

**PROPOSED ACQUISITION BY
ADOBE INC.**

OF

FIGMA, INC.



Case ME/7021/22 – Adobe/Figma

EVIDENCE APPRAISAL PAPER

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Skadden, Arps, Slate, Meagher & Flom LLP

Freshfields Bruckhaus Deringer

Slaughter and May

APPRAISAL OF EVIDENCE FOR THE THEORIES OF HARM BEING ASSESSED DURING THE PHASE 2 REVIEW

1. Introduction and summary

- 1.1 The CMA is assessing whether Adobe’s proposed acquisition of Figma (the “**Transaction**”) is more likely than not to result in a substantial lessening of competition (“**SLC**”) in the supply of “screen design software” and/or “creative design software”. The Issues Statement dated 26 July 2023 (“**Issues Statement**”) recognises that “*an important aspect of competition in this case is competition in innovation, specifically competition on product development between firms*”.¹ Future or dynamic competition features heavily in both theories of harm being assessed by the CMA, with the second theory of harm entirely based on an assessment of dynamic competition. The CMA’s assessment is therefore focused primarily on whether there is an SLC in relation to product development.
- 1.2 In reaching its decision, the Parties welcome the Inquiry Group’s further and more detailed appraisal of the evidence available on these aspects in the round and on the balance of probabilities standard.² The CMA has a duty of inquiry which requires it to “*take reasonable steps to acquaint itself with the relevant information*”³ and do “*what is necessary*” to put itself in a position properly to decide the Phase 2 statutory questions.⁴ In this respect, the Parties have set out in this paper some observations on the approach to evidence which are relevant to the assessment of this Transaction. In particular:
- (a) Less weight should be given to internal documents that are not probative of corporate intent, in particular, documents which were authored by personnel who are not strategic decision makers and/or contradicted either by other or more recent documents, actual corporate decisions on the matters in question or other relevant evidence (including testimony given under oath and oral evidence given to date to the CMA⁵ with the appropriate warnings as to the relevant statutory offences⁶).
 - (b) When assessing the relevance and weight to be attributed to internal documents, documents should be read in context and in conjunction with other evidence (including executive testimony).
 - (c) Adverse inferences should not be drawn from the absence of documentary evidence on a particular topic, particularly when other robust evidence is available (such as investment and resourcing decisions made and concrete corporate actions taken).
 - (d) Substantial weight should be accorded to oral evidence provided directly to the CMA and testimony given under oath to the US Department of Justice (“**DOJ**”) by senior decision makers at Adobe and Figma. This testimony is probative evidence on matters of concern, including regarding the precise documents upon which the CMA’s Phase 1 decision dated 30 June 2023 (“**PID**”) relies, and it is corroborated by objective evidence from multiple sources, such as internal documents, economic evidence and

¹ Issues Statement, ¶31.

² As opposed to the lower ‘realistic prospect’ standard applicable at Phase 1 (see Merger Assessment Guidelines, ¶¶2.33, 2.34 and 2.36).

³ *BAA Limited v Competition Commission* [2012] CAT 3 at ¶20(3); *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at ¶1065B; *Barclays Bank plc v Competition Commission* [2009] CAT 27 at ¶24.

⁴ *Tesco plc v Competition Commission* [2009] CAT 6 at ¶139.

⁵ At Adobe’s presentation to the CMA on 27 April 2023, the Issues Meeting on 6 June 2023, Adobe’s site visit on 2 August 2023 and Figma’s site visit on 3 August 2023.

⁶ Section 117 Enterprise Act 2002.

commercial and technical realities. Further to the letter from the Parties to the Inquiry Group dated 7 August 2023, the Parties reiterate their willingness to make the relevant decision-makers available to the CMA for direct questioning under the CMA's section 109 Enterprise Act 2002 powers.

- (e) The Issues Statement suggests that, because the theories of harm at issue are dynamic, the CMA will not place weight on empirical analysis of how users use the Parties' products.⁷ However, even a dynamic theory focusing on product development needs to acknowledge and reflect the current market context, including existing empirical data and what that implies for future competition.⁸ For example, analysis of Figma as a potential competitor to Adobe's asset creation tools needs to acknowledge the evidence on the constraint on Adobe from Figma's current capabilities relative to rivals and whether any hypothetical plan to bridge this gap is credible and likely to result in a SLC. Similarly, any assessment of the Parties' incentives to enter into new product areas or pursue hypothetical "next generation" products should be informed by: (i) empirical evidence on customer behaviour; (ii) customers' usage of product design and development tools and asset creation tools; and (iii) the Parties' economic incentives to engage in such hypothetical developments in light of their actual stated future plans and their technical capabilities. The Parties consider that a thorough analysis of the empirical data and facts available across all of these areas will support and enhance the CMA's assessment of the theories of harm being investigated and place them on a sound evidential footing.

- 1.3 The purpose of this paper is to set out key principles for the appraisal of evidence in the CMA's Phase 2 review. Given the focus on documentary evidence in the P1D and foreshadowed in the Issues Statement,⁹ the Parties have prepared further submissions on each of the internal documents cited in the P1D. These are set out in **Annex B** (for Adobe internal documents) and **Annex C** (for Figma internal documents).
- 1.4 The Parties are confident that a more detailed appraisal of the evidence during the Phase 2 review that properly takes into account other key sources of evidence, including executive testimony, evidence on the Parties' technical capabilities and commercial incentives, economic evidence, a wider set of internal documents and evidence on customer preferences and behaviour, will satisfy the Inquiry Group that this Transaction does not give rise to an SLC in any market on the balance of probabilities.

2. The approach to assessing documentary evidence in the Phase 2 review

Reliance on internal documents that reflect corporate intent

- 2.1 Corporate governance structures and the realities of how decision-making works at Adobe and Figma provides important context that informs how the Parties' internal documents should be properly interpreted.

⁷ For example, ¶264 of the P1D dismisses empirical analysis of usage data on the basis that it "does not provide any insights into how strong the dynamic competitive constraint is that Figma imposes to Adobe through product development". ¶44 of the Issues Statement appears to downplay empirical evidence stating that "At this stage, we are not proposing to conduct econometric analysis on usage of the Parties' products given that this analysis would be informative of the competitive constraints between the Parties' current offerings and is less likely to be relevant in the context of a theory of harm focusing on dynamic competition in terms of further product development. We are also not proposing to conduct a customer survey on the usage of the Parties' products for the same reasons, although we intend to consult widely with customers".

⁸ *Meta Platforms Inc. v CMA* [2022] CAT 26, ¶100.

⁹ Issues Statement, ¶44.

- 2.2 Adobe and Figma are successful, innovative businesses built on a culture of “daring to dream”, and there is no shortage of documents and messages (especially on the Adobe side) authored by personnel with endless ideas for innovation or new product development. This behaviour is encouraged, and many ideas will be presented to executives. In the absence of additional context, instant messages, texts and emails from employees can erroneously be attributed the same importance as executive communications which relate to actual decision-making and concrete implementation steps. High-level brainstorming, and communications in lower echelons of corporate hierarchies, often capture spontaneous reactions which should not be afforded the same evidential weight as executive decisions on where to allocate resources, or on the tangible development of new products or features. In the same vein, presentations and internal meetings held by junior executives are not dispositive of resourcing or product viability decisions.
- 2.3 The reality is that only a small number of senior executives make the difficult judgement calls on which product development ideas to ultimately pursue, having regard to technical, financial and resourcing constraints, management bandwidth and a determination of the company’s key strategic priorities. The importance that the CMA attaches to the involvement of such senior executives in strategic decisions is reflected in the Procedural Officer’s decision in relation to confidentiality claims over the PID.¹⁰ For the Adobe Digital Media business, the executive with responsibility for making these strategic decisions is [X], the President of the Digital Media business. For Figma, it is [X], the CEO.
- 2.4 Documents or communications to/from Adobe’s CEO and the President of the Digital Media division (who is designated as the key decision-maker on the DME business) are scarcely referenced in the PID in respect of communications about Adobe XD or Project Spice. The lack of such documents is a strong indicator that neither were [X]. In addition, Adobe’s action in diverting the vast majority of resources away from XD clearly demonstrates a lack of belief in its viability. Its action in moving resources in the same way from Project Spice shows its commitment to investing in the development and growth of Adobe Express. Similarly, Figma’s decision not to invest a [X] in creative design demonstrates the lack of any intention or plan to enter into that space.
- 2.5 It is therefore critical to distinguish ideas and brainstorming, and communications by non-executive personnel, from decisions taken by senior executives leading to concrete implementing action, which reflect the strategic decision-making processes at both Adobe and Figma. For example:
- (a) There is a significant lifecycle to development projects, from initial brainstorming stages to R&D through to building technical infrastructure and developing user-facing features for user testing before a new product or feature can be commercialised and launched. Brainstorming and horizon-scanning (even by senior executives) are ordinary course activities in innovative, dynamic industries such as the technology space, but most ideas do not lead to concrete action or even formal adoption as a corporate objective. Due regard should therefore be given to other sources of evidence, *i.e.* any concrete management actions and other steps taken in support of an idea advanced in a document (in particular, whether and how many resources – financial, people or otherwise – have been allocated to the idea, project or plan). In the absence of corroborative evidence of concrete corporate action, brainstorming and exploratory documents should be treated as such and not as probative evidence of corporate intent.

¹⁰ CMA, Procedural Officer Decision on Application in relation to publication of information in Adobe/Figma Phase 1 Merger Decision, 7 August 2023, pages 3, 5 – 9.

- (b) Product development is also necessarily a function of technical capabilities. As Project Spice [REDACTED] demonstrates, even ideas that make it past the drawing board can still fail to be developed or launched successfully. Similarly, Figma’s web-based architecture is [REDACTED].
 - (c) There will invariably be competing demands for limited development, engineering and financial resources, meaning that even projects that might technically be possible might still fail to be progressed given these competing demands and the opportunity costs for product development decisions.
- 2.6 The Parties submit that corporate intent is most accurately evidenced by:
- (a) executive and board communications;
 - (b) resource allocation, as this is where companies most authentically demonstrate their strategic corporate intentions; and
 - (c) available sworn testimony from executives, as this provides essential context as to how decisions were made and how wider employee communications impacted (or reflect) their decision-making processes.
- 2.7 Applying this analytical framework to the documents authored by (or prepared for) non-executive personnel that are cited in the PID shows that they are not probative of corporate intent or the executive viewpoint. This is especially the case where the inferences drawn from those documents are contradicted by other evidence, such as testimony from more senior executives as well as actions and decisions of those senior executives (*e.g.* as to what opportunities to pursue or where to allocate resources). By way of example:
- (a) A document prepared by Adobe’s Corporate Development team in December 2020 about a potential acquisition of Figma¹¹ does not support the proposition that the threat of competition from Figma “*may also be relevant to the Merger rationale*”. As the CMA accepted in the PID, this document was never [REDACTED]. On the contrary, none of the internal documents [REDACTED] or [REDACTED] supports a finding that the competitive threat from Figma was relevant to the rationale for the Transaction.
 - (b) In a similar vein, internal documents prepared by Figma’s [REDACTED] cannot support the finding that Figma’s acquisition strategy included “*actively exploring possible expansion into creative design tools*”.¹² Putting aside the fact that [REDACTED]¹³, routine market scanning activities by Figma’s [REDACTED] are not probative of Figma’s strategic direction. [REDACTED].
 - (c) [REDACTED].¹⁴ [REDACTED].¹⁵ [REDACTED]¹⁶ [REDACTED].
- 2.8 Second, not every document provided to, seen by, or (in Figma’s case) created by, an executive decision maker is probative of corporate intent. An assessment is needed of the purpose for which the documents were sent to the executive in question. Documents where an executive has been added to the copy line of a document or documents merely sent to an executive for its

¹¹ Adobe’s internal document, [REDACTED], cited at PID, ¶28.

¹² PID, ¶242.

¹³ See Figma’s internal document, FIGMA00000096, titled [REDACTED], dated October 2021.

¹⁴ See row 30, Annex 2 Issues Letter Response.

¹⁵ [REDACTED] Dep., page 166.

¹⁶ [REDACTED] Dep., page 165.

contents to be noted are not as significant as documents solicited by the executive in question and used for the purposes of action and decision making. In this respect:

- (a) As discussed at Adobe's site visit, communications to and by members of Adobe's executive and Board are most probative of corporate intent. As noted above, the lack of such documents at the Board and executive level is a strong indicator that Project Spice [REDACTED].
- (b) As explained at the Issues Meeting in Phase 1 and at Figma's site visit, the key internal documents which reflect Figma's strategic and commercial priorities are [REDACTED].

[REDACTED]¹⁷

[REDACTED]

The absence of any references to asset creation tools in Figma's [REDACTED] is strong evidence that Figma has no plans to develop an asset creation tooling product.

Assessment of documentary evidence in the round

2.9 When assessing the relevance and weight to be attributed to internal documents, it is important to look at the context of the document as a whole, as well as the realities of decision-making in the Parties' business and other available evidence. There are many examples in the P1D (some of which are set out below) where this approach was not taken and instead there was a selective focus on isolated extracts of the relevant document. The Parties consider that a proper assessment of the documentary evidence during the Phase 2 review will show that these findings in the P1D are misplaced.

- (a) The P1D identifies [REDACTED]¹⁸ [REDACTED]. However, a proper assessment of the evidence – including other statements in that very document – in the round does not support that inference. In fact, the evidence suggests that [REDACTED]:

- (i) [REDACTED].¹⁹

- (ii) [REDACTED]²⁰. [REDACTED].²¹ [REDACTED].

- (iii) [REDACTED]²².

[REDACTED]²³ [REDACTED]²⁴ [REDACTED]²⁵ [REDACTED]²⁶.

- (iv) The statement must also be considered in the context of the broader evidence base before the CMA. [REDACTED].²⁷ [REDACTED].

¹⁷ Please refer to the following Figma internal documents: (i) FIGMA-2R-003031647, dated 2019; (ii) FIGMA-2R-003093941, dated 2020; (iii) FIGMA-2R-003142879, dated 2021; (iv) FIGMA-2R-003142879, dated 2022; and (v) FIGMA-2R-003160079, dated 2023.

¹⁸ Case ME.7021.22000182034, cited at P1D, ¶157(a).

¹⁹ ADB-2R-014501543, titled [REDACTED].

²⁰ P1D, ¶157.

²¹ ADB-2R-014501543 [REDACTED].

²² Case ME.7021.22000182034, [REDACTED]. P1D ¶157 stated that this document evidences Adobe's confidence [REDACTED].

²³ Case ME.7021.22000182034, page 2.

²⁴ Case ME.7021.22000182034, page 2.

²⁵ Case ME.7021.22000182034, page 3.

²⁶ Case ME.7021.22000182034, page 3.

²⁷ Case ME.7021.22000182034, [REDACTED].

- (b) Referring to a [REDACTED], the P1D adduces this as evidence that [REDACTED]. A proper interpretation of this document that takes into account [REDACTED] leads to the opposite conclusion to that reached in the P1D, having regard to:
 - (i) [REDACTED].
 - (ii) [REDACTED].
 - (iii) [REDACTED];
 - (iv) [REDACTED].
 - (v) [REDACTED].
 - (c) An internal document highlighting [REDACTED]²⁸ [REDACTED]: for similar reasons as stated above, the conclusion that [REDACTED] cannot be sustained – even more so when later internal documents make clear that [REDACTED].²⁹
 - (d) Reliance on [REDACTED] which, as acknowledged in the P1D³⁰, was never carried out. [REDACTED].
- 2.10 Further examples of this selective approach are set out in **Annex A**, as well as the Adobe and Figma rebuttals annexes (**Annexes B** and **C**, respectively).
3. **Drawing adverse inferences from the absence of (documentary) evidence**
- 3.1 It is a well-established legal principle that adverse inferences cannot be drawn from an absence of contemporaneous documentation unless the lack of documentation is conspicuous.³¹ In addition, adverse inferences cannot be drawn on an issue unless the party seeking to do so has itself adduced some evidence.³² Where a determination is being made on issues where there is an absence of documentary evidence, the Parties invite the Inquiry Group to consider the other evidence that is available on the issue in question, rather than improperly drawing adverse inferences from the absence of documentary evidence. In this respect, the Parties draw the Inquiry Group’s attention to the following examples:
- (a) In relation to the cancellation of Project Spice, the Parties have provided robust evidence at Phase 1 and further in the Parties’ response to the issues statement of 26 July 2023 dated 9 August 2023 (“**Issues Statement Response**”)³³, in particular on the repeated delays that took place during its development phase, [REDACTED] from the [REDACTED] beta test, [REDACTED] and the shift in strategic priorities towards more important product development (namely Adobe Express which required [REDACTED] additional resources). The Parties have also provided evidence, including documentary evidence supported by executive testimony given under oath, that [REDACTED].
 - (b) In the absence of compelling (documentary or non-documentary) evidence to the contrary, the Parties do not consider that a conclusion can be sustained that Adobe would not have cancelled Spice absent the Transaction. The Parties invite the Inquiry Group to take into account:

²⁸ Case ME.7021.22000798585, cited at P1D, footnote 181.

²⁹ For example, Case ME.7021.22000798289 (ADB-2R-007925953), page 11 states that [REDACTED].

³⁰ P1D, ¶231(a).

³¹ See, for example, *Wetton (as liquidator of Mumtaz Properties Ltd) v Ahmed* [2011] EWCA Civ 610 at ¶14 and *Stagecoach v Competition Commission* [2010] CAT 14 at ¶111 and ¶131(d).

³² *Wisniewski v Central Manchester Health Authority* [1998] Civ 596 at ¶340.

³³ Section B.4 of the Issues Statement Response.

- (i) Testimony from executives given under oath on matters relating to the lead up and decision to cancel Spice, in particular the [REDACTED] delays, technical challenges and resource constraints that led to the conclusion that Spice could no longer [REDACTED].³⁴ This includes ample evidence around the issues facing Spice and how Express represented a much more important commercial opportunity.
- (ii) [REDACTED].³⁵ [REDACTED]³⁶ [REDACTED].
- (c) The P1D assesses loss of competition in creative design markets based on “*screen design use cases*”.³⁷ This appears to be an inference drawn from the fact that some customers use both product design and development software and creative design software in their workflows and then jumping to a conclusion that this is a product offering where the Parties overlap – or could overlap.³⁸ As explained in Section C.2 of the Issues Statement Response, so far no evidence has been adduced – whether from the Parties’ own data (e.g. usage data) or third parties – to support this artificial frame of reference.
- (d) The P1D speculates that there will be future customer demand for a “*next-generation integrated offering of screen design and creative design software*”, and that the Parties would compete for such demand for this hypothetical future product.³⁹ The Parties invite the Inquiry Group to reconsider this approach as there is no evidence or credible substantiation for this anticipated future customer demand. As explained in Section C.6 of the Issues Statement Response, neither Party is seeking to develop, let alone compete, for such a hypothetical product.
- (e) The P1D asserts that Figma was “*consider[ing] expanding into creating design software and was making efforts to do so*”⁴⁰ (emphasis added). The Parties urge the Inquiry Group to give due weight to the fact that Figma has not allocated [REDACTED] into such an expansion. The fact that ordinary course market scanning by Figma’s [REDACTED] considered potential opportunities in this space, is not probative of a credible entry plan [REDACTED]. By contrast, Figma has allocated [REDACTED] that make its products more attractive to its core audience of product teams, [REDACTED]. As explained in Section C.3 of the Issues Statement Response, Figma has no plans and has committed [REDACTED] financial resources to entering the creative design software space because it is simply not an attractive venture given the technical challenges, lack of customer appetite, and [REDACTED].

4. Other sources of evidence probative of the Parties’ current and future strategic direction and innovation efforts

Oral testimony

- 4.1 As explained in section 3 above, executive evidence is highly probative of each Party’s motivations and incentives. The evidentiary value of oral testimony is well established in case law, including: (i) to subject the documentary record to “critical scrutiny”⁴¹; and (ii) where there

³⁴ Including the types of evidence referred to at P1D, ¶162.

³⁵ [REDACTED] Dep., 219:9-10.

³⁶ P1D, ¶162(c).

³⁷ P1D, ¶103; Issues Statement, ¶43.

³⁸ P1D, ¶79.

³⁹ P1D, ¶173.

⁴⁰ P1D, ¶232.

⁴¹ *Gestmin SGPS SA v. Credit Suisse (UK) Ltd* [2013] at ¶22. See also *EWHC 3560 (Comm) Armagas Ltd v Mundogas SA (The Ocean Frost)* [1985] 1 Lloyd’s Rep 1 at ¶57.

is no contradicting evidence of probative value.⁴² As the Competition Appeal Tribunal has recently observed: “*documentary evidence is almost always helpfully coloured and given context and substance by a witness who can speak to that evidence*”.⁴³

- 4.2 Executive testimony from the most senior decision makers of both Parties has been provided to the CMA in the form of: (a) executive evidence provided verbally to the CMA’s case team during the Phase 1 process and subsequently at the Phase 2 site visits; and (b) executive depositions given under oath in US proceedings. As with all information provided to the CMA during its merger investigations, this evidence is provided subject to serious criminal penalties for providing false or misleading information.⁴⁴
- 4.3 During the Phase 2 review, the Parties invite the CMA to subject documentary evidence to critical scrutiny and to seek the context and substance to internal documents through witnesses who are able to speak directly to the relevant issues (and, in fact, have already done so). The Parties have provided the CMA with extensive DOJ deposition evidence, most of which goes directly to matters central to the theories of harm and provides helpful factual background to contextualise and explain many of the internal documents that are cited in the P1D. While the P1D states that the CMA has considered how this evidence “*align[s] with other evidence including the Parties’ internal documents*”⁴⁵, the Parties invite the Inquiry Group to more thoroughly interrogate particular internal documents (or indeed any other evidence) against the deposition evidence or oral evidence provided directly to the CMA.
- 4.4 To the extent that the Inquiry Group harbours any doubts about the veracity of testimony already provided or its usefulness to the issues under consideration, the Parties have offered in the letter to the Inquiry Group dated 7 August 2023 to provide further direct evidence to the Inquiry Group, and would be happy for the veracity of senior executive testimony to be tested against the documentary record, including under the CMA’s powers under section 109 of the Enterprise Act 2002.

Evidence on the Parties’ technical capabilities and commercial incentives

- 4.5 Given the theories of harm being investigated, evidence relating to the Parties’ innovation capacity, technical capabilities and commercial incentives to enter into each other’s product area is particularly relevant. The mere fact that the Parties had previously explored such an entry or that there are internal documents indicating a consideration to do so is not a sufficient evidentiary basis to conclude that either Party, to adopt the Phase 2 standard, would be more likely than not to enter into the other’s product areas absent the Transaction.
- 4.6 During the Phase 2 review, the Parties urge the Inquiry Group to place sufficient weight on the evidence provided by the Parties on:
- (a) the technical challenges which would need to be overcome to make any entry into the other’s space plausible;
 - (b) the significant investment of [X] engineering resources that would be required to overcome those technical challenges (assuming it is possible to do so); and

⁴² See, for example, *Stagecoach v Competition Commission* [2010] CAT 14 at ¶111 and ¶131.

⁴³ *BGL (Holdings) Limited & Others v CMA* [2002] CAT 36, at ¶234.

⁴⁴ Section 117 of the Enterprise Act 2002.

⁴⁵ P1D, at ¶116.

- (c) the Parties’ stated strategic focus and direction in response to competitive pressures and innovation in their respective markets (e.g. Express for Adobe and developer hand-off for Figma), and the plausibility of alternative hypothetical concerns in light of that.

Economic evidence and evidence on customer preferences and behaviour

4.7 The Parties do not agree that “*econometric analysis is less likely to be relevant in the context of a theory of harm focusing on dynamic competition in terms of further product development*”.⁴⁶

4.8 Market dynamics and the Parties’ strategic response to them (both today and looking to the future) must be the “starting point” for any forward-looking analysis. This has also been recognised by the Competition Appeal Tribunal.⁴⁷ The Parties therefore consider that econometric analysis and evidence on customer preferences and behaviour is relevant evidence for assessing the theories of harm. For example:

- (a) Econometric analysis shows that Figma is a negligible competitive constraint on Adobe today (which is not contested by the P1D⁴⁸). [X].⁴⁹ This must be the baseline for any analysis of potential competition or dynamic competition because it shows the gulf Figma would have to bridge to become a meaningful competitor in relation to creative design software. This places a much higher evidential threshold on the proposed dynamic theories, especially in circumstances where Figma in fact has no road map or investments to build asset creation tools and has identified for the CMA the various technical and [X] challenges were it minded to do so.⁵⁰
- (b) Similarly, claims that the industry is going to converge towards next-generation software “*encompass[ing] both screen design software and creative design software for screen design*”⁵¹ must be based on evidence that sufficient customer demand for such a product exists and that companies are innovating in relation to the creation of such a future product. The P1D’s concerns are largely based on the proposition that customers find value in using a single provider for multiple tasks⁵² which is in turn based on feedback from a small number of customers. Such anecdotal evidence needs to be weighed against the full weight of systematic evidence that [X]; and that [X]. If the CMA is to build a theory of harm predicated on the Parties inevitably building combined “next generation” products that compete with one another, then it should adduce evidence on the extent of customer demand for such a product and:
 - (i) whether such a product is technically feasible for each of the Parties to build;
 - (ii) how the potential demand for such an offering compares to demand for other product or feature improvements that each Party might prioritise instead; and
 - (iii) whether this customer demand is sufficient to justify the costs and challenges in building such a product.

4.9 Any reliance on speculation as to the extent of the demand for future products that is not properly grounded in the available empirical evidence on customer preferences risks depriving

⁴⁶ Issues Statement, ¶44.

⁴⁷ *Meta Platforms Inc. v CMA* [2022] CAT 26, ¶100.

⁴⁸ P1D, ¶227.

⁴⁹ See Section C.4 of the Issues Statement Response.

⁵⁰ See Section C.3 of the Issues Statement Response.

⁵¹ P1D, ¶278.

⁵² P1D, ¶203.

the Inquiry Group of key evidence which would be relevant to their determination of the Phase 2 statutory questions. Such an approach would also not be consistent with the CMA's duty to do "*what is necessary*"⁵³ to put itself in a position to appropriately decide those statutory questions.

⁵³ *Tesco plc v Competition Commission* [2009] CAT 6 at ¶139.

Annex A

The Parties set out below further examples of the selective approach to assessing documentary evidence in the P1D.

1. Selected extracts from the Parties' internal documents which are not probative evidence of Figma's interest in expansion into asset creation tools when considered in light of contrary or important contextual evidence:

Figma internal documents

- a. The P1D points to a Slack message [REDACTED]⁵⁴. The first half of the statement should not be interpreted as anything more concrete than blue sky thinking in light of: [REDACTED]⁵⁵; [REDACTED].
- b. The P1D also points to a Slack message [REDACTED]⁵⁶, [REDACTED]. However, the very same message makes clear that [REDACTED]⁵⁷, [REDACTED]. It is also necessary to take into account further important contextual [REDACTED]⁵⁸. [REDACTED].⁵⁹ A proper appraisal of this internal document must have regard to statements in the document which [REDACTED].

Adobe internal document

- c. Similarly, the P1D cites [REDACTED] to "suggest that [REDACTED]⁶⁰ [REDACTED].⁶¹ This [REDACTED] does not support that conclusion. [REDACTED].⁶²
2. Internal documents which are properly contextualised by executive testimony provided under oath to the DOJ:

Figma internal documents

- a. [REDACTED]⁶³, [REDACTED].
- b. [REDACTED]⁶⁴, [REDACTED].⁶⁵ [REDACTED].⁶⁶ [REDACTED].⁶⁷

Adobe internal documents

- c. In relation to the [REDACTED], the P1D contends that [REDACTED] a "continuum" between marketing design and interactive product design, and therefore that both should be included in the same product category. [REDACTED].⁶⁸

⁵⁴ See Figma's internal document, FIGMA-2R-000463700, dated 27 March 2022.

⁵⁵ See Figma's internal document, FIGMA-2R-000463564, dated 27 March 2022.

⁵⁶ See Figma's internal document, FIGMA-2R-000461292, dated 12 May 2022.

⁵⁷ Ibid.

⁵⁸ See Figma's internal document, FIGMA-2R-000461404, dated 12 May 2022.

⁵⁹ See Figma's internal document, FIGMA-2R-003145315, titled [REDACTED], undated.

⁶⁰ P1D at ¶255, citing Case ME.7021.Strategy.22000005734.

⁶¹ P1D at ¶255, citing Case ME.7021.Strategy.22000005734.

⁶² Case ME.7021.Strategy.22000005734 at ¶¶47.30-48.00.

⁶³ Issues Letter Response, ¶5.58(c)(ii).

⁶⁴ Issues Letter Response, ¶5.58(a).

⁶⁵ [REDACTED] Dep., pages 165 -166.

⁶⁶ [REDACTED] Dep., page 199.

⁶⁷ P1D, ¶231(c).

⁶⁸ [REDACTED] Dep., 168:18-23 148:11-149:3 and 147:02-147:13.

- d. The P1D refers to on an untitled Slack message, [REDACTED] to posit that [REDACTED]. However, when this is considered together with the sworn testimony of the participants in relation to that message, a proper appraisal of the evidence in the round leads to the opposite conclusion. [REDACTED].⁶⁹ [REDACTED]⁷⁰ [REDACTED].⁷¹
- e. The P1D also refers to a document titled [REDACTED], and finds that [REDACTED].⁷² However, when considering the context of this document, why it was created and [REDACTED] direct evidence to the CMA [REDACTED], this finding cannot stand. [REDACTED].⁷³ [REDACTED].
- f. In addition, substantial weight should be given to executive testimony – supported by internal documents – confirming that [REDACTED].⁷⁴ [REDACTED]⁷⁵ [REDACTED]. [REDACTED].
- g. [REDACTED].⁷⁶ [REDACTED].
- h. [REDACTED].⁷⁷

⁶⁹ [REDACTED] Dep., 133:20-134:4.

⁷⁰ Adobe's internal document, ADB-ADD-0020307, titled [REDACTED], dated January 2022.

⁷¹ ADB-2R-013202095, referenced in the Issues Letter at ¶138.

⁷² P1D at ¶29 and ¶167(b), referring to Case ME.7021.22000114932, at Slide 4.

⁷³ Case ME.7021.22000114932, at Slide 9.

⁷⁴ [REDACTED] Dep., 37:12-38:15

⁷⁵ Project Spice Follow Up paper of 19 May 2023.

⁷⁶ ADB-2R-010735168, at page 3.

⁷⁷ [REDACTED] Dep., 141:25–142:01, 38:24-39:02.