

What's the GIF for de-merger?

Meta Platforms, Inc. v. Competition and Markets Authority [2022] CAT 26 case commentary

The scene was, in many ways, all too familiar: two friends sitting down for breakfast comparing and laughing at images and short videos from films or TV shows encapsulating the gamut of human emotions. But during the meal Alex Chung realised that the manner in which he and his friend were searching for these GIFs was haphazard. If only someone could identify a way to search for the dancing baby featured in Ally McBeal reliably. This question, posed in 2013, led to the creation of GIPHY, a search website that, for a while, successfully competed with Google to become the most popular site where people go to search for human expression.

The site grew spectacularly as users sought to share, via WhatsApp and other social media channels, anthropomorphic animals striking interested, bored, excited or drunk poses. And Giphy did not merely attract clicks. Suitors also started calling. By 2016 it raised \$75 million from a series of venture capital investors and was valued at \$600 million. But by the time of its next funding round in 2019, Giphy proved slightly less popular. It was acquired for \$315 million (plus \$85 million in deferred stock options for employees) by a company within the Meta group – the owner of Facebook.

But was Meta's acquisition an attempt to give a boost to Google's competition, or a defensive move to limit the growth of one of its own competitors? This, broadly, was the question posed by the UK's Competition and Markets Authority ("CMA") who quickly opened an investigation. The CMA's interest should not have caused any hamsters to fall off their wheels in surprise – an often shared GIF. It was concerned that the merger would lead to a lessening of competition in the supply of display advertising (horizontal unilateral effects), and a narrowing of the channels through which internet users could share 1-second images on repeat (vertical effects). In November 2021 it ordered Meta and Giphy to break up – a phrase for which a Giphy search offers images ranging from the sentimental to the heartless: "we were on a break".

But Meta and Giphy did not want their union to be so short-lived. Meta appealed to the Competition Appeal Tribunal ("CAT") for judicial review of the CMA's decision. The CAT's judgment, handed down on 14 June 2022 (see [2022] CAT 26) is significant, and not just to people keen to find a reliable way to search for celebrities looking speechless.

When dynamic competition is dynamite

Of particular interest in the Judgment is the CAT's explanation of how the CMA should address whether a merger has impaired dynamic competition. The CAT, dismissing Meta's challenge on this issue, found that the CMA had correctly directed itself as to the applicable test for determining a substantial lessening of dynamic competition.

This concept concerns not just the existing market, but potential future developments and innovations which may emerge. The fact that the regulator must consider the future impact on innovation of a

merger means that it cannot look simply at the standard tools of concentration, market share and market definition.

The CAT held that, rather than looking at these indicators, the CMA should instead focus on the following considerations:

First, what are the relevant markets being considered, and what is the potential for dynamic interplay between those markets? Once these have been identified, the level of competition between the current participants should be analysed (so-called static competition).

Second, how are the markets in question likely to evolve? This requires an assessment of *“the likely future state of the relevant markets...and in particular the position of the entities that are merging.”* Static competition should be analysed first, through an extrapolation of existing trends. Thereafter, the CMA can assess dynamic competition, notwithstanding that this involves an evaluation of *“something that is inherently unpredictable.”* The latter assessment is, by its nature, somewhat *“speculative”*.

Third, the assessment of dynamic competition must isolate the realistic period in which an impairment to dynamic competition might emerge. The CAT held that, in almost all cases, it will be relevant only to consider impairment in competition that would emerge within five years of the date of the merger.

Fourth, the CMA must assess the independent market potential of the merging parties, which will be informed by market identification, definition and assessment of the parties.

Fifth, the preceding four steps should then enable the CMA to identify the nature of dynamic competition about which it is concerned. This must be defined before the CMA can conclude that it would be impaired by a merger.

Sixth, the CMA must then assess the likelihood that dynamic competition would lead to successful innovations. The CAT commented that the number of identifiable dynamic elements that actually succeed are in general vastly outnumbered by the failures. Many, or even most, failures will not have any effect, one way or the other, on competition. The CMA cannot order a de-merger out of a concern that the merged entity would stifle unsuccessful innovations. In order to help the regulator differentiate the *“dud from the genuinely dynamic”*, the CAT provided some indicative examples:

1. Motives of the firms: is a giant trying to kill off a rival (an impairment/suppression of competition), or is a struggling firm obtaining funding to develop a novel business strategy (a pro-competitive motive).
2. Rival bidders: if there is huge interest in the target firm from a range of bidders due to its plans, this indicates a valuable dynamic potential, which should perhaps be kept away from the already strong market power of a dominant player.
3. Contestability: the fact that a new entrant has established itself in the market is a reason to be cautious about a merger, unless it can be shown that the barriers to entry and exit are relatively low and the market is easily contestable.

4. Monetisation. The critical question as to the significance of a dynamic element turns on the manner in which it can be monetised. 'Good ideas' that can't be turned into revenue are less in need of control by the CMA.

Seventh, if the CMA has reached the provisional conclusion that a merger gives rise to an expectation of a substantial lessening of dynamic competition, the CAT held that it should carry out a cross-check to identify whether the impact of intervention would be greater than non-intervention. As the CAT commented, "*Competition authorities like the CMA face an unenviable predicament of being damned if they act and damned if they do not act.*"

De-merger on ice

The CAT found that the CMA had acted rationally in identifying the correct test as to how competition would be lessened in the case of dynamic competition, and dismissed Meta's appeal on this issue, and five other issues. However, it upheld Meta's appeal that the CMA had failed properly to consult and wrongly favoured the confidentiality concerns of third parties. As such, there remains some prospect that Meta can challenge the CMA's decision. What's the GIF for fingers crossed?

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