Completed acquisition by Facebook, Inc. of GIPHY, Inc.

Decision to impose a penalty on Facebook, Inc., Tabby Acquisition Sub Inc., and Facebook UK Limited under section 94A of the Enterprise Act 2002

The Competition and Markets Authority has redacted from this published version of the decision information which it considers should be excluded having regard to the three considerations set out in section 244 of the Enterprise Act 2002 (specified information: considerations relevant to disclosure). The redactions are indicated as applicable by [✂] or replacement non-confidential text in square brackets.

Decision to impose a penalty

1. The Competition and Markets Authority (the **CMA**) hereby gives notice[1] to Facebook, Inc., Tabby Acquisition Sub Inc., and Facebook UK Limited (together, **Facebook**)[2] of the following:

   (a) that it has imposed a penalty on Facebook under section 94A of the Enterprise Act (the **EA02**) because it considers that Facebook has, without reasonable excuse, failed to comply in certain respects with the requirements imposed on it by the Initial Enforcement Order issued by the CMA under section 72 of the EA02 on 9 June 2020 to Facebook and Giphy, Inc. (Giphy) (the **IEO**);[3]

   (b) the penalty is a fixed amount of £50.5 million, comprising of £50 million for Breach 1 (Qualified compliance statements), and £500,000 for Breach 3 (Change of roles of key staff).[4]

Chronology

2. On 2 July 2021, the CMA by letter to Facebook set out its initial concerns in relation to the suspected failures to comply with the terms of the IEO, and

[1] Notice is given pursuant to section 112 of the Enterprise Act 2002.
[2] References in this decision to Facebook as a defined term should be construed as references to Facebook, Inc., Tabby Acquisition Sub Inc., and Facebook UK Limited on a joint and several basis.
[3] The IEO of 9 June 2020 is published at: Initial enforcement order.
[4] No additional penalty has been imposed in respect of Breach 2 (Tenor outage).

Facebook's conduct and approach to IEO compliance. The CMA stated that it was considering imposing a penalty on Facebook. Facebook provided its submissions by letter dated 16 July 2021 (the **Preliminary Response**).

3. On 17 September 2021, the CMA issued to Facebook a provisional decision to impose a penalty under section 94A of the EA02 (the **Provisional Penalty Decision**). Facebook provided written representations on the Provisional Penalty Decision on 1 October 2021 (the (**Provisional Penalty Decision Response**).[5] The CMA has considered the Provisional Penalty Decision Response and has reviewed the Provisional Penalty Decision accordingly. The submissions in the Preliminary Response and the Provisional Penalty Decision Response are addressed in sections D and E below.

Structure of this document

4. This document is structured as follows:

   (a) Section A sets out an executive summary.

   (b) Section B sets out the legal framework.

   (c) Section C sets out the factual background.

   (d) Section D sets out the failures to comply without reasonable excuse.

   (e) Section E sets out the CMA's reasons for finding that a penalty of £50.5 million is appropriate and proportionate in this case.

   (f) Section F sets out next steps including Facebook's right to appeal the CMA's decision to impose a penalty.

A. Executive Summary

Failure to comply with the IEO

5. The CMA has found that Facebook adopted a high risk strategy reflecting a decision not to fully comply with its obligations under the IEO, which manifested itself through three breaches of the IEO described below. This has had the effect of limiting the CMA's awareness of material developments within the businesses under investigation (including other potential breaches) and in turn prejudiced the CMA's ability to carry out an important statutory function under the merger regime, namely to monitor, and as the case may be

[5] The Provisional Penalty Decision also stated that Facebook should contact the CMA within 5 days of receipt of the Provisional Penalty Decision to arrange a telephone conference call to discuss its written representations. Facebook did not provide a response in relation to this.

enforce, compliance with interim measures in order to prevent pre-emptive action.

6. As explained more fully in this document, the CMA has decided that Facebook failed to comply with the IEO in the following respects:

   (a) **Breach 1 (Qualified compliance statements):** Facebook has repeatedly failed to comply with paragraph 7 of the IEO by failing to submit fortnightly compliance statements in the appropriate form and, instead, submitting compliance statements that were accompanied by significant qualifications;

   (b) **Breach 2 (Tenor outage):** Facebook failed to comply with paragraph 8(b) of the IEO in relation to a loss of service affecting the provision of Tenor GIFs on Facebook surfaces; and

   (c) **Breach 3 (Change of roles of key staff):** Facebook failed to comply with paragraphs 5(c) and 5(i) of the IEO in relation to the following individuals changing role within the Facebook business without consent being sought:

      i. [Facebook Employee 1] leaving her role as acting Chief Compliance Officer and being replaced by [Facebook Employee 2]; and

      ii. [Facebook Employee 3] taking over as Chief Compliance Officer from [Facebook Employee 2].

7. For the reasons set out more fully below, the CMA considers Breach 1 (Qualified compliance statements) to be the core, and most egregious, manifestation of Facebook's decision not to fully comply with its obligations under the IEO. Breach 1 is not just a serious, flagrant, and intentional contravention to the IEO, but it was also persistent as it manifested itself through the submission of qualified compliance statements every two weeks for approximately one year. Breaches 2 and 3 are distinct instances of Facebook's defective approach to compliance, and provide (non-exhaustive) examples of the types of issues that should be captured by a more scrupulous approach to compliance.

Breach 1 – Qualified compliance statements

Failure to comply with paragraph 7 of the IEO

8. Under paragraph 7 of the IEO, Facebook was required to submit periodic statements of compliance on a fortnightly basis. This reporting obligation is

essential to the CMA's ability to monitor and enforce compliance with the IEO and is of critical importance to the functioning of the interim measures regime.

9. On 10 June 2020, Facebook sought a derogation to narrow its compliance obligations under the IEO. As a result of Facebook's failure to provide the CMA with the necessary information to assess its broad request, the CMA was unable to take a decision on whether to grant the derogation. A modified form of derogation, carving out certain parts of Facebook's business from the scope of the IEO, was ultimately granted on 29 June 2021 after the CMA received the necessary information required to form a view.

10. Despite repeated warnings from the CMA and reprimand from the Competition Appeal Tribunal (the **Tribunal**) and Court of Appeal, Facebook approached its compliance obligations as if its derogation request had been granted when it had not, unilaterally carving out parts of its business, activities and staff from the scope of its compliance statements. During the reporting period of 23 June 2020 to 29 June 2021, ie over a period of approximately one year, Facebook reported compliance only on the basis of a self-limited application of paragraphs 4(b), 5(c), 5(d), 5(e), 5(i) and 8(a) to 8(d) of the IEO. The qualifications accompanying each compliance statement were set out in letters signed by Facebook's external legal advisers, Latham & Watkins. In qualifying its compliance statements in this way, Facebook failed to comply with its obligations under paragraph 7 of the IEO.

Breach 2 – Tenor outage

Failure to comply with paragraph 8 of the IEO

11. Tenor (one of Facebook's two GIF suppliers) became globally unavailable on Facebook Messenger on [✂] and was not fully restored until [✂]. Facebook Posts was also affected by the outage. Facebook's failure to notify the CMA of the loss of service constituted a failure by Facebook to comply with paragraph 8 of the IEO. The CMA became aware of the Tenor outage four months later when Facebook provided the CMA with a White Paper on Vertical Foreclosure Analysis that refers to evidence obtained from a Tenor 'loss of service'.

Breach 3 – Change of roles of key staff

Failure to comply with paragraphs 5(c) and 5(i) of the IEO

12. After the IEO came into force, Facebook changed its Chief Compliance Officer on two separate occasions without seeking consent from the CMA for this change. The Chief Compliance Officer was responsible for ensuring compliance with the IEO and had been nominated by Facebook to provide

compliance statements under the IEO, in place of Facebook's CEO, Mark Zuckerberg. Accordingly, we consider the Chief Compliance Officer was a member of key staff with actual executive or managerial authority. Facebook failed to comply with paragraphs 5(c) and 5(i) by changing the holder of this role without first obtaining the consent of the CMA.

Risk of pre-emptive action

13. The CMA's ability to adopt interim measures has a similar purpose to the suspensory effect of merger notifications in many mandatory merger control regimes (such as the European Union). Interim measures play a critical role in preventing pre-emptive action. Breaches of the IEO undermine the CMA's ability to prevent, monitor and ultimately remedy any pre-emptive action taken by merger parties, i.e. action that might prejudice the outcome of the CMA's investigation or impede the taking of any remedial action that might ultimately be appropriate.

No reasonable excuse

14. The CMA has found that Facebook has no reasonable excuse for its failures to comply with the IEO.

15. These failures were not caused by a significant and genuinely unforeseeable or unusual event. Nor were they caused by events beyond the control of Facebook.[6]

16. Rather, in respect of Breach 1 (Qualified compliance statements), the Tribunal, upheld by the Court of Appeal, found that *'Facebook is not seeking to comply with the IEO in its current form but are complying with it on the basis of it having already been granted the Carve-Out Requests – which have yet to be granted.*[7] *'* The Tribunal described this *as 'an unsatisfactory state of affairs'*[8] and noted that it was *'undesirable that Facebook has 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 is taking or the changes it is making to its business that might fall within the scope of the IEO'*[9]

17. More broadly, the Court of Appeal found that Facebook was *'entirely the author of its own misfortune'* in relation to the CMA's inability to narrow the

[6] *Administrative penalties: Statement of Policy on the CMA's Approach* (CMA4) (**Penalties Guidance**), paragraph 4.4.
[7] *Facebook, Inc. and Facebook UK Limited v Competition and Markets Authority* [2020] CAT 23 (***Facebook v CMA***), paragraph 118.
[8] *Facebook v CMA*, paragraph 119.
[9] *Facebook v CMA*, paragraph 159.

scope of the IEO by granting an appropriate derogation.[10] For the reasons explained below, the CMA agrees with all of these findings.

Decision to impose penalty

18. The CMA has decided, having had regard to its statutory duties and the Penalties Guidance, and to all the relevant circumstances of the case, that:

    (a) it is appropriate to impose a penalty in connection with Breaches 1 and 3 due to the serious and flagrant nature of Facebook's failure to comply with the IEO and the risks arising from it, and to the CMA's ability to prevent, monitor and ultimately remedy any pre-emptive action having been substantially undermined;

    (b) while the CMA considers that it will be appropriate in most cases to impose a penalty for contraventions such as Breach 2, the CMA has decided not to impose a penalty in this case. Breach 2 is an example of the type of concerns underlying Breach 1, but is a significantly less serious and flagrant instance of such concern, and the CMA considers it is unnecessary for deterrence purposes to impose a penalty in relation to Breach 2 pursuing an objective that is already achieved by the penalty which the CMA has decided to impose in relation to Breach 1;

    (c) it is appropriate and proportionate in the round to achieve the CMA's policy objectives of incentivising compliance with interim measures and deterring future failures to comply by both Facebook and other persons who may be considering future non-compliance to impose a penalty of:

        i. £50 million for Breach 1 (Qualified compliance statements); and

        ii. £500,000 for Breach 3 (Change of roles of key staff); and

    (d) the amount of the penalty for Facebook's failure to comply is proportionate, given the penalty for Breach 1 represents only 0.09% of Facebook's global turnover (which is substantially below the statutory maximum of 5% of Facebook's global turnover). In view of Facebook's significant financial resources, a penalty of the amount in this decision is not anomalous, nor would it affect Facebook disproportionately at 0.26% of operating profit, 0.35% of profit after tax, and 0.06% of net assets. The penalty for Breach 3 represents less than 0.01% of each of these financial indicators.

[10] *Facebook, Inc. and Facebook UK Limited v Competition and Markets Authority* [2021] EWCA Civ 701 (***Facebook v CMA (CoA)***), paragraph 63.

B. Legal Framework

Relevant legislation

19. Section 72 of the EA02 is the basis for the IEO. Section 72(2) provides that the CMA may, by order, for the purpose of preventing pre-emptive action, impose certain restrictions and obligations.

20. Section 72(8) of the EA02 defines 'pre-emptive action' as '*action which might prejudice the reference concerned or impede the taking of any action … which may be justified by the CMA's decisions on the reference'*.

21. Section 72(3C) of the EA02 provides that a person may, with the CMA's consent, take action (or action of a particular description) that would otherwise contravene an initial enforcement order. In practice, where the CMA grants such consent, it does so by making a derogation in respect of specific provisions of an initial enforcement order.

22. Section 86(6) of the EA02 provides that an order made pursuant to section 72 of the EA02 is an enforcement order. Sections 94(1) and 94(2) of the EA02 provide that any person to whom such an order relates has a duty to comply with it. A company is a person within the meaning of section 94(2) of the EA02 and Schedule 1 of the Interpretation Act 1978.

23. Section 94A(1) of the EA02 provides that '*Where the appropriate authority considers that a person has, without reasonable excuse, failed to comply with an interim measure, it may impose a penalty of such fixed amount as it considers appropriate'*.

24. Section 94A(2) of the EA02 provides that '*A penalty imposed under subsection (1) shall not exceed 5% of the total value of the turnover (both in and outside the United Kingdom) of the enterprises owned or controlled by the person on whom it is imposed.*'[11]

25. Section 94A(8) of the EA02 defines 'interim measure' as including an order made pursuant to section 72 of the EA02.

26. There is no statutory time limit within which the CMA must impose a penalty under section 94A(1) of the EA02.

27. Section 94B(1) and (2) of the EA02 requires the CMA to prepare and publish a statement of policy on how it uses its powers to impose a financial penalty

[11] The Enterprise Act 2002 (Mergers) (Interim Measures: Financial Penalties) (Determination of Control and Turnover) Order 2014 makes provision for when an enterprise is to be treated as controlled by a person and the turnover of an enterprise.

under section 94A of the EA02 and how it will determine the level of the penalty imposed.[12]

28. Section 114 of the EA02 provides an appeal mechanism for a person on whom a penalty is imposed.

The concept of pre-emptive action

29. The meaning of 'pre-emptive action' and the role of interim measures in merger control has been considered by the Tribunal on a number of occasions.

30. In *Intercontinental Exchange, Inc v Competition and Markets Authority*[13] the Tribunal observed 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*'.[14] In *Facebook v CMA*, the Tribunal (subsequently upheld by the Court of Appeal) added that pre-emptive action includes '*action that has the potential to affect the competitive structure of the market during the CMA's investigation*'.[15]

31. The breadth of the CMA's statutory powers to prevent pre-emptive action was emphasised by the Court of Appeal in *Facebook v CMA (CoA)*. The Court of Appeal confirmed those powers include the ability to regulate activity merging parties might take in connection with or as a result of the merger that has the potential to affect the competitive structure of the market in question during the merger investigation.[16]

32. In *Stericycle International LLC & Anors v Competition Commission*[17] the Tribunal considered the meaning of pre-emptive action in section 80(10) of the EA02[18] and held that '*the word "might" implies a relatively low threshold of expectation that the outcome of a reference might be impeded*'.[19] The Tribunal added that at the time of considering whether to exercise the statutory powers to make an interim order (for the purpose of preventing pre-emptive action), the CMA necessarily cannot be sure whether any action

[12] On 10 January 2014, the CMA published the Penalties Guidance.
[13] *Intercontinental Exchange, Inc v Competition and Markets Authority* [2017] CAT 6 (***Intercontinental Exchange***).
[14] *Ibid* at paragraph 220.
[15] *Facebook v CMA* at paragraph 124; see also at paragraph 21. The Tribunal's judgment was upheld by the Court of Appeal (*Facebook v CMA (CoA)*, at paragraph 56).
[16] *Facebook v CMA (CoA)* at paragraph 56.
[17] *Stericycle International LLC, Stericycle International Limited and Sterile Technologies Group Limited v Competition Commission* [2006] CAT 21 (***Stericycle***).
[18] Section 72 of the EA02 relates to orders made during a Phase 1 merger investigation. The orders made during a Phase 2 merger investigation are made under section 81 of the EA02. The definition of 'pre-emptive action' for the purposes of section 81 of the EA02 is defined in section 80(10) of the EA02 and is in identical terms to the definition in section 72(8) of the EA02.
[19] *Stericycle* at paragraph 129.

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 reference.[20]

33. In *Intercontinental Exchange* the Tribunal held that '*[t]he word "might" means that it is the possibility of prejudice to the reference or an impediment to justified action which is prohibited. The IEO catches more than just actual prejudice or impediments, which is why the onus is on the addressee of the IEO to seek consent from the CMA if their conduct creates the possibility of prejudice or an impediment*'.[21] The Tribunal also held that '*… where an IEO has been issued, it is incumbent on parties to take a carefully considered view as to whether their conduct might arouse the reasonable concern of the CMA that the agreements that they reach are significant enough that they might prejudice the reference or impede justified action…*'.[22]

The purpose of an IEO

34. The Supreme Court has held that '*[t]he purpose of merger control is to regulate in advance the impact of concentrations on the competitive structure of markets.*'[23]

35. It is of central importance to the UK's voluntary, non-suspensory merger regime to regulate in advance the impact of a merger on the competitive structure of markets that interim measures should be effective, particularly where, as in this case, the merger is completed before it is identified and examined by the CMA. In *Facebook v CMA*, the Tribunal recognised the wide power conferred on the CMA by section 72 of the EA02 in imposing interim measures and noted that *'[t]he corollary of the voluntary nature of the regime is that the CMA is given wide powers to suspend the integration of merging companies and it is for merging parties to satisfy the CMA that the relaxation of any interim measures imposed by the CMA is justified.'*[24]

36. The purpose of an IEO is to prevent any action which might prejudice the merger investigation or impede the taking of any action which may be justified by the CMA's decision on the reference.[25] The broad nature of pre-emptive action is reflected in the similarly broad wording of the IEO which the Tribunal held in *Intercontinental Exchange* '*should be interpreted to give full effect to its legitimate precautionary purpose*'.[26] Given the statute's precautionary purpose, the Tribunal in *Facebook v CMA* confirmed the CMA has a wide

[20] *Ibid*. Affirmed in *Facebook v CMA* at paragraph 124.
[21] *Intercontinental Exchange* at paragraph 220.
[22] *Ibid* at paragraph 223.
[23] *Société Coopérative de Production SeaFrance SA (Respondent) v The Competition and Markets Authority and another (Appellants)* [2015] UKSC 75 at paragraph 4; see also paragraph 35.
[24] *Facebook v CMA* at paragraph 156.
[25] Section 72(8) of the EA02.
[26] *Intercontinental Exchange* at paragraph 220.

margin of appreciation in imposing an IEO under section 72 of the EA02. The Tribunal further added in that case that the role of interim measures also includes preventing anti-competitive harm from the merger impacting the position of other undertakings on any affected markets, which may be irremediably detrimental.[27]

37. More generally, in *Electro Rent*, [28] the Tribunal noted that '*[the] CMA's role in regulating merger activity, and its ability to do so effectively, is a matter of public importance*' and agreed with the CMA's submission that interim orders serve a particularly important function where, as in the case in question, the merger has been completed before it was examined by the CMA.[29]

38. Where a merger has been completed and an IEO has been imposed, it is critical that any business which has been acquired continues to compete independently with the acquiring business and is maintained as a going concern. This is to ensure that the viability and competitive capability of each of the merging parties is not undermined pending the outcome of the merger investigation, as this would risk prejudicing the reference or impeding any action the CMA might need to undertake should it ultimately find that the merger has resulted in a substantial lessening of competition (and any resulting adverse effects).

39. Consistent with the above, the IEO contains positive obligations on the addressees to do certain things as well as obligations to refrain from taking certain actions. The Tribunal in *Facebook v CMA* noted that *'it is of the utmost importance that interim measures are scrupulously complied with when the CMA is considering a derogation request and* ***merging parties should not themselves form judgements or reach decisions that are properly for the CMA****'* (emphasis added).[30] The onus is on the merging parties to seek consent if their conduct creates the possibility of prejudice or impediment[31] and engage with the CMA by submitting a derogation request which is '*fully specified, reasoned and supported by relevant evidence*'.[32]

40. Within that context, the provision of periodic compliance statements is an important obligation in the IEO to ensure that businesses take seriously their compliance obligations and put in place appropriate mechanisms to monitor and report on their compliance with the IEO to the CMA.

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[27] *Facebook v CMA* at paragraph 21, upheld in *Facebook v CMA (CoA)* at paragraph 59.
[28] *Electro Rent Corporation v Competition and Markets Authority* [2019] CAT 4 (***Electro Rent***).
[29] *Ibid* at paragraph 120. The Tribunal stated at paragraph 200 that *'It is a matter of public importance that the merger control process, and the duties that it creates, are strictly, and conscientiously, observed.'*
[30] *Facebook v CMA* at paragraph 158; see also *Electro Rent* at paragraph 206.
[31] *Intercontinental Exchange* at paragraph 220.
[32] *Facebook v CMA* at paragraph 156.

41. This transparency also ensures the CMA becomes aware of and understands any material developments within businesses subject to an IEO. This, in turn, enables the CMA to ensure that interim measures are fully complied with, to investigate in the event of potential failures to comply, to decide whether it is appropriate to impose a penalty for any instance of non-compliance, and to take action swiftly to address and seek to resolve any concerns it may identify as regards pre-emptive action.

42. The importance of compliance statements is reflected in the requirement set out at paragraph 7 of the IEO that a senior individual of the business, ie the Chief Executive Officer, or other persons as agreed with the CMA, must sign the statements to confirm compliance. The requirement of seniority reflects the need for an individual with sufficient knowledge of a business's operations, and sufficient authority to take steps to prevent breaches of the IEO, to take responsibility for monitoring and reporting on compliance with the IEO.[33]

43. In accordance with its precautionary purpose, the IEO seeks to protect against the *possibility or risk* of prejudice to the reference or potential remedies. It is incumbent on merging parties to comply with all obligations under the IEO, including the monitoring and reporting obligations. When assessing whether there has been a failure to comply with interim measures, the CMA does not need to demonstrate that the conduct of a merging party would impact the competitive structure of the market, nor demonstrate that it has caused actual prejudice to the outcome of a reference or impeded the taking of any appropriate remedial action.[34] A failure to comply with the obligations set out in the IEO is in itself sufficient to engage the penalty provisions under section 94A of the EA02.

Relevant provisions of the IEO

44. The relevant provisions of the IEO in this case are as follows:[35]

Paragraph 5

> *'5. Further and without prejudice to the generality of paragraph 4 and subject to paragraph 3, Facebook, Tabby Acquisition, Facebook UK and*

[33] This is addressed in Chapter 7 of the CMA's Guidance on *Interim measures in merger investigations* (CMA108) (**Interim Measures Guidance**).
[34] See paragraphs 79 to 81 of Notice of penalty addressed to Electro Rent Corporation dated 12 February 2019, Penalty Notice (publishing.service.gov.uk) and paragraphs 115 to 116 of Notice of penalty addressed to Paypal Holdings, Inc. dated 18 September 2019, Penalty notice (publishing.service.gov.uk).
[35] Note a Variation Order was made on 29 June 2021 pursuant to section 72(4)(b) of the EA02 to vary the IEO in light of the derogation granted by the CMA on 29 June 2021. The Variation Order is available here. These were the provisions of the IEO in force at the time the conduct described in this decision occurred.

Giphy shall at all times during the specified period procure that, except with the prior written consent of the CMA:

…

(c) except in the ordinary course of business, no substantive changes are made to the organisational structure of, or the management responsibilities within, the Giphy business or the Facebook business;

…

(i) no changes are made to key staff of the Giphy business or Facebook business;*'*

Paragraph 7

'7. Facebook, Tabby Acquisition, Facebook UK and Giphy shall provide to the CMA such information or statement of compliance as it may from time to time require for the purposes of monitoring compliance by Facebook, Tabby Acquisition, Facebook UK and Giphy and their subsidiaries with this Order. In particular, on 23 June 2020 and subsequently every two weeks (or, where this does not fall on a working day, the first working day thereafter) the Chief Executive Officer or other persons as agreed with the CMA of each of Facebook, Tabby Acquisition, Facebook UK and Giphy shall, on behalf Facebook / Tabby Acquisition / Facebook UK / Giphy provide a statement to the CMA in the form set out in the Annex to this Order confirming compliance with this Order.'

Paragraph 8

'*8. At all times, Facebook, Tabby Acquisition, Facebook UK and Giphy shall, or shall procure that Giphy shall, actively keep the CMA informed of any material developments relating to the Giphy business or the Facebook business, which includes but is not limited to:*

(a) details of key staff who leave or join the Giphy business or the Facebook business;

(b) any interruption of the Giphy or Facebook business (including without limitation its procurement, production, logistics, sales and employee relations arrangements) that has prevented it from operating in the ordinary course of business for more than 24 hours;

(c) all substantial customer volumes won or lost or substantial changes to the customer contracts for the Giphy or Facebook business including any substantial changes in customers' demand; and

(d) substantial changes in the Giphy or Facebook business's contractual arrangements or relationships with key suppliers.'

Paragraph 10

'The CMA may give directions to a specified person or to a holder of a specified office in any body of persons (corporate or unincorporated) to take specified steps for the purpose of carrying out, or ensuring compliance with, this Order, or do or refrain from doing any specified action in order to ensure compliance with the Order. The CMA may vary or revoke any directions so given.'

45. The definitions in the IEO applicable to the provisions set out above are:

(a) *'**commencement date**' means 9 June 2020;*

(b) *'**the Facebook business**' means the business of Facebook and its subsidiaries carried on as at the commencement date;*

(c) *'**the Giphy business**' means the business of Giphy and its subsidiaries carried on as at the commencement date;*

(d) *'**key staff**' means staff in positions of executive or managerial responsibility and/or whose performance affects the viability of the business;*

(e) *'**the ordinary course of business**' means matters connected to the day-to-day supply of goods and/or services by Giphy or Facebook and does not include matters involving significant changes to the organisational structure or related to the post-merger integration of Giphy and Facebook;* and

(f) *'**subsidiary**', unless otherwise stated, has the meaning given by section 1159 of the Companies Act 2006.*

C. Factual Background

The Transaction

46. On 15 May 2020, Facebook acquired, via its direct, wholly owned subsidiary Tabby Acquisition Sub, Inc., all outstanding equity in Giphy, Inc (the **Merger**). The transaction was not notified to the CMA but was subsequently detected by the CMA's mergers intelligence committee. Facebook was informed on 5 June 2020 that the CMA's mergers intelligence committee had determined that a merger investigation was warranted.

47. Facebook is a publicly traded company listed on NASDAQ, with headquarters in California. It has more than 250 subsidiaries across the globe. The Facebook group offers various online products and services worldwide, including the Facebook app, Instagram, Messenger, WhatsApp, Oculus, Portal, Workplace and others.

48. Giphy, which was founded in 2013 and is headquartered in New York, is also active worldwide with an online database and search engine that allows users to search and share GIFs (Graphic Interchange Format image files) and GIF stickers (GIFs with transparency allowing them to be applied on top of images or text).

The IEO

49. On 9 June 2020, the CMA issued the IEO (based on a standard template) [36] addressed to both Facebook and Giphy (the **Parties**) in accordance with section 72(2) of the EA02 to prevent pre-emptive action. The IEO is still in force.[37]

50. On 19 June 2020, the CMA issued directions under paragraph 10 of the IEO for the Parties to appoint a monitoring trustee (the **Monitoring Trustee**) for the purpose of monitoring compliance with the IEO (the **Directions**).[38] The Monitoring Trustee was appointed on 3 July 2020.

51. On 30 July 2020, the CMA issued directions under paragraph 10 of the IEO for the Parties to appoint a Hold Separate Manager to ensure (among other matters) that Giphy was operated separately from, and independently of, Facebook.[39]

Facebook's derogation requests

52. On 10 June 2020, Facebook wrote to the CMA and requested several derogations in respect of the following paragraphs of the IEO:

    (a) Paragraphs 5(a) and 5(l) in respect of payroll, benefits, HR access and security of personnel;

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[36] The IEO template is used by the CMA as the basis for interim measures made by it under the EA02 in relation to completed mergers. The IEO template is available here.
[37] The IEO remained in force after the commencement of the Phase 2 investigation of the Merger. A Variation Order was made on 29 June 2021 pursuant to section 72(4)(b) of the EA02 to vary the IEO in light of the derogation granted by the CMA on 29 June 2021 (see paragraph 79 below). The Variation Order is available here.
[38] Directions issued on 19 June 2020 pursuant to paragraph 10 of the Initial Enforcement Order imposed by the Competition and Markets Authority on 9 June 2020 on: Facebook, Inc, Tabby Acquisition Sub, Inc, Facebook UK Limited and Giphy, Inc.
[39] Directions issued on 30 July 2020 pursuant to paragraph 10 of the Initial Enforcement Order made by the Competition and Markets Authority on 9 June 2002 pursuant to section 72(2) of the Enterprise Act 2002.

(b) Paragraphs 5(a), 5(f) and 5(k) in respect of data protection and privacy law compliance;

(c) Paragraphs 5(a) and 5(l) in respect of treasury and accounting matters and the provision of funds;

(d) Paragraph 5(a) in respect of Giphy insurance; and

(e) Paragraphs 4(b), 5(c), 5(e), 5(i), 5(k) and 8 – Facebook requested that the obligations in these paragraphs of the IEO no longer apply to Facebook and its subsidiaries, 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*'.[40]

53. Facebook's letter of 10 June 2020 also stated that a number of integration steps had already been carried out since the Merger was completed.

54. The CMA responded on 12 June 2020 by email with further questions relating to each of the derogations requested.

55. In respect of the first four derogations requests (paragraphs 52(a) to (d) above):

(a) The derogation request outlined in paragraph 52(a) was partly withdrawn by Facebook on 25 June 2020, and the remaining parts were granted by the CMA on 26 June, 16 July, 27 August and 17 September 2020.

(b) The derogation request outlined in paragraph 52(b) was put on hold by Facebook.

(c) The derogation request outlined in paragraph 52(c) was withdrawn by Facebook on 25 June 2020.

(d) The CMA decided not to grant a derogation in relation to the fourth derogation request outlined in paragraph 52(d) as it related to activities which had occurred prior to the IEO being issued.

56. As regards the fifth derogation request outlined in paragraph 52(e) above (the **Carve-Out Request**), the CMA's email of 12 June 2020 set out that '*Generally, going forward, and in order for the CMA to fully consider all types of derogation requests, please note that requests need to be fully specified, reasoned and supported by relevant evidence (see paragraph 3.2 of the CMA's Interim Measures [guidance]...*' (emphasis in original) and requested

[40] Facebook's letter of 10 June 2020, paragraph 5.

Facebook to re-submit a fully specified, reasoned, and evidenced version of the Carve-Out Request, taking into account paragraphs 3.40 to 3.56 of the Interim Measures Guidance.

57. The CMA's email of 12 June 2020 also specifically referred to paragraph 3.43 of the Interim Measures Guidance, which states that the CMA is likely to be particularly cautious about granting derogations carving out activities of the acquiring business from the IEO at the earlier stages of its investigation where the full scope of the merging parties' activities may not yet have been fully analysed. Finally, the email drew Facebook's attention to paragraph 3.44 of the Interim Measures Guidance, which sets out information that merging parties should be able to show to delineate the parts of their businesses which engage in activities related to each other.

58. On the same day, in response to the CMA's email, Facebook provided the following justification for the Carve-Out Request:

'With respect to [the Carve-Out Request], please note that the Facebook business is global with c.50k employees and the vast majority do not interact with the GIPHY business. The IEO currently applies to Facebook, Inc. on a global basis and, as such, absent the CMA granting the derogations requested, it would be impossible for Facebook to carry on its ordinary course business activities unrelated to GIPHY or GIFs and stickers, more generally. For example, under the terms of the IEO, Facebook globally would be prohibited from changing key staff or updating customer / supplier contracts (regular ordinary course activities) and with respect to operations entirely unrelated to the transaction, e.g., virtual reality software development in the US. We assume 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. This ensures that 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 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.' (emphasis in original)

59. Facebook submitted a draft derogation consent letter (which included, among other derogations, the Carve-Out Request) on 15 June 2020. This did not provide information in relation to the Carve-Out Request beyond that set out in paragraph 58 above.

60. On 22 June 2020, the CMA by email reiterated that Facebook's derogation request needed to be fully specified, reasoned and supported by relevant evidence, as set out in paragraph 56 above, and stated that, '*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.*' The CMA requested that Facebook provide the specific operational areas which require consent for actions outside the ordinary course of business, the planned frequency of any actions which occur at regular intervals, and any other information necessary for the CMA to fully consider the derogation request.

61. In a letter dated 25 June 2020, Facebook set out its view that the CMA has adopted an '*unreasonable and disproportionate approach*' to applying the IEO and assessing the derogation requests outlined in paragraph 52 above. In relation to the Carve-Out Request, Facebook's view was that the CMA '*has refused to grant derogations from actions required by the IEO that are irrelevant to the operation of GIPHY's business, with which Facebook cannot comply as a practical matter, and/or which could not conceivably prejudice the CMA's remedial options.*'

62. The CMA responded to this by setting out in a letter dated 2 July 2020 that Facebook had yet to demonstrate how the Carve-Out Request met the criteria set out in the Interim Measures Guidance. In addition to reiterating the reasons provided in the CMA's email of 22 June 2020 (set out at paragraph 60 above), the letter stated that:[41]

    (a) The information requested from Facebook was necessary given that the information provided by the Parties to date[42] indicated that Giphy was already substantially integrated into the Facebook business.

    (b) The CMA would not consent to carving out parts of the Facebook business from the scope of certain IEO provisions, '*unless it were satisfied that the activities of Facebook (or the relevant parts of its business) 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.*' At this early stage of the investigation, the CMA did not have the necessary information to make a determination on this.

[41] CMA letter of 2 July 2020, pages 5 to 6.
[42] Including Facebook's response to the CMA's Integration Disclosure Questionnaire of 9 June 2020 which was required to be completed pursuant to section 109 of the EA02.

(c) Facebook '*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'.* Paragraph 3.46 of the Interim Measures Guidance states that vertical activities are taken into account by the CMA when assessing whether derogations can be granted.

63. In a further letter of 21 July 2020, Facebook, among other things, repeated its request for the Carve-Out Request to be granted, and submitted that the CMA should be able to assess the request on the basis of other information already provided by Facebook (such as the draft Merger Notice, internal documents, and responses to questions on integration).

64. No additional evidence supporting the Carve-Out Request was provided by Facebook. Facebook further stated in an email dated 23 July 2020 that '*There is no further information to be provided in respect of the request and the CMA has had ample opportunity to ask further questions.*'

65. The CMA explained by letter dated 7 August 2020 that it had '*significant concerns about Facebook's lack of cooperation, failure to comply with mandatory information requests and general adversarial approach to the CMA's investigation of the Merger*'.[43]

66. Specifically, as at 7 August 2020:

(a) Facebook had failed to submit a complete response to a section 109 EA02 notice dated 25 June 2020 regarding compliance with the IEO (namely its integration with Giphy) by the deadline of 2 July 2020 and only submitted the outstanding information on 28 July 2020;

(b) Facebook had failed to respond to questions 9 to 35 of the CMA's Enquiry Letter dated 5 June 2020 (relevant to the substantive assessment of the Merger)[44] by the deadline of 19 June 2020 (and had yet to respond fully to all questions including those relevant to establishing the CMA's jurisdiction); and

(c) Facebook had failed to submit any information in response to a section 109 EA02 notice dated 13 July 2020 by the deadline of 20 July 2020 (and, after a partial submission received on 31 July 2020, several responses remained outstanding in full). The section 109 EA02 notice included

[43] CMA letter of 7 August 2020, paragraph 8.
[44] The Enquiry Letter is a notice under section 109 of the EA02 sent requiring Facebook to supply certain documents and information in relation to the Merger

questions relevant to Facebook's integration with Giphy, the CMA's jurisdiction, and the substantive assessment.

67. As a result of Facebook's failure to respond fully (or at all) to these mandatory information requests, the CMA was required to issue three separate notices to stop the four-month period[45] until submissions were received. The CMA informed Facebook that these issues '*significantly hindered the CMA's ability to investigate the Merger or take informed decisions in relation to certain issues […] including the Carve-Out Request.*'[46]

68. The CMA was at this time not able to take a decision on the Carve-Out Request as a result of the limited information and evidence provided by Facebook to support the broad nature of the Carve-Out Request.

69. On 26 August 2020, Facebook filed an application under section 120 of the EA02 for a review by the Tribunal of the CMA's refusal to grant a derogation in relation to the Carve-Out Request. Facebook advanced the following grounds of appeal against the CMA's decision not to grant a derogation in relation to the Carve-Out Request:

    (a) the CMA's refusal to grant the Carve-Out Request was irrational and disregarded the statutory purpose of the EA02;

    (b) the CMA's refusal to grant the Carve-Out Request was disproportionate; and

    (c) the CMA's decision infringed the requirement of legal certainty.

70. On 13 November 2020 the Tribunal dismissed all of Facebook's grounds of appeal.

71. Following the Tribunal's judgment, on 23 November 2020 Facebook submitted an updated carve-out derogation request (the **Updated COD Request**) seeking to exclude Facebook's subsidiaries with no connection to 'GIF-related Activities' (as defined by Facebook) from the scope of the IEO, and limit the IEO obligations of the remaining entities[47] to 'GIF-related Activities'. The Updated COD Request set out Facebook's proposed definition of 'GIF-related Activities',[48] more information regarding Facebook's contractual and corporate relationships with GIF providers, how GIFs and stickers are integrated into Facebook, and Facebook's GIF and sticker employees. The request also clarified which of its entities were involved in any

[45] The four month period mentioned in section 24 of the EA02 pursuant to section 25(2) of the EA02.
[46] CMA letter of 7 August 2020, paragraph 8.
[47] Facebook, Inc (which includes Messenger), Facebook Ireland Ltd., WhatsApp Inc., and WhatsApp Ireland Ltd.
[48] 'GIF-related Activities' are defined in the Updated COD Request as '*the procurement/ supply of GIFs and procurement/ supply/ development of stickers via an API integration*'.

activities involving GIFs or stickers. Facebook requested the CMA to '*consider granting any derogation consents as it deems possible from the broad scope of the IEO on a rolling basis.*' [49]

72. The CMA provided its view on the Updated COD Request in an email dated 30 November 2020. While it was noted that Facebook's explanations were helpful, the CMA expressed concern that Facebook's definition of what constituted 'GIF-related Activities' was too narrow to capture all activities which might be pre-emptive action. The email provided non-exhaustive examples of information missing from the Updated COD Request which would enable the CMA to understand the implications of granting a derogation in relation to the request.

73. The CMA adopted a '*sequenced approach*' to considering the Updated COD Request – this entailed granting consent to carve out certain Facebook subsidiaries while continuing to assess whether a derogation could be granted in respect of the remaining Facebook entities.[50] This approach was in line with Facebook's request to consider granting derogations on a 'rolling basis'.

74. The CMA issued section 109 EA02 notices to obtain information necessary to consider the Updated COD Request.[51] Additionally, the CMA's section 109 EA02 notice on 4 December 2020 defined GIF-related Activities as '*any activities relating to the procurement, supply or development of GIF-related Content whether by or to Facebook, GIPHY or any third party, including (without limitation) any operational, relationship management, strategic, development, technical or back-office activities or services.*'[52]

75. Following the receipt of the necessary information sought by the CMA,[53] the CMA granted derogations to exclude most of Facebook's subsidiaries from the scope of the IEO as follows:

    (a) A derogation was granted on 22 December 2020[54] in respect of dormant or inactive subsidiaries, holding company subsidiaries, and subsidiaries that do not engage in any GIF-related Activities (as defined by the CMA and set out in paragraph 74 above). This was granted after Facebook provided its first response to the section 109 EA02 notice of 4 December

[49] Updated COD Request, page 3.
[50] CMA email of 15 December 2020.
[51] The CMA issued Section 109 EA02 notices on 4 December 2020, 6 January 2021, and 15 January 2021.
[52] This definition has been adopted in every derogation granted after this date which uses this term.
[53] Facebook's responses to the section 109 EA02 notice of 4 December 2020 dated 11 December 2020, 18 December 2020 and 15 January 2021 and Facebook's response to the section 109 EA02 notice of 6 January 2021 dated 11 January 2021.
[54] See Derogation of 22 December 2020.

2020 on 11 December 2020 and provided a draft derogation consent letter on 17 December 2020.

(b) A further derogation was granted on 8 February 2021[55] in respect of data centres. This was granted after Facebook provided its second and third responses to the section 109 EA02 notice of 4 December 2020 on 18 December 2020 and 15 January 2021 respectively.

(c) A third derogation was granted on 24 February 2021[56] in respect of entertainment entities and local ad and sales entities, which only engaged in GIF-related Activities (as defined by the CMA and set out in paragraph 74 above) on an ad-hoc or de minimis basis. This was granted following the receipt of Facebook's response to the section 109 EA02 notice of 6 January 2021 dated 11 January 2021.

76. To narrow the scope of the IEO obligations in respect of the remaining Facebook subsidiaries, the CMA and Facebook exchanged correspondence until May 2021 to discuss and agree on key aspects of the request such as the definition of, and reporting requirements in relation to, GIF-related Activities and key staff.[57] For example, Facebook's letter of 1 April 2021 asserted that the definition of GIF-related Activities (as defined by the CMA and set out in paragraph 74 above) which had been applied to the derogations outlined above should be narrowed in light of the findings in the Phase 1 decision.

77. On 17 December 2020, Facebook applied to the Court of Appeal for permission to appeal the Tribunal's judgment, which was granted. The Court of Appeal hearing took place on 28 and 29 April 2021. The Tribunal's judgment was subsequently upheld in full by the Court of Appeal on 13 May 2021.[58]

78. On 25 June 2021, the CMA by email attached a revised draft derogation consent letter and draft Variation Order. The email explained the CMA's proposed changes to the draft consent letter and provided comments on the remaining outstanding issues regarding the reporting of GIF-related Activities (as defined by the CMA and set out in paragraph 74 above) and the application of the key staff definition to the Facebook business.

79. On 29 June 2021, the CMA granted a derogation in relation to a modified version of the Updated COD Request (the **Carve-Out Derogation**)[59] in a form

[55] See Derogation of 8 February 2021.
[56] See Derogation of 24 February 2021.
[57] See the CMA's letters of 19 February and 27 April 2021, and Facebook's letters of 15 March, 1 April, 21 April and 13 May 2021. A draft derogation consent letter was attached to Facebook's letter of 13 May 2021.
[58] *Facebook v CMA (CoA)*.
[59] See Derogation of 29 June 2021.

satisfactory to the CMA, as a result of Facebook providing the required information to the CMA and finally engaging appropriately with the derogation process.

D. Failures to comply with the IEO

80. On the basis of the evidence provided to the CMA, and following careful assessment of the Provisional Penalty Decision Response, for the reasons set out below the CMA has decided that Facebook has failed to comply with the IEO in the following respects:

(a) Breach 1 – Facebook has repeatedly failed to comply with paragraph 7 of the IEO by failing to submit fortnightly compliance statements in the appropriate form and, instead, submitting compliance statements that were accompanied by significant qualifications;

(b) Breach 2 – Facebook failed to comply with paragraph 8(b) of the IEO in relation to a loss of service affecting the provision of Tenor GIFs on Facebook surfaces;

(c) Breach 3 – Facebook failed to comply with paragraphs 5(c) and 5(i) of the IEO in relation to the following individuals changing role within the Facebook business without consent being sought:

i. [Facebook Employee 1] leaving her role as acting Chief Compliance Officer and being replaced by [Facebook Employee 2]; and

ii. [Facebook Employee 3] taking over as Chief Compliance Officer from [Facebook Employee 2].

Breach 1 – Qualified compliance statements

Facts

81. Paragraph 7 of the IEO requires the CEO, or other persons as agreed with the CMA, of each of the Parties to provide to the CMA a statement in the form set out in the Annex to the IEO confirming that Party's compliance with the IEO. Facebook was required to submit a statement on 23 June 2020 and every two weeks thereafter.

82. From 23 June 2020 to 29 June 2021, ie for approximately one year, Facebook submitted IEO compliance statements to the CMA with an accompanying side

letter containing significant qualifications.[60] A table listing each compliance statement submitted with qualifications is set out in Appendix 1.

83. These compliance statements were signed by either:

(a) [Facebook Employee 1], Vice President and Associate General Counsel and Acting Chief Compliance Officer (July to December 2020 statements);

(b) [Facebook Employee 2], Vice President of Legal Risk Management (January to February 2021 statements); or

(c) [Facebook Employee 3], Vice President, Deputy General Counsel and Chief Compliance Officer (March to June 2021 statements).

84. The accompanying side letters with qualifications were signed by Facebook's external legal advisors at Latham & Watkins LLP.

85. The side letter accompanying Facebook's first compliance statement on 23 June 2020 stated that '*absent a derogation, the IEO currently applies to Facebook on a global basis*' and '*[t]he absence of a final CMA decision with respect to Facebook's Derogation Requests [dated 10 June 2020] has made it necessary for Facebook to set out in this letter a number of qualifications…*'[61]

86. Following the submission of Facebook's second compliance statement with an accompanying side letter with qualifications on 7 July 2020, the CMA emailed Facebook on 9 July 2020 expressing its concerns regarding Facebook's approach to the submission of its compliance statements. The CMA noted as follows:

'We are concerned that Facebook appears to be seeking to qualify its compliance with the IEO in circumstances where either Facebook has not requested, or Facebook has requested, but the CMA has not granted, derogation requests to limit the application of certain provisions of the IEO to the Facebook business.'

87. The CMA also expressly noted in this email that '*compliance with the IEO should be certified by the Chief Executive Officer (or another person agreed by the CMA), and that qualifications should not be provided separately by the Parties' external advisors…*'

88. Facebook continued to qualify its compliance statements with letters signed by its external advisors, Latham & Watkins. The CMA reminded Facebook by subsequent letter dated 7 August 2020 of its obligations regarding the

[60] Following the CMA's grant of the Carve-Out Derogation, Facebook submitted a compliance statement on 13 July 2021 without an accompanying side letter containing qualifications.
[61] Letter accompanying the compliance statement of 23 June 2020, page 3.

submission of compliance statements in the form required under the IEO and the possible consequences of a failure to comply. The CMA also reiterated that it remained concerned that Facebook was continuing to qualify its compliance with the IEO in circumstances where Facebook had requested, but the CMA had not yet granted, derogation requests to limit the application of certain provisions of the IEO to the Facebook business. The CMA also encouraged Facebook to work with the Monitoring Trustee in order to implement arrangements which would allow Facebook to certify its full compliance with the IEO.

89. Facebook continued to provide compliance statements qualified by letters from its external advisors, Latham & Watkins. The CMA's concerns were further repeated by letter dated 11 December 2020. This letter warned Facebook that '*Paragraph 7 [of the IEO] does not permit the unilateral modification or qualification of compliance statements by Facebook*' and '*in materially qualifying the compliance statements, each of Facebook, Tabby Acquisition and Facebook UK may have failed to comply with their obligations under paragraph 7 of the IEO*'. The CMA provided the following steer to Facebook on its compliance statements:

'the CMA would strongly encourage Facebook to engage with the Monitoring Trustee in order to implement the necessary arrangements which would allow Facebook to certify its full compliance with the IEO and avoid any further potential breaches. At a minimum (and subject to further discussions between Facebook and the CMA on any derogations to the IEO), the CMA would expect that, rather than qualifying its compliance in line with derogation requests which have not yet been granted, Facebook set out details of any actions taken since the IEO came into force which would fall under paragraphs 4 and 5 of the IEO to the extent that those actions relate to "Gif-related Activities" as defined in the CMA's notice issued under section 109 of the Enterprise Act 2002 on 4 December 2020.'[62]

90. In this letter, the CMA also expressed concern that Facebook had been providing information to the Monitoring Trustee as though the Updated COD Request had been granted, similar to its approach regarding the submission of compliance statements to the CMA in a qualified form. The CMA noted that Facebook had provided the Monitoring Trustee with certifications from certain individuals within the Facebook business on a fortnightly basis to enable the Monitoring Trustee to monitor Facebook's compliance with the IEO that were qualified, failing to capture all of Facebook's obligations under the IEO, and

[62] CMA letter of 11 December 2020, pages 7 to 8.

therefore not allowing the Monitoring Trustee to monitor Facebook's compliance with the IEO in the form in which it was issued.

91. Facebook continued to provide compliance statements qualified by letters signed by its external advisors, Latham & Watkins. In the letter accompanying Facebook's IEO compliance statement of 22 December 2020, Facebook's response to the CMA's concerns was that, absent the granting of a derogation which reduced the scope of the IEO, '*it remains the case that Facebook is forced to continue to submit qualified compliance statements.*' The CMA sent Facebook a further warning on 6 January 2021 by email, stating '*We also acknowledge receipt of your response to our warning letter [dated 11 December 2020] regarding Facebook's approach to qualifying its compliance statements. We are considering these representations, though at this stage continue to consider that Facebook's approach may be in breach of the IEO*'.

92. Facebook similarly justified its approach in its letter to the CMA dated 15 March 2021 regarding its Updated COD Request, in which it submitted that it was left with *'no option but to qualify its compliance with the IEO'* pending the granting of its requested derogations. Facebook repeated this position in its letter dated 1 April 2021, where it stated that granting its Updated COD Request will enable Facebook to no longer qualify its compliance with the IEO.

93. Facebook qualified 27 compliance statements in total covering the reporting period of just over a year (9 June 2020 to 29 June 2021). Broadly, Facebook qualified these compliance statements as follows:

    (a) In the reporting period of 9 June to 8 December 2020, Facebook reported compliance on the basis of a limited application of paragraphs 5(d) and 5(e) of the IEO to 'Facebook's Core Services' (as defined by Facebook),[63] and paragraphs 8(a) to 8(d) of the IEO to Facebook's Core Services or to those services as they relate to the development, supply or procurement of GIFs, when no such derogation had been granted;

    (b) In the reporting period of 8 December 2020 to 29 June 2021, Facebook reported compliance on the basis of a limited application of paragraphs 4(b), 5(d), 5(e), and 8(a) to 8(d) of the IEO to those parts of the Facebook business engaging in 'GIF-related Activities' (as defined by Facebook),[64] when no such derogation had been granted;

[63] 'Facebook Core Services' was defined in Facebook's qualification letters as Facebook (plus Facebook Messenger), Instagram and WhatsApp services in the reporting period of 9 June to 10 November 2020. After 11 November 2020, this term also included Workplace services.
[64] In the qualification letters accompanying Facebook's IEO compliance statements dated 22 December 2020 and 12 January 2021, Facebook stated that it has '*always maintained that, at most, the IEO should continue to*

(c) In the reporting period of 9 June 2020 to 29 June 2021, Facebook reported compliance on the basis of a limited application of paragraph 4(b) of the IEO to 'wholly-owned subsidiaries' or specific Facebook subsidiaries, when no such limitation to the IEO's definition of 'subsidiary' had been agreed with the CMA;

(d) In the reporting period of 9 June to 8 December 2020, Facebook reported compliance on the basis of a limited application of paragraph 5(c) of the IEO to substantive changes to Facebook's senior officers or heads of Instagram and WhatsApp and Facebook Inc. In the reporting period of 9 December 2020 to 29 June 2021, Facebook amended its qualification by limiting the application of paragraph 5(c) to GIF-related Activities (as defined by Facebook);[65] and

(e) In the reporting period of 9 June 2020 to 1 June 2021, Facebook reported compliance with paragraph 5(i) of the IEO on the basis of a limited definition to senior officers of Facebook and the heads of Instagram and WhatsApp, when no such limitation to the definition of key staff had been agreed with the CMA.

94. Following the granting of the Carve-Out Derogation, on 20 July 2021 Facebook submitted its compliance statement for the period 30 June to 13 July 2021 without qualifications.

Assessment of Facebook's submissions

95. The CMA has carefully considered Facebook's submissions to date in relation to this breach by reference to the evidence and responds to the submissions made by Facebook below. For ease of presentation, Facebook's submissions have been grouped into the following sections, which are addressed in turn:

(a) The necessity and reasonableness of qualifying compliance statements;

(b) The CMA's engagement with Facebook;

(c) Facebook's overall compliance programme; and

(d) Interactions with the Monitoring Trustee.

apply to its GIF-related activities (described in Facebook's [Carve-Out Request] as "the procurement or supply of GIFs and stickers") -- and has certified its compliance in line with that…'

[65] *Ibid*.

(a) The necessity and reasonableness of qualifying compliance statements

96. Facebook has made various submissions that qualifying its compliance statements was necessary and reasonable for the following reasons:

(a) Novel aspects of law were only clarified in the judgment of *Facebook v CMA (CoA),* including that the CMA's interim measures powers extend only to actions which might be causally related to the merger;[66]

(b) Practical challenges with the template IEO meant unqualified compliance was '*impossible*' without halting large parts of the global Facebook business which were mostly unrelated to the Merger and GIF-related Activities;[67]

(c) In any event, Facebook's approach to compliance (from December 2020) was the same as what was consented to in the Carve-Out Derogation;[68] and

(d) The CMA's approach to narrowing Facebook's IEO obligations differed to other mergers where a derogation was granted quickly or limited the IEO's application to the UK.[69]

The judgment in Facebook v CMA (CoA)

97. Facebook submitted that the Court of Appeal has now clarified the meaning of pre-emptive action in section 72(8) of the EA02 and scope of the CMA's interim measures powers, to extend to actions which might be causally related to the merger.[70] Facebook submitted that, had this been known to it at the time the IEO came into effect, or been made known to Facebook by the CMA, it would have reduced the literal scope of the IEO such that qualified compliance would not have been necessary.

98. The CMA does not agree that the Court of Appeal clarified the meaning of section 72(8) of the EA02 in the manner submitted by Facebook, nor does it consider that the Court of Appeal's findings on the proper interpretation of section 72 of the Act provide Facebook with a reasonable excuse for non-compliance with paragraph 7 of the IEO.

99. In *Facebook v CMA*, Facebook contended that the definition of 'pre-emptive action' is '*essentially grounded exclusively in the question of remedies'*. The CMA disagreed with this interpretation. In the CMA's consistent view,

[66] Preliminary Response, page 4; Provisional Penalty Decision Response, paragraphs 1.16 to 1.20.
[67] Preliminary Response, page 3; Provisional Penalty Decision Response, paragraph 1.3 and 1.7.
[68] Preliminary Response, page 7; Provisional Penalty Decision Response, paragraph 1.3.
[69] Provisional Penalty Decision Response, paragraph 1.12.
[70] Preliminary Response, page 4; Provisional Penalty Decision Response, paragraph 1.17.

the concept of 'pre-emptive action' was broader than this, encompassing both action that might prejudice the reference or impede the taking of any remedial action. However, it was never in dispute that section 72 of the EA02 applies to conduct that may be taken in connection with or as a result of the merger.

100. At paragraph 124 of its judgment, the Tribunal rejected Facebook's interpretation of section 72 of the EA02 and endorsed the CMA's approach:

'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]'

101. The Court of Appeal recognised (at paragraph 52) that:

'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. 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.'

102. The first part of paragraph 56 of the Court of Appeal's judgment, which continues to respond to Facebook's criticism of the Tribunal's approach to the meaning of 'pre-emptive action' set out in paragraph 124, has been omitted from citation in the Preliminary Response at page 4. Paragraph 56 of the Court of Appeal's judgment states 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.' (emphasis added)

103. There was, accordingly, no 'narrowing' of the legal interpretation of section 72 of the EA02 by the Court of Appeal. Rather, the Court of Appeal recognised, following submissions by Counsel for the CMA, that in its judgment the Tribunal was referring to harm in connection with or as a result of the merger – that was the context in which paragraph 124 of the Tribunal's judgment arose.[71] Counsel for the CMA made clear that paragraph 124 of the Tribunal's judgment did not require amending to relate specifically to the merger, as the statutory language used in section 72 of the EA02 is 'prejudice to the reference', such that it must obviously relate to the merger.

104. Accordingly, there was no shift in the legal interpretation of section 72 of the EA02 before the Court of Appeal. The Court of Appeal affirmed that the position had always been that the CMA could regulate any activity the merging parties might take in connection with or as a result of the merger that had potential to affect the competitive structure of the market during the merger investigation based on the statutory language used in section 72 of the EA02, as reflected in the Tribunal's judgment.

105. Facebook further submitted that it does not seek to rely on an incorrect interpretation of the EA02 as a reasonable excuse for non-compliance with the IEO; rather, it noted that this '*important clarification'* in respect of the CMA's interim measures powers is '*not in the CMA's guidance, it is not in the template IEO and the CMA did not make Facebook aware of this prior to its Counsel making this concession (or at least clarification) in proceedings before the Court of Appeal'.* Facebook submitted that had it been made known to Facebook, '*it would have been open to it to take a different approach to certifying compliance'.*[72]

106. Facebook also submitted that the point was further demonstrated by the CMA's application of the IEO in this case, and that '*at no stage did the CMA indicate that only '**Key Staff'** changes causally related to the merger should be restricted by the IEO'.*[73] Facebook's view is that the CMA required derogations to effect actions that have '*manifestly nothing to do with the transaction'* and *'the IEO obligations are manageable where the scope of the IEO is limited to Facebook's GIF-related Activities (as potentially related to the*

[71] See Court of Appeal proceedings transcript day 2, page 30, in *Facebook v CMA (CoA)*.
[72] Provisional Penalty Decision Response, paragraph 1.18.
[73] Provisional Penalty Decision Response, paragraph 1.19 and 3.11 to 3.12.

transaction), but not so where it applies to all of Facebook's operations globally, across all activities, and without limitation..'.[74]

107. Facebook was warned on multiple occasions by the CMA that its approach to its monitoring and reporting obligations was defective. As set out above, section 72 of the EA02 enables the CMA to impose interim measures in circumstances where it is considering making a reference under section 22 or 33 in relation to a completed or anticipated merger, and for the purpose of preventing pre-emptive action, including 'action which might *prejudice the reference'*. As such, the CMA's interim measures powers must obviously relate to the merger. This wording is reflected in the Recitals to the IEO itself[75] and the CMA's Interim Measures Guidance.[76]

108. Furthermore, section 72 of the EA02 necessarily relates to the potential impact of the action, not the subjective intention behind the action. The IEO is designed to prevent pre-emptive action and the obligations set out in the IEO are clear. The Court of Appeal confirmed that the requirements of section 72 of the EA02 were satisfied by the IEO in paragraph 55 of its judgment:

'[The] 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.'

109. In any event, it is not for Facebook to unilaterally determine the appropriate scope of the IEO. The appropriate way to narrow the scope of the IEO is to apply for derogations and to provide the necessary information to the CMA to support these requests. Facebook describes its conduct as cautious and conservative.[77] As set out in paragraph 33 above, merging parties should indeed take a carefully considered view as to whether their conduct might give rise to reasonable concerns of the CMA. The onus is on Facebook to seek consent if its conduct risks infringing the IEO and appropriately engage with the CMA. Contrary to Facebook's description of its conduct, the Tribunal (endorsed by the Court of Appeal) found that Facebook had adopted a '*high risk strategy*' not to comply with its IEO obligations and not inform the CMA of actions or changes being made to its business that might fall within the scope of the IEO.

[74] Provisional Penalty Decision Response, paragraph 1.20.
[75] The Recitals state: *'(c) the CMA wishes to ensure that no action is taken pending final determination of any reference under section 22 of the Act which might prejudice that reference or impede the taking of any action by the CMA under Part 3 of the Act which might be justified by the CMA's decisions on the reference; .. Now for the purposes of preventing pre-emptive action in accordance with section 72(2) of the Act the CMA makes the following order addressed to Facebook…'*
[76] Interim Measures Guidance, paragraph 1.3 and 1.6. Paragraph 1.6 is cited in *Facebook v CMA (CoA)*, paragraph 54.
[77] Provisional Penalty Decision Response, paragraph 1.19.

Practical challenges with compliance with the IEO

110. Regarding whether unqualified compliance was practically impossible from the outset, as set out at paragraphs 85 and 91 above, Facebook has repeatedly sought to justify its approach to qualifying compliance with the template IEO by submitting that it had '*no option but to qualify its compliance with the IEO*' pending the granting of its requested derogations.

111. As communicated to Facebook in the CMA's letter of 7 August 2020, the Interim Measures Guidance notes that: *'Given the need to impose an IEO quickly in completed mergers, any IEO imposed in these circumstances will almost always take the form of the standard template available on the CMA's website, which will be updated from time to time'.*[78] The CMA has followed this standard practice across all completed merger cases since the publication of the Interim Measures Guidance, including cases involving large, global businesses such as Facebook,[79] in order to ensure that an effective IEO is put in place as quickly as possible and to provide greater factual and legal certainty around the initial scope of the IEO. Facebook did not challenge the legality of the template IEO in its application to the Tribunal.

112. Facebook submitted that the *'insuperable difficulties of applying the CMA's template IEO to the Facebook business globally and across all business operations were recognised by the Tribunal'*[80] and that the subsequent granting of derogations implicitly acknowledges that the IEO was overly broad.[81] The CMA disagrees with these submissions.

113. The Tribunal did not recognise Facebook's *'insuperable difficulties'* in applying the IEO; rather, it recognised that the issues Facebook encountered were of its own making and its conduct *'unsatisfactory'.*[82] Similarly, the Court of Appeal found that Facebook was *'entirely the author of its own misfortune'*.[83]

114. The CMA also disagrees with Facebook's submission it had set out what practical difficulties have occurred, and the precise impact this has had on the Facebook business in the context of its derogation request and related correspondence with the CMA.[84] The information that had been provided by Facebook was not fully specified, reasoned and evidenced and accordingly was insufficient for the CMA to take a decision as to whether it should grant a derogation. Many of the examples provided by [Facebook Employee 1] in her

[78] Interim Measures Guidance, paragraph 2.29.
[79] For example, Google LLC / Looker Data Sciences Google LLC / Looker Data Sciences, Inc merger inquiry - GOV.UK (www.gov.uk), and Amazon.com, Inc, Amazon.com NV Investment Holdings LLC / Roofoods Ltd (Deliveroo) Amazon / Deliveroo merger inquiry - GOV.UK (www.gov.uk).
[80] Preliminary Response, page 3; Provisional Penalty Decision Response, paragraph 1.11.
[81] Preliminary Response, page 11.
[82] *Facebook v CMA*, paragraph 158.
[83] *Facebook v CMA (CoA)*, paragraph 63.
[84] Provisional Penalty Decision Response, paragraph 1.11.

first witness statement[85] were described as 'day-to-day' or 'ordinary course' activity. The IEO already provides for exceptions to certain of its obligations where activities are carried out in the 'ordinary course of business', and Facebook did not explain why a derogation should be granted in respect of activities which fall within this exception.[86] More broadly, Facebook did not explain why certain parts of its business (and staff) should be taken out of the scope of the IEO by way of derogation.

115. As set out in paragraph 36 above, the purpose of the IEO is precautionary and therefore necessarily broad in nature to guard against the possibility of pre-emptive action. While the Tribunal recognised the IEO was broad and needed refinement, it also found that *'It is most unsatisfactory in this case that Facebook has not sought to engage with the CMA and has not provided the CMA with information to ensure that its Carve-Out Requests are resolved so that it can submit unqualified compliance statements'.*[87]

116. In terms of the workability of the IEO, the Chancellor of the High Court in the Court of Appeal observed:

> *'As to workability, as my Lord pointed out earlier ,what is required, as the Tribunal said, what's required is cooperation between the parties and that is an option that your clients were not prepared to do. And they may be cooperating more now, but they certainly weren't cooperating at the time of the Tribunal's judgment… if you cooperated fully with the CMA and were able to demonstrate that actually there are whole chunks of your business that have got absolutely nothing whatsoever to do with GIFs and never will have under any circumstances whatsoever, then that is one thing. But that wasn't the position at the time when these interim measures were imposed…'*[88]

117. As observed by the Chancellor, it was critical that Facebook engage with the CMA and cooperate with its information requests to narrow the scope of the IEO. As outlined in paragraph 39 above, the onus was on Facebook to seek consent if its conduct would otherwise infringe the IEO, and to engage with the CMA by providing (as requested by the CMA on multiple occasions) [89] a fully specified and reasoned derogation request supported by evidence.

[85] First Witness Statement of [Facebook Employee 1], *Facebook v CMA*, 25 August 2020.
[86] Defence of the CMA to the Notice of Application, *Facebook v CMA*, 24 September 2020, paragraph 97. The CMA also did not accept that the defined term 'ordinary course of business' is so '*uncertain and poorly defined*' as to be meaningless.
[87] *Facebook v CMA,* paragraph 159.
[88] Court of Appeal proceedings transcript day 1, pages 82 to 84, in *Facebook v CMA (CoA)*.
[89] See paragraphs 56 and 60 above.

118. In *Facebook v CMA (CoA)*, the Court of Appeal recognised Facebook's failure to engage with the CMA in a way that would have allowed the CMA to narrow the scope of the IEO:

'…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.'[90]

119. The Court of Appeal further found that:

'*…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.*'[91]

120. The CMA recognises that a merger investigation places demands on the parties involved, including the need to monitor and certify compliance with an IEO that has a necessarily wide reach (in particular at the beginning of an investigation due to the information asymmetry between the CMA and the merging parties). This is, however, the necessary corollary of the UK's voluntary regime, and it is incumbent on parties to engage with the CMA and provide the required information to enable the CMA to narrow the scope of an IEO imposed at the beginning of a merger investigation where there are substantial information asymmetries.

121. When Facebook finally engaged appropriately with the CMA on its derogation requests following its failed challenge before the courts, the CMA has been

[90] *Facebook v CMA (CoA),* paragraph 63.
[91] *Facebook v CMA (CoA)*, paragraph 45.

able to grant over a dozen derogations[92] that have narrowed the scope of the IEO, including the Carve-Out Derogation, in complex circumstances where, as Facebook itself recognises, GIFs are *'enmeshed with Facebook, Instagram, WhatsApp, Messenger and Workplace (the "Core Services")'.*[93]

Facebook's approach to compliance and the Carve-Out Derogation

122. Facebook further submitted that it has been approaching compliance with the IEO since December 2020 in the '*same manner as was consented to*' in the Carve-Out Derogation.[94] Facebook submitted that its approach to qualifying compliance statements was *'open, transparent and practical'* and the approach it took was *'ratified by the CMA itself, when it finally granted Facebook's requested derogation in June 2021'*.[95]

123. The CMA does not agree with this characterisation. In fact, Facebook's approach to compliance with the IEO treated the IEO as if its scope had been narrowed significantly **beyond** that which has been subsequently authorised by the CMA (on a prospective basis) under the Carve-Out Derogation. For example, in relation to confirming there have been no changes to Facebook's key staff (paragraph 5(i) of the IEO), Facebook qualified its certification to such an extent that it was merely confirming that there had been no changes to senior officers of Facebook and the heads of Instagram and WhatsApp. This was considerably narrower than the agreed scope of Facebook employees who are still considered key staff following the Carve-Out Derogation. Furthermore, by limiting the certification of compliance with paragraph 5(i) of the IEO to senior officers with operational functions, Facebook excluded the role of Chief Compliance Officer from its certification, a position which was retained as 'key staff' in the Carve-Out Derogation (this is discussed further under Breach 3).

124. Moreover, the CMA's definition of GIF-related Activities (as set out in paragraph 74 above and contained in the Carve-Out Derogation) is much wider than the definition of 'GIF-related Activities' which Facebook proposed in its Updated COD Request, as well as the definition which Facebook applied to its compliance statement qualifications from December 2020 onwards.

125. Facebook's Updated COD Request narrowly defined GIF-related Activities as the procurement/supply of GIFs and procurement/supply/development of stickers via an API integration. In the qualification letters accompanying

[92] See, for example, derogations of 22 December 2020, 8 February 2021, 24 February 2021, 9 March 2021, 16 March 2021, 9 April 2021, 21 April 2021, 7 May 2021, 20 May 2021, 28 May 2021, 4 June 2021, 11 June 2021 and 17 June 2021.
[93] Preliminary Response, page 1.
[94] Preliminary Response, page 7.
[95] Provisional Penalty Decision Response, paragraph 1.9.

Facebook's IEO compliance statements dated 22 December 2020 and 12 January 2021, Facebook also stated that it has '*always maintained that, at most, the IEO should continue to apply to its GIF-related activities (described in Facebook's [Carve-Out Request] as "**the procurement or supply of GIFs and stickers**") -- and has certified its compliance in line with that -- and welcomes the CMA's engagement on this point. Facebook still considers that the CMA's definition is overbroad but is willing to engage immediately with the CMA on these and related issues*' (emphasis added).[96]

126. However, the definition of GIF-related Activities in the Carve-Out Derogation is much broader than Facebook's definitions above. It applies to the procurement, supply or development of 'GIF-related Content', a term which is not limited to only GIFs and stickers.[97] The scope of the term GIF-related Activities also extends without limitation to operational, relationship management, strategic, development, technical or back-office activities or services.

127. Facebook further submitted that its external legal advisers Latham & Watkins had explained to the CMA in the qualification letter accompanying Facebook's IEO compliance statement dated 22 December 2020 that Facebook was '*complying with the relevant paragraphs of the IEO, for which it had requested a carve-out, as it related to GIF-related Activities, applying the CMA's definition*'.[98] Facebook has not substantiated this assertion, nor has it cited the section of the letter which would state this. As set out in paragraph 125 above, Facebook said that it has certified compliance in line with '*the procurement or supply of GIFs and stickers'*. This definition is much narrower than the CMA's definition of GIF-related Activities. The CMA therefore disagrees that Facebook complied with the relevant paragraphs of the IEO in full.

128. In any case, even if Facebook's approach had been entirely consistent with the subsequently granted Carve-Out Derogation, this would not imply compliance with the IEO as it existed at the time. It is not for Facebook to reach its own decisions on what it considers is the appropriate scope of the IEO and act accordingly, prior to any derogation being granted by the CMA (see further paragraphs 238 to 239 below).

[96] Letter accompanying the compliance statement dated 22 December 2020, page 4 and letter accompanying the compliance statement dated 12 January 2021, page 2.
[97] GIF-related Content is defined as non-text content created or shared by users via a social media, social network or messaging platform (including GIFs, stickers (including GIF stickers), emojis, video clips, images and other micro-expression assets).
[98] Provisional Penalty Decision Response, paragraph 1.31.

The application of the CMA's standard template IEO to other mergers

129. As noted in paragraph 111 above, the CMA has previously imposed its standard template IEO in cases involving large, global businesses such as Facebook. Facebook submitted that the CMA's treatment of Amazon,[99] in which it carved out the same paragraphs requested by Facebook four days after the IEO was issued, and Google[100] supports its view regarding the practical challenges of complying with the template IEO.[101]

130. Additionally, the Provisional Penalty Decision Response submitted that the application of the IEO to Facebook's global business was contrary to other cases where the CMA limited the IEO's scope to a global business' UK activities from the outset of the investigation.[102] Facebook further submitted that the CMA has not explained the reason for this difference in approach.

131. Facebook's view is that it is being penalised for '*openly admitting*' that compliance with the standard template IEO across its global business is impossible without causing irreparable harm.

132. Regarding the global application of the IEO obligations on Facebook, Facebook's assertion that the CMA could have limited the IEO's scope to the UK at the outset of the investigation appears to contradict its previous submission. According to Ms [Facebook Employee 1] in her Second Witness Statement, Facebook offers global services, and Facebook apps '*offer a broad range of functionalities generally on a global basis*'.[103] Indeed, Ms [Facebook Employee 1]'s First Witness Statement described the UK qualifier in paragraph 5(d) of the IEO (the only paragraph in the template IEO which is UK-specific) as '*meaningless*' for a business such as Facebook due to its global services, and expectation of Facebook users for these services to be consistent and seamless worldwide.[104] This was further corroborated by Facebook's external counsel at the *Facebook v CMA* Tribunal hearing, where it was submitted that '*one cannot disaggregate the services into UK and non-UK hermetically sealed services*'.[105]

133. In any event, and as recognised by the Court of Appeal (as set out at paragraph 118 above), Facebook failed to engage with the CMA in a way that would have allowed the CMA to narrow the scope of the IEO. Two days after

[99] Amazon.com NV Investment Holdings LLC / Roofoods Ltd (Deliveroo) Amazon / Deliveroo merger inquiry - GOV.UK (www.gov.uk).
[100] Google LLC / Looker Data Sciences Google LLC / Looker Data Sciences, Inc merger inquiry - GOV.UK (www.gov.uk).
[101] Provisional Penalty Decision Response, paragraph 1.12.
[102] Provisional Penalty Decision Response, paragraph 1.7.
[103] Second Witness Statement of [Facebook Employee 1], *Facebook v CMA*, 9 October 2020, paragraph 15.
[104] First Witness Statement of [Facebook Employee 1], *Facebook v CMA*, 25 August 2020, paragraph 12(c).
[105] See Tribunal proceedings transcript day 1, page 14, lines 20 to 24 in *Facebook v CMA*. See also Tribunal proceedings transcript day 1, page 11, lines 17 to 22 in *Facebook v CMA*.

Facebook submitted the Carve-Out Request, the CMA requested Facebook to provide a fully specified and reasoned request supported by relevant evidence, in line with its standard approach as outlined in the Interim Measures Guidance.[106] The CMA clearly stated in its letter of 7 August 2020 that, to the extent that Facebook was seeking to carve out parts of the Facebook business with no relevance to Facebook's activities in the UK, Facebook needed to provide sufficient information of its relevant businesses in order for the CMA to reach a view, in accordance with the Interim Measures Guidance.[107] The Court of Appeal (as set out in paragraph 118 above) also found that the CMA can only properly consider representations in respect of derogations if merging parties cooperate by answering the CMA's reasonable questions, and Facebook failed to do so.

134. With respect to the application of an IEO to Amazon, the CMA has previously explained to Facebook that the circumstances in Amazon/Deliveroo are not comparable to the present case. Amazon/Deliveroo was an anticipated acquisition of a minority shareholding where no integration had taken place and the risk of pre-emptive action was low. This contrasts with the facts of this Merger, which is a completed acquisition where Giphy was substantially integrated into Facebook before the imposition of the IEO.[108]

135. With respect to the application of an IEO to Google, Facebook submitted that the CMA had taken a less stringent approach in applying the IEO to Google, having found a way of ensuring the IEO requirements could be satisfied in light of the commercial challenges faced by global businesses of the size and scale of Google, and that the CMA had not explained why such an approach could not have been taken with Facebook.

136. Where the CMA imposes an IEO, paragraph 1.8 of the Interim Measures Guidance requires the CMA to act proportionately and have regard to the necessity of preventing pre-emptive action which might prejudice the outcome of a reference or impede the taking of any appropriate remedial action. The CMA assesses what is necessary to achieve this in each case based on the facts available to the CMA at any given time. The CMA's approach to the IEO imposed on Alphabet/Google in the Google/Looker case was informed by the specific facts of the case and the CMA's assessment of the risks of pre-emptive action.

137. As recognised by the Tribunal and the Court of Appeal (as set out in paragraph 118 above), Facebook failed to engage with the CMA in a manner that would have reduced the compliance burden. Even where the CMA

[106] Paragraphs 52 and 56 to 57 above.
[107] CMA letter of 7 August 2020, paragraph 52.
[108] See paragraphs 53 and 62(a) above.

provided guidance (as set out in paragraph 89 above), which was specific to Facebook and the Merger, on how Facebook could certify compliance without qualification letters, Facebook chose to continue qualifying its compliance statements.

(b) The CMA's engagement with Facebook

138. Facebook submitted that:

(a) the CMA's lack of clarity on its position on limiting the template IEO in respect of parts of the Facebook business led Facebook to believe that the CMA would not consent to derogation requests where there was any overlap with Giphy's pre-Merger activities. Facebook stated that from its perspective, a carve-out of any aspect of Facebook's 'Core Services' (comprising Facebook, Messenger, Instagram, WhatsApp and Workplace) was therefore impossible from the outset;[109]

(b) the CMA ultimately did not require – or substantially modified – the information set out in paragraph 3.44 of the Interim Measures Guidance as originally requested prior to granting the Carve-Out Derogation;[110] and

(c) the CMA has acted with delay in assessing the Updated COD Request and that it should not be penalised for any period in which the CMA deliberated on Facebook's detailed requests, particularly in the '*unique circumstances*' of the case.[111]

139. Regarding Facebook's submission outlined in paragraph 138(a), Facebook submitted it believed that the CMA's position on the Carve-Out Request was that no derogation from the IEO could be granted to parts of Facebook's business which had any links to Giphy.[112] This submission does not relate to whether there was a failure to comply with the IEO; rather, it concerns whether Facebook has a reasonable excuse for not complying.

140. Facebook also submitted in this context that the CMA failed to correct Facebook's apparent misunderstanding of its position prior to the proceedings in *Facebook v CMA*, and that the CMA only clarified its position in the course of the proceedings where the CMA stated in its skeleton argument that '*the CMA may be prepared to carve out certain areas of the acquirer business in*

[109] Preliminary Response, page 6; Provisional Penalty Decision Response, paragraph 1.8.
[110] Preliminary Response, page 6; Provisional Penalty Decision Response, paragraph 1.21.
[111] Preliminary Response, page 7; Provisional Penalty Decision Response, paragraphs 1.26 to 1.30.
[112] Preliminary Response, page 5. The quote of this correspondence is set out in paragraph 62(b) above.

spite of such links, provided that doing so would not give rise to the risk of pre-emptive action.'[113,114]

141. The CMA notes that this is a selective quote and the sentences immediately following state, '*That may be achieved by, for example, giving thought as to other procedural safeguards that could be imposed, as envisaged by §3.16 of the Guidance. In this case, however, Facebook has simply failed to give the CMA the information it requires to make that assessment.*'[115] The CMA has been consistently clear in its position on granting derogations to limit the obligations under the template IEO, having regard to the Interim Measures Guidance at all times. Nothing in the Interim Measures Guidance says that the CMA will refuse to grant derogations in the circumstances described by Facebook. On the contrary, the Interim Measures Guidance envisages that in spite of such links certain parts of an acquirer business may be carved out provided that doing so would not give rise to the risk of pre-emptive action, and that it may do so by giving thought to other procedural safeguards that could be imposed – for example, paragraph 3.16 of the Interim Measures Guidance. The quote from the CMA's letter of 2 July 2020 set out above at paragraph 62(b) provides that the CMA would not consent to remove Facebook or any parts of its business from the scope of the provisions of the IEO unless it was satisfied that *'the activities of Facebook were unrelated to Giphy's pre-Merger activities […] such that there is no prejudice to the outcome of a reference or impediment to the taking of any appropriate remedial action'*. It was not reasonable for Facebook to read into this that no carve-out derogation would be granted.

142. Moreover, on multiple occasions, the CMA has provided guidance explaining its procedure and approach to assessing derogation requests to assist Facebook and its legal advisers.[116]

143. Not only has the CMA's position remained consistent and in line with the Interim Measures Guidance, Facebook did not make efforts to provide the CMA with the necessary information needed (as set out in paragraphs 63 to 64 above) to form a view on the Carve-Out Request or consider whether alternative arrangements such as procedural safeguards could be implemented. Prior to the Tribunal proceedings, the CMA made it clear that it was unable to reach a view on the Carve-Out Request in light of its broad

[113] Preliminary Response, page 5; Provisional Penalty Decision Response, paragraph 1.8.
[114] CMA's skeleton argument in *Facebook v CMA,* 15 October 2020, paragraph 52.c.iv.
[115] *Ibid*.
[116] See the CMA's (1) email of 12 June 2020 (2) email of 22 June 2020 (3) letter of 2 July 2020 (4) letter of 7 August 2020. Quotes from this correspondence are set out at paragraphs 56 to 57, 60, 63, and 65 to 67.

nature, the continuing absence of information and evidence requested from Facebook, and having regard to the Interim Measures Guidance.[117]

144. The subsequent granting of derogations by the CMA is the direct result of Facebook submitting requests which were (ultimately, following Facebook's failed challenge before the courts) fully specified, reasoned, and supported by relevant evidence. The CMA was unable to grant derogations without the necessary information from Facebook to determine whether the request met the criteria set out in the Interim Measures Guidance. Indeed, the CMA granted the Carve-Out Derogation after it had received the necessary evidence required to form a view. Therefore, the CMA's approach has been consistent with the position set out in the CMA's correspondence to Facebook (see paragraphs 60 and 62(b) above) and Facebook's submission in paragraph 139 above is unfounded. This submission cannot form the basis for a reasonable excuse for Facebook's conduct.

145. Regarding Facebook's submission outlined in paragraph 138(b) above, Facebook submitted that the CMA's initial requests to provide information set out in paragraph 3.44 of the Interim Measures Guidance was '*entirely untethered*' to its approach and ability to grant derogations. By ultimately granting the Carve-Out Derogation, Facebook submitted that the CMA departed from the '*requirements*' of paragraph 3.44 of the Interim Measures Guidance because this information had no bearing on the granting of the Carve-Out Derogation.[118]

146. Firstly, the CMA does not consider this submission to be relevant to the question of whether there is a breach or reasonable excuse, nor the appropriateness of imposing a penalty in this case or its quantum. As noted by the Tribunal and Court of Appeal, the onus was on Facebook to scrupulously comply with the IEO, and cooperate with the CMA's information requests to determine the scope of the IEO (see above paragraphs 39 and 117). In fact, in *Facebook v CMA (CoA)*, the judgment states that '*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***' (emphasis added).[119]

147. For the avoidance of doubt, the CMA does not agree with the characterisation of its information requests and how it has considered the information received. Paragraph 3.44 of the Interim Measures Guidance states that merging parties requesting derogations need to '*delineate clearly the parts of the merging parties' businesses that respectively do, and do not, engage in activities*

[117] CMA letter of 7 August 2020, paragraph 4.
[118] Provisional Penalty Decision Response, paragraph 1.21.
[119] *Facebook v CMA*, paragraph 64.

related to each other'. As set out in paragraph 62(c), above, in its correspondence with the CMA in relation to the Carve-Out Derogation Facebook simply asserted that there was no horizontal overlap without providing any information which would have allowed the CMA to form a view. As submitted by Facebook, it did not provide the information specified under paragraph 3.44 of the Interim Measures Guidance when it submitted the Updated COD Request.[120] However, contrary to Facebook's submission, the CMA has never stated that it '*no longer required this information*',[121] nor does the CMA accept the submission that '*this information had no bearing on the derogations ultimately granted by the CMA*'.[122] In fact, through various requests for information under section 109 EA02 notices, the necessary information was eventually obtained by the CMA and informed the decision to grant derogations such as the Carve-Out Derogation.

148. The CMA notes that the information listed under paragraph 3.44(a) to (g) of the Interim Measures Guidance are examples intended to assist merging parties by illustrating which parts of their businesses overlap with each other.[123] The information requested by the CMA in section 109 EA02 notices was in line with these examples.

149. For example, questions 2(a) to (d) of the CMA's section 109 EA02 notice dated 4 December 2020 requested Facebook to identify which of its subsidiaries engaged in GIF-related Activities (as defined by the CMA and set out in paragraph 74 above) were involved in:[124]

    (a) activities related to GIF-related content API integrations (both public and private), their development and upkeep, and the associated relationship with any third party connected via the API,

    (b) activities related to the supply, procurement and/or development of GIF-related content, whether by API integration or otherwise, including without limitation any R&D activities regarding new forms of GIF-related content, IP-related activities and licensing activities,

    (c) activities related to the engineering, maintenance, integration and presentation of GIF-related content within Facebook's Core Services, and

[120] Preliminary Response, page 6.
[121] *Ibid*.
[122] Provisional Penalty Decision Response, paragraph 1.21.
[123] See CMA letter dated 7 August 2020, footnote 47, which states that '*Paragraph 3.44 clearly sets out that 'Merging parties requesting derogations on this basis will be required to delineate clearly the parts of the merging parties' 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'.* ***Examples are provided in sub-paragraphs (a) to (g) of evidence that the merging parties would be expected to provide***.' (emphasis added)
[124] Each response required a description of the teams or business units involved in the activity and an estimate of the number of employees identified by name, role, and function (including key staff) involved in these activities.

(d) supporting services (eg compliance, data protection, legal, engineering, technical, analytical etc) to the parts of the Facebook business engaged with GIF-related content activities.

150. Additionally, and further to Facebook's response to the above, questions 1, 2, 4 and 6 of the CMA's section 109 EA02 notice dated 6 January 2021 requested Facebook to:

(a) set out which Facebook subsidiaries hold confidential information relating to Giphy which was transferred to Facebook in the context of the Merger (including both prior and following the imposition of the IEO),

(b) confirm whether any Facebook subsidiaries which have been identified as data centres for data storage are party to a contract between Facebook and any third party engaged in GIF-related Activities (as defined by the CMA and set out in paragraph 74 above),

(c) confirm whether any Facebook subsidiaries identified as only carrying out GIF-related Activities (as defined by the CMA and set out in paragraph 74 above) on an 'ad-hoc' or 'de minimis' basis acted as the employing entity for any of Facebook's key staff engaged in GIF-related Activities (as defined by the CMA and set out in paragraph 74 above), and

(d) describe the engineering support provided by Facebook UK Limited and confirm whether this support related to GIF-related Activities (as defined by the CMA and set out in paragraph 74 above).

151. The requested information set out above directly relates to the examples set out in paragraph 3.44 of the Interim Measures Guidance:

(a) The requested information in paragraph 149(a) is relevant to whether the viability or competitive capability of the 'related' business (ie the business which will remain subject to the IEO) is not dependent on the 'non-related' business (ie the business for which a derogation is sought) (paragraph 3.44(a));

(b) The requested information in paragraph 149(b) is relevant to whether the tangible and intangible assets (including intellectual property rights) of the 'related' business are not also used by the 'non-related' business (paragraph 3.44(c));

(c) The requested information in paragraph 149(c) and 150(c) is relevant to whether staff from the 'related' business do not interact with staff from the 'non-related' business or have dual responsibilities (paragraph 3.44(b));

(d) The requested information in paragraph 149(d) and 150(a) is relevant to whether the provision of back-office support functions (such as accounting, legal, HR and procurement) to the 'related' and 'non-related' businesses does not give rise to a risk that commercially-sensitive, confidential or proprietary information of the 'related' business can flow back to the 'non-related' business (paragraph 3.44(e));

(e) The requested information in paragraph 150(b) is relevant to whether the tangible and intangible assets (including intellectual property rights) of the 'related' business are not also used by the 'non-related' business (paragraph 3.44(c));

(f) and the information in paragraph 150(d) is relevant to whether staff from the 'related' business do not interact with staff from the 'non-related' business or have dual responsibilities (paragraph 3.44(b)).

152. In addition, as outlined in paragraph 138(c) above, Facebook submitted that the delay in resolving the Updated COD Request was caused by the CMA, and it would be unreasonable that any fine for non-compliance with the IEO should be levied for any period after 23 November 2020 (ie the date of the Updated COD Request), or for the entire period prior to the CMA granting the Updated COD Request.[125] As set out below, the CMA considers that (i) any alleged delay is irrelevant to the question of whether there has been a breach or whether Facebook had a reasonable excuse for it; and (ii) the CMA took a decision as soon as reasonably practicable after obtaining the necessary information to reach a decision on the Updated COD Request. Facebook's submission that the penalty should be calculated according to a shorter period of time is addressed in Section E (Appropriateness of imposing a penalty and of the amount of the penalty imposed).

153. Firstly, the CMA does not consider that any alleged delay caused by the CMA is relevant to the question of whether there has been a breach or whether Facebook had a reasonable excuse for its failure to comply with the IEO.

154. The CMA will address the factual aspects of Facebook's position on the time taken to consider the Updated COD Request in this section. The time in which the CMA considered the request does not change the fact that Facebook decided to submit qualified compliance statements from the time when the IEO was issued, and not as a result of alleged delay by the CMA to consider its request. As set out in paragraph 120 above, it is a necessary corollary of the UK's voluntary merger regime that merging parties need to monitor and certify compliance with an IEO that has a necessarily wide reach, particularly where there are substantial information asymmetries at the beginning of a

[125] Preliminary Response, page 7; Provisional Penalty Decision Response, paragraph 1.30.

merger investigation. Although the CMA recognises the demands placed on the parties, this does not justify qualified compliance, and the CMA clearly expressed its concerns with Facebook's compliance approach (see paragraphs 86 to 88 above) and the necessity of engaging with the derogations process (see paragraphs 56 to 57 and 60 above) from the outset.

155. Indeed, the Tribunal referred to this as a '*high risk strategy*' and the Court of Appeal found that Facebook was '*entirely the author of its own misfortune*' by failing to engage with the CMA. For the avoidance of doubt, the CMA considers that it gave clear guidance on the CMA's expectations for Facebook's compliance with its obligations to provide compliance statements, including in the period pending the CMA's review of the Updated COD Request.[126] This guidance was specific to Facebook and would have reduced the compliance burden, however Facebook chose to continue providing qualified compliance statements.

156. Additionally, the CMA disagrees with the characterisation that it has acted with delay in assessing Facebook's derogation requests. The CMA has a duty under section 72(7) of the EA02 to consider *'as soon as reasonably practicable'* representations in relation to varying an IEO. However, it would be a dereliction of its statutory duties if it simply accepted Facebook's representations and assertions at face value and granted its requests on that basis.[127]

157. The CMA has taken the necessary time to carefully assess the derogation requests in this case, which Facebook itself recognises to be '*unusual'* given the digital *'entanglements'* between the businesses of the Parties and the fact that Facebook does not have a separate GIF division or persons dedicated solely to the procurement, supply or development of GIF content.[128]

158. In the Provisional Penalty Decision Response, Facebook includes a timeline setting out a list of correspondence between the CMA and Facebook and the time in which the CMA considered the Updated COD Request. The CMA notes that this timeline excludes certain correspondence and context – to that end, a revised timeline is set out in Appendix 2 – and therefore fails to convey the fact that the CMA was considering the Updated COD Request, and each subsequent submission made by Facebook in relation to it until May 2021, as soon as reasonably practicable.

[126] See paragraph 89 above.
[127] See *Facebook v CMA* at paragraph 128: '*The Tribunal agrees with the CMA that it is not necessarily bound to accept assertions made by merging parties without further verification ... The CMA is under a duty to acquaint itself with the relevant information to enable it to assess whether there is a risk of pre-emptive action*'.
[128] Preliminary Response, pages 1 to 2.

159. In particular, Facebook's timeline fails to take into account or mention the following important details:

(a) The Carve-Out Derogation granted by the CMA was not '*conceptually identical*' to the Carve-Out Request or the Updated COD Request, as submitted by Facebook.[129] There were significant differences between the two requests: as set out in paragraph 52(e) and 58 above, the Carve-Out Request sought a blanket exemption of certain IEO obligations to the Facebook business. The Updated COD Request is narrower in scope to address specific pre-emptive action concerns raised by the CMA during the Tribunal hearing in *Facebook v CMA*.[130] However, there were still several outstanding concerns that needed to be addressed before the CMA could be in a position to grant a derogation based on the concept of GIF-related Activities (as defined by the CMA). Therefore, following the Updated COD Request made in November 2020, the CMA and Facebook engaged in correspondence so as to refine the derogation request until reaching the position on which the Carve-Out Derogation is based. The last correspondence from Facebook in this respect is dated 13 May 2021.

(b) Facebook's calculation of the time taken for the CMA's consideration of matters relating to the Updated COD Request for the period between 23 November 2020 and 13 May 2021 is incomplete and does not provide a full picture of the correspondence between the CMA and Facebook to refine the derogation request. For example, Facebook calculated the amount of time taken for the CMA to respond to Facebook's letter of 15 March 2021, and only acknowledged its additional letter of 1 April 2021 in a footnote. As mentioned in the CMA's response dated 27 April 2021, Facebook's letter of 1 April 2021 requested that the CMA grant a broader form of derogation to that proposed before the CMA was able to respond to the 15 March 2021 letter.[131] This necessarily required further consideration by the CMA prior to responding to Facebook.

(c) Facebook's timeline also omitted its letter of 21 April 2021. This letter provided the CMA with an update on employees who recently began working on GIF-related Activities and whom Facebook proposed to designate as key staff. This letter contradicted Facebook's position (as stated in its letter of 15 March 2021) that this requirement to monitor changes to any member of staff carrying out GIF-related Activities on an ongoing basis is practically impossible and unreasonable.[132]

[129] Provisional Penalty Decision Response, paragraph 1.27.
[130] CMA letter of 27 April 2021, paragraph 22 and the Updated COD Request, page 2.
[131] CMA letter of 27 April 2021, paragraph 7.
[132] Facebook's letter of 15 March 2021, page 5 and CMA letter of 27 April 2021, paragraphs 40 to 44.

(d) As mentioned to Facebook in the CMA's letter of 27 April 2021, not only did Facebook initially fail to respond to the CMA's letter of 19 February 2021 for over three weeks, Facebook's response did not address all of the CMA's issues.[133] To that end, the CMA made various proposals in its letter of 27 April 2021 to resolve the outstanding issues.[134]

160. Moreover, the CMA's approach of considering the Updated COD Request in stages (as set out in paragraph 73 above) enabled it to grant derogations which excluded unrelated Facebook subsidiaries without delay while discussions regarding the application of the IEO to the remaining Facebook subsidiaries involved in GIF-related Activities continued.[135] This approach was consistent with Facebook's request to consider granting derogations on a 'rolling basis'.[136]

161. Facebook submitted that the CMA's sequenced approach to considering the Updated COD Request was inconsistent with Facebook's expectation that all aspects of the request would be considered in parallel.[137]

162. The CMA notes that this submission is inconsistent with the correspondence between the CMA and Facebook at the time of the Updated COD Request. This is summarised in the CMA's letter of 27 April 2021:

'… in its [Updated COD Request], Facebook requested that the CMA grant derogations on a "rolling basis". The CMA discussed this and agreed on such an approach during the call with Latham & Watkins on 2 December 2020. In accordance with this request, the CMA focused initially on Derogation 1 of the Revised COD Request and granted derogations in relation to approximately 270 Facebook subsidiaries on 22 December 2020, 8 February 2021 and 24 February 2021 following the provision of the necessary information by Facebook ...'[138]

163. The agreement regarding the approach is also corroborated by the Latham & Watkins email dated 11 December 2020:

'The case team agreed that it would consider granting the [Updated COD Request] on a rolling basis utilising these categories…'

164. The CMA therefore disagrees with Facebook's submission that any delay in the granting of the Carve-Out Derogation was caused by the CMA or occurred in circumstances where Facebook fully engaged with the CMA. The CMA has

[133] CMA letter of 27 April 2021, paragraph 15.
[134] For example, see CMA letter of 27 April 2021, paragraphs 29, 39 and 74.
[135] As set out at paragraphs 74 to 76 above.
[136] Paragraph 71 above.
[137] Provisional Penalty Decision Response, paragraph 1.28.
[138] CMA letter of 27 April 2021, paragraph 14.

taken the necessary time to carefully assess the derogation requests in this case, with regards to the unique challenges of the conceptual nature of the request, taking decisions as soon as reasonably practicable. The CMA has agreed an approach with Facebook to the granting of derogations precisely in the interests of reducing the compliance burden without unnecessary delay. The CMA has maintained this approach even in the face of incomplete or conflicting correspondence from Facebook. As expressed by the CMA in its letter of 27 April 2021, '*it is clear that any delay in granting Facebook's derogation requests is the consequence of Facebook's persistent failure to engage with and respond to the CMA's reasonable requests for information, together with significant changes to the scope of the derogation request since the Tribunal's Judgment*'.[139]

(c) Facebook's overall compliance programme

165. Facebook submitted that it has always been and remains committed to compliance with the IEO. Facebook claims to have adopted a 'risk-based approach' to its compliance to manage the IEO's broad obligations and certify compliance on activities relevant to the Merger, and that this approach is consistent with the CMA's draft revised Interim Measures Guidance.[140,141] Facebook submitted that its regard for its IEO obligations is evidenced by its robust and comprehensive compliance regime which 'exceeds' the measures relating to this issue included in the CMA's draft revised Interim Measures Guidance.[142]

166. Paragraph 2.16 of the CMA's draft revised interim measures guidance states:

'.. the CMA considers that merging parties should take a risk-based approach to the design and implementation of any steps taken to ensure compliance with Interim Measures; this involves undertaking a thorough review of each area of the merging parties' respective businesses in order to identify any risks for compliance.'

167. By referring to a 'risk-based approach' to interim measures compliance, the CMA is not inviting merging parties to unilaterally re-interpret or disapply their IEO obligations. Paragraph 2.16 is intended to set out the steps which

[139] The CMA notes Facebook's submission that it has been '*pressured*' into allegedly not complying with the IEO by the CMA's inaction, and that this is incompatible with Article 6 ECHR as it serves to enlarge the scope or scale of the offence. The CMA disagrees with this characterisation on the basis that (1) it does not accept that Facebook had no choice but to qualify its compliance with the IEO and (2) the CMA did not delay or extend its consideration.
[140] See Interim Measures in merger investigations revised new template: tracked changes dated 7 April 2021.
[141] Preliminary Response, page 2.
[142] Preliminary Response, page 8.

merging parties should take to ensure effective compliance with the interim measures that are imposed upon them.

168. Instead, Facebook's approach to compliance has been to treat the scope of its obligations under the IEO as if they had been narrowed in line with what *it* considers to be reasonable, rather than to ensure compliance with the obligations that in fact apply. As observed by the Tribunal and set out in paragraph 39 above, Facebook has acted as if derogations to the IEO that it sought from the CMA had already been granted,[143] whilst at the same time failing to engage with the CMA and provide it with the information it required to properly assess the derogation requests.[144] The Tribunal referred to this '*as a high risk strategy not to comply with outstanding IEO requirements and not to inform the CMA of the actions it is taking or the changes it is making to its business that might fall within the scope of the IEO*'.[145]

169. By unilaterally proceeding in this way and certifying compliance on the basis of derogations which had not yet been granted by the CMA, Facebook has effectively designed and implemented a compliance programme which fails to monitor compliance with the IEO obligations actually imposed by the CMA on Facebook, as it carved out parts of its activities, staff, and business from the scope of the IEO where, in fact, no such derogation had been granted.

(d) Interactions with the Monitoring Trustee

170. Facebook contends that no concerns have been raised by the Monitoring Trustee in respect of not providing the information it required, nor have any concerns been raised by the Monitoring Trustee or Hold Separate Manager in respect of Giphy's independent operation.[146]

171. The approval or acquiescence of the Monitoring Trustee does not remove the need to seek the consent of the CMA where Facebook's conduct may breach the IEO.[147]

172. The CMA's view is that Facebook has consistently taken the same approach with the Monitoring Trustee as it has adopted with the CMA. Facebook limited the scope of the information provided to the Monitoring Trustee and acted as though it had been granted derogation requests which had not been granted. For instance, in its fifth report to the CMA dated 14 September 2020, the Monitoring Trustee reported:

[143] *Facebook v CMA,* paragraph 158.
[144] *Ibid*, paragraph 118 and paragraph 128.
[145] *Ibid*, paragraph 159.
[146] Preliminary Response, pages 2 and 9 to 10; Provisional Penalty Decision Response, paragraph 1.9.
[147] See *Electro Rent* at paragraphs 164 and 182.

- *'Facebook had prepared its compliance procedures based on a more limited scope of the Facebook business than was permitted under the IEO. We previously reported that this posed a risk that Facebook was not compliant with the full scope of the IEO, and limited the scope of our role to monitor Facebook's compliance therewith*

- *Facebook explained that it had focused its identification of relevant controls and control owners to those who were most likely to interact with Giphy. Facebook considered that the organisation was too large to feasibly carry out a regular reporting exercise that would allow for it to confirm complete compliance with the IEO'*[148]

173. As mentioned in paragraph 90, the CMA made known to Facebook its concerns with Facebook's approach to reporting information to the Monitoring Trustee. As a result of qualifications given by Facebook (examples of which appear below), its certifications did not capture all of Facebook's obligations under the IEO, and therefore did not allow the Monitoring Trustee to properly monitor Facebook's compliance with the IEO in the form in which it was issued. This issue was also highlighted by the Monitoring Trustee to Facebook, as noted above.

174. The CMA's concerns are evidenced in Facebook's certification form covering the period from 27 October to 10 November 2020, in which Facebook staff certified that '*There have been no material developments in relation to Facebook's Core Services (FB + messenger, IG and WA) as they relate to the supply or procurement of GIFs.*' The CMA understands that this certification relates to Facebook's obligations under paragraph 8 of the IEO. However, paragraph 8 of the IEO is broader than this and applies to *'the Facebook business',* which extends beyond Facebook's core services and moreover is not limited by reference to the supply or procurement of GIFs.[149]

175. Additional examples from Facebook's certification form covering the period from 27 October to 10 November 2020 include certifying:

    (a) '*there have been no changes to the FB senior leadership team (Mark Zuckerberg and directs) and no substantive changes to the leadership of Instagram and WhatsApp.*'

[148] Fifth Monitoring Trustee Report to the CMA, 14 September 2020, page 18.
[149] In the Carve-Out Derogation, the CMA has consented to a derogation to limit Facebook's reporting requirements under paragraph 8 of the IEO so that Facebook is no longer required to report on those material developments that, as a result of other derogations in the Carve-Out Derogation, are outside the scope of paragraphs 5(c), 5(d), 5(e), 5(i) and 5(k) of the IEO. The remainder of Facebook's reporting requirements under paragraph 8 of the IEO remain intact.

(b) '*there have been no changes (hires, reorgs, terminations) among any product or partnership leads who work on gif and sticker integrations.*'

176. As illustrated by these certifications, Facebook appears to have limited the relevant certifications to a narrow sub-set of Facebook's key staff, rather than all key staff as defined in the IEO.

177. Facebook submitted that early on in the process, Facebook specifically asked the Monitoring Trustee how it could certify compliance given the broad language of the IEO and its impact on the Facebook business. Facebook pointed to the Monitoring Trustee's reply in an email dated 22 July 2020 with a recommendation as follows:

'In relation to Facebook's certification process, as a starting point Facebook may wish to consider defining what may meet the threshold of materiality, such areas may include:

● *any functional areas where amendments to the organisational structure that would be considered a material change to managerial responsibilities within Facebook*

● *the identification of exactly who are the key staff within Facebook whose loss would be of significant risk to the business*

● *any areas where disposal of assets would require disclosure*

● *segments of Facebook's operations that would be at risk in the event of any changes to customer or supplier volumes*

● *any notable contracts that comprise a significant component of Facebook's income stream*

This may serve to reduce the scope of the compliance statements'.[150]

178. Facebook submitted it carefully considered this guidance '*recommending a materiality approach*' which informed its '*risk-based approach to compliance with the IEO*'.[151]

179. The Monitoring Trustee explained by email to the CMA dated 13 August 2021 the background to the guidance it issued above. The Monitoring Trustee submitted that Facebook had highlighted on an initial call on 10 July 2020 that it was qualifying its compliance statements given the scope of the IEO, and asked for suggestions on how to manage compliance. The Monitoring Trustee suggested that it could consider defining what might meet the threshold of

[150] Preliminary Response, page 9.
[151] *Ibid*.

materiality to refine what was needed to be covered in an unqualified compliance statement. The Monitoring Trustee clarified that:

'Our understanding of our feedback was that it would serve as a starting point for future discussions [between the Monitoring Trustee and Facebook] on how Facebook might address the issues it was facing with the scope of the IEO.'

180. The Monitoring Trustee submitted that on a follow up call with Facebook the guidance above was discussed and the following points covered:

(a) That Facebook was currently focusing certification on parts of business that it considered relevant but the CMA had indicated this is not acceptable;

(b) That Facebook could limit the scope of what is needed to present unqualified compliance statements by focusing on risks through establishing materiality;

(c) That some items in the IEO were quite specific and from Facebook's perspective it would need to be material to trigger disclosure requirements, assuming then that such events would be known about by senior people in Facebook so then there could be a limited or reduced compliance procedure targeted to those areas that would give Facebook comfort they had picked up everything material; and

(d) The Monitoring Trustee hoped the points discussed gave Facebook some thought about how to move to a position where the CMA was comfortable.

181. The Monitoring Trustee informed the CMA in its email of 13 August 2021 that Facebook indicated at that time it would think further about the points discussed. The Monitoring Trustee told the CMA that a further call was held with Facebook on 30 July 2020, where *'Facebook confirmed that they would continue to qualify the scope of the compliance statements and push the CMA on this point'.* The Monitoring Trustee considered that the feedback provided in the 22 July 2020 email and subsequently discussed with Facebook was a suggested approach to deal with the parts of the Facebook business it was not covering in its compliance statements to move to a *'better position than an outright qualification'.* The Monitoring Trustee stated that '*our understanding is the Facebook* [sic] *chose not to pursue continued engagement with us on this area'*.

182. In the Preliminary Response, Facebook further submitted that in a call with the Monitoring Trustee team on 18 December 2020, it asked the Monitoring Trustee team whether Facebook could enhance its IEO compliance

programme as it relates to Facebook's GIF-related Activities.[152] Facebook states in its submissions that the Monitoring Trustee team '*confirmed that it did not have any further suggestions at that time and indicated that, in its experience, the Facebook IEO compliance programme was a strong one.*'[153]

183. However, this comment was clarified by the Monitoring Trustee team on 11 January 2021 in an email to Facebook and the CMA. It was clarified in this email that:

(a) the Monitoring Trustee team believed it was acknowledged by Facebook that the sub-certification process[154] created by Facebook did not extend to all of Facebook's subsidiaries;

(b) although the Monitoring Trustee team did not have further suggestions on the approach to certifying compliance to the subset of companies included in the sub-certification process, the Monitoring Trustee team noted that the CMA was questioning the scope of Facebook's compliance (and that Facebook's approach to compliance was not giving the full picture), rather than the certification process itself; and

(c) the Monitoring Trustee team did not think it was accurate to say that there were no further suggestions, as the Monitoring Trustee team suggested that Facebook could seek to refine its list of key staff in order to certify its IEO compliance.

184. In light of the above (and, in particular, the clarifications made by the Monitoring Trustee), the fact that no concerns have been raised by the Monitoring Trustee or Hold Separate Manager in respect of Giphy's independent operation does not demonstrate the effectiveness of Facebook's compliance with the IEO, as submitted by Facebook. In any event, the obligations in the IEO are not limited to ensuring that Giphy operates independently of Facebook. Additionally, discussion with the Monitoring Trustee does not remove the need to seek the consent of the CMA where Facebook's actions may breach the IEO.[155]

Failure to comply with paragraph 7 of the IEO

185. Following consideration of the evidence provided to the CMA and careful assessment of Facebook's submissions to date, the CMA has found that Facebook repeatedly failed to submit fortnightly statements confirming

[152] 'GIF-related Activities' as defined by the CMA in a section 109 notice of 4 December 2020. This definition did not apply to the IEO until 29 June 2021.
[153] Preliminary Response, page 9.
[154] 'Sub-certification process' refers to the process implemented by Facebook to enable the Chief Compliance Officer to certify compliance with the IEO. This process is described in paragraph 215 below.
[155] See *Electro Rent*, paragraphs 164 and 182.

compliance with the IEO in the appropriate form in accordance with paragraph 7 of the IEO.

186. Every compliance statement submitted during the reporting period of 23 June 2020 to 29 June 2021 was provided with significant qualifications in a side letter signed by Facebook's external legal advisers Latham & Watkins. Facebook only certified compliance with the IEO in respect of certain parts of Facebook's business, activities, and staff. In doing so, it proceeded as if derogations had been granted, carving out parts of the business, where, in fact, no such derogations had been granted.

187. Despite clear direction at the outset (as set out in paragraphs 56 to 57 above) and repeated warnings from the CMA regarding Facebook's approach to certifying compliance (set out at paragraphs 86 to 90 above), Facebook continued to adopt a strategy in which it narrowed its compliance obligations under the IEO, refused to sufficiently engage with the CMA and provide requested information in full, and limited the CMA's ability to ensure that Facebook was complying with its IEO obligations. For the reasons set out above at paragraphs 96 to 128, the CMA finds that Facebook's approach to certifying compliance was neither necessary nor reasonable.

188. The effect of Facebook qualifying its compliance statements in this way is that it has not informed the CMA of whether it is complying or not complying with the IEO in respect of those parts of its business, activities and staff that it has effectively excluded from its compliance statements. Facebook's approach to certifying its compliance prejudices the CMA's ability to monitor, and (as the case may be) enforce, compliance with the IEO because the CMA has been left in the dark as to whether or not the IEO is being fully complied with by all parts of the business.

189. This effect was compounded, as set out in paragraphs 171 to 184 above, by Facebook consistently taking the same approach of limiting the scope of the information provided to the Monitoring Trustee, acting as though it had been granted derogation requests which had not been granted.

190. Such an approach undermines a critical element of the interim measures regime, which is essential to the CMA's role in regulating merger activity; the CMA's ability to do so effectively is a matter of public importance.[156] As set out at paragraphs 34 to 39 above, it is of the utmost importance that interim measures are scrupulously complied with, including when the CMA is considering but has not yet granted a derogation request, and merging parties

[156] See *Electro Rent* at paragraphs 120, 200 and 206. The Tribunal stated at paragraph 200 that *'It is a matter of public importance that the merger control process, and the duties that it creates, are strictly, and conscientiously, observed.'*

should not themselves form judgements or reach decisions that are properly for the CMA. It is incumbent on parties to engage with the CMA by submitting a derogation request which is fully specified, reasoned and supported by relevant evidence, and to continue to comply with the IEO in full until such time as a derogation is granted.

191. The CMA further notes, as set out in paragraph 123 above, that Facebook's approach to compliance treated the IEO as if its own broad derogation request had already been fully granted by the CMA and as if its compliance obligations had been significantly narrowed (including on a basis that went significantly beyond that which was ultimately authorised by the CMA under the Carve-Out Derogation).

192. For the reasons set out above, the CMA has reached the view that Facebook's submission of compliance statements accompanied by qualifications constitutes a failure to comply with paragraph 7 of the IEO.

193. This failure to comply is particularly concerning since there were several instances, throughout the course of the CMA's Merger investigation, where Facebook informed the CMA of developments falling within the scope of the IEO sometime after the facts, including the breaches set out below.

Breach 2 – Tenor outage

Facts

194. Paragraph 8 of the IEO imposes an obligation on the Parties to keep the CMA informed of any material developments relating to the Giphy business or the Facebook business, which includes but is not limited to any interruption of the Giphy or Facebook business (including without limitation its procurement, production, logistics, sales and employee relations arrangements) that has prevented it from operating in the ordinary course of business for more than 24 hours (paragraph 8(b) of the IEO).

195. GIFs on Facebook platforms are provided by two providers, Giphy and Tenor.

196. On 22 January 2021 Facebook provided the CMA with a White Paper on Vertical Foreclosure Analysis (the **White Paper**), prepared by Frontier Economics, that refers to evidence obtained from a Tenor 'loss of service'. This was the first time that the CMA had been made aware of the Tenor outage.

197. The White Paper explained that '*Tenor became unavailable on the* [✂] *(morning PST time) globally and was unavailable on all versions of*

Messenger until the [✂] *[…] Tenor was fully restored on all app versions by the* [✂].' The White Paper stated the outage occurred '*in the ordinary course of business*', providing a '*natural experiment*' that demonstrates a '*high level of substitutability*' between Tenor and Giphy (pages 7 to 14).

198. Facebook did not report the outage to the Monitoring Trustee or the CMA when certifying compliance with the IEO during the relevant period. In its compliance statements covering the relevant period, Facebook confirmed '*there are no material developments to report during this Reporting Period*' (paragraph 2(o)). The side letters accompanying the compliance statements during the relevant period stated that '*no business interruptions or other material developments as listed in 8(a) – 8(d) have occurred in relation to Facebook's Core Services or as they relate to the supply or procurement of GIFs and stickers.*' Similarly, Facebook certified that '*there have been no material business interruptions related to other GIF/sticker collaborations*' in the course of the sub-certification control provided to the Monitoring Trustee (control 55).[157]

Assessment of Facebook's submissions

199. The CMA has carefully considered Facebook's submissions to date in relation to this breach by reference to the evidence and responds as set out below.

200. Facebook considered the 'failure' to report does not constitute a breach of the IEO. In its submissions, Facebook describes the outage as a '*minor and temporary loss of service, based on a technical glitch*' that was '*not a material development for any portion of the Facebook business*' – *'not a "material" event for Messenger, let alone Facebook'*. Facebook submitted that as the IEO does not define the term 'material', a public company such as Facebook may need to apply a high-threshold definition of materiality in self-assessing its IEO obligations. Facebook submitted that 'material' should mean, at a minimum, '*something well beyond ordinary course, day-to-day, activity*' and this was not a material development as the outage only affected one of many inputs (and one of multiple GIF inputs).[158]

201. The CMA disagrees with Facebook's submission. The **'**Facebook business' is defined in the IEO to mean *'the business of Facebook and its subsidiaries carried on as at the commencement date'*. The term 'business' is in turn defined by section 129(1) and (3) of the EA02 to include '*a professional practice and includes any other undertaking which is carried on for gain or reward or which is an undertaking in the course of which goods or services are supplied otherwise than free of charge'*. This definition does not solely

[157] Fourteenth Monitoring Trustee report to the Competition and Markets Authority dated 1 February 2021.
[158] Preliminary Response, page 16; Provisional Penalty Decision Response, paragraphs 2.7 and 2.8

capture Facebook, Inc, but its subsidiaries and smaller divisions too, including with particular reference to the acquired business. The CMA considers this outage was a 'material development' relating to 'the Facebook business' for the purposes of paragraph 8 of the IEO – specifically, the interruption of a relevant element of Facebook's business with a consequential and beneficial impact on another part of Facebook's corporate group (Giphy) potentially relevant to the CMA's ongoing investigation of the completed acquisition of Giphy, which prevented it from operating in the ordinary course of business for more than 24 hours – for the following reasons:

(a) The outage involved the loss of one of Facebook's two GIF providers during the investigation of Facebook's acquisition of its other GIF provider, Giphy, which potentially materially benefited from the outage. The length of the Tenor outage was considerably longer than 24 hours. Moreover, the loss of one of two providers of GIFs reduced the overall quality of GIFs offering (in terms of range) on Facebook platforms for more than 24 hours and affected the distribution of Tenor's GIFs through Facebook's core products. Indeed, the White Paper on Vertical Foreclosure Analysis notes that during the Tenor outage '*Tenor GIF sends fall close to zero and GIPHY GIF sends immediately increase by a similar amount, suggesting users who would otherwise have shared a Tenor GIF substituted to a GIPHY GIF.*'[159]

(b) Without Facebook reporting this type of outage, the CMA was not in a position, at the time of the outage, to investigate its causes and, as the case may be, take action if it considered that such an outage may have been the result of, or have led to, pre-emptive action. For example, by not reporting outages of this nature in a timely manner, the CMA was unable to monitor and, if possible and appropriate in the circumstances, intervene to ensure that such incidents do not lead to further integration with Giphy or affect the competitive landscape. The fact that the outage was resolved and not repeated and, with hindsight, without any long-lasting consequences to Facebook's operations and its relationship with Tenor, or Giphy's operations, does not affect the fact that the CMA should have been informed of this development at the time it occurred in order to carry out its own assessment of the risk of pre-emptive action.

202. The Tenor outage should have been considered a material development in the context of the Facebook and Giphy businesses. Given (i) the direct

[159] The White Paper, pages 31 to 32. The next sentence states that '*There appears to be a small increase in native GIF sends as well, meaning some users potentially chose to share GIFs from their own device storage when they might otherwise have shared a Tenor GIF – this could be the case if a user had a particular GIF in mind when searching for a GIF within Messenger using the API integration*' further demonstrating a possible effect on the provision of GIFs during the Tenor outage.

relevance of Facebook's relationship with Tenor to the subject matter of the CMA's investigation (and therefore to the risk of pre-emptive action) and (ii) the length of the outage, the risk or pre-emptive action was increased.

Failure to comply with paragraph 8 of the IEO

203. The CMA considers the Tenor outage to be an interruption of a relevant element of Facebook's business which prevented it from operating in the ordinary course of business for more than 24 hours and a material development in the context of the Giphy business and the CMA's investigation. As set out in paragraph 197 above, Tenor was globally unavailable on Facebook Messenger for at least [✂] (including the 'overhang' period, this increases to [✂]) and the outage also affected Facebook Posts. The CMA only became aware of the existence of the Tenor outage upon receiving the White Paper, four months after the outage occurred.

204. There is a requirement for such material developments to be notified under paragraph 8 of the IEO.

205. Therefore, the CMA has reached the view that Facebook's failure to notify the CMA of this development constitutes a failure to comply with paragraph 8 of the IEO.

Breach 3 – Change of roles of key staff

Facts

206. From 9 June 2020, when the IEO took effect, the CMA is aware of at least two changes in the roles of key staff at Facebook that were not authorised in advance by the CMA:[160]

(a) Ms [Facebook Employee 1] leaving her role as acting Chief Compliance Officer and being replaced by Mr [Facebook Employee 2]; and

(b) Mr [Facebook Employee 3] taking over as Chief Compliance Officer from Mr [Facebook Employee 2].

The replacement of [Facebook Employee 1] by [Facebook Employee 2]

207. [Facebook Employee 1] was, at the time of the issuance of the IEO and until 21 December 2020, Vice President, Associate General Counsel and acting Chief Compliance Officer of Facebook. In that role, [Facebook Employee 1] was responsible for ensuring Facebook's compliance with the IEO and for

[160] [✂].

signing the IEO compliance statements on behalf of Facebook (and in lieu of the CEO).

208. On 22 June 2020, Facebook sought the CMA's consent by email for [Facebook Employee 1] to execute the compliance statements in place of Facebook's CEO, Mark Zuckerberg. Facebook confirmed that [Facebook Employee 1] was capable of representing and binding Facebook. The CMA consented to this request.

209. [Facebook Employee 1] provided a witness statement on 25 August 2020 in her capacity as '*Vice President and Associate General Counsel at Facebook, and Facebook's acting Chief Compliance Officer*' (paragraph 1) in support of Facebook's appeal to the Tribunal. At paragraph 11 of that statement, [Facebook Employee 1] stated that '*As Facebook's acting Chief Compliance Officer, I am responsible for ensuring Facebook's compliance with the IEO*'.

210. On 21 December 2020, [Facebook Employee 1] subsequently took the role of Vice President, Business Integration for Facebook Financial. Facebook did not seek consent from the CMA for such a change nor did it report it directly after the event.

211. The CMA became aware of this change on 6 January 2021 when Facebook sought the CMA's consent by email to change the IEO compliance statement signatory to [Facebook Employee 2]. Facebook stated in this email that [Facebook Employee 2] currently served as Vice President of Legal Risk Management and will be acting Interim Chief Compliance Officer.

212. In its response to Facebook's email on 6 January 2021, the CMA indicated to Facebook its concerns with the change to the role of Chief Compliance Officer and explained that Facebook was obliged to seek a derogation for the same under the terms of the IEO.

213. On the same day in response to the CMA's 6 January 2021 email, Facebook noted that the Monitoring Trustee '*did not raise any concerns or suggest that a derogation was necessary*' on a call between Facebook and the Monitoring Trustee held on 15 December 2020 in which the intended move was discussed. However, the Monitoring Trustee clarified by subsequent email on 11 January 2021 that Facebook *'advised the [Monitoring Trustee] team that Facebook/L&W would be taking this up directly with the CMA. Accordingly, [the Monitoring Trustee] made no comment as [Facebook] intended to notify the CMA.*' The CMA received no such notification prior to the implementation of [Facebook Employee 1]'s change of role.

214. The CMA's letter to Facebook dated 19 February 2021 also expressly referred to the replacement of [Facebook Employee 1], and that '*the CMA is*

concerned that Facebook is not engaging with the CMA sufficiently or in a timely fashion on matters that give rise to concerns about pre-emptive action'. In the letter, the CMA reserved its position as to whether the replacement of [Facebook Employee 1] constituted a breach of the IEO.

215. In Facebook's response dated 4 June 2021 to the CMA's notice under section 109 of the EA02 seeking certain information concerning Facebook's compliance with the IEO issued on 21 May 2021 (the **June 2021 Response**), Facebook outlined the sub-certification process for ensuring compliance with the IEO that [Facebook Employee 1] oversaw in her capacity as Acting Chief Compliance Officer. Facebook explained that, in order to enable [Facebook Employee 1] to certify compliance with the IEO, the following process for reporting to her was followed:

    i. Control owners are sent forms shortly before each certification is due and asked to confirm compliance with assigned 'controls'.

    ii. The IEO compliance team reviews all responses from control owners.

    iii. The IEO compliance team would confirm with [Facebook Employee 1] once all control owners had certified.

    iv. The compliance team would also consider inquiries raised by the business outside of the sub-certification process.

The appointment of [Facebook Employee 3]

216. On 8 February 2021, [Facebook Employee 3] joined Facebook as Vice President, Deputy General Counsel and Chief Compliance Officer. The CMA became aware of this appointment on 3 March 2021 when Facebook sought the CMA's consent by email for [Facebook Employee 3] to execute the compliance statements on behalf of Facebook and its subsidiaries. Facebook confirmed in this email that [Facebook Employee 3] was capable of representing and signing on behalf of Facebook, Inc. Facebook did not seek consent for this change prior to the appointment of [Facebook Employee 3].

217. Facebook also confirmed in its email of 3 March 2021 that [Facebook Employee 3] would be reporting to the General Counsel and that he would have oversight of compliance with the IEO. [Facebook Employee 2] ceased to be acting Interim Chief Compliance Officer. He remained as Vice President of Legal Risk Management and reported to [Facebook Employee 3].

218. In the June 2021 Response, Facebook explained that [Facebook Employee 3] follows the sub-certification process for certifying compliance with the IEO as outlined at paragraph 215 above.

Assessment of Facebook's submissions

219. The CMA has carefully considered Facebook's submissions to date relating to this breach by reference to the evidence and responds as set out below.

The definition of key staff within the IEO

220. Facebook submitted that the scope of the definition of key staff[161] is unclear and could conceptually capture around 12,000 members of Facebook staff. Facebook submitted that the definition in the IEO *'creates legal uncertainty and makes practical compliance by means of self-assessment virtually impossible*'.[162] Further, Facebook submitted that a definition of 'key staff' which, in its view, is reasonable and proportionate to the aim of an IEO should:[163]

(a) only apply to staff who are 'key' because their decisions genuinely affect the viability of the Facebook business;

(b) most likely apply to staff at an executive or very senior management level;

(c) not include junior managers whose decisions cannot affect the viability of the Facebook business; and

(d) include those '*within Facebook whose loss would be of significant risk to the business'.*[164]

221. The CMA does not accept Facebook's approach to the definition of key staff:

(a) The definition of key staff in the template IEO imposed necessarily has a wide reach. This is the necessary corollary of the UK's voluntary regime and reflects significant information asymmetries between the CMA and merging parties at the beginning of the CMA's merger investigation.[165] Specifically, the definition of key staff must be construed in the light of the statutory objective of the IEO (ie to prevent pre-emptive action which might prejudice the reference concerned or impede the taking of any action which may be justified by the CMA's decisions on the reference). This definition is designed to capture, on a precautionary basis, a broad

[161] See paragraph 42(d) above for the definition of key staff under the IEO.
[162] Provisional Penalty Decision Response, paragraph 3.8.
[163] Preliminary Response, page 12.
[164] The suggestion of the Monitoring Trustee to Facebook in correspondence dated 22 July 2020.
[165] it is incumbent on parties to engage with the CMA and provide the required information to enable the CMA to narrow the scope of that definition where there are substantial information asymmetries between the CMA and the parties.

number of individuals, including those[166] who hold positions of executive or managerial responsibility.

(b) The definition of 'key staff' in the IEO does not solely capture positions such as board members or individuals reporting directly to the CEO or other members of the leadership team. It is clearly more broadly defined, and includes positions with 'executive or managerial responsibility'. Accordingly, limiting the definition of key staff to individuals of a 'very senior management level' (in particular in the case of a company the size of Facebook) would potentially remove from the scope of the IEO a large number of individuals who have responsibilities that are relevant to the statutory objective.

(c) Additionally, the CMA views the role of Chief Compliance Officer as being particularly significant for the purposes of the IEO. The CMA considers this role to be clearly caught by the definition of key staff. Ensuring compliance with the IEO, and providing compliance statements under the IEO, are important obligations for the addressees of an IEO (as set out in paragraph 42 above). The CMA expects that the holder of such a position should have actual executive or managerial authority (and sufficient knowledge of the business's operations) to carry out this role effectively (including by taking steps to prevent any pre-emptive action in breach of the IEO) and bind the enterprise vis-à-vis the CMA (noting that failure to comply with an IEO can carry liability of penalties of up to 5% of worldwide turnover).

The replacement of [Facebook Employee 1]

222. As to the specific points made in Facebook's submissions regarding the definition of 'key staff' within the IEO and its application to the replacement of [Facebook Employee 1]:[167]

(a) Facebook submitted that the CMA's letter of 2 July 2021 refers to a CMA email dated 9 July 2020 which '*asserts that the IEO should be certified by the Chief Executive Officer.*' The relevant section of the 9 July 2020 email states '*…compliance with the IEO should be certified by the Chief Executive Officer (**or another person agreed by the CMA**), and that qualifications should not be provided separately by the Parties' external*

[166] Facebook submitted in paragraph 3.8 of the Provisional Penalty Decision Response that by including the words 'including those' to the interpretation of the definition, the CMA has expanded the scope of the definition and applied the definition in a '*nebulous and excessively broad manner*', making compliance '*wholly unworkable'*. The CMA does not accept this submission. The CMA is applying the definition of 'key staff' as set out in the IEO, which is: '**staff in positions of executive or managerial responsibility** and/or whose performance affects the viability of the business' (emphasis added). This definition is clearly broader than Facebook's overly narrow interpretation of the term.
[167] Preliminary Response, page 13.

advisors…' (emphasis added). For the avoidance of doubt, the CMA has never criticised Facebook for appointing [Facebook Employee 1] as the signatory of Facebook's compliance statements, and this is consistent with the CMA's policy set out in paragraph 42 above.

(b) Facebook submitted that [Facebook Employee 1] '*did not, at any time during this period, have a business or strategic decision making role*'. The CMA notes however that the term 'business or strategic decision making' does not appear in the definition of 'key staff' in the IEO. Whilst individuals with such responsibilities may be considered key staff within the meaning of the IEO, this is not a necessary condition.

(c) Facebook submitted that [Facebook Employee 1] '*only ever held the role of Acting Chief Compliance Officer on a temporary basis'* and '*her role in certifying compliance with the IEO formed one aspect of her legal responsibilities*'. The CMA notes however that the temporary nature of [Facebook Employee 1]'s role as Chief Compliance Officer is irrelevant to the definition of 'key staff' within the IEO. Whether or not [Facebook Employee 1] had other responsibilities does not mean that she is not within scope of the definition of 'key staff'.

(d) Facebook submitted that '*Ms. [Facebook Employee 1]'s role change was an ordinary course internal move that was entirely unrelated to the Merger [and] her role was shortly filled by a new (permanent) Chief Compliance Officer.*'[168] The CMA notes however that the role of Chief Compliance Officer is directly related to the Merger as the person appointed to the role ensures Facebook's compliance with the IEO and must take steps to prevent any pre-emptive action. Any change in this role cannot be described as 'entirely unrelated' to the Merger. In any event, Facebook is obliged to seek consent for the change of any key staff. The reasons for the change – such as further information regarding the '*ordinary course internal move*' – would have been considered by the CMA when assessing whether to grant a derogation had a request been made. As set out by the Tribunal in paragraph 39 above, it is not for Facebook to form judgements or reach decisions that are properly for the CMA.

223. Further, the CMA notes that in its thirteenth report to the CMA dated 18 January 2021, the Monitoring Trustee reported that '*in our view we would consider [Facebook Employee 1] was Key Staff given her seniority within the*

[168] Preliminary Response, page 13. The Provisional Penalty Decision Response also stated that the allegation there was a breach of paragraph 5(c) was wrong since this paragraph of the IEO carves out changes made in '*the ordinary course of business'* (paragraph 3.9).

business and responsibility for ensuring Facebook's compliance with the IEO'.[169]

The appointment of [Facebook Employee 3]

224. Facebook has submitted that '*[Facebook Employee 3] does not have a business or strategic decision making role*', and that '*the appointment was entirely unrelated to the Merger*' and '*IEO compliance only forms one part of [Facebook Employee 3]'s broader remit'*.[170] Additionally, Facebook has queried whether a 'hire' can be a 'change' of key staff, and that a limitation on hiring any senior staff would place an '*extraordinary restriction*' on Facebook's ordinary course business activities.[171]

225. The CMA does not accept that these reasons demonstrate that [Facebook Employee 3] should not be considered as 'key staff':

(a) The lack of business or strategic decision-making responsibilities is not a necessary condition for satisfying the definition of key staff, as discussed in paragraph 222(b) above.

(b) The role certifying Facebook's compliance with its IEO obligations and taking steps to prevent any pre-emptive action is directly related to the Merger, and, in any event, Facebook was obliged to seek consent for the change of any key staff irrespective of the reasons, as discussed in paragraph 222(d) above. That [Facebook Employee 3] might have a remit that extends beyond compliance with the IEO does not mean he does not fall within the definition of 'key staff'.

(c) A plain English interpretation of the word 'change' in paragraph 5(i) of the IEO would clearly encompass hiring a new member of key staff and assigning them responsibilities previously allocated to a different member of key staff.

Failure to comply with paragraphs 5(c) and 5(i) of the IEO

226. The changes made by Facebook – which occurred twice after the IEO took effect – to the responsibility for supervising Facebook's compliance with the IEO (and the appointment of a Chief Compliance Officer) without informing or seeking consent from the CMA constituted a failure to comply with the IEO as follows:

[169] Thirteenth Monitoring Trustee Report to the CMA, page 9.
[170] Provisional Penalty Decision Response, paragraph 3.12.
[171] Preliminary Response, page 14.

(a) the failure by Facebook to ensure no substantive changes are made to the organisational structure of, or the management responsibilities within, the Facebook business, except in the ordinary course of business (paragraph 5(c) of the IEO); and

(b) the failure by Facebook to ensure no changes are made to key staff of the Facebook business (paragraph 5(i) of the IEO).

Replacement of [Facebook Employee 1] by [Facebook Employee 2]

227. [Facebook Employee 1] falls within the definition of 'key staff' as defined in paragraph 13 of the IEO on the basis that [Facebook Employee 1] has held executive or managerial responsibilities within the Facebook business throughout the period in which the IEO has been in place.

228. The CMA expects that the holder of Chief Compliance Officer should have actual executive or managerial authority (and sufficient knowledge of the business's operations) to carry out this role effectively and bind the enterprise vis-à-vis the CMA (see paragraph 221(c) above).

229. [Facebook Employee 1]'s nomination to fulfil this role of Chief Compliance Officer in lieu of Facebook's CEO[172] and her executive or managerial responsibilities for that purpose (including over the compliance team and the 'sub-certification' process designed to enable her to certify compliance)[173] reflects the seniority of her position within Facebook.

230. That [Facebook Employee 1]'s position included executive or managerial responsibilities is further evidenced by the fact that, in both her role as Vice President, Associate General Counsel and acting Chief Compliance Officer and later in her role as Vice President, Business Integration, she has held a staff management role (specifically, in her role as Vice President and Associate General Counsel, she had four attorney direct reports plus an administrative assistant as of 30 November 2020).[174]

231. [Facebook Employee 1] was therefore, for the reasons set out above, a key member of staff for the purposes of the IEO, and the CMA has reached the view that Facebook's decision to make such a change to key staff of the Facebook business (without obtaining CMA's consent) amounts to a failure to comply with paragraphs 5(c) and 5(i) of the IEO.

[172] See paragraph 208 above.
[173] See paragraph 178 above.
[174] See the June 2021 Response, paragraph 7.3.

Replacement of [Facebook Employee 2] by [Facebook Employee 3]

232. [Facebook Employee 3] is responsible for ensuring Facebook's compliance with the IEO and for signing the IEO compliance statements on behalf of Facebook (and in lieu of the CEO). No derogation was sought in respect of [Facebook Employee 3]'s appointment or the allocation of these responsibilities to him.

233. [Facebook Employee 3] falls within the definition of 'key staff' as defined in paragraph 13 of the IEO on the basis that [Facebook Employee 3] has held executive or managerial responsibilities within the Facebook business since joining the Facebook business and whilst the IEO has been in place.

234. As with [Facebook Employee 1], the CMA expects that the holder of Chief Compliance Officer should have actual executive or managerial authority (and sufficient knowledge of the business's operations) to carry out this role effectively and bind the enterprise vis-à-vis the CMA (see paragraph 221(c) above).

235. [Facebook Employee 3]'s nomination to fulfil this role in lieu of Facebook's CEO,[175] and his executive or managerial responsibilities for that purpose (including over the compliance team and the 'sub-certification' process designed to enable him to certify compliance)[176] reflects the seniority of his position within Facebook. That [Facebook Employee 3]'s position included executive or managerial responsibilities is further evidenced by the fact that [Facebook Employee 3] holds a staff management role within the Facebook business (specifically, in the June 2021 Response, Facebook explained that [Facebook Employee 3] has four attorney direct reports in his role as Chief Compliance Officer).

236. [Facebook Employee 3] is therefore, for the reasons set out above, a member of key staff for the purposes of the IEO, and the CMA has reached the view that Facebook's decision to make such a change to key staff of the Facebook business (without obtaining CMA's consent) amounts to a failure to comply with paragraphs 5(c) and 5(i) of the IEO.

Risk of prejudice to a reference or of impeding remedial action

237. Facebook submitted that the three breaches identified by the CMA above in this decision *'did not have, and could not have had, any impact on the CMA's*

[175] See paragraph 208 above.
[176] Set out at paragraph 215 above.

ability to refer the Merger and, if appropriate, impose a remedy upon conclusion of the reference'.[177]

238. As set out in paragraph 43 above, the precautionary purpose of the IEO seeks to protect against the *possibility or risk* of prejudice to the reference or potential remedies. It follows that the CMA need not show actual adverse effects on the competitive structure of the market or on its ability to take remedial action. The purpose of interim measures is to ensure merging parties seek the consent of the CMA before undertaking actions that *might* prejudice the reference or impede the taking of remedial action. A risk of adverse effects is therefore sufficient.[178] Moreover, it is not for Facebook to decide or predict whether there may be any prejudice in circumstances where the Merger is still being investigated by the CMA. Even in circumstances where the CMA may eventually conclude that there was no actual adverse effect, it is not for Facebook to unilaterally determine the appropriate scope of the IEO: the appropriate way to narrow the scope of the IEO is to apply for derogations and to provide the necessary information to the CMA to support these applications..

239. The effect of Breach 1 as set out above was to leave the CMA (and the Monitoring Trustee) in the dark as to whether or not the IEO was being fully complied with by all parts of the business in scope of the IEO. Similarly, Breach 2 related to a development within the scope of the IEO that Facebook failed to report to the CMA in a timely manner and Breach 3 meant that the CMA was not put in a position to decide whether to grant consent to changes to key staff before these were implemented as per the IEO. These breaches had the effect of limiting the CMA's awareness of material developments within the businesses under investigation (including other potential breaches) and in turn prejudiced the CMA's ability to carry out an important statutory function under the merger regime, namely to monitor, and as the case may be enforce, compliance with interim measures in order to prevent pre-emptive action.

240. As to Breach 3, the signatory of compliance statements has overall responsibility for compliance with the IEO and therefore plays a critical role in guarding against the risks of pre-emptive action. The failure to seek a derogation in advance of the changes of staff that constitute Breach 3 heightened the risk of pre-emptive action.

[177] Preliminary Response, pages 3 and 7. Facebook also requested the CMA to set out the pre-emptive action which has occurred in relation to each breach. In the Provisional Penalty Decision Response Facebook further stated that '*the CMA does not seriously contend that any action has been taken that has or might prejudice the reference or any action which the CMA might take on the outcome of the reference'* (paragraph 1.8).
[178] *Electro Rent v CMA* at paragraph 200.

241. On that basis, the CMA is of the view that the above failures to comply with the IEO risked prejudicing the reference (for example, by potentially affecting the competitive structure of the market) or impeding action justified by the CMA's decisions on the reference.

Failure to comply without reasonable excuse

242. Section 94A(1) of the EA02 provides that penalties can only be imposed if a failure to comply is '*without reasonable excuse*'. The CMA notes that the EA02 does not define 'reasonable excuse'.

243. The CMA's Penalties Guidance states:[179]

'The circumstances that constitute a reasonable excuse are not fixed and the CMA will consider whether any reasons for failure to comply amount to a reasonable excuse on a case-by-case basis. However, the CMA will consider whether a significant and genuinely unforeseeable or unusual event and/or an event beyond [the person's] control has caused the failure and the failure would not otherwise have taken place.'

244. More generally, once a breach of an IEO has been established, the person who has committed the breach bears the evidential burden of setting out a case for reasonable excuse. Any excuse must be objectively reasonable. The CMA will consider any arguments put forward as to reasonable excuse on the facts of the case.

245. In *Electro Rent*, the Tribunal found that, in the context of assessing whether Electro Rent had a reasonable excuse for breaching the interim order by serving a break notice, it was irrelevant whether or not Electro Rent had good commercial reasons for having done so.[180] The Tribunal also rejected Electro Rent's argument that its engagement with the monitoring trustee pre-breach constituted a reasonable excuse. The Tribunal did so partly on the basis that Electro Rent had failed to properly brief the monitoring trustee and partly on the basis that, in circumstances in which only the CMA could decide what was a breach of the interim order requiring consent or derogation, it was insufficient to merely notify the monitoring trustee of a possible breach.[181]

246. Facebook has made several submissions arguing that it had a reasonable excuse not to comply with the IEO:

[179] Penalties Guidance, paragraph 4.4.
[180] *Electro Rent*, paragraphs 114, 138 and 139.
[181] *Electro Rent*, paragraphs 155 to 157 and 159 to 164.

(a) it had a reasonable excuse for believing that no derogation from the IEO would be possible while Giphy's content was an input into Facebook's core services[182];

(b) it took the only reasonable and proportionate option available to it in good faith, absent guidance from the CMA or the courts (with the Court of Appeal only providing guidance on the interpretation of section 72 of the EA02 in *Facebook v CMA (CoA)*)[183];

(c) the CMA failed to engage with Facebook's practical challenges regarding IEO compliance;[184] and

(d) there is *'no dispute*' that it has, at all times, complied with its core obligations to hold Giphy separate and preserve Facebook's GIF-related Activities (as defined by Facebook).[185]

247. Facebook further submitted that Article 6 of the European Convention on Human Rights (the **ECHR**) requires the CMA to give Facebook the benefit of the doubt on the correct interpretation of the IEO and on the issue of whether Facebook has a 'reasonable excuse'. It suggested that the Tribunal had alluded in *Electro Rent* to the application of Article 6 ECHR in this context (the argument raised by the party was premised on the quasi-criminal nature of the penalty).[186]

248. For the avoidance of doubt, the Tribunal in *Electro Rent* did not decide on whether penalties imposed under section 94A of the EA02 were quasi-criminal and did not require the CMA to give addressees the benefit of the doubt (as it found that there was no room for any level of doubt in the circumstances of that case). The CMA considers that the penalty is not quasi-criminal in nature; rather it is an administrative penalty. In any event, there is no separate issue of giving Facebook the benefit of the doubt; the issues are simply:

(a) the correct interpretation of the IEO, which is a question of construction, and

(b) whether, on the balance of probabilities, there was a reasonable excuse.

249. Furthermore, the CMA records for completeness that it does not consider there to be any doubt as regards these issues.

[182] Provisional Penalty Decision Response, paragraph 1.8.
[183] Provisional Penalty Decision Response, paragraphs 1.7 to 1.8 and 1.10.
[184] Paragraphs 1.13 to 1.15 of the Provisional Penalty Decision Response
[185] Preliminary Response, page 11; Provisional Penalty Decision Response, paragraph 1.9.
[186] Provisional Penalty Decision Response, paragraph 1.8; citing *Electro Rent*, paragraphs 71 to 73.

250. The CMA has carefully considered whether Facebook's submissions on failure to comply with the IEO amounted to reasons why Facebook considered it has a reasonable excuse not to comply with the IEO. These submissions are addressed in turn.

251. Firstly, regarding the submission outlined in paragraph 246(a) above the CMA disagrees with Facebook's submissions that it believed no derogation would be possible in this present case. This is addressed in paragraphs 139 to 144 above. Further, had Facebook held such a belief, it would not have been reasonable.

252. The CMA has been consistently clear in its position on granting consent to limit the obligations under the template IEO, having regard to the Interim Measures Guidance at all times. The CMA has provided guidance explaining its procedure and approach to assessing derogation requests to assist Facebook and its legal advisers. Facebook did not make efforts to provide the CMA with the necessary information needed (as set out in paragraphs 63 to 64 above) to form a view on the Carve-Out Request or consider whether alternative arrangements such as procedural safeguards could be implemented. Prior to the Tribunal proceedings, the CMA made it clear that it was unable to reach a view on the Carve-Out Request in light of its broad nature, the continuing absence of information and evidence requested from Facebook, and having regard to the Interim Measures Guidance.[187] The subsequent granting of derogations by the CMA is the result of Facebook submitting requests which were (ultimately, following Facebook's failed challenge before the courts) fully specified, reasoned, and supported by relevant evidence. The CMA was unable to grant derogations without the necessary information from Facebook to determine whether the request met the criteria set out in the Interim Measures Guidance. Indeed, the CMA granted the Carve-Out Derogation only after it had received the necessary evidence required to form a view.

253. Secondly, regarding the submission outlined in paragraph 246(b) above the CMA does not accept that Facebook adopted the only reasonable and proportionate option available to it in good faith. As set out in paragraphs 110 to 121 above, Facebook failed to engage with the CMA's information requests, which were necessary for the CMA to determine whether to grant derogations that and would have limited the burden of the IEO on Facebook. Furthermore, as set out in paragraph 90, the CMA's letter of 11 December 2020 set out what, at a minimum, the CMA expected from Facebook in terms of the submission of its compliance statements. Despite this clear direction, Facebook continued to unilaterally narrow its IEO obligations and qualify its

[187] CMA letter of 7 August 2020, paragraph 4.

compliance statements based on derogations which had not been granted. As to the points made regarding the Court of Appeal's judgment in *Facebook v CMA (CoA)*, the CMA does not agree that the Court of Appeal 'clarified' the meaning of section 72(8) of the EA02 in the manner submitted by Facebook. As set out in paragraphs 97 to 105 above, it was never in dispute that section 72 of the EA02 applies to conduct that may be taken in connection with or as a result of the merger. Facebook should have been aware of its obligations under the IEO and cannot rely on its own incorrect interpretation of the EA02 as the basis for a reasonable excuse for non-compliance with the IEO, particularly in circumstances when it was warned on multiple occasions by the CMA that its approach to its monitoring and reporting obligations was not compliant with the IEO.

254. Thirdly, regarding the submission outlined in paragraph 246(c) above, the CMA does not accept Facebook's submission that it failed to engage with Facebook's concerns that compliance with the IEO was impossible without causing '*irreparable harm*' to the Facebook business due to its size and scale.[188]

255. Facebook submitted that the CMA did not:

(a) reduce the scope of the IEO, either at the outset or at the time of establishing the definition of GIF-related Activities in its section 109 notice of 4 December 2020 (at this point, Facebook's view is that it would have been '*logically open*' for the CMA to limit the IEO to GIF-related Activities (as defined by the CMA) on a conceptual basis), or

(b) offer informal comfort to Facebook regarding the IEO's application, such as '*by clarifying to Facebook that the IEO (for instance) de facto only applied to Facebook's GIF-related Activities (as defined by the CMA)*'.[189]

256. The CMA disagrees with these submissions by Facebook:

(a) As set out at paragraphs 115 to 121 above, at the outset of an investigation the scope of an IEO is necessarily broad due to the lack of information available to it. What is required to refine the IEO is cooperation from the merging parties, providing the information needed for the CMA to consider derogations, something that Facebook failed to do for a long period of time, as recognised by the Tribunal and the Court of Appeal.

[188] Provisional Penalty Decision Response, paragraph 1.12.
[189] Provisional Penalty Decision Response, paragraphs 1.13 to 1.14.

(b) Whilst the CMA defined GIF-related Activities in its section 109 EA02 notice of 4 December 2020, the CMA needed to reach a considered view on how this definition would apply in practice so as to be able to give precise directions to Facebook at the time of granting a derogation. Indeed, after the term GIF-related Activities was defined by the CMA in the section 109 EA02 notice, there was evidence of a lack of common understanding of the concept of GIF-related Activities between Facebook and the CMA. As explained to Facebook in the CMA's letter of 19 February 2021, there were several outstanding concerns that needed to be addressed before the CMA could be in a position to grant a derogation based on the concept of GIF-related Activities (as defined by the CMA), including, among others, the following concerns:

i. the conceptual nature of the Updated COD Request gave rise to significant difficulties regarding how the CMA would identify the specific activities that would remain within the scope of the IEO, and ensure the CMA and Facebook understood how the IEO would apply in practice once a derogation takes effect;

ii. Facebook might adopt its own, narrower interpretation of GIF-related Activities if this concept was used to narrow the scope of the IEO;

iii. Facebook's lack of sufficient or timely engagement with the CMA on its conduct in relation to its existing IEO obligations (including the conduct described in Breaches 2 and 3) heightened the concern that the IEO may not be fully complied with; and

iv. it was unclear how Facebook would monitor or report any changes to its GIF-related Activities and its employees involved in GIF-related Activities, as well as how it would ensure no action is taken that would breach the remaining IEO obligations.

(c) The CMA considers that, as set out in paragraph 89 above, the CMA did provide guidance to Facebook: it set out what, at a minimum, the CMA expected from Facebook in terms of the submission of compliance statements. Facebook instead chose to continue qualifying its compliance. As set out above at paragraph 190 above, it is of the utmost importance that interim measures are scrupulously complied with. The CMA therefore does not accept that Facebook had no choice but to continue to qualify its compliance statements. A business the size of Facebook should have no difficulty in engaging with the CMA and setting up robust compliance mechanisms, even on a broad basis.

(d) In any event, Facebook's submissions do not change the fact that Facebook was obliged to comply with the requirements of the IEO and report its compliance to the CMA. Facebook continued to unilaterally narrow its IEO obligations and qualify its compliance statements based on derogations which had not been granted.

257. In respect of Facebook's certification of key staff in its qualified compliance statements, the Provisional Penalty Decision Response submitted that Facebook cannot be criticised for applying a '*vague and unworkable*' definition of key staff (which would have applied to up to 12,000 members of its staff) in a manner which was practical and achievable.[190]

258. The CMA does not agree with this submission. The definition of key staff applied to Facebook is the standard definition included in the template IEO and the proper course of action for refining that definition is through engagement with the CMA. Instead, Facebook chose to unilaterally determine the scope of the IEO, reaching decisions that were properly for the CMA. The inappropriateness of this approach is emphasised by the fact that the list of key staff which Facebook decided to certify compliance for was much narrower than those subsequently captured by the Carve-Out Derogation.[191]

259. Fourthly, regarding the submission outlined in paragraph 246(d) above, the CMA does not agree that there is '*no dispute*' regarding whether Facebook has complied with its core obligations under the IEO. Setting up compliance mechanisms that reflect the full scope of the obligations imposed by the IEO, and certifying compliance on that basis under paragraph 7 of the IEO (rather than on the basis of a narrower scope determined unilaterally by a merging party) is a core element of the IEO. As set out in paragraph 188 above, Facebook's defective approach to ensuring, monitoring and certifying compliance meant that the CMA was not able to effectively monitor Facebook's compliance with the IEO, and was therefore left in the dark as to whether or not the IEO was being fully complied with by all parts of the business. As described in paragraph 42 above, the importance of this is reflected in the requirement that the person responsible for monitoring and reporting on compliance with the IEO is of sufficient seniority, possesses sufficient knowledge of a business's operations, and has sufficient authority to take steps to prevent IEO breaches.

260. The Provisional Penalty Decision Response submitted that the CMA has only cited two examples of alleged breaches which have occurred over 12 months. It noted that this is in circumstances where the CMA's investigation has been

[190] Provisional Penalty Decision Response, paragraph 1.32.
[191] Paragraph 123 above.

ongoing for 16 months and where the Parties' activities have been closely monitored by a Monitoring Trustee and a Hold Separate Manager.[192]

261. As set out above, the precautionary purpose of the IEO seeks to protect against the *possibility or risk* of prejudice to the reference or potential remedies. Such risk has arisen from the fact that Facebook implemented a compliance programme that did not monitor compliance with the IEO obligations imposed by the CMA on Facebook. Instead, it did so on a significantly narrower basis than the IEO in place at the time; indeed, this basis was narrower even than the scope of the IEO following the granting of the Carve-Out Derogation (as set out in paragraphs 123 to 126). The CMA considers that there is no reasonable excuse for Facebook adopting this approach to compliance, instead of cooperating with the CMA to refine the scope of the IEO. If the CMA uncovers additional breaches, it will consider imposing separate, additional penalties in relation to such breaches (as it has done in relation to Breach 3).

262. The CMA does not view the monitoring of Facebook by a Monitoring Trustee to be relevant in considering whether Facebook had a reasonable excuse. Firstly, it does not affect the CMA's position as to whether the breaches set out in this decision have occurred. Secondly, as set out in paragraphs 170 to 184 above, Facebook has consistently taken the same defective approach with the Monitoring Trustee as it has adopted with the CMA.

263. With respect to Breach 3 specifically, for the reasons set out in paragraphs 283 to 285, the CMA disagrees with Facebook's submission[193] that there was uncertainty as to the application of the Key Staff definition to the individuals to whom the Breach 3 relates, such that it has a reasonable excuse for failure to comply with the IEO. This is even more so the case in relation to the second instance of that breach, which occurred after the CMA had made it very clear by email on 6 January 2021 to Facebook that it was obliged to seek a derogation for changes to the role of Chief Compliance Officer under the terms of the IEO.

264. The CMA concludes that the reasons put forward by Facebook are matters that do not amount to a reasonable excuse (individually or in aggregate). None of the reasons disclose a genuinely unforeseeable[194] or unusual event and/or an event beyond Facebook's control causing it to fail to comply with

[192] Provisional Penalty Decision Response, paragraph 1.15. [✂].
[193] Provisional Penalty Decision Response, paragraph 3.8.
[194] We note in this context that paragraph 14 of the Directions state that '*If Facebook, Tabby Acquisition, Facebook UK and/or Giphy has any reason to suspect that the Order may have been breached, it must notify the MT and the CMA immediately*' (emphasis added).

the IEO, nor do they provide an alternative basis for finding a reasonable excuse.[195]

265. Accordingly, the CMA has concluded that Facebook had no reasonable excuse for failing to comply with the requirements of the IEO which have been identified above. Accordingly, the CMA has considered imposing a penalty of such fixed amount as it considers appropriate (section 94A of the EA02).

E. Appropriateness of imposing a penalty and of the amount of the penalty imposed

Policy objectives of the penalty – preventing actions which might prejudice any reference and deterrence

266. The CMA considers that it is of utmost importance to the UK's voluntary, non-suspensory regime that interim measures should be effective, particularly in the small number of completed mergers which the CMA identifies as warranting review. Their function is to prevent conduct that might prejudice a reference or impede action justified by the CMA's final decision. The purpose of an IEO, as noted by the Tribunal, is precautionary, guarding against the possibility of pre-emptive action.[196] It is also incumbent on parties to provide full and accurate information to the CMA and any appointed monitoring trustee throughout the investigation particularly if they identify risks as to their activities pursuant to the IEO and any related derogations.

267. It is important that parties take such obligations to comply seriously, recognising the importance of conducting their business within the parameters of any IEO, and exercise due care and attention over any activities that might be permitted under a derogation, to ensure they do not engage in a breach, whether inadvertently or otherwise.

268. The above is reflected in the policy objectives set out in the Penalties Guidance:[197]

> *'Use of the CMA's investigatory and interim measures powers is therefore intended to:*
> (…)
> • *prevent action which might prejudice any reference, impede the taking of*

[195] For the avoidance of doubt, the CMA considers that this conclusion holds regardless of whether Article 6 ECHR requires in this context that the benefit of the doubt be given to Facebook. This is because, for the reasons set out in this section, there was no room for doubt that would have required application of any benefit of the doubt principle in favour of Facebook.
[196] *Intercontinental Exchange* at paragraph 220.
[197] Penalties Guidance, paragraph 3.1.

action following a reference, or cause detrimental and irreversible changes to market dynamics, and

• ensure that the threat of penalties will deter future non-compliance with relevant CMA powers, by those on whom penalties have been imposed and other persons who may be considering future non-compliance.'

269. The CMA notes that in *Electro Rent*, the Tribunal held that '*it was appropriate to set the penalty at a level that would bring home to Electro Rent, and to other parties involved in a merger investigation, that it is of the utmost importance that interim orders be scrupulously complied with, and that a party should not itself form judgments or reach decisions that are properly for the CMA. This is so, whatever the intentions or incentives of the party involved*.'[198] The CMA subsequently issued revised guidance on interim measures, stating that '*given the importance of Interim Measures to the functioning of the regime, the CMA will not hesitate to make full use of its fining powers. The CMA will therefore impose proportionately larger penalties in future cases should this prove necessary in the interests of deterrence*.'[199]

270. Financial penalties perform an important function in signalling the unacceptability of commercial practices by merging parties that contravene the CMA's interim measures, and the serious potential consequences of engaging in such practices. It is therefore imperative that the CMA set the penalty at a level that reflects the seriousness of the failure to comply with interim measures, and is effective in achieving deterrence.[200]

Appropriateness of imposing a penalty

271. Having had regard to its statutory duties and the Penalties Guidance, and having considered all relevant facts and submissions of Facebook, the CMA has decided that the imposition of penalties in the present case is appropriate.[201]

272. In reaching this view, the CMA has had regard to the policy objectives set out above (in particular the need to achieve deterrence), as well as the factors

[198] *Electro Rent*, paragraph 206. In doing so, it rejected Electro Rent's submission that setting the penalty at such a level was not appropriate because the breach was inadvertent and because Electro Rent had approached the monitoring trustee in advance and had taken steps to rectify the breach.
[199] Interim Measures Guidance, paragraph 7.6.
[200] There are two aspects to deterrence: first, the need to deter the undertaking which is subject to the penalty decision from engaging in future contravention of interim measures (recidivism), and second, the need to deter other undertakings which might be involved in future merger investigations. Any penalty that is too low to deter an undertaking which has contravened interim measures is also unlikely to deter other undertakings.
[201] In accordance with paragraphs 5.2 and 5.9 of the Penalties Guidance, the CMA's General Counsel has been consulted on the reasons for, the approach to and level of the penalty.

influencing a decision to impose a penalty as set out in the Penalties Guidance.[202]

273. Facebook submitted that if the CMA determined that there was some impact from Facebook's conduct, it would at most be a technical infringement of the IEO that does not justify a financial penalty.[203] It also submitted that penalties should only be imposed for infringements that impacted the CMA's investigation or any of the markets concerned. The CMA disagrees with this submission. As set out below, the CMA has concluded that imposing a penalty for Breaches 1 and 3 is appropriate given:

    (a) the serious and flagrant nature of these two breaches; and

    (b) the adverse impact that these breaches are likely to have had on the CMA's ability to monitor, and (as the case may be) enforce, compliance with interim measures.

274. While the CMA considers that Breach 2, taken in isolation, would in most circumstances warrant a penalty, the CMA has decided that such a penalty in relation to Breach 2 is not necessary in the present case for the reasons set out below.

Serious and flagrant nature of the failure to comply with the IEO

Breach 1 – Qualified compliance statements

275. The CMA finds Facebook's conduct and approach to certifying compliance with its IEO obligations (Breach 1) to be of a particularly serious and flagrant nature.[204]

276. In the CMA's view, Breach 1 is serious because the provision of periodic compliance statements is an important obligation in the IEO and fundamental to the effective operation of the UK merger control regime:

    (a) Businesses are required to both monitor and report on their compliance with the IEO to the CMA, including by certifying compliance on a fortnightly basis. This transparency helps to actively keep the CMA informed of any material developments relating to the merging parties' activities, and immediately inform the CMA if it has any reason to suspect the IEO has been breached. It also focuses the attention of the business

[202] See paragraphs 4.2 and 4.3 of the Penalties Guidance.
[203] Preliminary Response, page 7.
[204] Penalties Guidance, paragraph 4.2.

on the requirements in the IEO, which in turn helps to ensure compliance with interim measures.

(b) Failure to comply with such obligations has an adverse impact on the CMA's ability to carry out its statutory functions (see below paragraphs 286 to 291). This is why paragraph 7 of the IEO requires the most senior individual of the business (the CEO) or other persons as agreed with the CMA, to personally sign statements to confirm compliance with the IEO and for the business to provide these to the CMA on a regular basis while interim measures are in place.

(c) For these reasons and those set out in paragraph 259 above, the IEO provisions which the CMA finds to have been breached reflect a core feature of the interim measures regime (which in turn is critical to the effective functioning of the UK's voluntary, non-suspensory merger regime). This breach is therefore a fundamental breach of the obligations imposed in accordance with section 72 of the EA02 via the IEO.

277. Further, in the CMA's view, Breach 1 is flagrant (and intentional) because it reflected a deliberate decision by Facebook to comply with the IEO only to the extent that it considered to be necessary and proportionate despite repeated warnings from the CMA and reprimand by the Tribunal and Court of Appeal. The CMA disagrees with Facebook's submission that it has been transparent with the CMA and developed an effective and robust compliance programme.

(a) Facebook limited the CMA's visibility of its actions by unilaterally carving out parts of its business and activities from compliance reporting, and operated as if its derogation requests had already been granted. Facebook also simultaneously failed to properly engage with the CMA and provide it with the information it required to assess derogation requests made by Facebook.

(b) As set out above in this decision, the CMA indicated on multiple occasions to Facebook that Facebook's approach to certifying compliance was unsatisfactory.[205] Despite this, Facebook continued to qualify its compliance statements, even after it was reprimanded for such conduct by both the Tribunal[206] and the Court of Appeal.[207]

(c) As such, Breach 1 is considered by the CMA to reflect a high-risk strategy by Facebook not to fully comply with its obligations under the IEO.

[205] See paragraphs 86 to 89 above.
[206] See paragraph 115 above.
[207] See paragraphs 118 and 119 above.

(d) Facebook is a well-resourced company that was aware from the outset that it needed to provide unqualified compliance statements to comply with the IEO, guided by external legal counsel familiar with the CMA's merger investigation process.[208]

278. Therefore, the CMA considers that Facebook's decision to qualify its compliance in accordance with derogations which had not been granted, and to refuse to provide the necessary information to the CMA to assess those derogation requests, amounted to a flagrant, intentional and conscious decision to choose non-compliance over cooperation with the CMA, signed off by Facebook's Chief Compliance Officers.

279. Facebook further submitted that the circumstances of the present case are novel and difficult. It notes the recent judgment of the Tribunal in *Paroxetine*[209] where 'novelty' was considered as a factor that could justify the non-imposition of a penalty or at least a substantial reduction in penalty.[210] However, the CMA does not consider the requirement to adhere scrupulously to the terms of an IEO to be a 'novelty' (see paragraph 269 above, based on *Electro Rent*)[211] such that it should impact the decision of whether to impose a fine and in what amount.

(a) As set out above, the CMA finds Breach 1 to be flagrant, intentional and persistent (even after Facebook's approach to compliance drew criticism from the Tribunal and Court of Appeal), and as such bears no resemblance with the circumstances of *Paroxetine*[212] and the antitrust case law on 'novelty' referred to in that judgment.

(b) Whilst the CMA recognises this case presented some challenges for the derogations process given the 'tentacles' of Giphy run into various elements of the Facebook business, addressing these simply required Facebook to properly engage with the CMA's process (with which Facebook's experienced external counsel are very familiar), and specifically with the CMA's information requests. Indeed, as set out in paragraph 144 above, with proper engagement from Facebook, the CMA was subsequently able to grant the Carve Out Derogation and narrow

[208] See Tribunal proceedings transcript day 1, page 14, lines 11 to 15, in *Facebook v CMA* where, in the context of discussing compliance with the IEO, Facebook's counsel says, '…*the downside of getting that wrong is not a trivial thing: the sanction 5 per cent of worldwide turnover and/or perhaps even a period of imprisonment. [...] on the face of it this is a substantial restriction and the consequences of not complying are equally substantial.*'
[209] *GlaxoSmithKline PLC, Generics (UK) Ltd, Xellia Pharmaceuticals ApS, Alpharma LLC, Actavis UK Ltd and Merck KGaA v Competition and Markets Authority* [2021] CAT 9.
[210] Preliminary Response, page 4.
[211] *Electro Rent*, at paragraph 206.
[212] We further note in any event that, in *Paroxetine*, a penalty was imposed – the complexity of the infringement was only one relevant factor among others in reducing the penalty on proportionality grounds.

down the scope of the IEO, following which Facebook has not qualified its compliance statements.

Breach 2 – Tenor outage

280. Tenor was globally unavailable on all versions of Facebook Messenger for at least [✂] (including the 'overhang' period, this increases to [✂]). The loss of service also affected Facebook Posts. Tenor is one of Facebook's two GIF providers, and the outage of the Tenor API occurred during the CMA's investigation of Facebook's acquisition of its other GIF provider, Giphy. Not only was the outage considerably longer than 24 hours, the loss of service reduced the overall quality of GIFs available (in terms of range) and affected the distribution of Tenor's GIFs through Facebook's core products. Facebook did not notify the CMA of the Tenor outage, and the CMA subsequently became aware four months after the outage occurred. As the CMA was not informed of this material development, the CMA was not able to investigate its causes and, as the case may be, take action if it considered that such an outage may have been the result of, or have led to, pre-emptive action. The CMA therefore finds Facebook's conduct to have been serious and flagrant.

281. Furthermore, the CMA is of the view that this breach was committed intentionally or, at the very least, negligently by Facebook. As set out above,[213] the Tenor outage lasted for [✂] and the loss of service affected an input (GIFs) and input provider (Tenor) with direct relevance to the subject matter of the CMA's investigation. Therefore, the CMA finds that Facebook must have either been aware (or could not have been unaware), or ought to have known, that its conduct in failing to report this incident would constitute a failure to comply with the IEO.

282. The CMA therefore considers that Breach 2 is serious as it amounts, as with Breach 1, to a failure to report a material development. The CMA notes however that, compared to Breach 1, it is not as serious or flagrant as it constitutes only a very specific and limited instance of a material development that Facebook failed to report, rather than the general exclusion of parts of the Facebook business from its compliance process and reporting (the CMA also considers Breach 2 to be less serious and flagrant than Breach 3).

Breach 3 – Changes made to key staff

283. For the reasons set out above, Facebook must have been aware, could not have been unaware, or at the very least ought to have known, that a person

[213] See also paragraphs 201 to 202 above.

responsible for ensuring compliance with the IEO falls within the definition of key staff.

284. Facebook failed to seek consent prior to changing the holder of that key position on two occasions after the IEO came into effect. After the change to [Facebook Employee 1]'s role, the CMA made it very clear by email on 6 January 2021 to Facebook that it was obliged to seek a derogation for changes to the role of Chief Compliance Officer under the terms of the IEO, and provided a further warning in its letter of 19 February 2021.[214] Despite this clear direction, [Facebook Employee 3] was appointed to the role of Chief Compliance Officer on 8 February 2021, and the CMA only became aware of the appointment on 3 March 2021 when Facebook sought the CMA's permission by email for [Facebook Employee 3] to execute the compliance statements on behalf of Facebook.

285. Therefore, the CMA finds Facebook's conduct to have been serious and flagrant, and that this breach was committed intentionally, or, at the very least, negligently, in particular after the clear direction given by the CMA.

Adverse impact on the CMA's investigation – risk of prejudice to the reference

Breach 1 – Qualified compliance statements

286. The CMA has considered Facebook's submissions that Facebook's approach to qualifying compliance with the IEO has not resulted in any pre-emptive action and that the breaches identified by the CMA could not have had any impact on the CMA's ability to investigate the Merger and, if appropriate, remedy any substantial lessening of competition upon final determination of the reference.[215]

287. The CMA disagrees, and finds that Facebook's conduct and approach to certifying compliance with its IEO obligations (Breach 1) has prejudiced the CMA's ability to perform an important aspect of its statutory functions, namely to monitor compliance with the IEO, including to investigate potential breaches because the CMA is ultimately unable to discern whether parts of the Facebook business have complied with the IEO.

288. As set out above, the CMA finds that Facebook's approach created a risk of pre-emptive action, particularly in circumstances where the CMA's investigation is ongoing and no final remedies have been decided (noting the breadth of the concept of pre-emptive action and of the CMA's powers in

[215] Preliminary Response, page 7; Provisional Penalty Decision Response, paragraph 1.9.

remedying an SLC as set out below) and had an adverse impact on its ability to monitor compliance, and (as the case may be) enforce compliance, with the IEO:

(a) The scope of the IEO, and the obligations imposed by it on merging parties, reflect the breadth of the concept of pre-emptive action, which is broader than suggested by Facebook. As established in jurisprudence, the concept of 'pre-emptive action' which IEOs seek to prevent encompasses more than the question of remedies, including both action that might prejudice the reference or impede the taking of any remedial action. Also, as found by the Court of Appeal, the statutory remedial powers exercised by the CMA in the merger investigation are not limited to requiring divestiture of the acquired corporation. Indeed, Section 41(2) of and schedule 8 to the EA02 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.'*[216]

(b) As noted above at paragraph 259, setting up compliance mechanisms that reflect the full scope of the obligations imposed by the IEO, and certifying compliance on that basis under paragraph 7 of the IEO (rather than on the basis of a narrower scope determined unilaterally by a merging party) is a core element of the IEO. This is because the CMA must be made aware of material developments within the relevant businesses in order to be in a position to assess, at the time these material developments occur, whether these might cause a prejudice to the reference, or impede remedial action should the CMA identify a substantial lessening of competition.

(c) The effect of Facebook's actions in qualifying 27 compliance statements, over a period of approximately one year – sanctioned by senior Facebook management (i.e. the Chief Compliance Officers) – is that the CMA cannot know whether Facebook has complied with the IEO in respect of those parts of its business, activities and staff that it has excluded from its compliance statements without the CMA's involvement. Facebook's approach further reflects the narrowing down by Facebook of the internal mechanisms set up to ensure compliance with the IEO, and report instances of non-compliance, *de facto* limiting its compliance to certain parts of the business and activities.

(d) This, in turn, limits the CMA's awareness of material developments within the business under investigation, including developments which in

[216] *Facebook v CMA (CoA),* paragraph 44.

principle had the potential for causing a prejudice to the reference or impeding the taking of remedial actions, and therefore prejudiced the CMA's ability to carry out an important statutory function under the merger regime, namely to monitor, and as the case may be enforce, compliance with interim measures in order to prevent pre-emptive action.

289. For the avoidance of doubt, the CMA's assessment of the seriousness of Breach 1 is not relying on a finding that Facebook's failure to report material developments in its compliance statement has caused an actual prejudice to the reference or has impeded the taking of remedial action. The fact that the CMA has not identified such an outcome in this decision does not alter the fact that Facebook, as a result of Breach 1, created a risk of such prejudice. Specifically, by not reporting to the CMA material developments affecting the relevant businesses at the time when these developments occurred, it undermined the CMA's ability to assess the risk of pre-emptive action arising from these, and to take any appropriate decisions in a more effective manner as it saw fit. Facebook was obliged to comply with the requirements of the IEO that were in effect at the relevant time of the conduct set out in this decision. Facebook's conduct created the risk of pre-emptive action at that point in time. Indeed, there is a broad range of activities which remain within the scope of Facebook's IEO obligations after the granting of the Carve-Out Derogation but were excluded from Facebook's compliance process.

290. Facebook's conduct underpinning Breaches 2 and 3 provide (non-exhaustive) examples of the type of events that should be identified through the compliance process (and therefore by the compliance statements) and the risk arising from Facebook's approach to certifying compliance.

291. Given the selective approach taken to compliance with the IEO outlined above, the CMA has limited ability to know if Facebook has committed any other breaches of the IEO in addition to Breaches 2 and 3. Any such breaches would not have been reported in a timely manner to the CMA as they should have been and were not reflected in Facebook's periodic compliance statements.

Breach 2 – Tenor outage

292. As the Tenor outage was not notified to the CMA by Facebook, nor was it reported to the CMA under the qualified compliance statement, the CMA was not made aware of the Tenor outage in a timely manner. Instead, the Tenor outage was mentioned in passing in the White Paper four months after it occurred.

293. Breach 2 is an example of the type of concerns underlying Breach 1. Facebook's decision not to fully comply with its obligations under the IEO served to limit the CMA's awareness of material developments within the businesses under investigation (including other potential breaches) and in turn prejudiced the CMA's ability to carry out an important statutory function under the merger regime, namely to monitor, and as the case may be enforce, compliance with interim measures in order to prevent pre-emptive action.

294. Specifically, this breach created a risk of prejudice to the reference or potential remedial action to the extent that the CMA was not able to assess at the relevant time whether any action by it was required in view of the Tenor outage (even if, with hindsight, no such action would have been required).

Breach 3 – Changes to key staff

295. The CMA is of the view that Breach 3 is symptomatic of the decision adopted by Facebook not to fully comply with its obligations under the IEO.

296. Ensuring compliance with the IEO, and providing compliance statements under the IEO, are important obligations for the addressees of an IEO (as set out in paragraph 42 above). It is therefore important for the CMA to be in a position to ensure that key staff responsible for this process are capable of carrying out this role effectively (including having the actual executive or managerial authority and sufficient knowledge of the business's operations to take steps to prevent any pre-emptive action in breach of the IEO) and bind the enterprise vis-à-vis the CMA (noting that failure to comply with an IEO can carry liability of penalties of up to 5% of worldwide turnover).

297. For the purposes of this Merger, Facebook decided to entrust these functions to the Chief Compliance Officer. Facebook failed (twice) to seek consent prior to implementing changes to key staff holding this position. Instead, it merely sought such consent, after the change made to this key staff position, on a narrow basis, namely seeking consent for transferring responsibility for executing the compliance statements, ie when actual responsibility for supervising Facebook's internal compliance process as Chief Compliance Officer had *de facto* already been transferred without giving the CMA the opportunity to consider such changes to key staff. This defective approach to compliance risks prejudicing the reference and/or risks impeding any remedial action, and undermines the CMA's ability to exercise its monitoring functions under the IEO, in this case to ensure that the person in charge of supervising and certifying Facebook's compliance process is capable of carrying out this role effectively and taking the necessary steps to prevent pre-emptive actions from occurring.

Pattern of behaviour

298. Facebook's overall compliance with the IEO is particularly concerning since, as set out above, the CMA is of the view that there have been several instances of contraventions to the IEO (ie Breaches 1, 2 and 3). These are symptomatic of the adoption by Facebook of a *'high risk strategy'*[217] not to fully comply with IEO requirements, and evidence a disregard on the part of Facebook for the requirements of the IEO. Specifically, Facebook failed to properly engage with the CMA in the interim measures process (eg seeking derogations where needed, providing the information requested by the CMA, delaying any implementation of proposed action until the derogation had been granted, and reporting any breach or material developments), but reached decisions that are properly for the CMA (eg qualifying compliance statements by limiting the scope of the IEO on a basis that it unilaterally deemed appropriate).

299. More specifically, the CMA considers that:

(a) The conduct encompassing Breach 2 (Tenor outage) is a further example of Facebook's failure to report material developments demonstrated by Breach 1, and had the same effect of limiting the CMA's awareness of developments that could have been material, undermining its ability to take action if appropriate.

(b) The failure to seek the appropriate consent or derogations demonstrated by Breach 3 (Change of roles of key staff) is consistent with Facebook's approach to certifying compliance described in relation to Breach 1, which is based on a unilateral decision taken by Facebook to exclude parts of its business, activities and staff from its compliance process. Facebook should not have relied on its own narrow view of the appropriate scope of the IEO in relation to key staff where no derogation had been granted by the CMA, particularly in the second instance when the CMA had warned Facebook that it considered the Chief Compliance Officer to be key staff.

300. The CMA further notes that Facebook has taken a similar approach when engaging with the Monitoring Trustee (see above paragraphs 171 to 184).

Conclusion on the appropriateness of imposing a penalty

301. In view of the above, the CMA has found that it is appropriate to impose penalties in relation to Breaches 1 and 3 on the basis of:

[217] *Facebook v CMA*, paragraph 159.

(a) the serious and flagrant nature of these failures to comply with the IEO (set out in paragraphs 275 to 285 above), and

(b) the adverse impact of these failures to comply on the CMA's ability to monitor, and (as the case may be) enforce, compliance with interim measures (set out in paragraphs 286 to 297 above).

302. While the CMA considers that it will be appropriate in most cases to impose a penalty for contraventions such as Breach 2 (for the reasons set out above), the CMA has decided not to impose a penalty in this case because:

(a) Breach 2 is an example of the type of concerns underlying Breach 1, namely they both consist of a failure to report material developments affecting the Facebook business to the CMA. The failure to disclose such developments undermines the CMA's ability to monitor compliance and, as the case may, enforce the IEO.

(b) Breach 2 is however a distinct, single instance of such concerns. In comparison, Breach 1 is a *de facto* exclusion of parts of the Facebook business from the scope of reporting for a period of approximately one year. As such, Breach 1, which is clearly intentional as it is the result of explicit decisions made by senior management at Facebook, is significantly more serious and flagrant than Breach 2.

(c) The CMA considers that the penalty it is imposing in relation to Breach 1 is sufficient, appropriate, and proportionate in achieving the objective of deterring Facebook and other undertakings in future cases from failing to report material developments to the CMA (see next section). It is therefore unnecessary for deterrence purposes to impose a penalty in relation to Breach 2 pursuing an objective that is already achieved by the penalty which the CMA is imposing in relation to Breach 1.

303. The CMA considered that the other factors relevant to the appropriateness of imposing a penalty listed in the Penalties Guidance at paragraph 4.2[218] did not affect this conclusion.

[218] Namely the need to achieve swift compliance in the context of this investigation (the CMA considers that general and specific deterrence in relation to future cases are more relevant) or any benefit accrued to Facebook (this consideration is taken into account for the determination of the penalty amounts).

Appropriateness of the amount of the penalty for each breach

304. Consistent with its statutory duties and the Penalties Guidance,[219] the CMA has assessed all relevant circumstances in the round to determine an appropriate level of penalty for each of the breaches.

Assessment of Facebook's submissions on the CMA's approach to determining the appropriate amount of the penalties

305. In its submissions, Facebook stated that:

(a) other than citing the size of Facebook's global turnover (paragraph 260) and the need to achieve deterrence (paragraph 223), the CMA has failed to explain how it has arrived at the fine amount in the Provisional Penalty Decision;[220]

(b) the CMA has failed to meet its obligations under section 94B(2) of the EA02 which requires that the CMA must set out '…the considerations relevant to the determination of the amount [i.e., how to quantify] of any penalty imposed under section 94A', and contrasted the Penalties Guidance with the approach set out in the CMA guidance for calculating fines for breaches of competition law under the Competition Act 1998 (ie CMA73).[221] On that basis, Facebook submitted that its rights of defence are prejudiced as it has not been afforded the opportunity to comment on how the fine was calculated;[222] and

(c) the fine of £50 million is *'entirely arbitrary'* as the CMA failed to set out how it quantified the amount of the fine in the Provisional Penalty Decision.[223]

306. In line with the process outlined in section 94B of the EA02, the Penalties Guidance has been adopted by the CMA following open consultation and subsequent approval by the Secretary of State. A presumption of regularity applies to the Penalties Guidance, that is the presumption that a public law decision is presumed to be valid unless and until quashed as being unlawful.[224] Contrary to CMA73, the approach provided for by the Penalties Guidance is that the CMA must consider all the relevant circumstances in the round in order to determine a penalty that is reasonable, appropriate and thus proportionate in the circumstances (see paragraph 4.11 of the Penalties

[219] Penalties Guidance, paragraph 4.11.
[220] See Provisional Penalty Decision Response, paragraph 1.37.
[221] Provisional Penalty Decision Response, paragraphs 1.39 and 1.40.
[222] Provisional Penalty Decision Response, paragraph 1.42.
[223] Provisional Penalty Decision Response, paragraph 1.47.
[224] See *DHL International (UK) Limited v Ofcom* [2016] EWHC 938 (Admin), paragraph 108, and case law cited therein.

Guidance). This is the approach that has been followed by the CMA in this case (and in previous cases): the reasons for its provisional penalty, which are in line with the Penalties Guidance, were set out in the Provisional Penalty Decision and Facebook has had an opportunity to comment.

307. It is factually incorrect that the CMA cited only the size of Facebook's global turnover and the need to achieve deterrence.

(a) the CMA has taken into account a range of financial indicators reflecting the size and financial resources available to Facebook,[225] primarily to ensure that the administrative penalty achieves the deterrence required at a level which is fair, reasonable and proportionate in view of the circumstances of the case. Contrary to Facebook's submission, this includes not only global turnover but also a range of other financial indicators relevant to assess the size and financial resources available to Facebook (as set out in paragraphs 342 to 344).

(b) further, in its Provisional Penalty Decision the CMA discussed and assessed in the round each of the factors which are listed as being relevant to assess the appropriateness of any penalty amount to achieve its objectives of deterrence while remaining proportionate. As recognised by the Tribunal, the determination of a penalty on the grounds of deterrence and proportionality involve matters of evaluation or judgement, which by their very nature do not lend themselves to elaborate explanation.[226]

308. Facebook further submitted that the penalties imposed by the CMA in this case exceeded the penalties imposed in previous cases, including against companies as comparatively well-resourced as Facebook, e.g. PayPal.[227] The CMA considers that it is necessary to be cautious when drawing comparisons with previous decisions. The CMA's previous decisions do not create binding precedents analogous to legal case law. Each case turns heavily on its own facts, including as regards such matters as the seriousness of the breach and the assessment of what is required for deterrence.[228] These are matters which the CMA must assess in each case, applying the published policy and exercising its judgement in relation to the facts of the particular case.

309. Nonetheless, in considering Facebook's submissions, the CMA has reviewed its previous penalty decisions. When one takes account of the size and financial position of the parties in each case, the CMA does not consider that

[225] One of the relevant considerations listed at paragraph 4.11 of the Penalties Guidance.
[226] *FP McCann v CMA* [2020] CAT 28, paragraph 312.
[227] Provisional Penalty Decision Response, paragraphs 1.35 to 1.36.
[228] See by analogy (specifically on the assessment of seriousness) *Eden Brown v OFT* [2011] CAT 8, paragraph 78.

these previous decisions, taken in the round, demonstrate that the penalty in this case is unusually or disproportionately high (or low). The key exercise is to apply the policy and to exercise judgement in relation to the facts of the particular case, as is set out below.

310. Therefore the CMA considers that the amount of the penalties imposed on Facebook is broadly consistent with the amount of past penalties imposed, when assessed against the size and financial position of each of these companies and the seriousness of the conduct.[229] Of course it will often be just and proportionate to impose a higher penalty on a larger undertaking than a smaller undertaking involved in the same type of infringement, including because a higher financial penalty is required in order to achieve the required deterrent effect.[230] This is consistent with the Interim Measures Guidance, which makes it clear that the CMA will impose proportionately larger penalties where necessary in the interests of deterrence.[231]

Breach 1

311. The CMA considers Breach 1 (Qualified compliance statements) to be the core, and most egregious, manifestation of Facebook's defective approach to compliance, which reflects what was described by the Tribunal as a '*high-risk strategy not to comply with outstanding IEO requirements and not to inform the CMA of the actions it is taking or the changes it is making to its business that might fall within the scope of the IEO*'[232] (see also paragraphs 298 to 300 above). Breach 1 is not just a serious, flagrant, and intentional contravention to the IEO, but it was also persistent as it manifested itself through qualified compliance statements every two weeks for approximately one year. Breaches 2 and 3 are distinct instances of Facebook's defective approach to compliance. Moreover, Breach 2 provides an example of the types of issues that should be captured by properly certified compliance statements.

312. In assessing the appropriate amount of the penalty in relation to Breach 1, the CMA has taken into account the considerations set out above, including:

    (a) The fact that Breach 1 is serious, intentional and flagrant. In total, Facebook submitted 27 qualified compliance statements to the CMA, over a period of approximately one year. Facebook has taken the conscious decision not to fully comply with its obligations under the IEO; it has acted as if derogations requested had already been granted, whilst failing to provide the CMA with the information it required to properly assess the

[229] This is particularly the case once the seriousness of Facebook's breaches is taken into account.
[230] See Penalties Guidance, paragraph 4.12 and by analogy *Eden Brown v OFT* [2011] CAT 8, paragraph 98.
[231] Interim Measures Guidance, paragraph 7.6.
[232] *Facebook v CMA*, paragraph 159.

derogation requests. The CMA considers it particularly aggravating that Facebook's failure was persistent, as it continued to qualify its compliance with the IEO despite clear warnings from the CMA and reprimand by both the Tribunal and Court of Appeal; and

(b) The adverse impact this failure to comply is likely to have on the CMA's ability to monitor, and (as the case may be) enforce and/or address, compliance with interim measures.

313. In addition to the above considerations, the CMA has also taken account of other factors, including (but not limited to) relevant factors listed in the Penalties Guidance.

Aggravating factors

314. The CMA is of the view that the following factors listed in paragraph 4.11 of the Penalties Guidance support the imposition of a higher penalty.

- *The nature and gravity of the failure, including: whether it was intentional or negligent, there was any attempt to conceal the failure, and the extent to which Facebook complied with other aspects of the investigatory and interim measures requirements*

315. The CMA has found that Facebook's approach to certifying compliance is serious in nature, intentional, and part of a broader pattern of conduct, and notes that (as set out further above):

(a) Facebook has taken a similar defective approach to certifying compliance in its engagement with the Monitoring Trustee;

(b) the CMA has identified at least two other breaches of the IEO, reflecting a pattern of behaviour in relation to compliance; and

(c) Facebook failed to submit complete responses to requests for information regarding compliance with the IEO under section 109 of the EA02.[233]

316. However, the CMA is not aware of any attempt on Facebook's part to conceal its failures to comply with the IEO. This has been taken into account when deciding on the appropriate level of the penalty.

317. Facebook submitted that:

[233] Outlined in paragraph 66 above.

(a) it has cooperated with the Monitoring Trustee's requests in full and that the identified breaches do not demonstrate a pattern of behaviour in relation to compliance, but in fact demonstrate the opposite;

(b) only two other breaches have been identified in this decision, which does not demonstrate a pattern of behaviour or a disregard for the IEO obligations by Facebook; and

(c) it responded to the above IEO requests issued under section 109 of the EA02 on time and in a manner which it considered to be complete; it further submitted that it was not appropriate to include this as an aggravating factor for increasing the level of fine, in circumstances where the CMA has separate fining powers for failures to respond to section 109 notices which are limited to either a single fine of £30,000 or a daily fine of up to £15,000.[234]

318. The CMA does not agree that Facebook has fully cooperated with the Monitoring Trustee in full for the reasons set out at paragraphs 171 to 184 above. As regards the section 109 notices, Facebook's submission ignores the fact that the CMA did not view Facebook's responses as complete or submitted on time,[235] and the Tribunal's finding that Facebook failed to engage with the CMA.[236] Further, as set out in paragraphs 298 to 300, the pattern of behaviour is demonstrated by Facebook's failure to properly engage with the CMA in the interim measures process, unilaterally limiting the scope of its IEO compliance, and reaching decisions that were properly for the CMA. Finally, the CMA disagrees that it is inappropriate under this specific factor to consider Facebook's deficiencies with compliance in other aspects of the IEO when these shortcomings are demonstrative of the cavalier approach taken to compliance identified in Breach 1. As set out above, the CMA considers that each of these breaches is symptomatic of the adoption by Facebook of a *'high risk strategy'* pursuant to which Facebook reached decisions about the scope of the IEO that were for the CMA to make. By failing to appropriately engage with the CMA, Facebook impeded the CMA's ability to monitor compliance with the IEO.

319. In the Provisional Penalty Decision Response, Facebook listed various steps which Facebook has taken to comply with the IEO, and submitted that the CMA has failed to have regard to these steps as mitigating factors.

[234] Provisional Penalty Decision Response, paragraph 1.43(a). Facebook also submitted that the allegation it had not cooperated with the CMA's process was wrong and relied upon the Witness Statement of Barbara Blank filed with the Tribunal in *Facebook v CMA*.
[235] See paragraph 66 above. See also the CMA's skeleton argument, *Facebook v CMA*, 15 October 2020, paragraphs 14 to 15, and the Witness Statement of Richard Romney, *Facebook v CMA*, 24 September 2020, paragraphs 15 to 18.
[236] See paragraph 118 above.

320. The CMA has considered these steps when deciding on the appropriate level of the penalty in the round. However, for the reasons explained below, the CMA considers these factors to be of limited weight in the circumstances. Facebook's submissions, and the CMA's assessment, are set out below.

(a) Facebook designed and implemented a *'substantial IEO compliance programme, including forming a dedicated team reporting to the Chief Compliance Officer'*. The CMA does not however consider Facebook's compliance programme to be satisfactory or effective (see above at paragraph 277);[237]

(b) Facebook voluntarily had approximately 200 members of its staff who were in involved in the acquisition of Giphy sign non-disclosure agreements to prevent further dissemination of Giphy confidential information within Facebook.[238] The CMA notes that these non-disclosure agreements were signed after the CMA enquired into the transfer of information between Giphy and Facebook that pre-dated the IEO and possibly required unwinding action.[239] Upon the CMA asking Facebook what safeguarding measures were in place to prevent the further transfer of information (and the Monitoring Trustee making such a recommendation in its first report), Facebook confirmed that it would ask Facebook employees involved in the acquisition of Giphy to sign such non-disclosure agreements.[240]

(c) Facebook has provided $[✂] per month in funding to support Giphy throughout the Merger investigation.[241] Purchasing a company such as Giphy which was still at a stage of development which required external funding, and completing the transaction before regulatory clearance, was a choice made by Facebook. Moreover, payments of this order of magnitude were necessary under paragraph 5(b) of the IEO which also requires Facebook to maintain the Giphy business as a going concern and ensure sufficient resources are made available for its development. In any event, Facebook providing financial support to Giphy does not mitigate in any way Facebook's responsibility for failing to comply with the IEO.

(d) Facebook *'has paid for and fully cooperated with a Monitoring Trustee and Hold-Separate Manager to enforce the IEO and independently*

[237] Provisional Penalty Decision Response, paragraph 1.45(e).
[238] Provisional Penalty Decision Response, paragraph 1.45(f).
[239] See Facebook's response to question 8 of the section 109 notice of 25 June 2020 dated 2 July 2020,
[240] See the CMA's email of 6 July 2020 and Facebook's response to the CMA's follow-up questions to Facebook's response of the section 109 notice of 25 June 2020, dated 28 July 2020.
[241] Provisional Penalty Decision Response, paragraph 1.45(g).

manage Giphy's business'.[242] Again, both steps were requirements under the terms of the interim measures steps directed by the CMA under paragraph 10 of the IEO, alongside compliance with the terms of the IEO. Facebook was therefore legally required pursuant to the Directions to cooperate with the Monitoring Trustee and pay for their services;[243]

(e) Facebook has *'at all times complied with the primary obligations of the IEO'* to ensure Giphy's independent operation and to preserve its GIF-related Activities.[244] Again, complying with the terms of an IEO would simply reflect the legal obligation that Facebook was under. However as set out in this decision, Facebook's unilateral narrowing of the scope of the IEO, and its chosen approach to certifying its compliance with the IEO has prejudiced the CMA's ability to monitor, and (as the case may be) enforce compliance with the IEO because the CMA has been left in the dark as to whether or not the IEO is being fully complied with by all parts of the business;

(f) Facebook *'cooperated with the CMA to the fullest possible extent in providing information in relation to the Updated COD Request'.*[245] Facebook's submission is inaccurate for the reasons set out above in paragraphs 159(c) and 159(d).

- *Steps in mitigation / continuation of the failure to comply after becoming aware of the failure to comply*

321. The CMA considers that Facebook has not taken appropriate steps in mitigation to avoid the failure to comply with the IEO in the future; rather, despite reprimand by the CMA, the Tribunal and the Court of Appeal, Facebook continued to qualify its compliance statements.

322. Facebook submitted that it did take steps in mitigation: it requested that the CMA provide practical guidance on compliance and none was forthcoming. Further, Facebook submitted that it engaged with the Monitoring Trustee in respect of its actions and certified compliance in line with the CMA's definition of GIF-related Activities from December 2020 onwards and in the manner '*eventually consented to by the CMA'.*[246]

323. Contrary to what is alleged in the Provisional Penalty Decision Response, the CMA has provided guidance explaining its procedure and approach to

[242] Provisional Penalty Decision Response, paragraph 1.45(h).
[243] See Directions issued on 19 June 2020 pursuant to paragraph 10 of the Initial Enforcement Order imposed by the Competition and Markets Authority on 9 June 2020 on: Facebook, Inc, Tabby Acquisition Sub, Inc, Facebook UK Limited and Giphy, Inc.
[244] Provisional Penalty Decision Response, paragraph 1.45(i).
[245] Provisional Penalty Decision Response, paragraph 1.45(c).
[246] Provisional Penalty Decision Response, paragraph 1.43(b).

assessing derogation requests to assist Facebook and its legal advisers throughout the investigation of the Merger, as set out above at paragraph 252. Furthermore, for the reasons set out in paragraphs 123 to 127 above, the scope of Facebook's qualified compliance statements from December 2020 were considerably narrower than the scope of the compliance statements required under the IEO as varied following the granting of the Carve-Out Derogation.

324. In any event, Facebook was obliged to fully comply with the IEO in effect at all times, rather than unilaterally decide to qualify its compliance statements on the basis of requested derogations that had not been granted. As set out above, at the outset of an investigation the scope of the IEO is necessarily broad and Facebook failed to cooperate with the CMA to put it in a position to refine it, such that it was the '*author of its own misfortune*' (see paragraph 118 above). Merely raising concerns, without cooperating with the interim measures process, clearly does not amount to a mitigating step.

325. Further, Facebook submitted that it engaged with the Monitoring Trustee in respect of its actions.[247] As noted above at paragraph 123, Facebook's approach to compliance with the IEO treated the IEO as if its scope had been narrowed significantly beyond that which has been subsequently authorised by the CMA (on a prospective basis) under the Carve-Out Derogation. As a result of the qualifications given by Facebook, the certifications provided to the Monitoring Trustee did not capture all of Facebook's obligations under the IEO, and therefore did not allow the Monitoring Trustee to properly monitor Facebook's compliance with the IEO in the form in which it was issued, or in the way intended by the Directions to appoint a monitoring trustee (see above at paragraphs 170 to 182).

- *Impact on the Merger process / other costs to the case*

326. Facebook's persistent failures to comply with the IEO have required detailed investigation by the CMA, diverting resources from other matters of public interest, including the substantive assessment of the Merger, at a cost to the public purse.

327. Facebook submitted that this cannot reasonably be considered an aggravating factor, and that dealing with issues arising from the imposition of interim measures in merger investigations flows from its statutory functions. Facebook further submitted that the CMA has not specified what additional costs to the public purse it has incurred beyond normal consideration of derogations in completed cases, and that increasing fines as a penalty for a

[247] Provisional Penalty Decision Response, paragraph 1.43(b).

party exercising its legal rights would be inconsistent with the CMA's statutory duty and arguably the ECHR, without any grounding in the Interim Measures Guidance.[248]

328. The CMA does not agree that this factor cannot be considered an aggravating factor. While the CMA indeed has a statutory duty to examine mergers, in this case the CMA has deployed greater resources to deal with Facebook's deficient approach to compliance than would normally be required in a Merger investigation concerning a completed transaction where the main parties duly cooperate with the CMA. For the avoidance of doubt, these costs are separate from the purely financial costs incurred in the Tribunal and Court of Appeal proceedings (Facebook was required to pay the CMA's costs in full), which the CMA has not taken into account when determining the appropriate level of the penalty in this case. The CMA therefore rejects Facebook's submission that the CMA is 'increasing fines as a penalty for Facebook's exercise of its legal rights'.[249]

- *Advantage to Facebook:*

329. By unilaterally limiting its obligations under the IEO, Facebook derived an advantage as it reduced the burden for its business to comply with the IEO.

330. Facebook submitted that it is unclear how qualifying compliance conferred any advantage on Facebook when it tried to resolve the concern on multiple occasions and for over a year, including through litigation. In Facebook's view, the CMA's approach appears to suggest that the burden of complying with the IEO should result in a punitive financial consequence as a result of completing a transaction which the CMA then investigates. This is contrary to the purpose of a voluntary mergers regime which is intended to reduce the burden on businesses.[250]

331. The CMA's concerns in this case have been to address Facebook's failures to comply with the IEO, an integral component of the UK's voluntary mergers regime, and not to punish Facebook for completing a transaction that the CMA has cause to investigate.

332. As noted above, the corollary of the voluntary, non-suspensory UK merger regime, and the precautionary aim underpinning it, is the imposition of a necessarily broad IEO at the outset of an investigation. In order to refine the IEO, and resolve the issues faced in this case, the proper course of conduct was for Facebook to appropriately engage with the CMA. Instead, Facebook

[248] Provisional Penalty Decision Response, paragraph 1.43(c).
[249] *Ibid.*
[250] Provisional Penalty Decision Response, paragraph 1.43(d).

sought to obtain derogations without engaging in the interim measures process or cooperating with the CMA. The CMA does not therefore agree that Facebook did not derive an advantage: by qualifying its compliance with the IEO, it reduced the burden of compliance on its business.

- *The involvement of senior management or officers in relation to Breach 1*

333. It is axiomatic that the failure to comply with paragraph 7 of the IEO (qualified compliance statements signed by the Chief Compliance Officer) involved senior management, specifically the individuals holding the position of Chief Compliance Officer at the relevant time. As set out above in paragraph 42 above, the seniority of their position is reflected by their executive or managerial responsibilities, including over the compliance team and the 'sub-certification' process designed to enable the certification of compliance, and their appointment by Facebook to sign compliance statements (a role reserved by paragraph 7 of the IEO to the most senior individual of the business (the CEO) or other persons as agreed with the CMA).

334. Facebook submitted that this is not an aggravating factor, serving only to demonstrate that the practical challenges of certifying compliance with the template IEO across Facebook's global business were well-understood by those senior officers.[251]

335. The CMA disagrees: as set out above at paragraph 312, the CMA considers that this breach was intentional as it reflected a deliberate decision by Facebook to comply with the IEO only to the extent that it considered to be necessary and proportionate despite repeated warnings from the CMA and reprimand by the Tribunal and Court of Appeal. Clearly this strategy was decided, or at the very least sanctioned, by Facebook's senior officers including the Chief Compliance Officers.

Mitigating factors

336. The CMA has considered Facebook's arguments that it had no choice but to qualify compliance with the IEO in the absence of derogations being granted to narrow its scope. As set out above at paragraph 168, Facebook failed to engage with the CMA's information requests, which were necessary for the CMA to determine whether to grant derogations which would have limited the burden of the IEO on Facebook. While Facebook submitted it believed that the CMA's position on the Carve-Out Request was that no derogation from the IEO could be granted to parts of Facebook's business which had any links

[251] Provisional Penalty Decision Response, paragraph 1.43(e).

to Giphy,[252] the CMA has found that this did not constitute a reasonable excuse for the reasons above at paragraphs 242 to 265.

337. As such, it does not consider that Facebook has provided any reasonable excuse for failure to comply with the IEO.

338. Facebook made various submissions that the approach taken by Facebook was '*entirely reasonable'* in the circumstances of this particular case (i.e. where the template IEO '*does not account*' for situations like the present which demand a '*conceptual derogation'*,[253] and where Facebook took a 'risk-based approach' to compliance).[254] It submitted that it had no choice but to qualify compliance with the IEO in the absence of derogations being granted to narrow its scope.

339. Facebook submitted that the CMA failed to have regard to a number of mitigating factors. These are listed below, together with an explanation of the CMA's assessment of the significance of these factors to the overall assessment:

(a) the fact that Giphy services have '*tentacles'* that extend into the Facebook business (making the determination of which parts of the global Facebook business should be carved-out from the IEO a *'unique and challenging'* situation for Facebook).[255] This is addressed in paragraph 279(b) above: to address this challenge, Facebook should have properly engaged with the CMA's derogation process and it was its decision not to do so for a long period of time.

(b) the CMA has acted with delay in assessing the Updated COD Request and that it should not be penalised for any period in which the CMA deliberated on Facebook's detailed requests.[256] As set out in paragraphs 152 to 164 above, the CMA does not agree that any delay in the granting of the Carve-Out Derogation was caused by the CMA. In any event, even if a marginal delay had been caused by the CMA, this would not affect the quantum of the penalty. Facebook did not take any specific steps in mitigation to comply with paragraph 7 of the IEO as it applied to Facebook at the time. The CMA considers that it gave clear guidance on the CMA's expectations for Facebook's compliance with its obligation to provide compliance statements, including in the period pending the CMA's review

[252] Provisional Penalty Decision Response, paragraph 1.45(a).
[253] Preliminary Response, page 8.
[254] *Ibid.*
[255] Provisional Penalty Decision Response, paragraph 1.45(b).
[256] Provisional Penalty Decision Response, paragraphs 1.26 to 1.30. The CMA's response to the factual elements of Facebook's submission is set out at paragraphs 152 to 164 above.

of the Updated COD Request. Facebook instead chose to continue qualifying its compliance statements.[257]

(c) that the CMA '*no longer required Facebook to prove that Facebook's services were non-related to GIPHY's – per section 3.44 of the Interim Measures Guidance*.[258] Facebook's submission is inaccurate for the reasons set out above in paragraphs 146 to 147 above (this information ultimately informed the decision to grant the Carve-Out Derogation). In any event, the CMA does not consider this to be relevant to the appropriateness of imposing a penalty or its quantum. Contrary to Facebook's submission, the CMA is of the view that Facebook continued to qualify its compliance in a manner which, as set out above in paragraph 312, was serious, intentional and flagrant.

(d) that the CMA *'eventually granted the Updated COD Request in (nearly) the precise same manner in which Facebook had requested and had been certifying compliance since December 2020'.*[259] This is addressed in paragraphs 123 to 127 above: the CMA considers that the scope of the Carve-Out Derogation was significantly narrower than that of the Updated COD Request (and required an expansion of certain compliance reporting obligations),[260] the result of a refinement following a number of submissions made by Facebook until 13 May 2021. In any event, the CMA's view is that this does not mitigate Facebook's conscious decision to take decisions which were properly for the CMA, the persistent nature of this approach, and the adverse impact of Facebook's failure to comply (set out in paragraph 312 above).

(e) Facebook's submission on how it has complied with other aspects of the IEO to date is addressed in paragraph 320 above.

340. The CMA does not consider that these factors, either in isolation or together, are of any significant weight when determining the penalty in the round where in this case Facebook's defective approach to compliance has fundamentally undermined the CMA's ability to exercise its monitoring functions under the IEO. While in some respects Facebook has complied with investigatory requirements as noted above, the CMA has concluded that Facebook's approach to compliance was not reasonable. Facebook failed to properly engage with the CMA's information requests, which was necessary for the CMA to determine whether to narrow the scope of the IEO and limit the burden of the IEO on Facebook. This is not affected by the fact that a

[257] See paragraph 89 above.
[258] Provisional Penalty Decision Response, paragraph 145(c).
[259] Provisional Penalty Decision Response, paragraph 1.45(d).
[260] See Variation Order made on 29 June 2021.

'conceptual approach' needed to be taken for granting the derogations. If anything, this required greater engagement with the CMA.

341. On that basis, the CMA finds there to be no mitigating factors applicable to this case.

Size and financial resources available to Facebook

342. The CMA has also had regard to the size and financial resources available to Facebook.[261] This is primarily because the CMA must ensure that administrative penalties achieve the deterrence required at a level which is fair, reasonable and proportionate in view of the circumstances of the case, including the size and financial resources available to parties. As set out in paragraph 4.11 of the Penalties Guidance, the CMA is likely to set higher penalties where it is necessary to do so having regard to the parties' size and financial position.

343. In determining the appropriate level of penalty, the CMA has therefore considered the last fully audited financial statement for Facebook, Inc for the year preceding the imposition of the IEO,[262] i.e. the financial year ended 31 December 2019. This statement shows that Facebook, Inc is one of the largest (by market capitalisation and turnover) and most profitable undertakings in the world. Its turnover was USD$70,697 million (£55,405.23 million), its operating profit was USD $24,812 million (£19,445.16 million), its profit after tax was USD $18,485 million (£14,486.69 million, i.e. a profit margin of nearly 25%), and its net assets were USD $101,054 million (£79,196.02 million). Facebook acquired Giphy for [✂].[263]

344. The above information indicates that Facebook had sufficient financial resources available to it to ensure compliance with the IEO and to engage with the CMA's process.

Conclusion on the imposition of a penalty in relation to Breach 1

345. As set out in the Penalties Guidelines, the CMA must determine a penalty that is appropriate, taking into account all the relevant circumstances of the case to achieve the policy objectives set out in the Penalties Guidance, and in particular the need to deter Facebook and other companies from contravening interim measures in the future, and to ensure that they 'scrupulously' comply

[261] Penalties Guidance, paragraph 4.11.
[262] Enterprise Act 2002 (Mergers) (Interim Measures: Financial Penalties) (Determination of Control and Turnover) Order 2014, Article 3.
[263] Paragraph 2.8 of the Final Merger Notice submitted on 26 January 2021. Facebook paid USD $315 million in cash, [✂].

with interim measures imposed by the CMA (see paragraphs 266 to 270 above).

346. The CMA has decided that the imposition of a penalty of £50 million is appropriate having considered the relevant factors and circumstances of this case set out in this decision in the round, and in particular, the following important factors:

(a) the seriousness of the failures to comply with the IEO:

i. Facebook has taken an unreasonable and cavalier approach by choosing not to comply with the IEO, nor to engage, despite repeated requests by the CMA, with the interim measures regime, which is itself a necessary corollary of the voluntary, non-suspensory UK merger regime (see paragraphs 35 and 276 above);

ii. This was not a distinct instance of contravention of the IEO, but reflects an intentional, flagrant, persistent and continued 'high-risk strategy' pursued by Facebook even after the criticism directed at Facebook by the Tribunal and Court of Appeal, and which reflects a broader pattern of behaviour of non-compliance (see paragraphs 277 and 278 above);

iii. As set out in paragraph 288, setting up compliance mechanisms that reflect the full scope of the obligations imposed by the IEO to prevent pre-emptive actions, and certifying compliance on that basis under paragraph 7 of the IEO (rather than on the basis of a narrower scope determined unilaterally by a merging party) is a core element of the IEO. Facebook's conduct limited the CMA's awareness of material developments within the business under investigation (including other potential breaches) and in turn prejudiced the CMA's ability to exercise its statutory functions of monitoring (and as the case may be enforcing) compliance with the IEO. As a result it has run risks of pre-emptive action that interim measures are designed to avoid; and

(b) Facebook's size and financial position (see paragraphs 342 to 344 above).

347. Facebook submitted that a fine of £50 million was entirely disproportionate, noting that it was equivalent to over 20% of the purchase price, that Giphy is a US company with no revenues, assets or staff based in the UK, and that the CMA has failed to explain what harm has or might have accrued from Facebook's approach to qualifying its IEO compliance statement in certain

limited respects.[264] For the reasons set out above, the CMA does not consider the penalty to be unreasonable or disproportionate when considered in the round with Facebook's size and financial position[265] and the seriousness of the breach. This conclusion is not affected by the weight of the penalty relative to the purchase price.

348. The risk of prejudice arising from Breach 1 is discussed at paragraphs 237 to 241 above. The risk of prejudice that may arise from pre-emptive actions is not affected by GIPHY's absence of turnover in the UK; this is consistent with the fact that Parliament has given the CMA jurisdiction to impose IEOs in relation to transactions such as the Merger.

349. In deciding on the appropriate penalty to reflect the seriousness of the breaches and to meet the objective of deterrence, the CMA has had regard both to the absolute level of the penalty and also to the size of the penalty relative to Facebook's size and financial position. In this latter respect, the CMA notes that Facebook has emphasized that it is a global business. Compliance with the CMA's orders may require steps to be taken by individuals outside the United Kingdom. It is important, therefore, that the penalty is sufficiently high as to bring home to Facebook, as a global business, that it must take the CMA's orders seriously, even in the context of a transaction which may appear small relative to Facebook's size. Other businesses must also be deterred from acting as Facebook has acted in this case.

350. One obvious reference point for helping to decide upon a penalty is the size of the penalty relative to an undertaking's worldwide turnover (noting that the statutory maximum is set at 5% of worldwide turnover). As set out in paragraph 4.11 of the Penalty Guidance,[266] the CMA is likely to set higher penalties relative to worldwide turnover for the most serious failures to comply, taking account of the size and financial position of the undertaking. The CMA does not consider that the breach in this case is the *'most'* serious failure, but it is serious, and the CMA has therefore considered whether a penalty representing a higher percentage of worldwide turnover would be appropriate.[267] However, the CMA has concluded that a penalty of a higher magnitude is not necessary in the present case. As already mentioned, the CMA also considers that the absolute size of the penalty is a relevant factor, and looking simply at the percentage of turnover is overly simplistic. The

[264] Provisional Penalty Decision Response, paragraph 1.41.
[265] The CMA has noted the purchase price when assessing Facebook's size and financial position but does not consider this is to be a significant factor within that context or in determining the appropriate level of the penalty.
[266] '*The CMA is likely to set penalties towards the upper end of the relevant statutory maxima for the most serious failures to comply and/or where it is necessary to do so having regard to P's size and financial position'* and that the penalty appears prima facie small relative to the financial indicators set out below, but considers that it is nonetheless sufficient to achieve the penalty's objective of deterrence.
[267] And in any event it would have remained well below the statutory maximum of 5% of worldwide turnover.

penalty needs to be large enough to bring home to Facebook's global business the importance of complying with the CMA's orders, but in the context of this acquisition.

351. Bringing these matters together, the CMA has decided that a penalty of £50 million would be sufficient to achieve the objectives in the circumstances of this case. The CMA takes the view that that is a sufficiently large figure, both in absolute terms and as a percentage of Facebook's global turnover, to emphasise the seriousness of the issues and the importance of compliance. On the other hand, such a figure is no more than necessary and is not disproportionate to its objectives. In this regard we note in particular:

(a) the penalty represents only 0.09% of Facebook's global turnover, which is substantially below the statutory maximum of 5% of Facebook's global turnover; and

(b) in view of Facebook's significant financial resources (see paragraph 343 above), the penalty is not anomalous, nor would it affect Facebook disproportionately at 0.26% of operating profit, 0.35% of profit after tax, and 0.06% of net assets.

Breach 3

352. In assessing the appropriate amount of the penalty in relation to Breach 3, the CMA has taken into account the considerations set out above, including:

(a) The fact that Breach 3 is serious and flagrant for the reasons set out at paragraphs 283 to 285; Facebook failed to seek consent prior to changing the holder of a key position on two occasions after the IEO came into effect; and

(b) The adverse impact this failure to comply has on the CMA's ability to monitor, and (as the case may be) enforce compliance with interim measures.

353. In addition to the above considerations, the CMA has also taken account of the following factors listed in the Penalties Guidance.[268]

[268] One of the factors set out in paragraph 4.11 of the Penalties Guidance is not discussed below as the CMA does not consider that this constitutes either an aggravating or mitigating factor in this case, specifically the scale of any adverse effects on the case (including costs) that will be incurred by the CMA if the investigation has to be extended to take account of information provided late.

Aggravating factors

354. The CMA is of the view that the following factors listed in paragraph 4.11 of the Penalties Guidance support the imposition of a higher penalty:

(a) *The extent to which Facebook complied with other aspects of the investigatory and interim measures requirements*: as described above (see in particular paragraphs 298 to 300 above), the CMA has found that this Breach is part of a broader pattern of conduct and has identified other breaches of the IEO.

(b) *Steps in mitigation / continuation of the failure to comply after becoming aware of the failure to comply:* Facebook failed to seek consent in advance of [Facebook Employee 3] taking the role of Chief Compliance Officer, despite previous clear direction from the CMA that consent for such a change was required in respect of his predecessor, [Facebook Employee 1].

(c) *The involvement of senior management or officers in relation to Breach 3:* It is axiomatic that the substitution of key staff holding the position of Chief Compliance Officer involved senior management, specifically the individuals holding the position of Chief Compliance Officer at the relevant time. As set out above in paragraphs 229 and 235, the seniority of their position is reflected by their executive or managerial responsibilities, including over the compliance team and the 'sub-certification' process designed to enable the certification of compliance, and their appointment by Facebook to sign compliance statements (a role reserved by paragraph 7 of the IEO to the most senior individual of the business (the CEO) or other persons as agreed with the CMA).

Mitigating factors

355. The CMA is of the view that the following factors listed in paragraph 4.11 of the Penalties Guidance support the imposition of a lower penalty:

(a) *Advantage to Facebook:* the CMA has not identified any material benefit (distinct from the benefits deriving from the approach taken by Facebook in certifying compliance, as discussed in relation to Breach 1).

356. The CMA has assessed the mitigating factors listed in Breach 1 and does not consider there to be any significant mitigating factors for the same reasons as Breach 1.

The size of, and administrative and financial resources available to Facebook

357. The information set out in paragraphs 342 to 343 above indicates that Facebook had sufficient financial resources available to it to ensure compliance with the IEO and to engage with the CMA's process.

Conclusion on the imposition of a penalty in relation to Breach 3

358. As set out in the Penalties Guidelines, the CMA must determine a penalty that is appropriate, taking into account all the relevant circumstances of the case to achieve the policy objectives set out in the Penalties Guidance, and in particular the need to deter Facebook and other companies from contravening interim measures in the future, and to ensure that they 'scrupulously' comply with interim measures imposed by the CMA (see paragraphs 266 to 270 above).

359. The CMA has decided that the imposition of a penalty of £500,000 is appropriate having considered the relevant factors and circumstances of this case set out in this decision in the round, and in particular, the following important factors:

(a) The serious and flagrant nature of this failure to comply with the IEO (see paragraphs 283 to 285 above). The second instance of this breach (ie the appointment of [Facebook Employee 3]) is particularly flagrant since Facebook ignored the CMA direction given after the first instance;

(b) Facebook's defective approach to compliance undermined the CMA's ability to exercise its monitoring functions under the IEO, in this case to ensure that the persons in charge of supervising and certifying Facebook's compliance process were capable of carrying out this role effectively and taking the necessary steps to prevent pre-emptive actions from occurring (see paragraphs 295 to 297 above); and

(c) Facebook's size and financial position (see paragraphs 342 to 344 above).

360. Facebook submitted that:

(a) the CMA has not explained what pre-emptive action has occurred or might occur as a result of the changes – that Breach 3 is at most a technical infringement;

(b) that the CMA has not justified why it warrants a penalty higher than any amount imposed by it in its enforcement of interim measures to date; and

(c) therefore that the level of the fine is unsubstantiated and plainly excessive.[269]

361. The CMA disagrees with the first point for the same reasons set out in paragraphs 237 to 241 and 348 above. As regards the second point, the CMA disagrees for the reasons set out at paragraphs 305 to 309, 349 to 351, and 359.

362. The CMA considers that a penalty of £500,000 for Facebook's failure to comply would not be disproportionate. It is substantially below the statutory maximum of 5% of Facebook's global turnover and, in view of Facebook's significant financial resources (see paragraph 343 above), the penalty is not anomalous, nor would affect Facebook disproportionately.

F. Next steps

363. Facebook has the following rights in relation to the final penalty which the CMA has imposed:

(a) Facebook is required to pay the penalty in a single payment, by cheque or bank transfer to an account specified to Facebook by the CMA, by close of banking business on the date which is 28 days from the date of service of this notice on Facebook.

(b) Facebook may pay the penalty or different portions of it earlier than the date by which it is required to be paid.

(c) Pursuant to section 112(3) of the EA02, Facebook has the right to apply to the CMA within 14 days of the date on which this notice is served on them for the CMA to specify different dates by which the penalty or different portions of it are to be paid.

(d) Pursuant to section 114 of the EA02, Facebook has the right to apply to the Tribunal against any decision the CMA reaches in response to an application under section 112(3) of the EA02, within the period of 28 days starting with the day on which Facebook is notified of the CMA's decision.

(e) Pursuant to section 114 of the EA02, Facebook has the right to apply to the Tribunal within the period of 28 days starting with the day on which this notice is served on Facebook in relation to:

i. the imposition or nature of the penalty;

[269] Provisional Penalty Decision Response, paragraphs 3.13 to 3.14.

ii. the amount of the penalty; or

iii. the date by which the penalty is required to be paid or (as the case may be) the different dates by which portions of the penalty are required to be paid.

(f) If Facebook applies to the CMA pursuant to section 112(3) of the EA02 for the CMA to specify a different date by which the penalty is to be paid, then the period of 28 days referred to in relation to (e)(iii) above shall start with the day on which they are notified of the CMA's decision on the section 112(3) application.

(g) Where a penalty, or any portion of such penalty, has not been paid by the date on which it is required to be paid and there is no pending appeal under section 114 of the EA02, the CMA may recover any of the penalty and any interest which has not been paid; in England and Wales such penalty and interest may be recovered as a civil debt due to the CMA.[270]

[Signature]

Joel Bamford

Senior Director, Mergers

20 October 2021
Competition and Markets Authority

Appendices:

1. **Details of Facebook's qualifications to its compliance statements from 23 June 2020 to 29 June 2021**

2. **Timeline of key correspondence relating to the Updated COD Request**

3. **Bundle of non-public documents relied on in evidence**

[270] Section 115 of the EA02. Section 113 of the EA02 covers (among other matters) the interest payable if the whole or any portion of a penalty is not paid by the date by which it is required to be paid.