



JUDICIARY OF
ENGLAND AND WALES

13 May 2021

FACEBOOK, INC and FACEBOOK UK LIMITED
v.
THE COMPETITION AND MARKETS AUTHORITY

JUDGMENT SUMMARY

Important note for press and public: this summary forms no part of the court’s decision. It is provided so as to assist the press and the public to understand what the court decided.

1. In this case, the Court of Appeal (Sir Geoffrey Vos, Master of the Rolls, Sir Julian Flaux, Chancellor of the High Court and Lord Justice Phillips) dismissed Facebook’s appeal against the decision of the Competition Appeal Tribunal (Hodge Malek QC, Tim Frazer and Timothy Sawyer CBE).
2. Facebook completed a merger with GIPHY, Inc on 15 May 2020. On 9 June 2020, the Competition and Markets Authority made an Initial Enforcement Order against Facebook and GIPHY, for the purpose of preventing “pre-emptive action”. The Competition and Markets Authority also appointed a Hold Separate Manager to ensure that GIPHY’s business was preserved as a going concern and operated independently from Facebook, pending its review.

3. 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 embedded into third party apps, such as WhatsApp, Instagram, TikTok or Snapchat.
4. The Enterprise Act 2002 provides for the Competition and Markets Authority to conduct a two-stage review of completed mergers. In Phase 1, it decides whether or not to make a Phase 2 reference. In Phase 2, it decides whether "a relevant merger situation has been created" and, if so, whether that has resulted, or may result, in a substantial lessening of competition within any UK market. If it has, the Competition and Markets Authority can take action to remedy the substantial lessening of competition or to prevent any adverse effects of it.
5. On 26 August 2020, Facebook applied to the Competition Appeal Tribunal for a judicial review of the Competition and Markets Authority's refusal to grant the derogations it had sought from the Initial Enforcement Order. Facebook said that the Competition and Markets Authority's refusal to grant its, so-called, Carve-Out Requests was irrational and disproportionate. The Tribunal refused Facebook any relief.
6. Facebook appealed to the Court of Appeal on the main ground that the Initial Enforcement Order had the effect of freezing hundreds of Facebook's businesses and more than 50,000 employees worldwide. Facebook contended that 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". Facebook said 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 Initial Enforcement Order". Facebook also argued that the Competition and Markets Authority had wrongly demanded information about direct and indirect links between GIPHY and each aspect of the Facebook business before dealing with the Carve-Out Requests.

7. The Master of the Rolls decided that Facebook's case was based on three misapprehensions. First, the powers of the Competition and Markets Authority were not limited to requiring divestiture of GIPHY. The Enterprise Act 2002 allowed the Competition and Markets Authority to take action to remedy, mitigate or prevent adverse effects from any substantial lessening of competition it has found. For example, if Facebook decided to abandon completely its own sticker library as a result of its acquisition of GIPHY, the CMA could, in theory, order it to reverse its decision. Secondly, the problem had been entirely of Facebook's own making. Facebook had not properly engaged with the Competition and Markets Authority. It had made Carve-Out Requests and then sat on its hands, refusing to answer the Competition and Markets Authority's questions. Thirdly, a consequence of the UK merger regime being prospective is that the Competition and Markets Authority 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 was intended to hold the ring whilst the Competition

and Markets Authority obtained the information that it inevitably lacks. That process broke down if those against whom Initial Enforcement Orders were made refused to cooperate as happened in this case.

8. Accordingly, the Court of Appeal unanimously dismissed Facebook's appeal.