CMA is unlikely to grant a derogation request.

Then at 30, fact-finding, where the fact-finding remains at an early stage, CMA are

likely to adopt a cautious approach.

Then at 31, the Interim Measures Guidance explains that the CMA may be willing to grant derogations where it is clear that certain parts of the target business's activities are not related to those of the acquiring business.

And, don't forget, this is the basis that Facebook has relied on.

Derogations on this basis will only be granted in circumstances in which the CMA is able to establish clearly that this will not impede the CMA from taking any appropriate remedial action that might be required. Likely to be particularly cautious about granting derogations on this basis at the earlier stages of its investigation where the full scope of the merging parties' activities have not yet been fully analysed. Interim Measure Guidance explains that parties requesting derogations on this basis will be required to delineate clearly the parts of the merging parties' businesses that respectively do and don't engage in activities related to each other and provide clear descriptions of all relevant businesses along with their functions and reporting lines.

Then, as set out further below, the guidance identifies a number of specific matters that parties will be required to demonstrate in order to obtain a derogation on this basis, and that the CMA will take into account both horizontal overlaps and any potential vertical relationships.

So then you have, at 32, that the carve-out request did not meet the criteria set out in the Interim Measures Guidance in its originally submitted form.

You have seen how brief the request was.

The CMA provided feedback on this and invited the parties to submit fully specified and reasoned requests, taking this feedback into account. The CMA still does not have the necessary information and evidence to fully consider the

carve-out derogation request.

So that's the difficulty. Then Mr O'Donoghue relied on paragraph 35, which you see on the same page, and he said that -- so that says that there is no requirement for the CMA to identify any particular substantive competition concerns before imposing an IEO. We say that that's quite right. That's why, in section 72(1), you don't see any reference there to SLC or identifying any particular competition concerns.

The reason why that's important is that this approach that Mr O'Donoghue is seeking to persuade the Tribunal to adopt, which is that the CMA has to identify theories of harm and map the carve-out requests on to these theories of harm in order to demonstrate that there are concrete risks of pre-emptive action, that's just not how the legislation works. Because if it was how it worked, it would not be framed in the way that it was. It's framed in a precautionary manner. So, yes, the CMA has to take the view that there might be a risk of pre-emptive action, but it doesn't have to do so in the very granular way specified by Mr O'Donoghue, because it simply is not at that stage of the investigation and it doesn't have the necessary evidence.

THE CHAIRMAN: You accept, though, when you are looking at individual derogation requests you still need to see if there's a conceivable basis for action, for remedial action?

MS DEMETRIOU: You do, but, Sir, that might be as broad as saying, look, integration steps have taken place here that are pretty substantial but those integration steps themselves present a risk of pre-emptive action because it's changed the structure of the market. It doesn't require the CMA to go on and say, "Ah, and we have this particular vertical theory of harm and if X, Y and Z

happens, that translates" -- that's not how the statute works.

Then moving on to paragraph 48, you see there that at this early stage of its investigation, the CMA has not been able to determine that granting the carve-out request would not result in pre-emptive action. Again, Mr O'Donoghue criticised that. But he's wrong to criticise that because that just reflects the low threshold that the Tribunal found in Stericycle and ICE Trayport and in Electro Rent. And it's his position that's wrong in law because he keeps saying, and their decision tree says in their skeleton, that the CMA has to find that there would be pre-emptive action. That isn't the test. This is just reflecting the low threshold that the Tribunal has repeatedly emphasised in the cases.

Moving on to the end of that paragraph, you see that the CMA -- so not being able to determine the request. This is due to:

1. The integration of the business, number 1, and Facebook's failure to provide complete and accurate information on the extent of this integration. So that's the first point, which means it's difficult for it to assess risk.

2. The broad and unspecified nature of the carve-out derogation request, which relates either to the entirety of the Facebook business or to the entirety of Facebook's business except as it relates to the procurement or supply of GIFs and stickers. And you have my point as to how the CMA does not really understand what is meant by that in practice.

3. The vague basis on which the carve-out derogation request is being made. So vague meaning, as the CMA has repeatedly said, that there's no evidence to back it up or explain it.

4. The fact that the CMA is still at an early stage of its investigation, which has been

hindered by Facebook's persistent failure to cooperate and respond to the mandatory information request.

So there is a lack of information, as the CMA has said repeatedly.

Then, 59 to 60, so looking at internal page 16, again under the heading, "Failure to provide a sufficiently specified, reasoned, and evidenced derogation request", you see the CMA making the points again by reference to the information asymmetries between the CMA and the parties and that the CMA is not properly able to assess whether granting a derogation might result in pre-emptive action if it hasn't been given the information.

Again, at 60, as communicated to the parties on 22 June and again in the 2 July letter, and in fact we have seen it more than that, the information provided by the parties to date has failed to demonstrate that the carve-out derogation request meets the criteria set out.

61, furthermore, the CMA doesn't consider that Facebook has adequately explained how the carve-out derogation would operate in practice. For example, in relation to those elements of the carve-out derogation request that would exclude the operation of the IEO from the entirety of the Facebook business, except as it relates to the procurement or supply of GIFs and stickers, Facebook has not explained which parts of its business would be within and outside the IEO perimeter or the basis on which Facebook would propose to draw a distinction between the two.

So that's all at large, and that's an important point and one that I've emphasised before.

What it's being faced with, the CMA, is just an assertion, there's no meat on the bones. There's no way in which it can properly assess what's being asked for

or how that could operate in practice.

That takes us back to Mr Romney's statement in the first bundle, behind D1. It's paragraphs 93 to 100 where he explains the position from the CMA's perspective, which you've seen outlined in those documents. You see at 93, so this is page 268 of the bundle, Mr Romney saying: the CMA has not refused to grant the carve-out derogation. Rather, it has requested that Facebook provide fully specified, reasoned and evidenced requests so that it can consider it.

Again, you have seen that in all the documents. There's no ex post facto gloss in any of this at all.

Then you see, at 94, at the heart of the CMA's request is its need to fully understand the scope of the Facebook businesses that interact in some way with GIPHY's activities. The derogation that's being proposed by Facebook seeks to disapply certain paragraphs to the Facebook business in its entirety. However, other paragraphs are only disapplied to the extent that the Facebook doesn't relate to the procurement or supply of GIFs and stickers. We would need to understand that, he's been saying. That's the point made, you have just seen, in the correspondence.

Then you see at 95 that the CMA knows, because Facebook has confirmed in its draft merger notice, that GIPHY interacts with Instagram, Facebook, Messenger, WhatsApp, and the case team also discovered that GIPHY's API integration also extends to Facebook's Workplace and Oculus business. To the extent that parts of the Facebook business have no connection with GIPHY's activities, the CMA may well agree to carve out those assets of the Facebook business from the scope of the IEO. So that really goes to the

question that the Chairman just put to me. However, beyond the extremely high level information described above, Facebook has not provided any information or evidence as to which of its businesses do or do not have connections with GIPHY's activities.

And then it goes on to say, for those businesses that do have a connection, a global carve-out may still be possible, however Facebook would need to assist the CMA in identifying essentially any benign activities carried out by those businesses and would need to provide certain assurances and put safeguards in place.

So that's the backdrop to paragraph 97 that Mr O'Donoghue took you to, and that is the CMA's position and has been the CMA's position throughout.

Those are the key facts that I wish to emphasise. What I propose to do now is really draw together my submissions.

We say that the key question for the Tribunal is whether the CMA has acted lawfully in taking the position that it requires further information to assess the carve-out request or whether Facebook is right to say that the only lawful response for the CMA was to grant the carve-out request without obtaining further information.

The starting point, as I said at the outset, is that as the expert regulator, the CMA has a wide margin of discretion in determining what information it needs in order to exercise its statutory powers and duties.

I know this authority will be familiar to the Tribunal but I would just like to remind you of what was said in the BAA case, which is behind tab 34 of the authorities, bundle 2, and if you could turn, please, to paragraph 20, subparagraph 3. The pagination is 1510.

THE CHAIRMAN: Sorry, which bundle are we in now?

MS DEMETRIOU: We are in bundle 2 of the authorities and it's tab 34.

We have at 20, subparagraph 3, which is the bottom of page 1510:

"The CC, as decision-maker, must take reasonable steps to acquaint itself with the relevant information to enable it to answer each statutory question posed for it (in this case, most prominently, whether it remained proportionate to require BAA to divest itself of Stansted airport notwithstanding the MCC the CC had identified, consisting in the change in government policy which was likely to preclude the construction of additional runway capacity …"

Then:

"See eg Secretary of State for Education and Science v Tameside."

And Tameside, the Tribunal is probably aware, is now an old but very often cited public law case which states that in carrying out statutory functions, a public body is under a duty to take steps to acquaint itself with the relevant material to enable it to carry out those functions.

Then:

"The CC 'must do what is necessary to put itself into a position properly to decide the statutory questions'."

That's really the Tameside obligation.

"The extent to which it is necessary to carry out investigations to achieve this subjective will require evaluative assessments to be made by the CC, as to which it has a wide margin of appreciation as it does in relation to other assessments to be made by it ... In the present context, we accept Mr Beard's primary submission that the standard to be applied in judging the steps taken by the CC in carrying forward its investigations to put itself into a position

properly to decide the statutory questions is a rationality test."

Then:

"The following statement by Neill LJ in ... ex parte Bayani is quoted with approval in Khatun."

Khatun is another very well known public law authority:

"The court should not intervene merely because it considers that further inquiries would have been desirable or sensible. It should intervene only if no no reasonable [relevant public authority - in that case, it was a housing authority] could have been satisfied on the basis of the inquiries made."

So the point being made here is that where a regulator has a statutory function to carry out -- so in that case what the Tribunal was looking at was the divestment decision, so the remedy. When it's considering what material it needs to carry out that statutory function, it has a wide margin of discretion, and that decision is subject to rationality review.

So you can see here the distinction that's drawn in BAA between the ultimate decision that the CC made, which is the one under challenge about divestment, and those decisions, or a decision requiring divestment or a decision refusing an IEO derogation, or imposing an IEO, we say that is subject, in principle, to proportionality review.

But the prior question, which is where the authority says, well, in order to determine that question, I need X, Y and Z information, that question is subject to a rationality review. That's what the Tribunal is saying in this case.

So we say that it follows that the CMA will only have acted unlawfully in this case in seeking the information if it acted irrationally. Our submission is that it's clear that the CMA did not act irrationally.

Just to summarise the points that I have already made, and I will do so shortly because I know that you have them:

In imposing the IEO, the CMA is exercising a broad precautionary power. Section 72 doesn't require it to have reached any view at all on the SLC or theories of harm or anything like that. This is the very earliest stage of the investigation. There may turn out to be no SLC at all and no reference that has been made.

What section 72 does is to enable the CMA to hold the ring in case there is.

Now, we say that where a merger has already been completed and integration steps have taken place, there is highly likely, by definition, to be a risk that the reference will be prejudiced or remedial action impeded. That's because there will already have been a change to the competitive dynamics of the market, and that's why the guidance makes clear that in the case of completed mergers, an IEO will almost always be required, because of the risk of pre-emptive action. We know that in this case substantial integration had already taken place and so we say that risk had materialised. The CMA was justified in imposing the IEO, and that is not under challenge, so the imposition of the template IEO has not been challenged.

As the CMA has consistently said, it will consider requests for derogations as quickly as it can in order to refine the IEO and take account of proportionality concerns and so on.

But requests have to be evidenced properly as the CMA has next to no information at this stage in relation to the parties, what they do, how they operate, how their businesses are organised, what the competitive structure is of the market, what markets they compete in; they don't know any of that.

In this case, the carve-out request was extremely wide ranging, seeking to exclude

most of Facebook's business, and the request was made, as I have emphasised, on the basis that most of Facebook's activities were not related to the activities of GIPHY.

However, despite being made on that basis, and despite purporting to keep in the IEO Facebook's business activities relating to the procurement or supply of GIFs or stickers, the request didn't explain what Facebook understood by those concepts, or how that mapped on to Facebook's business.

It provided no information at all. We have seen the sparse nature of the requests. All of its correspondence just consists of assertion, and so there was a wholesale failure by Facebook to engage with the CMA's request that it provide evidence. You have seen that Ms Del Rosario now makes various points in her second witness statement about how it would be difficult for Facebook to provide all of the information required by the guidance, but the position is that Facebook provided nothing at all. So we are not in a situation where Facebook has done its best to comply and provided a certain amount of information and has then said, "Well, the guidance is not really apt to cover our business, we cannot do X, Y and Z, but let's talk to you about how that operates in practice". We are not in that position at all.

It's really quite stark that when the Tribunal asked a very basic question, "Well, all of these subsidiaries that Ms Del Rosario talks about, what are they?", we don't know. The CMA has never been told that and that's really rather basic information that's required in order to progress this carve-out derogation request.

If the Tribunal would pick up our defence behind tab 2 of the hearing bundle, at paragraph 62 we see a concrete example of how the moving picture in terms

of information matters. This is the point relating to Oculus that I said I would come back to.

So we say there that the peril of Facebook's stance that the CMA should take its broad assertions on trust is reflected by Facebook's approach to the status of its virtue reality business, Oculus. And we see in Latham & Watkins' letter of 23 June it was said that the obligations in the IEO apply even with respect to operations entirely unrelated to the transaction, eg virtual reality software development in the US. You saw that, I took you to that letter.

We say that as it transpired that assertion was wrong. The CMA had been considering whether it might be appropriate to grant a derogation in relation to Oculus in light of the content of Facebook's draft merger notice. However, following the submission by Facebook of its first tranche of responses to the CMA's request for information, the CMA has become aware that there is also a vertical relationship between Oculus and GIPHY. That's an example, we say, of why the CMA was right to seek further information, because further information is coming out in dribs and drabs, which is highly relevant to these carve-out requests.

So we say for all those reasons, the CMA didn't act irrationally in seeking evidence from Facebook in order to progress the derogation requests, and we say moreover that it's instructive, in our submission, to turn Facebook's submission around and ask whether it would have been reasonable for the CMA to have simply accepted Facebook's derogation request at face value without seeking information.

Imagine that the CMA had done that, so it was faced with the very sparse request, full of assertion and submission, no evidence, and granted these wide

carve-out requests. And then a third party, a third party, a player in the market who stands to be damaged by this merger, comes along, challenges that decision on the basis that the carve-out does risk pre-emptive action, then the question for the court would have been the Tameside question, has the CMA fulfilled its Tameside duty of taking reasonable steps to acquaint itself with the relevant information to enable it to answer the question.

I can say to the Tribunal that I would not be very happy about representing the CMA on such a judicial review and having to argue that simply accepting the parties' submissions at face value was enough to fulfil the duty to take reasonable steps as a regulator to work out whether this broad carve-out request was compliant with the CMA's statutory functions.

That's also one of the reasons why it wouldn't be the right course for the Tribunal to determine the proper scope of the derogation.

One of the points put by the Chairman yesterday to Mr O'Donoghue was that there are three possibilities here. So one possibility is to allow the appeal. One is to refuse the appeal. The third possibility is for the Tribunal somehow to decide what sort of derogation might be right.

We say that that would not be appropriate because the Tribunal is in the same position as the CMA. It doesn't have the information required to assess whether this broad carve-out request is appropriate or not, and, if not, which alternative derogation should be granted. It's not in any event, we say, the proper function of the Tribunal to do that on a judicial review. Because the Tribunal's function, as the Tribunal knows with judicial review, is to decide whether the CMA's decision, its decision that it could not assess the carve-out request without further information, is lawful or unlawful.

The question before the Tribunal was not whether some modified request, which we've never seen, is appropriate, because that's never been put to the CMA. Indeed, that's the CMA's difficulty, because the CMA would have welcomed Facebook providing it with information and sitting down with the regulator to work out some modified IEO that met the statutory purposes and took account of Facebook's submissions. They could have explored whether a narrower derogation was appropriate and discussed alternatives, but we have never got to that point because Facebook has taken this very black and white approach.

So Facebook's position, as Mr Malek put to me at the outset, is that the only lawful course for the CMA was to grant its carve-out request without needing any further information, and it makes that submission on the basis that there is no rational connection between the matters that they seek to carve out and the risk of pre-emptive action.

You heard Mr O'Donoghue say that what the CMA should have done is to examine each of the elements of the carve-out request and determine whether each of them gave rise to the risk of pre-emptive action. And the CMA's position in turn is that it wasn't able to do that without the further information from Facebook because in the absence of that further information, the CMA couldn't understand how the carve-out would operate in practice and therefore couldn't assess risk.

That's precisely why it was seeking the further information. Mr O'Donoghue's argument that the CMA didn't need the further information because it should have been obvious that there's no risk to pre-emptive action is wrong. Really, that's what this case comes down to.

We say that it wasn't at all obvious, or to frame the point in a legally more accurate

manner, it wasn't irrational for the CMA to take that view. Essentially, we make three points by way of response to Mr O'Donoghue's submission.

The first point we make relates to Mr O'Donoghue's focus yesterday on paragraphs 86 and 87 of Mr Romney's statement. If we could pick that up again. So that's behind D1 of the first bundle.

You heard Mr O'Donoghue focus yesterday especially on paragraphs 86 and 87, which are on page 261. He said that those paragraphs refer first to the possibility of a dowry, second, to the source code issues, and third, to paid alignments.

My learned friend's argument was that none of those things have any bearing on whether the derogation should be permitted. He said, well, this is the CMA's greatest hits and if those don't work then we may as well pack up and go home.

But really, Mr Romney was not in his statement seeking to set out the CMA's case on possible theories of harm. It's really important to see what Mr Romney says about that because he makes clear that that's precisely what he is not doing.

If you turn to paragraph 21, which is on page 236, you can see there that he says that none of these matters -- these are the matters in paragraph 20, including that the transaction is purely vertical in nature and that the worst case potential remedy would be the divestiture of GIPHY -- none of those are uncontroversial, they are all live issues in the CMA's investigation which the case team is currently considering. Then he says:

"... given that the CMA's investigation is ongoing, I cannot provide any definitive statements or concrete views as to the CMA's position in this regard. To do

so would be premature. It may be that the CMA ultimately accepts Facebook's position. However, it is equally possible, at this stage, that the CMA may reach a different conclusion on these issues. I elaborate on each of them below, providing - to the extent I can at this stage - some examples of the types of considerations which are currently being weighed by the case team and which illustrate why Facebook's assertions in relation to each of these issues cannot be regarded as foregone conclusions. I must emphasise, however, that at this stage these are no more than current lines of investigation."

He's very clear about what he is doing and what he is not doing. And we see that at 26 as well, that:

"... the case team does not currently have the necessary information to complete its assessment of the extent to which the transaction has either horizontal or vertical effects. Normally, the CMA would anticipate having internal discussions on those theories of harm that are to be taken forward in its 'preliminary assessment' meeting ... and its 'internal state of play' meeting (usually scheduled for around working day 15 of the 40 working day phase I investigatory period)."

But we know that the 40 day has not been triggered yet so we are somewhere off that.

Then you see also at 32 a similar point, but this time relating to the worst case remedy:

"For present purposes, the central point is that it is far too early for the CMA to know whether any remedy will be necessary or what form it would take. For that reason, its use of interim measures must necessarily take into account the

wide range of potential pre-emptive harm that is possible."

That's a very key point.

Then even more importantly, we say that Mr O'Donoghue rather skipped over paragraphs 84 and 85. So if we can go back to those. 84 is at the bottom of 260, and what the CMA is saying there is that substantial integration has taken place:

"As I have already explained, the concept of pre-emptive action includes both preservation of the merger parties in case of a remedy scenario, but also preservation of the competitive structure of the market to avoid the risk of a reference to phase 2 being impeded."

That's the first part of the definition of pre-emptive action that Mr O'Donoghue did not make any submissions on:

"This second scenario could, for example, take the form of harm to Facebook's rivals by the Facebook business during the course of the CMA's investigation. There is also potential for such harm to be irremediable at the conclusion of a reference, for example, if input or customer foreclosure occurs during the investigation which results in the exit of a competitor."

So that's an important point which Mr O'Donoghue didn't deal with at all. Then you have at 85, the point that I have already made about divestment of GIPHY not being the only remedy that's possible.

So the point in 84 about the first limb of the definition is really the subject of my second point that I want to make in response to Mr O'Donoghue's overall submission, and as I say, he ignored that limb yesterday.

Mr O'Donoghue's answer to Mr Frazer; Mr Frazer said, "Are you going to make any submissions on that?" And he said, "I might make submissions in reply but

it's not a point the CMA has relied on." But we found that very odd because at no stage has the CMA said that it's only relying on the second limb of the definition of pre-emptive action. That would be a very odd stance for the regulator to take. It has to take into account the whole of the definition.

The CMA has not got to that stage because it has not rejected the carve-out stage yet, all it's done is to seek further information. So it's inaccurate really for Facebook to try and present the CMA has having rejected the carve-out request on the basis only of the second limb of the definition.

The reason that there may be in the papers a focus on remedies is because that's how Facebook has put its case. From the beginning in its notice of appeal it said: this is the worst-case scenario remedy. As long as GIPHY is in, it doesn't matter if Facebook is out.

But of course we say that it's very important for the CMA to have regard to both limbs of the definition when determining the scope of an IEO. If you could go back in Mr Romney's statement to paragraph 27, he gives you an example.

This is highlighted, so this is confidential. Could I just ask the Tribunal to read paragraph 27.

(Pause)

I just want to focus for a moment on the last part of that, so the last part of that paragraph.

We understand, the CMA understands, that Facebook operates a sticker store and is therefore already active in the supply of stickers. So one can see that the type of horizontal theory of harm that the CMA needs to investigate is that one can see that following acquisition of GIPHY, it might conceivably be the case that Facebook decides to discontinue investment in its own sticker store,

because it's purchased GIPHY. It could have had plans before the merger to actually increase that part of the business -- we don't know, that's all for the CMA to investigate -- and then shelved those plans to expand that part of the business once it acquired GIPHY. So that's the kind of thing the CMA needs to investigate.

If that were right, then any such action in deteriorating that part of its business could result in a loss of actual or potential competition in the supply of GIFs and stickers. So that's the kind of point that the CMA needs to investigate in phase I. That's harm which might be caused to the competitive structure of the market by the merger, which might prejudice the reference.

Then we look also to the other point made in paragraph 27, referring to the supply of digital advertising services. So again, the CMA understands that GIPHY were seeking to monetise its business through the use of paid alignment contracts, through which brand partners paid GIPHY to promote their GIF or sticker content. And it may have been that absent the merger, Facebook may have perceived a threat to its own digital advertising business and taken action to compete with GIPHY, for example, by investing in that part of its own business.

It might be that following the merger, Facebook discontinues any such plans. So again, that's the kind of thing that the CMA needs to investigate in phase I, because that would potentially be action which could prejudice the reference.

Then I would ask you, please, to read paragraph 28 to yourselves, and this relates to vertical theories of harm.

I just want to focus on the first one by way of example, which relates to customer foreclosure.

So the CMA understands, and Mr O'Donoghue submitted, he gave Tenor as the example, that Facebook has relationships with other third party GIF providers, and Mr O'Donoghue explained that Facebook Messenger and WhatsApp all have an API with Tenor, which is one of GIPHY's rivals, to provide GIFs.

So it could be that post merger and during the investigation, Facebook might seek to deteriorate those relationships with GIPHY's rivals.

So of course that could potentially result in those rivals leaving the market, depending on how dependent they were on Facebook's business. So Facebook is currently dealing, pre-merge, not just with GIPHY but also with Tenor and others. If post-merger and during the enquiry, it decides to cut off its relationship with GIPHY's rivals, that could foreclose those rivals from the market. It may or it may not, but that's precisely the kind of thing the CMA has to investigate.

Why that's important, even if Facebook were right that the worst-case scenario in terms of remedy is divestment of GIPHY, if in fact GIPHY's rivals were foreclosed during the investigation, then that remedy would not resolve the harm to the market, so that the reference would have been prejudiced.

So we say that Mr Romney has given these as examples, but you have our point that it's very early days and that the CMA is not required, at the outset, to pin its colours to any particular mast. It really is in the position of trying to investigate different possible theories of harm and see whether there's anything in them. It's at such an early stage of the investigation.

Now, the third point relates to Facebook's argument that the worst remedy would be divestment of GIPHY. We say that it's a bit odd to think about it in terms of worst and not worst, but the point is that it's not the only possible remedy

because the CMA would have the power to order Facebook to divest assets and services if this were necessary to remedy the SLC. There's no doubt about that.

You have seen that Mr Romney says that it's important to keep that in the frame.

Now, Mr O'Donoghue took you to five authorities which he said established a legal principle. He said, that the CMA could not do anything more than order divestment of the acquired business. But there is no such legal principle. I have shown you the statute and the CMA has a broad remedial duty, as I have shown you, and there's nothing at all in the statute to say that the CMA cannot, if necessary, order divestments of part of the acquiring undertaking.

The authorities relied on by Mr O'Donoghue establish no such legal principle. They all turned on their own facts. I am not going to take you to them in turn but can I just show you two, because it's quite helpful to see the context of some of these points.

So my learned friend took you to BSkyB, which is behind tab 27 of the authorities, which is volume 2, and he took you to paragraph 281, which is bundle pagination 1108.

THE CHAIRMAN: What tab is it again?

MS DEMETRIOU: It's tab 27 and it's page 1108. Mr O'Donoghue took you to paragraph 281 at the bottom of that page. You will recall he emphasised the words:

"By considering the most extreme remedy of full divestiture first and concluding that it was effective ..."

So he said that's the most extreme remedy, they cannot do anything more than that.

But that's not what this says. First of all, the important thing is that this is Sky's

submission, this is not the Tribunal's findings. You see that at the beginning of that paragraph, "Sky's first contention". This was its submission.

It's understandable that Sky put the case in that way because its argument was that less extreme remedies should have been imposed. So all it was saying was: you have chosen the most extreme remedy but there was a less extreme remedy in our case. There is no finding of the Tribunal that the CMA has no power to impose another remedy.

Then, in the same bundle, if you look at the Somerfield judgment behind tab 20. Here Mr O'Donoghue relied on paragraph 99 and that's at page 790 of the bundle. Here, the Tribunal said:

"In particular, in our view, it is not unreasonable for the CC to consider, as a starting point, that "restoring the status quo ante" would normally involve reversing the completed acquisition unless the contrary were shown. After all, it is the acquisition that has given rise to the SLC, so to reverse the acquisition would seem to us to be a simple, direct and easily understandable approach to remedying the SLC in question. While we can see Somerfield's argument that divestment of the existing, rather than the acquired, business may also remedy the SLC, that may not always be the case ... and may in any event be less certain and less direct."

This were really a case, if one were needed, that supports us rather than Facebook. Because the context of this case is that the remedy that the CC imposed was the divestiture of stores that were acquired by Somerfield, and what Somerfield were saying was: you shouldn't have taken that as your starting point, we would prefer to divest four of the stores we already owned.

What the Tribunal are saying in terms in this paragraph is, well, yes, that might be

a way of remedying the SLC, to divest part of the acquirer's business, so they are exactly recognising the point that we make.

There is certainly nothing here to say that that can't be done. These are all cases which just turn on their own facts. And the Tribunal has seen the statutory provisions; there really is no bar on the CMA if necessary ordering divestiture of part of the acquiring business's assets or services or part of its business.

THE CHAIRMAN: You can see that quite easily in quite a few different businesses. So if you look at a supermarket, one supermarket acquires another supermarket chain, you may say, if you want to do that, you are going to have to give up various branches in different places in the country.

MS DEMETRIOU: Exactly.

THE CHAIRMAN: If you do that, you can go ahead. If not, we will block the whole of the merger in its entirety.

MS DEMETRIOU: Exactly, Sir. At that stage, the CMA may be agnostic as to whether it's some of the acquired supermarkets or some of the original supermarkets of the acquirer or both. It may not be that it's just the acquired ones that have to be divested and, in fact that's what we see in the Somerfield decision. Somerfield were saying: we do not want to divest ourselves of the stores we have acquired, we want to divest ourselves of four of the old stores.

THE CHAIRMAN: Exactly.

MS DEMETRIOU: We say that that point does not really get off the ground and it follows that the CMA was entitled to have in mind the possibility that it might have to order Facebook to divest part of its business and to take the view that it needed to ensure that Facebook didn't take action during the investigation which might undermine that.

So, Sir, those are really our submissions, but what I want to do now is address the question which you put to me at the very outset which I said I would get to and I am now getting to it --

MR FRAZER: Ms Demetriou, just before you get to that point, sorry to delay you further, Mr O'Donoghue made the point also that requiring the disposal of part of the acquirer's business or an acquirer's business was so vanishingly rare that it could be all but discounted as a possibility. Will you be addressing that as well?

MS DEMETRIOU: Well, Sir, I don't have statistics on which to address you on that but we say it's really a point that goes nowhere. Mr O'Donoghue hasn't provided evidence to make that good, that's his assertion.

But in any event, what he would need to show in order for his argument to succeed is that it's a legal impossibility for this to happen. Not only is it not a legal impossibility, but there are cases, as the Chairman has indicated, where it may well be the sensible thing to do. So one is looking at the enhanced competitive position of the merged entity and you may say, well actually, we don't want to go for the extreme step of ordering divestiture of the whole of the acquired business.

What we can see is there's an SLC in this limited market and if you could just divest yourself of this service, then that would mean that there's no SLC, or that would remedy the SLC.

That's why I say it's rather odd to paint it as being the most extreme remedy, because sometimes a less extreme remedy is for the acquirer to divest itself of part of its business.

MR FRAZER: It would be more extreme for a divestment to include the whole of the

acquired business and part of the acquirer's business as well.

MS DEMETRIOU: Yes. Again, that's perfectly possible. We don't have evidence before you as to when that's been done. We have given an example in our skeleton, we have footnoted an example of that happening. So that can happen, but in a sense, we don't need to show that the sort of super extreme remedy, if you like, of divestiture of the whole of the acquired, plus some of the acquirer, is commonplace because even if -- so the CMA would wish to preserve the remedy of divestiture of part of the acquirer's business even without divestiture of the whole of the acquired. That's a less extreme remedy but that may be a remedy that remedies the SLC.

So that's why we say that this black and white view of what's the most extreme, that's just not how it works. The CMA has a wide range of remedial options available to it and it doesn't want to preclude any at this stage.

MR FRAZER: Thank you, that's helpful, Ms Demetriou.

MS DEMETRIOU: I was going to finally address the Tribunal's question, which is to look at each of the elements of the derogation and consider how each might risk pre-emptive actions. I am going to go through them and by reference to the submissions I have made already hopefully illustrate the sorts of concerns that might arise.

The Tribunal has my fundamental point, which is that this is not an exercise that the CMA was equipped to do because it didn't have the information. So without the information, as I have said, the CMA was not properly in a position to understand what Facebook was seeking and then assess the risks.

If we turn up the marked up IEO -- I have that separately; does the Tribunal have that or shall I find a reference?

THE CHAIRMAN: No, it's fine, it's in the miscellaneous bundle.

MS DEMETRIOU: You have already my overarching point that Facebook's request proceeded on the basis that it was an unrelated business and the CMA wanted to understand what it meant by that.

Also, you have my point that it sought to keep in the IEO, in 5(d), its business relating to the procurement or supply of GIFs and stickers. And you have my point that the CMA doesn't understand precisely what they mean by that and what parts of the business they are talking about. And you have my point about Ms Blank's statement, which is that looking at it one might think, well, that includes WhatsApp because WhatsApp relates to the procurement of GIFs and stickers because they use GIFs and stickers, but we know from Ms Blank they mean to exclude all of WhatsApp. So there's a huge lack of clarity, which is one reason the CMA needed further information.

What this means is that it's fundamentally unclear what Facebook says is in and what Facebook thinks is out. We say that presumably Facebook has an idea of what is covered, because if the derogation were granted, then presumably they would cease providing these qualified compliant statements --

THE CHAIRMAN: On their own basis they must know, because they are not seeking to comply with the IEO in the current form but they are complying with it at the moment on the basis of them having already been granted the derogation request which hadn't been granted. So they would need to know for their own purposes what's in and what's out.

MS DEMETRIOU: Exactly, Sir. If one looks at paragraph 8, for example, so looking at paragraph 8, they would have to know -- so as modified, their proposal to keep the CMA actively informed of details of key staff who leave or join the

Facebook business as it relates to the procurement or supply of GIFs and stickers.

Do you see that? You see at the beginning of paragraph 8:

"... actively keep the CMA informed of any material developments relating to the GIPHY business or the Facebook business, which includes ..."

And then you see you have:

"... key staff who leave or join the GIPHY business or the Facebook business", in 8(a).

THE CHAIRMAN: The important point here is that, even if Facebook understand what that means and the implications of it, you need to know as well and so does the monitoring trustee.

MS DEMETRIOU: Exactly. So that's exactly the point, and that's really why we need further information.

It's odd as well; there are some oddities. It's also unclear to the CMA why only 5(d) and 8 should continue to apply to those parts of Facebook's business which relate to the procurement or supply of GIFs and stickers. Why shouldn't the other part of the IEO also extend to those parts?

So focusing on key staff, you've seen that paragraph 8 requires Facebook to keep the CMA informed of details of key staff who join or leave, so they have an information requirement. But then if you look at 5(i) and 5(k), they are at that stage excluding the Facebook business. So that's a bit odd. We don't understand why they think that they should be able to keep us informed of changes but not actually seek permission for those changes. So we would need to understand all of this. It's never been reasoned or explained.

But then taking in order, going to paragraph 4(b), this derogation would exempt

Facebook from taking any action which might transfer the ownership or control of the Facebook business or any of its subsidiaries. So an initial point to make is it only bites on action taken by Facebook itself, so it wouldn't impinge on any third party's ability to trade in Facebook's shares.

The main way in which it operates, the CMA says, is to prevent Facebook from selling its subsidiaries. We say that there is a connection between that and the possibility of pre-emptive action because, as I have said, for example, Facebook accepts that it has a business which relates to the procurement or supply of GIFs and stickers, it accepts that, that's why it makes the proviso as to 5(d) and 8. But we don't know what subsidiaries own that business or which subsidiaries are unrelated to that business. So absent that information, Facebook may be able to divest itself of part of its business which is related to the procurement or supply of GIFs and stickers.

As I have already shown the Tribunal, the CMA is aware that Facebook has its own sticker library, and so it could, as a result of the transaction, discontinue investment in that sticker library and seek to sell it or divest itself of it, which could result in the loss of actual or potential competition.

But at the moment, the CMA doesn't know where the sticker store is being run from or which subsidiary owns it, and that provides a good illustration of the information or asymmetry which exists.

So just to add a little bit more colour to that point, if you could take up the draft merger notice, which is in bundle 2, G1, page 1201 of the bundle. That's where it starts. You see it's dated 3 July. So that's more than three weeks after the derogation request.

There is no mention in this document of Facebook's sticker library. So, on the

contrary, if you look at paragraph 14, which is on page 1209, you see there at paragraph 14:

"... Facebook is not active in the provision of any of the same services as GIPHY in the UK."

It says what Facebook is active in, but it says clearly it's not active in any of the provisions of the same services as GIPHY.

Then if you go to paragraph 17, over the page:

"Given that Facebook is not active in the supply of GIFs (at any level of the value chain) ..."

Just to complete the picture, when you see the definition of GIFs at paragraph 5 on page 1206, that includes GIFs and stickers. Do you see that, paragraph 5?

So there, in this draft merger notice three weeks after the derogation request, Facebook is saying, "We are not active in the market for the supply of GIFs and stickers", but the CMA then realised that Facebook appeared to operate a sticker store and self-supply with stickers and asked questions about that on 13 July.

It's received some answers, and we don't have those in the bundle, but as part of its answer, Facebook is attempting to distinguish its stickers from the GIF stickers provided by GIPHY. That's a matter which is under investigation by the CMA.

So that's one of the questions which the CMA will have to investigate in the phase I enquiry.

But it still doesn't know which subsidiary operates the sticker library. So you can easily see that 4(b) might, it were granted in this way, permit Facebook to sell a subsidiary that's operating a sticker library and divest itself of that part of the

business and that might lead to a loss of competition in the market. It may or may not lead to that but it's certainly something the CMA wants to investigate.

They have not come to us saying, "Well, look, our sticker library is managed by a subsidiary in the Philippines so we'll keep that one in, but there are lots of other subsidiaries who have nothing to do with GIFs at all, let's give you a list of the subsidiaries and what they do". They have not done that, so we just simply have not been in a position to modify this derogation request, and it's too broad at the moment, and that's an illustration of why 4(b) is problematic as things stand, without knowing more.

I have also already mentioned the theory of harm relating to customer foreclosure. That's mentioned at paragraph 28 of Mr Romney's statement. As I have said, what the CMA has in mind there is that Facebook could act to foreclose one of GIPHY's rivals, for example Tenor, for which it also has API connections, and it might seek to do that during the CMA's investigation. Again, we don't know how Facebook's business is structured, but if, for example, there were certain subsidiaries who deal with procurement from GIPHY and others who deal with procurement from Tenor, then it's possible that if this derogation were granted, Facebook could seek to sell the subsidiary which procures from Tenor and divest itself of that part of the business.

So again, we say that that's an example of why 4(b) as it stands, the CMA cannot be confident that there is no risk of pre-emptive action.

So moving on to 5(c), which is the next modification, we see there that this would exempt Facebook in its entirety from the obligation, except in the ordinary course of business, to make substantive changes to the organisational structure of or the management responsibilities within the business. That

would exempt Facebook in its entirety from that obligation.

We say that that raises similar points to 4(b), to the points that I have just made, because, again, I'm repeating myself, but Facebook accepts that it has a business which relates to the procurement or supply GIFs and stickers but it wants a blanket exemption from this obligation and that might enable it to make substantive changes to the organisational structure or management responsibilities within that aspect of its business.

Again, we say that that could affect its sticker library or give rise to pre-emptive action in the form of customer foreclosure concerns, because Facebook could reorganise itself and restructure itself to stop procuring GIFs from Tenor or another of GIPHY's rivals.

Again to put some flesh on the bones of that point, I am told that Facebook recently announced that it's intending to integrate Instagram and Facebook Messenger and at present Instagram uses only GIPHY, while Messenger uses both Tenor and GIPHY. So one can see that in that organisational change, one can well imagine that there's a risk that this change in the organisational structure of these two core services could have an impact on whether or not Facebook continues procuring GIFs from Tenor.

The CMA, as I say, I emphasise here, we don't know whether that's the case but it's conceivable and that's precisely the type of risk the IEO needs to guard against.

Moving on to 5(d), this amendment would see Facebook only being obliged to maintain and preserve the nature, description, range, quality of goods and/or services it supplies in the UK insofar as those goods or services are being supplied by those parts of the Facebook business which relate to the

procurement or supply of GIFs and stickers.

Now, I have already made my point that we don't really understand what they mean by that. We don't understand what they mean by "those parts" of the Facebook business. They haven't told us.

It's also a bit odd, we don't really understand why and how the introduction of the language of procurement fits in with the fact that the unamended language only deals with supply. So that's again something which they haven't explained.

I have already discussed Mr Romney's -- some of the potential theories of harm, so customer foreclosure, which is a vertical theory of harm, the sticker library and digital advertising, which are horizontal theories of harm. These all mean it's important for the CMA to understand what this proviso in 5(d) means and how it maps on to Facebook's business in practice, because without the proviso, it's quite possible that the merger reference would be prejudiced, so we need to know what the proviso means in practice.

So how much comfort can it give the CMA that there's not going to be any prejudice to the merger reference.

Then we move on to 5(i) and (k), so (i) is key staff and no changes to key staff --

THE CHAIRMAN: What about 5(e)?

MS DEMETRIOU: So sorry, 5(e), assets of the GIPHY business -- yes, that's, again, Sir, a similar point to the points I made on 4 and 5(c), which is that they could, by dissipating assets, for example, deteriorate the sticker library or foreclose GIPHY's rival. So those are just examples.

As I say, they are examples which are given in Mr Romney's statement, but the overriding point is that there may be other theories of harm which the CMA

has not yet considered because this is all so early.

These are very complex markets and it's a complex business. So the CMA needs to, in a precautionary way, make sure that it's satisfied that there is no risk of pre-emptive action.

Of course, the dissipation of assets could also mean the sale of IP rights. Again, you can quite see how that might give rise to risks.

Then we move on to 5(i) and 5(k), which relate to key staff. Again, we say why should Facebook be permitted to remove key staff who relate to its procurement or supply of GIFs and stickers. So what if it sought to remove someone who ran its sticker store or managed its relationship with one of GIPHY's rivals, that could lessen competition or give rise to foreclosure effects.

We say that Facebook complains about the number of its employees who are subject to this restriction, but even that is not information which was provided to the CMA prior to this litigation.

In relation to that issue, there are straightforward or obvious steps which Facebook could have taken. So it could have told us those numbers and said, "Well, why don't we amend the definition of key staff in the IEO to exclude, for example, those with managerial responsibility and instead to limit it to those with executive responsibility and whose performance affects the viability of the business". But it simply didn't come to us with the numbers of staff or make any proposals like that or give any information which could have given the CMA a basis for narrowing those provisions.

So I am not suggesting that that type of derogation would necessarily be granted by the CMA, they would have to look at it on the basis of the evidence, but it's an

example of precisely the kind of dialogue that Facebook could have sought to engage in and has shut itself off from doing, which is a point we made at paragraph 111 of our defence.

Then paragraph 8 I think I have largely dealt with. So I have made the point that we are unsure why it relates to key staff when the primary obligations in 5(i) and (k) do not. Likewise, when you look at 8(d) you see that Facebook's content to tell us about material developments in its relationships with key suppliers but, as we have seen, it seeks derogations which would prevent it from actually making material changes to its relationships with other suppliers of GIFs and stickers.

So again, there's a disparity between what it is seeking in the information requirements and the actual primary obligations. It has not explained why that is or how that's supposed to assist.

So I hope that that's helpful. You have my overriding point, which is that we say it's not for the CMA at this very early stage to determine what the theories of harm are and engage in that kind of granular analysis, but we are very, very far from where Mr O'Donoghue requires us to be, which is that it's irrational for the CMA to have taken the position that without further information it's not in a position to grant these derogation requests. We are very, very far from that position, and that's why we say that this application must fail.

THE CHAIRMAN: Can you just take me to the evidence on what there is on Facebook's own sticker library?

MS DEMETRIOU: Do you mean Mr Romney's statement? So Mr Romney's statement at D1, paragraph 28 and footnote 60. You also have the points in paragraph 27 about possible --

THE CHAIRMAN: Is that all we have about that? There's nothing else in the papers that tells us anything more about the sticker store --

MS DEMETRIOU: No, Sir, but the critical reason for that is because this is at the very, very outset of the investigation. So you have seen the timeline. The timeline is that they made their derogation request in the sparse form it was on 10 June, that since then they have provided no further information in relation to it and we don't have very, very key and basic information.

So because we are at this very early stage of the enquiry, generally there's been a problem with getting evidence, though the 40 days has not started. The purpose of the 40 days is precisely to investigate different theories of harm. So the CMA really are at the point of trying to piece things together to work out what possible theories of harm there might be.

It's an iterative process and sometimes theories of harm are alighted on and then discarded very quickly. Sometimes later on in the enquiry something which was not perceived to be a potential harm is identified because of some evidence that comes in. There are meetings with the parties, there's third party information requests. This is an iterative process and the picture changes very rapidly throughout the period.

So what the Tribunal is looking at is a snapshot at the very beginning of the enquiry where there is almost next to no information. And what the legislation says is section 72 says, well, you don't need to show any theory of harm or any SLC or even that you believe there might be an SLC at this stage, there may never be a reference, but this is to hold the ring and that's why when you are looking at pre-emptive action, it's exceptionally broad, and here there's a risk of pre-emptive action because there was integration which changes the nature

of the market.

What Mr Romney is doing here, he's being very clear about this. He is not saying to the Tribunal, well, this is definitely a theory of harm which we are going to pursue. He is trying just to explain to the Tribunal the position that the CMA is in, is he is giving you just some examples of theories of harm which will have to be considered, but there may well be more, and it's liable to be a changing picture.

So just to be clear about our position, we are not pinning our case on this evidence. We use it for illustrative purposes.

THE CHAIRMAN: Okay, so the fact that Facebook has its own sticker library, that could be an actual or potential rival to GIPHY.

MS DEMETRIOU: Yes.

THE CHAIRMAN: If it procures stickers from elsewhere, like Tenor, that is an actual rival to GIPHY. And you are saying that if let's say one subsidiary ceases doing business with Tenor, and let's say Facebook is important for Tenor, that can have a big impact on that rival.

MS DEMETRIOU: Exactly. So why that's important is that if Facebook is important for Tenor, and if -- so pre-merger we know Facebook was dealing both with GIPHY and with Tenor and with other third party GIF providers, and if post-merger, with no IEO or with a super wide derogation, Facebook were to say, "Well, we are going to just ditch Tenor because we have GIPHY now", then that could result, if Facebook is very important for Tenor, that could make it very difficult for Tenor to compete on the market, it might foreclose them from the market.

Even if you are in a situation where let's say a reference is made and let's say the

CMA does do what Mr O'Donoghue says is the worst-case scenario of ordering divestment of GIPHY, well, if in the meantime Tenor has gone out of business, well the structure of the market has been changed and competition has been lessened. So it's not right for him to say, "Well, as long as we protect GIPHY so that that can be divested then there's no risk of any pre-emptive action". Because you could divest GIPHY and GIPHY could be doing fine because that's been part of the IEO, but in the meantime, if Tenor has gone out of business, then harm has been caused to competition in the market.

So that's why Mr O'Donoghue's way of looking at it is much too narrow and it does not accord with the precautionary purpose of these provisions.

THE CHAIRMAN: Or that we may need a lot more complicated derogation if there is going to be one, perhaps for undertakings and a lot more detail than we have at the moment.

MS DEMETRIOU: Sir, precisely. We are not excluding that and you have seen that as a consistent theme. The CMA is saying, we need the information, let's engage to work out what we can do, and it accepts that it has to act proportionately and that the IEO should be proportionate. But none of this information -- so you have my submission on rationality. We say that actually the key question in this case is whether the CMA has acted rationally in seeking this further information, and we say plainly yes. But even if one were applying a proportionality standard, then we say that plainly the CMA has acted proportionately in seeking this further information, because it needs to understand what the scope of the derogation is in practice and it needs to make a proper risk assessment, and it's unable to do that at the moment

given the absence of information.

Then if you were applying the proportionality test -- this is really to deal with Mr O'Donoghue's submissions on proportionality -- then the only additional factor you would be bringing in is the burden on Facebook.

In relation to that, we say two things. We say, first of all, all of the information we have had now in the witness statements about burden was never even put to the CMA, it's only been given in this litigation.

Secondly, the burden on Facebook is really a burden of its own making because the CMA has not closed its mind to a derogation. What it wants is information and the fact that that narrower derogation or some form of derogation hasn't happened yet is because it hasn't sought the information, it has not received the information, and that is a problem which has been caused by Facebook. It's a problem of its own making because of its stance.

THE CHAIRMAN: When you talk about the burden, there are two ways of looking at it. One is to say Facebook are not really suffering from any burden because they have decided not to have regard to the IEO insofar as they want their derogations, so they have given themselves a derogation in advance. On the other hand, it is burdensome to them because they say it's something they cannot practically follow and that they are at the threat of a fine further down the line.

MS DEMETRIOU: Sir, yes, and it's obviously highly unsatisfactory that that's what Facebook has done. We say that however one characterises the burden, it's not a burden which is, if I can put it this way, the fault of the CMA. Because the CMA has not said, well, we are shutting our mind to any form of derogation, it's just said, "Please give us the evidence so that we can consider

it".

So we say even if the right approach is to apply proportionality review, which we don't accept is the case because of BAA and because actually what this point comes down to, what this case comes down to, is whether the CMA acted reasonably in seeking further information. But even if one were to apply a proportionality standard it does not help Facebook in the circumstances of this case.

I think, Sir, that only leaves me with legal certainty. I think I really do not need to deal with it because Mr O'Donoghue, on the one hand, says we have not abandoned the point, but on the other hand says, well, it comes down to the IEO is not very well drafted.

But, Sir, not very well drafted is not a ground for judicial review, first of all. But secondly, there is no problem with the drafting of the IEO.

As you pointed out, it may well be that it's difficult in practice because of the complexity of Facebook's business to apply it to Facebook's business, but that's why we need information about Facebook's business, to make sure that it can be modified so that it's easier to apply. If that's a difficulty that's not a legal certainty issue. The provisions themselves are sufficiently clear.

So we say there's nothing in that ground of review.

Unless I can assist any further, those are the CMA's submissions.

THE CHAIRMAN: Okay. So we will hear from Mr O'Donoghue at 3.45 because I want to talk to the other members of the Tribunal now. If we have any further questions for you, Ms Demetriou, we will give those to you at 3.45.

MS DEMETRIOU: May I just give you the statistics you asked for before we rise?

THE CHAIRMAN: Yes.

MS DEMETRIOU: So you asked for the last three years statistics for the number of cases that have had both a monitoring trustee and a hold separate manager.

THE CHAIRMAN: At the same time, yes?

MS DEMETRIOU: At the same time. In phase I, that's 5 out of 146 cases. In phase II, that's 1 out of 28 cases.

THE CHAIRMAN: Yes, okay. Right, we will adjourn until 3.45.

(3.31 pm)

(A short break)

(3.45 pm)

THE CHAIRMAN: Ms Demetriou, if you and Facebook can get together and send us by Friday, at lunchtime, let's say 2 o'clock, a note which gives us all the references to Facebook having its own sticker library and the extent to which it uses or accesses stickers or GIFs from other suppliers. I am not asking anyone to go out and get further evidence, but looking at all the bundles before us, what is there in there. That deals with those two aspects.

MS DEMETRIOU: Sir, I had a look last night and this morning and the RFI request which the CMA sent on that, and the response, I don't think is in the bundle. So I don't know whether you want us to produce documents which are not currently in the bundles or ...

THE CHAIRMAN: I think on that one point I would like to see what there is. But obviously it's down to you and Facebook to consider what you both think is appropriate for us to look at. But it is a piece of information that I am interested in for the purposes of dealing with this case.

MS DEMETRIOU: Okay, we will ...

THE CHAIRMAN: Work together. I don't want something that's in dispute between

you, I just want a joint note between both of you saying, this is what it is, firstly by reference to what's already in the bundle, but if there's anything else that has the information in convenient form, then send that to us as well.

MS DEMETRIOU: Do I take it from that you are not interested in further information on the other points that Mr Romney gave as examples? So he referred to another potential horizontal theory of --

THE CHAIRMAN: No, I am not interested in that. I am just looking at that one thing --

MS DEMETRIOU: I understand.

THE CHAIRMAN: -- or those two things.

Yes, Mr O'Donoghue, you have as long as you need I think.

Reply submissions by MR O'DONOGHUE

MR O'DONOGHUE: I will try not to overstay my welcome.

THE CHAIRMAN: You are always welcome.

MR O'DONOGHUE: Thank you, Sir. Can I start off first of all with what I would call the rewriting of history, what Marxism called revisionism.

Ms Demetriou said that the CMA was not taking what she described as the extreme position of saying that the existence of overlaps would preclude a derogation, and she said that, rather, the CMA was simply responding to points made by Facebook.

In my submission, that is plainly wrong.

If we can just quickly go to two of the key documents. The first is one I think we have seen at some point, which is the 2 July letter. It's in F23, or row 23 of the hyperlink.

THE CHAIRMAN: Let me just go from the hyperlink one. So row 23, you say?

MR O'DONOGHUE: Yes. Tab 23 of hearing bundle 1, F23.

THE CHAIRMAN: Where is it in the hyperlink?

MR O'DONOGHUE: It's row 23 I think.

THE CHAIRMAN: That's 2 July?

MR O'DONOGHUE: Sorry, 22, sorry. It's paragraph 19, so internal page 432. So you'll see, Sir, from the first sentence in 19 the CMA is there explaining the criteria in the Interim Measures Guidance, and then you see (a). Then over the page at (b), so they make the point in the first sentence about being cautious and so on. Then they say:

"... the CMA would not consent to remove Facebook ... from the scope of certain provisions of the IEO, unless it were satisfied that the activities of Facebook ... are unrelated to GIPHY's pre-merger activities, whether horizontally, vertically or otherwise, such that there is no prejudice to the outcome of a reference or impediment to the taking of any appropriate remedial action."

Then it makes the point about the information. So in my respectful submission, given that this is a description of what the CMA says the guidance says, it is impossible fairly to read that as a response to a point made by Facebook. This is setting out the CMA's own position.

Just so there is no doubt on that whatsoever. If we then go to tab 17, back a few pages, row 17 in the hyperlink, this is the 22 June email from the CMA. It's the second paragraph:

"... we would like to reiterate that, in line with the [guidance] ..."

So again a reference to the guidance:

" ... the CMA is cautious about granting derogations ... In particular, for the CMA to consent to remove Facebook entirely from the scope of certain provisions of

the IEO, we would need to be satisfied that Facebook's activities that are in any way related to GIPHY's activities, whether vertically, horizontally or in an otherwise adjacent market, would remain within the scope of the IEO. As such, we require fully specified and reasoned requests that take this into account."

Again, one cannot fully read this as a response to points made by Facebook on the question of overlaps. This is setting out the CMA's position of principle.

So that is why we have --

THE CHAIRMAN: Mr O'Donoghue, I understand this point you are making about this email but when you get to the letter of 7 August, are they still maintaining that position? If so, can you show me the relevant paragraph?

MR O'DONOGHUE: Well, Sir, it certainly has not been disavowed, which is the point I am entitled to make. I have showed you the reference in the 7 August letter to the issue of horizontal overlap.

THE CHAIRMAN: Yes, exactly, I saw that bit, yes.

MR O'DONOGHUE: From my perspective, this is something which has been effectively maintained by the CMA, and Ms Demetriou of course is quite right to call it an extreme position, and if that is the position it is a clear misdirection in law.

In my submission, in some ways this is the original sin in this case, which is the CMA has effectively misinterpreted its guidance as precluding derogations where there's essentially any overlap and that's why they then go down the rabbit hole of seeker seeking an extraordinary level of information in connection with these overlaps.

If their point of principle is any overlap ipso facto precludes the derogation, then all

the information in the world isn't going to shift them from that position.

So it is an extreme position and it is wrong in law and a clear misdirection.

That is the first point.

A second point in this context. Ms Demetriou is also wrong to say that effectively we have presented the question of overlaps as being one of central relevance to this application. As the Tribunal will see from the list of issues, we have not at any stage invited the Tribunal to reach any findings on the question of overlaps, and we accept that is something which remains at large.

In particular, we have made clear that these derogations do not depend on bottoming out whether and to what extent there are any overlaps. Instead, the question is a rational connection with pre-emptive action.

So that's the first point, Sir.

The second point is to deal with Ms Demetriou's submission that the CMA is at an early stage, and she makes a number of points on the back of that.

First of all, she's clearly wrong to suggest that we have advocated for an incorrect legal standard. We have accepted in our notice of appeal, paragraph 59, that the test based on the Chairman's judgment in the ICE case is based on might. We have never suggested, contrary to what Ms Demetriou has said, that the CMA needs concrete theories of harm. We've never said that.

As I said at the outset today, Sir, the test is, as you, Sir, have set out yesterday, what is the risk of pre-emptive action and how did the derogation sought potentially adversely affect the CMA's ability to frame or implement an effective remedy if at the end of the day an SLC is found.

That is the core test, we have never suggested otherwise. Indeed, in our respectful submission we have been consistent at all times and the Tribunal, through

that formulation, has effectively accepted the formulation that we have put forward.

If one takes a step back from Ms Demetriou's argument, it proves too much. If it were correct, then it would mean that an undertaking could never challenge interim measures because the nature of the transaction and the scope of any overlaps and possible remedies will ex hypothesi always be up for grabs at the date of the challenge. The mere fact the CMA has not yet made up its mind about a remedy that it might impose cannot mean that it is entitled to impose a template IEO that is then immune from challenge on an interim basis.

The question remains the same: is there a conceivable risk of pre-emptive action and what is that risk?

THE CHAIRMAN: Yes.

MR O'DONOGHUE: In particular, what the CMA cannot do is, as it's done here, impose an over-broad IEO which they accept might fall outside the statutory purpose under section 72(2) and then fall back on the information requests to avoid answering the very question that the statute requires them to consider.

To repeat, the CMA only has the power to impose interim measures to prevent a risk of pre-emptive action, which I will come to in more detail, and any decision of the CMA, whether it be to reject the derogation requests or to seek further information, must be directed to that question and that question alone. In this case, the question is why the CMA needs to freeze all or even part of Facebook's business in order to prevent pre-emptive action.

The only relevant consideration for freezing any aspect of the Facebook business is whether it could be relevant for a remedy. Freezing key staff or its

organisational structure does not preserve remedial options. For example, Facebook executives would not transfer as part of any remedies package, therefore why is it necessary to freeze any changes to those staff globally.

I will come back to the second string in Ms Demetriou's bow in relation to the question of other overlaps.

The second point to make in this context is it is in any event not correct to say that the CMA was unable to form a view on the alleged risks of pre-emptive action. It clearly did so, but did so on an incorrect basis.

If we can go back to the hearing bundle, it's at tab 30, page 586. I think, Sir, this is hyperlinked row 30.

So this is a letter from July and you will see, starting from page 586, where it's headed "Substantial integration of the GIPHY business", if I can invite the Tribunal quickly to peruse these two or three pages. I am not asking you to read it in detail, it's just to get the gist of the points being made. Essentially these are all integration-related issues and I just want the Tribunal to see the types of issues being raised at this stage.

THE CHAIRMAN: Yes. I've got that anyway. I don't need to look at it again, I have looked at it before.

MR O'DONOGHUE: Even as early as July, the CMA was able to nail some of its colours to the mast in terms of what was it concerned about, and at that stage it was concerned about aspects of integration. So we do not accept that just because it's at an early stage, that the CMA was unable to form any view. It clearly did in the pages you have seen.

Now, to pick this up in Mr Romney, which is in D1, page 260 --

THE CHAIRMAN: What paragraph number?

MR O'DONOGHUE: It starts, Sir, at 84. Just one point on the heading. So the heading says "The CMA's concerns about pre-emptive action and potential effect on remedies/competition".

So subject to one point Ms Demetriou makes in relation to paragraph 84, on any view this is dealing with remedies and pre-emptive action, there's no doubt about that.

If one then turns to 85 -- Sir, we have been through all this yesterday in some detail. What Mr Romney does is he picks up on two of the integration issues, the source code and the paid alignment, which is a direct nexus with the letter in July we have just seen. At this stage, he is nailing his colours to the mast as well, saying at this stage of the investigation, "Here are the types of things that we are concerned with", so the source code and the termination of the revenue stream.

The Tribunal has my detailed submissions in relation to those. The source code has completely fizzled out, it's simply sitting there, and quite what the GIPHY revenue stream has to do with the Facebook side in the context of these derogations is completely and utterly baffling.

So we do not accept that the CMA has been stabbing around in the dark. It has identified, in the letter we have just seen, and in this part of the evidence, which is the only part dealing with pre-emptive action, what are its concerns at this stage. We are therefore perfectly entitled to tackle those head on. It is very striking that Ms Demetriou made no effort whatsoever to attempt to try and justify either of these points. These were teed up in the evidence as the killer points at this stage, and Ms Demetriou didn't even condescend to deal with them in any shape or form, which is extremely revealing.

So we do not accept that the CMA has been unable to identify any pre-emptive action. We say they have identified a number of items and they just don't go anywhere.

So there's the two points in relation to integration. You have my point in paragraph 85 on behavioural remedies.

So we have addressed each and every one of the specific reasons which have been put forward. They are utterly disconnected from the derogation requests that we have applied for. That is the key point.

I will come back in a second to paragraph 84, which doesn't go anywhere. Can I just start off this point with picking up on the statutory definition of "pre-emptive action."

Ms Demetriou responded to Mr Frazer's question, initially to me and then to her, to the definition of pre-emptive action in section 72(8) as comprising two limbs: first, prejudice to the reference concerned, and second, prejudice to remedies. She says we only deal with the second whereas Romney at paragraph 84 also deals with the first.

So just to take this in a series of discrete points. She didn't actually explain what, on the CMA's case, the first limb adds and nor has she identified any case law to show that this first limb, or alleged limb, adds anything substantial to limb 2.

At paragraph 25 of its own skeleton, the CMA accepts that it can only act to prevent merger-specific consequences and its powers to impose interim remedies are restricted accordingly.

To state the obvious, the purpose of a reference is to allow the CMA to investigate whether there is an SLC and, if so, whether remedies should be imposed.

So we don't understand how the first limb is said to add materially to expand the

scope of the CMA's statutory power to manipulate the market more broadly than the CMA's ultimate power to impose a final remedy to address the merger-specific effects.

We say that is how the CMA itself interprets section 72(8) in its own guidance. If we can quickly turn to paragraph 3.63 of the guidance. It's in authorities 4, tab 78.

4364. And it's (c):

"Clearly unlikely to have any impact on the CMA's ability to achieve effective remedies."

Turning to what Mr Romney says in paragraph 84, and in our respectful submission all the Tribunal has here are a couple of bare assertions. Just to look at what he actually says, he talks about preservation of the competitive structure of the market to avoid the risk of a reference to phase II being impeded, and he says this could take the form of harm to Facebook's rivals by the Facebook business during the course of the CMA's investigation.

This really is question-begging. I mean, if this is a separate limb, and if by alluding, and doing no more than that, to these bare possibilities is sufficient, then the statutory test becomes a question of ipse dixit by the CMA and is not subject to any meaningful limit whatsoever.

These are literally throwaway remarks that are not grounded in any other evidence in this case.

In terms of the underlying point itself in relation to the Facebook sticker store, the long and short of this point is paragraph 5(d) of the IEO itself. So Ms Demetriou queried why we had amended the wording to include both the procurement and supply of GIFs and stickers. The reason, as is perfectly

obvious, is because it was expressly intended to cover both the procurement and the supply of GIFs and stickers, and that would to the extent necessary also cover anything to do with anything on the Facebook side and not simply on the procurement of GIFs and stickers from GIPHY.

So what 5(d) does, and was specifically intended to do, is to freeze all of that in its totality pending the CMA's review.

It was quite revealing that, when Ms Demetriou finally got around to going through each of the derogations individually -- I mean, essentially it all collapsed into the same point, which is Facebook has got something on its side to do with stickers. That was the point she made repeatedly under paragraphs 4 and 5. The answer to all of that is 5(d), read together with paragraph 4, which is that all of that has been preserved to the extent necessary.

We also go further to say it's a very bizarre point to make, if indeed there were some overlap in respect of stickers, that Facebook divesting a company or asset referable to stickers on its side, that that would make the situation worse. Logically, the removal of any overlap from that perspective must be better and not worse. It doesn't make any sense. But the central point is that paragraph 5(d) caters with all of this.

THE CHAIRMAN: You are saying that that deals with your own sticker library and the Tenor point we were discussing earlier?

MR O'DONOGHUE: Sir, indeed, it is a complete answer to both points. Indeed, it's a point very much in my favour because it shows that the amendments we have made to 5(d) to make it over-inclusive do the trick. They are out to capture both procurement and supply and therefore actually materially improve, or at least protect, the CMA's position on this particular issue.

A couple of points, if I may, on the question of unwinding. I hear what the Chairman says in relation to that.

To be clear, we are certainly not saying that if the CMA thought there had been problematic integration it must make an unwinding order now. Of course it could do that if and when a remedy was imposed. But the existence of that power is important for two reasons:

First of all, the only reason the CMA is allowed to impose an unwinding order is to ensure there is no prejudice to its remedial options. So, the fact the CMA has not seen fit to impose such an order now provides some basis for suggesting that it does not consider that there is any ongoing risk to its remedial options arising between now and the date of any remedy direction.

So, at least pro tem, it cannot rely on the historic integration to support the continued existence of the IEO, which can only be made for the very same purpose.

Secondly and in any event, there is a proportionality point. If the CMA thinks it might exceptionally need to poach some assets from the Facebook camp, which I will come back to, as part of any future remedy, the proportionate step, surely, is to impose an unwinding order to restore any missing assets that have migrated from the GIPHY to the Facebook side. The answer, in proportionality terms, cannot be to gum up the entire Facebook business globally for the duration of this investigation, which could last well into 2021.

On the information requests, Ms Demetriou makes the forensic point that the Tribunal has asked for a particular document, the full list of subsidiaries, that Facebook had not provided to the CMA. But, to be clear, the CMA itself has never asked for that information. If that is what the CMA required to answer the statutory question under section 72(2), it could and should have said so.

It is striking -- if we can turn up the information request table; it's in the final hearing bundle at the back -- sorry, it's in the miscellaneous hearing bundle, at the back of it.

THE CHAIRMAN: The last document on that is the revised IEO.

MR O'DONOGHUE: Yes. Sorry, it's 2559 of the main hearing bundle.

THE CHAIRMAN: All right, I'll look at that.

MR O'DONOGHUE: So it is hearing bundle 3 and it is at the back of that.

THE CHAIRMAN: This document, yes, I've got that separately.

MR O'DONOGHUE: 2559. Sir, this was the document you asked for, what information was requested and why. You will see over the page; at 2560 you will see in the left-hand column -- it's essentially a reference back to 3.40 to 3.56 of the guidance. If you then see over the page at 2561, they set out verbatim paragraph 3.44 of the guidance.

So they are certainly not saying at this stage: we asked for information on subsidiaries and it wasn't forthcoming. In fact, they are making a different point, which is to reiterate it's all about paragraph 3.44 of our guidance.

So this is an opportunistic point --

MR FRAZER: Mr O'Donoghue, sorry, I might be reading this incorrectly, but on 2560, in the left hand column, column 1, A, B and C, does that not go to the corporate structure and the identification of the subsidiaries?

MR O'DONOGHUE: Sorry, Sir, 2-5?

MR FRAZER: 2560, the second page where you directed us to.

MR O'DONOGHUE: Well Sir, two points. Well, one, we say no, it doesn't actually say that. But, second, it is important to bear in mind, if you look at the middle column on page 1, we make the point, as a preliminary point, despite

Facebook asking CMA to list its further questions, the CMA has not previously articulated the alleged outstanding requests in the way now set out in column 1. Notably, paragraphs A to C in column 1 are not direct quotes from correspondence and the CMA has found it necessary to set out supplemental reasoning.

We say this is essentially something after the fact and was not something asked for contemporaneously. We also say if they want to ask for specific information about each of the subsidiaries, it isn't difficult to state that in plain terms.

MR FRAZER: I see, thank you.

MR O'DONOGHUE: That deals with subsidiaries.

THE CHAIRMAN: Presumably, if Ms Demetriou is going to say that they have asked for the identities of the relevant corporate entities, she can give us a reference in due course after you have finished your submissions.

MR O'DONOGHUE: Well, Sir, what we need to see is a contemporaneous document --

THE CHAIRMAN: That's what I'm saying. If there is one, we would like to see it, that's all. Yes.

MR O'DONOGHUE: The second point made by Ms Demetriou is she suggested that, until she had read Barbara Blank's first statement, she had no idea that paragraph 5(d) of the IEO as amended in our proposal would, for example, not apply to all of WhatsApp.

Can we start by looking at what Barbara Blank actually says. This is in the first hearing bundle, C1, tab 3 on page 201. Ms Demetriou took you to paragraph 17, and it's the last sentence:

"Facebook has at all times been clear that its core services ... are vertically linked to

GIPHY but its position is that this has no rational connection to whether the carve-out request could result in pre-emptive action."

So with respect to Ms Demetriou, what she said in relation to Barbara Blank's statement is completely misleading. That isn't what Barbara Blank is saying there, she's making a different point, which has to do with the logical connection between the carve-out derogation request and the question of pre-emptive action.

But in any event, it is completely unsurprising that paragraph 5(d) was expressly intended, and does, not apply to the totality of WhatsApp. Because the essential point, which is now common ground, is that the GIPHY inputs are used, or potentially could be used, in a vertical context, by a number of Facebook's core services. Our persistent point in relation to the IEO is that, to have to certify compliance on a global basis across all of these businesses, across the difference subsidiaries, is utterly disproportionate.

So it would be very bizarre if, having made that point, we then got a machine gun out to her own foot and said: well, we also want paragraph 5(d) to cover the totality of Facebook. It makes no sense whatsoever. That was the very thing we were seeking derogations from.

So, Chairman, to go back to your example about WhatsApp, WhatsApp is a bundle of different products and services. For Luddites like me, I simply use WhatsApp to text my family and friends with messages. Other people may use it for videos, and people may also use it for GIFs and emojis and so on. But it is clear that WhatsApp is a complex product with a large number of different components. A very small part, or one of those components, is the facility to offer a GIF-related functionality for those people who may wish to

avail of it.

But there is no rational reason why, just because WhatsApp, as one of a large number of product offerings, has that facility, why the entirety of WhatsApp on a global basis should be gummed up in the way that the IEO currently provides for.

THE CHAIRMAN: Indeed, I was not even aware until this case started that GIFs were available on WhatsApp. But, as a result of reading into this case, I have found it and I have used it now.

MR O'DONOGHUE: Well Sir, that's deeply reassuring.

THE CHAIRMAN: Yes.

MR O'DONOGHUE: But the point to be extrapolated -- I mean, essentially most of Facebook's core services either can use or do use the API. So it is obvious, if the IEO is maintained in its current form and it were applied to the entirety of these core services, that the extent of the reporting obligations under the IEO would be eye-watering, and that is precisely why 5(d) is limited in the way that it has been limited. That was deliberate and intentional.

Now, just to clarify one factual point in relation to Oculus, which Ms Demetriou sought to make some mileage on the back of. She says that Facebook failed to disclose this so-called vertical relationship between Oculus and GIPHY and the information came in dribs and drabs; that is incorrect. We volunteered this information in July of this year, it was never hidden from the CMA.

Second, she's in any event wrong. Oculus does not in fact have any active relationship with GIPHY, it has a contractual possibility that might enable it to use the API at some point, but it is not actually using the API as things stand, and in fact has never done so.

The CMA has been aware of this since 13 July, as Ms Blank explains in paragraph 16 of her statement, and that has never been queried or controverted until now. Ms Demetriou, with respect, should withdraw the submission she made.

THE CHAIRMAN: I don't think she will do.

MR O'DONOGHUE: No. But it's wrong, is the point.

I said I would come back to the question of remedies. Mr Frazer pushed Ms Demetriou, could she give any example of a case where, in addition to requiring the divestiture of target, the CMA also required divestiture on the acquirer side. After some humming and hawing, she was unable to give him any example. That, of course, is an eloquent silence.

So our point that this has never been done, in decades of merger control in this country, remains good.

There was some brief reference to the Stagecoach case. Let me just give you our headline points on that.

First of all, that was a case where the acquirer first attempted to put the target out of business through a campaign of predation and abnormal competition. Effectively, the target was on its last legs, and then, having contrived to produce that situation, it then acquired the target business.

So that is a case where the acquirer has deliberately run the target into the ground and has nothing to do with this case whatsoever.

Second, there's an important legislative difference because, at the time, which was 2009, in Stagecoach, the Competition Commission did not have any legislative powers in respect of unwinding powers on an interim basis. So that is an important legislative distinction.

Now, the Chairman put to Ms Demetriou the point that: well, couldn't you have

a situation where, as a condition for obtaining merger clearance, the parties had to divest assets on the acquirer side?

We say there is a fundamental distinction between where the parties voluntarily, to get their merger done, offer to engage in some divestitures on the acquirer side and the situation which we are concerned with, is whether there would be a legal power to compel the acquirer to divest its assets instead of those of the target.

Ms Demetriou, with respect, simply hasn't responded to that point. We do, therefore, insist on the point that this is a legal principle to do with causation, which is clearly reflected in the legislation in section 41 in the case law. She has not come up with a single example that calls into question that legal principle.

A couple of final points on proportionality. The Tribunal has the points of detail. I don't want to over-egg this pudding, but the IEO has to be seen in its context. The CMA's IEO applies to Facebook's global business, which has 54,000 employees, more than 250 subsidiaries and over $70 billion in global turnover.

All of this freezing and restricting of that business is done in order to preserve the CMA's options in relation to a GIPHY business which has just over 100 employees, which involves a single legal entity and a de minimis turnover.

We say, when one sees it in that context, the expansive approach taken in the IEO is manifestly disproportionate. It is a classic case of the tail wagging the dog.

Now, Ms Demetriou says that we don't even get to proportionality because the CMA's anterior decision to request information is subject only to a high rationality view. We don't accept that, and indeed it would be very surprising if an authority could sidestep a proportionality standard by insisting on entirely

disproportionate information requests.

Ms Demetriou relied on a series of cases which say that the question of what factual enquiries it should make is subject only to light touch, rationality review. But all of those cases were about a situation in judicial review where the claimant was complaining about an authority that has not done enough to acquaint itself with the facts and has therefore reached the wrong decision. That's the BAA case.

Our case is the opposite. We say that the CMA has done too much, by way of factual enquiry, by burying Facebook in questions that are irrelevant. Effectively what it is doing, as one sees in the information request table, it is trying to shoehorn paragraph 3.44 of its guidance into a situation and context for which it is manifestly unsuited.

We have repeatedly made the point, which has not been responded to, that what paragraph 3.44 is really dealing with is a situation where the acquirer wishes, pending the CMA's review, to integrate part of the target's business within its own.

Of course, in that context, one can perfectly see why the question of what would be integrated and unintegrated and what might indirectly become integrated by the back door is highly relevant.

But in our case, where we are not seeking any integration whatsoever with GIPHY and where the requests only concern the Facebook side and the Facebook business, that simply does not arise. It is a classic case of an unthinking application by the CMA of a particular provision of its guidance that is simply not applicable to a case like this.

What the CMA has not done, and should have done, is directed its mind to whether

that information, first of all, is suitable to a non-integration scenario and, second, whether it is remotely suitable for being grafted on to a global IEO on the Facebook side in relation to a complex dynamic and relatively flat and seamlessly integrated business. It has never, ever addressed its mind to that question.

So, Sir, that is all we wish to say by way of proportionality.

I start in many ways with where I ended up -- I mean, it was quite striking this afternoon when Ms Demetriou, at some pace, went through the marked-up IEO. This is the first and only occasion where the CMA has condescended to examine our particular derogations and even attempt to explain why, in view of the retained provisions of the IEO, there would nonetheless be a risk of pre-emptive action.

The reason we say this application must succeed as a matter of principle, quite apart from proportionality, is that that methodical exercise, that intellectual exercise, has not been grappled with at any stage prior to this application by the CMA. Indeed, Ms Demetriou, doing this for the first time this afternoon, really served to underline the complete failure to do so until now. Essentially, her submissions, as I have indicated, can be reduced to one point, the Facebook stickers. The answer to that is paragraph 5(d).

So insofar as that is meant to be a surrogate or proxy for the exercise that the CMA should have gone through before this application was issued, it is manifestly inadequate and they had simply not addressed their minds to the relevant question. Of course, it's quite striking in this context that the CMA effectively objected to the template document that we handed up with the amendments. Because what that does, in a very practical way, is crystallised what would go,

which is next to nothing, what would be retained, which is practically everything. The reason they were uncomfortable about this document going in is that it really highlights for the Tribunal --

MS DEMETRIOU: Can I just interrupt, because we have never objected to that document but it was handed to me just before the bundles were finalised and I didn't have time to read it, so that's why it was sent as a non-agreed document. I just wanted to read it, but we never objected to it and I do --

MR O'DONOGHUE: It certainly is not agreed.

MS DEMETRIOU: Well, I am happy to agree that it represents Facebook's --

THE CHAIRMAN: It's a clear statement of Facebook's position in a form that I, as Chairman, asked them to provide.

MS DEMETRIOU: We are very happy with that, but Mr O'Donoghue is getting carried away and saying that I objected to it and I wanted to say that I never have objected to it.

THE CHAIRMAN: Don't worry. It's fine, it's a non-point.

MR O'DONOGHUE: The key point which remains good is that we have had very, very limited engagement with the central questions and Ms Demetriou's limited engagement essentially collapses into one point, for which my answer remains paragraph 5(d).

If you could give me a minute to check anything I've missed.

THE CHAIRMAN: Yes, of course.

(Pause)

MR O'DONOGHUE: Sir, I think that concludes my reply submissions.

THE CHAIRMAN: Okay.

Discussion

MS DEMETRIOU: May I just deal with the point about the subsidiaries?

THE CHAIRMAN: Yes, of course you can, yes.

MS DEMETRIOU: Thank you. You have seen, and I am not going to take you back to the documents, but including the immediate response of the CMA on 12 June, that consistently the CMA has said you need to evidence your request, and they have referred to the guidance as containing the type of information that the CMA will need to see.

Without taking you back to it, the email of 12 June is an example of that. If you would not mind turning up the guidance, and in particular paragraph 3.44, which is in authorities 6 behind -- you have seen it a number of times now -- page 4359.

THE CHAIRMAN: I have, yes.

MS DEMETRIOU: So 3.44:

"Merging parties requesting derogations on this basis will be required to delineate clearly the parts of the merging party's businesses that respectively do and do not engage in activities related to each other. Derogation requests should therefore include clear descriptions of all relevant businesses, along with their functions and reporting lines."

So we say that that was obviously clearly in the frame, it's pretty fundamental. If Mr O'Donoghue's point is, well, that doesn't mention the word "subsidiary", it's not really a submission that needs to be responded to. It's obvious that a sophisticated undertaking like Facebook would understand what that's getting at.

THE CHAIRMAN: What about the point that Mr O'Donoghue makes about 3.44 generally, saying that actually that's not dealing with this type of situation, it's

dealing with a different situation where someone wants to have some parts of the business integrated on an interim basis?

MS DEMETRIOU: We say -- I have made my points on that, Sir. We say that 3.46, I think it is, of the guidance makes clear that this is not only limited to horizontal issues but also vertical issues. Also, my other point is that we've identified, by way of example only, two possible horizontal concerns, which I've explained, which are horizontal theories of harm which the CMA -- which are in the frame which the CMA is investigating.

So there are two points. First of all, this is not the case -- and you have seen this throughout the correspondence -- in which the CMA has yet been able to conclude that there are no horizontal competitive concerns.

Secondly, even if that were the case, there are vertical theories of harm which are impacted by overlaps in the business. So we don't accept that, and the guidance makes it clear.

THE CHAIRMAN: Okay.

MR O'DONOGHUE: Sir, if I may.

THE CHAIRMAN: Of course you can, yes.

MR O'DONOGHUE: With respect, that's not an answer at all. It's all very well to say it might be horizontal or vertical, but my point remains good, which is it's concerned with integration. That's the point Ms Demetriou has not responded to. We are not seeking integration, we never have.

THE CHAIRMAN: I understand what your point is on 3.44. Your point is that this relates to where parties are seeking integration at this stage.

MR O'DONOGHUE: Yes, and so you can see -- if we can just briefly turn to the guidance, just to make sure you have the reference, it's in tab 78.

THE CHAIRMAN: Yes.

MR O'DONOGHUE: It's 4361. I think I showed you this yesterday; I just want to make sure you have the reference. It's 3.47. It says:

"Where integration is permitted in relation to only part of the merging party's businesses ..."

And so on. We say that is the key. That tells you that this section is dealing with integration. It is not dealing with an acquirer-side-only related derogation.

MR FRAZER: Is there anything in 3.44 which says that or are you saying that 3.46 necessarily implies that in 3.44?

MR O'DONOGHUE: Yes. I mean, I've made the point that the question of interpretation of the guidance is not one where the CMA gets to pull rank. We have put the Holder case in the supplemental authorities bundle. It is a question of law and the Tribunal needs to form its own view on whether the CMA has effectively misinterpreted its own guidance.

So we do make the point that it is not common ground that we are seeking a so-called complex derogation. We say that derogations in 3.44 and following are concerned with integration, which we do not seek.

THE CHAIRMAN: I think that's it for now, thank you very much.

We will try and get a decision out as soon as reasonably practicable, but it won't be this week or next week, I can say that for sure. But beyond that, I can't make any promises. I would hope that you will get it in the month of November, but at the moment it's not clear to me when in November. We are going to have to meet as a panel and work timings out.

MR O'DONOGHUE: Well, Sir, we are extremely grateful for the efficiency with which the Tribunal has conducted this entire proceeding.

THE CHAIRMAN: Thank you very much to the parties. The bundles were really good and very helpful and the hyperlink chronology is really, really helpful when it comes to writing a judgment and considering this; it's so easy to find any documents we want. Thank you very much.

We will adjourn now.

(4.37 pm)

(The hearing concluded)