Neutral Citation Number: [2021] EWCA Civ 701

Appeal Nos. C3/2021/0167 & 0168
Case No: 1366/4/12/20

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
Hodge Malek QC, Tim Frazer and Timothy Sawyer CBE

Royal Courts of Justice
Strand
London WC2A 2LL

Date: 13/05/2021

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
SIR JULIAN FLAUX, CHANCELLOR OF THE HIGH COURT
and
LORD JUSTICE PHILLIPS

BETWEEN:

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

Applicants/Appellants

and

THE COMPETITION AND MARKETS AUTHORITY

Respondent

- -

Mr Robert O'Donoghue QC, Mr Gerard Rothschild and **Mr Tom Pascoe** (instructed by **Latham & Watkins (London) LLP**) appeared on behalf of the **Appellants** ("Facebook").

Ms Marie Demetriou QC, Mr Ben Lask and Ms Emma Mockford (instructed by **The Competition and Markets Authority**) appeared on behalf of the **Respondent** (the "CMA")

Hearing dates: 28 and 29 April 2021

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JUDGMENT

"Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am, Thursday 13th May 2021."

Sir Geoffrey Vos, Master of the Rolls:

Introduction

1. Facebook's main ground of appeal turns on a relatively small point of statutory construction. It contends that the Competition Appeal Tribunal (the "Tribunal") was wrong to construe the definition of "pre-emptive action" in section 72(8) of the Enterprise Act 2002 (the "2002 Act"),[1] as amended by the Enterprise and Regulatory Reform Act 2013 (the "2013 Act"), as extending beyond conduct that might prejudice the CMA's remedial options at the conclusion of a merger investigation or the investigative process itself. There was no basis for including "action that has the potential to affect the competitive structure of the market during the CMA's investigation" within the meaning of pre-emptive action.

2. The definition in section 72(8) provides that "pre-emptive action" means "action which might prejudice the reference concerned or impede the taking of any action under this Part which may be justified by the CMA's decisions on the reference".

3. The CMA submits that pre-emptive action "encompasses both action which may impede or inhibit the CMA's final remedial powers, at the conclusion of the investigation, and action which the merging parties may take in connection with or as a result of the merger that alters the competitive structure of the market during the course of the CMA's investigation, but which may be irremediable at the conclusion of the investigation".

4. This debate is taking place in the context of a merger between Facebook and GIPHY, Inc ("GIPHY"), completed on 15 May 2020, in respect of which the CMA made an Initial Enforcement Order (sometimes referred to as an "IEO") on 9 June 2020. The CMA also appointed a Monitoring Trustee to oversee compliance with the IEO, and a Hold Separate Manager to ensure that the GIPHY business was preserved as a going concern and operated independently from Facebook.

5. Facebook paid some US$400 million for GIPHY, less than 0.5% of Facebook's annual turnover. GIPHY's business involved the production of a database of short soundless videos (GIFs) and stickers, which are GIFs with transparency at the edges. Most GIFs and stickers are accessed without charge through an Application Programming Interface (API) embedded into third party apps, such as WhatsApp, Instagram, TikTok or Snapchat.

6. As the Tribunal explained at [4], the 2002 Act provides for a two-stage review for completed mergers, generally referred to as Phase 1 and Phase 2, although those terms are not used in the 2002 Act. In respect of a completed merger, section 22(1) places the CMA under a duty in Phase 1 to decide whether or not to make a Phase 2 reference. In this case, the CMA decided to make a Phase 2 reference after the decisions that are challenged by Facebook in these proceedings.

7. Facebook itself summarised the main terms of the Initial Enforcement Order made against it and GIPHY broadly as follows:

    i) General obligations on the merging parties not to take action which might prejudice the reference or action taken by the CMA under the 2002 Act, not to

[1] All section numbers and schedule references in this judgment are from the 2002 Act, unless otherwise stated.

integrate the GIPHY and Facebook businesses, not to impair the ability of the two businesses to compete independently, to ensure that the two businesses are carried on separately, to maintain the two businesses as going concerns, not to integrate IT systems or customer lists, and not to exchange sensitive information.

ii) Specific obligations applicable to Facebook's entire business, such as the obligation not to transfer any Facebook subsidiaries, not to make changes to the organisational structure of the businesses, not to make changes to the nature, description, range and quality of goods and/or services supplied in the UK, not to dispose of or encumber assets, not to make any changes to key staff, and to take all reasonable steps to encourage such staff to remain with the respective Facebook and GIPHY businesses.

iii) Facebook and GIPHY must certify their compliance with the IEO fortnightly and must keep the CMA informed of any material developments in the businesses.

8. Facebook also summarised the effect of its Carve-Out Requests of 10 June 2020 (the day following the IEO) as requesting that certain paragraphs of the IEO should:

i) Not apply to Facebook's business including those concerned with transfer of ownership, changes to organisational structure, restriction on dealing with assets, changes to and incentivising key staff; and

ii) Only apply to Facebook's business insofar as it related to the supply or procurement of GIFs, including those concerned with changes to product ranges and with reporting obligations.

9. Facebook complains that the CMA adopted an inappropriate and impractical approach in the correspondence that followed the Carve-Out Requests. Facebook contended that the IEO applied across hundreds of businesses and more than 50,000 employees worldwide. The restrictions "could not be rationally or proportionately justified to preserve an investigation into Facebook's merger with GIPHY which provides only one input into some elements of some of Facebook's services". Most significantly, Facebook argued, and still argues, that "the Carve-Out Requests would still preserve the CMA's remedial options, since the most extreme remedy the CMA could impose … would be a wholesale divestiture of GIPHY, which would be preserved under the surviving provisions of the IEO". Facebook also submits that the CMA misdirected itself in claiming that it was not in a position to determine the Carve-Out Requests until further information was provided about direct and indirect links between GIPHY and each aspect of the Facebook business at an entity-by-entity, department-by-department and workstream-by-workstream level.

10. On 26 August 2020, Facebook applied to the Tribunal for a review of the CMA's refusal to grant the derogations sought in the Carve-Out Requests on three grounds. It argued that the CMA's refusal to grant the Carve-Out Requests (i) was irrational and disregarded the statutory purpose of preventing pre-emptive action, (ii) was disproportionate, and (iii) infringed the requirement of legal certainty. The Tribunal rejected each of these three grounds.

11. Facebook now raises four grounds of appeal against the Tribunal's decision:

i) **Ground 1: Statutory meaning of "pre-emptive action"**: The Tribunal wrongly held that the CMA had power to regulate any activity that had the "potential to affect the competitive structure of the market during the CMA's investigation", when it should have held that the CMA's powers were limited to taking measures to protect its investigation and potential remedies.

ii) **Ground 2: Excessively broad Initial Enforcement Order**: The CMA had no basis for freezing Facebook's business in order to preserve its remedies, because the most radical final remedy lawfully available to the CMA would have been to order a divestiture of GIPHY, which was preserved under Facebook's derogation request. In addition, the CMA's information requests were irrelevant, as they all went to the issue of which parts of Facebook's business should be included under the Initial Enforcement Order.

iii) **Ground 3: Excessively broad specific obligations in the Initial Enforcement Order**: It was neither rational nor proportionate to impose specific obligations, which applied indiscriminately to Facebook's entire global business. Facebook should have been released from these specific obligations, when it was already obliged not to take pre-emptive action and not to integrate with GIPHY.

iv) **Ground 4: Disproportionate information requests by CMA**: The relevant decision of the CMA was not a mere request for further information, but was disproportionate and, in effect, a decision to refuse the derogations sought.

12. The CMA's answer to these grounds of appeal is that the Tribunal was correct for the reasons it gave. More specifically, Ms Marie Demetriou QC, leading counsel for the CMA, submits that the statutory regime envisages a low hurdle as the trigger for an Initial Enforcement Order, because at that stage the CMA can have no information. Thereafter, the CMA did not refuse to grant the Carve-Out Requests, but asked Facebook to provide information so that it could understand whether the requests were appropriate. Instead of cooperating, Facebook "got on its high horse", refused to provide any information and characterised the issue as one of principle. It argued wrongly that it was unlawful for the CMA to ask for the information, on the basis that Facebook's business did not overlap with GIPHY, so that the only remedy available to the CMA would be divestiture. Facebook argued, again wrongly according to the CMA, that a derogation had to be granted before Facebook provided information. The true position is that the CMA has a wide range of remedies under section 41(2) and schedule 8 and needs to preserve the position.

13. Before dealing with the issues raised by Facebook's grounds of appeal, I will set out the most relevant parts of the 2002 Act and summarise the Tribunal's reasoning.

Relevant legislation

14. The CMA's duty to make references in relation to completed mergers is contained in section 22(1), which provides that "[t]he CMA shall … make a reference to its chair … 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 a substantial lessening of competition within any market or markets in the United Kingdom for goods or services".

15. Section 35(1) provides for the questions to be decided in relation to completed mergers as follows: "… the CMA shall, on a reference under section 22, decide the following questions — (a) whether a relevant merger situation has been created; and (b) if so, whether the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services".

16. Section 41(2) provides for the CMA's duty to remedy the effects of completed mergers as follows: "[t]he CMA shall take such action under section … 84 as it considers to be reasonable and practicable— (a) to remedy, mitigate or prevent the substantial lessening of competition concerned; and (b) to remedy, mitigate or prevent any adverse effects which have resulted from, or may be expected to result from, the substantial lessening of competition".

17. Section 72 provides as follows under the heading "Initial enforcement orders: completed or anticipated mergers":

> "(1) Subsection (2) applies where—
>
> (a) the CMA is considering whether to make a reference under section 22 or 33; and
>
> (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.
>
> (2) The CMA may by order, for the purpose of preventing pre-emptive action—
>
> (a) prohibit or restrict the doing of things which the CMA considers would constitute pre-emptive action;
>
> (b) impose on any person concerned obligations as to the carrying on of any activities or the safeguarding of any assets;
>
> (c) provide for the carrying on of any activities or the safeguarding of any assets either by the appointment of a person to conduct or supervise the conduct of any activities (on such terms and with such powers as may be specified or described in the order) or in any other manner;
>
> (d) do anything which may be done by virtue of paragraph 19 of Schedule 8.
>
> (3A) Subsection (3B) applies where—
>
> (a) subsection (1)(a) and (b) applies; and
>
> (b) the CMA also has reasonable grounds for suspecting that pre-emptive action has or may have been taken.
>
> (3B) The CMA may by order, for the purpose of restoring the position to what it would have been had the pre-emptive action not been taken or otherwise for the purpose of mitigating its effects—

(a) do anything mentioned in subsection (2)(b) to (d);

(b) impose such other obligations, prohibitions or restrictions as it considers appropriate for that purpose.

(3C) A person may, with the consent of the CMA, take action or action of a particular description where the action would otherwise constitute a contravention of an order under this section.

(4) An order under this section—

(a) shall come into force at such time as is determined by or under the order; and

(b) may be varied or revoked by another order.

(6) An order under this section shall, if it has not previously ceased to be in force and if it is not adopted under paragraph 2 of Schedule 7, cease to be in force—

(a) where the CMA has decided to make the reference concerned under section 22 or 33

(i) if the CMA accepts an undertaking under section 80 or makes an order under section 81, on the acceptance of the undertaking or the making of the order, and

(ii) otherwise on the final determination of the reference concerned;

(b) where the CMA has decided to accept an undertaking under section 73 instead of making that reference, on the acceptance of that undertaking;

(c) where an intervention notice is in force, at the end of the period of 7 days beginning with the giving of that notice; and

(d) where the CMA has otherwise decided not to make the reference concerned under section 22 or 33, on the making of that decision.

(7) The CMA shall, as soon as reasonably practicable, consider any representations received by it in relation to varying or revoking an order under this section.

(8) In this section "pre-emptive action" means action which might prejudice the reference concerned or impede the taking of any action under this Part which may be justified by the CMA's decisions on the reference".

18. Section 80 in relation to interim undertakings includes in section 80(10) the same definition of pre-emptive action as contained in section 72(8).

19. Section 84(2) in relation to final orders provides that the CMA may make an order containing "(a) anything permitted by Schedule 8; and (b) such supplementary, consequential or incidental provision as the CMA considers appropriate".

20. Schedule 8 deals with the provisions that may be included in enforcement orders. It specifies a wide range of measures including prohibiting agreements, withholding services, price discrimination, the exercise of a right to vote and, notably at paragraph

10(1): an order requiring "a person to supply goods or services or to do anything which the [CMA] considers appropriate to facilitate the provision of goods or services".

The Tribunal's reasoning

21. At [20]-[23], the Tribunal explained the background to the role of interim measures in the UK's merger control. It said that the UK's merger control system was unusual in being voluntary and non-suspensory, allowing merging parties to self-assess whether to complete their merger without first seeking clearance from the CMA. It said that its purpose was "to regulate in advance the impact of mergers on the competitive structure of markets". Interim measures played a vital role in allowing the CMA to ensure that the merger did not impact the pre-merger competitive structure of the market during the investigation.

22. There followed a passage about which Facebook makes specific complaint:

> "Preserving the competitive structure of the market is not just concerned with the ability to restore the position of the acquired and acquiring businesses in the event that the merger transaction is found by the CMA to be anti-competitive. It also includes preventing anti-competitive harm from the merger transaction impacting the position of other undertakings on any affected markets, which may be irremediably detrimental. Such undertakings could include competitors, suppliers or customers of the merging entities."

23. The Tribunal dealt with Facebook's contention that the CMA's refusal to grant the Carve-Out Requests was irrational and disregarded the statutory purpose at [83]-[133].

24. At [119], the Tribunal decided that the CMA's decision that it would not determine the Carve-Out Requests without the further information requested was reviewable. At [120], it said that it would apply the undisputed principles in *BAA Limited v. Competition Commission* [2012] CAT 3 ("*BAA*") to determine "whether the CMA's decision not to determine the Carve-Out Requests without further information was rational", which involved considering whether the CMA's request for further information was reasonable.

25. At [121], the Tribunal explained that the statutory purpose of section 72, as described in the Explanatory Notes to the 2013 Act, was to confer a wide power on the CMA so as to make it easier for it to suspend immediately the integration of merging companies during Phase 1, and then to consider granting derogations. The CMA was right to describe the use of IEOs as precautionary. The use of the standard IEO template, which was not challenged by Facebook, was driven by the need to act quickly and to 'hold the ring' pending the outcome of the CMA's investigation.

26. The Tribunal recorded at [123] that the parties had not disputed the approach to pre-emptive action in *Stericycle International LLC v. Competition Commission* [2006] CAT 21 ("*Stericycle*"), *Intercontinental Exchange Inc v. CMA* [2017] CAT 6 ("*ICE*") and *Electro Rent Corporation v. CMA* [2019] CAT 4 ("*Electro Rent*").

27. The core reasoning criticised by Facebook is in [124] as follows:-

> "In the Tribunal's view, the statutory purpose of s.72 EA02 is wider than the Applicants have contended. The definition of pre-emptive action is not grounded exclusively in the question of remedies. It includes action which might prejudice a Phase 2 reference. As the CMA submitted, this includes action that has the potential to affect the competitive structure of the market during the CMA's investigation. This is supported by the Tribunal's jurisprudence, which is clear that pre-emptive action is a broad concept and includes the possibility of prejudice to the reference or an impediment to justified action: *ICE* at [220]. The use of "might" in the definition implies a relatively low threshold of expectation because the CMA is at a stage of its investigation where it necessarily cannot be sure whether any action being taken or proposed to be taken by the merging parties will ultimately impede any action being taken by the CMA as a result of the Phase 2 reference: *Stericycle* at [129]".

28. The Tribunal then dealt with some important factual questions that have not been specifically appealed. It is important to record these findings in this judgment. At [125], the Tribunal said that it did not accept Facebook's "characterisation of the CMA's correspondence as evidence that the CMA misdirected itself". The context showed that the CMA was acting responsively to the letters from Facebook's solicitors and the assertion that there were no horizontal overlaps between the activities of Facebook and GIPHY. The CMA had explained that the connection between its assessment of any horizontal or vertical overlaps and the provisions of the Initial Enforcement Order related to the CMA's concern to preserve the competitive structure of the market.

29. At [126], the Tribunal concluded that, as the statutory purpose of an Initial Enforcement Order was precautionary, the CMA had a considerable margin of appreciation (*Stericycle* at [130]). To make or maintain an Initial Enforcement Order, the CMA did not have to think that it was likely that there would be prejudice to the Phase 2 reference; a risk or a possibility was enough.

30. The Tribunal accepted the CMA's reasons for thinking that certain features were a cause for concern which it needed to investigate, giving it a rational basis for its cautious approach. These concerns included the possibility that Oculus (Facebook's virtual reality business) might be able to use the API with GIPHY, Facebook's own sticker library, which could be an actual or potential rival to GIPHY, and Messenger and WhatsApp having an API with Tenor (a third party GIF provider), which was a rival to GIPHY.

31. At [128], the Tribunal held that the CMA had a wide margin of appreciation to decide what information it needed (*BAA* at [20(3)]). Merging entities seeking derogations were expected to engage with the CMA. In this case there had been a "lack of real and constructive engagement … by Facebook", which was not a constructive approach. Conversely, the CMA had been actively seeking further information from Facebook so that it could deal with the Carve-Out Requests properly. An element of give and take was necessary to work out the precise terms of the derogations.

32. The Tribunal determined at [131] that it was not desirable to grant a derogation to a specific Initial Enforcement Order provision on the basis that there was a broader provision that caught all pre-emptive action. It was not an answer to the CMA's concerns (for which it had reason) to say that there were broader, fall back provisions within the IEO that could give the CMA comfort against the risk of pre-emptive action.

That was particularly so where Facebook's compliance statements excluded matters which were the subject of its Carve-Out Requests, so that the CMA did not know what was excluded or what Facebook was "doing in those areas which might fall within the IEO".

33. The Tribunal concluded at [133] that the CMA's decision that it would not determine the Carve-Out Requests without further information was rational, so that Facebook's first ground (see [11] above) failed.

34. At [148]-[161], the Tribunal dealt with Facebook's second ground that the CMA's refusal to grant its Carve-Out Requests was disproportionate.

35. The Tribunal started at [148] by applying *BAA* at [20(5)-(7)] to the standard of review. The CMA's decision that it would not determine the Carve-Out Requests without sufficient further information was reviewable, and the standard of that review was "essentially equivalent to that given by the ordinary domestic standard of rationality, which is flexible and can be adjusted to take into account proportionality".

36. The Tribunal thought that Facebook's contentions that the IEO imposed a disproportionate burden (i) because of Facebook's "international nature, size and scale", making it "commercially impracticable to comply", and (ii) in order just to preserve the divestiture of GIPHY as a remedial option, were both directed to the breadth of the template IEO rather than the reasonableness of the CMA's request for further information. At [154], the Tribunal said, relying on *BAA* at [20(3)] that the CMA had a wide margin of appreciation to decide what information it needed. Unless the information requested by the CMA was "so manifestly without reasonable foundation, it [was] not for [the] Tribunal to second guess what information [was] sufficient for the CMA to assess and determine the Carve-Out Requests". It thought the information sought in the Schedule of Outstanding Information appeared rational, and therefore, not disproportionate, so that Facebook's second ground was rejected.

37. The Tribunal then made some further important findings on the facts at [156]-[161], none of which is appealed. It noted Facebook's "most unsatisfactory" lack of engagement with the CMA, and said that it was also unsatisfactory for Facebook to have decided "effectively to proceed on the basis of it having already been granted the Carve-Out Requests". Even if Facebook could not provide everything, it should have "made efforts to comply with the information requests so far as it was possible". Facebook had undesirably chosen to take "what might be regarded as a high-risk strategy" not to comply with outstanding IEO requirements and not to inform the CMA of the actions it was taking or the changes it was making to its business that might fall within the scope of the IEO. The Tribunal gave its failure to provide a list of its subsidiaries as an example.

38. Finally at [161] the Tribunal said this in a passage on which Facebook relies, which is worth reciting in full:

> "In the light of the submissions and evidence filed in these proceedings, Facebook would appear to have good grounds for submitting that the IEO is unnecessarily wide and burdensome. This is a position which the CMA might ultimately find to be correct once the information it has requested has been provided and analysed. That said, the approach Facebook followed has

not enabled the CMA to decide what derogations sought by the Carve-Out Requests are appropriate. Whilst the Tribunal has determined that the approach of Facebook was not the correct one in the circumstances, the Tribunal appreciates the practical difficulties that Facebook encountered in needing to file its initial compliance statement before the issue of its Carve-Out Requests could be resolved".

39. The Tribunal rejected Facebook's legal certainty ground 3 on the basis that the Initial Enforcement Order was clear in itself, and where there was uncertainty as to the precise scope of the boundaries to the restrictions it was open to Facebook to seek clarification from the CMA. It did not accept any criticism of the drafting which largely followed the standard template.

The broad picture advanced by Facebook

40. In oral argument, Mr Robert O'Donoghue QC, leading counsel for Facebook, bolstered his points about the CMA's unworkable approach to merger control with two additional arguments. First, he submitted that the CMA's argument blurred the clear distinction between Parts 3 and 4 of the 2002 Act. Part 4 concerns Market Investigation References, and any measures directed at anti-competitive conduct beyond divestiture should be reserved for actions taken under that part. If the Tribunal were right about the extent of the CMA's ability to control the competitive structure of the market under Part 3, it would "vastly exceed or be equivalent to the separate powers in Part 4 of the same legislation". Secondly, Mr O'Donoghue submitted that such wide powers of merger control would ignore the CMA's overriding duty in section 25(3) of the 2013 Act to "seek to promote competition, both within and without the United Kingdom, for the benefit of consumers". Whilst the CMA was obviously entitled to require GIPHY to be held separate, a much broader requirement to freeze all Facebook's meaningful business activities globally would not lead to the promotion of competition.

41. On these two points, Mr O'Donoghue relied strongly on the recent decision of the European Court of Justice ("CJEU") in *Ernst & Young P/S v. Konkurrenceradet* (Case C-633/16) ("*E&Y*"), where the CJEU considered the proper interpretation of article 7(1) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the "EC Merger Regulation"). Article 7 provides that: "[a] concentration with a Community dimension as defined in Article 1 … shall not be implemented either before its notification or until it has been declared compatible with the common market …". In *E&Y*, Ernst & Young had acquired control of KPMG Denmark, which was not structurally within KPMG International, but was bound to it by the terms of a cooperation agreement. Under the merger agreement, KPMG Denmark was to withdraw from KPMG International. The Danish Competition Council based its decision on its assessment that the termination of the cooperation agreement was merger-specific, irreversible and likely to have market effects in the period between the notice of termination itself and the approval of the merger. Although the merger was approved by the Competition Council, it considered that the termination of the cooperation agreement was a breach of the prohibition on the implementation of the merger. The questions for the CJEU asked whether that termination fell within the jurisdiction of interim measures in the context of merger control. At [43], the CJEU said that article 7(1) prohibited the implementation of a concentration, but limited that prohibition only to concentrations as defined, which excluded prohibition of any transaction which could not be regarded as contributing to the implementation of a

concentration. At [49]-[50], the CJEU made clear that such a termination did not fall within the scope of article 7(1), even if it was carried out in the context of the merger, if it was not necessary to achieve the merger. The fact that such a transaction might produce market effects was "in itself insufficient to justify a different interpretation of Article 7". Mr O'Donoghue concludes from *E&Y* that "the jurisdiction for interim measures is linked directly to the putting into effect of the acquisition of the target and integration and does not extend, as a matter of jurisdiction, to other agreements which are indirectly linked with the merger or preparatory or otherwise ancillary". Such an interpretation was, as the CJEU said at [53]-[55], consonant with the regulatory regime of the EC Merger Regulation. Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU") could be utilised to ensure that competition was not distorted.

42. Accordingly, Facebook submitted that the reference in [124] of the Tribunal's judgment to the "competitive structure of the market" came out of nowhere and raised the fundamental legal question of whether, considering the competition legislation as a whole, it was legitimate for the CMA, by the happenstance of reviewing this merger, to acquire "a global power to freeze all markets everywhere in the world" subject to a "slow and bureaucratic derogation procedure".

General introduction to the issues

43. Facebook's submissions are based, in my judgment, on a number of misapprehensions. These may be summarised briefly.

44. First, the CMA's ultimate statutory powers are not limited to requiring divestiture of the acquired corporation. Section 41(2) and schedule 8 have a broad scope. Section 41 allows the CMA to take such action as it considers reasonable and practicable to remedy, mitigate or prevent the substantial lessening of competition it has found and any adverse effects which have resulted from it. To take a simple example from the facts of this case, if Facebook decided to abandon completely its sticker library as a result of its acquisition of GIPHY, the CMA could, in theory, order it to reverse its decision. Nothing in *E&Y* demands the alignment of the powers available under the 2002 Act with those under the EC Merger Regulation.

45. Secondly, the central problem in this case was entirely of Facebook's own making. As the Tribunal found, Facebook did not properly engage with the CMA. It put in its Carve-Out Requests and then sat on its hands, refusing to answer the CMA's questions. That is what the Tribunal decided at [128] and [156]-[161], none of which has been appealed. Facebook sought to make points on the correspondence since the Tribunal decided its application, but this court is only concerned with the correctness of the Tribunal's decision.

46. Thirdly, a significant consequence of the UK merger regime being prospective is that the CMA is required to act quickly in appropriate cases. That is why it has developed a broad template for Initial Enforcement Orders, the use of which Facebook has not specifically challenged. The process provided for in section 72, as the Tribunal held and the CMA's *Interim Measures in Merger Investigations*[2] (the "Interim Guidance") envisages, is intended to hold the ring whilst the CMA obtains the information that it

[2] 28 June 2019: CMA 108.

inevitably lacks. This process breaks down if those against whom Initial Enforcement Orders are made refuse to cooperate as happened in this case.

47. With that introduction, I turn to deal with the 4 specific issues raised by Facebook's grounds of appeal.

Issue 1: Was the Tribunal wrong to hold that the CMA had power to regulate any activity that had the potential to affect the competitive structure of the market during the CMA's investigation?

48. I have already set out at [1]-[3] the competing constructions of "pre-emptive action" in sections 72(2) and 72(8). Ultimately, in my judgment, the flaw in Facebook's argument is that it is founded on the proposition that the CMA has no power to make orders affecting the acquirer's business, beyond ordering divestiture of the target corporation. That is too narrow a view of the legislation.

49. In Phase 1 of any investigation, the CMA has to ascertain under section 22(1) whether it "believes that it is or may be the case" that the "relevant merger situation" "has resulted, or may be expected to result, in a substantial lessening of competition within any market" in the UK. First, this is a low threshold. Secondly, it demonstrates that the CMA is looking beyond the merger itself to see whether it results in substantial lessening of competition within any market.

50. Section 72 reinforces the points already made in relation to Initial Enforcement Orders. The threshold for such an order is also very low, because section 72(1) is engaged where the CMA is "considering whether to make a reference under section 22", and it has reasonable grounds for suspecting that "it is or may be the case that two or more enterprises have ceased to be distinct …". The orders that the CMA may make are defined in section 72(2) as being "for the purpose of preventing pre-emptive action". For that purpose, the CMA may prohibit "things which the CMA considers would constitute pre-emptive action", and "impose on any person concerned obligations as to the carrying on of any activities or the safeguarding of any assets". Thus, before one even looks at the definition of pre-emptive action in section 72(8), the CMA has very wide powers to prohibit what it considers would constitute such action, and impose obligations as to the carrying on of any activities or the safeguarding of any assets.

51. Section 72(8) then defines the "pre-emptive action" in question as "action which might prejudice the reference concerned or impede the taking of any action under this Part which may be justified by the CMA's decisions on the reference".

52. In [124] the Tribunal focused on the first limb of the definition, namely "action which might prejudice the reference concerned" in order to rebut Facebook's argument that the definition was only about action that might impede the remedy of divestiture. It reasoned that this first limb **included** "action that has the potential to affect the competitive structure of the market during the CMA's investigation", referring to *ICE* at [220] where it was indeed made clear that pre-emptive action is a broad concept and includes the possibility of prejudice to the reference or an impediment to justified

action.[3] In [124], the Tribunal then highlighted the use of the word "might" in the definition as implying a relatively low threshold of expectation because the CMA is at a stage of its investigation where it cannot be sure about the effects of actions by the merging parties.

53. In my judgment, Facebook is mistaken in seeking to construe [124] as a deed, and in taking one sentence from it out of its context. The sentence in question actually said that "as the CMA submitted, this [being "action which might prejudice the reference concerned"] includes action that has the potential to affect the competitive structure of the market during the CMA's investigation". Facebook submits that the words it complains of remove the action concerned from the context of the merger itself, since they refer generally to action that has the potential to affect the competitive structure of the market. It is clear, however, that the Tribunal was talking about action which the merging parties might take in connection with or as a result of the merger that alters the competitive structure of the market during the course of the CMA's investigation.

54. Moreover, Facebook is wrong to submit that the Tribunal plucked the formulation of "the competitive structure of the market" out of the air. Paragraphs 3.34 and 3.35 of the CMA's publication on *Merger Remedies*[4] both use a similar phrase to explain that the structural remedies employed by the CMA "seek to restore or maintain the competitive structure of the market". Paragraph 1.6 of the Interim Guidance explains that "the purpose of merger control is to regulate in advance the impact of mergers on the competitive structure of markets", and says, in relation to interim measures, that "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".[5]

55. Accordingly, bearing in mind the breadth of the definition in section 72(8), I reject Facebook's criticism of the Tribunal's approach to the meaning of "pre-emptive action". It is undesirable to attempt any comprehensive definition of what is and what is not pre-emptive action, and the Tribunal was not attempting in this case to do so. Section 72 allows the CMA to issue Initial Enforcement Orders to prevent all kinds of pre-emptive action. Importantly, the CMA's statutory power is to prohibit "things which [it] considers would constitute pre-emptive action", giving it a wide margin of appreciation. At the risk of repetition, the CMA may then "impose on any person concerned obligations as to the carrying on of any activities or the safeguarding of any assets". That formulation in section 72(2) is undoubtedly broad enough to encompass the terms of the template Initial Enforcement Order imposed in this case, as was acknowledged by Facebook's failure to challenge its legality.

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3 The Tribunal actually said this in *ICE* at [220]: "Nevertheless, we think it appropriate to observe that 'pre-emptive action' is a broad concept. It concerns conduct which might prejudice the reference or which might impede action justified by the CMA's ultimate decision. The IEO in these proceedings is phrased in similarly broad language and should be interpreted to give full effect to its legitimate precautionary purpose".

4 13 December 2018, CMA 87.

5 See also [4] of Lord Sumption's judgment in *Société Coopérative de Production SeaFrance SA v CMA* [2015] UKSC 75, where he said that "[t]he purpose of merger control is to regulate in advance the impact of concentrations on the competitive structure of markets".

56. I would, therefore, dismiss Facebook's first ground of appeal, and hold that the Tribunal was right to say (as it effectively did) that the CMA had power to regulate any activity which the merging parties might take in connection with or as a result of the merger that had the potential to affect the competitive structure of the market during the CMA's investigation.

Issue 2: Was the Tribunal right to reject Facebook's complaint that the CMA had no basis for freezing Facebook's business, because the most radical final remedy lawfully available was the divestiture of GIPHY?

57. The Tribunal dealt with this argument somewhat obliquely at [109], [137] and [151], having already held that the CMA had power to do more than simply order divestiture. Facebook submits that the Initial Enforcement Order was excessively broad, because it applied to other parts of Facebook's business. The questions which the CMA asked Facebook to answer before it would grant significant derogations were, it submits, irrelevant or unlawful because they related to Facebook's entire business.

58. The simple answer to this ground is the one I have already given, namely that the CMA's statutory powers are not limited to requiring divestiture of the target. Section 41(2) allows the CMA to take such action as it considers reasonable and practicable to remedy, mitigate or prevent the substantial lessening of competition it has found and any adverse effects which have resulted from it. Schedule 8 allows the CMA to take a range of actions many of which can affect the acquirer's business beyond the specific steps taken to integrate the target, including, for example, requiring the acquirer to supply services or do anything which the [CMA] considers appropriate to facilitate the provision of services.

59. Moreover, *E&Y* does not assist Facebook. *E&Y* was not concerned with post-completion merger control legislation, such as that contained in Part 3 of the 2002 Act. Contrary to Facebook's submission, restricting the CMA to requiring divestiture under Part 3 would fly in the face of the clear wording of the sections I have set out above, and would stultify the CMA's power to control completed mergers. The regime envisaged by the legislation requires the CMA to act fast to hold the ring at the outset without any real information. It has eventually to determine in Phase 1 whether it believes that it may be the case that there has been or may be a substantial lessening of competition as a result of the merger. The acquirer may quickly take steps to consolidate its investment by removing the parts of its own business that compete with the target. If the CMA were prevented from making orders that impinged on the acquirer's existing business, divestiture at the end of a relatively lengthy process would, by itself, be incapable of either restoring the status quo at the time of the merger or protecting competition in the relevant market. This is the point that the Tribunal explained at [21]. I agree with what the Tribunal said, as follows:-

> "… interim measures play a vital role in allowing the CMA to ensure that, other than certain steps taken in the ordinary course of business, a merger and the actions of merging parties do not impact the pre-merger competitive structure of the market during the period of the CMA's investigation. Preserving the competitive structure of the market is not just concerned with the ability to restore the position of the acquired and acquiring businesses in

the event that the merger transaction is found by the CMA to be anti-competitive. It also includes preventing anti-competitive harm from the merger transaction impacting the position of other undertakings on any affected markets, which may be irremediably detrimental. Such undertakings could include competitors, suppliers or customers of the merging entities".

60. Accordingly, in my judgment, the Tribunal was right to reject Facebook's complaint that the CMA had no basis for making an Initial Enforcement Order that affected Facebook's own business. There was, for the same reasons, nothing inappropriate, irrelevant or unlawful about the CMA asking questions that related to Facebook's business beyond GIPHY. I would dismiss Facebook's second ground of appeal.

Issue 3: Was the CMA right to refuse to release Facebook from the specific obligation in paragraph 5 of the IEO when it remained bound by the general obligations not to integrate with GIPHY?

61. Under this issue, Facebook submits that it was neither rational nor proportionate to impose specific obligations in paragraph 5 of the Initial Enforcement Order, which applied indiscriminately to Facebook's entire global business, in addition to the general obligations in paragraph 4 by which it was bound. Facebook submits that it should have been released from these specific obligations, because it was already obliged not to take pre-emptive action and not to integrate with GIPHY.

62. The Tribunal rejected this argument at [131]. It found that the CMA had good reasons for its concerns. It accepted Mr Romney's evidence that the provisions in the CMA's template Initial Enforcement Order were designed specifically to "target those actions that may be taken by merging parties and which, in the CMA's substantial experience, are inherently most likely to give rise to concerns about pre-emptive action". The general provisions were not sufficient to give the CMA comfort against the risk of pre-emptive action. That was particularly so when Facebook had provided no substantive information in response to the CMA's requests for information. The CMA did not know what Facebook was "doing in those areas which might fall within the IEO".

63. In my judgment, there is no need for this court to trawl through the detailed terms of the Initial Enforcement Order, which is not itself challenged. Facebook's argument fails because it is based on two misapprehensions. First, it ignores the fact that the Tribunal found that Facebook had failed to engage with the CMA. Had it provided the information requested, the Tribunal found that the CMA would have dealt with its Carve-Out Requests properly. It was entirely the author of its own misfortune. Secondly, Facebook misunderstands the statutory regime, under which the CMA has no information at the outset, and needs to impose broad measures to prevent pre-emptive actions in the way I have described. Thereafter the CMA considers derogations from the broad template Initial Enforcement Order it makes, after considering representations from the merging parties as soon as reasonably practicable, as contemplated by sections 72(3C) and 72(7). It can only properly consider such representations if the merging parties cooperate with the CMA by answering its reasonable questions. Facebook failed to do so in this case as the Tribunal found.

64. I would, therefore, dismiss Facebook's third ground of appeal. The CMA was right to refuse to release Facebook from the specific obligations in its Initial Enforcement Order until it had cooperated by answering the CMA's reasonable questions. For the reasons

given already, the CMA rightly had competition concerns that went beyond the simple question of whether Facebook was integrating its business with GIPHY.

Issue 4: Was the Tribunal right to hold that the CMA's information requests were not irrational, and should it have considered instead whether they were disproportionate (and decided they were)?

65. The first question raised under this issue is whether the Tribunal was right to ask itself whether the CMA's information requests were irrational rather than disproportionate. Facebook argues for a more intense standard of scrutiny, and contends that the Tribunal failed to engage with its submission that the CMA's requests for information were disproportionate. The CMA submits in answer that the Tribunal dealt fully with this submission applying at [148]-[155] of its judgment the principles enunciated by the CAT at [20(3), 20(5)-(7)] of *BAA*.

66. The Tribunal set out the standard of review that it was applying to Facebook's application at [17]-[19] citing lengthy passages from the Tribunal's decision in *BAA* (which was approved by the Tribunal in *Ecolab Inc. v. CMA* [2020] CAT 12 ("*Ecolab*") at [58]). The Tribunal said that *BAA* was a judicial review under section 179 of the 2002 Act of the CMA's decision in a market investigation but that the approach was the same here. At [20(3)] in *BAA*, the Tribunal said that it accepted that "the standard to be applied in judging the steps taken by the [CMA] in carrying forward its investigations to put itself into a position properly to decide the statutory questions is a rationality test". At [20(5)] in *BAA*, the Tribunal said that "[w]here social and economic judgments regarding "the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken" are called for, a wide margin of appreciation will apply". Subject to any significant countervailing factors, which were not a feature of *BAA*, "the standard of review to be applied will be to ask whether the judgment in question is "manifestly without reasonable foundation": *James v United Kingdom* (1986) 8 EHRR 123, para. 46 (see also para. 51)". The Tribunal concluded as follows at [20(5)] in *BAA*:-

> "Where, as here, a divestment order is made so as to further the public interest in securing effective competition in a relevant market, a judgment turning on the evaluative assessments by an expert body of the character of the [CMA] whether a relevant [adverse effect on competition ("AEC")] exists and regarding the measures required to provide an effective remedy, it is the "manifestly without reasonable foundation" standard which applies. One may compare, in this regard, the similar standard of review of assessments of expert bodies in proportionality analysis under EU law, where a court will only check to see that an act taken by such a body "is not vitiated by a manifest error or a misuse of powers and that it did not clearly exceed the bounds of its discretion": Case C-120/97 *Upjohn Ltd v Licensing Authority* [1999] ECR I-223; [1999] 1 WLR 927, paras. 33-37. Accordingly, in the present context, the standard of review appropriate under [A1P1] and section 6(1) of the [Human Rights Act 1998] is essentially equivalent to that given by the ordinary domestic standard of rationality".

67. Accordingly, the Tribunal in *BAA* was saying that, in a situation like this, the standard of review for the CMA's actions was "manifestly without reasonable foundation", which was itself equivalent to the domestic standard of rationality. As I have said, at

[154], the Tribunal held in this case that the CMA had a wide margin of appreciation to decide what information it needed. Unless the information requested by the CMA was so manifestly without reasonable foundation, it was not for the Tribunal to second guess what information was sufficient for the CMA to determine Facebook's Carve-Out Requests. It decided that the information that the CMA had sought from Facebook was rational, and therefore, not disproportionate.

68. Facebook sought to distinguish *BAA* in its oral submissions, but in my judgment made little headway. I find the approach explained by Sales J (as he then was), William Allan and Joanne Stuart in *BAA* persuasive and applicable to the CMA's actions in dealing with Facebook's Carve-Out Requests. Facebook did not seriously suggest that the CMA's requests for information were irrational. In my judgment, the Tribunal was right to hold that it was not for it to second guess what information was sufficient for the CMA to determine Facebook's Carve-Out Requests. This court is in the same position. The Tribunal applied the correct legal principles to the CMA's handling of Facebook's Carve-Out Requests. The Tribunal made no legal error, as Facebook suggested, in characterising the decision of the CMA as a decision to request further information.

69. I would dismiss Facebook's fourth ground of appeal. The Tribunal was right to hold that the test was rationality and to find that the CMA's information requests were not irrational.

Conclusion

70. I would dismiss Facebook's appeal and uphold the Tribunal's judgment for the reasons given in this judgment and in its own judgment.

Sir Julian Flaux, Chancellor of the High Court:

71. I agree.

Lord Justice Phillips:

72. I also agree.