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If the UK CMA Were An Emoji: Merger Clearance Lessons from Meta/Giphy

Stephen Dnes, Joe Day (Northeastern University) · Tuesday, January 10th, 2023

When, why, and on what evidence can a competition regulator in one jurisdiction push for divestments in global deals? An increasingly active UK Competition and Markets Authority ("CMA") has been making its presence known, not least in technology mergers. This blog post will review core questions from *Meta/Giphy* relevant to advising on UK merger clearance risk in future deals: (i) jurisdictional questions; (ii) counterfactual analysis; and (iii) the dominance of procedural over substantive arguments. The piece concludes that, for all the hubbub, the same basic advice for merger clearance applies; not least, the importance of proving factual points before specialist regulators, rather than seeking to prevail upon judicial review. In this, the case may be more evolutionary than revolutionary.

Jurisdictional questions

Many competition lawyers will be only too familiar with the broad UK merger control jurisdiction tests: £70 million target turnover, or 25% market share with an increment, but sitting behind a permissive 1992 precedent in providing that any rationally arguable "*supply*" definition would suffice in the interpretation of that 25% share and the increment associated with it. This is emphatically not the same thing as proving a relevant market and it is accorded substantial judicial deference. It will not surprise, in this context, that jurisdiction was found. The essential question for advisors is the basis on which this was done, especially at a time when the thresholds may become more inclusive following impending reforms.

In *Meta/Giphy*, the CMA has pushed forward a broad conception of the jurisdictional test. Both Meta and Giphy ardently argued that the CMA had no jurisdiction over the case as both entities wholly operate outside of the UK. While Facebook clearly has UK activities, it was less clear that there was a strong UK nexus for Giphy, not least as Giphy had no UK revenue. Against a backdrop of US merger clearance, comity issues arose as to whether the UK was quite the right forum for review. Here, there is an important lesson from other recent CMA deals. Drawing on *Sabre Corporation v CMA* – another US-approved deal called in for UK scrutiny — the CMA argued, based on its Tribunal victory there, that it has jurisdiction in merger approval if goods and services are supplied in the United Kingdom or in a substantial part in a broad and inclusive sense. However, *Giphy* appears to extend the analysis. In *Sabre,* the entities supplied 30-40% of the services to British Airways, which provided a tolerably clear "*effects*" basis for jurisdiction,

including in comity terms.

How did this principle play out in *Giphy*? Yes, there are Facebook users in the UK – but a conventional reading of jurisdiction requires consolidation in a jurisdiction before jurisdiction is properly asserted. For all that some jurisdictions may disregard this principle, the UK had tried not to be among their number. So, where was the *Giphy* overlap, exactly? Here the most controversial evidence was put forward: to satisfy the share of supply test, horizontal consolidation was found on the basis that the supply of API-based GIFs would amount to horizontal consolidation since Facebook also uses them. Another view is that vertical relationships, such as API inputs, cannot themselves fulfil the share of supply test, in accord with the CMA's jurisdictional guidelines and the Tribunal position in *Sabre* (see especially paragraph 156, expressly excluding wholly vertical relationships from the jurisdictional test). Nonetheless, the supply of an input to a related market which could be construed to have horizontal elements (i.e., supply to other messaging services) was found to provide the requisite consolidation for jurisdiction.

This has significant implications for suppliers of what might be thought to be input markets, such as API supply, and will hem in the argument that vertical supply cannot itself give rise to share of supply, despite the contrasting statement in *Sabre Corporation v CMA*. The interpretation prefigures possible changes in the forthcoming Competition Bill to require mandatory pre-notification from certain large "strategic" players, who may come to have to notify all deals depending on the final form the new law takes.

Counterfactual analysis

The counterfactual used in the case also repays close study. There is an elegant statement on this in the US Horizontal Merger Guidelines: "*certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal*". That is, the competition bar must always get its crystal ball out to advise, and it must also second guess what is in the agency's crystal ball. The critical question here is always *exactly how* predictive the evidence must be.

The CMA argued that absent the merger Giphy would have remained a strong and growing competitor to Meta in advertising by using its GIF-based advertising technology. Advertisers might well raise their eyebrows at that statement: could it really be that return on advertising investment, and competition for it, relies on having access to GIFs? Prior CMA case law found relatively broad markets several layers up, e.g., advertising on a particular medium. However, against this, it could be said that Facebook and Google command large market shares, and relatively large margins on advertising, as noted in the CMA's 2019-20 Online Platforms and Digital Advertising market study, such that lost competition with them would raise particular concerns. Even so, an issue remains: it is not clear that *close* rivalry would be demonstrably lost, just because someone owns a pre-eminent supplier of GIFs. That would require further market evidence. Thus, where large companies are involved, the strictures of proving unilateral effects before blocking a deal appear to have been relaxed.

Core issues to consider here include:

- **Giphy's status as a relatively weak competitor.** Giphy was a relative newcomer to advertising online and was best thought of as "*waiting in the wings*". It might have become a strong and close rival for online advertising, but this would be a future scenario. There was limited evidence

that, as of today, strong competition arose from Giphy in the sense of lost bids, impacts on pricing and output, and other competitive constraints. The case seems distinctly precautionary as regards future competition, and that is a change from past practice. It is also important to note the counterargument, which is that evidence of constraint with particularly large platforms is particularly difficult to show, the gap with entrants being that much larger.

- **Volumetric analysis of competitive effects.** These are conspicuous by their absence because Giphy's competition was considered to be dynamic. So, instead of looking at the closeness of competition between Facebook and Giphy, it was simply noted that Giphy was growing and that it *might* come to be a closely constraining alternative. This is puzzling because the market size of UK advertising had grown substantially during the pandemic. From 2019 until 2021 the UK population spent 11% more time on the internet, social media and other forms of digital content, according to the communications regulator Ofcom's 2021 Online Nation report. With more screen time available to advertisers, concerns about scarcity seem less likely. While it is *possible* that all that extra time would flow through large platform websites, it is also a potential foothold for expansion by smaller rivals. This is especially so as an investment in alternatives is likely to be fostered by greater demand, particularly if profit margins are high, as would be essential to a robust theory of harm here. Thus, if there were concerns about "*possible*" future events, they should logically extend to market growth and the opportunities for new and innovative apps that might arise. The lurking hypothesis – that growth had not yet come to pass simply because of a lack of consumer demand, suggesting a lack of closeness in rivalry – did not receive clear analysis.
- **Relaxation of closeness of competition analysis.** The assumption seems to be that the future growth *would be* close competition, but without any quantitative basis for this analysis in existing bidding data. The analysis is essentially not disprovable. Even if the Tribunal was at pains to make it go through certain specific evidence gateways at paras. 100-110, the list of analysed factors speaks only to (i) potential competition; (ii) timeframes in which it will take place; (iii) an empty statement to "*keep well in mind the particular positions of each merging party*" (para 106); (iv) to consider dynamism and (v) to consider that some investments will be "*duds*". Remarkably, this omits any analysis of working out whether the future competition will be close, a major relaxation from existing analysis of static unilateral effects.
- **Risks of inadvertently pushing vertical disintegration.** The classic argument in favour of large platforms is that they enable the scaling up of innovations. From this perspective, incorporating GIFs into Facebook simply brings them to more users. If there is a competition problem, e.g., in an input market used by a rival platform, that might undermine the logic, but that would need to be tested on evidence. Otherwise, there is a risk that the benefits of scale are denied, even where competition is strong. It is unclear how the decision distinguishes good, and bad, scale. As in the title of the recent book, sometimes *Big is Beautiful* just as much as it can be bad.

Procedure vs substance

It is rare for merger cases to reach the courts. Often, the commercial wheels fall off far earlier. So, the conventional advice is that the most important aim is to win the case in the agency review. In this sense, the UK system differs from the US system and its requirement for agencies to prove the case against mergers in court. It is English due process principles that the US system thereby applies, derived from Magna Carta. Yet it is the English who have since weakened these earlier due process principles, which have instead been more fully retained in the USA. Those in America caught by UK merger control procedures having earlier received US clearance – *Meta, Sabre* – will

spot the irony. Just as Magna Carta is given pride of place next to the US Constitution in the US National Archives, due process is that bit more strongly protected in US federal court procedures, even though it was the UK where the due process principle arose.

Why, exactly, is it considered unreasonable in the UK to require the agency to prove itself in court on evidence? It is striking not to do so in this historical context. Presumably, if evidence is strong, the case would be provable. There are also significant benefits to clarity from courts stating evidence standards, rather than deferring to sometimes opaque agency weighing. This is especially so where, as in *Giphy*, agency guidelines appeared to have been changed so as to provide greater scope for action against particular parties. An unkind observer might liken such an exercise to a bill of attainder: a reform aimed at particular parties.

Even in the context of such elevated due process concerns, the English judiciary appears firmly committed to the social-democratic model of judicial review, developed in the early twentieth century, that distrusts court review of the merits of evidence on the (usually unstated) assumption that experts should be empowered to pursue the "*public good*" (as defined by them). From this perspective, the guiding principle is not "*did the court credit the evidence?*" but instead the much more deferential question: "*was the agency within its empowerment?*" Thus, provided there is some evidence of competitive effects, the "*competition*" reference in the legal empowerment has been fulfilled, and the quality of that evidence is accordingly not scrutinised. In this very significant way, when it comes to UK merger review, the merging parties are "*not in Kansas anymore*" — even if they have a US clearance in hand.

This is a puzzling choice of interpretation by the Tribunal. The law refers to a "*substantial lessening of competition*" and rejects a public interest criterion following the deliberate reforms to that effect in the Enterprise Act 2002. Yet the judicial review function takes a hands-off approach to interpreting what "*competition*" means, even though the deliberate choice of Parliamentary language is *not* to apply a deferential public interest standard. This follows abolition, under the weight of great criticism of inconsistency and capture, of the broad and accommodating "*public interest*" test in the Fair Trading Act 1973 in favour of a competition-based standard. Yet on the Tribunal's flexible interpretation, is there any practical difference in meaning between "*public interest*" and "*competition*"?

Insensitivity to this history can be seen very clearly in the Competition Appeal Tribunal (CAT) postscript to *Giphy*. Meta had sued on a range of procedural and substantive grounds, several of which called for substantive evidence review: the simple request for a fresh pair of eyes to take a look at the evidence and the conclusions drawn. Yet it was rebuffed on all substantive points of evidence. It prevailed on only one procedural ground: access to more information regarding the Gfycat transaction by Snap.

The CMA had withheld information about Snap's informal offer to Gfycat for 14 months, despite the clear materiality of an alternative transaction by a rival as regards the competitive effects of *Meta/Giphy*. The standard CMA line here is to be concerned about reprisals and potential damage from the disclosure of commercially sensitive information. Meta argued that this critically impeded Meta's ability to prepare its own arguments in response to the CMA because Meta did not have all the relevant information, not least as safeguards such as confidentiality rings could be used. Effectively, the CMA had relied on secret evidence.

This raises the classic due process argument known to every American lawyer: no "*John Doe*"

complaints. The CAT seemed sympathetic to this line of criticism and found a duty on Meta to disclose all relevant information to assess the rationality of decision-making. That is, while the CMA benefits from a generous evidence standard of giving only the "*gist*" of arguments to merging parties, as the Tribunal noted in *Tobii*, even this has its limits.

The CAT gave a very clear answer to this procedural point: if the information redacted is unnecessary to justify the CMA's reasoning it should be omitted; but, if the information is part of the reasoning for the CMA's decision, there is a *prima facie* duty to disclose to Meta. The confidentiality protections from the Enterprise Act 2002 are thus to be more narrowly applied if due process concerns are in play. Thus, the CMA had to provide more detailed information, given the critical importance of the development.

Those steeped in the common law of US merger reviews will spot the major due process omission: merely disclosing information is not the same thing as court review of the agency's interpretation *of the evidence*. Surely the interesting question here is *why* the decision was made, and not only *what* was disclosed. Otherwise, what is the point of the disclosure? That broader assessment would be a classic role for the courts in a common law system, yet the Tribunal emphatically did not engage with this. A much narrower view of due process was instead taken: provide the information. What is done with the information appears to remain largely above review provided that it is rational, applying the classic *Wednesbury* standard, which provides that a decision can only be vacated if there is no rational explanation for it.

Perhaps the Tribunal was cowed by the concern that generalist English judges in more senior courts would harshly enforce the deferential model of judicial review on any troublesome Tribunal judge pushing for a more fulsome review of the merits of evidence, and in so doing, would extinguish prospects of that Tribunal judge's promotion to the Court of Appeal.

Yet without the Tribunal assessing the quality of evidence, how will increasingly assertive UK merger control law ever define clear and consistent evidence standards as a matter of law, so as to help craft clear advice to merging parties? This will only become more urgent if the UK continues to push hard for an expansive role in the review of global deals.

There is also no small irony in the Tribunal effectively giving the CMA a monopoly on factual interpretation. Surely if competition enriches markets, it enriches regulation too?

So, in this rather nuanced context, material information regarding the Snap offer had to be remitted to Meta, but what was made of it was not for the Tribunal to say. Thus, the CMA received an order to remit the Snap evidence. It proceeded to make the same decision, having done so. So, for Meta, the Tribunal victory is only Pyrrhic.

Those hoping for clarity in the substance of UK merger review will not, therefore, find it from the Tribunal decision, at least until a future Tribunal judge proves willing to engage with the substance of the evidence base. Those seeking merger clearance in the UK would be best advised to put their efforts into agency clearance, there being little scope for second chances to judge by *Meta/Giphy*.

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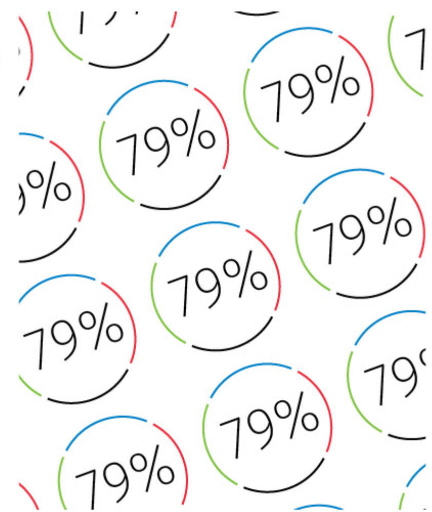

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