PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT
GENERAL COMMITTEES

Public Bill Committee

DIGITAL MARKETS, COMPETITION AND CONSUMERS BILL

First Sitting

Tuesday 13 June 2023

(Morning)

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not later than

Saturday 17 June 2023

The Committee consisted of the following Members:

Chair: Mr Philip Hollobone

Carter, Andy *(Warrington South)* (Con)
† Coyle, Neil *(Bermondsey and Old Southwark)* (Lab)
† Davies-Jones, Alex *(Pontypridd)* (Lab)
Dowd, Peter *(Bootle)* (Lab)
† Firth, Anna *(Southend West)* (Con)
† Ford, Vicky *(Chelmsford)* (Con)
† Foy, Mary Kelly *(City of Durham)* (Lab)
† Hollinrake, Kevin *(Parliamentary Under-Secretary of State for Business and Trade)*
† Malhotra, Seema *(Feltham and Heston)* (Lab/Co-op)
† Mayhew, Jerome *(Broadland)* (Con)
Mishra, Navendu *(Stockport)* (Lab)
† Russell, Dean *(Watford)* (Con)
† Scully, Paul *(Parliamentary Under-Secretary of State for Science, Innovation and Technology)*
† Stevenson, Jane *(Wolverhampton North East)* (Con)
† Thomson, Richard *(Gordon)* (SNP)
Watling, Giles *(Clacton)* (Con)
† Wood, Mike *(Dudley South)* (Con)

Kevin Maddison, John-Paul Flaherty, Bradley Albrow, *Committee Clerks*

† attended the Committee

Witnesses

Sarah Cardell, Chief Executive, Competition and Markets Authority

George Lusty, Senior Director for Consumer Protection, Competition and Markets Authority

Will Hayter, Digital Markets Unit, Competition and Markets Authority

Rocio Concha, Director of Policy and Advocacy & Chief Economist, Which?

Matthew Upton, Acting Executive Director of Policy & Advocacy, Citizens Advice

Public Bill Committee

Tuesday 13 June 2023

(Morning)

[Mr Philip Hollobone *in the Chair*]

Digital Markets, Competition and Consumers Bill

9.25 am

The Chair: We are now sitting in public and the proceedings are being broadcast. I have a few preliminary announcements that Mr Speaker has asked me to draw to your attention. *Hansard* colleagues will be grateful if Members could email their speaking notes to hansardnotes@parliament.uk. Please switch electronic devices to silent.

Today, we will first consider the programme motion on the amendment paper. We will then consider a motion to enable the reporting of written evidence for publication and a motion to allow us to deliberate in private about our questions before the oral evidence session. In view of the time available, I hope that we can take those matters formally, without debate.

Ordered,

That—

1. the Committee shall (in addition to its first meeting at 9.25 am on Tuesday 13 June) meet—

(a) at 2.00 pm on Tuesday 13 June;

(b) at 11.30 am and 2.00 pm on Thursday 15 June;

(c) at 9.25 am and 2.00 pm on Tuesday 20 June;

(d) at 11.30 am and 2.00 pm on Thursday 22 June;

(e) at 9.25 am and 2.00 pm on Tuesday 27 June;

(f) at 11.30 am and 2.00 pm on Thursday 29 June;

(g) at 9.25 am and 2.00 pm on Tuesday 4 July;

(h) at 11.30 am and 2.00 pm on Thursday 6 July;

(i) at 9.25 am and 2.00 pm on Tuesday 11 July;

(j) at 11.30 am and 2.00 pm on Thursday 13 July;

(k) at 9.25 am and 2.00 pm on Tuesday 18 July;

2. the Committee shall hear oral evidence in accordance with the following Table:

Date	*Time*	*Witness*
Tuesday 13 June	Until no later than 9.55 am	Competition and Markets Authority
Tuesday 13 June	Until no later than 10.25 am	Which?; Citizens Advice
Tuesday 13 June	Until no later than 10.55 am	Chartered Trading Standards Institute; National Trading Standards
Tuesday 13 June	Until no later than 11.25 am	News Media Association; Publishers Association; DMG Media
Tuesday 13 June	Until no later than 2.45 pm	Professor Jason Furman, Harvard University; Professor Philip Marsden, College of Europe; Professor Amelia Fletcher, University of East Anglia
Tuesday 13 June	Until no later than 3.30 pm	The Consumer Council; Consumer Scotland; National Consumer Federation
Tuesday 13 June	Until no later than 3.45 pm	Professor Geoffrey Myers, London School of Economics and Political Science
Tuesday 13 June	Until no later than 4.00 pm	British Retail Consortium
Tuesday 13 June	Until no later than 4.15 pm	Open Markets Institute
Thursday 15 June	Until no later than 11.45 am	techUK
Thursday 15 June	Until no later than 12.15 pm	Coalition for App Fairness; Geradin Partners
Thursday 15 June	Until no later than 1.00 pm	Match Group; Gener8; Kelkoo
Thursday 15 June	Until no later than 2.30 pm	XigXag; Paddle
Thursday 15 June	Until no later than 2.45 pm	Google

3. proceedings on consideration of the Bill in Committee shall be taken in the following order: Clauses 1 to 36; Schedule 1; Clauses 37 to 59; Schedule 2; Clauses 60 to 121; Schedule 3; Clauses 122 to 124; Schedule 4; Clause 125; Schedule 5; Clauses 126 to 131; Schedule 6; Clause 132; Schedule 7; Clauses 133 to 136; Schedules 8 to 10; Clause 137; Schedule 11; Clause 138; Schedule 12; Clauses 139 to 142; Schedules 13 and 14; Clauses 143 to 200; Schedule 15; Clauses 201 to 207; Schedule 16; Clause 208; Schedule 17; Clauses 209 to 217; Schedule 18; Clauses 218 to 247; Schedule 19; Clause 248; Schedule 20; Clauses 249 to 276; Schedule 21; Clauses 277 to 287; Schedule 22; Clauses 288 to 292; Schedule 23; Clauses 293 to 300; Schedule 24; Clauses 301 to 308; Schedule 25; Clauses 309 and 310; Schedule 26; Clauses 311 to 317; new Clauses; new Schedules; remaining proceedings on the Bill;

4. the proceedings shall (so far as not previously concluded) be brought to a conclusion at 5.00 pm on Tuesday 18 July.—*(Kevin Hollinrake.)*

The Chair: The Committee will therefore proceed to line-by-line consideration of the Bill on Tuesday 20 June at 9.25 am.

Resolved,

That, subject to the discretion of the Chair, any written evidence received by the Committee shall be reported to the House for publication.—*(Kevin Hollinrake.)*

The Chair: Copies of written evidence that the Committee receives will be made available in the Committee Room and circulated to Members by email.

Resolved,

That, at this and any subsequent meeting at which oral evidence is to be heard, the Committee shall sit in private until the witnesses are admitted.—*(Kevin Hollinrake.)*

9.27 am

The Committee deliberated in private.

Examination of Witnesses

Sarah Cardell, George Lusty and Will Hayter gave evidence.

9.28 am

The Chair: Before we start hearing from the witnesses, do any Members wish to make declarations of interest in connection with the Bill? No.

We will move straight on then to hear oral evidence from the Competition and Markets Authority. This morning, we are privileged to have a trio of stellar CMA executives: Sarah Cardell, the chief executive; George Lusty, the senior director for consumer protection; and Will Hayter from the digital markets unit.

Before calling the first Member to ask a question, I remind all Members that questions should be limited to matters within the scope of the Bill, and that we must stick to the timings in the programme motion that the Committee has agreed. For this session, we have until 9.55 am. Could I ask our three witnesses, starting with the chief executive, to introduce themselves for the record?

Sarah Cardell: I am Sarah Cardell, chief executive of the CMA.

George Lusty: I am George Lusty, senior director for consumer protection at the CMA.

Will Hayter: I am Will Hayter, senior director for the digital markets unit at the CMA.

Q1 Seema Malhotra (Feltham and Heston) (Lab/Co-op): Thank you very much for coming today to give evidence. We very much appreciate your time. The CMA has supported this legislation, and there has been quite a lot of talk about how it provides a different approach to how the EU has taken forward legislation in this area. Do you think we have got the balance right, and why do you think a more flexible approach is helpful? You may have an example that you might want to use from your experience of a shadow digital markets unit.

Sarah Cardell: I will start off, and Will might come in with a specific example. We are talking here specifically about the provisions around digital markets in the Bill. What we have got with the design of the provisions here is exactly as you say—something that is really quite bespoke, quite targeted and flexible. I think that is really important. When we look at the issues that we are seeking to tackle in digital markets, there are many benefits that come from them, but there are real competition concerns. We see a concentration of market power. We see the characteristics of these markets, where there are substantial economies of scope and of scale, and the aggregation of data, and that results in potential harm, both for consumers, in terms of their ability to access a broad range of products and services, and for competing businesses that want to be able to compete and grow and innovate on a level playing field.

What does the Bill do? The Bill enables us to tackle those concerns in a very targeted way. That is critical. You asked about the comparison with the European Union's Digital Markets Act. In terms of the underlying concern, what we have in the EU is designed similarly—there is no fundamental difference there—but it is a more blanket approach, with a blanket list of prohibited conduct, whereas what we have here is a Bill that enables the CMA to designate particular companies in relation to particular activities, and then to design conduct requirements to manage their market power in relation to those specific activities. That is a much more bespoke system from the outset—it is targeted at the individual company and the individual conduct that is a cause of concern.

I think this Bill also has a greater degree of future-proofing. That is obviously critical in these markets, because they evolve so rapidly. The system in the EU is a slightly more static approach. You have a set of provisions that prohibit certain conduct as things stand at the moment. What we will have is the ability to bring in new conduct requirements if we see new concerns emerging, and to vary those or remove them when they no longer apply. That means that the system over time will be much more responsive and much more future-proofed. Will might want to come in with a couple of specific examples.

Q2 Seema Malhotra: We have quite a lot to get through, so let me just ask a follow-up question. There has been some criticism that the approach of regulating firms with strategic market status would be a discouragement to business investment and confidence in the UK technology sector. What would your view be?

Sarah Cardell: My view is that it is entirely the opposite. Competition and open competitive markets are the foundation of an economy that encourages investment, innovation and growth. We see that from a vast range of economic literature and economic research. The work that the CMA already does is very much tied to driving innovation, investment and growth.

So the starting point is that open competitive markets are good for innovation, good for investor confidence and good for growth. We then need to make sure that the design of the regime delivers that, and that the implementation of the regime, by the CMA, delivers that. I think the design does, for the reasons that I broadly outlined, and obviously the scrutiny is then, rightly, on the CMA to make sure that in practice we deliver the regime in a way that inspires that confidence.

I think we will do that in a number of ways. The first is to look at the outcomes that we deliver, which will ensure that businesses, large and small, are able to grow, invest and thrive in these markets. The second way is to make sure that we have really strong stakeholder engagement. This is not a regime where we want to operate behind closed doors. The whole design of the regime is a participative approach where we will engage with a broad range of stakeholders, businesses and consumers as we consult on designation, design the conduct requirements, and then enforce against them.

Q3 Seema Malhotra: The Government have not taken forward the recommendations from the CMA on tackling consumer detriment in the secondary ticketing market. Do you think that that was a mistake and that that should be in the Bill? Finally, huge new powers are going to the CMA. Do you think that the accountability mechanisms have the right balance? That will be a concern for Parliament. Mr Lusty and Mr Hayter might want to come in.

Sarah Cardell: If I quickly take accountability, George might come in on secondary tickets. Accountability is key. The Bill gives us greater responsibility and power, and with that must come greater accountability. That comes in a number of forms. Parliamentary accountability is critical. We are accountable to Parliament. We do that already through a number of appearances and engagement with Committees, but I am sure that there is more that we could do in the design of that, and we are very keen to work with colleagues in Government and across Parliament to ensure that that happens. Accountability for our decisions through the courts is another important element, and accountability to stakeholders, going back to the previous point, is key as well.

George Lusty: On secondary tickets, the CMA has taken a lot of action in this area. It has taken Viagogo to court. We found ourselves up against some of the inherent weaknesses in the existing consumer protection toolkit when we did that. We effectively had to initiate an attempt to start contempt of court proceedings to get Viagogo to comply with the court order that we had secured. We think that many of the changes in the Bill will address those weaknesses directly by giving us civil fining powers for the first time. We set out specific recommendations back in August 2021 about other things that we think could be done, but ultimately it is a matter for the Government to decide what they want to include in the legislation.

Q4 The Parliamentary Under-Secretary of State for Science, Innovation and Technology (Paul Scully): How will the enforcement powers accelerate your enforcement action in particular? Remediation needs to come quickly in digital markets, especially with the appeals process, which has been a topic of conversation. Why do you believe that judicial review is sufficient to give proportionatality for people to push back and for keeping the speed up?

Sarah Cardell: On digital markets, the design works very well, because you have an engaged approach where we will work with businesses to secure compliance with the conduct requirements. We hope that that will be a constructive engagement, and that much of that compliance will be achieved without any enforcement activity. That is the aspiration and the goal. Of course it is important to have enforcement as an effective backstop and that that enforcement happens rapidly for the reasons that you stated. The Bill envisages a six-month time limit for enforcement, which is important so that everybody knows that that timing is ringfenced.

On appeals, let me take a minute to talk through the JR standard and why I think that it is effective, because there has been a lot of debate about that. It is critical that the CMA faces effective judicial scrutiny for our work. That should go on the record. We think that the JR standard achieves that. The JR standard applies to much of our work already, including our merger control and market investigations. It applies to a number of regulators for their regulatory work already, so there is an established approach for JR.

What JR is not, certainly in our experience, is a very light-touch procedural review. It looks at process questions, but it also looks fundamentally at whether we have applied the right analytical approach, the kind of evidence that we have reviewed, how we have weighed that evidence, and the rationality—the reasonableness—of our decision making. Take the example of the Competition Appeal Tribunal review of our merger decision, which was a review of the acquisition by Meta of Giphy. We had 100-plus pages in that judgment, with 50-plus pages looking at our analytic framework, how we looked at the effect on competition, the kind of evidence that we took into account and whether we weighed it effectively. It was a very detailed critique of our assessment.

What JR does not do is start a full merits from first instance court process. It does not say, "Back to the drawing board—we are going to set the CMA's decision to one side and then conduct the process all over again." That is much more similar to the full merits review that we have at the moment on Competition Act 1998 cases. Our experience there is that it results in very protracted litigation—we often have cases that are in court for five or six weeks. But, fundamentally, it also changes the incentives to the parties that we are engaging with, because all eyes are on that litigation process. That means that, in our process and our own investigations, it is a lot harder to reach constructive, collaborative outcomes, because every point that we are investigating is thrown into an adversarial contest. It means that we have to turn every stone, check every piece of evidence and make sure that every point is covered, which means that our investigations themselves are more protracted and the litigation is much longer.

The benefit of judicial review in this process is that it provides absolutely robust and effective scrutiny, but it also supports an environment that is aligned with the aspirations of the Bill more broadly—to encourage engagement early on and to encourage constructive, collaborative outcomes. Then, of course, parties absolutely have the right to challenge and appeal our decisions and, where they do so, that is resolved effectively through a JR process.

Q5 Paul Scully: So you believe this is the right balance between being robust enough for those with strategic market status and being speedy enough for remediation for challenger tech.

Sarah Cardell: Absolutely.

Q6 Alex Davies-Jones (Pontypridd) (Lab): Good morning. We have talked a lot this morning about accountability to Parliament. That was highlighted quite heavily on Second Reading by Members from across the House. One of the other things that we have already discussed is the need for the CMA's strategic priorities to be directed and advised by Parliament. Could you expand on your thoughts on that point? Also, where do you see the priorities for the Digital Markets Bill? That is not intended to be a loaded question.

Sarah Cardell: I will give a high-level response, and Will might come in on some of the specific priorities for the DMU. It is really important to highlight the difference between accountability and independence. The CMA is independent when we take our individual decisions, but, as you say, it is absolutely accountable for those decisions, both to Parliament and to the courts. That is accountability for the choices that we make about where we set our priorities, accountability for the decisions that we take when we are exercising our functions, and accountability for the way that we go about doing that work. I think it is important to have accountability across all three areas.

On the strategic priorities, since I came into the role as chief executive and our new chair, Marcus Bokkerink, came into post, we have put a lot of focus on really setting out very clearly what our strategic priorities are, looking at impact and beneficial outcomes for people, businesses and the economy as a whole. We see those as a trio of objectives that are fundamentally reinforcing, rather than in tension with one another.

We also take account of the Government's strategic steer. That is in draft at the moment. You can see that there is a lot of commonality between our own strategic priorities that we set out in our annual plan and in the Government's strategic steer. That sets a very clear framework for our prioritisation.

Will might want to come in on how we will set the priorities for the DMU.

Will Hayter: We are obviously thinking very carefully about where to prioritise action under the strategic market status regime. We cannot jump too far ahead with that, because Parliament is going through this process now and we have to see where the Bill comes out, but, as Sarah says, we will be targeting our effort very firmly at those areas where the biggest problems and the biggest current harmful impacts on people, businesses and the economy are likely to be.

You can get a bit of a sense of what those areas might be from the areas we have looked at already, particularly the digital advertising market, search, social media, interactions between the platforms and news publishers, and also mobile ecosystems. We did a big study there, where we see a range of problems stemming from the market power of the two big operating systems.

We will continue to update our thinking as we go through the next year-plus, building on our horizon-scanning work and understanding of how developments in the markets are shaping up and what that might mean for where the problems are.

Q7 The Parliamentary Under-Secretary of State for Business and Trade (Kevin Hollinrake): First, thank you for the work that you do. You are obviously an independent body and you make difficult decisions. You receive more scrutiny than we have ever seen before, with the CMA's higher profile, and at times that must put you under quite a lot of strain. I appreciate the work that you do. You make the decisions as you see fit, of course, but those often come with criticisms, so thank you.

My question is about innovation. If you speak to some of those who are likely to be designated SMS—strategic market status—businesses, many of them might say, "Well, this will inhibit innovation from our businesses." I think part of that is about the power to look ahead at where this may take us. What do you say to that? If one of those platforms was opening a new type of supermarket, for example, it might be claimed that this would limit innovation. How would you respond to that?

Sarah Cardell: I have a couple of points, and Will might come in. The general point is that this regime is very much pro-competition and pro-innovation, both from the major platforms, which are likely to be designated in relation to some of their activities, and across the economy. It is important that we encourage innovation that supports competing businesses, large and small. You can have innovation that supports an incumbent by allowing that incumbent to offer additional services, but sometimes at the cost of entrenching their market position. We want to ensure that we have an environment that enables those major players to continue to innovate, sparked and incentivised by the competitive pressure that they are facing, but equally allows smaller competitors to thrive and innovate too. That is the broad point.

As we have said, it is a very targeted and bespoke regime. We will be focusing only on areas where there is substantial and entrenched market power already. Therefore, the principal point is that businesses, large and small, will continue to be free to innovate and to develop their products and services. Of course we want to ensure that that happens in a way that does not reinforce positions of market power. Will, you might want to come in on that.

Will Hayter: As Sarah says, this is all about creating a fertile environment for innovation, and you can think about that at at least three levels. First, it might be that those companies are innovating on top of the platforms that we are talking about here—in mobile ecosystems, through app stores, mobile browsers, and so on. Secondly, there are companies that are seeking to compete directly against some of the big platforms, and we want to ensure that there is a possibility that the current incumbents will be knocked off their perch by tomorrow's innovators. Finally, increasing competition should increase the pressure on the incumbents—the most powerful firms—to innovate further themselves, in a way that delivers the greatest benefits for people, businesses and the economy.

Q8 Kevin Hollinrake: Would you therefore say that those kinds of worries are ill-founded and that that is not something that would prohibit an SMS organisation from innovating?

Sarah Cardell: I do not think that there is anything in the Bill that prohibits innovation. The fundamental design, and certainly the way that we would intend to operate it, is entirely pro-innovation. We want to ensure that, as the designated companies continue to seek to develop and grow their businesses—of course they will want to, and that brings many benefits—that happens in a way that does not entrench their position, which is disadvantageous either to consumers or to competing businesses. That does not inhibit innovation, but it puts some guardrails around that innovation to ensure that the impact of that is beneficial and positive.

The Chair: We now come to a quick-fire round. We have six minutes left and four Members seeking to ask questions, so we want quick questions and quick answers.

Q9 Neil Coyle (Bermondsey and Old Southwark) (Lab): Do you have the resources to take on the new powers?

Sarah Cardell: The short answer is yes. We are well funded in terms of our budget. We are carrying out significant recruitment, and we have a good breadth of expertise, which is particularly important to developing our digital data technology expertise. We have done a lot of that already, but it remains a key focus.

Q10 Neil Coyle: Do you have an in-house legal team, or will you be taking on additional lawyers, given that it has taken legal action against some companies even to get to this point?

Sarah Cardell: We have very substantial legal resources internally. We have a legal directorate of around 150 people. We will be growing our resource by more than 200 people over the next two years, and growing substantially outside London, which will be key for us.

Neil Coyle: And—

The Chair: We will have to move on, I am afraid.

Q11 Vicky Ford (Chelmsford) (Con): I want to ask what success is and what it looks like. Is success giving my consumers greater choice and lower prices, and my businesses ensuring that the UK is an attractive place to

[Vicky Ford]

invest compared with other markets? If that is the definition of success, how do you measure it both domestically, compared with what has happened in the past, and internationally, compared with other markets?

Sarah Cardell: The brief answer is that in our annual plan we set out our measure of outcomes: benefits for people in terms of great choices and fair deals; benefits for businesses in terms of enabling them to compete, innovate and thrive; and benefits for the economy as a whole in terms of growing productively and sustainably. That applies across the new suite of roles, powers and responsibilities. If you are looking at outcomes for people, what is the impact on prices and choice? Can people access their data? Can they move between services more effectively? What is the impact on businesses? Can they get fair and reasonable terms when they are reliant on the infrastructure of some of these major players in order to innovate and grow? Are we seeing innovation coming from smaller businesses as well as the incumbents? When we look at the benefit for the economy as a whole, do we see the flow-through of greater competition, improving productivity and improving growth? We have our "State of UK competition" report, which reports on that, and that will continue to be an important metric.

We are taking on responsibility for an annual consumer protection study, again looking at areas of consumer concern and the impact of interventions we are taking. You mentioned international benchmarks; I think that is really important. Obviously, a lot of these issues, especially on the digital side, are international in nature. We want to see benefits in terms of changes in international trends—there is a real opportunity here for the UK to set the model for positive regulatory intervention in digital markets, and for that to be adopted by others—and real benefits for UK businesses in terms of their ability to grow and innovate, and the investment that that attracts from overseas.

Q12 Vicky Ford: Really quickly—will you be watching our market compared with what is happening in other markets?

Sarah Cardell: As one of our factors, absolutely.

Q13 Jerome Mayhew (Broadland) (Con): You say that open, competitive markets are good for growth. I totally agree, but we are one market among a global series of markets. Building on what Vicky Ford just said, where do you see this regulatory innovation sitting? You have referenced the EU and what it is doing, and there are other things going on in the US. Will this draw investment into the UK in this sector, or will it make people say, "Hmm, I'm not sure"?

Sarah Cardell: I firmly believe it will draw investment in. Will, do you have a couple of examples of people you have spoken to?

Will Hayter: You have app developers who are wanting to provide a service through these mobile ecosystems that have pent-up business—I think you are talking to one of them later—waiting to be invested in and to grow. There is also a UK-based search engine looking for opportunities to expand. Those are exactly the kind of businesses that are trying to grow and want this kind of regulatory infrastructure to create the conditions to do that.

Q14 Dean Russell (Watford) (Con): When I go back to my constituency in Watford tonight and speak to people on the street, what can I tell them will make a difference to their lives, in the simplest terms?

Sarah Cardell: It is opening up choice; it is opening up access to the fullest range of services. It is enabling them to have confidence that their data will be used in an effective way and that they can move between different products and services so that they do not get locked in. When we think about the consumer side, daily we hear and see so much about consumer detriment. We are working as hard as we can to address that, but the consumer reforms will enable us to take a massive step up in terms of the impact we can deliver, the speed with which we can tackle their concern,s and the effectiveness with which we can deliver improved outcomes for people.

Q15 Dean Russell: Will they see that happen, or will they need to be involved in the process to report where there are issues?

Sarah Cardell: Both. On engagement, we work very much with bodies such as Which? and Citizens Advice, which I know you are hearing from shortly, so we have a lot coming in. That is really important, because when we make the choices about the work we are doing, they need to be informed directly by consumer concerns, not be something that we just think is the right thing to do. We want to deliver that visible impact.

George Lusty: I think your constituents will see the CMA directly taking decisions. When we find that something has broken the law, they will find that we are taking direct orders to get their money back for them, and we will be imposing deterrent fines on the firms that do not do the right thing.

The Chair: I thank our three stellar witnesses very much indeed for their time this morning. We wish you continued success at the CMA.

Examination of Witnesses

Rocio Concha and Matthew Upton gave evidence.

9.55 am

The Chair: I welcome Rocio Concha, director of policy and advocacy and chief economist at Which?, and Matthew Upton, acting executive director of policy and advocacy at Citizens Advice. Thank you for coming this morning. Would you be kind enough to introduce yourselves to the Committee for the record?

Rocio Concha: I am Rocio Concha, the director of policy and advocacy, and the chief economist at Which?.

Matthew Upton: I am Matthew Upton. I am the acting executive director of policy and advocacy at Citizens Advice.

Q16 Seema Malhotra: Thank you for coming to give us evidence today. I have a couple of questions. First, will you outline how you see the Bill delivering consumer benefits, and how you will seek to measure that impact? Secondly, the Government announced with much fanfare that the Bill would tackle the practice of fake reviews, but they are not mentioned in the legislation; they are instead left to a delegated power. Do you think that

more action is needed on fake reviews, and how concerned are you that the Bill will not deliver on the changes needed?

Rocio Concha: Let me start by saying that we are fully supportive of the Bill. We think that it will modernise competition policy and consumer policy in the UK, and that it will deliver clear benefit for consumers, businesses and the economy.

We are very supportive of part 1 of the Bill, which you discussed with the previous panel and which is about the additional powers to introduce a pro-competition regime. That is very important and we think that the regime will be proportionate and flexible, and will deliver benefit to consumers by providing more choice and lower prices.

One thing to say is that it important to look at the regime in its totality. The CMA explained that the regime is very proportionate and consultative. For it to work, it is important that the appeal process is on a judicial review basis, which is what is proposed in the Bill. That should be maintained as the Bill goes through Parliament. Obviously, we are very supportive of the new powers for the CMA to fine directly companies that breach consumer law. Why? Because that is a stronger deterrent to those businesses that may decide to ignore the law.

We are also very supportive of the Secretary of State having the power to act on the practices set out in schedule 18 that are clearly unfair. Why? Because we need a flexible system, particularly in the digital space where things move very quickly. We need that flexibility in the system as we identify additional areas.

You mentioned fake reviews. We welcome the commitment to include fake reviews in the Bill, but basically the commitment is that that will be introduced by the Secretary of State. We do not think that we should wait. Clearly, fake reviews are harmful, so the buying, selling and hosting of fake reviews should be included in schedule 18. We think that drip pricing is another practice that is very harmful. There is a lot of evidence that that is the case, and it should be included on the face of the Bill.

How will we measure this? When we look at our work and at the areas we want to focus on, we do quite a lot on consumer detriment; we also work with the Government and the CMA to see what the big areas of detriment are. We expect to see changes in the behaviours of some companies that decide not to follow the law. With the previous panel, you talked about, for example, the measures that the CMA took in the past on secondary ticketing companies, such as Viagogo. That took six years—six years of harm for consumers. We expect that, after the Bill becomes an Act, we will see action and that all those crimes that do harm will be resolved more quickly.

Q17 Seema Malhotra: Thank you very much. This question may be more for Mr Upton. The Bill goes some way towards tackling the problem of subscription traps, but it does not go as far as what Citizens Advice has called for, or indeed the Labour party's policy of making subscription renewals opt in rather than opt out. Why do you think that the legislation needs further safeguards? Why, in the light of your experience, is that important for protecting consumers from harm?

Matthew Upton: We have been asking for action on subscription traps for a long time. Any action is positive, but we are seeing this in the context of a cost of living crisis, where anything that takes cash out of people's pockets stops them getting by from day to day. To be honest, we think that the intent is right, but this is potentially a huge missed opportunity for action on subscription traps. We have to understand how high the incentive is for firms to trap people in subscriptions. There is a huge amount of money to be made, to the extent that it changes the whole incentive structure so that for many firms, rather than thinking about how to provide a quality subscription, the rational thing to do is think about how to design the worst possible customer journey and to trap someone, whether through an online process that makes it difficult to cancel something—you will all have experience of this—or, to give a slightly facetious example, a process whereby you can cancel only when you ring between 2 and 2.30 on a Tuesday and you have wait for 45 minutes in the queue.

Obviously, we want to change that incentive structure so that we have a flourishing subscription economy, which should be encouraged, where consumers want to stay in subscriptions and firms focus on providing quality subscriptions. We do not think that the Bill as it stands will do that. For example, it says that exit has to be timely and straightforward. We do not think that that will work. We have been here before, if we think back to utility bills four or five years ago, when there was a big push to stop people rolling on to expensive contracts and to get them to switch. Regulators were focused on trying to dictate what went into letters to consumers about their renewals. Firms could make so much money by obeying the letter but not the spirit of the regulation that they would find ways round it, and switching rates did not go up. We think that the same will happen here.

The specific change that would make a huge difference and is legislatively straightforward is to provide that, at the end of an annual trial subscription, the default is that the consumer opts out. That is not about things like car insurance, where there is a detriment to people opting out, but for basic subscriptions, opt-out should be the default. That would allow firms to use all their ingenuity, power and influence to persuade consumers to stay in. They could go for it—send as many reminders as they wanted; that is absolutely fine. If the subscription is good, a consumer will stay in. That change will make the difference. We have done some polling on this and about 80% of people agree that that should happen. We think that it will put millions of pounds back in people's pockets, that it is proportionate and that it will encourage a flourishing subscription economy.

Q18 Kevin Hollinrake: Rocio, on your point about including fake reviews on the face of the Bill, our intention is to legislate in this area. I do not know whether you have seen the evidence from Trustpilot, which was submitted as written evidence. It rightly points to the fact that most of the discussion around fake reviews thus far has been about products rather than services. Does not that illustrate that we need to consult properly about that to ensure that we get the legislation right? Isn't there a risk that we could get it wrong by rushing to stick this on the face of the Bill?

Rocio Concha: A provision on fake reviews in the Bill should apply to both products and services. There is evidence to show that fake reviews also harm services. I

do not think that there is a major risk. We and the CMA have produced a lot of evidence about how fake reviews are endemic on some sites. We have demonstrated the harm that they cause. It is clear what is needed. We know that we need to look at selling, buying and hosting. I do not see a risk to including such a provision on the face of the Bill. Then, in secondary legislation—

Q19 Kevin Hollinrake: Even though there might be some things we have not thought about at this point in time. That would be a good example in terms of Trustpilot's evidence.

Rocio Concha: If there is something that needs to be improved, you can always do it with the Secretary of State's power later. There is quite clear evidence to provide a clear steer on what is an unfair practice. Obviously, as with anything in schedule 18, you have that power to modify, to add to the practice as more evidence comes in. We will provide enough evidence to the Committee to show that it can be introduced on the face of the Bill.

Q20 Kevin Hollinrake: Sure, okay. Mr Upton, on subscription traps, do you not feel that the powers that the Bill affords the CMA on civil penalties will address some of the concerns you highlight of people trying to get around the rules, for example? Would that not be something it could act on when it sees gratuitous behaviour such as what you describe?

Matthew Upton: I think it could, but we worry that it will not in reality. It is quite difficult to decide, for example, what constitutes easy and timely exit from a contract. You cannot necessarily measure it incredibly specifically, and I could imagine enforcement being really complicated. I could imagine firms dragging their feet, despite the way powers would speed up the ability of the CMA to act, as I say, because the incentive structure is so great.

One reason for the growth of the subscription economy is that it is a great way to provide services, but another is that it is such an easy way to make money by trapping people in. That is our firm belief and what our evidence shows. I just think a simple default would be much more effective than basically having the CMA chasing its tail and chasing firms. It would not be of any detriment to good firms who want to provide really solid subscriptions that people should want to stay in.

Q21 Richard Thomson (Gordon) (SNP): The EU has a right to redress for consumers, and there is a schedule in the Bill that would allow the Secretary of State to introduce that again in future through secondary legislation. Do either of you have any sort of sense of the extent to which UK consumers might be at risk of being at detriment compared with their EU counterparts while that secondary legislation is not in place?

Rocio Concha: Our view is that it should be on the face of the Bill. We do not know why the right to redress has not been transposed into the Bill. From our perspective, we do not want to leave it for the Secretary of State to decide once we have an Act. It should be included.

The other thing is that the right of redress does not cover all the practice in schedule 18, only misleading practice and aggressive practice. It does not really cover all the list of unfair practice in schedule 18. I think that the right to redress should also cover that.

Q22 Richard Thomson: On fake reviews, the challenge that came up at Second Reading was about how we might define, judge and act on them. How do you think it is best to tackle the problem of fake reviews? Have you any suggestions while we are engaged in this consultation?

Rocio Concha: You mean how—

Richard Thomson: How could we legislate create the framework by which the problem of fake reviews could be best addressed?

Rocio Concha: I think it needs to be in the list on schedule 18, and there is a very simple way to draft that amendment. We are going to suggest an amendment to help you with that, so I do not think that it is a major difficulty to include it on the face of the Bill.

Q23 Dean Russell: You are both at the coalface for consumers in terms of the challenges around all the issues addressed by the Bill. Can you briefly share some real-life examples of why the Bill is so important and what difference it will make to consumers?

Rocio Concha: I can give you some examples from the past so that you can see what consumers face. I already talked about the secondary ticketing problem, but I will give you another example. During covid, there were a lot of issues about people getting their refunds that they were entitled to by law. Many people could not really get them. I will give you another example on the digital side—that was on the consumer side.

At the moment, as you have heard from the CMA, digital advertising is basically controlled by two companies, Google and Facebook. Google has doubled its revenue from digital advertising since 2011 and Facebook used to make less than £5 per user—more recently, it has been around £50 per user. Google charges around 30% more for paid-for advertising than other search engines. All that cost translates into the products that we buy. We expect that once this pro-innovation, pro-competitive regulatory framework is put in place we will see it translate into prices.

We will also see it translate into more choice, in particular on data. At the moment, it is very difficult for consumers to have a choice on how much of our data is used for targeted advertising. You will have seen examples of that. When we talk to consumers in particular on the issues surrounding data, they feel disempowered. When we talk to consumers about the problems that they face in some of the markets where there are high levels of detriment, they also feel disempowered.

Matthew Upton: To be clear, there is a lot of good in the Bill. I echo Rocio's first comments that there are a lot of positives. It has been a long time coming, and is a testament to the civil servants in the Department who have stuck with it. The main lens through which we see the impacts of the potential changes in the Bill is the cost of living. It is not exactly headline news that people are struggling with their bills. One of the main measures that we look at is whether one of our clients is in a negative budget: whether their income meets their essential outgoings. About 52% of our debt advice clients can no longer meet their essential—not desirable—outgoings with their income.

There are two areas where the Bill can make a real difference. One of the frustrations is that a debt adviser will go in detail through someone's income and where

they spend their money, helping them to balance their bills, and so on. You see the impact of other Government interventions, such as energy price support, putting money in their pockets and uprating benefits. You are combing through their expenditure and you find something like a subscription trial taking £10 a month—a huge amount for a lot of our clients—unnecessarily out of their account. They did not even know that it was there. Often, it is people who are not online, are not savvy, and are not combing their bills every month because they have a lot on. That is hugely frustrating, and things like this, especially if strengthened, could tackle that.

You will see similar things where people are just about balancing their monthly income with their expenditure and they get hit by some big scam bill or are let down by a company. Such companies are too often not held to account in the right way. It is a bit of a tangential example in some ways, but the hope is that the CMA's increased ability to act and, in effect, to disincentivise poor behaviour towards consumers will lessen such instances as well.

The Chair: We have 12 minutes left, and five Members are seeking to ask questions, so we need to increase the pace.

Q24 Neil Coyle: Electrical Safety First and the British Toy & Hobby Association have described Amazon and other online platforms as a bit of a wild west when it comes to product safety for consumers. I appreciate that you both support the Bill as a step forward, but what is missing for consumers when it comes to product safety? Is it a new sheriff for the wild west?

Rocio Concha: Definitely. Legislation is required to ensure that online platforms take responsibility for the products that they sell on their platforms. We have done lots of reviews and gathered evidence that shows that consumers in the UK can buy very unsafe products on those platforms. Online platforms should be doing more to tackle that issue. The issue probably requires separate legislation, but I want to make it clear that we need legislation, and we need it now.

Q25 Neil Coyle: So this is a missed opportunity. There is nothing within clauses 67 to 82 on the investigatory powers that would allow for sufficient tackling of unsafe products, including toys reaching children.

Rocio Concha: No, I do not think that what is in the Bill will really tackle the issue.

Neil Coyle: That is disappointing.

Matthew Upton: I have nothing to add.

Q26 Jerome Mayhew: Mr Upton, I want to come back to you about subscription traps. You are saying that the requirement in the Bill that subscription cancellation should be a timely process is not sufficiently detailed. I declare an interest: in a former life, I used to help write European regulations. Is it not an absolutely basic tenet of writing regulations that you design outcomes—you do not list processes unless you absolutely have to, because things change? Given that point, are the Government, or the drafters of this Bill, not correct to focus on the outcome required and leave the process alone?

Matthew Upton: In a sense, I disagree with you because I agree with your point about it being outcomes-focused. In a sense, you are right; it leaves it fairly open, which gives some space for people to interpret, but I think what will end up happening is that firms will get around those provisions in various ways. They will tweak the subscriptions to find other ways to find people to step in. We will have a game of whack-a-mole, where we chase around trying to clamp down, a little bit like we had in the utility-switching space of four or five years ago. Ultimately, whether people agree or not, that led to much heavier intervention in the market.

Just taking one step to move towards opt-out—in a sense, you are right; it is a process step—is incredibly simple in terms of aligning the incentives. I think that would mean you would have to do less of the tweaking, constant interventions and prodding of firms. It just sets up the incentives in a much more simple way.

Q27 Jerome Mayhew: Is the intervention not actually the exact opposite of what you are suggesting, in that, if you have a stricter requirement within the regulations, people find ways to get round that strict interpretation, but if you have an outcomes-focused statement as is currently in the Bill, the onus is on the companies to demonstrate compliance, and the CMA, with the fining power of 10% of global turnover, has the stick with which to enforce it?

Matthew Upton: I disagree, because I think the simplicity of simply saying, "You opt out at the end of a period" gives clarity. I think it is easier for firms to interpret. In reality, under the current set-up, I do not think you will see a lot of firms thinking in a positive way about how to interpret it. I think they will think about how they can push as far as possible.

Customer journey design is so complex—this is the challenge of emerging digital markets. It is not a case of being able to say, "You have two click-through screens versus three," so that constitutes easy or hard. There are incredibly subtle ways to make it difficult. I think a lot of firms would continue to put their efforts into thinking about how they can stay as close as possible to the law to avoid CMA sanctions, while effectively still making it psychologically and in reality difficult for consumers. An opt-out would just simplify it, and would take that thought process off the table for firms.

Q28 Alex Davies-Jones: You mentioned schedule 18 already and some of the missed opportunities that you see there. Some things that have been highlighted are drip pricing and misleading green advertising. Can I push you a bit further on the missed opportunities in schedule 18?

Rocio Concha: In what respect? On why we want them there?

Alex Davies-Jones: Yes. What you would like to be in there.

Rocio Concha: As I said, we would like to see fake reviews and drip pricing included, because there is clear evidence on them. There is also this issue of greenwashing. That should also be considered to be put in schedule 18—we feel that we know enough to include it there. We have not done as much work in that area as we have on drip pricing and fake reviews, but we would be very supportive of including it in schedule 18.

Why do we want these areas in the Bill, versus them being included later under the Secretary of State's powers? If they are not in the Bill, they will not be criminal offences, and they should be, because that will be a more credible deterrent for stopping these practices.

Q29 Vicky Ford: When the CMA was answering Dean Russell's question about how consumers will feel the benefits, one of the things it pointed to was its greater powers to fine companies that are misbehaving. Do you not think that the threat of fines on companies will have a trickle-down benefit to the consumers, and that it will mean that companies will think harder about not acting in ways that are to the detriment of consumers?

Rocio Concha: Absolutely. That is one of the powers of that power. Basically, companies will know that they will not be able to drag the system for years, as happened with Viagogo and some anti-virus subscriptions. They will know that the CMA will be able to act directly. Hopefully, that will make businesses that do not want to comply with the law think twice.

Matthew Upton: I really agree. I cannot share a specific example, but we have had a lot of conversations with regulators and competition authorities after we have uncovered bad practice. We have said, "Listen—go after them." We were met with a frustrated shrug of the shoulders—"There's no point because they will run rings around us for a huge amount of time and we will end up with nothing. We have to use our powers where we can more clearly have impact." As you say, that should now end. In a sense, we are more positive about the disincentive for poor behaviour than the fines themselves.

Rocio Concha: There is an opportunity in the Bill to make that deterrent even stronger. At the moment, in part 1 of the Bill there is the opportunity for private redress, which will allow businesses or consumers to apply to the court for compensation from companies that have breached the conduct requirements in part 1. It is very unlikely that consumers like each of us or a small business will use that power in the courts. But if we allowed collective redress—the co-ordination of consumers and businesses to get redress—that would be for those companies a credible additional deterrent against breaking the law. That is in part 1, in relation to competition.

There is also the opportunity to include a provision within the breaches of consumer law. At the moment, collective redress is allowed for breaches of competition law, but not for breaches of consumer law.

Anna Firth (Southend West) (Con): You have given us a simple, practical way to end subscription traps through the opt-out. Do you have any other simple, practical amendments in the locker that would help better protect my consumers in Southend-on-Sea?

Matthew Upton: I have a very simple one, which echoes what Rocio said earlier: to add drip pricing to the list of banned practices.

Rocio Concha: For me, it would be fake reviews. As I said, we will suggest the drafting of amendments, to make that easy to include in the Bill.

The Chair: I thank our witnesses very much indeed for your precious time this morning; we appreciate it.

Ordered, That further consideration be now adjourned. *—(Mike Wood.)*

10.23 am

Adjourned till this day at Two o'clock.

PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT
GENERAL COMMITTEES

Public Bill Committee

DIGITAL MARKETS, COMPETITION AND CONSUMERS BILL

Second Sitting

Tuesday 13 June 2023

(Afternoon)

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No proofs can be supplied. Corrections that Members suggest for the final version of the report should be clearly marked in a copy of the report—not telephoned—and must be received in the Editor's Room, House of Commons,

not later than

Saturday 17 June 2023

The Committee consisted of the following Members:

Chairs: † Rushanara Ali, Mr Philip Hollobone, Dame Maria Miller

† Carter, Andy *(Warrington South)* (Con)
† Coyle, Neil *(Bermondsey and Old Southwark)* (Lab)
† Davies-Jones, Alex *(Pontypridd)* (Lab)
Dowd, Peter *(Bootle)* (Lab)
† Firth, Anna *(Southend West)* (Con)
† Ford, Vicky *(Chelmsford)* (Con)
† Foy, Mary Kelly *(City of Durham)* (Lab)
† Hollinrake, Kevin *(Parliamentary Under-Secretary of State for Business and Trade)*
† Malhotra, Seema *(Feltham and Heston)* (Lab/Co-op)
† Mayhew, Jerome *(Broadland)* (Con)
Mishra, Navendu *(Stockport)* (Lab)
† Russell, Dean *(Watford)* (Con)
† Scully, Paul *(Parliamentary Under-Secretary of State for Science, Innovation and Technology)*
† Stevenson, Jane *(Wolverhampton North East)* (Con)
† Thomson, Richard *(Gordon)* (SNP)
† Watling, Giles *(Clacton)* (Con)
† Wood, Mike *(Dudley South)* (Con)

Kevin Maddison, John-Paul Flaherty, Bradley Albrow, *Committee Clerks*

† attended the Committee

Witnesses

Professor Jason Furman, Aetna Professor of the Practice of Economic Policy, Harvard University

Professor Amelia Fletcher CBE, Professor of Competition Policy, University of East Anglia

Professor Philip Marsden, Visiting Professor, College of Europe

Noyona Chundur, Chief Executive, The Consumer Council

Peter Eisenegger, NCF Board Member, National Consumers Federation

Tracey Reilly, Head of Policy and Markets, Consumer Scotland

Professor Geoffrey Myers, Visiting Professor in Practice, London School of Economics and Political Science

Graham Wynn, Assistant Director for Consumer, Competition and Regulatory Affairs, British Retail Consortium

Max von Thun, Europe Director, Open Markets Institute

John Herriman, Chief Executive, Chartered Trading Standards Institute

David MacKenzie, CTSI Lead Officer, Chartered Trading Standards Institute

Owen Meredith, CEO, News Media Association

Peter Wright, Editor Emeritus, DMG Media

Dan Conway, CEO, Publishers Association

Public Bill Committee

Tuesday 13 June 2023

(Afternoon)

[Rushanara Ali *in the Chair*]

Digital Markets, Competition and Consumers Bill

2 pm

The Chair: Good afternoon, everyone. I need to call the Government Whip to move a motion to amend the Programme Order agreed this morning. The purpose of the motion is to enable us to hear from the witnesses who were unable to give evidence earlier today.

Ordered,

That the Order of the Committee of 13 June 2023 be varied by the insertion of the following words at the end of the Table in paragraph 2—

Tuesday 13 June	Until no later than 4.45 pm	Chartered Trading Standards Institute
Tuesday 13 June	Until no later than 5.15 pm	News Media Association; Publishers Association; DMG Media

—(Mike Wood.)

The Committee deliberated in private.

Examination of Witnesses

Professor Jason Furman, Professor Amelia Fletcher CBE and Professor Philip Marsden gave evidence.

2.4 pm

The Chair: Good afternoon, everyone. Could each of the witnesses introduce themselves, please? One witness is in the room and two are joining us virtually.

Professor Fletcher: I am Amelia Fletcher, Professor of Competition Policy at the University of East Anglia. I should mention that I am also a non-executive director of the Competition and Markets Authority; I know you heard from our chief executive officer this morning. I am very much here, I believe, with my academic hat on and because of my role on what has become known as the Furman review, which kicked all this off.

Professor Furman: I am Jason Furman, Professor of Economic Policy at Harvard University; I am jointly at the Harvard Kennedy School and in the economics department. I was chair of the expert panel on digital competition, and I am thrilled to be with you—this morning for me, and this afternoon for you.

Professor Marsden: I am Philip Marsden, Professor of Law and Economics at the College of Europe in Bruges. I am deputy chair for enforcement at the Bank of England. I was a member of the panel here and was formerly inquiry chair at the Competition and Markets Authority.

The Chair: Thank you all very much for joining us. I call shadow Minister Alex Davies-Jones to kick off with questions.

Q30 Alex Davies-Jones (Pontypridd) (Lab): Good afternoon professors and thank you for joining us today. We have had a lot of chatter about whether the Bill will help or hinder the growth of innovation in the UK's digital market. What are your opinions about that and do you feel that the Bill goes far enough?

Professor Marsden: In the branch of legislation being considered internationally in this area, this is the only Bill with a pro-innovation approach written into it. That was our original intention in the Furman review—not to sacrifice any innovation by large tech platforms, but simply to unlock the opportunities for innovation from smaller, more diverse firms so that there were more ideas and more flow. I do not see any correct arguments at all that this will hinder innovation; if anything, it will do the opposite.

Q31 Alex Davies-Jones: Professor Fletcher?

Professor Fletcher: I fully endorse that. When we did the review, we spoke to a lot of firms that were seeking to innovate in the digital space but were struggling. We heard that they really needed access to a whole number of things such as data. They needed access to customers and to be interoperable with systems out there. They needed access to finance. They found, essentially—some of them, at least—that the way in which the biggest platforms were working was making all that very difficult. They were concerned that although there had been a huge amount of innovation, at that point—and still, I think—firms' ability to innovate was being gradually increasingly stymied by the conduct of the biggest tech platforms. We very much saw the Bill as a pro-innovation piece of regulation.

Professor Furman: This question is so fundamental. This legislation would have benefits for consumers in terms of price and choice, but far and away the most important benefit would be innovation. It was designed with that in mind; our recommendations, which the legislation took on, established firms with strategic market status. They would fall under these rules, which would give a lot of leeway to small and medium-sized UK businesses to really innovate and come up with their own models rather than being constrained. More competition would help innovation by the large platforms as well.

The other thing that is so important is that the speed in the digital sector is just so much faster than in other parts of the economy, so traditional anti-trust rules just take too long: by the time a case is settled or decided, everyone has moved on. Getting there at the front end and having something that is much more flexible and faster is critical in this sector.

Q32 The Parliamentary Under-Secretary of State for Business and Trade (Kevin Hollinrake): Thank you very much for your answers. Amazon has recently said the complete opposite of what you are saying. It has said that the Bill will stop it from innovating. It has started these new stores where you can go and shop and there are no staff—people just go in, take the stuff off the shelf and walk out. Amazon says that this Bill would have stopped it from taking forward that kind of innovation. What particular areas in the Bill is Amazon referring to? Do you recognise those as valid concerns?

Professor Fletcher: Amazon would have to be more precise about what it thought in the Bill would stop that. I think the Bill has trod a very careful, innovation-

focused line between stopping the biggest tech platforms from inhibiting innovation by third parties and facilitating them to innovate themselves. The Bill is designed to only address the very biggest platforms in the first place, but also only to address the elements of their business where they have very strong market positions and entrenched market power. I think that way is the right way. As far as I know, Amazon would not be inhibited by the Bill from setting up those stores.

Q33 Kevin Hollinrake: There is a forward-looking provision, is there not, for the CMA to look five years into the future and decide whether a company will have entrenched market power then? Is that what Amazon is referring to? Is that their concern, and would that be valid?

Professor Fletcher: I think the concern is to ensure that it is entrenched market power that we are addressing. The CMA recognises, as do we, that these are intrusive measures and you do not want to do them unless you are trying to address entrenched market power.

Professor Marsden: Personally, I agree that there is an aspect where the five-year period, which I find a bit too long, can be gamed by some of the potentially SMS—strategic market status—firms, but I understand why it is in there. I probably would have been more comfortable with a two or three-year period, because that is traditional for competition authorities and as far as they can look ahead in terms of crystal ball gazing. But I understand why it is there.

Q34 Kevin Hollinrake: How would they game the system, Professor Marsden? What do you mean by that?

Professor Marsden: They could game the system in the sense of one thing being done by just slowly walking backwards, for example—"We are introducing so many innovations and having so many thoughts and thanks from various small businesses." They could drown the CMA with a range of evidence that actually does not go to the point, which is: who is being excluded, who is being locked out and what are we as consumers and citizens missing by relying only on three or four types of seed in the environment, as opposed to a whole globe of seeds? That is the metaphor I would like to use.

Professor Fletcher: It is worth highlighting that if you compare the UK regulation with the equivalent in the EU, the EU has taken a less bespoke, less evidence-based approach. It basically gets a quantitative presumption, and that presumption is going to be relatively hard to shake. What we have done is much more evidence-based, bespoke and proportionate. Whenever you do that, it makes it slightly less administrable and slightly harder to actually make stick.

Again, I think a very delicate balance has been trodden, and it is the right balance. I think all of us would agree on that, and on the fact that Brussels has made it easier for itself, but it is arguably then not proportionate nor sufficiently bespoke. It is a very delicate thing, but I think it is in the right place.

Q35 Kevin Hollinrake: Professor Furman, I saw your hand up. Do you have any comments?

Professor Furman: Look at the tools that the Digital Markets Unit would have under these provisions; the conduct requirements, such as fair dealing and open choices, are not brand new inventions. They largely draw on existing roles under anti-trust measures. It is just that they would be more explicit and clearer up front, and enforced more quickly. To some degree, at least in terms of the conduct requirements, this is not about imposing some brand new set of rules; a lot of it is about taking existing things and ensuring that they can be enforced in a clear and transparent manner.

The Chair: I call shadow Minister Seema Malhotra.

Q36 Seema Malhotra (Feltham and Heston) (Lab/Co-op): Thank you very much for coming today. I want to pick up on the argument that the legislation will enhance innovation. In your excellent report, which underpins much of our work, you mention hearing from businesses that were finding it hard to innovate.

Some conversations that we have had have been more explicit about the increased costs of innovation, and the difficulties when there is no interoperability or access, and increased costs being passed on to customers. Is that consistent with your experience, and what are the likely economic benefits to businesses and consumers of this legislation? I will take Professor Fletcher first, and then we will come back to Professor Furman and Professor Marsden.

Professor Fletcher: That was exactly our experience. We heard about the importance of interoperability with systems, and access to data and consumers, and how all those things were not always effective. Some innovation was fostered by big tech and some was less fostered by it, but the point is that they were in control of what happened in a way that we felt was not right for a proper, innovative environment, and certainly not right if you want to see real, disruptive innovation coming through—and I think that is what we do want to see.

We also thought that interoperability, data portability and data access were all pretty intrusive interventions. Therefore—unlike what has been done in the EU, where they have particular rules that require interoperability and require data portability on a fairly widespread basis—we instead thought that that should not be part of the core code of conduct, and that the aim could be achieved via pro-competitive interventions that were evidenced, bespoke and really well targeted. Again, that has been taken through into the Bill's design, and shows that it is targeted at the barriers to innovation that we identified.

Q37 Seema Malhotra: Professor Furman, I would be interested to know whether you think the Bill strikes the right balance. Does it give the CMA too much power? Does it put the right amount of power in the new digital markets regime?

Professor Furman: The short answer is yes, I think it gets it right. It strikes what my colleagues have described—and I agree—as a delicate balance. It depends on who is the head of the DMU and who is the head of the CMA.

In general, my experience with the regulators in the UK is that they are very thoughtful in understanding the importance of markets, competition and taking evidence seriously. The legislation gives them a certain amount of discretion. As my colleagues have testified, that is unavoidable; in a market and an environment where things are changing very rapidly, it would be very

difficult to try to write into the legislation every single detail. This sets the standard for what the world should do. Frankly, part of the reason I agreed to do this project is that I would love to see the United States following legislation like this. I hope the UK serves as a model for the world in this regard, and I think it is doing so.

On innovation, I agree with Amelia that what we heard from businesses and reviewed in the academic research is that it is not just a question of how much innovation, but what type of innovation. Are you trying to innovate so you can be acquired by Google or are you trying to become the next Google? There is one thing that motivated us. It is very hard to see the future of this space, but four years ago we thought the next big thing would involve artificial intelligence and machine learning. Unlike the past waves of innovation—where IBM was dominant, and then it became about PCs so it was Microsoft, and then it was about the internet so it became Google, and we saw one wave after the next displacing the previous—we were very worried that because artificial intelligence required large amounts of data, it would not necessarily lend itself to a new upstart competitor, but would instead entrench the power of the existing ones. So far, what we are seeing with OpenAI and the role that Microsoft plays in it, and with what Google is doing in this space, is that it is largely playing out along the lines that we were concerned about. That is partly motivating us looking forward.

Q38 Seema Malhotra: Thanks for those responses. Professor Marsden, how much we will need some global leadership to ensure this legislation has the impact it needs to have? Some of these issues and the companies' operations do not stop at borders. To what extent are there tools in the legislation and more widely for the CMA to operate with sister regulators abroad?

Professor Marsden: Let me take your first point with respect to evidence related to economic benefits. We had a natural experiment before this, called open banking. You will have heard things about this before. No matter what hopes or disappointments people had about open banking, we seemingly had the power at the time to investigate a market that had competitive problems but no anti-trust violations, so there was nothing we could address with anti-trust law. We identified certain competitive structure problems, and there was an expectation on us perhaps to break up the banks, and we hear that with respect to some platforms.

That power is there in the Bill, but with the Furman review and this Bill, which has been kindly carried forward by the excellent civil servants, our emphasis is on the idea of opening up these markets with the same kinds of ex ante obligations on the larger platforms that we imposed on the big banks. Did we break up the banks? No. Did we see massive amounts of switching from one bank to another? No, but we have evidence that British people switch their spouse more frequently than they switch their bank.

What we want is more engagement. We want customers, users and small businesses to be engaged with their platform—with their bank—and that is what we will be seeing. We saw new offers coming in without the extensive capital requirements to bring in a full new entry, but there were new services offers in real intermediation and disintermediation of various products. If anything, open banking allowed consumers and users to—I hate this term—have affairs. It allowed them to check out where they could get the best mortgage, the best loan and those kind of things. That disciplines the incumbents, especially HSBC and Barclays, to provide competitive offers themselves. That is an example, to me at least, about how a pro-competitive, ex ante set of rules on very large platforms with a lot of data can help diversify the economy without harming the platforms. If anything, it puts a little bit of heat under them. I think that was a good achievement, whatever people think politically about it. It was supposed to be a balanced, gradual attempt to try to fix a market that had competitive structure problems, and I believe that is what the Bill does here.

In terms of global leadership, the UK is definitely still leading, despite a bit of a delay. It is the most bespoke, nuanced and balanced bit of legislation that has been proposed so far that I have seen, as we have already discussed this afternoon. At the same time—I completely understand your jurisdictional point—there is a real zeitgeist politically around the world to introduce measures like these of some sort. Of course, they depend on the economic, political and legal backgrounds of the society, but I cannot imagine like-minded authorities and Governments not trying to work hard or co-operate in this space.

We are seeing some examples of that already in the digital space. It is not really an area where there is a competition of competition laws; it is more that this is a regulated solution that we are putting forward in various jurisdictions through a democratic process. It does not depend too much on the discretion of the authority. It depends on the process that the authority undergoes to understand the markets and to then work with the tech platforms to find out which remedies would be available. That participative nature is a very important part of this, rather than an adversarial nature where we just chase after the companies after they have done something that is alleged to be wrong.

Seema Malhotra: Professor Fletcher and Professor Furman, do you want to add anything?

Professor Fletcher: A lot of jurisdictions around the world are looking at this space. We talked earlier about how some of what we will achieve through this is stuff that can be achieved through competition law, and almost all jurisdictions have competition law. In a way, the more jurisdictions that have regulation, the easier it becomes for other jurisdictions to achieve some of the same things through competition law, because it changes the costs and benefits for the firms to change their business model.

The firms have quite an interesting decision to make on a global basis anyway about how much they do the same thing globally as they are required to do locally. I think it will vary depending on what thing it is. If it is terms and conditions, they can easily change that on a local basis. If it is interoperability, it is quite hard or rather more hard to design a system so that it has different interoperability standards in different places. We may well see an extraterritorial effect—not a deliberate one—because of the cost considerations and reputational considerations of the firms themselves. That will have a

positive benefit in terms of providing a more consistent framework globally for the third parties that we are hoping to innovate. The more consistent global framework they have to compete upon, the better it is for innovation.

Professor Furman: The ideal thing would be if the whole world sat down and agreed how it was going to approach this problem and there was a single global system, or lots of countries co-ordinated and did the same thing. In practice, that is impossible, so what one should aspire towards is having essentially correlated actions in different countries, where different countries have similar rules and are looking at each other and learning from each other.

This puts the UK in a position to be a leader in that global process, and that, frankly, is the way mergers work already. It is not like there is a single global merger authority; there are merger authorities in economies around the world, but they use similar rules, are looking at similar evidence, come up with similar decisions and all, to some degree, talk to each other. That is what this is—an emerging correlation of approach.

We have seen in the United States in both the House of Representatives and the Senate legislation being put forward and in some cases being passed out of Committee that would accomplish some of the different pieces of what this legislation would do, frankly, more comprehensively than anything I have seen in the United States.

Q39 The Parliamentary Under-Secretary of State for Science, Innovation and Technology (Paul Scully): Thank you for coming before us. You are right: you cannot have a monopoly of monopolies commission. That would be wrong, but if we can have more regulatory certainty across the globe, that is good. There are three areas that I can see the different interests pushing on. There is the appeals system, whether it is judicial review or a full merits review, the final offer mechanism and the countervailing benefits exemption. On appeals, do you think judicial review is sufficient, proportionate and fast enough? That is what we are trying to do here—is it fair and fast to get that remediation? It would be interesting to hear your comments.

Professor Fletcher: I know this is something that Philip cares a great deal about. I will come in first and then let him have a go. We have talked about it being a delicate balance. I discussed the EU regulation, where they have gone very far towards ensuring administrability and enforceability by having the rules set out in the legislation with quantitative thresholds. That is how they have dealt with the need for administrability and enforceability.

We have tried to be more bespoke, as I have said, and more evidence based, but there is a real risk in terms of administrability and enforceability that we end up in the same place as we have been with competition law, whereby the cases get hugely burdensome and hard to bring to a conclusion within a sensible timescale, and there are insufficient agency resources really to do everything that is needed.

I think there is a real risk that if you play around with what might seem like tiny changes to the legislation, that could really threaten the administrability and enforceability of it, and we could lose the benefits of it over competition law and put us in a bad place relative to the EU—whereas at the moment I think we could show ourselves to be better in terms of getting the right balance by being more bespoke and evidence based. The appeals standard goes to that point. I strongly support the JR appeals standard because if we went for a full merit standard, it would be too far and would become inadministrable. I am sure the CMA would find a way to try to administer it, but I do not think it would be the right balance. I feel the same way about the customer benefits exception.

Paul Scully: Professor Marsden or Professor Furman, do you have any views on that? Professor Marsden, your screen has frozen. Professor Furman?

Professor Furman: That is unfortunate because everything I know about this topic has come from him. *[Laughter.]* I do not have anything to add.

Paul Scully: Okay. Thank you.

Q40 Dean Russell (Watford) (Con): Professor Fletcher, imagine I am a growing business: I am successful, I have an online presence, I am doing lots of great stuff and I am a challenger to the global big businesses. What does the Bill mean to me? What difference will it make?

Professor Fletcher: It would make quite a lot of difference, but quite small differences. It would depend on the business that you were in. You might be an app developer. First of all, at the moment we have categories of rules rather than specific rules, so I cannot say exactly what it would do. For example, it could give you fairer access to app stores. If you were a seller through Amazon, which we were talking about earlier, it could give you fairer access to your own data on your own sales. I could probably talk for a long time about all the things that it could do, but I will highlight that you are, in that role, exactly who the law is targeted at helping.

Dean Russell: Thank you. I notice that we have lost one of our witnesses, so I will go to Professor Marsden—I mean Professor Furman. My apologies; I forget my own name sometimes!

Professor Furman: Fair dealing, open choices, and trust and transparency are three of the main conduct requirements. They are all designed to make sure you could not have a search engine hiding searches from your business, and that you could not have them preferencing themselves and directing to themselves instead of to you. You might benefit from some of the interoperability and data access by being given access to the data or access to a system that you could operate on, which right now one of your bigger competitors is doing, so I think it is preventing harmful and unfair things being done to you, but also affirmatively opening up some options. By the way, all that is good not just for innovation but for the consumer, because it will make things easier and more streamlined for them.

Q41 Dean Russell: Excellent. If I may follow up and spin that question on its head, Professor Marsden—hopefully I have the right person. I was asking before about what difference the Bill will make to a small business or growing business, but what will it mean for big businesses—the global giants—especially those that work in the online space? What will it make them better at doing? What will it stop them doing that might be harmful to competition at the moment?

Professor Marsden: I will deal with that first, then I can go back to the appeal point, if you would like my views.

The Bill will make those big platforms compete, basically for the first time. You will hear a lot of guff about how they are in some sort of monogopoly competition with each other all the time, and some of that might be true, but they are not really—they really are not. We see that in the competitive structure of the market, in the profits and in the concentration levels and so on. We are not trying to reduce profits or anything like that; we are trying to allow others to have a chance. If anything, like with open banking, that will light a fire underneath some of the big platforms, which are telling you they are innovative, and they are, but they are usually innovative in a way that makes us more dependent on them. We are not that fond of dependence in such markets; we are fond of diversity, choices and allowing competition on the merits—for products to rise and fall based on their merits, rather than on whether they have satisfied the terms and conditions of a particular platform.

On appeal, briefly—I am sorry for cutting out; Zoom might not be a platform of strategic market status—I have heard many advisers to tech platforms that might be subject to the Bill argue that the appeal issue is not just a small thing in the legislation, but absolutely fundamental. I agree with them on two things: first, the Bill itself and the ex ante approach that we have been discussing are absolutely fundamental—that is the big change. Secondly, the change with respect to ex post enforcement—the review of the conduct requirements, the investigations, anything imposed on the platforms and so on—to me involves such an involved, open and participative process between the platform, the digital markets unit and other entities that it gives me a lot of comfort about due process. If anything, if there were a full appeal standard, we might as well move to a prosecutorial approach, where the DMU is a prosecutor and everything is adversarial, and takes 18 years in court.

That is kind of what we have now so, if anything, this is an opportunity really to understand the business models, to put in bespoke requirements, to test ably the remedies—that is an important aspect—and to release remedies if they are not working or if they need to be tightened up. That therefore shows internationally what the UK thinks about such practices, which might help with the global spread that Amelia was mentioning. However, I have to state firmly that I believe that judicial review takes a lot longer than a substantive appeal, and I think that if the Bill were amended to allow a substantive appeal or even a few years of substantive appeal, we might as well have not done the study at all and might as well not pass the Bill in respect of the digital prior arrangements, because it will just return us to what we have seen before, basically.

In contrast, the European Commission is allowing substantive appeal rights. If anything, I think that means that they will code for prohibitions. As Amelia said, the law is not as bespoke, so we are going to see: "Here's your general obligation. I don't think you are satisfying it." Then there will be an appeal to the Court and a wait of 18 years for Luxembourg to make a ruling. Here, those issues we hope will be dealt with at the administrative stage, and whether the authority of the DMU or the process itself was fair and reasonable is something that the courts should obviously review. We welcome that scrutiny. In fact, if I were involved in any of this, I would very much welcome that kind of scrutiny at the judicial review level, which is itself a very intense form of review, so it feels perfect to have this JR standard, but I appreciate that you will have already heard a lot against that and will in future.

The Chair: Thank you, professor. I have a follow-up from the Minister.

Paul Scully: No, that is fine.

The Chair: Okay. In that case, I will bring in Jerome Mayhew.

Q42 Jerome Mayhew (Broadland) (Con): I understand the evidence that you have given about the need under clause 194 to have a JR approach to the appeal process. What that does, however, is underline the power that the CMA has. Professor Furman, you mentioned earlier in evidence that it really matters who the leader of the CMA is. The area that I want you to comment on is whether you think that, under this process, there is sufficient political accountability for the decisions of the CMA. Such organisations are big, with the potential to have a huge impact on the economy of this country. Inevitably, they are deeply politically sensitive—or it is foreseeable that they will be—so are we not in danger of passing the buck too much to an arm's length organisation like the CMA? Perhaps we should recognise that the decisions are inevitably political and that we therefore need a greater sense of political accountability. Professor Furman, could you start off on that?

Professor Furman: Political accountability is very much the broad approach. It is important that you have a body that approaches this transparently and predictably. I have a lot of respect for the role that you all play in the political system. You think that you should set the goals for consumer choice, innovation and so on, but it is important that what ultimately gets done is done in a much more judicial, regulatory way so that it is predictable for all the parties involved and does not change dramatically over time. In that, there is obviously the appeals process that was just discussed. That is not a political appeals process; it would be within the legal system.

I confess that I am not familiar with exactly how things would work in the UK. In the United States, Congress would have the head of the Federal Trade Commission, or whatever body was charged with this, up to testify. Generally, Congress would not ask, "Why did you bring that case yesterday?" but "Why aren't you being more aggressive?" or "Why aren't you being less aggressive?" They would try to oversee things at a strategic level, while leaving each case, decision and regulation to the regulator. Something like that system—I do not know exactly how you would do it in the UK—would be ideal.

Q43 Jerome Mayhew: Professor Fletcher, you are nodding. Would you like to expand on that?

Professor Fletcher: I fully agree. I can see why there is concern about discretion, but the CMA has shown that it takes its responsibilities seriously. It also understands that it is answerable to the Government of the day on a strategic level, rather than on individual cases.

To follow what Philip said, JR is not a walk in the park. It is a pretty serious test, which the CMA has faced occasionally in the past. It is a very serious expectation on the CMA. I support the view that if you want investment and open and competitive markets, you must have a transparent, consistent framework, which has lots of legal certainty. I worry that too much political intervention risks undermining that.

The Chair: Thank you. We have time for one more question, so I call Andy Carter.

Q44 Andy Carter: Professor Fletcher, picking up on something that you mentioned earlier, I want to look at innovation and investment. You said that we are leading the world in the some of the work that we are doing. Can you quantify how that work will benefit UK plc? I am conscious that that is a big question, but has any work been done on our approach and the benefits to our economy that we might see?

Professor Fletcher: I have to confess that I am not aware of work that has specifically been done on that. It is worth seeing this as a global thing, and we are trying to play our part in creating a global environment that will foster global innovation. I think that by doing it here, we will set rules that foster much of that innovation and encourage it to come here. There will be people who have made estimates; my hunch is that most of them will be pretty back-of-the-envelope, but I confess that I have not seen them.

The Chair: Thank you very much. That brings the allotted time for this witness panel to an end. On behalf of the Committee, I thank you all very much for giving us your time.

Examination of Witnesses

Noyona Chundur, Peter Eisenegger and Tracey Reilly gave evidence.

2.45 pm

The Chair: We will now hear from our next panel of witnesses. We have Noyona Chundur, chief executive of the Consumer Council; Peter Eisenegger, board member, National Consumer Federation; and, via Zoom, Tracey Reilly, head of policy and markets, Consumer Scotland. May I ask you to introduce yourselves for the record?

Noyona Chundur: I am the chief executive of the Consumer Council.

Peter Eisenegger: I am the director of the National Consumer Federation with responsibility for the digital perspective in the consumer world. From the nature of our response, you will see that we have also commented a lot on the standards world, so I think it is appropriate that I indicate my background there: I have participated in digital standardisation in the UK through the British Standards Institution, in Europe through CEN and CENELEC, and internationally through the International Organisation for Standardisation. We do our best to represent the consumer voice in those arenas.

Tracey Reilly: I am head of policy and markets at Consumer Scotland.

The Chair: Thank you. I invite shadow Minister Seema Malhotra to start the questions.

Q45 Seema Malhotra: Thank you for coming to give evidence. Perhaps I could start with you, Ms Chundur, and then others may wish to come in. Do you think that this Bill will adequately address consumer detriment in digital markets? Are there areas where the legislation could go further?

Noyona Chundur: Thank you for the great question. Perhaps I can start with a little bit of context. We believe that confident consumers will drive competitive markets. There is a lot that the Bill does really well. It is great progress, and I commend the work of colleagues in the Department, as well as partners in the CMA and Tracey from Consumer Scotland for their input in getting us to this point. There are eight areas that could be strengthened or clarified. There is building consumer confidence. There is the potential risk of only the CMA having direct enforcement powers. It is around the supervision of enforceable standards, practice and conduct of businesses. It is the ability to add and remove—

Vicky Ford (Chelmsford) (Con): Slow down!

Noyona Chundur: Sorry, would you like me to step through each one? Would that be easier?

Seema Malhotra: You are going through them quite well, but could you go you through them slightly more slowly, because colleagues will want to write them down?

Noyona Chundur: The first thing for us is building consumer confidence as a priority, because prioritising consumer protection to build the foundations that create confidence in competitive markets will benefit both the consumer and the economy. We are looking at this through the prism of the cost of living crisis and through the heightened prism of vulnerability. In the packs that we provided, you can see that vulnerability has certainly increased in the last 12 months. The Consumer Council has dealt with over 33,000 consumers, and they are showing increasingly more complex and multifaceted needs. Income in Northern Ireland has—

Q46 Seema Malhotra: Sorry: your list of eight things was quite useful, so would you be able to go through those—as you were before, but just a bit slower?

Noyona Chundur: Understood. Did I get to adding to or removing from the list of banned practices in the Consumer Protection from Unfair Trading Regulations 2008?

Vicky Ford: I wrote down the first one.

Seema Malhotra: Could you start the list again?

Noyona Chundur: Okay. Building consumer confidence is a key priority for us. The second thing is the potential risk of only the CMA having direct enforcement powers. The third is perhaps expanding the Bill in some way to include the supervision of enforceable, standards, practice and conduct. The fourth is adding to or removing from the CPR list of banned practices.

Next is establishing enforceable minimum standards to alternative dispute resolution schemes. We welcome the mandatory accreditation as part of the Bill, but we would like to take it a step further. Then there is a question around better regulation of firms that exploit behavioural bias or nudge techniques for negative effect.

Finally, we recommend going further on subscription traps with opt-in clauses after the trial or end-of-contract period.

Q47 Seema Malhotra: Thank you—that was very helpful. On subscription traps, you will have evidence for recommending opt-in rather than opt-out. Could you talk us through the impact of the opt-out?

Noyona Chundur: The key thing for us comes from research that the Government have published. I think the Department for Business and Trade estimated that 81% of UK households signed up to at least one subscription last year, and consumers are spending £1.6 billion per year on subscriptions that they do not want. That is a huge amount of money that a lot of consumers do not have in the current cost of living crisis. Our own research highlights the lived experience. In the online detriment research that we carried out, one consumer told us that they signed up for a 30-day trial but it took them six months to get the subscription cancelled. In the light of that, I think that it is appropriate for us to recommend that legislating for opt-in clauses after the initial trial or end-of-contract period is reasonable. I also believe that that may deliver the most immediate and material benefit to consumers in the short term, given the vast quantities involved.

Q48 Seema Malhotra: Mr Eisenegger, are there any gaps that you would argue for, and what is your view on fake reviews and whether they are being sufficiently addressed in the legislation?

Peter Eisenegger: Our overall approach here, at the more strategic level, is that the Bill contains lots of good stuff. It is a significant step forward. What we do not want is, as has happened with the Online Safety Bill, for it to hang around forever and not enter law. Our view is that we can talk about improvements in some areas. You mentioned one—the way that fake reviews are handled. To delve into that detail, however, would just prolong the process of getting it into law. We recommend that the Bill gets enacted as soon as possible, that we recognise it as a step forward, and that the CMA and this Committee look at areas of improvement beyond it. There is something that would relate to online reviews in terms of whether the information being provided is accurate, but it is good enough. Let us press on and get it done.

That said, I have not heard a discussion about the role of standards and supporting regulation. We are in the digital world, and an awful lot of regulation is supported by standards. You will find that General Data Protection Regulation is leaning very heavily on work in Europe to adapt and put some final European tweaks on the work that has gone on at the ISO level, and similarly with AI. If you want to be a leading player in this area, particularly an innovative one, from our perspective—we play in international, European and UK standards—you have to be very well aware of, and participating in, all those arenas.

To make an innovation comment—having spent two thirds of my career in product management and innovation, I am now doffing the consumer cap and putting the real-life innovation one on—good innovation practice is to look at what other people are doing and pinch as many legitimate ideas as you can from them. Quite honestly, the fact that the EU has the same sort of intent but a slightly different approach is great. Just keep an eye on its members to see whether there is good stuff. To be fair, I will say the same to them, because I am participating in the AI standardisation at the moment.

Q49 Seema Malhotra: In the interests of time, I will move on to Ms Reilly. What is your view of how this will affect/benefit consumers in Scotland? Are there any other specific issues that we should consider in relation to Scotland?

Tracey Reilly: Broadly speaking, we welcome the Bill. As your previous panellists said, it has lots of good stuff in it. It should provide the CMA with more flexible powers, which can be used in a more responsive and timely way to prevent detriment. On how the Bill will affect individual consumers, we hope that it will lead to consumers experiencing lower levels of detriment and being less subject to unfair, misleading or aggressive trade practices so that if and when such practices occur, they can be stamped out more quickly and easily, and it is easier for consumers to seek redress through ADR systems that are appropriately regulated and standardised.

In terms of how the Bill will affect Scottish interests, in many ways the level of detriment experienced by consumers across the UK is similar. The consumer protection survey is UK-wide and the patterns of detriment for Scottish consumers are generally not hugely different from those experienced in the rest of the UK. That said, there are obviously differences between the two nations in the regulatory enforcement and judicial landscapes, and it is important that we understand and pay attention to them. Equally, I understand that the Department has been engaging with Scottish stakeholders. We welcome that and would obviously like that to continue through the implementation process.

Some markets operate differently in Scotland, either because they are entirely devolved because there are fewer providers and therefore lower levels of competition, or because consumers access services differently, for example, due to geography. It is important that, within the overall UK framework, the system can respond to those regional differences or local issues. We hope that the additional levels of flexibility granted to the CMA under the Bill will allow for a more flexible and targeted response, particularly if any local practices cause detriment. We look forward to liaising with the CMA on that. Noyona may wish to make additional comments, given that she is in Northern Ireland.

Q50 Kevin Hollinrake: Noyona, you mentioned that you felt that the CMA should not be the only enforcement body that oversees the legislation. Who else do you think has the experience and expertise to perform some of those significant obligations?

Noyona Chundur: There is a heightened risk, Minister, if the new direct enforcement powers sit only with the CMA. Ultimately, the purpose of those powers is to be much more agile, flexible and responsive to consumer detriment in the market. Is there a heightened risk that enforcement will default to the CMA because perhaps it may deliver a solution that is much more agile and responsive and much more in keeping with the pace of detriment in the marketplace compared with a courts-based

system? The sector regulators and trading standards could therefore have the same or similar powers. The question is about agility and responsiveness to detriment, which is exploding in the marketplace. We see it increasingly, particularly in digital markets, which evolve so quickly. That is our perspective.

Q51 Neil Coyle (Bermondsey and Old Southwark) (Lab): The Bill aims to protect consumers and challenge unfair competition online, but one significant disadvantage for British companies and consumers is counterfeit goods sold on platforms such as Amazon. For example, the British company that holds a licence to make Peppa Pig toys has the trademark and the patent, and meets the standards, including safety standards, but counterfeit goods, particularly those imported from other countries such as China, are dangerous and do not meet safety conditions. Will the Bill help end that situation for consumers and companies here? Is it an opportunity to do so or, if not, is it amendable to achieve that?

Peter Eisenegger: The Bill has clauses that allow us to address that in terms of, "Has the information put before the consumer been complete and accurate?" If something does not comply with safety standards, that has been omitted. It is a question of interpretation that we would have to nail down and make clear.

Q52 Neil Coyle: Would the Bill allow for a company here to say that? Amazon's excuse is that that is for the producer in China, for example, to do that, rather than for Amazon. Does the Bill address that gap or not?

Peter Eisenegger: This is an area where I have had a lot of conversation with Electrical Safety First, which is very concerned about it. We have started to outline, at a very preliminary stage, what constitutes an online market set of functionality for which people should be held responsible and—what do you know—Amazon fits that. We find that online retailers do not perform all the functions, but they perform enough to be reasonably interpreted as having a retailing responsibility in the traditional physical world. But they have to do the heavy lifting of getting stuck into the detail and mapping it out.

I am afraid I come back to the standards world, which tends to be set up to provide that level of detail for the regulation to lean on. There are standards for complaints handling, for alternative dispute resolution, for dealing with vulnerable consumers and for online reviews—all issues that touch on what we have said. They are there, and mainly my UK consumer colleagues in British Standards either instituted them or were very influential in getting them taken forward.

A personal expert view? Yes, I think it can be interpreted that people like Amazon have a retail responsibility. To provide the evidence and analysis to support that position, however, is work that we have started with Electrical Safety First, but we are a bit busy and neither of us has had the time to finish it off.

Q53 Neil Coyle: Thank you for your work. Perhaps the Government will pick up on some of that. Noyona, I think you were going to come in.

Noyona Chundur: May I add something? Electrical standards are not my area of expertise, unlike consumer expectations around standards generally, so I will make a comment about that. Consumers expect minimum standards, particularly in new markets. It is worth saying that when we are talking about new digital markets, everyone is vulnerable, so there is no "vulnerable consumer" per se.

An interesting point to make is that we did a joint project with the Utility Regulator for Northern Ireland on what consumer expectations might be of future regulation and decarbonisation. Consumers were very clear that, in addition to trusted accessible information and concerns about costs or financial health, they wanted absolute protection from safety fraud, obsolescence or mis-selling, but they also wanted clear and robust standards on certification, registration and standards for installers, and protection against damage and disruption during installation. That is moving away from something that is perhaps more price-led and economic to where we need to have a minimum enforceable standard that works for everyone, so that we bolster the safety net and create confidence in markets. The more that we do that, the more consumer spending we have in the economy, which is good for everyone.

Peter Eisenegger: May I make a comment about enforcement? A backstop is in action at the moment: the class actions that our law now allows for the consumer world. My colleague Arnold Pindar, the chair of the NCF, is part of an advisory group that is taking on Mastercard at the moment. Another colleague, Julie Hunter, is fronting the case against Amazon about the way it presents its own products unfairly in its online marketplace. These names are in the public domain; I would not mention them otherwise. To a certain extent, the powers being provided to the CMA to be a bit more responsive and active make sense where we have class actions, which really is a major "after the horse has bolted" situation. We hope that the CMA will prevent more horses from escaping. Thank you for the opportunity to comment.

Q54 Vicky Ford: Could you give us examples of where the industry has set standards in the digital space that have helped to address particular holes? You have given us a list of standards for online reviews and alternative dispute resolution, but can you give us a way to explain to our constituents why these industry-led standards help to underline good behaviour in this market, and why it is important that they are set in an international sphere for these players?

Peter Eisenegger: Okay. The industry-led—

Vicky Ford: Are they industry-led?

Peter Eisenegger: You only get good standards when you have proper stakeholder engagement—that is a comment that we address in our supporting paper. You need standardisation bodies that actually work hard at getting their stakeholders involved. BSI is good at that, and the European system is pretty good. In the digital area, because there are so few of us with the right background and expertise, you find that the consumer voice is not getting through. I have two consumer colleagues who are on the BSI mirror committee for AI; they feel that the international standard is not reflecting what they are trying to input, because we do not really have anyone effective at the international level on the consumer side.

You need very careful insight into where there is decent stakeholder engagement and where there is not. Where there is, you are quite right: I have worked on a number of committees where the good guys and gals from industry have just been saying the right thing, and you end up just tweaking a little of what they already understand in their industry is good practice. There is no problem with working with the good people in industry, but—particularly in the digital space—you do get the big players coming in and influencing things, whereas the small and medium-sized enterprise stakeholders are not as fully represented. When a standard is put forward, careful understanding is needed of who the people are who are really contributing to it.

Q55 Vicky Ford: I think you said that you sometimes see the standardisation process in the digital world being used by larger players to put barriers in the way of smaller players getting involved.

Peter Eisenegger: Exactly.

Q56 Vicky Ford: Can you give an example where you have seen that?

Peter Eisenegger: Yes, I can. It was a consumer-initiated standard on complaints handling. If you want the number, I can blind you with it: it was ISO 10002. It was initiated by the consumer side of ISO. It is clearly written for the big company: it has lots of good practice where you divide all the responsibilities, the analysis of the complaints and things like that. There is an annex for SMEs. I have been through the main part of the document and counted the number of requirements: there are more than 250. For the SMEs, there are eight.

Where you look at the consumer and it is your small local trader, you go, "That's fine," because they know you personally—you know where they live, basically, and that changes the whole local relationship. But you do not really see that many standards where the practicalities for the smaller company are reflected. I am quite pleased that the consumer world did a decent job for the SMEs there, because they are very important to us in terms of local service and providing competition to the big guys.

Q57 Seema Malhotra: I want to come back to some areas that we have picked up on in previous evidence sessions. Schedule 18 to the Bill sets out a list of commercial practices that are to be considered unfair, but a number of arguably unfair commercial practices are not included. Examples might be drip pricing or misleading green advertising, which is an increasing consumer concern. Do you consider those omissions to be something that needs more attention during the passage of the Bill so we do not miss this opportunity?

Peter Eisenegger: Do as much as you feel you can make time for, while getting the Bill implemented as quickly as possible. I come back to the key clauses that relate to the appropriateness of the information provided. Is it complete? Is it misleading? As a charity, we have looked at how heat pumps are being advertised at the moment. About 80% of the online information did not provide the right contextual information for your heat pump decision; some did not even mention it at all, and a few hid it away behind several layers of interaction with the website before you found it out. That would fall under the incompleteness clause, but again, you are going to come back. The CMA would be able to apply an interpretation, which would probably go through some sort of intense dialogue with the industry people concerned, but if you do not have time to cover all those other aspects as explicitly as you would wish in the Bill, I think there is a clause that gives the CMA some capability for addressing it.

Noyona Chundur: Maybe I can add to that. This talks to the point in the earlier session on how quickly or whether fake reviews should be automatically added to the list of bad practices, or should we go through full consultation. In all these things, we need to have appropriate consultation and the appropriate due diligence carried out. It needs to be done as quickly and thoroughly as possible so there is no doubt. I am completely supportive of what was said earlier today that there is a lot of detriment as a result of fake reviews, and the sooner that is resolved, the better. None the less, we need to be careful about setting the right precedents. We need to have consistency in procedural application. For all those things—I believe we are all in agreement that drip pricing is of huge concern, as are misleading green claims—we need to follow the right process and get through it as quickly as possible.

Seema Malhotra: I think Ms Reilly wants to come in as well.

Tracey Reilly: I simply want to endorse much of what Noyona said. There are issues around fake reviews, drip pricing and greenwashing that we all want to see addressed, and for that to happen as soon as possible. However, there is also a need to ensure that the definitions are right and the provisions are effective. We would hugely support the Secretary of State having the power, which is in the Bill, to amend the schedule by regulation. I realise that is a Henry VIII clause, which is not always popular, but in this case I think it is an acceptable use of that power, and it comes with appropriate safeguards in terms of the affirmative statutory instrument procedure and the requirement to consult first.

Touching briefly on greenwashing in particular, we acknowledge that existing regulators have powers to tackle that and that there are existing programmes of both education and enforcement. However, greenwashing claims are hugely prevalent and there is a lot of work to be done. It is an issue that, for us, has real risks associated with the net zero transition, because we are going to get consumers to make quite different choices around what they eat, what clothes they buy, how they heat their houses and what vehicles they drive. Some of those are quite big-ticket items in terms of cost, so there is a real risk for consumers and a real need for them to be able to trust the information they are given, which links back to the points my colleague Noyona was making about consumer confidence.

Q58 Seema Malhotra: In relation to support for consumer organisations, how do you think the CMA and the Government can better support consumer organisations that are supporting consumers on the frontline?

Tracey Reilly: Just a couple of quick points. There is a need to produce very clear guidance on the new plans and have very clear referral processes to the CMA for

the use of those plans, so that advocacy and advice bodies have almost a direct line, if you like, into the points of contact. Essentially, it is about pathways and signposting, and ensuring that the routes from an individual consumer experiencing detriment to those who are able to take action on it are as quick and flexible as possible.

Noyona Chundur: From my perspective, I would ask for two things. The first is greater connectivity across the ecosystem. We all have a lot of data; we all have a lot of intelligence; we all have a lot of on-the-ground insights that should be shared and published in a more connected and co-ordinated way. Ultimately, that is more holistic, but it gives the level of granularity we need on a four nations basis. The other is greater focus on the broader issues of online behavioural bias and the exploitation of behavioural bias—you know, nudge techniques—to negative effect. To my mind, the Bill does not adequately cover that, so I believe this is an area of potential development.

As has been touched on already, vulnerability is not just about personal characteristics or social circumstances; the behaviour of organisations can cause harm and put you in a vulnerable position. That is a key area that we would love to see explored in more detail as the Bill passes through scrutiny.

Peter Eisenegger: In terms of support, having mentioned standards, there is a Government mechanism for providing the consumer arm of BSI with money to support its experts. Keep a careful eye on that, and work with BSI and its consumer arm to ensure that that is suitable for the level of really important issues we need to address.

There is another area of the consumer world, which is about the smaller, really voluntary charities, such as ourselves and the Child Accident Prevention Trust, which have no regular income and live hand to mouth. We have been on the brink of extinction every now and then, and although we have managed to haul ourselves back, it is a very precarious position. When we and others in a similar position contribute to this sort of arena or talk to regulators, our voice is valued and has something to offer, but we are very precarious. If Parliament looks at the people who really represent the grassroots and different perspectives and are without a regular income, and if something can be done, that would be extremely useful. Some of these voices drop out.

Q59 Vicky Ford: I want to come back to schedule 18 and ensure that I absolutely understood what Tracey said. This morning, I think Which? said that they thought fake reviews should now be put in schedule 18. I have had constituents who have suffered from fake reviews for services they have given, and the fake review has been very damaging to their business. We all know about fake reviews on books, which can be very damaging. Are you saying, Tracey, that we need to ensure we get the wording of how it goes into schedule 18 right—have the consultation and get the wording right—but let the Government introduce it through Henry VIII powers later, rather risk delaying the Bill by trying and maybe not getting the exact wording right now?

Tracey Reilly: I think that is a very difficult question. Without remotely passing the buck, I think that ultimately it is a judgment for your Committee to take as to whether it considers there is sufficient clarity in the definitions proposed during the amending stages to allow for those decisions to be made now. If the Committee is confident that there is sufficient clarity, and the soundings you are receiving from stakeholders indicate that they are content, it is a matter for the Committee to decide. Ultimately, our position is that we want to see it as soon as possible, but we also want to see it done correctly, because as we all know it is very difficult to amend primary legislation once that is in place.

Q60 Vicky Ford: So "get it clear" is what you are saying to us.

Tracey Reilly: It is a very complicated area, not just in terms of how you define fake reviews but in terms of the precise powers that regulators need in order to determine where, how and when fake reviews are occurring. AI will make that an even more complicated picture, so it is important to get that right.

Q61 Jerome Mayhew: Ms Chundur, you gave a very interesting stat earlier: £1.6 billion per year is spent on subscriptions that people do not want. One of your eight areas of concern is an opt-in clause for the subscription trap issue. You are in good company, because Citizens Advice came up with the same recommendation in this morning's evidence session. However, we will hear later today from the News Media Association, which expressed exactly the opposite view in its written evidence: that the current wording of clause 252(1), which is essentially that you should be able to unsubscribe with one click without any unreasonable additional steps to go through, "may hinder the provision of improved subscription offers that are in the best interest of the consumer". Can you comment on that? I will test the NMA if no one else does regarding what exactly it meant by that, and ask for examples of how it might hinder improved consumer engagement, but if the NMA can substantiate that, would you accept that it has a point?

Noyona Chundur: Perhaps, but I agree with what Citizens Advice said this morning: if your product is good enough and consumers want it, they will seek it out. Another point made this morning was that the consumer journey sits across multiple markets and is quite complex. That is where we are coming from. We are looking at the end-to-end consumer journey. In that context, consumers also want minimum standards. If you do not have minimum standards—if the default position is that you are just rolled on to another contract, and there is no opportunity to review whether that contract is the best for you, has the best price, is the best product or suits your particular circumstances—I am afraid that that does not necessarily give the consumer the best deal from a price or quality perspective.

Q62 Jerome Mayhew: Do you also recognise that there are people like me out there who signed up for a contract, and to be asked every single time, "Do you want to renew it?" when it is a core level of services that I benefit from, year in, year out, would be less constructive for my wellbeing? That is poor English, but you know what I am trying to say.

Noyona Chundur: Respectfully, I would say that most people will want the reassurance that the deal that they are getting every year is the best deal possible, is coming at the best price, is being delivered with the best service in mind and meets their needs, rather than the assumption that an algorithm or someone else has made that decision for them. Certainly the consumers we speak to want

transparency, accessible communication and more choice. This is one way of giving them exactly what they want. I echo the sentiment of what was said this morning: if the product or service is good enough, people will sign up to it. It is nothing to fear, but it will raise standards and make for better competition and a more sustainable economy. Those are all good things, because they are being viewed through the prism of consumer accessibility and affordability.

Q63 Andy Carter: Tracey, you mentioned in your opening statement that a number of markets operate differently in Scotland. I wonder whether I could ask you to expand on that a little. What particularly were you referring to, and where does the Bill need to be amended to accommodate those markets operating differently?

Tracey Reilly: I probably had two or three examples in mind. One would be legal services, which are entirely devolved, so they are regulated entirely differently. Key parts of that market around complaints are regulated differently. Another would be one that we share in common with Northern Irish colleagues: the prevalence of off-grid heating systems. There may be ones where how you access services is simply different according to where you live; for example, there is the perennial issue of postal delivery in Scotland and Northern Ireland. Those were the types of thing that I had in mind.

We have regular and very constructive dialogue with the CMA about local issues, and about regional and sub-national issues. We hope that the Bill's provisions will enable the CMA to deal flexibly and responsibly with those concerns. The framework that they operate, as with any body that has limited resources, makes prioritisation decisions on a UK-wide basis. We would like to ensure that regional and national differences, and differences for specific communities within the nations, can be dealt with as part of that. I think Noyona would probably welcome coming in on that point.

Q64 Andy Carter: Do you want to pick up on that from a Northern Ireland perspective?

Noyona Chundur: Absolutely. A key regional difference, both for Tracey and for me, is the microbusiness economy. In Northern Ireland, 89% of our businesses employ 10 people or fewer. We are absolutely a microbusiness economy. We know that the experiences of many consumers and of many small businesses and microbusinesses mirror each other in multiple markets. Tracey's point is about ensuring that the prioritisation principles, or the applications of how the Bill is operationalised on the ground, need to be mindful of the diverse experiences that can happen among the four nations.

Q65 Andy Carter: I have one further question. You touched on nudge techniques. Can you expand on that and on what action you think needs to be taken?

Noyona Chundur: It is when you are pressurised into purchasing a product or service without even knowing that it is being served up to you because of an algorithm.

Q66 Andy Carter: Can you give me an example of where that is happening?

Noyona Chundur: It can happen in retail; it can happen in any digital market; it can happen in telecoms. It is a technique that is growing, and there needs to be further investigation and exploration of what that means for regulation. That is not just the job of the CMA; it will need sector regulators to play a part. It needs the whole ecosystem to coalesce, but also trading standards and trading standards in Northern Ireland.

Q67 Andy Carter: Sorry to pressure you on this, but I want to understand what you mean by a nudge technique. If I go on to a website and then I get an email afterwards, is that a nudge technique? What do you mean?

Noyona Chundur: That is probably an algorithm. A nudge technique is perhaps a little bit more sinister than that: it is where you are being prompted to purchase products and services that you never thought you might need, based on your previous purchasing patterns and purchasing decisions. That may not come at the best cost or the best specification, and it certainly may not be the best offer to use.

Andy Carter: That is really helpful. Thank you.

The Chair: I call Dean Russell to ask a brief question.

Q68 Dean Russell: I have two, but they are really quick. First, will the consumer be expected to do anything in order to see benefits from the Bill, in your view? Will they benefit from all the wonderful things we have talked about, or will a communications campaign be needed alongside the Bill to tell them what their new rights are so that they can report back and make complaints, as it were?

Noyona Chundur: A communications campaign is fundamental. The language that is used, how the messaging is framed and how it is targeted to the various consumer groups will be key, as will consistency of messaging across the regions, not just from a UK perspective. It needs to be mindful of how consumers absorb information and who they engage with, as well as being mindful of communities. Consumers want clear, transparent information in plain English, so we need to make it simple for them. We need to be careful not to just push the onus on consumers to make decisions. The job of the Bill, and of Government, is to make lives better, so that is what we want to do.

Dean Russell: I will leave my second question, because I am conscious of time.

The Chair: Thank you.

That brings us to the end of the time allocated for this witness panel. On behalf of the Committee, thank you all very much for taking the time to give evidence.

Peter Eisenegger: Thank you for listening.

Examination of Witness

Professor Geoffrey Myers gave evidence.

3.30 pm

The Chair: We will now hear oral evidence from Professor Geoffrey Myers, visiting professor in practice at the London School of Economics and Political Science. For the record, Professor, could you introduce yourself?

Professor Myers: In addition to my role at the London School of Economics, I had a prior 30-year career working for public authorities, competition authorities and regulators, particularly Ofcom, so I have hands-on experience of being a regulator. For full disclosure, I should say that I am one of the independent digital experts whom the CMA has appointed to assist it in preparing to take on the duties should this Bill become law. But I am representing my own point of view, not the CMA's.

Q69 Alex Davies-Jones: This is a question that we have been asking a lot of the witnesses today, but it is important to get your views on the record. Could you please outline whether you think the Bill will help or hinder innovation growth in the UK digital sector? Do you think the Bill goes far enough, or are there any omissions from the Bill that you would like to see included?

Professor Myers: I think on balance it will help improve innovation, and I largely agree with the comments made by the witnesses in the first session this afternoon, Professors Fletcher, Marsden and Furman. We need to think about innovation by big tech companies, which are the targets of the regulation here. They are likely to become the firms with strategic market status and to become regulated companies, but there is also innovation by their customers, by their competitors and by new starters.

On the innovation incentives and the ease of innovation, I think the playing field has been tilted a bit too far towards big tech and against the other set of players, so making it easier for that other set of players to innovate is very valuable. One of the tasks in implementing this regime, which I think is about the CMA doing its job well, is taking seriously potential concerns about deterring innovation from the SMS firms and making sure that the potential risks are minimised. I think that goes beyond what is on the face of the Bill and is really a task for implementation by the CMA.

Q70 Alex Davies-Jones: On omissions, do you think the Bill could go further?

Professor Myers: I think it strikes a sensible balance. As you have already heard, there are great advantages in having flexibility and future-proofing because of that flexibility. That implies a structure—a framework—that is laid out in this legislation, which will put quite a bit of onus on regulatory discretion to implement it, and then there are sets of regulatory capabilities and accountability that are needed to make that all work. But I think the Bill is a very good attempt at striking a good balance there.

Q71 Alex Davies-Jones: Comparing this Bill with other legislation that we are seeing—in the EU, for example—do you see it as positioning the UK as a world leader, which is the phrase the Government like to use, in this area?

Professor Myers: I think it does, because it heightens those points about flexibility and future-proofing. There is always a trade-off, so it is not that one system is uniquely better than another in every respect. The Digital Markets Act is more prescriptive and lays down specific dos and don'ts, whereas this approach—the UK approach, which I very much favour—does not. It sets the framework and objectives, and then it is for the CMA to develop specific regulations, both on conduct requirements and on pro-competitor interventions, in a way that is more tailored to the individual circumstances. I think that aspect is highly valuable.

Q72 Alex Davies-Jones: Finally, the other thing we have heard a lot around this Bill is the length of time it has taken us to get to this place. We had the digital competition expert panel set up in 2018, and the Bill's impact assessment now suggests that the provisions in the Bill will not be fully operational until 2025 at the earliest. Can our digital economy wait that long?

Professor Myers: I do not think I have seen that full timeline to 2025, but I guess what I would say in that respect is that, yes, this legislation has taken a while to come to fruition. At one point the UK looked like it was going to legislate before the European Union, but the CMA has done a lot of preparatory work, and I am sure that it recognises that it needs to hit the ground running as soon as this legislation is passed. It is doing market studies and other work now. It is a well-resourced regulator in this area. The digital markets unit is up and running and doing active work, and obviously my digital expert role is trying to assist them in that work. There will undoubtedly be a time for implementation, but the CMA is well aware of the need to get on with it.

Q73 Kevin Hollinrake: You may have heard my question earlier. Some of the firms that are likely to be designated as SMS might argue that this Bill will prevent them from innovating. Do you see any chance of that? Are there any areas within the Bill that make it likely that innovation will be inhibited?

Professor Myers: I do not think it is that likely. It would be interesting to hear specific examples. As for the one that was commented on earlier, I did not quite see why this Bill would prevent that, as Professor Fletcher outlined. It may be that I have not heard the full set of reasons as to why it might prevent Amazon's innovation in the very different area of retail outlets. The reason, which again goes back to the targeted and tailored approach in the UK, is that when the CMA designates specific digital activities where there is substantial entrenched market power and indeed a position of strategic significance, that is not going to include peripheral areas. It is going to be focused on what some people call the core areas of market power of the large tech companies, because that is where the market power concerns are largest. There is significant freedom outside that.

There are concerns about leveraging market power in the core markets into other markets, and it is appropriate for there to be an ability to address that through things like conduct requirements. However, you cannot introduce a new regulatory regime without some risk around how the incumbents—the regulated companies—are going to respond. Obviously you are looking for good responses, but it is almost impossible to avoid some undesirable effects. The way this Bill is set up, however, looks to minimise those adverse effects.

Q74 Kevin Hollinrake: I know you are an expert in ex ante regulation. Obviously the way in which people can appeal any intervention by the CMA or the DMU would be only by JR, rather than on the merits method. Is that the right standard?

Professor Myers: Again, I think the Bill strikes quite a good balance with the judicial review approach. To bring in some practical experience from my days at Ofcom, I have had a role as an expert witness in quite a number of appeals of Ofcom decisions, in front of both the Competition Appeal Tribunal and the High Court. At the Competition Appeal Tribunal, those have been under different standards: there used to be a full-merits review, but recently that was changed to a judicial review.

I think what matters, as well as the legal standard of review as laid out in this legislation, is the nature of the appeal body. In this case, it is the Competition Appeal Tribunal. Compared with the High Court, these are specialists—both judges and lay members—with specialist knowledge and experience of dealing with both competition and regulatory cases. They have a greater appetite to get into the detail and merit issues, to the extent that that is compatible with the judicial review standard, than the High Court would. Having appeared in front of the Competition Appeal Tribunal under a judicial review standard, I can say, as I think Professor Fletcher did, that that is not a walk in the park for the regulator. You get a thorough testing, and what the Competition Appeal Tribunal is looking to identify is clear errors of either law or reasoning. I think that that is an appropriate way to strike a balance here.

Q75 Seema Malhotra: I want to pick up on the answers you gave earlier when my hon. Friend the Member for Pontypridd was talking about the delays in reaching this point and the length of time it will take for the Bill to go through. If there are any further delays, particularly if we reach 2025 before this is operational, what do you see some of the risks being in the meantime?

Professor Myers: You heard some evidence earlier this afternoon about the relationship between jurisdictions in different countries. Clearly, the Digital Markets Act in the European Union is being implemented at the moment and the effects of that will come in. The longer the UK legislation takes, the more that will condition the context within which the CMA will have to operate in implementing this regime. That is probably the most likely thing. There are obviously some other countries that are looking into that, but that is probably the main issue I would point to.

Q76 Seema Malhotra: Would you be concerned that by the time it comes in, it will need amending again?

Professor Myers: I do not think that that kind of timeline of 2025 means it is all a waste of time and we should not bother; I think it will still be important. It is not a complete all or nothing. There are some digital services where the platforms will want to standardise globally, but there are others where they will be interested in making national variations. I think the CMA can influence things using its competition powers. An example of that at the moment is the competition case it has had about Google's Privacy Sandbox and the use of third-party cookies on Chrome. That is a Competition Act case where the commitments that Google has agreed with the CMA are actually influencing how it is operating Chrome globally, so there is still some scope for the UK to have a role even before this Bill comes in. Then when it does, obviously that will increase.

Q77 Seema Malhotra: I am interested, because you have such a depth of experience across these areas, in whether there is anything you feel has not been said in the evidence session that you would like to make as a contribution to the Committee's deliberations.

Professor Myers: Perhaps one of the few things I did not entirely agree with in the evidence room was when Professor Marsden talked about the participative approach which, again, is obviously not in the legislation, but is envisaged in how the CMA will operate. I do not think what you want out of that is a cosy relationship between the regulator and the SMS firms. You need to have a constructive relationship, but that is going to be adversarial. To expect it not to be adversarial to some extent is probably over-optimistic and, indeed, probably undesirable, but it is also very important for the CMA to build a wider set of relationships with the industry, consumers and smaller stakeholders, who are not so used to dealing with a regulator. It is important for the CMA as a regulator to have a good overview of a cross-section of all the views in the industry and not just be captured by the SMS firms, which they are inevitably talking to an awful lot.

The Chair: That brings us to the end of this session. On behalf of the Committee, I thank you, Professor, for taking the time to give evidence.

Professor Myers: Thank you very much.

Examination of Witness

Graham Wynn gave evidence.

3.44 pm

The Chair: We will now hear oral evidence via Zoom from Graham Wynn, assistant director for consumer competition and regulatory affairs at the British Retail Consortium. Graham, will you introduce yourself for the record?

Graham Wynn: I am Graham Wynn. I am assistant director at the British Retail Consortium, dealing with consumer affairs mainly and a number of other issues for some years now—about 20, I think. Today, I am representing the views of members.

Q78 Seema Malhotra: Thank you for joining us to give evidence. Will you outline what you see as the main consumer issues in the retail industry that you would want—hope for—the Bill to address? Do you see any gaps?

Graham Wynn: As far as the Bill is concerned, it is about 50:50. We would like the Committee to examine about 50% of the issues particularly carefully. Generally, we support the Bill—we think it does some useful things—but there are one or two matters of detail. On the other hand, we think that some omissions need to be looked at, whether in the Bill or elsewhere; they are necessary for the Bill to succeed.

We have some concerns about the enforcement landscape as a whole, the resources available to trading standards, and whether the Bill and its focus on the CMA will mean that trading standards go even more into the background. Members tell me they find that enforcement activity by trading standards has declined quite dramatically

over the years. The other day, someone said to me, "Online, it is the wild west out there." Although people try to comply with all the regulations, they find that many businesses—many of their rivals—do not do so, and that no one enforces anything. One of the issues retailers hope will be looked at is whether the whole regime, with the CMA's new powers, will lead to better enforcement to create a level playing field for consumers and for businesses.

We are concerned about fake reviews. We support the banning of them. We wish that what the Government propose for them was on the face of the Bill. It is also important that people understand exactly what a review or a website should and should not include. They should include both negative and positive reviews, but it is very difficult to define what a fake review is and to ensure that whatever we come up with is enforced. The key theme is enforcement. It is no good giving people protections if they are not enforced.

The other thing is the CMA's new approach to consumer issues and admin powers. We have a good relationship with the CMA. Members are more—let us say—acquiescent with the proposal to move towards an administrative-based regime. They accept that it has been debated over many years now, and that the Government are determined, so the key thing is to make it work. The real thing is to make sure that there is a good appeals system, independent of the CMA at the end of the day.

Another concern about what is missing from the Bill is the requirement for the CMA to accept primary authority advice. The CMA refuses to do that. When a business has been given primary authority advice—assured advice—that governs what other local authorities and trading standards do in the area, but that is not the CMA approach. We think that with its new powers, it is important for the CMA to accept primary authority advice, or indeed, to devise its own system by which it gives advice to businesses that is assured advice. It will do that in the competition area—on sustainability—but we think it would be very important in the consumer area as well.

There are other issues, of course. The review of the blacklist is another that I would pick out as one we are slightly concerned about. One of the dangers in all politics is a knee-jerk reaction to a political issue, and we think that one such danger is in adding to and subtracting from the blacklist in schedule 18 by statutory instrument, rather than right up front in primary legislation. We argued this in the EU when it first came out with the unfair commercial practices directive. We argued that successfully in relation to much retail and commerce across Europe. The point is that we want to make sure that anything that goes into or comes out of the blacklist is properly debated and analysed and so on, rather than going through virtually on the nod, which is likely even with affirmative resolution. Those are some of the things you might want to bring out, such as unit pricing, and you might want to ask about those.

Q79 Seema Malhotra: I just want to follow up on your point about trading standards and enforcement. Trading standards resources have dropped by 50%, and there is a wild west on our high streets and online, with products coming through porous borders at the moment.

Graham Wynn: Yes.

Q80 Seema Malhotra: In your view, should more powers be given to trading standards as well? I was not quite clear on where you saw a role for the CMA and trading standards together.

Graham Wynn: I think it is important that they co-operate and that there is a clear line of responsibility for each and a clear demarcation. The real problem with trading standards is not so much their powers but their lack of resources. One business with over 2,000 stores —not a supermarket—said the other day that the number of inspections and the number of times they see a trading standards officer has come down dramatically in the last few years. It makes it very difficult for those who are responsible for compliance in the business to persuade those who are responsible for, say, marketing and promotions to keep in line. The lack of trading standards activity makes that more difficult and also leads to a playing field that is not totally level. The problem is resources.

Q81 Kevin Hollinrake: Mr Wynn, you mentioned schedule 18 and not adding to the list without proper evidence. Is it your position then that we should not at this point in time add fake reviews to that list and that we should go through a proper process of consultation before we decide what to do about that?

Graham Wynn: The view is, as I said, that we do not want to see what I call knee-jerk reactions to *Daily Mail* items that are politically sensitive or are political problems. The obvious answer is to say, "Let's add it to schedule 18 as a banned practice." It really is important that the schedule and what is in it is clear, clearly understood and that we do not add or subtract from it just on the basis of needing to get over a political problem, for example.

You can make sure that you do proper consultation and all that sort of thing, but we can understand why the Government would want to be able to add to it more quickly—obviously, primary legislation takes a while. In Europe, we certainly argued against Governments or the Commission being able to add to it willy-nilly. We were keen to keep it as something that had to be put in the directive originally. On balance, we would rather it was debated fully and that it amended legislation. Alternatively, you could decide to make changes once a year, say, rather than as you go along. That might be an alternative answer to the danger of a knee-jerk reaction.

Q82 Neil Coyle: I want to see the wild west tackled. As the Bill is drafted, will the consumer detriment provisions be sufficient to tackle producers or suppliers of products that reach UK consumers via platforms such as Amazon, or do the platforms need tackling for responsibility and enforcement action?

Graham Wynn: I should say that Amazon is a member of the BRC, so I preface my comments with that. Amazon does tell me that it is using AI and other means of ensuring there are not fake reviews, and that it takes as much responsibility as it can for product safety on its sites and for illegal products. Clearly others have a different view and think that it would be possible to go further and Amazon should be legally obliged to take more responsibility.

Again, throughout the Bill, the issue will be resources for enforcement, as it is in general. Be it fake reviews, subscription traps or the responsibilities of marketplaces

and platforms, unless there is real, effective enforcement, people get the impression that something has been done without really having the rights that the Government say they have—when I say people, I mean consumers.

Q83 Kevin Hollinrake: On that very point, it is something that we are keen to tackle—and Mr Coyle is right to raise it, as he has done several times today. You have talked about an evidence-based approach to this. You will be aware that we will shortly launch the product safety review, which will tackle some of these issues, including the clarification of online marketplaces' responsibilities in terms of ensuring the safety of products. Do you think that is the right place to deal with this, rather than the Bill?

Graham Wynn: Yes. I think it needs to be done, but without committing us, we would expect it to be done in the context of a product safety review and how you are going to deal with product safety issues in the future. It needs a thorough examination, including the role of marketplaces, their general obligations and what is practical and proportionate. I would not add that to this Bill now, because it requires more of an assessment and consideration than would be possible.

Q84 Seema Malhotra: An area that we have not covered is much is alternative dispute resolution. Part 4 of the Bill would make accreditation of ADR providers compulsory unless an exception applies. How effective do you think that provision will in protecting consumers, and do you think it is the right approach?

Graham Wynn: ADR is not something that our members are exercised about in the same way as some other people are. Those who are responsible for selling high-value items tend to be members of ADR schemes. Their criticism of the current arrangement has been that they are not convinced that there is a full assessment of the ADR providers, so everything that is necessary to give them the confidence to use the systems. They believe that that perhaps has held back ADR schemes from really taking off in some places.

Those who sell high-value items—kitchens, some white goods and furniture items—generally are members of ADR schemes. Those who sell groceries, as they are generally called these days, including food and non-food, tend to feel that it is not really appropriate for them because of the cost. When dealing with something worth only a few pounds, it is much cheaper and much more sensible to just deal with the consumer and, ideally, give them their money back if there is a problem, rather than take everyone through ADR. It is not necessarily the best approach. However, the accreditation system and making sure that companies abide by what they are supposed to do in ADR is vital to have confidence in general.

The Chair: I am afraid that brings us to the end of this witness session. Thank you very much for your evidence.

Examination of Witness

Max von Thun gave evidence.

4 pm

The Chair: We will hear now from Max von Thun, Europe director of Open Markets. Max, would you introduce yourself for the record?

Max von Thun: Thank you for the opportunity to give evidence on this important piece of legislation. I am Max von Thun, the Europe director at the Open Markets Institute, which is a competition policy think-tank. We focus on the risks that arise from corporate concentration, and advocate for policies to tackle that. Prior to working at the Open Markets Institute, I spent several years in the private sector advising on competition and tech policy, and also here in Parliament advising MPs on economic policy. I have been following the UK digital competition debate for quite some time now.

Q85 Alex Davies-Jones: How important is it that this legislation is not watered down, as the Government's approach to the Online Safety Bill has been as that passes through the House?

Max von Thun: That is very important. We think the legislation as it currently stands is very strong. It very much represents the approach that has been recommended initially by the Furman review and then by the Digital Markets Taskforce, and will go a long way towards promoting competition in digital markets. There are a couple of areas where we have seen some campaigning—particularly from some of the larger platforms—including on the review standard, which a lot of people have talked about today.

There are a couple of other areas of the legislation that, although not necessarily designed to be loopholes, could have that effect. Other speakers have talked about the countervailing benefits exemption. You might want to see some changes to prevent that from being abused or from stymieing the enforcement of the new system. Similarly, I point to the five-year criteria that the CMA will need to use to establish whether a platform has entrenched market power. Although it makes sense to base market power not just on a platform's dominance in any one year, at the same time making it forward-looking with such a long timeframe will give platforms opportunities to put forward arguments as to why they should not be designated as SMS. For example, they might point to new technologies like generative AI and say, "We look dominant now, but there's all this disruption coming down the future, so you shouldn't designate us." That is another area you will want to make sure is fit for purpose. Overall, it is a strong Bill and the priority should be getting it through as quickly as possible.

Q86 Alex Davies-Jones: On the matter of getting it through as quickly as possible, we spoke to previous witnesses regarding the time that this will take to implement—2025 was mooted. It would be helpful to the Committee if you could outline some specific cases and instances of competition in digital markets that have been threatened up to this point, and any specific cases of detriment to the smaller market actors or to consumers.

Max von Thun: Sure. I mainly refer to some examples given by previous witnesses. I am thinking, for example, about issues we have seen with data in the digital economy, where dominant platforms such as marketplaces collect data on the sellers using their platforms and use that to compete against them or produce products that compete against them. The flipside of the coin is restricting data—sometimes generated by the users of the platform—by not allowing those users to use it to improve their business operations. Self-preferencing is another problem.

That can be everything from a large dominant firm pre-installing its own app on its operating system and making it hard for competing providers to get their app on to the system. You see interoperability restrictions—for example, where it can be hard for a third party or a competing platform to have access to the fundamental software or hardware it needs to produce a good product.

With those sorts of practices, which we have seen over the past decade or so, there have been lots of competition investigations, particularly in Brussels, to try to solve them, but we have not really seen much success or the introduction of much competition in the market. With the conduct requirements and especially the pro-competition interventions, hopefully the Bill will be able to address that and help smaller players to really compete in the market.

Q87 Vicky Ford: I did some market research with my 23-year-old son, who is much more of a digital consumer than I am, especially when it comes to online games. I want to ask you about where the dividing line is with in-game purchases. I, being very pro-market, would say that anybody should be able to sell these products once you are in the game, but my son was saying, "But wouldn't that put off the person who invested all the money in inventing that game in the first place and is getting some of his money back because of my in-game purchase? It's up to me whether or not I make that purchase." Where is the line, Max?

Max von Thun: Obviously if someone has produced a particular product or service that you can buy in a game, they should be entitled to profit from it. The main issue that we have seen with purchases from app stores, which are increasingly what people use to access these games through their phone, is that a small number of companies—basically Apple and Google—are using their control of the app stores to take a very big cut. They take up to 30%, which is not what you would be seeing in a competitive market. Sure, it is fair that they get a share of the proceeds, because they are putting in the time to maintain these app stores, but 30% seems quite steep.

Another issue is that it is hard for alternative payment providers to offer their services on these systems, because you will be forced to use Apple or Google's payment solution, for example. That also makes it easier to charge high commission rates. I think it is about allowing the large platforms to play their role, but making sure that they are not using that power to exclude people.

Q88 Vicky Ford: I get that, but let's say that an online game is like a shop. If I own the shop, I am not going to let anybody else walk in, put their products on my shelves and sell them, because I am paying the set-up costs and running the shop. If I have invented a game, should I let other people sell their products inside it?

Max von Thun: I would say yes.

Vicky Ford: Interesting.

Max von Thun: But you do have games where one company will provide the fundamental game—the world that you play in—but allow third parties to interact with it and sell you an outfit to wear in the game, a weapon or something like that. That kind of interoperability is very feasible, and you can have different companies co-existing.

Vicky Ford: Thank you—and sorry, colleagues, for the family discussions.

Max von Thun: I am not a huge gamer, but that is my take.

Q89 Andy Carter: Can I ask about the whole area of innovation, particularly for smaller start-up tech firms? What is your feeling towards the Bill with regard to the attitude that they might take to operating in the UK?

Max von Thun: Overall, I think it would be very positive for those types of firm. As others have said, this Bill is very targeted: the actual regulatory obligations apply to only a very small handful of dominant firms. It is not legislation like the Online Safety Bill or privacy regulation, where you are creating a compliance burden for the whole tech sector; it is very targeted at dominant firms.

As I mentioned earlier, if you look at what the Bill is trying to do, it is very pro-innovation. It is really about introducing contestability into the market. The combination of the conduct requirements, which are more about stamping out some of the problematic anti-competitive practices that we have seen over a long period, and the PCIs, which we think are a more significant tool because they allow you to inject competition into the market through interoperability and opening up data, will be very good for start-ups. I think it will give them more confidence to launch businesses that directly take on the dominant tech platforms.

At the moment, if you are a smaller firm, your strategy will often be to grow to a certain point and then get bought up. That is how firms design their business model, and investors will often look at it that way, but if through legislation you change the picture, you will change the incentives and create more opportunities for companies in the UK to scale up to a global level.

Q90 Andy Carter: You wrote an article in *The Times* recently about fast-growing British tech firms seeing acquisition by the US giants as a viable exit route. Do you think the Bill might change any of that?

Max von Thun: Yes, to an extent. The merger requirements for SMS firms are really just about reporting. They require SMS firms to let the CMA know if they are acquiring companies that meet certain thresholds. That will allow the CMA to avoid things slipping under its radar. Another part of the Bill is about what is called an acquirer-focused threshold, which is basically designed to prevent what have often been called killer acquisitions from taking place. Those are acquisitions that do not meet the UK's merger control thresholds when it comes to turnover or market share, because they are very small start-ups that do not generate much revenue but that often produce very innovative technology.

The tech giants buy them up either to prevent eventual rivals from emerging or to use that technology to extend their dominance into new markets. The Bill will prevent some of that. That means, to an extent, that in some cases involving very large platforms it will be harder to be bought up if you are a start-up. It is important to acknowledge that to an individual founder being bought up by a big tech firm can often be attractive. Big tech firms can pay a lot of money to acquire you. They can offer all sorts of technical and logistical expertise to

help you to grow, but if we look at the wider ecosystem, those deals can be very harmful, essentially by eliminating competition.

Think of what Instagram might have become had it not been bought up by Facebook. Rather than just being part of Meta's business model, it could be challenging Facebook. To take a more local example, DeepMind, a leading AI company, was bought by Google in 2014. Had it not been, it would be an independent AI company. That would have put the UK at the forefront of a lot of the development in general AI. Obviously, the UK is already doing well in AI, but now DeepMind is part of Google's empire and subordinate to Google's business objectives. Those are some of the reasons we should care about this.

Also, if you make it a little harder for these companies to buy up start-ups, the market will respond. The UK already has a lot of alternatives. It has a very healthy venture capital scene—I think the best in Europe. If it is harder for big tech purchases to take place, investors will partly fill that space. I am sure that there are things that the Government can do as well to incentivise private investment—maybe investing themselves in some cases, as they did with the Future Fund, and so on. There are a lot of other routes that, in the long run, are better for the tech sector than these types of deals.

Q91 Kevin Hollinrake: Thank you for your evidence. You probably heard my questions from earlier. We are very keen to ensure that innovation continues, not just in terms of the start-ups and scale-ups but with our big tech firms. Do you see anything in the Bill that will inhibit that?

Max von Thun: Honestly, not really. If I look at what is in the legislation, focusing on the conduct requirements and the PCIs that the large firms will have to comply with, what I see is something that says, "You're allowed to operate in the UK. You're allowed to grow in the UK. You're allowed to invest. You just have to play by the rules. You can't use your dominance to unfairly exploit small businesses or prevent rivals from emerging." It does not stop them investing lots of money in R&D or hiring top talent. We are seeing all the innovation that they are doing now, and I do not see anything in the Bill that will stop that.

More broadly, there is quite a lot of evidence, not just in tech but in other sectors, that more competitive and less concentrated markets are better for innovation because challengers invest a lot of money in trying to take on the incumbents because they believe that they can replace them. The dominant firms have to defend themselves, and they invest more to protect themselves. The Bill will have that effect.

Lastly, particularly since the whole debate around Microsoft and Activision, we have seen to an extent an attempt to conflate the interests of a small subset of dominant firms with the wider tech sector. That is often a mistake. What is good for a large majority of tech start-ups may not necessarily be good for big tech firms. It may be, but it is important to separate out the two.

The Chair: Are there any further questions? In that case, on behalf of the Committee, thank you very much for coming to give evidence.

Examination of Witnesses

John Herriman and David MacKenzie gave evidence.

4.15 pm

The Chair: Thank you all very much. We will move on to our next session to hear from John Herriman, chief executive, and David MacKenzie, lead officer, from the Chartered Trading Standards Institute. Could you introduce yourselves for the record?

John Herriman: I am John Herriman, chief executive of the Chartered Trading Standards Institute.

David MacKenzie: I am David MacKenzie. My day job is with the Highland Council on trading standards, in the sunny north of Scotland. I also have a role with the CTSI across the UK for free commerce and related issues.

Q92 Seema Malhotra: Thank you very much for coming to give evidence to the Committee. I know from your briefings that you have welcomed the Bill, but I wonder if you might be able to talk us through where you see gaps. Specifically, where do you think there should be, for the successful implementation and enforcement of the new regimes, a greater role for trading standards officers, and why?

John Herriman: Obviously, as you have heard, we have been very publicly supportive of the Bill. The key point, which I know others have made, is that in the online marketplace and the landscape, it feels like a bit of a wild west out there—I know that term was used this morning—and there has been a lack of protection for consumers and clarity for businesses. We have also seen that dramatic change in business and consumer behaviours, particularly during the pandemic, which is good for consumers, businesses and the economy. Trading standards absolutely sees that first hand. Trading standards plays a very unique role in this discussion; we are at that interface between the business and the consumer, so the lens through which we look at this is consumer confidence. Essentially, that is what we are really taking a perspective on.

We very much welcome the Bill and the new powers, particularly for the scope of the CMA, which we work with closely. We think it provides clearer legislation and changes to CPRs. We think it will enable quicker and stronger action, and we think it is very supportive of competition and innovation but, as you have alluded to, we do think there are some opportunities in the Bill where it could go further and where it would not impact on competition and innovation, and also where it would be more supportive of consumer confidence. We are happy to talk in more detail about those.

It is probably best to explain that we are both here because I can take that very strategic view and answer questions about that. David is our lead officer for the online marketplaces, so when we get into more of the technical detail he will be able to answer some of those questions. Essentially, in those areas around drip pricing, fake reviews, subscription traps and greenwashing, we think there are opportunities to go further or for some further discussion.

We also think the Bill addresses the national issues around the CMA's powers, but we do not think it is sufficiently robust in some areas to enable trading standards which, in the context of this conversation, does the

place-based and local regulatory enforcement and support for local businesses and enterprise. That national system does not work effectively if you do not have the local system working effectively alongside it, because they are mutually supportive of each other as part of that same system.

Q93 Seema Malhotra: Is that a point about greater powers that trading standards officers should also have alongside the CMA's role, or is it a question of resources?

John Herriman: It is a combination of both. David will be best placed to comment on the powers. Essentially, there are some issues there that we would like to consider, but it is also a factor of capacity. If I just focus on that, David can answer the second part of the question. From a capacity point of view, trading standards over the last 10 years or so—I think the National Audit Office reported back in 2021; it has also just done a very recent report—has been hit by about 50%. Relative to other regulatory services and local governments, regulatory services—according to the latest National Audit Office report—have been hit by about 25% cuts.

Trading standards has been hit exponentially harder than some of those other services. If we do not have enough capacity, we cannot do the enforcement activity. If we cannot do the enforcement activity, we cannot ensure that there is a level playing field for businesses. There is a definite capacity issue there. This Bill will make the legislation more robust, but we also need the capacity alongside that to make that system work effectively, because regulatory systems do not work effectively unless you have the right levels of enforcement capacity. David, do you want to answer the other part of that question?

David MacKenzie: We really welcome the strengthening of civil enforcement in the Bill. It introduces a range of potential punitive sanctions that can be imposed on businesses. That potentially strengthens our position, and we really welcome that.

At the same time, as John says, that is really dependent on our guys up and down the country being able to utilise that through civil enforcement, which is still a relatively newish thing for us. Our officers are very well versed, over many decades, in criminal law investigations and going for prosecutions. The civil law is relatively newer. Along with these new powers, there needs to be a bit of a campaign across the whole UK to ensure that local authorities have the skills and necessary legal backing to take these cases. I have certainly discussed that with the Department and will continue to do so.

Those are the good things in the Bill—giving us more powers and more sanctions. Our disappointment is what is not included: officers' powers. The way that I like to characterise it is that the existing powers are very good, but are they very good for a world that is changing all the time? They are essentially based on one of our officers being on physical premises, doing the work.

The powers are all really good: powers of entry, of inspection, to test, to get documents, and all that kind of stuff. But we increasingly find that, when it comes to the documents side of things, if somebody still has a filing cabinet with bits of paper in it, that is fine—we can get that and use it as part of our investigation—but, as we would all expect nowadays, even small business do not operate in that way anymore. The information will be in the cloud; it will be somewhere else that is not necessarily accessible from those premises.

Q94 Seema Malhotra: What happens in that situation? Do you just not get access to the data and the files?

David MacKenzie: The current powers do not give us direct access to that—they just don't. The Bill addresses that to a degree in that, in terms of entry under a warrant, as long as the files are accessible—again, from that physical premises—there is an extra power there. We welcome that. That is good progress. But it is important to realise that the vast majority of our investigations are done not under warrant, but using normal powers of entry, so the vast majority of situations are not covered by the change.

Even when the power is exercised through warrant, and we are able to use the new provision, that is only when the files are accessible from that premises, but we are increasingly finding that the local branch manager just does not have access to that information. I suppose that we are calling for a general power to access that information, in the same way as if it happened to physically be on those premises, and to be able to use it in all cases, including criminal prosecutions.

The other point that goes along with that is about online enforcement and takedown powers. I think it would really surprise the public if we told them that we do not have any formal powers of takedown at all for any online content. The only way we can do that is through ways and means—trying to get platforms to do the right thing and all that kind of stuff. It is long past time that we got a formal takedown power.

Q95 Seema Malhotra: Would that be specifically for websites where that may be misleading or scamming consumers?

David MacKenzie: Absolutely, yes. It could be a whole website, an account on a website or just a narrow bit of content. The Bill contains the concept of online interface orders that the CMA can apply to the court for, and we think that that should be applied to other regulators—particularly trading standards, from my point of view, but to other regulators as well. I think that if we are to be taken seriously in—

Q96 Seema Malhotra: Sorry, in the interests of time—we may have to go to a vote shortly—I have just one small question, and then I will hand over to colleagues. You said in your evidence that it is important that more is done, because there is nothing requiring online marketplaces and other collaborative platforms to make buyers aware of who the seller is—whether it is a business or a private seller—and that that has implications for consumer rights. Could you explain a bit more about what you think needs to happen that is not in the Bill?

David MacKenzie: Absolutely. A lot of the stuff in the Bill that replaces the consumer protection regulations is really good, and we really welcome it. There is still some stuff around the definition of "trader" that we think is a little bit of a missed opportunity.

There are two angles. When does a consumer become a trader? How many things do you have to sell in an online marketplace before you become a trader? That is a difficult judgment for us to make and we feel that some work should be done on that. The point you have made is equally important: the status of the seller in an

online marketplace. We think there should be a requirement for the online marketplace to declare whether the seller is a consumer or a business because that makes a massive difference to the consumer rights of the buyer and it also makes a difference to what we do.

If someone is a business seller, they have to comply with all consumer law; if they are a private seller, they do not really have to comply with anything, so this is for both consumers and for us. To be fair to other businesses that operate on the site, we think this is a necessary change that is not in the Bill.

Q97 Kevin Hollinrake: You make some important points that we seek to deal with in creating a fair and level playing field and protecting consumers at the same time. There is the whole point about whether an online marketplace is a distributor, retailer or whatever else. Do you think those questions are best resolved in this legislation or in the product safety review, which we have committed to do and brings in many other things that you have referenced already?

John Herriman: That was another point that we wanted to make. This is not the only legislation that impacts on the landscape: the product safety review is fundamentally important in this space. The key point there is being clear on where those boundaries are.

We will be contributing to the product safety review. It is fundamentally important that it should come out quickly, so that we can address it and respond to the consultation. We can then look at that in the context of this Bill and others that it might impact on as well. We think that some things would be best placed in the product safety review—anything to do with legislation there—and would not appear here. But it is important that those provisions work hand in hand over a similar period, so that we can make sure that there are not any gaps. Consumers will then be better protected and businesses will have the clarity that they need, which is really important for them.

David MacKenzie: I agree with everything John said, but if we leave all these issues to the product safety review, presumably that would apply only to unsafe products. There is a wider range of situations for which we need these take-down powers when it comes to fair trading—scams and so on.

Q98 Kevin Hollinrake: And the Online Safety Bill does not deal with that?

David MacKenzie: No.

The Chair: If there are no other brief questions, I bring this session to a close. I thank the panel on behalf of the Committee. This is perfectly timed as there will be votes shortly and we will be away for quite a long time. Thank you very much. We have spared you having to wait an hour or so.

Examination of Witnesses

Owen Meredith, Peter Wright and Dan Conway gave evidence.

4.30 pm

Q99 The Chair: Thank you all. Before we suspend the sitting for a vote, it is important to get you to introduce yourselves. We will start and see how much progress we make. Next we have Owen Meredith, the CEO of the News Media Association; Peter Wright, the editor emeritus of DMG Media; and Dan Conway, CEO of the Publishers Association. Will you introduce yourselves for the record?

Owen Meredith: Hi. I am Owen Meredith, chief executive of the News Media Association. We represent companies across local, regional and national news media in about 900 brands across the UK.

Peter Wright: I am Peter Wright. I am editor emeritus of DMG Media. We are a major British and international news publisher.

Dan Conway: Hello, everyone. I am Dan Conway. I am chief executive of the Publishers Association. We represent publishers of books, journals and educational materials of all shapes and sizes in the UK.

Q100 Alex Davies-Jones: Thank you all for being here this afternoon. My question is probably aimed at Owen and Peter. In your view, does the Bill go far enough in enabling journalists and media outlets to be empowered to negotiate fair deals with the tech platforms? Can you spell out why that is not the case at the moment?

Owen Meredith: First, it is important to welcome the Bill. As many people around the room know, alongside many other organisations across the economy we have been pushing for this Bill for some time, so it is pleasing to see it. It is in very good shape, albeit we will want some parliamentary scrutiny no doubt and the opportunity to tighten up some of the policy intent to ensure that it is fully reflected in the language on the face of the Bill.

Clearly, the imbalance of power that exists between news publishers and platforms is self-evident. It has been documented extensively from the Cairncross and Furman reviews through to various CMA reviews. At the moment, a handful of tech platforms are an essential gateway and a key discovery route for consumers to find news online. As consumers increasingly shift their consumption of news online, rather than from print—in the local market, north of 70%, and in the national market, north of 80% of consumers read news online—that is not fairly renumerated and rewarded back to the original investors and content creators of that journalism.

For society, we all understand the importance of that journalism, particularly in the online world combating mis and disinformation, but we just do not have a balance of power between those two players. On the one side, we have in particular smaller, local, independent news publishers, even up to large multinationals, but on the other, we do not have access to the right information or data about how our news is being surfaced and used on the platforms, including search and across social. We do not have an asymmetry of information to be able to negotiate fairly, so it is a take-it-or-leave-it approach by the tech platforms to how our content is used by them.

Peter Wright: You asked where the Bill possibly does not do the job. I would agree with Owen: it is a very good Bill and long overdue. I was on the Cairncross review five years ago, and it is great to see some of the things we were talking about bearing fruit.

One area you might want to look at is the final offer mechanism; there is a helpful table on page 38 of the explanatory notes. You can see it is a 13-stage process, and I think what to us might be the most important bit is information sharing, which comes at stage 8. If that process can be speeded up in any way, that would be immensely helpful.

The other thing that I would like to flag up and the thing that concerns most of us in the industry most of all is that you are likely to face concerted lobbying from the online platforms over the review process. From our point of view, that will not truthfully be about the justice of decisions made by the CMA; it is a delaying tactic. We hear that the platforms and the big City law firms will get together and to ask for a merits-based process, which would mean that every decision by the DMU is subject to appeals that are likely to involve weeks in court, with months or even years before decisions are taken.

If that happens, the whole purpose of the Bill—this whole structure, which we believe to be very good, and a great deal of work has gone into it; it is legislation that is likely to be copied around the world—will simply be nullified. It is vital that we stick with the judicial review process that is in the Bill.

Q101 Alex Davies-Jones: You answered my question, but are you concerned that by that point the tech companies will use this as a delaying mechanism, which will help proliferate disinformation and misinformation online by people who claim to be journalists? Provisions in the Online Safety Bill enable anybody to be a journalist, and will prevent that information or fake news—for want of a better phrase—from being taken down.

Peter Wright: The crossover between the two Bills is not that great. The real risk regarding fake news is that the most expensive news to produce is the high-quality public interest journalism that I am sure everybody in this room wants to encourage. If you cannot fund it, and at the moment it is a great struggle to fund it, the space will be taken by people who are not proper journalists and are not working for responsible news organisations with complaints procedures and people you can sue if you get it wrong.

The really serious danger is that because the online platforms have over the last 20 years sucked billions of pounds out of the news production in this country, the internet will be filled with conspiracy theorists and people producing cheap, easy-to-manufacture news, largely copied from other outlets.

Q102 Kevin Hollinrake: In your organisation's written evidence, you took a different view from some of our earlier witnesses, who think we are not going far enough in terms of making it easy for people to exit a subscription only to opt back in. Yours said that actually we should make it slightly more difficult, for example, by taking away the cooling off periods and making the exit subscription slightly different in terms of allowing people to take advantage of other offers, which might confuse the process of unsubscribing. I am interested to hear your views on that.

Owen Meredith: We broadly support the Government's policy and intent as I understand it in terms of helping consumers to manage subscriptions, particularly subscriptions that they are not aware they are in or for services they are not using. My concern and our organisational concern is that currently it is set out in the Bill too prescriptively, and there is a real danger that you end up in a situation where consumers are being bombarded by subscription notices and they become blind to them.

I would put the analogy out there of the cookie banner, which I think they are hoping to get rid of through different legislation before the House at the moment. There is a danger that consumers are just blinded by the amount of information they are being presented with as stand-alone notices, with the frequency and nature in which they have been spelt out in legislation. While I do not fundamentally disagree with the Government's policy intent, I do not think how it has been crafted in the Bill at the moment necessarily achieves that in the way we would need it to.

Q103 Kevin Hollinrake: I get that, but if you are in a situation where you are subscribed to just one service and there is not a forest of different emails coming in saying your subscription is ending, the effects of your suggestions would make it more difficult for people to exit contracts.

Owen Meredith: It would not make it more difficult for people to exit contracts; it would ensure that consumers still have access—

Kevin Hollinrake: The cooling off period was—

Owen Meredith: It would ensure that consumers still have access to the offers that would be available to them in the current system of processing. If you subscribe to a service that you are using and you wish to terminate it, there are multiple ways you can do that, either via online touchpoints for most of our subscribed services at the moment or via a call centre. If a call centre phoned you and said, "You've been using this service for 12 months. We can identify through data that you have been reading the content. Can we ask you what the reason for cancelling is and if we can retain you as a customer with the right promotion?", I think that would be in the consumer's interest.

Q104 Kevin Hollinrake: But the removal of the cooling off period would make it more difficult for some people to exit a contract, wouldn't it?

Owen Meredith: The removal of the cooling off period for us is a concern around how that technically applies and whether consumers have had benefit that they are then seeking to be refunded for, despite having engaged with and received the benefit.

Q105 Dean Russell: We live in an era where we talk about consumers, who might be consuming services or products—but they also might be consuming news. How will the consumers of journalism benefit from or be impacted by the Bill?

Peter Wright: They will benefit through the quality of the journalism they are offered. Every news organisation —we are no exception; we went through a period of redundancies earlier this year—is having to trim their editorial budgets, because you cannot make sufficient revenue in the present digital advertising market to support the scale of editorial resource that you would really like.

Commercial news publishers have seen revenues falling, despite inflation, over the last two decades. At some point, we need to have a mechanism that gives us—this particularly applies to smaller and regional publishers—a level playing field and levers we can pull to bargain with these vast companies. I have colleagues who work at not

inconsiderable regional publishing companies, who do not even have a telephone number they can ring at Google, so they just have to accept whatever terms Google offers. We are slightly more fortunate in that we can ring Google, but we do not necessarily get an answer.

Q106 Dean Russell: I am the MP for Watford. We have the *Watford Observer* and *My Local News*—those smaller regional organisations. Do you see this legislation benefiting them?

Peter Wright: Absolutely. I once worked as a local paper journalist in Watford. Tristan Garel-Jones was the MP then; he used to pop into our office once a week. He was very assiduous—I would recommend it! I do see this legislation benefiting them. It is more important to them than to anybody else.

The Chair: I will bring in Andy Carter to ask a brief question. I would like us to be able to wrap up soon to avoid detaining our witnesses for up to an hour. If everybody is agreed and there are no further questions other than Andy Carter's, I will call him to ask his question.

Andy Carter: It is a question to Dan. I am very conscious that you have sat here and not had an opportunity to say anything. Could you give us a broad overview of how the Bill might affect the publishing sector?

Dan Conway: Thank you for the question. I will keep it brief, as I am conscious of everybody's time. I am primarily here to talk about the role of Amazon in our area of publishing. Amazon has done great things to expand digital markets in books, has great partnerships with UK publishers and has got books into the hands of readers all over the world—and that is a great thing. But we firmly believe that we are now at a tipping point in terms of regulation with Amazon, as they have such entrenched market power in the book market that we need modern proportionate regulation to make sure that that entrenched market power does not lead to anti-competitive outcomes.

By our best estimates, Amazons sell over 50% of the print books in the UK market and about 90% of the e-books and audiobooks. That is monopoly power in selling print books and monopsony power as the sole buyer in retail books. It makes them a gateway company for my members; they are an unavoidable trading partner for any UK publishing company in the UK market, and we strongly support the Bill because we think it will help.

We think Amazon should be assigned strategic market status with the code of conduct that goes alongside it. We particularly support clause 20(2)(a) on trading on "fair and reasonable terms". It is our view that currently, because of Amazon's role in the market, publishers are not often able to trade on fair and reasonable terms. We heard from other witnesses about "take it or leave it" terms; effectively, if you are a small publishing business in the UK market, if you enter into a negotiation with Amazon, you are offered "take it or leave it" terms and you cannot negotiate with a retailer of that size.

Q107 Andy Carter: Can you write to us at some point and share those terms with us, so we can see the experience some of your members face?

Dan Conway: Yes, absolutely. As a trade association, we have to be one stage removed from that for obvious legal reasons, but our members have fed back to us on areas of concern, and we hear that Amazon is removing buy buttons, labelling products as out of stock, delisting products and refusing to stock products without reasonable cause—and all that is in the middle of a commercial negotiation. You have a major retailer that is able to use its size effectively to distort upstream competition through those kinds of tactics. I can absolutely look and see what we can write to you about that.

The Chair: Unless there is anything else, I will bring this session to a close. On behalf of the Committee, I am grateful to you all for the rapid responses you have provided. Thank you very much.

Ordered, That further consideration be now adjourned. *—(Mike Wood.)*

4.45 pm

Adjourned till Thursday 15 June at half-past Eleven o'clock.

Written evidence reported to the House

DMCCB01 NatWest
DMCCB02 NatWest
DMCCB03 Consumer Scotland
DMCCB04 GlobalCharge Limited
DMCCB05 Consumer Council
DMCCB06 Gener8
DMCCB07 Oles Andriychuk
DMCCB08 National Consumer Federation
DMCCB09 Trustpilot
DMCCB10 Radiocentre
DMCCB11 News Media Association

PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT
GENERAL COMMITTEES

Public Bill Committee

DIGITAL MARKETS, COMPETITION AND CONSUMERS BILL

Third Sitting

Thursday 15 June 2023

(Morning)

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not later than

Monday 19 June 2023

The Committee consisted of the following Members:

Chairs: † Rushanara Ali, † Mr Philip Hollobone, Dame Maria Miller

† Carter, Andy *(Warrington South)* (Con)
Coyle, Neil *(Bermondsey and Old Southwark)* (Lab)
† Davies-Jones, Alex *(Pontypridd)* (Lab)
Dowd, Peter *(Bootle)* (Lab)
† Firth, Anna *(Southend West)* (Con)
† Ford, Vicky *(Chelmsford)* (Con)
† Foy, Mary Kelly *(City of Durham)* (Lab)
† Hollinrake, Kevin *(Parliamentary Under-Secretary of State for Business and Trade)*
† Malhotra, Seema *(Feltham and Heston)* (Lab/Co-op)
† Mayhew, Jerome *(Broadland)* (Con)
Mishra, Navendu *(Stockport)* (Lab)
Russell, Dean *(Watford)* (Con)
† Scully, Paul *(Parliamentary Under-Secretary of State for Science, Innovation and Technology)*
Stevenson, Jane *(Wolverhampton North East)* (Con)
Thomson, Richard *(Gordon)* (SNP)
Watling, Giles *(Clacton)* (Con)
† Wood, Mike *(Dudley South)* (Con)

Kevin Maddison, John-Paul Flaherty, Bradley Albrow, *Committee Clerks*

† attended the Committee

Witnesses

Neil Ross, Associate Director Policy, techUK

Gene Burrus, Chief Policy Advisor, Coalition for App Fairness

Tom Smith, Partner, Geradin Partners

Tom Fish, Head of Public Policy & Research, Gener8

Richard Stables, CEO, Kelkoo

Mark Buse, Senior Vice President for Global Government Relations and Policy, Match Group

Public Bill Committee

Thursday 15 June 2023

(Morning)

[Philip Hollobone *in the Chair*]

Digital Markets, Competition and Consumers Bill

Examination of Witness

Neil Ross gave evidence.

11.30 am

The Chair: Good morning. We are sitting in public and the proceedings are being broadcast. We have Mr Ross with us; thank you for your kind attendance. Will you introduce yourself to the Committee for the record, please?

Neil Ross: Yes. My name is Neil Ross. I am associate director for policy at techUK, which is a trade association that represents about 1,000 technology companies that operate in the UK.

The Chair: Welcome. I call Alex Davies-Jones.

Q108 Alex Davies-Jones (Pontypridd) (Lab): Good morning. Thank you, Neil, for being here this morning. You at techUK are in a unique position, representing everyone who should be impacted by this legislation. Will you outline exactly what impact the Bill will have on the breadth of the tech industry from smaller firms to the big challenger firms?

Neil Ross: As you rightly said, techUK represents the wide breadth of the tech sector. Our members fall broadly into three categories: the likely strategic market status or SMS firms, which will be regulated; their immediate challengers, which stand to benefit the most from the Bill and which I think you will hear from later; and a third group, the wider tech sector, which sees the benefits of the Bill but is perhaps not engaging as deeply as others.

The Bill sets up a structure and confers on the digital markets unit powers to boost competition in digital markets. The way those powers are set out is sound, but how they are exercised is something that happens after the legislation has passed. Ultimately, whether the Bill results in a positive regime depends on a number of things: how the regime has its priorities set; how it is held accountable by this House and by Government; how proportionate the regime is, in terms of when guidance is consulted on and who is engaged with after the scheme is up and running; and how we ensure that the checks and balances in the regime—such as the appeal standard—work for the Bill.

Q109 Alex Davies-Jones: How will the Bill ensure that the smaller businesses and start-ups are not unfairly disadvantaged by the existing, big, dominant market players?

Neil Ross: The key thing that the digital markets unit will have to do is to ensure that it is actually consulting those companies and engaging with them throughout the process. At the moment, the rules for how the digital markets unit will consult are not set out in legislation—the Bill just gives a duty to consult, and subsequently the digital markets unit will issue guidance on how it will do that—but, ultimately, we want to ensure that those companies are involved at pretty much every single stage of the discussion and that they are able to submit evidence privately to engage with the DMU informally. Competition regulation often uses requests for information, which can be quite heavy-handed tools to extract information from firms, but we think that the DMU will have to come up with a much more sophisticated way of doing its stakeholder engagement, which is likely to involve a blend of panels, stakeholder engagement and those RFIs, to make sure that it does not overburden smaller and challenger firms, which will want to feed in but will be cautious about going through the legal mechanisms.

Q110 Alex Davies-Jones: Thank you—you actually outlined my final question, which was on that point. One of the things we have heard as legislators looking at the Bill is about those risks around confidentiality and how some of the smaller firms have wanted to submit evidence, but have felt unable to do so, due to commercial sensitivities, for example. Will you outline that a bit further? How does the Bill need to ensure that safeguarding is in place to protect those smaller firms with commercial sensitivities so that they are not disproportionately disadvantaged?

Neil Ross: We have seen this throughout the process of consultation on the Bill and in submitting evidence to the Committee. We have found that smaller and challenger firms, which often have very tight commercial relationships with the larger companies and often rely on and benefit from them for scale and various things, are very sensitive about what they can and cannot submit. The Bill says very little about confidentiality requirements, so the DMU will have to set out in a lot of detail how that is going to work. We really encourage it to ensure that it consults those firms closely, to make sure that there are clear guardrails around what confidentiality marks are put on evidence that is submitted, what could be shared in summaries, and so on. That is going to be absolutely critical to make sure that the DMU can actually gather the information it needs to do its job.

Q111 The Parliamentary Under-Secretary of State for Business and Trade (Kevin Hollinrake): I think I am right in saying that you said in your opening remarks that you may have concerns about the appeal standard. If we move to a full merits system, what is to stop huge tech giants, with almost endless resources, being able to tie up any actions that the DMU takes in the courts for a long time and, in doing so, providing a big deterrent to the DMU taking action in the first place?

Neil Ross: There is a risk of that, so we have put forward a position that aligns with what the Government want, which is an appeal standard that is principally based on judicial review principles, but has the flexibility to consider the different requirements of the case. Both techUK and the Government have pointed to the standard

used by Ofcom as one that would be suitable in this case. The issue is that we are not sure that with the way the Government are applying the standard in the Bill, it will actually meet that test. As far as I understand it, the Government have set out a legal position that the appeal standard will be flexible because the Competition Appeal Tribunal will be able to look at human rights law, as well as private property rights, to consider how that standard will flex. We have tested that legal argument very widely with members—in-house legal counsel as well as other lawyers—and, to be blunt, a very limited number of people share that view.

Ultimately, what we want to do is work with the Government to see where we can go further to provide additional clarity on how that appeal standard would work—what the flex would look like. Ultimately, the standard will have to principally sit in JR principles, but have that flex higher up.

The point you made about speed is also hugely important. We set out a position saying we would like to see a standard that makes sure that any appeals are limited to about six months in length, because these are very fast-moving markets. If the standard means that things are bogged down, you know that the market might move on and the benefits might not be conferred across. We understand why hard limits might not be possible as part of the regime, but you could take steps in the Bill to try to encourage the courts to move a bit quicker, especially in more dynamic or high-impact cases.

Q112 Kevin Hollinrake: But you do accept that there is a risk of a greater deterrent to the DMU being able to take action against these big companies.

Neil Ross: Yes.

Q113 Kevin Hollinrake: Thank you for the brevity of your answer. The other thing that we have heard from some of the people likely to be affected by SMS status is about the impact on innovation, for example. It has been said to us that they feel that they would have to go to the DMU or the Competition and Markets Authority for permission to innovate. Is that something you recognise from reading the Bill?

Neil Ross: It is a concern that has been raised. There is nothing in the legislation that would mean that that was what happened. It is going to rely much more on how the digital markets unit itself exercises its powers. I think that if we can make sure that the regime is proportionate, is accountable to Parliament and has a pro-innovation focus, we can get over that. But it could happen. It is just that it is much more dependent on the subsequent guidance and the role that the DMU itself plays.

Q114 Kevin Hollinrake: Sure, but the criterion that it can intervene really only where there is entrenched market power should be a protection against those worries about innovation.

Neil Ross: If the digital markets unit, as I think the Government and the CMA intend, is focusing on a small number of firms with very significant market share in a select number of markets, then yes, that will be the case. However, some concerns have been brought by other companies, which are perhaps leading in their market but would not consider themselves as having a strategic position or causing serious consumer harms and which look at the Bill and think, "At its widest possible scope, I could be included." That is why we have to make sure that, in exercising the powers, the regime is being held to account.

Kevin Hollinrake: Thank you for your answers.

The Chair: Mr Ross, we will now have a quickfire round, because we have you for only another five minutes and there are three Members seeking to ask questions. It will be one question each and one answer each.

Q115 Jerome Mayhew (Broadland) (Con): I want to pick up on what you said about your concerns about the JR approach to appeals and whether it should be full merits. Then you said, "Well, we could do full merits, but within a six-month period." How could you possibly do that?

Neil Ross: We put out a position paper ahead of the Bill being published and we did not argue in favour of full merits; we argued in favour of what is often referred to as a judicial review-plus system, which is a blended system that gives a bit more flexibility for the CAT to decide what factors to take into account.

Q116 Jerome Mayhew: Okay, but the bit that I am really interested in is how you could contain an appeals process within six months if you were going to look, even in any element, at the merits.

Neil Ross: I am not 100% sure of exactly how it would work in practice. We are just reporting back that what our members are really keen to see happen is that they move forward at speed. There is a lot of debate about exactly how you speed up that process, and we are pretty open to what solutions might be brought forward.

Q117 Jerome Mayhew: But you do recognise that speed is of the essence in a fast-moving market.

Neil Ross: Yes, absolutely.

Q118 Jerome Mayhew: So if you could not limit it to six months, that would be self-defeating in its own right in many cases.

Neil Ross: I think there is a balance to be struck depending on what the case is and what is being discussed. Ultimately, the aim would be speed and flexibility. There are going to be trade-offs between the two, depending on what is happening. We want to give the CAT as much discretion as it needs to make that judgment, depending on what is being put before it. Because this regime has enormously flexible and very invasive powers at the upper end, we do not know exactly what kind of cases are likely to be brought forward or discussed. That is why we will want that focus on flexibility as well as speed.

Q119 Andy Carter (Warrington South) (Con): This follows on from that question. Do you think the Bill is designed with sufficient flexibility for the CMA and the digital markets unit to respond to the changing nature

[Andy Carter]

of the sector? Five years ago some of the things we have today just did not exist. What is your view on that?

Neil Ross: Yes. Sorry to repeat points I have made before. I think it depends on exactly how the DMU exercises the power. They have to look ahead five years when making an SMS designation, which puts a lot of pressure on the digital markets unit to make an assessment about how a market is going to be used.

Q120 Andy Carter: Do you think five years is the right length? Should it be a shorter period?

Neil Ross: It is as much as five years; it could be longer. It is really how the digital markets unit looks at that. Companies in the broader sector would be given a lot of certainty if the DMU came out fairly early on and set up a priority list of where it is likely to look first. There is quite a good precedent in the Communications Act 2003 of the reporting powers conferred on Ofcom. I know the CMA has some reporting capabilities, but given the wide-reaching powers of the Bill, it might make sense to also think about applying the same standards to the digital markets unit.

Q121 Vicky Ford (Chelmsford) (Con): You have mentioned a few times the importance of accountability to Parliament. I guess that needs transparency so you can get scrutiny. Do you think there is adequate accountability and scrutiny in this Parliament? How does it compare with other Parliaments?

Neil Ross: With this Parliament, the CMA is here quite a lot and so are the other regulators, so there is regular scrutiny of the regulators themselves. As the various different Bills go forward, whether that is the Online Safety Bill, the Digital Markets, Competition and Consumers Bill or the Data Protection and Digital Information (No. 2) Bill, we might have to think again about exactly how we are scrutinising those interrelated bits of digital regulation. That is a decision for this House and how you want a change of structures. It would be important to make sure—

Q122 Vicky Ford: Have you looked at how other Parliaments scrutinise their regulators in this space? Is there best practice that we should be looking at? I recall my time in Europe, when we had much bigger Committees that held regulators to account, often much more regularly and with bigger Committees.

Neil Ross: That is certainly one example to look at. I know a number of people in this House are actively thinking about that, given the loss of those Committees following the referendum.

Q123 Vicky Ford: But you have not given your thoughts as an industry as to how we could approve it?

Neil Ross: Not really. I do not think we would necessarily go so far as to advise Parliament on how to set up a Committee structure.

Q124 Vicky Ford: I am not asking that. I am asking whether your members have experience of other places where they think it works better or worse.

Neil Ross: They certainly do, and we can get back to you on that if that is something you wanted in more detail.

The Chair: Mr Ross, you have been a complete star. Thank you very much indeed for your time.

Examination of Witnesses

Gene Burrus and Tom Smith gave evidence

11.43 am

The Chair: We move on to the next panel. Gene Burrus is coming in by Zoom. Tom Smith is in the room with us. Mr Burrus, please introduce yourself to the Committee briefly.

Gene Burrus: My name is Gene Burrus and I am here on behalf of the Coalition for App Fairness, which is a coalition of mobile app developers numbering over 70 at this point, from the UK, the US, the EU and around the world. I have been a competition lawyer for 30 years and have worked for the last two decades in dominant digital platforms, with time at Microsoft, Spotify and now in private practice.

The Chair: You sound dangerously overqualified. Mr Smith.

Tom Smith: I am a competition lawyer and have been for 17 years. I most recently spent seven years as legal director at the CMA, including working on the digital markets taskforce that recommended these proposals. Two years ago, I went into private practice and launched the London office of a competition boutique firm called Geradin Partners. I advise a lot of companies on competition and digital regulation.

The Chair: Thank you, gentlemen. Welcome to the Committee. I call Alex Davies-Jones.

Q125 Alex Davies-Jones: Thank you, Mr Hollobone, and thank you to both our witnesses. Mr Burrus, can I come to you first, please? We have heard a lot in the evidence already submitted to the Committee about the 30% effective stealth tax that is put on apps that would like to use certain designated platforms. How will this Bill ensure that fairer digital markets, especially for smaller tech firms and apps, and innovation are enabled?

Gene Burrus: If properly enforced, I think this Bill will break the distribution monopoly that currently exists with respect to mobile devices. Currently, app developers have no choice but to use the existing app stores of the dominant firms, Apple and Google, if they want to get their products to consumers. This Bill holds the promise that that monopoly will be broken, so that if the fees are too high in any given instance or for a particular developer, they will have other options and other ways to get their products to consumers. We think it is a great step forward. It is a problem that has been recognised around the world and various approaches have been tried to get at that problem. This gives the DMU the flexibility to both develop bespoke solutions to this problem, as well as the ability to future-proof what is going on, which will take us a great deal forward on avoiding that specific problem and, I think, the broader problems that come with the distribution monopoly that exists.

Q126 Alex Davies-Jones: You mentioned, Mr Burrus, the need for the provisions to be properly enforced. I would like to bring you in here, Mr Smith. Can you outline how exactly you would like to see that happening? Does the Bill get that right?

Tom Smith: From my point of view, the Bill is very well drafted indeed. It gets it exactly right; I think a lot of careful thought has gone into it. It is really a very modest approach. The CMA cannot do anything at all unless it can prove its case to a high standard, which can withstand the appeals in court, but the Bill gives the CMA the right amount of discretion. There is a list of categories, for example, in clause 20, which gives it enough discretion without giving it unbounded discretion to roam over the strategic market status firms' wider groups, for example.

Q127 Alex Davies-Jones: One of the points of concern that has been raised with the Committee is that the bigger, dominant firms have the ability to tie up firms in legal wranglings for a considerable amount of time, leading to a significant cost to smaller firms, some of whom are unable to meet them; it ties them up so long that they are unable to carry on. Do you see that as a concern with the current drafting of the Bill?

Tom Smith: It is a concern with existing competition law, and that is why this Bill is needed. The Bill as currently drafted is exactly right. For example, the judicial review standard is the right one. It is the well-established standard for UK regulators. It is the standard used for the CMA's market investigations, for example, which has the exact same legal test as the pro-competitive interventions under this Bill. It would be quite strange to have a different standard. By definition, one party may not like the outcome of a given decision, but everyone benefits if there is a prompt outcome, because everyone can get on with running their businesses rather than fighting in court.

The best example of fighting in court forever is the Google Shopping case in Brussels. That was started by a complaint from a UK company, Foundem, back in 2009. Unbelievably, it is still going through the courts now. Foundem has long since stopped operating, so whatever the outcome in the courts, it is not really going to benefit them. This Bill will enable the DMU to intervene before harm materialises, so that businesses do not go out of business so quickly.

Q128 Alex Davies-Jones: Mr Burrus, one final question for you. One of the arguments that has been put to us is that costs to consumers might increase, as a result of the costs for apps on platforms having to be reduced. Do you see that argument? What do you have to say to that?

Gene Burrus: I think the opposite is actually true. We will see immediate benefits in terms of costs to consumers, when the taxes that the dominant players are able to extract are eliminated. We will see immediate benefits in terms of innovations and features that can appear in apps that right now are being prohibited by the dominant platforms. Those things can appear immediately.

Longer term, too, the opportunity to truly unleash innovation on mobile devices is key. We are in a place in history much like we were in the late 1990s when one company owned access to the internet. As mobile devices have taken over as the way consumers access the internet, we are now in a similar position where two firms manage access to the internet. Just as intervention with Microsoft 25 years ago led to the explosion of firms just like Apple and Google that could reliably build their businesses on PC computers, we will see firms able to reliably build their businesses on mobile devices. The long-term unleashing of innovation will be key here.

Alex Davies-Jones: Brilliant, thank you.

[Rushanara Ali *in the Chair*]

Q129 Kevin Hollinrake: Mr Burrus, some concerns have been raised with us that the subscription traps requirements in the Bill might be too onerous for some people who work on a subscription basis to comply with. Do you think those are valid concerns?

Gene Burrus: I am not sure that those concerns are really valid. There is a consultation process in place. I agree with the prior witness that it is important for third-party input to be part of that process with the DMU, so it can fully understand what it is implementing and the ways in which it is doing that. We have seen problems emerge in the past in competition law cases with respect to trying to craft orders without sufficient input from industry, and those have fallen on the rocks as being ineffective or unwise. We saw that, for instance, when the European Commission attempted to settle cases with Google long ago. They would reach a settlement, then finally market test that settlement that they thought was great, and industry would pan it. I think that is why, with sufficient third-party input into the process with the DMU, those concerns can be addressed

Q130 Kevin Hollinrake: Thank you. On the innovation point, do you see anything in the Bill that would inhibit companies designated as SMS or make them think twice about innovating in any particular space?

Gene Burrus: Quite the opposite. I think it will drive their innovation as well. Right now they are in a position where they are not often faced with competitive constraints with respect to innovating on things such as the privacy and security of their app stores and features that they need to put out. Or, when they self-reference their own products, sometimes that means that they do not have to make the best product; they just have to make the product that they can ensure users will get whether they want it or not.

The Bill will not only unleash innovation for third parties, but force the SMS firms to innovate more in order to keep up. I think history proves that is true. I will go back again to that point in time 25 years ago. Even with all the constraints that were put on Microsoft, nothing has prevented it from innovating. In fact, Microsoft is still a great innovative company today.

Q131 Kevin Hollinrake: Sure. That is very useful, thank you. Mr Smith, I do not need to ask you any questions. I think you were very clear on the appeal standard; I was very comfortable with your answer.

Tom Smith: May I add something quickly on the JR-plus proposal? I think it is strange to come up with a whole new appeal standard when we have perfectly

good ones already. Also, the JR-plus standard came in, as far as I understand it, to comply with an EU telecoms directive. It is strange in this period in our country's history to start putting that standard in place again. The direction of travel is in fact the opposite—to go from merits to JR—and another place in the Bill actually does that. It is the same for Ofcom; that went from merits to JR in the Digital Economy Act. I really do not see the JR-plus standard working.

Also, it is all very well putting a deadline on an appeal, but you need to explain how you will complete the process in that time. It will not work if you just put a deadline on it, then expect everyone to do 18 months' work in six months. I think you need to explain how on earth that would work, because I do not see it working.

Kevin Hollinrake: Very useful. Thank you.

Q132 Andy Carter: Mr Burrus, could I just put to you something that I suspect some of the platforms might say? They have spent billions and billions and billions developing their platforms. Is it not reasonable that they make charges for app users to access those platforms? What they are doing is just recouping their costs, so making a reasonable profit from your members who get access to these fantastic platforms.

Gene Burrus: I think that ignores and rewrites the history of how these platforms got to be as powerful as they are today. If you go back in time to 2008, for example, when there was intense competition among mobile platforms to be your phone, right? There were dozens of firms that you barely know exist any more, like Blackberry, like Nokia, like Microsoft. There were lots of firms competing in that space. And the game then was actually to be as attractive as possible to developers, to the point where those platforms were paying developers to be on their platform, because they were going to recoup that investment through the sale—in Apple's case—of very expensive mobile devices. And that is where they have recouped—handsomely recouped. It is probably the best business in human history, actually. It is only after they gained a degree of market power that they then began to use that power to try to flip the game and try to extract. Once they had developers in a place where they could not leave, that is when they attempted to go and extract those rents from developers.

I think that argument is a false argument. Apple has recouped its investment in these markets through the sale of very expensive hardware, and Google has recouped its investment in Android through billions and billions of dollars in ad revenue that it has continued to generate. The recoupment argument is a false one, I think.

Q133 Andy Carter: Thank you very much. I just want to pick up on one of the points that you make in your written submission to us, where you talk about a timeline for imposing an initial set of conduct requirements. I think you talk about a relatively short period—a three-month period. Would you just like to expand on that, because I think that is quite an interesting proposal?

Gene Burrus: Yes. I think the reason we are at this place today in the UK and why the European Union has come to a place in seeking to ex ante regulate these markets, and why even the US is considering it, although unfortunately quite slowly, is because of the speed that these markets move and the reality we have experienced in the past that often the competition cases against these dominant digital firms end up being an archaeological dig for the dead bodies and bones of the companies that did not survive long enough to see the outcome of the cases.

It is also the case that continuing to flout the law is extremely profitable for these dominant digital platforms; there almost is not an ex post fine that is large enough to deter them from engaging in the conduct going forward. The ability to find a way to quickly impose the codes of conduct means that, first, it is of benefit to the companies that are actually being harmed today and, secondly, tit will bring certainty to the market in a way that allows firms to reliably make investments based on those codes of conduct, instead of where we are today, where there are probably lots of firms that are declining even to start on mobile devices today because they know that they might not be able to recoup their investment, even though they have great innovative ideas for products that they know people would love. They also know that, absent action, it is likely that all of their investments might eventually just flow to the dominant players.

Q134 Andy Carter: Thank you. I have one question for you, Mr Smith, if I may. We are taking action to legislate; the EU has taken action to legislate. Many other countries are not yet in that place. Are we not just going to drive innovation outside of the UK?

Tom Smith: I think a lot of major economies are in the same place and moving forward in the same direction anyway. There are rulings against Google in India. There is app store legislation already in force in Korea. The Netherlands has a ruling against Apple's app store. Australia is proposing a very similar regime to this one. There are lots of proposals, obviously, in America. Germany already has its regime in place and in force, as does the EU. There is a major benefit to all the major economies moving forward together because these are global issues.

As for deterring investment, I would say that monopolies do not stimulate innovation, competition does. That is the whole point of the Bill—to open up competition and get rid of artificial restrictions. When Apple bans alternative app stores on its devices, it is just holding the market to itself. If the DMU removes that ban, new app stores can come in and innovate. Maybe they will offer a better service than Apple; maybe they will not, and people can stick with Apple and Apple can make lots of money. That is great if it has a better product, but currently it is not being challenged.

Q135 Vicky Ford: Can you give us an example of the rent inflation you mentioned? For the app, how much would they have been paying five years ago and what are they being charged now, just to contextualise this?

Gene Burrus: The problem bothering a great number of our members is the forcing of the use of an in-app payment system that comes along with a 30% tax on any apps that sell what are called "digital goods" from within their app. If it is a digital subscription for a gaming app, for a news app or for music streaming, that comes along with a 30% charge. Those digital platforms did not contribute anything to those products; they simply take it off the top.

Ten years ago, the game was the opposite. People were actually paying those developers to come on to the platforms. To some degree, it has been a bit of a bait and switch for these platforms. When they were facing competition, they had one business model and, once they achieved dominance, they altered their business model to try to extract those rents. Making the bet with that 30% is probably one of the best examples of that.

Q136 Vicky Ford: How quickly have we gone from zero to 30%?

Gene Burrus: In 2008, it was zero, and the 30% probably came in about 2012. Once the markets settled down and it was clear that there were two phone platforms to be had, that is when Apple began to try to extract that.

Tom Smith: We focus on the app store stuff, but there is potential at other SMS firms. There are a lot of allegations about Amazon's fees going up over time for small sellers, for example, and them being pushed into buying Amazon's logistics operations, which are said to be expensive. The DMU can go and investigate whether they are expensive and whether they should be freed up to competition more. The CMA published a very good market study report on Google's advertising businesses. It was 2,000 pages long and detailed the excessive profits made. Google charges 30% to 40% more than Bing to reach the exact same eyeballs. Those prices are going up.

Q137 Jerome Mayhew: You are buying a service to reach the same number of eyeballs. The process does not have greater reach. You said that, to achieve the same outcome as a facilitating business, they charge 30% to 40% more. Why doesn't everyone use Bing?

Tom Smith: You may have seen yesterday that the European Commission is threatening to break up Google in the ad-tech business. The European Commission is formally alleging that Google is abusing its dominant position in ad tech. That is on the display side of the business. On the search side, Google has a 90%-plus market share in this country. It is a must-have product, and people are buying that product. There are lots of allegations about why it should be able to sustain such prices, but I do not want to make an unfounded allegation.

Q138 Kevin Hollinrake: We have put subscription traps in the Bill. I will ask the same question I asked Mr Burrus earlier: do you see anything in the legislation that would make it difficult for companies that currently operate on a subscription basis to comply with what we have set out?

Tom Smith: No, I do not think so. In fact, one of the problems with subscriptions that are operated through mobile devices is that Apple inserts itself and Google inserts itself in between the developer and the customer. If you are a British person who subscribes to an app and then something goes wrong or you want to cancel your subscription, quite naturally you might want to contact the developer, such as Tinder or whatever other developer—you are talking to Mr Buse later. At that point the developer has to say, "I'm terribly sorry; you might think you are dealing with us, but you have a contract with Apple," and that is a major source of complaints. It is pretty confusing for consumers.

Q139 Kevin Hollinrake: On the innovation point, there are concerns that if you are designated SMS you will have to go to the CMA or DMU to seek permission to enter a new marketplace or bring forward a new product. Is that something you see anywhere in the legislation?

Tom Smith: No, it is nowhere in the legislation. The idea that the CMA wants to stop SMS firms innovating is not based in any evidence that I can see anywhere. There is a leveraging principle in clause 20, which is extremely narrowly written and I think should be made slightly wider, but that is the only thing that could touch a non-SMS activity.

Kevin Hollinrake: Thank you.

The Chair: I thank our witnesses for their evidence. If there are no further questions, we will move on to the next panel.

Examination of Witnesses

Tom Fish, Richard Stables and Mark Buse gave evidence.

12.7 pm

The Chair: We will now hear oral evidence from Tom Fish, head of public policy and research at Gener8; Richard Stables, CEO of Kelkoo; and Mark Buse, senior vice president for global government relations and policy at the Match Group. Will you introduce yourselves for the record, please?

Mark Buse: I am Mark Buse, SVP for global Government affairs and policy at Match Group.

Richard Stables: I am Richard Stables, CEO of Kelkoo Group. I have been with Kelkoo for 14 years.

Tom Fish: I am Tom Fish, head of public policy and research at Gener8.

The Chair: Thank you. We have until 1 pm for this session. I call Alex Davies-Jones.

Q140 Alex Davies-Jones: Thank you, gentlemen, for joining us this morning. Are you able to explain to us exactly how consumers are harmed by the behaviour of big tech in your industry and how that has hindered and harmed you?

Richard Stables: I can jump in. Just to give you a little bit of background, Kelkoo was a shopping price comparison site—an internet darling. It started in '99 and grew to be probably the most popular shopping comparison site in Europe, especially in the UK. Our industry and our company was decimated by the actions of Google, who decided to put themselves at the top of Google and remove the likes of us from the listings and put us on page 10 or page 20, which is pretty much in the wilderness. Why do you care? There are two big reasons. If you are a consumer, you want to see prices, and you want to see prices of lots of goods from lots of merchants.

I am a tennis player, and I want to buy a tennis racket. I am interested in what the cheapest tennis racket is, because I know that I am going to buy a Babolat or a HEAD racket. I want to see 30 to 40 merchants side-by-side, and I want to look at availability, brand and price. If I

cannot see that, I am being hurt. I am not seeing the best price. With Google at the moment, you see 10 or 12 merchants. You do not see the entire industry. You can scroll to the right and see more, but what you see are the merchants that can afford to be on Google and pay the most to be in there at the top left. That is reason No. 1: you are seeing less prices.

As for the second, Google has created a complete monopoly on traffic. If I am a merchant or retailer, the only place I am going to get traffic from digitally is through Google. If I am only getting it from one place, I am basically in a monopoly. As we know, with a monopoly you are paying probably 25% to 30% more for the prices. What if I am a retailer in a cut-throat situation? What am I going to do with that price? I am going to pass it on to the likes of you and I. We are all paying a much higher mark-up to pay Google's execs and Google for the massive amounts of money they extract from the UK economy. That is how consumers are hurt by not having proper competition in digital markets.

Q141 Alex Davies-Jones: Thank you, Richard. As someone representing your company, which has been directly impacted by the practices that the Bill is seeking to protect against, do you see any omissions from the Bill? Had the Bill been around when you were going through your legal processes, would it have been able to save you from this heartache and pain?

Richard Stables: I think the Bill is well written, well founded and I would not change it. The abuse started way back—according to the Commission's shopping decision, in 2008. The first complaint came in 2009. It came from a company that we now own, Ciao, which has now disappeared, along with LeGuide, which is now part of our company. We basically have been in a fight with Google since 2010, when the investigation started with the Commission. In 2017, it made a decision and fined Google £2.4 billion. We are still in legal uncertainty, because Google has gone to a court of first instance and lost and has now gone to the European Court of Justice. That is why a merits appeal is absolutely loved by big tech. They want to delay, delay, delay—to kick the can down the road.

If there is one thing I would say to you guys today, it would be: do not move from JR. If you move from JR, you might as well go home. For businesses like mine, if we had had the Bill 10 or 12 years ago, the CMA could have looked at what happened and said, "You know what, we will do this in an ex ante fashion. We think there is a problem here. We will go and investigate. We know there is an issue, so let's change it." We have been going for 13 and a half years and we still do not have legal certainty because of the problem with ex post. That is the problem with antitrust regulation in digital, where markets move so quickly, so you are absolutely right. There will be a really vibrant market for price comparison today, but it would have been great for consumers if we had this legislation 10 or 15 years ago.

Q142 Alex Davies-Jones: Just to push you on omissions, do you think there is anything missing from the Bill that would have helped you, or is it great and perfect?

Richard Stables: I think it is long overdue. Governments in America, Europe and the UK have, frankly, been asleep at the wheel for the last 20 years in terms of big tech. There is a worldwide movement, and everybody recognises that there is a huge problem. They realise that you need ex ante regulation in digital. You have the Digital Markets Act in Europe, and this Bill is well founded, well thought through. From discussions I have had, it seems to be really well supported from both sides of the House. I implore you guys to pass it quickly.

Q143 Alex Davies-Jones: I have a question to you, Mark, from Match Group. A lot of your products and offerings were traditionally on desktop providers, rather than apps. How can we ensure that the Bill is adequately future-proofed to ensure that that does not happen and it will not hinder businesses like yours?

Mark Buse: We believe the Bill has the flexibility to be future-proofed. When we look at how our users access our services, it is almost exclusively via an app. Desktop has no role. You can use our products, such as Tinder, cheaper if you go to the website and download it, but nobody does. The user behaviour is that they all use apps. Our fastest growing brand in the UK is called Hinge; Hinge does not even have a website. It was not worth the time or money to build one, because nobody uses it.

When I say nobody, I mean that less than 1% of Tinder's users go to the website. That is also partially because Apple and Google have restrictions that they impose on us contractually. They do not allow us to tell our users that they can subscribe cheaper if they go to the website. In an ideal world—we think the Bill will go a long way in creating an open market—somebody who wants to subscribe to our product will have those options right there in front of them. They will be able to subscribe using our service, PayPal, or whatever else is available, and get it cheaper.

Apple, Google or big tech say, "This is all a myth. You are not going to have cheaper products". Match has stated emphatically and publicly that we will drop our prices if we do not have to pay an artificially imposed 30%, which is what occurs today. We will drop our prices. We have also pledged that we will put more money into research and development, the hiring of employees and online safety, which we believe is crucial. By the way, the monopoly power that both Apple and Google exert over the store hinders online safety. That also has a negative pejorative impact on consumers today.

Q144 The Parliamentary Under-Secretary of State for Science, Innovation and Technology (Paul Scully): Thank you for those really powerful testimonies. Before I come to Tom, could I ask you, Mark, to elaborate on the online safety that you just talked about?

Mark Buse: Sure. There are a couple of issues when we look at safety. One is keeping bad actors off our platforms—for example, entities or individuals who intend to do harm. Another is under-age users; they do not intend any harm, but our platform is limited to 18 and over only. We do not allow people under the age of 18. We do not want them there and our users do not want them there. In both cases, we have a limited pot of data to try to assess whether somebody is a bad actor or under age. There is a lot of data that exists that could inform us about that. I am going to use this little device—my phone—when I fly home on Saturday as my boarding pass. I am going to pay my bills on it. I am

incentivised to put truthful information into my phone, which is the most powerful computer that most people own. I use it for a multitude of services.

For us, 98% of our revenue is from subscriptions; ads have virtually no impact. When you look at our companies, when somebody subscribes to Tinder, we do not know who they are, because they do not actually have a subscription with us. That also has a pejorative consumer impact. Consumers cancel their subscriptions for perfectly good reasons, such as, "I have a three-month Tinder subscription and I met the love of my life. Neither of us want me on Tinder any more, so I am cancelling my subscription".

As the consumer, I go to Tinder and say, "I have a Tinder subscription that I want to cancel. Tinder, cancel it". We have to inform them, "You don't actually have a subscription with us. You have a subscription with Apple or Google", who artificially put themselves in the middle of this situation because they can—because they have a monopoly and they can demand and force it. As a result, they know who I am. They have my credit card and real address—all those identifiers that we could use at Match to keep a bad actor off our platform.

This Bill would change all that dynamic. The positive impacts, as I say, go much further than just increased competition; they go directly to lower prices and increased online safety.

Q145 Paul Scully: Thank you for that. These two panels are getting right to the heart of the Bill. Obviously, Kelkoo had financial damage that held it under water some time ago. Match is obviously a successful company. You started to talk about data. Tom, this comes to you and Gener8. I have spoken to all three of you over the past few months and heard your stories. Gener8 is a relatively new company going great guns, and data is at the heart of your business plan. Could you tell us your story and where the risks are to Gener8?

Tom Fish: Absolutely. Before I dive in at the deep end, it is worth recognising that these big tech companies play an essential stewardship role within their ecosystems, but the flipside of that is they are operating as the de facto regulator for millions of businesses up and down the country in a whole range of important public policy areas, including advertising standards, consumer protection and data protection. One thing we know is that the commercial incentives of these companies are not perfectly aligned with the optimal outcomes that we would hope to see in those areas, regardless of how hard they say they are trying. In many cases, they are operating as the rule maker, the referee and the player in that game. As a result, there are, of course, conflicts of interest. It is undeniable that some degree of growing oversight and scrutiny will be needed if participants like us in those markets are to believe that there is a level playing field and that they will get a fair crack of the whip.

When it comes to the challenges that Gener8 is facing, we struggle with unpredictable and opaque review processes. We miss out on a potential revenue stream for our browser as a consequence of Google's dominance in search. We lose users of our browser in Windows because Microsoft disrespects our users' choices. We suffer from surprisingly confusing and random rejections of our ad campaigns by Meta, which makes planning our user growth and acquisition strategy impossible. We observe insurmountable barriers to entry in the mobile browser market, leading to us putting development of that product on ice. When it comes to data and your question, we face unnecessary friction at every turn as we try to access our users' data on their behalf and earn money on it for them.

Collectively, these issues cause real harm to our business—they have consequences. We face increased costs and we divert resources away from product development to fight these fires. Missing out on revenue means our users missing out on gift cards and charity donations. It makes us a less attractive investment proposition. We have a drag placed on our ability to attract and then retain new users. Most alarmingly, in my opinion, is the way I have been witnessing it filtering through into internal discussions and thinking about what we should invest in and which innovations we should bring forward to market. From our perspective, the Bills urgently need to establish this regime and address these issues.

Q146 Paul Scully: Obviously, the risk of harm is predominately due to what your business is. Could you say a bit about Gener8 to bring it to life for people who have not heard of it and about what you are trying to do on freeing up people's data?

Tom Fish: Gener8 is a personal information management service. Essentially what we do is we enable our users to access their data from third-party services, bring it into the app and visualise it. If they want to, they can choose to earn from it, and we then put that data to work for them, just like a bank does with people's monthly income. The crux of this issue is we need to be able to act as an agent for our users and to access that data. Unless that is possible in a streamlined, efficient way, users quickly get turned off. What we need is really for the companies that are hoovering up all this data to enable the data owners—the consumers—to be able to access it, and then ultimately share in its value.

Q147 Paul Scully: It is essentially the premise that if something is free, it is because you are giving away your data. You are actually saying either you can go private, or you can actually be rewarded and paid for the data that those companies you are giving the data to would otherwise be commercialising themselves.

Tom Fish: That is right. I think the excess profits of these companies, year after year, is an illustration that consumers are not necessarily getting a fair deal, even though it might look like it.

Q148 Paul Scully: Finally, when the founder, Sam, founded it, he was working for Red Bull. When he first pitched and created the business, it was because of what he was seeing coming back about the value of data.

Tom Fish: Exactly. He was being pitched to on the basis of these companies having astronomical levels of granularity and detail about what people are up to online. That is filtering through in the advertising market to vast profits. He had the idea that people should be able to take a share of that value themselves.

Q149 Paul Scully: So when we are looking at that commercial strata, individual consumers will ultimately be harmed if we do not act.

Tom Fish: That is right.

Q150 Anna Firth: One of my questions has already been asked. You have given us a very powerful case around the benefits of this Bill. You have highlighted lower prices, charity donations and increased online safety. Are there any other benefits for my consumers in Southend-on-Sea that you could highlight? Also, what about the unintended consequences of the Bill? Are there any issues—Pooh bear traps—that we should be aware of and considering at this point?

Tom Fish: Shall I answer quickly and then pass over? I looked it up, and in Southend-on-Sea there are 372 active Gener8 users. At the micro level, they stand to benefit from Gener8 bringing forward new features more quickly, earning more revenue more quickly, and they will quickly start to earn more value from their data themselves.

Zooming out from Southend-on-Sea and Gener8 and looking at the big picture, all these excess profits in the advertising sector filter through into the prices people pay for all goods and services across the economy, whether that is hotels, flights or insurance. They miss out on choice and potential quality that is banned by big tech, but really the biggest issue here is innovation. It is those innovations that we do not know about that never make it through to disrupt the status quo—the unknown unknowns—which are the greatest value consumers are missing out on.

Richard Stables: You have probably read George Orwell; you have probably read "1984". Later on today, you will hear some "1984"-type speak, because they will sit in front of you and they will say, "This Bill is going to hurt innovation. This Bill is going to hurt investment in the UK." Basically, listen to what they say and think the complete opposite, because I can tell you now that if you are a businessman or businessperson trying to invest today in digital, your No. 1 question is, "How am I going to get keeled over by big tech?" If I am going to be keeled over, I am not going to invest in it. Why would you? It makes absolutely no sense.

By creating level playing fields, you will do the absolute opposite of what they are saying. You will get investment in the UK. People will look at the UK and say, "That is a place I want to be, because I know that I have got a level playing field against big tech, therefore I will invest in it," so you get investment. What happens with investment? Innovation. Innovation comes from well-functioning markets.

Another myth you will get today is on security, or privacy, or China, or AI. If you look at what has happened in America when they tried to bring this type of legislation, big tech went out on the biggest expenditure—bigger than they did on even Medicaid, from big pharma—trying to rubbish the Bills. They said, "Amazon Prime will stop working. Google Maps will stop working", but that is complete baloney; it is the opposite. None of that is going on.

For your constituency, you should be thinking, "We get lower prices, investment into the UK—why the hell weren't we doing this 10 or 20 years ago?" Why have we got only five big huge titans running the internet today? Because we have not regulated them. These are winner-takes-all markets, and they have taken their power in one market to go and gobble up the rest.

Mark Buse: Let me put some real-world facts around what my colleague here is saying. Match has been very consistent when we have said, "We will invest in markets in countries where the regulatory regime encourages competition." So we were very active working with the Korean National Assembly to make the law pass there that broke open the app store. The law said people could have alternative payments. We then moved employees out of Japan and into Korea. Now, as they were testifying, my friends over on the big tech side of the world, said, "No, people aren't going to move," or, "It's going to stifle innovation," but others said, "Well, Match did." They say, "No, that's not true." I say, "Yes, we moved employees. We absolutely did."

When we look at marketplaces, we want to operate and headquarter in marketplaces that allow maximum innovation, flexibility and competition. What we want on our product is what you see today on Uber. You can open up Uber and choose to pay in 10 different ways; if you open up our products, you can pay one way and one way only—that is by using Apple or Google, and they take their 30%. That is the first point.

The second point is that, when you are a start-up, you are just creating the next new, great product. If you have to look at that and say, "Wait a minute! The moment I go in, I have to start paying 30%," that changes the economics.

To make another, fine point about how fast things move, Tinder is the largest online dating app in the world, with 3.5 billion swipes a day. Tinder is 10 years old—10! That is nothing in the real world. Tinder was invented at a hackathon. If the UK creates this marketplace, all of a sudden you will see everyone flowing into it. Match would view this—absolutely, and we are happy to state this publicly—as a huge opportunity to put jobs and potentially even broad decision-making and corporate authority into a marketplace where we do not have to have our relationship with our users dictated by a couple of select big-tech companies.

Q151 Anna Firth: Thank you. You did not actually answer my second question at all, which was whether you can foresee any unintended consequences. If you think it is perfect, that is fine, but otherwise it would be useful to have something on the record.

Mark Buse: I think there are unintended consequences in every piece of legislation, some of which are impossible to anticipate, but what the UK is doing with the Bill you are considering is unique, in that it gives flexibility to the CMA to adjust and adapt. Recently, Google submitted its proposal or response to the CMA, in which it said, okay, it could do a 26% fee, which we would have to pay instead of 30%, and that there could be some flexibility so a company like Match could put an alternative payment provider in. The CMA accepted Google's proposal because it had no authority to demand anything more from Google.

Make no mistake: 26% is a specific number chosen by Google and Apple, and they have done this in Korea and the Netherlands. They know that if we are paying a 26% commission—originally, it was called an "in-app payment fee"; now it's a commission—and then pay to have payments processed and handled, we will be paying over 30%. What developer is going to want to choose the option that is going to cost them more money? Nobody will.

This kind of flexibility means that you do not end up in a world where you have these companies who have all the data and all the ability to come up with what are

essentially programmatic solutions that are not solutions. I think that that whole dynamic is encapsulated in this flexibility in the Bill, designed to avoid unintended consequences.

Richard Stables: My unintended consequences? More jobs for the UK, more investment and the UK maybe becoming a leading digital place to be. That may be unintended—*[Laughter.]*

Tom Fish: A lot has been said about the fact that it has taken quite a long time to get this legislation to this point. Well, I guess that an unintended consequence of that is that it has given people a lot of time to think about these issues and to think through the design very carefully. So, actually, I cannot say that I think there are any obvious unintended negative consequences. Ultimately, a lot of the nature of the impacts will be determined by the individual decisions that the CMA makes. I think it has shown itself in recent years to be very adept at assessing the full range of potential pros and cons of the decisions it makes.

Anna Firth: Thank you.

Q152 Mary Kelly Foy: Thank you—I think that that evidence has been very useful to me as a parliamentarian. Richard, you raised some of the warning signs and some of the tactics that the big companies—Apple and Google—may use with us later on. To what extent do you think that the likes of Google and Apple lobby parliamentarians to maintain the status quo?

Richard Stables: The biggest spender in the US on lobbying—they have to make this public—is Google. They spend millions. You must have heard what happened in the European Commission. There was a whole programme they were going to do in terms of trying to lobby on the Digital Markets Act, but it became public and it backfired massively. The Commission said, "Oh, we're not going to speak to any of you in that sort of forum; we're going to do it in a very clear fashion."

I see this a lot, because I have been fighting this a long time. You will see institutions, education bodies and units that have been put up and that are sponsored by big tech. You will listen to what they are saying, and you are going, "Where did you get that from?" They go, "Oh, we've done all this research and evidence," but it's baloney. You get underneath it, and you are like, "That is not based on facts. That is based on you basically touting what they want you to tout."

So, yes, I would be really suspicious of what these companies have to say. They have been on the biggest gravy train in history; they do not want to get off it. So they will say whatever it takes to try and obfuscate and persuade and stop this type of activity happening, because they know that the game is up.

Mark Buse: By publicly available numbers, and we obviously believe that the spending far outpaces that, Google, Apple, Microsoft and Amazon have spent well in excess of $300 million in the last two years on advertising alone against anti-trust change. They have spent another huge amount of money on direct lobbying, as well as on public relations efforts and so on around these issues, in the context of the US alone. They have been very strong on that and I do think, as somebody who used to work in Congress, that it has proven effective in slowing anything from occurring in the US.

As was said, if you have an assured pot of income coming in—if you are Apple and Google, in the store—every day that you can keep your walled garden intact is a good day, because even if the Bill passes tomorrow, companies like us are going to have to convince users to try something different. We believe we can drive users to alternatives by lowering price, and there are a lot of dynamics around that. However, in many cases, it is still going to be difficult to pull users out of that walled-off system that has been created.

Richard Stables: To add to what Mark has just said, when they were trying to pass the legislation in the US, there was one month where these companies spent $30 million on TV advertising. They specifically went to a couple of places where there were either Senate or congressional races happening and said exactly what I said earlier, which was, "Amazon Prime will stop working and your Google Maps will stop working." It is just madness. I remember speaking to Senators and Congressmen, explaining to them that that is just rubbish and asking them to look at what is happening with the DMA in Europe. Amazon has not switched off its Amazon Prime and is never going to, and Google Maps works fine. They will do whatever it takes. I do not think they will try that in the UK, because they have recognised that parliamentarians are—well, they will not. I will not fill that; you can answer that yourselves. But they will try other, subtle things, and the most subtle one of all is innovation and investment. It is the absolute opposite of what they say.

Q153 Mary Kelly Foy: Tom, do you want to add anything?

Tom Fish: You certainly cannot blame the companies for wanting to put their points across to politicians who are potentially radically transforming their markets. I certainly echo the point about being wary of supposed bodies that represent small businesses in these areas. If you receive views from those types of organisation, think carefully about who they are really speaking for.

The one thing I would add is that knowing that those big companies will be lobbying hard is why companies such as Gener8 and others are willing to take the risk to speak out publicly and share our experience, because it is just so important that you hear both sides of the argument.

Q154 Kevin Hollinrake: Mr Buse, I think you will be pleased to know that everybody in the Committee has now moved their subscription for Tinder from the app store to the website to get cheaper subscriptions, so thank you for that—*[Laughter.]*

You are a very successful company. You own plenty of brands—Plenty Of Fish, as well as Tinder and the like. What do you make of the argument that, actually, far from inhibiting investment, these companies have encouraged investment by giving you a platform that can access lots of customers around the world?

Mark Buse: We do not deny, first, that what they have created is revolutionary and, secondly, that they should be paid for their intellectual property and their ongoing work. We have always stated that we support their ability to recoup and to profit off of this. There is no issue on that for Match. What causes us so much concern is that they make their decisions arbitrarily in a black box, with no transparency.

If you look at Tinder's algorithm and Uber's algorithm, they operate, at the base level, almost identically. We connect two strangers in real time for the purpose of a date. Uber connects two strangers in real time for the purpose of a ride. Uber does not own the car and it does not employ the driver; we encourage you to use an Uber, to not meet somebody in a dark alley in their car. Essentially, it works the same. Yet, on Uber, Uber pays nothing. We and our users have to only use Apple or Google and have to pay 30%. So there is a fundamental problem here.

Some of that is just due to a historical anomaly back when there was a competitive marketplace, but that competitive marketplace no longer exists. Again, we think this Bill gives flexibility, in that it does not have the CMA declare these companies as regulated utilities. Recently, a Minister in the Netherlands said that he believes Apple and Google should be treated like regulated utilities, such as a bank. That is not for me to decide; it is up to parliamentarians to decide. We would have concerns about that, just for precedent, but we think this Bill balances that and creates a flexible marketplace where, as long as Apple and Google are treating entities in a fair and transparent manner, they are entitled to earn profit.

Q155 Kevin Hollinrake: Would you say that the situation has hampered your willingness to invest and the growth of your company?

Mark Buse: Absolutely. It has hampered it in an actual way, in that 30% of the money we should bring in goes to Apple and Google. To put it into context, we do a little over $3 billion a year in revenue. Last year we paid Apple and Google around $700 million, which we could be investing in employees, research and lowering prices. The question is, $700 million for what? What are we paying for? Are we subsidising Uber? We would say yes, in fact we are. What do our users get from that? To show you how the stores recognise the value, Apple buys ads within the app store search for Tinder. We do not buy ads for Tinder; Apple buys ads for Tinder. You might ask why. It is because Apple knows that the average user of an online dating product will have four or five different dating apps on their phone—us and all our competitors—and will bounce back and forth between them all non-stop. That is just the way the user behaviour is. Once you meet somebody, you do not use any of them, so it is a high-churn business.

With Tinder being the most well-known brand, Apple knows that if it can convince a 19-year-old to open a Tinder account, that 19-year-old will also then open a Bumble account, an OkCupid account, a Grindr account or whatever. Apple knows that they are going to start subscribing to all of them, so that is all free money. The system is already built. Uber is using it, Walmart is using it and Tesco is using it, but 16% of the companies are paying the extra 30%, which is subsidising all of this and enriching Google and Apple's profits, so there are issues there.

The Chair: Minister Scully, do you want to come in on any of the points that have been made?

Q156 Paul Scully: There was a brief point that someone raised—I think it was you, Tom, when you talked about the fact that you guys have put your heads above the parapet and come in front of us. Can you talk to us about why some other companies that you have spoken to would not want to put their heads above the parapet, and so it is you guys at the forefront?

Tom Fish: I certainly am aware that other companies I have spoken to are reluctant to speak out publicly about the issues they face and the concerns they have. They are concerned about the risk that they might be penalised in the search engine, the app store or the marketplace. I will not name them, naturally, but those concerns are real. From my perspective, there is no choice. Unless this Bill is introduced, and the regime comes through and starts to address these issues, we will not be able to reach out for potential and the markets that we want to operate in will not be open and accessible. From our perspective, there is really no choice but to take this step.

Q157 Paul Scully: Because of the ongoing relationship with those companies.

Tom Fish: Exactly.

Richard Stables: I could give a bit of colour to that. When we started being hit by Google, we thought that it was just us. Eventually we realised that the whole market was suffering. We started talking to the commission. We were absolutely paranoid. We said, "Don't tell Google because we think we might get the traffic back. If they know that we're talking to you, that's going to hurt us." Eventually, they hurt us so much that it did not matter. I have spoken to so many firms—big firms as well as small firms—that have turned around and said, "We're really glad about what you're doing. I can't come out and say this." The power that these companies have is phenomenal. Companies can literally be put out of business overnight if one of these companies decides that that is what is going to happen.

Mark Buse: They believe in retribution. When we tried to offer Korean citizens in Korea a discounted price, Apple, instead of rejecting our app build, put every app build on hold. If you are not familiar with the concept of a build, it is where you update and change your app. You always get messages on your phone saying, "You need to update." For 35 days, Apple froze every app build for every brand that we have that operates anywhere around the globe. We were unable to bring new products out, but more importantly we had bug fixes in all those builds. We have white-hat hackers: people we pay to show us what is wrong. We learned bug fixes internally. There were people who could not use the product right.

All those bug fixes sat on hold, so for UK citizens using our products, with no connection to Korea, those fixes did not take place for 35 days because Apple refused to let us move any builds. When we withdrew the build that would have given us the right to use alternative payment authorities, Apple then approved everything within 72 hours.

Tom Fish: On that point, it is important not always to get drawn into a polarised debate on these issues. It is not necessarily black and white—that big tech is good or evil. You can be a supporter of the Bill and the new regime without wanting to break up big tech. All that I am really asking for is a bit more scrutiny, oversight and transparency where obvious conflicts of interest exist.

Q158 Seema Malhotra (Feltham and Heston) (Lab/Co-op): Briefly, you were saying that the app subscriptions that you might have will be through Apple, so the

relationship is between the customer and Apple. We will look at the issue of subscription traps as the Bill progresses. Will the renewal relationship be between you and the customer or Apple and the customer? How will that end up working?

Mark Buse: We believe that the relationship should be between us and the customer—that Apple should not intermediate between us and the customer. Then we will, rightly, have the responsibility to ensure that there are not subscription traps or any other issues around subscription. At this point, generally what happens is that we are still blamed but the subscription is actually with Apple. We do not think that in an ideal world it should necessarily be just us. If some of our users want to subscribe via Apple, we are more than happy to let them use our service and continue to subscribe through Apple. If they believe that that is a safer, more private way to do it, great. We want to bring as many people as possible into our business. It is not about excluding; it is about different ways to include.

Q159 Andy Carter: May I pick up on the point that you made about Match payments and Uber payments? I was not sure why there is a difference. Why is Uber treated differently from Match?

Mark Buse: It is a historical anomaly. When the store was created, in a brilliant move by Steve Jobs, he needed to get companies to build apps. Apps did not exist. People my age were bombarded with commercials. The slogan for Apple was, "There's an app for that." Apps have become the way we use our phones because they make it easier. He had to go to all these physical companies and say, "Build me an app. I'll put it on the phone." The Walmarts and Tescos of the world said, "We want people coming into our stores. Why on earth would we want them not to, and to use the app?"

What Jobs did, again because he was a brilliant man, is say, "Look—it won't cost you anything. In essence, it will just increase sales. It's you-branded. It's yours. You operate it." That is why apps are distinct. Uber had just come on to the scene and was the hottest thing going. It went into New York and into London—some would argue illegally, not abiding by the rules. What happened is that Jobs—you can see this from various biographies and public court documents—said to Uber, "Come into the store, but because you're a digital product, and the whole idea of the walled garden is that they hold on to your digital data, you're going to have to pay 30%." Uber said, "No. We won't do it." Because the store was nascent and Uber was popular, Jobs said, "You know what? Go into the store anyway. It's fine. I won't make you pay."

Match at the time was a fledgling, super-small company, and our business was not big and growing because there was a lot of stigma around online dating at the time. People thought that if you cannot meet a date in real life, in person, you go to the online dating world. Now online dating is the No. 1 way that people meet in the UK. More relationships start online than in any other way. In the LGBTQ community, over 70% of all relationships start online. The market has changed. If the store was being created today, our market power might enable us to say, "Don't include us in that."

Andy Carter: That is really helpful.

The Chair: I am afraid that we need to wind up. Mr Carter, very briefly.

Q160 Andy Carter: Just a quick question to Tom. In your written submission, you commented on the scope of the Bill. Are you confident that it is broad enough, and future-facing enough, to cover things that we do not yet know about?

Tom Fish: Largely speaking. The one issue that I raised in my written submission was a small concern around a degree of ambiguity regarding operating systems. It is critical that operating systems can be designated with strategic market status. Half the potential interventions that have been talked about for opening up markets will not be possible if you cannot designate operating systems. This is just a plea really to insert the words "operating systems" as an example. It will not cost anything, but it will solve a lot of problems.

The Chair: Thank you. I am sorry that we have run out of time. On behalf of the Committee, I thank our witnesses.

Ordered, That further consideration be now adjourned. *—(Mike Wood.)*

12.59 pm

Adjourned till this day at Two o'clock.

PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT
GENERAL COMMITTEES

Public Bill Committee

DIGITAL MARKETS, COMPETITION AND CONSUMERS BILL

Fourth Sitting

Thursday 15 June 2023

(Afternoon)

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not later than

Monday 19 June 2023

The Committee consisted of the following Members:

Chairs: † Rushanara Ali, Mr Philip Hollobone, Dame Maria Miller

† Carter, Andy *(Warrington South)* (Con)
Coyle, Neil *(Bermondsey and Old Southwark)* (Lab)
Davies-Jones, Alex *(Pontypridd)* (Lab)
Dowd, Peter *(Bootle)* (Lab)
† Firth, Anna *(Southend West)* (Con)
† Ford, Vicky *(Chelmsford)* (Con)
† Foy, Mary Kelly *(City of Durham)* (Lab)
† Hollinrake, Kevin *(Parliamentary Under-Secretary of State for Business and Trade)*
† Malhotra, Seema *(Feltham and Heston)* (Lab/Co-op)
Mayhew, Jerome *(Broadland)* (Con)
Mishra, Navendu *(Stockport)* (Lab)
Russell, Dean *(Watford)* (Con)
† Scully, Paul *(Parliamentary Under-Secretary of State for Science, Innovation and Technology)*
Stevenson, Jane *(Wolverhampton North East)* (Con)
† Thomson, Richard *(Gordon)* (SNP)
Watling, Giles *(Clacton)* (Con)
† Wood, Mike *(Dudley South)* (Con)

Kevin Maddison, John-Paul Flaherty, Bradley Albrow, *Committee Clerks*

† attended the Committee

Witnesses

Kelli Fairbrother, Co-founder and CEO, xigxag

Christian Owens, Founder and Executive Chairman, Paddle

Tom Morrison-Bell, Government Affairs and Public Policy Manager, Google

Public Bill Committee

Thursday 15 June 2023

(Afternoon)

[Rushanara Ali *in the Chair*]

Digital Markets, Competition and Consumers Bill

2 pm

The Committee deliberated in private.

Examination of Witnesses

Kelli Fairbrother and Christian Owens gave evidence.

2.1 pm

Q161 The Chair: Good afternoon. We will now hear oral evidence, for the 13th panel, from Kelli Fairbrother, co-founder and CEO of xigxag, and Christian Owens, founder and executive chairman of Paddle. We will have until 2.30 pm. Could the witnesses please introduce themselves for the record?

Kelli Fairbrother: I am Kelli Fairbrother. I am the co-founder and CEO of xigxag.

Christian Owens: And I am Christian Owens. I am the founder and executive chairman of Paddle.

Q162 Seema Malhotra (Feltham and Heston) (Lab/Co-op): Thank you very much for coming to give evidence to us this afternoon. If you could say a few words about your businesses—what they actually do and what your services actually are—when answering, that would be helpful.

I know that both of your businesses are players in the digital market sector. It would be useful to understand, with some illustrative examples, how the current market dominance of a few large tech companies affects how you do your business, and how it has perhaps affected how you have been able to innovate and the costs of innovation. Perhaps we can hear from Ms Fairbrother first?

Kelli Fairbrother: I lead an independent business based in Cornwall that is challenging the incumbents' dominance of digital books, which we believe have not been innovated on in decades. Our aim is to create an exceptional digital book experience that keeps young people engaged in books, makes books more accessible to the one in five people who struggle with traditional reading, and saves the 320 million or so books that end up in landfill every year.

The challenge that we face as a fast-growing, innovative business is that Apple and Google use their dominant positions in the mobile device and mobile app ecosystem as a means of forcing themselves into transactions between us and our customers. They do that to us in two ways: they force us to distribute our apps through the app stores, then, because we are distributed through the app stores, they force us to use their in-app payment services when we want to enable our customers to buy in-app, which is clearly the most obvious way in which customers would expect to transact with us, as we are an app-led business. They also prevent us from using alternative providers such as Paddle, which is a great UK business that we would love to use.

The challenge that that creates is that, by forcing us to use their in-app payment systems, they charge us about five to 10 times more than we would pay in the free and fair online payments ecosystem—we would be paying about 3%, versus the 15% to 30% they charge—and they pay us our own revenue at least a month late. That is our own revenue—

Q163 Seema Malhotra: "At least a month"? How long could that take?

Kelli Fairbrother: For example, the revenue that I earned on 1 January this year I did not earn back from Apple until 9 March. By comparison, on average, online payments are paid to us in about seven days on a regular basis. The fees are effectively allocating all of the costs and generating excess profits from a minority of people who use the system to deliver digital content and services, which happen to compete with Apple and Google's content services businesses. The behaviour you see in the market is the result of this behaviour. Companies either need to charge more for in-app purchase or they force customers on to a web experience to redeem their content in the app.

You heard earlier from Match explaining the difference between Uber and Match. It is the same. If I were selling physical books, I would not be subject to a 30% tax, even if I were selling them through the app, so that is interesting. As a very early-stage business, this hit to our margin and our cash flow is especially precarious. As you can imagine, it makes it difficult to access investment, especially in what is a very difficult fundraising environment at the moment.

The other thing we observe is that, as a non-subscription-based business, the app stores are not really fit for purpose for our needs. Up until about a month ago, we were allowed to choose—we have a catalogue of 50,000 titles—from approximately 90 price points, from 99p up to about 1,000. Our customers receive invoices that say, "Audiobook: £7.99". They do not give them any more detail, which makes it difficult to know which books they have bought and which books they are trying to return. We do not control returns.

Q164 Seema Malhotra: Sorry, could I ask a question on this? You are given 90 price points by Apple and you have to choose them. Then Apple effectively does the marketing. If they say what it is, you cannot say anything extra about the products.

Kelli Fairbrother: In the receipts, yes, that is correct. I cannot merchandise—what we would call merchandise—or allocate the receipt to a particular title that the person bought to allow for the ability to reconcile transactions. It is not possible on Apple. Again, it is not fit for purpose. The way that the system works is that it is delivering you a receipt that says, "Audiobook: £7.99". Those are the limitations of the system. Any discussion of it being a competitive product is quite misleading.

They offer us no control over our returns. Although there is some ability to control returns through the Apple system, it is difficult to understand exactly the

process by which we are allowed to challenge returns. My co-founder is among the best in the world of digital media tech, a former director of production technology at ITV, and he is constantly frustrated by the limitations of the app store APIs. We get very little visibility into the transactions from Apple and Google. Our model for in-app payment where we sell these multiple thousands of different products is terribly supported by Apple and Google. We believe that it is either unintentionally—through neglect—unsupported, or intentionally, trying to force our customers to be on a subscription model.

Seema Malhotra: I will have to move on.

Christian Owens: I started Paddle about 11 years ago to help small software companies and developers to sell their products internationally. Today, we do that for around 5,000 businesses, a number of which are based in the UK. We provide payment services. We help those businesses to take payments all around the world and to pay local taxes and be compliant with the various regulations of wherever it is they sell.

For the last 10 years we have had constant inbound from our customers—who we support by processing payments and paying their taxes for them online for the web or desktop-based version of their products—saying, "Why can't I use Paddle for my iOS or Android app?" We have tried on numerous occasions to figure out a solution to that, but we are simply prevented, on the basis of the terms and conditions of the app stores, from allowing those developers to process transactions via any mechanism that is not controlled by Apple and Google. For us, we are explicitly prevented from competing. I have no problem if Apple or Google build a better solution than us—that should win. Today, we are not even allowed to try.

Q165 The Parliamentary Under-Secretary of State for Science, Innovation and Technology (Paul Scully): I just have just a couple of follow-up questions, because I think I got most of what I need from that. On the merchandise area, you say you cannot get out the receipts. Presumably, you have another mechanism, because you have got to ascribe some of it to the authors, or do you author all the books yourself? How do you process who has bought what on that side of things, rather than the back office bit?

Kelli Fairbrother: We are monitoring, on our own side, the transactions to be able to control entitlements, because we actually have to control the rights of the books for individuals who have purchased them. The risk for us is that a lack of ability to reconcile at the level of an individual transaction actually puts us at a degree of risk, in terms of our ability to manage the 100% accuracy of what we have delivered. The other interesting thing that happens, on the returns side, is that a customer could read the entire book and go to Google and get a return. I am only getting informed of that after the fact; I cannot really challenge the fact that the return was probably invalid. That is another example.

Q166 Paul Scully: I know you saw the other panel. You have come out and put your head above the parapet, as it were, whereas a lot of companies would not. Why is that? How is your relationship with the app stores? You have a wider relationship with the app stores—do you see the positive side as well?

Kelli Fairbrother: I think the internet is global, and there are plenty of options out there. We are not convinced that we are not sending our own customers to Apple and Google, as an example. Customers are finding us, and they are being forced into particular ways to buy. Yes, there might be some benefit, but I am not convinced that the global internet would not provide me that same benefit and do it in a more competitive way.

Q167 Paul Scully: Briefly, Christian, you talk about Apple or Google having a different, better system that you could then access. What do you think you would need to do to have the assurance that that system was safe and secure for what you are offering?

Christian Owens: We have been doing this for 11 years, exclusively for digital products and for software companies; we have worked with thousands around the world and sell billions of pounds worth of digital and software products a year. This is something that we are very familiar with. Really, one of the main reasons that companies come to Paddle is so they can do that in a compliant manner. With the nature of digital commerce being so international, and dealing with various regulations and things like this around the world, coming to a trusted third party that is able to navigate all of those things for you—but, in our instance, do so in a way that is economically viable for these businesses—is what we have been doing for the last 10 years.

We have a tried and tested solution that has been working, and that many millions of consumers have used over the last 10 years. It is just that we are prevented from selling in this single medium.

Q168 Paul Scully: So you would be okay if they set standards for you to reach to have access?

Christian Owens: Absolutely.

Q169 Paul Scully: One final question: do you think the Bill, as is, gives you the speed and depth of remediation that you need to level that playing field?

Kelli Fairbrother: We think the Bill is a great first start. We think that it will give the digital markets unit the powers to move quickly. We would love to see timelines around the conduct requirements built in. We think this is a great opportunity for the UK to take a leading role in creating a free and fair ecosystem in the mobile space.

Christian Owens: I have nothing to add.

The Chair: Minister Hollinrake?

The Parliamentary Under-Secretary of State for Business and Trade (Kevin Hollinrake): I have no further questions.

Q170 Vicky Ford (Chelmsford) (Con): Do you see Google and Apple acting in collusion and taking similar moves, or are they different moves? Do you see examples where they are putting similar blocks against businesses?

Kelli Fairbrother: Yes. It is interesting, because there are differences between the two ecosystems. Whereas I do get transaction-level data from Google, for example, I do not get it from Apple. Apple moved first to lower the price points from 30% to 15%, and Google took at least another six or 12 months after Apple moved to

create that small business tier. Generally, they seem to be both on this path of using their dominant market positions to extract as much value from me. The question I would love to hear Google answer when they come in later is that these are our customers; my customers are also your customers. I just do not really understand why, if you can see that there is actual consumer harm happening, you are not working yourselves to address it.

Q171 Vicky Ford: Christian, do you see them acting—do you think they are in collusion?

Christian Owens: I would not want to say that that is definitely happening. I think it is rather coincidental that within six to eight weeks of any price change happening in one ecosystem, it tends to happen in the other, as mentioned with the small business tier of 15%, with the subscription tier after one year also reducing to 15%. It does seem that way.

Q172 Vicky Ford: You have been very brave, Kelli, in coming and talking about your experiences, because there will be some companies that say, "I don't dare say that, because these guys have got so much power over me." There are other issues where women sometimes do not speak out when they say that people have got power over them, so you are obviously being very brave. Do you think there is enough protection for people's confidentiality in this Bill that others will feel that they can talk about what is happening?

Kelli Fairbrother: I am afraid that I am not a lawyer on the depth of confidentiality. From our side, we would love to see a little bit more transparency in the consultation process, so if there is action being taken by the DMU, we would love to make sure that we are being consulted if it affects our area. I am not sure I have a strong opinion on the confidentiality piece itself.

Q173 Vicky Ford: Christian, do you have any further—?

Christian Owens: No, not any specific details on this.

Q174 Seema Malhotra: On a slightly different area, there were some concerns raised by some Members in the debate on the Bill about the Government changing the appeals process to one based on judicial review, as opposed to a merits-based review. How important, in your view, is that, and what would you want to see if the Bill progresses through Parliament?

Kelli Fairbrother: It is absolutely critical that judicial review is the standard that is used, because I think we have seen time and time again, in markets all around the world, that when Governments act, Apple and Google do their best to try to get around the work that is being done. They lawyer up—they have millions to spend on appeals slowing things down—and there really is a sense of urgency. This is existential for a lot of small app developers, so we would really urge that the Bill passes, it is not watered down and it passes without delay and without dilution, I think we would say.

Christian Owens: I agree.

Q175 Andy Carter (Warrington South) (Con): I have just downloaded your app, so you have got another customer there.

Vicky Ford: He is such a charmer.

Andy Carter: I was interested in what you said about the cost of transactions. You suggested 3%. Where does that figure come from?

Kelli Fairbrother: Because of the constraints that Apple and Google put on us, we built a website, and on our website we use Stripe integration. The Stripe fees come out at about 3% to 4%, and it pays us every seven days. Again, this is where you can see competition; in the online payments ecosystem, there is healthy competition. Then you compare that with the app store monopolies and the control that it exerts over payments. The terms and conditions say that I am not allowed to use a prohibited payment method—for example, Christian is a prohibited payment method. That is not a free and fair ecosystem.

Q176 Andy Carter: Christian, do you want to add to that? You are in that space. Is 3% or 4% the sort of—

Christian Owens: We take the action that Apple and Google are taking, in terms of processing a transaction. We do this for thousands of companies outside the realms of the app store. The average price that a business will pay us will be somewhere in the region of 5%, and we are able to provide all the same services. We do payment processing. We are able to pay local sales taxes. We are able to deal with fraud. We review, with a human, every product that we sell before we sell it to ensure consumer safety. We are able to do all that in a profitable way by charging 5% on transactions.

Q177 Andy Carter: Sorry to flip between you, but Kelli, are your prices higher as a result of what you are having to pay? If there is freedom to choose who processes, will we see prices come down?

Kelli Fairbrother: For our site, because of the 15%, we tend to break even on most of our transactions—on a transactional basis. So for us, there actually is not a great deal of room, because we also pay the content providers. The challenge that we have at the moment is that we are trying to raise investment and look as investible as possible. The reason why we built the website is that we were given a really difficult decision: should we force people into a web-based experience, to try to regain the margin that we have lost, or should we raise our prices? For us, it may not be that you will see this immediately delivered back to the customer. For us, the position is that we are going to continue to deliver an exceptional experience to the customer and we are going to be able to afford to do that. That is the crux of it for us.

Q178 Andy Carter: This will be the final question from me. If we look at the Bill overall, is there anything that it does not tackle that you think it should?

Christian Owens: In its current form—as it is now—this is a very good Bill, and I really encourage it to go through without being watered down any further. It is great as it stands; it is a great start. I think that it is going to allow small businesses in this country to be more competitive and not be giving away a third of their revenue, effectively, to Apple and Google.

Kelli Fairbrother: I agree.

Q179 Paul Scully: This is a question that I forgot to ask Kelli earlier about payment. You said something about Apple paying you over a period of time. Is it not

automated? Is there any reason why it cannot be? Late payments are always an issue for small businesses. You were talking about Stripe, which pays on a regular basis. Is this not on a regular basis as well?

Kelli Fairbrother: It is regular in the sense that the company takes a month of data and then pays me a month and some days later. So it happens every month, but it is happening every month on a timeline that is, again, at least five times as long as what I would be getting—using Stripe as an example.

The Chair: I thank our witnesses for giving evidence today. We will move on to the next panel. Thank you very much.

Examination of Witness

Tom Morrison-Bell gave evidence.

2.24 pm

The Chair: Thank you very much for coming, and welcome. We will now hear oral evidence from Tom Morrison-Bell, Government affairs and public policy manager at Google. We have until 2.45 pm. Could the witness please introduce himself for the record?

Tom Morrison-Bell: I am Tom Morrison-Bell. I am a public policy manager at Google, and I work on a range of competition and media policy issues.

Q180 Seema Malhotra: Thank you very much for coming to give evidence today. A 2019 Competition and Markets Authority report found that Google enjoyed over a 90% share in the search advertising market in the UK. Would you accept the argument that such a significant market share is to all intents and purposes a monopoly that hinders growth and innovation?

Tom Morrison-Bell: Thank you for the question. Let me just take a step back and look at how search and this question fit in with the current regime. A huge amount of consumer benefit comes from products such as Google Search. By and large, Google's products are free, and there are also paid services that support around 700,000 small businesses in the UK. If you look at the financial aspects of search—so, advertising—the revenues generated are in a very small subsection of that. The market might be e-commerce or retail, for example, rather than general search. If you look at retail—people will place an ad next to a keyword such as "buy trainers"—you will see in the market that most retail searches do not start on Google Search. Also, advertising revenues on other e-commerce platforms are growing much faster than Google. So it is important to understand it specifically: yes, there is a general search engine, but in the case of markets, that can often be a different story.

Q181 Seema Malhotra: I want to understand whether you accept that there is a problem with the effective monopoly. In terms of growth and innovation in the sector, I am keen to understand whether you have a view about some of the evidence, which you may have heard, that constraints are effectively a hindrance to innovation. One example, which we have just heard, is about the ways in which other payment systems are prohibited and about the costs associated with having apps in Google. Are some of those behaviours, and the way in which Google is interacting, inhibiting innovation and costing the consumer more in turn?

Tom Morrison-Bell: With respect, I do believe that Google is one of the most innovative companies and largest investors in innovation. Between 2018 and 2022, Google spent $145 billion on research and development. That includes amazing stuff that happens here in the UK. For example, Google DeepMind, which is probably the world's foremost artificial intelligence research institute, is based here and is solving incredible problems such as protein folding.

Q182 Seema Malhotra: I accept and recognise the innovation that Google brings. The Bill is addressing specific issues around market power and the dominance of big tech. Perhaps you could give us your more general views about the Bill and what your concerns are.

Tom Morrison-Bell: Yes, I can. I am happy to touch on some of those issues with regard to the Bill. As you will have heard by now, the Bill gives very extensive powers to the DMU that will be highly discretionary and very open-ended. That is how the Bill has been drafted. In Google's case, those will be powers to direct how complex products are designed, and critically the regime will be forward-looking rather than backward-looking, which is how traditional competition policy works. As I have said, Google's products and services drive a huge amount of consumer benefit in the UK, and these markets are fast-moving and complex.

With the Bill specifically, our key point is that in relation to products that provide a substantial amount of consumer benefit, that are innovative and that are complex, it is important that these very open-ended powers for the regulator have appropriate checks and balances. I wanted to bring to the Committee three specific areas in which we think the Bill can be strengthened. I am sure that you will have heard about these in other sessions.

First, I think there are strong grounds for making sure that the appeals standard is aligned with that in the Competition Act 1998, which is appeal on the merits as opposed to judicial review. Secondly, the Bill should ensure that consumer benefits can appropriately be considered by the regulator in the regime by adding a bit more coherence to the way the countervailing benefits exemption is constructed. Thirdly, one of the really innovative things that is designed to drive the Government's ambition of ensuring that it is a speedy regime with innovation at its heart is this idea of a participative approach, whereby all parties involved in the market are encouraged into dialogue with the regulator.

One thing that the Bill provides for is for private cases to be brought before the digital markets unit has found any breach of a requirement on a firm. If that is the case, we think it is important that the digital markets unit is given the opportunity to make the decision first. Otherwise, there is a risk of the courts deciding something and the digital markets unit deciding something else, so that we end up with potentially conflicting compliance requirements on regulated firms.

Q183 Seema Malhotra: I will finish with this question, because I am conscious that colleagues want to come in. In terms of the participative approach, I have cited

before the CMA's dialogue with Google over the Privacy Sandbox policy and their reaching an agreement on how to move forward. I cite that as an example of how the participative process has worked.

I want to come back to a specific point. You have talked about consumer benefit, and I think we all see the consumer benefit that can and does come from the innovation of Google. However, given your dominance and market power, do you accept that the way in which Google works with other companies is actually contributing to consumer harm as well?

Tom Morrison-Bell: As a general statement, no: I would not agree with that, straight up. We deliver huge amounts of consumer benefit. There are numerous areas where we are and have been in dialogue with the CMA. We really want to continue to be able to deliver that.

Q184 Seema Malhotra: So you do not accept any of the examples we have heard of consumer harm.

Tom Morrison-Bell: Well, I think there are some things to unpack. For example, payment systems have been mentioned. We have agreed commitments with the CMA—I believe they are out to market testing at the moment—on offering a range of payment systems. When it comes to app stores, 99% of app users pay 15% or less on fees. There are important details here.

Q185 Paul Scully: Tom, it is good to see you. Thank you very much for coming in front of us. We have had some quite punchy evidence sessions before this, so it is important that we get a balanced view. Obviously you are not here to speak for all of big tech and everything that has been going on. Let me give you a minute or two to give the other side of the argument about how you are benefiting, as you see it, the kinds of companies represented in the previous session and in the session before that.

Tom Morrison-Bell: Generally speaking, Google is estimated to provide around £55 billion of economic activity a year in the UK, as a starting figure. We have multiple products. It depends where you look. Workspace is our productivity suite, with word processing and similar, and is estimated to have saved 600 million hours for workers around the UK through more effective communication and speedier software. As I have said, tools like search and maps are free, and they also support businesses across the country to be more effective. That drives £55 billion in economic activity.

There is also our Play store. Android is open source and a free operating system that is available free to mobile device manufacturers, and they can make their own versions. That has substantially driven down the cost of handsets around the world and has been a huge contributor to making sure that people can have access to the internet at lower rates. The Play store itself is estimated to support about 240,000 developer jobs in the UK alone. That drives revenues for them of about £2.8 billion. Across the board, there is substantial benefit.

Q186 Paul Scully: I know that you are broadly supportive of the Bill, although there are areas that you disagree with. Could you address the comments in our previous evidence sessions that were aimed specifically at Google? Until the Bill is passed, what can you do in the meantime to start addressing some of those issues?

Tom Morrison-Bell: There are two things there. First, what is most important about the regime is that consumers are at the heart of it, and that it is for the regulator, with the powers that it is given, to make the assessments as to whether practices are pro-consumer or not.

What we also think is important is that on one side we have very large and open-ended powers, with products and markets that drive a lot of consumer benefit, and on the other a need for more robust checks and balances to ensure that consumers really are at the heart of the regime. In a sense, it is less about what company X says about company Y than about the coherence of a regime to ensure that consumers are at its heart and that the Government's ambition for driving innovation without blanket requirements on firms or unduly burdensome regulation is realised.

Q187 Paul Scully: I have a final question on appeals. You talked about full merits. I understand the need to get the balance right in being fair to both sides, but how do you answer the charge? My biggest fear about the consistent level of JR is whether it is just used to kick things down the road, before starting on full merits, as we heard on Tuesday about the significant element of competition law from a competition expert. Basically, it would be used to outspend and outbox opponents.

Tom Morrison-Bell: Of course. There are two questions about appeals to address. One is speed, which I will come to, and the other is why there are good, principled reasons for that being the right standard.

As I said, the Competition Act has appeal on the merits as the appeal standard. These interventions are much more akin to what the Competition Act does. In both 2013 and 2019, the Government consulted on whether to lower the threshold in the Competition Act to judicial review. In both cases, it was decided not to do so. Indeed, in 2013, the competition appeal tribunal itself made a submission that that would not be appropriate, because it had seen cases overturned or sent back to the CMA.

Furthermore, in recent weeks, an interesting paper by the former head of the Government Legal Service, Sir Jonathan Jones, appeared as a law article. He said specifically with regard to the DMU that, with those very open-ended powers on the one side, the current proposals—his quote, not ours—give rise to "concerns about due process", because of the imbalance. There are strong and principled reasons why.

There is also the speed point, which needs to be addressed. That is in line with the regime and, as when we worked on the Privacy Sandbox, we want this to be a speedy regime, to accelerate it. We have shown good will in real examples of how we have tried to make that participative approach work. But there are other existing regimes in which, by and large, the CMA is given time limits to which it has to respond. That is evident in gas or electricity prices, postal services, civil aviation, parts of financial services, parts of water and numerous other precedents in the UK of time-limited appeals. There is, however, scope to ensure that we end up with consumers at the heart. It is important—these are complex products—that at the end of the day we are able to have a system in which someone can scrutinise whether the decisions are right or wrong for consumers and companies. It is not just about whether due process has been followed.

Q188 Kevin Hollinrake: No doubt you are right that there are consumer and business benefits from what Google does, so thank you for the investment you made to ensure that that is the case. We will always intervene—or we should intervene—where there is market failure. We believe that there is market failure in certain areas here, so this is in that context.

On innovation, we are keen that you continue your R&D spend and innovate. Is there anything in the Bill that will make you think twice about innovation? We asked other witnesses and they cannot see any issue, but some concerns have been raised with us. Do you feel that you might have to talk to the regulator or CMA before you develop a new product? Is that a rational concern that you have?

Tom Morrison-Bell: The Privacy Sandbox is probably the best example of perhaps any company, as far as I am aware. That is the only model to date that could be a bit like the participative approach. That is a really good example of where we were able to come to the regulator to say, "Look, when it comes to competition, there are trade-offs. In this case, it is privacy, with us phasing out cookies, with competition, because maybe you have to use different Google advertising technologies." We would like the competition authority and the privacy authority to make sure that both their concerns are met before we roll things out. That is good, because it prevents costly roll-outs that might have to be rolled back, and regulators are aware, consumers have clarity and other businesses in the ecosystem have clarity as well. It is true that that required numerous months of consultation with the regulator, but I think there is the opportunity for the participative approach to work well. Again, because you have this open-ended and flexible system, it is important that there are checks and balances in place.

Q189 Kevin Hollinrake: I think the question I am trying to ask is: you are not honestly saying that you are going to stop innovating because of this Bill, if becomes an Act?

Tom Morrison-Bell: No. We are really committed to the UK, which is a special market for us. We employ 6,500 people here. But those checks and balances are important to make sure that you know that your decision is right or wrong, not just whether due process has been followed.

Q190 Anna Firth (Southend West) (Con): I am sure we all agree that we want to put consumers at the heart of the regime. I want to put to you the very specific and powerful example that we have heard this afternoon, which I do not think you have really answered, from a British start-up in Cornwall selling electronic books. If it does it on an app, it will have to pay up to 30% in payment processing charges, and the payments can be delayed by as much as two months. If it does it with a web-based approach, where there is competition for payment processing—it uses Stripe, for example—it will pay 3% to 4% in processing charges and receive those payments within seven days. How can it possibly be in the best interests of my residents and businesses in Southend-on-Sea not to address that huge distortion in the market, with a huge monopoly and another system where there is more free competition?

Tom Morrison-Bell: With respect, I think that if you look at the broader Play system as a whole, 99% of all users of the Play store—those developers—pay 15% or less on their fees. By and large, the fees are staggered. That means that companies that make less money get to enjoy the benefits of the ecosystem in the same way as larger companies, which may pay larger fees.

On the payments point specifically, we are in discussions with the CMA, as I said. There are two different billing models, which are being agreed on and are out for market testing, so there is ongoing discussion in a constructive way with the CMA that will bring forward those two new payment methods.

Q191 Anna Firth: But why do you prohibit other payment providers from operating?

Tom Morrison-Bell: I do not think we do. This is what the CMA process is going to yield: something called user choice billing or developer choice billing. In developer choice billing, developers can pick their billing system; with user choice billing, it is users who have the choice.

Q192 Anna Firth: So you agree that it needs reform.

Tom Morrison-Bell: It is being reformed. The developers will have those choices, and those choices are being scrutinised by the CMA to make sure that they are good for consumers, that they are good for companies like the ones you mentioned, and that they are appropriate in the ecosystem.

Q193 Vicky Ford: If you are so keen at Google to work with the CMA and other competition authorities to get issues resolved quickly, why did Kelkoo tell us this morning that its issue is unresolved and has been going on since 2009, and why did the EU Commission need to make the announcement today about the investigation into ad tech procedures that it started two years ago, minus a handful of days? It seems to me that Google does not actually get these differences resolved in anything like a timely way.

Tom Morrison-Bell: I think there are a few things to unpack there. With respect, the Kelkoo case refers to the Google Shopping case with the European Commission. The remedy that was agreed by the European Commission as the competition authority was rolled out by Google in 2017, around 60 days after the finding was heard. The appeals are still going on, because there are different points of law that are being considered, but the remedy—

Q194 Vicky Ford: So it is six years of appeals.

Tom Morrison-Bell: But, importantly, the remedy that was agreed by the Commission has been in place for six years. That is not necessarily going to change if the points of law change. The remedy has been in place for that time, and the courts considered the opinions of various different complainants and Google as part of that appeal process.

Q195 Vicky Ford: What about this latest one, on ad tech, which has been going on for two years?

Tom Morrison-Bell: The Commission's inquiry process has been going on for two years, rather than a legal process.

Q196 Vicky Ford: But I thought that you were trying to say to us that, where there was an issue, you would work to get that resolved really quickly with the competition authorities.

Tom Morrison-Bell: The proposed participative approach in the UK is different from how the competition system works in Europe.

The Chair: Order. I am afraid that that brings us to the end of the time allocated for this session. On behalf of the Committee, may I thank our witness for giving evidence today?

Ordered, That further consideration be now adjourned. *—(Mike Wood.)*

4.45 pm

Adjourned till Tuesday 20 June at twenty-five past Nine o'clock.

Written evidence reported to the House

DMCCB12 Richard Stables, CEO, Kelkoo Group

DMCCB13 UK Finance

DMCCB14 City of London Law Society (CLLS) Competition Law Committee

DMCCB15 Epic Games, Inc

DMCCB16 Association for Commercial Broadcasters and On-Demand Services (COBA)

DMCCB17 The Walt Disney Company

PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT
GENERAL COMMITTEES

Public Bill Committee

DIGITAL MARKETS, COMPETITION AND CONSUMERS BILL

Fifth Sitting

Tuesday 20 June 2023

(Morning)

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No proofs can be supplied. Corrections that Members suggest for the final version of the report should be clearly marked in a copy of the report—not telephoned—and must be received in the Editor's Room, House of Commons,

not later than

Saturday 24 June 2023

The Committee consisted of the following Members:

Chairs: Rushanara Ali, Mr Philip Hollobone, †Dame Maria Miller

† Carter, Andy *(Warrington South)* (Con)
† Coyle, Neil *(Bermondsey and Old Southwark)* (Lab)
† Davies-Jones, Alex *(Pontypridd)* (Lab)
† Dowd, Peter *(Bootle)* (Lab)
† Firth, Anna *(Southend West)* (Con)
† Ford, Vicky *(Chelmsford)* (Con)
Foy, Mary Kelly *(City of Durham)* (Lab)
† Hollinrake, Kevin *(Parliamentary Under-Secretary of State for Business and Trade)*
† Malhotra, Seema *(Feltham and Heston)* (Lab/Co-op)
† Mayhew, Jerome *(Broadland)* (Con)
† Mishra, Navendu *(Stockport)* (Lab)
Russell, Dean *(Watford)* (Con)
† Scully, Paul *(Parliamentary Under-Secretary of State for Science, Innovation and Technology)*
† Stevenson, Jane *(Wolverhampton North East)* (Con)
† Thomson, Richard *(Gordon)* (SNP)
† Watling, Giles *(Clacton)* (Con)
† Wood, Mike *(Dudley South)* (Con)

Kevin Maddison, John-Paul Flaherty, Bradley Albrow, *Committee Clerks*

† attended the Committee

Public Bill Committee

Tuesday 20 June 2023

(Morning)

[Dame Maria Miller *in the Chair*]

Digital Markets, Competition and Consumers Bill

9.25 am

The Chair: To avoid anybody expiring, please remove your jackets, if that would help. Please ensure that electronic devices are in silent mode. No food or drink is permitted during the sittings of the Committee, except for the water provided. *Hansard* colleagues would be incredibly grateful if Members could email their speaking notes or pass their written speaking notes on to the *Hansard* colleague in the room.

Today, we begin line-by-line consideration of the Bill. The selection list for today's sitting is available on the table in front of me. It shows how the selected amendments have been grouped together for debate, and I urge colleagues to examine it carefully, because some clauses are grouped together, which will make things a little more complicated as we move forward. Amendments grouped together are generally on the same or a similar issue. Please note that decisions on amendments do not take place in the order they are debated, but in the order that they appear on the amendment paper. The selection and grouping list shows the order of debates.

Decisions on each amendment are taken when we come to the clause to which the amendment relates. Decisions on new clauses will be taken once we have completed consideration of the existing clauses of the Bill. Members wishing to press a grouped amendment or new clause to a Division should indicate when speaking to it that they wish to do so. If colleagues want to speak to an amendment or take part in a stand-part debate, they should indicate that to me in the normal way, so that I can ensure that everybody who wishes to participate does so.

Clause 1

Overview

Question proposed, That the clause stand part of the Bill.

The Parliamentary Under-Secretary of State for Science, Innovation and Technology (Paul Scully): It is a pleasure to serve under your chairmanship, Dame Maria, and to address the Committee today. I thank all its members for volunteering to serve on this Committee, and I look forward to our discussions over the coming days and weeks.

Part 1 of the Bill provides for the pro-competition regime for digital markets. This is a targeted regime that will establish new, more effective tools for the Competition and Markets Authority and, in turn, the digital markets unit. That will allow them to proactively drive more dynamic digital markets and prevent harmful practices.

Clause 1 is purely introductory and provides an overview of part 1. I hope that hon. Members agree that this clause will therefore assist readers to navigate this part. I will briefly explain some of the language I will use in this series of debates. First, the Committee will hear me referring to the digital markets unit, or the DMU, which is a new administrative unit of the Competition and Markets Authority—the CMA. While the legal functions of the regulator under part 1 of this Bill remain those of the CMA, in practice it is likely that most of the responsibilities under part 1 will be carried out by staff within the DMU. Therefore, for consistency and ease, I will be referring to the DMU throughout the debates. The exception to that is the merger functions in chapter 5 of part 1, which will generally be carried out by those staff who deal with mergers more broadly.

Secondly, I will use the words "firm" and "undertaking" interchangeably. "Undertaking" is the word used in this part of the Bill and is an economic concept that is already used in the Competition Act 1998. The concept of an undertaking covers any person engaged in economic activity, regardless of its legal status and the way in which it is financed. "Persons" may be corporate bodies, and an undertaking may encompass multiple corporate bodies when they form a single economic unit under competition law. The Government's view is that an undertaking will often encompass the entirety of the relevant corporate group, but it may sometimes be a smaller subset of the corporate group.

I hope that that helps to clarify the language that the Committee will hear over the coming days.

Alex Davies-Jones (Pontypridd) (Lab): It is a genuine privilege to serve under your chairship, Dame Maria. I look forward to the weeks ahead. I imagine that the debates will be healthy but, in a real rarity for this place, relatively collegiate too. With that in mind, I will keep my comments on this clause brief. We all agree that this is an important that we will not seek to delay. Competition is vital to encourage innovation, and consumers deserve the best possible protections and value. We all want to get this right, and the Minister knows that. I want to say clearly that the Opposition welcome the Bill in principle. However, it will come as no surprise that we have some concerns that the Bill is lacking in some areas and could go further. We will explore those concerns in the hours and weeks ahead, and I look forward to debating the Bill further.

Question put and agreed to.

Clause 1 accordingly ordered to stand part of the Bill.

Clause 2

Designation of undertaking

9.30 am

Alex Davies-Jones (Pontypridd) (Lab): I beg to move amendment 55, in clause 2, page 2, line 25, at end insert—

> "(5) An SMS investigation in subsection (4) may take account of analysis undertaken by the CMA, on similar issues, that has been the subject of public consultation, within the five years prior to Royal Assent of this Act."

This amendment and Amendments 56 and 57 ensure that the CMA is able to draw upon analysis and consultations that took place before the passing of this Act.

The Chair: With this it will be convenient to discuss the following:

Amendment 56, in clause 13, page 7, line 18, at end insert—

"(3) Consultation on matters relevant to a decision under section 14(1) undertaken before this Act is passed is as effective for the purposes of subsection (1) as consultation undertaken after it is passed, unless the CMA considers that there has been a material change of circumstances."

See statement for Amendment 55.

Amendment 57, in clause 47, page 26, line 10, at end insert—

"(3) Consultation on matters relevant to a decision under section 14(1) undertaken before this Act is passed is as effective for the purposes of subsection (1) as consultation undertaken after it is passed, unless the CMA considers that there has been a material change of circumstances."

See statement for Amendment 55.

Alex Davies-Jones: With your permission, Dame Maria, I will make some general points about clause 2 before turning to the amendments. Clause 2 gives the CMA the power to designate undertakings, as defined in clause 115, as having strategic market status in respect of a digital activity. Of course, only those undertakings designated with SMS will be subject to the digital markets regime.

The clause is vital in establishing the CMA's new functions that will allow it to regulate digital markets. We welcome efforts to put the previously established digital markets unit on a statutory footing, and we see it as a key step in establishing the CMA's responsibility for overseeing digital businesses of a certain size and status operating in the UK. As colleagues will note, this part of the Bill is seen by many as the UK's version of the EU Digital Markets Act as it has many similarities to it. For an undertaking to be designated as having SMS, the following conditions need to be met: the undertaking carries out a digital activity, which means either providing an internet service or digital content; that digital activity is linked to the UK; and the undertaking must have substantial and entrenched market power. The latter condition requires the CMA to look five years ahead and imagine future developments. The undertaking must also have a position of strategic significance in that it generates £25 billion in global turnover or £1 billion turnover in the UK.

We see those as sensible barometers for SMS status, but I want to take this brief opportunity to press the Minister further on the CMA's ability to look to the future. He will know—and, I am sure, agree—that the sectors we seek to regulate are often incredibly fast moving. We will debate this further shortly in clause 5, but I would be grateful for the Minister's thoughts on this particular point, especially around his assessment of the CMA's capacity and ability to essentially predict how changes across industries will emerge.

Amendments 55 to 57 would ensure that the CMA would be able to draw on analysis and consultations that took place before the passing of this Act. The amendments are critical to ensuring that the CMA is able to draw on the work that it did in shadow form once the Bill lands on the statute books. We cannot risk further delay to implementing this regime when we already know that the lack of competition regulation is having a significant impact on both consumers and businesses.

Last week we heard evidence from Professor Myers, who is a visiting professor in practice at the London School of Economics and Political Science. He had some interesting comments to make on the timeline for the Bill so far which I feel are worth reiterating here. Professor Myers said that

"this legislation has taken a while to come to fruition. At one point the UK looked like it was going to legislate before the European Union, but the CMA has done a lot of preparatory work, and I am sure that it recognises that it needs to hit the ground running as soon as this legislation is passed."—[*Official Report, Digital Markets, Competition and Consumers Public Bill Committee,* 13 June 2023; c. 46, Q72.]

That is why the amendments are so important, because they would allow the CMA to reflect on the lessons learned in the various consultations and analysis that it has already undertaken. I hope the Minister can see that these simple amendments would make sense for all involved.

The Chair: Before we proceed, I note that the shadow Minister has efficiently covered clause 2 stand part, so perhaps the Minister could also do so in his response, in the interests of time.

Paul Scully: Amendments 55 to 57 relate to ensuring that the DMU will be able to use, in its digital markets investigation, evidence that was gathered and consultations that were undertaken before the Bill becomes an Act. I am grateful for the opportunity to explain this really important aspect of the regime.

To provide some context, clause 2 will give the DMU the power to designate undertakings with strategic market status with regard to a specific digital activity. It sets out that, to designate a firm with SMS in respect of a digital activity, the DMU will need to be satisfied that a number of conditions detailed in clauses 3 to 8 are met. SMS designation is the gateway into the digital markets regime. Only the very small number of firms that are designated will be subject to the rules of the regime. The DMU will only be able to designate a firm following an evidence-based SMS investigation, which must include a public consultation that allows the firm itself and wider stakeholders to provide input on the designation decision. I explained earlier that I would use "firm" and "undertaking" interchangeably. Accordingly, when I say a "firm with SMS" or an "SMS firm", that is the same thing as a "designated undertaking".

Turning to amendment 55, I strongly support the point that the CMA should not have to repeat work that it has already done. It is for the DMU to decide what is and is not relevant analysis to its investigations, and it should be able to draw on insight from previous analysis or consultations when carrying out an SMS investigation where it is appropriate and lawful to do so. I am happy to confirm that the Bill does not prevent the DMU from doing that, provided that it acts in accordance with general public law principles, which would, for example, require it to ensure that evidence remained relevant. As such, I do not believe this amendment is necessary to ensure the DMU can reflect its existing evidence, understanding and expertise in its designation investigations. Further, the amendment could restrict the DMU's ability

[Paul Scully]

to draw on analysis that had not been the subject of consultation, even if the DMU considered that analysis to be relevant to an investigation.

Amendments 56 and 57 relate specifically to consultations on proposed decisions as part of the DMU's SMS and pro-competition intervention investigations respectively. The DMU can launch PCI investigations into suspected adverse effects on competition. We will return to PCIs when debating the clauses in chapter 4.

Consultation is a fundamental feature of the regime. It ensures that the decisions are based on the best available evidence and that the regime is transparent. For SMS and PCI investigations, the DMU must consult on the specific decisions that it intends to take at the end of its investigation. That will ensure that all relevant parties have an opportunity to feed in views and perspectives on what the DMU is proposing on the decision at hand, not simply on the general operation of the market.

As I have highlighted, it is absolutely right that the DMU will be able to draw on broader knowledge during the course of its investigations, but it should not be able to do away with the consultations entirely. The consultations are a necessary part of the procedural safeguards that ensure good decision making. I know that the Coalition for App Fairness said that it would raise that in its evidence. I am grateful for its evidence. I totally agree with it that the consumer should not start with a blank piece of paper, but I do not think that it is necessary to amend the Bill in order to be able to be able to use that existing analysis where it is there.

I will now turn to clause 2, which will give the DMU the power to designate undertakings with SMS with regard to a specific digital activity. To do that, the DMU will need to be satisfied that a number of conditions are met. The concept of "digital activities" is detailed in clause 3. To be in scope of the regime, the turnover condition must be met. That is explained in clauses 7 and 8.

The DMU must also consider that the digital activity is linked to the UK, and that the undertakings meet the SMS conditions in respect of the digital activity. That is to say that the firm has, in respect of the digital activity, substantial and entrenched market power, and a position of strategic significance.

Jerome Mayhew: It is a pleasure to serve under your chairmanship, Dame Maria. I will deal first with whether clause 2 should stand part of the Bill. It is of course axiomatic. Right at the heart of the purpose of the Bill is the designation of undertaking. Importantly, it references clause 7, which deals with the turnover of an undertaking. I am looking forward to what the Minister has to say about clause 7, particularly with reference to the levels of revenue or turnover for an undertaking. The Minister has given definitions for "undertaking" and "firm". I look forward to his further comments about those definitions, particularly when it comes to the classification of worldwide turnover and the revenue being undertaken within the United Kingdom. I am straying slightly into clause 7, but because there is reference to it in clause 2, I hope that is acceptable.

I am just flagging that there may be consideration under clause 7 as to the possibility of the manipulation of turnover where there is a global undertaking with global turnover of less than £25 billion, but where the turnover associated with the United Kingdom is approaching the £1 billion mark. It is foreseeable that we could start to have economically significant manipulation associated with the definition of turnover—I flag that because it is referred to in clause 2. Of course, the main body of clause 2 is right at the heart of the Bill. I welcome the constructive opening comments from the hon. Member for Pontypridd, and I look forward to engaging with her and the other Members of the Committee on that basis over the coming days and, I am afraid to say, probably weeks. *[Laughter.]*

I turn to amendment 55. This Bill is already hundreds of pages long, and it was often noted in my former career at the Bar that legislation gets longer and longer as it seeks to become more and more specific. However, there is a risk with seeking to list all the elements that we wish to cover. By having a list, we encourage exemptions and the seeking out of elements that are not quite on the list. Through that mechanism, undertakings can avoid the intention while complying with the letter. In my submission, the approach taken by the Government in the current drafting of clause 2 is the right one, because, as the Minister has already mentioned, it gives the DMU the wide scope it needs to take account of work that has already been done without constraining it by having a specific list, as amendment 55 would require. Proposed subsection (5), which the amendment would insert, says that an SMS investigation

"may take account of analysis undertaken by the CMA, on similar issues, that has been the subject of public consultation, within the five years prior to Royal Assent of this Act."

Who could object to that? However, the Minister made the point that it is already encompassed within the powers of the DMU under the current drafting of the Bill. If we say that this is specifically included in the body of text, it prompts the question: what if someone is just outside that but would otherwise properly be within the consideration of the DMU? It raises arguments that will be explored via litigation, particularly by organisations that have substantial turnover and considerable economic interests to defend, as we heard in oral evidence over the past week.

The last thing we want is to have legislation that invites clarification by the courts. Although I and the Minister are very sympathetic to the intentions behind amendment 55, I fear that it might have the unintended consequence of increasing the chances of prolonged litigation as we seek to explore what exactly is and is not within scope of the DMU. For that reason, I do not support the amendment.

Alex Davies-Jones: I welcome the comments from the hon. Gentleman and the Minister, but we would like to press the amendment.

9.45 am

Question put, That the amendment be made.

The Committee divided: Ayes 6, Noes 8.

Division No. 1]

AYES

Coyle, Neil	Malhotra, Seema
Davies-Jones, Alex	Mishra, Navendu
Dowd, Peter	Thomson, Richard

NOES

Carter, Andy	Scully, Paul
Ford, rh Vicky	Stevenson, Jane
Hollinrake, Kevin	Watling, Giles
Mayhew, Jerome	Wood, Mike

Question accordingly negatived.

Clause 2 ordered to stand part of the Bill.

Clause 3

DIGITAL ACTIVITIES

Question proposed, That the clause stand part of the Bill.

The Chair: With this it will be convenient to discuss clauses 4 to 8 stand part.

Alex Davies-Jones: We do not oppose clauses 3 to 8, on the basis that they set out what constitutes a digital activity for the purpose of part 1 of the Bill. Clause 3 is an important clause with a number of subsections that clarify the exact definitions of digital activities and provision of services. These are all critical to empowering the DMU, which, if properly supported, has the potential to be a world-leading regulator and is ultimately the critical first step in modernising our competition policy.

We can all agree that the UK has the potential to be recognised as a global leader in technology and innovation, and capitalising on that is vital to our economic growth, yet the current situation, which sees a small number of firms dominate digital markets, is reducing competition for other businesses. Ultimately, it is consumers who are paying the price in the products and services we all receive.

This clause is crucial to defining exactly which digital activity will fall under the regulation, and it is welcome. After all, Labour has been clear and has long called for measures to regulate the digital space more widely. We specifically support the clause, as it gives us all clarity on how we can define digital activity.

Subsection (3), which outlines how the regime will give the CMA the power to treat multiple digital activities carried out by a single undertaking as a single digital activity, is particularly welcome. For different activities to be grouped together, they must either have substantially the same or similar purposes—for example, a social media provider offering a number of internet services under different brands with a common function, allowing users, such as advertisers and publishers, to interact and communicate with each other; or can be carried out together to fulfil a specific purpose—for example, services and products that are part of the same supply chain, such as services selling advertisements and the provision of an advertising platform. We all know the rapid rate at which companies can develop and expand, so it is particularly welcome to see this subsection.

Subsection (4), which sets out that where the CMA is required to give or publish a notice or other document under part 1 of the Bill, it may describe the digital activity by reference to the nature of that activity, brand names, or a combination of these, is also vital to the success of the regime. We clearly support the clause, which we regard as crucial to establishing the barometers of the CMA's regulatory powers, and we have therefore not sought to amend it at this stage.

Clause 4 sets out the ways in which a digital activity could be linked to the UK for the purposes of designation. We are pleased to see that the clause considers the number of UK users in its criteria, as we have all read the reports of tech firms threatening to leave the UK if other legislation places requirements on them in future. That is why, with regard to pro-competition law, the UK user base must be considered when it comes to implementing this regime.

Once on the statute book, the DMU will be empowered to oversee a new regulatory regime for the most powerful digital firms, promoting greater competition and innovation in these markets and protecting consumers and businesses from unfair practices. It is vital that UK-specific connections are established in the Bill. The clause is also an important opportunity to highlight the significant impact that inaction is having on our digital markets in the UK. As we know, these markets are characterised by having just a few big tech firms with entrenched market power and the ability to shape the market to the detriment of consumers and smaller businesses. The 2020 CMA market study said:

"Both Google and Facebook grew by offering better products than their rivals. However, they are now protected by such strong incumbency advantages—including network effects, economies of scale and unmatchable access to user data—that potential rivals can no longer compete on equal terms."

The current balance of power means the big tech companies often have an unfair advantage over their competitors and dominate key markets. For example, virtually all UK smartphones run either Apple or Google operating systems. In 2018, Google had a more than 90% share of the UK search advertising market, and Meta owns 50% of the UK's digital display advertising space. Thanks to their dominance, Apple and Google made in excess of £4 billion of profits from their mobile businesses in 2021. The CMA estimates that Facebook and Google made profits of £2.4 billion above what would be considered a fair return in the digital advertising market in 2018. On Meta's market dominance, the CMA noted:

"Facebook's average revenue per user in the UK has increased from less than £5 in 2011 to over £50 in 2019."

The consequence is worse outcomes for smaller businesses and consumers. That is why we welcome the clarity in the clause and support its inclusion.

Clause 5 requires the CMA to look at the next five years when assessing whether an undertaking has substantial and entrenched market power in respect of a digital activity. Specifically, it must be satisfied that the undertaking's market power and influence in the digital activity is neither small nor transient. Although we welcome that requirement—ultimately, none of us wants companies to be stifled to their detriment—I hope the Minister will flesh out exactly how he thinks the clause will work in practice. The CMA is clearly well placed to assess digital firms' plans for progression and development over the next five years, but we are concerned that the clause is broadly asking the impossible, given the rate at which technological developments and expansion can occur in this space. I would therefore welcome the Minister's assessment.

The clause further outlines that the CMA must take into account expected or foreseeable developments if it does not designate the undertaking as having strategic market status in respect of the digital activity to which

[Alex Davies-Jones]

the investigation relates. Again, that is the kind of welcome and balanced approach to designation that we would expect of a new regulatory regime, but will the Minister confirm how the Bill will ensure that such decisions and designations are made public so that the transparency of the regime as a whole is enhanced? It would be helpful for all of us—parliamentarians, firms, civil society bodies and stakeholders in the sector—to understand how designations are made, and transparency is central to that. I hope the Minister will address those points. We seek some assurances, but I am sure we will be happy to support the clause as it stands.

Clause 6 sets out the terms by which an undertaking has a position of strategic significance. It sets out a number of conditions, including size, scale and the role the firm plays in terms of digital activity more widely. We support the need for flexibility in the regime, so paragraphs (c) and (d) are particularly welcome. Paragraph (c) is intended to cover circumstances in which the undertaking can use its position in the digital activity to leverage or expand into a range of other activities. That is vital, because companies have to be agile to dominate a variety of markets, and they can abuse that. Paragraph (d), which is intended to cover scenarios where an undertaking's position enables it to determine or substantially influence how other undertakings operate—in other words, to set the rules of the game—is equally important.

It would, however, be remiss of me not to highlight our slight concerns about subsection (2), which gives the Secretary of State the power to vary the conditions set out in the Bill. The success of the regime relies on scrutiny and direction from the Government, but will the Minister clarify exactly what type of scenario would require the Secretary of State of the day to vary the conditions?

As I have said, we support an agile approach to regulation. After all, even across other jurisdictions, the idea of regulation and encouraging pro-competition across our digital markets is a complex process for legislation. We wholeheartedly support the need to get this Bill on the statute book—it is something Labour has long called for—but none of us wants the regulator to be undermined or constrained by the opinions of the Secretary of State of the day, so I would appreciate some reassurance from the Minister on that point before proceeding.

Clause 7 outlines the turnover conditions that must be met for the CMA to designate an undertaking as having strategic market status in respect of a digital activity. Subsection (2) sets out that the turnover condition is met if the CMA reasonably estimates that the undertaking's UK turnover in the relevant period exceeds £1 billion or that its global turnover in the relevant period exceeds £25 billion. We welcome the clarity that only one of these thresholds needs to be met for the turnover condition to be met and, if the undertaking is part of a group, the turnover of that pooled group should be considered, which is a matter we will come to when we debate clause 114.

I will take this opportunity to highlight the fact that while the £1 billion and £25 billion turnover figures may seem high, they show the sheer market dominance that certain firms have over our digital markets. Setting the conditions at the current rate will not act as a deterrent for growth, which, of course, none of us want to see. We particularly welcome subsection (5), which requires the CMA to keep the thresholds under review and, from time to time, to advise the Secretary of State as to whether they are still appropriate and proportionate.

It would be helpful for all of us in the room and those listening elsewhere to understand how the Minister envisions that this will work in practice. Will it be on an annual review basis, and when will we have clarity on that? Will the reviews be made public to ensure proper and appropriate scrutiny? These are small points, but given the lack of transparency around the regime as it stands, I would be grateful for the Minister's assurances. Despite that, again, we support the clause as it stands and do not seek to amend it at this stage.

Finally—thank you for your indulgence, Dame Maria—clause 8 makes provision about the value of an undertaking's or a group's UK or global turnover in the relevant period for the purposes of the turnover condition. We see this as a fairly procedural clause, which outlines the definition of global turnover by which the CMA will make its decisions on designation. We note that subsection (4) gives the Secretary of State the power to make regulations providing further detail about how the total value of an undertaking's or a group's UK turnover or global turnover is to be estimated for the purposes of the turnover condition. Again, we feel that this could be problematic, and I would welcome the Minister's reasoning as to why and in what instance the Secretary of State would need to make regulations to provide that further detail.

If the CMA is to be trusted to make reasonable decisions on a group's turnover for the purposes of the turnover condition, it seems odd to give the Secretary of State the power to provide further detail when the merits or even the content of such further detail is so ambiguous. I hope the Minister can provide clarity and expand on that point. That aside, we support the clause because the turnover point is crucial for designation. The clause should remain and it should stand part of the Bill.

Jerome Mayhew: I briefly made mention of clause 7 in my earlier remarks. I am interested in the Minister's view, particularly on clause 7(2)(b) and the definition of UK-related turnover being £1 billion or more. There is a legitimate question to be asked, because while that is a substantial amount of money, it is not that great in terms of global business. As I mentioned, I could foresee a situation whereby when a global undertaking's global turnover is substantially less than £25 billion and its UK-related turnover is approaching the billion-pound mark, there might be a perverse incentive to direct investment and activity away from the United Kingdom because of that cliff-edge definition. I would love to propose a better alternative—it is above my pay grade—but I highlight that as being an issue we might need to take into account.

Paul Scully: I will cover most of the points in my main speech, but the reasons for designation of SMS status will be published, so that will be public. I will cover the points on the Secretary of State and on turnover. Clause 3 sets out what constitutes a digital activity for the purposes of the digital markets regime.

Digital activities are defined as the provision of digital content, such as software, operating systems or applications; services provided by means of the internet, such as an e-commerce platform; and any other activity carried out for the purposes of providing digital content or internet services, such as background processes.

A firm can only be designated with SMS in respect of a digital activity. The restriction to digital activities is appropriate for the new regime, which responds to the specific characteristics of digital markets, such as network effects and data consolidation, which makes them extremely fast-changing as well as prone to tip in favour of a few firms. With all of this, the definition of digital activities has been designed so that our regime will be able to handle the complexities of different and fast-evolving digital business models, and that is reflected in the powers given to the Secretary of State.

Clause 4 sets out when the DMU will be able to consider a digital activity as being linked to the UK for the purposes of designation. As we have heard, the global nature of digital markets means that business actions in other countries can impact on consumers and businesses in the UK, so it is important to allow the DMU to address harm to competition in the UK, even when all or part of a firm's physical operations are located elsewhere.

10 am

Clause 4 will allow the DMU to do just that. The DMU will be able to designate an undertaking in respect of a digital activity, if the activity has a significant number of UK users, the undertaking carries on business in the UK in relation to the activity, or the digital activity or the way it is carried on is likely to have an immediate, substantial and foreseeable effect on trade in the UK. That is a proportionate approach, which is consistent with global practices.

Clause 5 requires the DMU to carry out a forward-looking assessment when considering whether an undertaking has substantial and entrenched market power in respect of a digital activity. The Government expect that, when considering whether a firm has substantial and entrenched market power, the DMU will consider whether a firm exercises significant influence in respect of an activity. That could be for a number of reasons, including where users of a firm's product or service lack sufficient alternatives or there are few other suppliers. The DMU's assessment will be evidence-based. The DMU will need to consider whether power is entrenched—that is, determining that it is not temporary and is likely to persist.

Clause 6 sets out what constitutes a position of strategic significance, which is the second of the two SMS conditions which the DMU must assess. The clause sets out the specific factors that the DMU must take into account when assessing whether a firm has a position of strategic significance. Those factors align with the challenges identified by reports such as the Furman review.

A firm has a position of strategic significance where one or more of the conditions set out in clause 6 is met. Those are: the firm has a position of significant size or scale in respect of the digital activity; a significant number of other firms use the activity in their business, such as where the firm operates an ecosystem on which others rely; the firm is able to leverage its position to expand into other activities, for example by bundling products together; and the firm's position allows it to determine or substantially influence how other firms operate, such as by setting the rules of the game, as it were.

It is important for the regime to be capable of adapting to change, such as the discovery of new technologies or changes to business models. That is why clause 6 also gives the Secretary of State the power to amend the conditions as necessary. The affirmative resolution procedure is the appropriate mechanism for the power, as the parameters of the DMU's power to designate firms will define the scope of the regime.

Clause 7 sets out the turnover condition. It ensures that the DMU cannot designate a firm as having SMS in a digital activity unless the DMU estimates that the firm's, or group's, global or UK turnover exceeds minimum thresholds. The clause also gives the Secretary of State the power to amend the turnover thresholds by regulations subject to the affirmative procedure. It ensures that only firms with a 12-month turnover of more than £1 billion in the UK or £25 billion globally are in scope of the regime.

Seema Malhotra (Feltham and Heston) (Lab/Co-op): The Minister may have explained this elsewhere, but I am wondering about the thresholds of £1 billion and £25 billion. Will those thresholds be assessed over time, because firms' turnover and so on can change from year to year? When is the point at which assessment is made, and will the threshold change subsequently if turnover drops?

Paul Scully: The hon. Lady makes a good point, which relates to what my hon. Friend the Member for Broadland said about fluctuation of turnover and what companies may do with their turnover. It might be a good time to tackle that.

First, the turnover of the whole corporate group needs to be considered. That approach will help to avoid complications in revenue allocation, which could result in firms avoiding investigation and designation by virtue of their corporate structure or accounting practices. The DMU will be able to consider the past two periods of 12 months, not just the more recent one when calculating turnover—that should cover fluctuations, which the hon. Member for Feltham and Heston asked about. Markets can fluctuate, and turnover is not the same as market power; it is just part of the definition. The flexibility will also reduce the likelihood of the figures being manipulated and circumvented for the purposes of the turnover threshold.

Importantly, the use of the turnover thresholds will provide certainty to the vast majority of firms that they cannot be in scope of the regime, as they will easily be able to determine that their turnover is below the thresholds. However, if a firm meets the turnover threshold that does not necessarily mean that it will be subject to an investigation. The DMU will also need to have reasonable grounds to consider that the firm meets the two SMS conditions in respect of a digital activity that is linked to the UK—that is, that it has substantial and entrenched market power, and a position of strategic significance in respect of that activity.

[Paul Scully]

Clause 7 will give power to the Secretary of State to amend those thresholds. That will ensure that they remain relevant as digital markets develop, evolve and grow over time. The DMU will be required to keep the thresholds under review and advise the Secretary of State whether they are still appropriate. The Government anticipate that the DMU may take into account factors such as inflation and currency fluctuation when doing so, using its expertise and while having its finger on the pulse of digital markets. As was the case for clause 6, the affirmative resolution procedure is the appropriate mechanism, as this is a significant power that would alter the scope of the regime.

Clause 8 relates to the turnover condition and sets out further details about the meaning of global and UK turnover. Any activity of the firm will be considered when estimating global turnover. Both digital and non-digital activities will be considered, making it easier for firms to know whether they are in scope without having to distinguish between different types of activity.

For UK turnover, any activity of the firm will be considered, but the turnover must relate to UK users or UK customers. The clause also gives the Secretary of State the power to make provision about how turnover should be estimated, including provision about amounts that should or should not be regarded as comprising turnover. That level of detail would not be suitable for primary legislation. We believe a negative procedure is most appropriate because of the technical and non-controversial nature of any regulations.

Question put and agreed to.

Clause 3 accordingly ordered to stand part of the Bill.

Clauses 4 to 8 ordered to stand part of the Bill.

Clause 9

INITIAL SMS INVESTIGATIONS

Question proposed, That the clause stand part of the Bill.

The Chair: With this it will be convenient to discuss clauses 10 to 18 stand part.

Paul Scully: Clause 9 relates to initial SMS investigations. It sets out the circumstances under which the DMU can start an initial SMS investigation. An initial SMS investigation is for circumstances in which a firm either is not designated at all or is designated but in a different digital activity. The DMU can open an investigation only if it has reasonable grounds for considering that the tests for designation may be met—that is to say, most importantly, the tests of substantial and entrenched market power and a position of strategic significance in respect of a digital activity. Clause 9 does not require the DMU to open an investigation as it should be able to prioritise investigations to ensure its resources are targeted at the most pressing competition issues.

Clause 10 relates to further SMS investigations—the other type of SMS investigation. A further investigation is an investigation into whether to revoke an existing designation or designate a firm again in respect of the same digital activity. A further SMS investigation may also look at whether to designate a firm in respect of a similar or connected digital activity. The investigation will consider whether to make provision about existing obligations, which I will say more about on clause 17.

It is important that a designation should not continue indefinitely. That is why the DMU must review any designation before the end of the five-year designation period. The DMU will need to open a further SMS investigation at least nine months before the end of the five-year designation period if it has not already done so. It will either revoke a designation, if the firm no longer meets the criteria, or decide to designate the firm again for another five-year period. The DMU will be able to open a further investigation at any point during an existing designation. For instance, if the DMU considers that a firm no longer has substantial and entrenched market power in the digital activity, then it is important that the designation can be reviewed and, if necessary, revoked early.

Clause 11 sets out the procedure that the DMU must follow for either an initial or a further SMS investigation. To ensure that the regime is fair and transparent, the DMU will be required to give the firm a notice when it starts an investigation, stating the purpose and scope of the investigation as well as its length. For initial SMS investigations, the notice must set out the DMU's reasonable grounds for considering that the designation tests may be met. The DMU must also publish a statement summarising the notice in order to make the wider public aware that it is opening an investigation. That notice will trigger the start of the investigation period.

Clause 12 sets out that the DMU may close an initial SMS investigation at any point before reaching a final decision on designation. It is important that that option is available to the DMU for initial investigations as there may be situations where flexibility is needed. For instance, unexpected circumstances may arise while an investigation is ongoing. The Government believe that in order to reprioritise resources if needed, the DMU should have the discretion to close an initial SMS investigation before reaching a final decision.

Clause 13 sets out that the DMU must consult on its proposed decisions as part of an SMS investigation. It is important that the firm under investigation, as well as all relevant parties, has an opportunity to feed in views and perspectives to the DMU's investigation process. That consultation is also important in providing for a transparent regime that builds on the best evidence available.

Clause 14 sets out what the DMU must do at the end of an SMS investigation. For a further SMS investigation, the DMU must decide whether the existing designation should be revoked or whether the firm should continue to be designated in the same activity. The DMU must also decide whether to make provision in relation to existing obligations. If relevant, the DMU must decide whether the firm should be designated in a similar or connected activity.

For an initial investigation, the DMU should also reach a decision when it has not closed the investigation early under clause 12. The DMU will need to give the firm a notice of its decision on or before the last day of the investigation period, which lasts up to nine months. It must also publish a summary statement. If for some reason the DMU does not give the decision notice to

the firm by the deadline, by default the firm is not designated, or is no longer designated, in the relevant digital activity.

Clause 15 sets out the requirements for decision notices when the DMU decides to designate a firm as having SMS in respect of a digital activity. The decision notice needs to be given to the firm. Among other things, the notice should include a description of the firm, a description of the digital activity, any provision made regarding existing obligations, per clause 17, and the DMU's reasons for its decisions.

Clause 16 sets out the requirements for decision notices when the DMU decides to revoke an existing designation following a further investigation. A designation will no longer be appropriate once a competitive environment has developed. The decision notice needs to be given to the firm, as set out in clause 14(2).

Clause 17 gives the DMU the power to apply transitional arrangements to obligations revoked as a result of the DMU's ending an SMS firm's designation in relation to a digital activity, but only for the purpose of managing impacts of the revocation on persons who benefited from those obligations, and only in a way that appears to the DMU to be fair and reasonable. That will help ensure a smooth transition for wider market participants.

Clause 17 also allows the DMU to continue to apply existing obligations, such as conduct requirements or pro-competition orders. That is for cases where the new designation is in respect of the same digital activity, or an activity that is similar or connected to the previous designated digital activity. The clause will ensure that existing obligations do not automatically end where they still remain appropriate following a further SMS designation. The power to continue to apply obligations will be subject to the DMU's ongoing duty to monitor and review obligations, which means that the DMU cannot continue to apply obligations that are no longer appropriate.

Finally, clause 18 sets out that a firm will be designated as having SMS in respect of a digital activity for five years, beginning with the day after the day on which the SMS decision notice is given. We believe that five years strikes the right balance between giving enough time for the regulatory interventions to have an impact on the one hand, and making sure the obligations on the firm do not last longer than necessary on the other.

Alex Davies-Jones: Labour broadly welcomes this grouping. I will make some brief comments about clauses 9, 10 and 11 before addressing my amendments, and will then come on to clauses 12 to 18.

As we know, and as the Minister has outlined, clause 9 concerns initial SMS investigations. We see the clause as an important start point that will allow the CMA to have clarity over exactly how it will begin the designation process for the regulatory regime. Subsection (1) sets out that the CMA may begin an initial SMS investigation where it has reasonable grounds to consider that it may be able to designate an undertaking in accordance with clause 2. We believe that that is vital and that the CMA is given the statutory powers to investigate fully. We agree that "reasonable grounds" are an important way to capture the beginnings of the process.

It is clear that the regime will apply only to firms with significant market dominance, as we have already discussed, but it is right that the CMA should use a logical approach to establish SMS firms from the outset. We also agree that it is right that where the CMA considers that the digital activity is similar or connected to a digital activity in respect of which the undertaking is already designated, it may instead begin a further SMS investigation.

Similarly, we agree with the wording of subsection (3), which clarifies that the CMA has the power to open a designation investigation in respect of a digital activity even if it has previously decided not to designate the undertaking as having SMS in respect of that digital activity. That would include circumstances where a previous designation had ended or where a previous decision had been taken not to designate the undertaking in respect of that digital activity. It is incredibly important that the CMA should not be restricted in terms of its designations, so this clarity is welcome.

10.15 am

Labour welcomes clause 10, which we see as central to providing the CMA with the statutory footing to ensure that its investigations and designations into SMS firms are thorough and suitable. We particularly agree with subsection (1), which sets out that the CMA may begin a further SMS investigation in relation to a designation at any time during the designation period. The CMA must be empowered to act rather than be restricted, although it must also be well resourced in order for these powers to be put to use in reality. Plenty of us are concerned about the significant workload that the regime could place on the CMA more widely; I would welcome the Minister's thoughts on that particular point.

In addition, we support subsection (3), which sets out the various matters with which further investigations are concerned. An important point worth clarifying for the purposes of this legislation is that further SMS investigation is an investigation into whether to revoke a designation or to designate an undertaking again in respect of the same digital activity. It is also concerned with whether to make provision under clause 17 in relation to existing obligations.

Similarly, subsection (4) sets out that a further investigation may also concern whether or not to designate an undertaking in respect of a digital activity that the CMA considers to be similar or connected to the relevant digital activity that is defined later on. That is a nuanced but important point. We all want to see the regime capture the far-reaching power that SMS firms have across different domains and digital activities. We therefore support the clause and have not sought to amend it at this stage.

As with previous clauses relating to procedural matters, Labour supports clause 11, although we have tabled some important amendments.

The Chair: Order. I ask the hon. Lady to restrict her comments to the stand part debate on clauses 10 to 18. We debate the amendments a little later.

Alex Davies-Jones: Yes, Dame Maria.

I turn to clause 11. We see the clause as important in establishing exactly how the CMA should carry out an SMS investigation. It is important for all involved—from the CMA to regulated firms—that there should be some transparency over exactly how the CMA will begin an SMS investigation, and under what circumstances.

[Alex Davies-Jones]

We particularly welcome provisions for investigation notices; it is important that all parties are given adequate time and notice in order for this regime to fully succeed.

As I have already noted, we particularly welcome subsection (5), which sets out that as soon as reasonably practicable after giving an SMS investigation notice, or a revised version of the notice, the CMA must publish a statement summarising the contents of the notice and give a copy of the statement to the Financial Conduct Authority, the Office of Communications, the Information Commissioner, the Bank of England and the Prudential Regulation Authority. That is an important point for transparency—a common theme, I am afraid, to which I will continue to return as the Bill progresses through Committee.

As we all know, there are certain aspects of digital markets that make them prone to creating tipping points, where very large online platforms have huge and entrenched market power. The lack of transparency is a particularly problematic issue, and one that the Bill must seek to address. For example, in online advertising a complicated bidding process may take place very quickly—advertisers may not able to scrutinise decisions about where their ads are placed and how much they cost. That has a knock-on impact by exacerbating other competition problems, as people and businesses are unable to make informed choices.

We see the transparency and publication of these investigation notices as an important part of the package around getting the regime right. We welcome the fact that the Financial Conduct Authority, Ofcom, the Information Commissioner, the Bank of England and the Prudential Regulation Authority will all have sight of such notices, but what assessment has the Minister made of making these notices public? Of course, Labour recognises that there is a difficult line to toe here in terms of publishing information that could impact markets and potentially cause detriment to companies' market share or worth. However, could a sensible middle ground be reached?

I move on to clause 12. Labour welcomes clause 12, which outlines the circumstances in which an initial SMS investigation may be closed without a decision. We recognise that giving the CMA that flexibility is important. None of us wants undue time limits to be placed on its decision-making and designation process. Central to the success of the regime is that the CMA should be empowered to take decisions within its remit. We all recognise that the CMA is a proactive regulator that currently seeks to use its soft power alongside its formal powers, but it is currently being hampered by its existing legal powers. That is causing a disparity between its ability to enforce competition and consumer law—a significant issue that stakeholders, including Which?, Citizens Advice and others, have repeatedly raised, including during our evidence sessions.

We see clause 12 as an important clause that gives the CMA the ability to work in an agile manner, according to workload and priorities. As with previous clauses, we particularly welcome subsections (2) to (4), which set out that if the CMA decides to close an initial SMS investigation, it must give the undertaking under investigation notice of the closure, including the reasons, and publish a statement summarising the contents of the notice. Labour supports the clause, and we have not sought to amend it at this stage.

Clause 13 requires the CMA to consult on any decision that it is considering making as a result of an SMS investigation. Subsection (1) requires the CMA to carry out a public consultation and bring it to the attention of such persons as it considers appropriate. Of course, there is a balance to strike here: public consultation is an important part of any regulatory regime, but none of us wants to see the CMA bound by delays and, as a consequence, unable to regulate effectively. I would be grateful for some clarity from the Minister on his understanding of the "appropriate" person, as outlined in subsection (1), which reads:

"The CMA must—

(a) carry out a public consultation on any decision that it is considering making as a result of an SMS investigation (see section 14(1)), and

(b) bring the public consultation to the attention of such persons as it considers appropriate."

I imagine the Secretary of State will be one such person, but will the Minister clarify who else he envisions will be privy to the public consultations? In addition, I would be grateful if the Minister again confirmed whether the public consultations will be published. Consultation is an important part of any regulatory regime, particularly this one, which aims to do a colossal thing in regulating our digital markets and, ultimately, to encourage competition. Labour recognises the extent of the challenge, and there is a fine balance to be struck between consultation and stifling action. We do not want to see consultations get in the way of the regime more widely. We have had enough delay as it is, and I am sure the Minister will not mind my highlighting just how many consultations the Bill has endured on its journey so far.

In 2018, the Government established a digital competition expert panel to examine competition in digital markets. In 2021, the DMU was set up within the CMA to oversee competition in the digital markets sector. Between July and October of that year, the Government ran a consultation on plans for a new regime. Almost a year on, in May 2022, the Government responded to the consultation, setting out the final position on a new regime. There has already been significant delay to getting the Bill to this stage, and we already know from its impact assessment that the regime is unlikely to be fully operational until 2025, so I would be grateful if the Minister could reassure us all that the CMA will not be delayed by consultations, as the Government seemingly have been. That point aside, we understand the value of the clause and will support it.

Clause 14 sets out what the CMA must do at the end of an SMS investigation. It broadly clarifies the actions and decisions that the CMA must take in deciding whether an undertaking will be designated as SMS in respect of its digital activity. Again, we welcome subsection (2). We also support subsection (5), which sets out that the CMA must publish a statement summarising its contents as soon as reasonably practicable after giving an SMS decision notice. This is an important clause, which we see as a practical outline of how the CMA will be empowered to act on concluding its initial SMS investigations.

Clause 15 sets out a requirement for SMS decision notices where the CMA decides to designate an undertaking as having SMS in respect of a digital activity. We

welcome the clarity afforded in subsection (2), which outlines on the face of the Bill the exact contents that the SMS decision notice must include. This ranges from a description of the designated undertaking to a statement outlining the designation period and the circumstances in which the designation could be extended.

It is also worth referring specifically to subsection (4), which clarifies that giving a revised SMS decision notice to provide for the designation of an undertaking does not change the day on which the designation period in relation to that designation begins. That is a welcome clarification, which I know will be useful for undertakings and civil society to understand as we seek to establish the regime in full.

Although Labour supports the clause, I am interested to know the Minister's thoughts on subsection (5), which states:

"As soon as reasonably practicable after giving a revised SMS decision notice, the CMA must publish a statement summarising the contents of the revised notice."

Again, that is rather vague, so will the Minister clarify what he considers to be "reasonably practicable"? Ultimately, companies and consumers alike would benefit from a timely and transparent approach to the regulation. Although I am reassured by the CMA's ability, we and many others have slight concerns about its capacity and resource, as I have previously outlined, so I would be grateful for the Minister's assurances on that issue.

Clause 16 sets out the requirements for SMS decision notices where the CMA decides to revoke an existing designation as a result of a further SMS investigation. There is no need for me to repeat myself. We support the clause, and it is important for the CMA to be empowered to act flexibly, particularly given the ever-changing nature of digital markets. Again, we welcome clarification that the CMA will provide for the revocation to have effect from an earlier date—for example, where the undertaking has already ceased to engage in the relevant digital activity. None of us wants to see overregulation, so we support the clause and have not sought to amend it. While I am all for a collegiate approach to legislating, I assure the Minister and my Whip that we do not agree with the Bill in full, as can be seen from the amendment paper. However, on the points covering designation, we welcome the progress and clarity of the clauses, which we see as fundamental to the regime's wider success.

Labour supports clause 17, which aims to define the nature of an existing obligation, which is any conduct requirement, enforcement order, final offer order or pro-competition order applying when a designation is revoked or another one is made after a further SMS investigation. We particularly welcome subsections (3) and (4), which set out that the CMA may apply any existing obligation in respect of a new designation, may modify that obligation in respect of a new designated activity, and may make transitional, transitory or saving provision in respect of that obligation. Again, we see that as standard procedure to allow the regime to operate in full and have not sought to amend the clause.

Finally—colleagues will be pleased to hear that—clause 18 establishes that where the CMA decides to designate an undertaking as having SMS in a digital activity, the designation period is five years, beginning the day after the day on which the SMS decision notice is given. We welcome other provisions later in the Bill on the circumstances in which the designation period may be extended or revoked. Labour recognises that assessing the regulatory regime in digital markets will take some time, so we believe a designation period of five years is a sensible approach. Given certain undertakings' market dominance, we think five years is a reasonable timeframe to allow pro-competition mechanisms to take effect and consumers to see that reflected in the options and prices afforded to them. We therefore support the clause and have not sought to amend it.

Paul Scully: On the two questions of what is reasonably practical and practicable in terms of time, we do not want to set an artificial deadline but want to make sure that the DMU can act as quickly as possible. As the hon. Member for Pontypridd rightly says, and we have said all the way through, technology and digital markets move really quickly. That is why we want to make sure that decisions are out of the door as quickly as possible, so that people can see what is happening as soon as possible. The decisions will go to the appropriate persons as described, which are relevant third parties and the SMS firms themselves. It is for the CMA to determine who is a relevant third party, but that will clearly include any challenger tech companies that may be affected by the initial SMS designation.

Question put and agreed to.

Clause 9 accordingly ordered to stand part of the Bill.

Clause 10 ordered to stand part of the Bill.

Alex Davies-Jones: I beg to move amendment 46, in clause 11, page 6, line 36, at end insert—

'(6) The CMA must provide a copy of the SMS investigation notice to any person who requests a copy.'

This amendment and Amendments 47 to 52 aim to ensure access to information relevant to the regime is available publicly.

The Chair: With this it will be convenient to discuss the following:

Amendment 47, in clause 12, page 7, line 9, at end insert—

'(5) The CMA must provide a copy of the notice under subsection (2) to any person who requests a copy.'

See the statement for Amendment 46.

Amendment 48, in clause 14, page 7, line 36, at end insert—

'(5A) The CMA must provide a copy of the SMS decision notice to any person who requests a copy.'

See the statement for Amendment 46.

Amendment 49 in clause 26, page 14, line 19, at end insert—

'(3A) The CMA must provide a copy of the SMS decision notice to any person who requests a copy.'

See the statement for Amendment 46.

Amendment 50 in clause 28, page 15, line 20, at end insert—

'(5) The CMA must provide a copy of the notice to any person who requests a copy.'

See the statement for Amendment 46.

Amendment 51 in clause 30, page 16, line 13, at end insert—

'(4A) The CMA must provide a copy of the notice to any person who requests a copy.'

See the statement for Amendment 46.

Amendment 52 in clause 46, page 25, line 38, at end insert—

'(5) The CMA must provide a copy of the PCI investigation notice to any person who requests a copy.'

See the statement for Amendment 46.

Alex Davies-Jones: These important amendments to clause 11 that we have tabled are designed to encourage a more transparent approach to SMS investigations. As repeatedly stated, transparency, openness and accountability have to be central to the Bill working in practice and in reality. The Minister will note that this is a simple set of amendments, which will broaden the regime's openness. Labour firmly believes that a transparent approach where possible and where the impact on markets is limited will be vital to its success. Will the Minister share his thoughts on our amendments? They seek to make the Bill more transparent for everyone and I look forward to some clarity.

Paul Scully: Amendments 46 to 52 would require that the notices the DMU must provide to an SMS firm in respect of an SMS designation, conduct requirements and PCIs should be made available on request to third parties. We agree with the hon. Member for Pontypridd that transparency and accountability are essential to the new regime, and we will always look for ways to make sure that it is open and at the core of what we do.

The Bill already provides that the DMU will be required to publish online a statement summarising the contents of those notices whenever they are provided to a firm. That is, it will need to set out required elements of the notice, such as describing its decisions and the reasoning behind them, in a shortened form. In the statements, the DMU will provide the key information from the notice about its decisions to other businesses, consumers and the wider public, in line with public law principles. The DMU may redact commercially sensitive information.

For example, the summary notice for a conduct investigation must give details about the conduct requirement and the behaviour suspected of breaching that requirement, and it must provide information about the investigation period and the timeframe for making representations for third parties.

10.30 am

Peter Dowd (Bootle) (Lab): I completely understand where the Minister is coming from, but the Labour Front Bench is trying to push this question of transparency and I am concerned about what the Minister just said. The hon. Member for Broadland talked in relation to another issue about the courts becoming involved. The last thing we want is to create a need for clarification from the courts. Is there not a danger that, unless this area is transparent and the statements are more significant than just a summary, we will get into needing clarification by the courts?

Paul Scully: Third parties can clearly get involved and approach the DMU, which I will cover in a minute, so we do not necessarily need to get to court stage. I have talked about some of the specifics that will be in the summary notices, which will have quite a considerable amount of detail anyway. We do not want to add extra resource requirements that take away from the core tasks of the DMU.

The summary statements are just one of the ways in which the DMU will inform and involve stakeholders in its decision making. The DMU will be required to publicly consult before making major decisions, which include designating a firm with strategic market status in a digital activity, making pro-competition orders, and imposing conduct requirements. It will also be required to publish guidance on how it will take those decisions.

Should a third party be unsatisfied with the DMU's summary statement, they can request the full notice through a freedom of information request. As a public authority, the CMA is required under the Freedom of Information Act 2000 to provide the public with information it holds when requested to do so, subject to the relevant exemptions, which include a requirement to protect commercially sensitive information. We agree that public transparency for the new digital markets regime is vital. The drafting ensures that the right information will be made publicly available. I hope I have set out our position to hon. Members and that they feel able to withdraw their amendments.

Alex Davies-Jones: I have listened to the Minister carefully outline the Government's position. I do recognise that a balance needs to be struck, yet we feel that our amendments would seek to increase transparency, openness and accountability. For that reason, we will press them to a vote.

Question put, That the amendment be made.

The Committee divided: Ayes 6, Noes 7.

Division No. 2]

AYES

Coyle, Neil	Malhotra, Seema
Davies-Jones, Alex	Mishra, Navendu
Dowd, Peter	Thomson, Richard

NOES

Ford, rh Vicky	Stevenson, Jane
Hollinrake, Kevin	Watling, Giles
Mayhew, Jerome	
Scully, Paul	Wood, Mike

Question accordingly negatived.

Clause 11 ordered to stand part of the Bill.

Clauses 12 to 18 ordered to stand part of the Bill.

Clause 19

POWER TO IMPOSE CONDUCT REQUIREMENTS

Alex Davies-Jones: I beg to move amendment 54, in clause 19, page 11, line 17, after "CMA," insert—

"(ab) where the designated undertaking has been given an SMS decision notice under section 14(2), must come into force no later than three months of the SMS decision notice being given".

This amendment introduces a timeline for the enforcement of conduct requirements set out on the face of the Bill and in CMA Guidance.

With your permission, Dame Maria, I will also speak to clause 19, in the interests of efficiency.

The Chair: *indicated assent.*

Alex Davies-Jones: Clause 19, which outlines the CMA's power to impose conduct requirements on a designated firm, is very welcome indeed. It is an important clause that aims to prevent harm that may result from the market position of undertakings with strategic market status.

In practice, these conduct requirements are essentially instructions given to a designated undertaking to conduct digital activities in a manner that promotes competition. The requirements can be prescriptive or prohibitive in nature; they are essentially the dos and don'ts, except that the requirements do not apply automatically to every undertaking having SMS and instead apply on a case-by-case basis. The DMU therefore has wide discretion to impose conduct requirements on specific SMS firms, as long as they fit within a list of purposes that are listed in clause 20.

Vicky Ford (Chelmsford) (Con): I am very fond of the hon. Member and she has a beautiful voice, but she did complain earlier about how long it had taken this Bill to get to market. I urge her to remember that we want to get through the Bill as quickly as possible, for consumers. Repeating every single thing that we can already read in the explanatory notes and in the Bill does not seem to me to be the most efficient use of all of our time.

Alex Davies-Jones: I am grateful for that intervention. The hon. Member will know I am also fond of her and her voice. I think it is important to clarify exactly what we are debating, and why we are reasoning as we are. I will happily refer to certain clauses if that would please the hon. Member, but it is important that we outline exactly why we have come to the rationale that we have on the Bill as it stands before us.

Potential examples of prescriptive conduct requirements include having effective processes for handling complaints, trading on fair and reasonable terms, or giving users options or default settings. Conversely, some examples of prohibitive conduct requirements may be preventing abuse of dominance practices, such as treating its own products more favourably, using data unfairly, tying practices, restricting interoperability, refusal to grant access and so on.

We particularly welcome subsection (5), which provides that the CMA may impose conduct requirements only for certain objectives. However, we have concerns about subsection (10), which says that a conduct requirement

> "(a) comes into force at a time determined by the CMA, and
>
> (b) ceases to have effect—
>
> (i) in accordance with a decision of the CMA"—

as Members can read in the Bill.

For swift implementation, it is right that the Bill's approach allows for conduct requirements to be written alongside an SMS designation investigation, but we need a statutory time limit for the initial set of conduct requirements to be implemented. As it is likely that the DMU will have considered the three conduct objectives before the SMS designation decision is made, the DMU should be required to impose the initial set of conduct requirements either at the same time as the SMS designation or within three months of its date.

A central feature of the new regime is to enable the DMU to revise its rules as time goes on, so the deadline should apply only to the initial set of conduct requirements, so as not to hinder the DMU in revising or adding to them subsequently. Amendment 54 would introduce a timeline for the enforcement of conduct requirements set out in the Bill and in CMA guidance.

Peter Dowd: Given that subscription traps cost between £28 billion and £34 billion a year, my constituents in Bootle are perfectly entitled to listen to my hon. Friend ram home this point time after time, because £28 billion out of their pockets in someone else's pocket is not appropriate, not reasonable and not fair, given the current cost of living crisis. My hon. Friend should speak as much and as long as she wants.

Alex Davies-Jones: I am grateful for that intervention. It is important that we get the Bill right. It is a very technical Bill. It is incredibly wordy—Members will have heard me trip over my words a number of times. It is important that we are able to portray the nature and benefits of the Bill to those listening at home or elsewhere, for the future and for the CMA, so that they understand what we as legislators mean when we speak in this place. That could influence decisions later. It is important for our constituents, who will be positively—we hope—impacted by the Bill. It will enable to have them more choice to hear exactly what we as legislators in this place mean.

The amendment introduces a timeline. It is important and we have given it some serious thought. I hope that the Minister has given it serious thought, too, because it would be helpful to ensure that the CMA is forced to act swiftly, as we have all discussed. I look forward to hearing his comments. I hope that he sees how beneficial this simple amendment could be. It is not meant to trick him; it is meant to make the legislation as positive and as beneficial as it can be.

The Chair: I remind the Minister that he may speak to clause stand part as well.

Paul Scully: Thank you, Dame Maria. I will cover the clause first. It enables the DMU to introduce conduct requirements to govern the behaviour of SMS firms. That will help manage the effects of their market power by protecting the businesses and consumers that rely on their services. The tailored rules will be used to promote fair dealing, open choices, and trust and transparency, which mean that the DMU will be able to ensure that SMS firms treat consumers and other businesses fairly, not subjecting them to unreasonable terms and conditions. It will also mean that the regulator is able to intervene to ensure that users can choose freely and easily between different products and providers. Finally, the DMU will be able to intervene to ensure that users have the information they need to understand what is on offer, and to make their own decisions about whether they want to use the SMS firm's products.

[Paul Scully]

The clause sets out that, where the DMU imposes a conduct requirement, it must send a notice to the SMS firm and publish that notice online as soon as reasonably practicable. That will ensure that the obligations and responsibilities will be made clear to the SMS firm and to those businesses and consumers who rely on them.

Neil Coyle (Bermondsey and Old Southwark) (Lab): My hon. Friend the shadow Minister has been accused of repetition, but she made a point about resources. The Minister is making further comments about the capacity and tasks of the regulator, so perhaps he could come back to the earlier question on resourcing, about which a lot of concern was expressed last week in the evidence sessions. Will the Minister address some of that and tell us how the new body will be resourced to fulfil all the tasks that he is discussing?

Paul Scully: That is a good point. The hon. Gentleman will be aware that that is one of the reasons why we have set the DMU up in shadow form, to start building up its capacity and expanding on its expertise. Currently, the DMU stands at about 70 people, and it is able to lean in on expertise as required. In the evidence session last week, we heard from the chief executive of the CMA that she feels that they have the expertise and the resource able to make the clear decisions needed in a complicated area of competition. The whole point about digital markets is that they are not like the analogue competition regime that we have been used to for so many years. That is complex enough, but it is well established and matured; in digital markets, things happen very quickly.

The Opposition are absolutely right when they say that we need to make decisions quickly, transparently and in a way that holds the confidence of consumers and the challenge attackers, to ensure that this is a place where people can grow and scale a company, even to the size of those companies that are likely to have entrenched market power and to have SMS in the first place.

The clause enables the DMU to vary conduct requirements as firms and markets change, ensuring that they remain appropriately tailored and proportionate. Without the clause, the DMU would not have the means to regulate the most powerful tech firms appropriately, and consumers would continue to be not adequately protected from harms in digital markets.

Neil Coyle: The Minister made reference to the analogue competition. That equivalent is trading standards and physical competition, but last week they told us that they had had a cut of 50% in their capability to tackle problems. The Minister is talking about powers to investigate, to assess, to recall, to monitor and to review, all within a fixed timetable, against companies with very significant resources, so what capacity will there be to review the powers and resources of the new body and how will it be kept up to date in terms of its skills?

10.45 am

Paul Scully: I have talked about the fact that the CMA will publish on a regular basis—on an annual basis—its report about what it is doing and how it is working. The Under-Secretary of State for Business and Trade, my hon. Friend the Member for Thirsk and Malton, has regular meetings with the CMA and with the Competition Appeal Tribunal as well. We will meet regularly the digital markets unit to talk through the issues of capacity and its decision making, but it is not just for us to be talking to it "behind closed doors", within the Department. The regular reports from the CMA and the decision-making reports, which will be published as well, will absolutely highlight why the decisions have been taken and how they have been taken, and therefore we can take a judgment on what resources it needs and whether it is under-resourced.

Over the three years of my ministerial career, I seem to have been giving the CMA jobs to do. I say that having done the Bills that became the United Kingdom Internal Market Act 2020 and the Subsidy Control Act 2022 and now this. The hon. Member for Bermondsey and Old Southwark is right to say that the CMA has expanded. But it has expanded in accordance with the expertise that it has.

Jerome Mayhew: We had three days of oral evidence last week and were lucky enough to have the chief executive of the CMA come and give evidence to us. I do not have a copy of *Hansard* with me, so I stand to be corrected, but I believe that I am right in saying that Ms Cardell, when she gave her evidence, was directly questioned about the level of resource that the CMA had and her degree of confidence as to whether it would be sufficient to carry out the tasks anticipated in the Bill. The words that stick in my mind and that I ascribe to Ms Cardell—again, I stand to be corrected—were that the CMA is well resourced and more than capable of undertaking these activities.

Paul Scully: I thank my hon. Friend.

Peter Dowd: Does the Minister agree with me that we have to learn lessons from history? The Committee considering the Bill that became the Criminal Finances Act 2017, on which I served, took evidence from the enforcement and regulatory authorities and they said at the time, "Oh yes, we have all the resources we need," but that proved not to be the case. If the chief executive of the CMA is saying that, let us come back in 12 or 18 months' time and see whether it is actually correct. Will the Minister agree to a review of it in perhaps 12 or 18 months' time, when this Bill has bedded in?

Paul Scully: The hon. Gentleman is absolutely right that we have to keep all these things in our purview, because if we get this wrong, that just embeds the entrenched power that we are talking about. It is absolutely the case that we have to ensure that the CMA, as an important body—I am thinking of not just the digital markets unit, which we are discussing here, but the entirety of its operation—has the capacity to do its work. As I said, we will clearly continue to look at the resources, capacity and expertise of the digital markets unit.

Amendment 54 would introduce a duty on the DMU to impose conduct requirements within three months of a decision notice being given, as we have heard. I absolutely share hon. Members' interest in ensuring

that conduct requirements are imposed quickly so that businesses and consumers can be protected. Indeed, we anticipate that conduct requirements will be in place from the day a firm is designated—or if not, much sooner than the three months proposed in the amendment. That is because the DMU can develop tailored conduct requirements informed by, and alongside, the designation investigation. That is facilitated by clauses 13(2) and 24(3), which enable the DMU to carry out the public consultation on strategic market status designation alongside the public consultation on any proposed conduct requirements.

Although we expect conduct requirements to be imposed as soon as a firm is designated, the Government have not included a statutory deadline. That is because the DMU needs the flexibility to deal with the complexities of developing targeted obligations. That includes taking the time necessary to consult and consider all the views shared by interested stakeholders.

Vicky Ford: I want to be quick. I really care about this Bill, because it is incredibly important for our constituents, who are consumers, to ensure that they are offered fair choices and fair prices. The clause is important, because it means that when a company acts inappropriately, the CMA, through the digital markets unit, can tell it what to do. Can the Minister give an example of a case where it might need more than three months for that telling it what to do to be done?

Paul Scully: That is a very good point. I do not think that I can give my right hon. Friend a specific example. If particular technicalities are involved, we do not want to put an arbitrary time limit such as three months, because we want the decision to be right. The Government absolutely expect the decision to be taken either on the day of designation or very shortly afterwards, but by binding ourselves there may be examples—I am afraid I am not nimble enough to think of a specific example, but I am sure one will come down the line. The whole point of this Bill is that it is flexible, proportionate and gets things right. At the end of the day, that is what we are trying to do, rather than putting in a timescale.

Vicky Ford: For the record, when the DMU tells a company what to do, does the Minister agree that that should always be done as quickly as possible, given that there may be technical changes to get things done as well? This is not a suggestion that decisions or actions should be delayed.

Paul Scully: I totally agree. That is exactly the point. Let us make it quickly, but we do not want an arbitrary timescale so that we rush and get the decision wrong. It is more important to get the answer right. For those reasons, I hope that the hon. Member for Pontypridd will withdraw her amendment.

Alex Davies-Jones: I have listened to the robust debate we have had. I still feel that having a timeline on the face of the Bill would provide transparency, clarity and certainty. Therefore, we will press the amendment to a vote.

Question put, That the amendment be made.

The Committee divided: Ayes 6, Noes 7.

Division No. 3]

AYES

Coyle, Neil	Malhotra, Seema
Davies-Jones, Alex	Mishra, Navendu
Dowd, Peter	Thomson, Richard

NOES

Ford, rh Vicky	Stevenson, Jane
Hollinrake, Kevin	Watling, Giles
Mayhew, Jerome	
Scully, Paul	Wood, Mike

Question accordingly negatived.

Clause 19 ordered to stand part of the Bill.

Clause 20

Permitted types of conduct requirement

Alex Davies-Jones: I beg to move amendment 53, in clause 20, page 12, line 11, at end insert—

"(ca) carrying on activities in an area of its business other than the relevant digital activity, which if they were done in relation to the relevant digital activity would be prevented under the provisions of this section."

This amendment prevents a designated undertaking from carrying on activities that would be prevented by the provisions of section 20 from being done in a different area of its business.

Amendment 53 aims to prevent a designated undertaking from carrying on activities that would be prevented by the provisions of section 20 from being done in a different area of its business. We feel that the amendment gets to the heart of the issues at hand, and we urge the Minister to consider it carefully. It will prevent a Whac-A-Mole situation in which the regulator is always having to define new activities to catch up, and we see it as an essential part of the Bill.

Paul Scully: I am trying to work out the intention of the amendment. It seems that it would add a permitted type of conduct requirement in order to expand the ability of the DMU to intervene outside the designated digital activity; I am not sure that I understand whether my understanding of that is clear.

The regime is explicitly designed to address competition issues in activities when a firm has strategic market status—that is, when it holds substantial and entrenched market power and a position of strategic significance. In some circumstances, SMS firms may use other, non-designated activities to further entrench their market power in the designated activity. Clause 20(3)(c) allows the DMU to create conduct requirements to address that; however, it is important that the DMU does not intervene in non-designated activities beyond that.

SMS firms are likely to be active in a large range of activities, and in many of them will face healthy competition from other firms. The amendment would allow the DMU to intervene outside the designated digital activity, without any requirement to show that there is a link to the firm's market power in any given activity. That could be harmful to competition, consumers and innovation.

[Paul Scully]

We are worried about whether the regime can tackle retaliatory conduct. It is important that that ability is built in, because a retaliatory action is likely to be captured under conduct requirement categories to ensure fair dealing, such as those that prevent discriminatory treatment or unfair terms and conditions. We want the DMU to be able to take firm action against retaliatory conduct, whether or not that is within the scope of designation, but only if it can prove the link between the two. It is really important that that step happens first.

Alex Davies-Jones: I appreciate the Minister's comments, although I disagree with him on the reasoning. We see the leveraging principle as critical to the success of the pro-competition regime. It is important to clause 20, which is a mammoth clause. Our amendment would prevent a designated undertaking from carrying on activities that would be prevented by the provisions in the clause. It is really important that the amendment is included so we will press it to a vote.

Question put, That the amendment be made.

The Committee divided: Ayes 6, Noes 8.

Division No. 4]

AYES

Coyle, Neil	Malhotra, Seema
Davies-Jones, Alex	Mishra, Navendu
Dowd, Peter	Thomson, Richard

NOES

Firth, Anna	Scully, Paul
Ford, rh Vicky	Stevenson, Jane
Hollinrake, Kevin	Watling, Giles
Mayhew, Jerome	Wood, Mike

Question accordingly negatived.

Alex Davies-Jones: I beg to move amendment 58, Clause 20, page 12, line 22, at end insert—

"(i) discriminating against a recognised news publisher by withholding from an internet service material produced by the recognised news publisher."

This amendment would allow a conduct requirement to be used to stop a designated undertaking withholding news from a recognised news publisher from its platform.

The Chair: With this it will be convenient to discuss new clause 2—*Recognised news publisher: definition*—

"(1) In section 20, 'recognised news publisher' means any of the following entities—

(a) the British Broadcasting Corporation,

(b) Sianel Pedwar Cymru,

(c) the holder of a licence under the Broadcasting Act 1990 or 1996 who publishes news-related material in connection with the broadcasting activities authorised under the licence, and

(d) any other entity which—

(i) meets all of the conditions in subsection (2), and

(ii) is not an excluded entity (see subsection (3)).

(2) The conditions referred to in subsection (1)(d)(i) are that the entity—

(a) has as its principal purpose the publication of news-related material, and such material—

(i) is created by different persons, and

(ii) is subject to editorial control,

(b) publishes such material in the course of a business (whether or not carried on with a view to profit),

(c) is subject to a standards code,

(d) has policies and procedures for handling and resolving complaints,

(e) has a registered office or other business address in the United Kingdom,

(f) is the person with legal responsibility for material published by it in the United Kingdom, and

(g) publishes—

(i) the entity's name, the address mentioned in paragraph (e) and the entity's registered number (if any), and

(ii) the name and address of any person who controls the entity (including, where such a person is an entity, the address of that person's registered or principal office and that person's registered number (if any)).

(3) An 'excluded entity' is an entity—

(a) which is a proscribed organisation under the Terrorism Act 2000 (see section 3 of that Act), or

(b) the purpose of which is to support a proscribed organisation under that Act.

(4) For the purposes of subsection (2)—

(a) news-related material is "subject to editorial control" if there is a person (whether or not the publisher of the material) who has editorial or equivalent responsibility for the material, including responsibility for how it is presented and the decision to publish it;

(b) 'control' has the same meaning as it has in the Broadcasting Act 1990 by virtue of section 202 of that Act.

(5) In this section—

'news-related material' means material consisting of—

(a) news or information about current affairs,

(b) opinion about matters relating to the news or current affairs, or

(c) gossip about celebrities, other public figures or other persons in the news;

'publish' means publish by any means (including by broadcasting), and references to a publisher and publication are to be construed accordingly;

'standards code' means—

(a) a code of standards that regulates the conduct of publishers, that is published by an independent regulator, or

(b) a code of standards that regulates the conduct of the entity in question, that is published by the entity itself."

This new clause is linked to Amendment 58.

Alex Davies-Jones: The amendment would allow a conduct requirement to be used to stop a designated undertaking withholding news from a recognised news publisher from its platform. None of us want to see in the UK situations like those occurring elsewhere across the globe. Colleagues will be aware that Google and Meta have attempted to ward off fair negotiations in Australia and Canada by restricting or threatening to restrict access to domestic trusted news that is the antidote to online disinformation. Denying citizens access to reliable information to avoid payment serves only to

emphasise the primacy that such firms place on profits, rather than citizens' interests. The Government must absolutely not give in to similar threats in the UK.

As the EU and other jurisdictions have forged ahead with similar but ultimately less agile and effective digital competition regulation, there is a danger that the UK will become a rule taker and not a rule maker. I urge the Minister to consider carefully the principles of the amendment and new clause 2, which further outlines a favourable definition of a recognised publisher that Labour supports. I look forward to hearing the Minister's comments, but if we are not reassured, we will press the amendment to a vote.

Paul Scully: As we have heard, amendment 58 and new clause 2 are intended to strengthen the regime's protections for news publishers by defining "recognised news publisher" and introducing a specific power to protect them from discrimination. I understand and appreciate the sentiment behind the amendment and what the hon. Member for Pontypridd is striving to do. It is important that news publishers can benefit from the robust protections offered by the new regime. I am confident that the Bill, as drafted, will make an important contribution to the sustainability of the press. I hope the hon. Lady will understand when I expand on that, because the DMU's tools, including all permitted types of conduct requirement, are designed to rebalance the relationship between SMS firms and those who rely on them, including firms and sectors across the economy. They are drafted in a sector-neutral way for that reason.

11 am

Clause 20(3)(a) will already enable the DMU to prevent an SMS firm from

"applying discriminatory terms, conditions or policies".

That could apply to a wide range of businesses, very much including news publishers. Adding a sector-specific type of conduct requirement on discrimination is therefore redundant. It would also create the risk of DMU interventions being unfairly skewed towards one sector at the expense of others. Right the way through, we have tried to ensure that the regime is not only technology-agnostic, but sector-agnostic.

Alex Davies-Jones: Is the Minister reassured that the Bill will not allow the emergence of a situation like those in Australia and Canada, where online disinformation is pumped around constantly because of the lack of clarity on platforms highlighting recognised news publishers?

Paul Scully: Yes.

Peter Dowd: Does the Minister agree that this is an exact replica of what happened when ITV tried to stop Sky advertising on ITV platforms, in terms of competition? That was stopped: it was not fair and it was not reasonable. Is this not sort of similar? We cannot give the power to the platform itself to decide what it does or does not do and what people's access to news is.

Paul Scully: No, I do not agree. To answer the question asked by the hon. Member for Pontypridd, I absolutely believe that it does, because the conduct requirements can be tailored to instruct SMS firms on how they should treat consumers and other businesses, including publishers. In the case of publishers, that could, for example, include conduct requirements on SMS firms to give more transparency to third parties over the algorithms that drive traffic, or it could oblige firms to offer third parties fair payment terms for the use of their content. Examples of that have come up time and again, both in evidence and in my conversations with publishing representatives.

Freedom of contract is a crucial principle, but withdrawal of service by an SMS firm could be considered anti-competitive if the behaviour is discriminatory or sufficient notice is not given. In such a scenario, the DMU could take appropriate action through conduct requirements or PCIs. There are plenty of general examples, and the Bill very much accounts for the examples of Australia and Canada. We are just shaping it in a different way, in as flexible—

Neil Coyle: The Minister's assertion is not shared by the News Media Association. The Opposition amendment tries to address some of the concerns around timeframes of designation and final offer mechanisms. Will the Minister tell us why he thinks the News Media Association's briefing is inaccurate?

Paul Scully: At the end of the day, this is an interpretation of the Bill. The amendment names a number of specific news publishers; our approach is sector-unspecific. All those will come within the regime of the Bill, but specifying just one sector would risk skewing the conduct of the regime and the way it works towards that sector. I think the question that was asked was whether those news publishers and the kind of behaviour that has been described come under the regime of the Bill, as drafted. We believe they absolutely do.

Alex Davies-Jones: I appreciate the Minister's rationale, but leaving the interpretation of the Bill so ambiguous could mean certain platforms allowing news publishers that are not relevant news publishers to cause harm and damage to society and the public, as we have seen elsewhere in the world. It is imperative on us as legislators to get it right, and we have that opportunity in the Bill.

We have always said that we want this law to be world-leading. We wanted to be able to do things differently from the EU. This amendment gives us the flexibility to make that change and do things differently, which is why we will press it to a vote.

Question put, That the amendment be made.

The Committee divided: Ayes 6, Noes 8.

Division No. 5]

AYES

Coyle, Neil	Malhotra, Seema
Davies-Jones, Alex	Mishra, Navendu
Dowd, Peter	Thomson, Richard

NOES

Firth, Anna	Scully, Paul
Ford, rh Vicky	Stevenson, Jane
Hollinrake, Kevin	Watling, Giles
Mayhew, Jerome	Wood, Mike

Question accordingly negatived.

Question proposed, That the clause stand part of the Bill.

Paul Scully: The DMU will be able to use conduct requirements to address and prevent practices that exploit consumers and businesses or exclude innovative competitors. Clause 20 sets out an exhaustive list of permitted types of conduct requirement that the DMU can impose in order to address and prevent harm to businesses and consumers in digital markets. It ensures that the regime can adapt to future challenges by empowering the Secretary of State to amend this list, subject to parliamentary approval.

The list reflects insights drawn from the CMA's market studies and regulatory expertise. It captures 13 well-evidenced types of anti-competitive behaviours including self-preferencing, tying and bundling, and the unfair use of data. Conduct requirements could be used to ensure that SMS firms interact with users of all kinds on fair and reasonable terms; that consumers are not discriminated against; or that competitors do not lose out because an SMS firm has used data unfairly. The list of permitted types of requirement reflects the competition issues we see in digital markets today, but these markets are fast-moving.

It is vital that the Secretary of State is able to amend the list in future, with Parliament's approval, to ensure that consumers are protected from whatever new challenges arise. Setting out the types of permitted requirement in the legislation, rather than specifying the requirements themselves, means that the regime will be flexible and responsive. It will make it possible to impose targeted and tailored interventions that address harms to consumers, while avoiding unnecessary burdens and unintended consequences for SMS firms.

Alex Davies-Jones: Clause 20 is a mammoth clause that sets out an exhaustive list of permitted types of conduct requirement. Labour welcomes the clarity in the clause—as, I am sure, will the CMA and firms likely to be designated. Ultimately, pro-competitive interventions will tackle the causes of market power and are a necessary step to addressing the characteristics of these markets, such as network effects and economies of scale that tip some digital markets towards a single firm. Those interventions could also include mandating that consumers have greater choice over the collection and use of their personal data. They could even look at ownership separation. However, some digital markets cannot be made competitive, and in such cases the effects of market power must be managed. To do this, the DMU needs sufficient powers. We see the clause as central to getting that balance right.

Clause 20 states that conduct requirements may prevent the SMS firm from

"carrying on activities other than the relevant digital activity in a way that is likely to increase the undertaking's market power materially, or bolster the strategic significance of its position, in relation to the relevant digital activity".

The leveraging principle is critical to the success of the pro-competition regime. Without it, the DMU will find itself unable to address harmful conduct and will meet arguments about where—meaning in which activity—a piece of conduct occurs, because the DMU will be unable to touch conduct that occurs outside the SMS activity even if it is closely related to the SMS activity.

A stronger leveraging principle would prevent designated firms from simply moving their service fees from one location in the ecosystem to another, such as from app store service fees to an operating system licence—the stealth tax that we heard about during our evidence sessions. It would prevent a whack-a-mole situation in which the regulator always has to define new activities to catch up.

We have already debated our amendment, with which we were seeking a stronger principle. Sadly, it was not accepted by the Government, but we will push this further as the Bill progresses.

Question put and agreed to.

Clause 20 accordingly ordered to stand part of the Bill.

Clause 21

Content of notice imposing a conduct requirement

Question proposed, That the clause stand part of the Bill.

The Chair: With this it will be convenient to discuss clauses 22 to 25 stand part.

Paul Scully: Clauses 21 to 25 set out the procedural aspects in relation to conduct requirements, because it is really important that SMS firms, and the people and businesses who rely on them, understand what obligations are being imposed and why. The DMU is required to give notice to the SMS firm and then publish the notice online as soon as is reasonably practicable. Clause 21 sets out the information that must appear in the notice.

Given the rapid pace of change across businesses and digital markets, it is important that the DMU can adapt conduct requirements to ensure that they remain targeted and proportionate, so clause 22 will establish the DMU's power to revoke a conduct requirement, helping to ensure that conduct requirements remain targeted and proportionate as markets and firms change.

Clause 23 will allow the DMU to facilitate the smooth transition into or out of a conduct requirement. Without the clause, there is a risk of disruption or harm to businesses and consumers where a conduct requirement comes into force or ceases to have effect without a sufficient transition period.

The conduct requirements in clause 24 will impose tailored, enforceable obligations on SMS firms. It is only right that consumers and businesses, including the SMS firms themselves, have a chance to share their perspective on those obligations, so clause 24 requires the DMU to carry out a public consultation on its proposed decision before it can impose, vary or revoke a conduct requirement.

Clause 25 requires the DMU to keep conduct requirements under review, ensuring that requirements remain effective, targeted and proportionate. It also ensures that the DMU monitors where breaches may have taken place.

Alex Davies-Jones: Clause 21 sets out the information that the CMA is required to publish as part of the notice imposing or varying a conduct requirement. Labour supports the clause, which we feel is important for clarifying the details around the content of potential conduct requirements. Again, I am keen to understand exactly who will have access to such information. As

ever, I would appreciate the Minister's thoughts on that point. That aside, we see the clause as integral to the Bill, so we have not sought to amend it at this stage.

As with clause 21, we support clause 22 and its intentions in full. The only point that I feel is worth raising with the Minister is the slight ambiguity around the timeframes. It will be helpful for all involved if the regime is not only flexible, but rapid and able to evolve for changing markets. Can the Minister assure us that the clause will support this in practice?

Clause 23 is important and serves a vital function in establishing the transitional provisions related to conduct requirements. An example would be if a conduct requirement were imposed from a particular date, but some allowances were made in relation to certain aspects of that conduct requirement so that they had effect from a later date to smooth the transition for the benefit of a designated undertaking. That speaks to the nature of the regime: we all want to see it as flexible and fair, but it is therefore only right that the CMA be given appropriate statutory powers to vary its conduct requirements where required. We also welcome subsection (2), the details of which will enable and empower the CMA to investigate and enforce against historical breaches. That is vital, as we seek to establish a regime that will be sufficiently agile for breaches both past and present.

Clause 24 is also incredibly welcome. It imposes a duty on the CMA to consult publicly before imposing, varying or revoking a conduct requirement. The consultation must be brought to the attention of such persons as the CMA considers appropriate. We have already discussed who is an appropriate person, but sadly the transparency and commitment to consultation is not mirrored elsewhere in the Bill, which is frustrating. Given the broadly collegiate nature of our debate thus far, I hope that the Minister can consider some adjustments, and I look forward to hearing from him shortly. By and large, though, Labour welcomes the provisions in subsection (3), which provide that the CMA will be allowed to carry out a consultation on proposed conduct requirements before making a decision on designation. As we know, that makes it possible for the CMA to impose conduct requirements at the same time as issuing a decision on designation, or very shortly afterwards. We consider that to be a sensible approach, and we therefore support the clause.

Again, there is no need to repeat myself. Labour supports clause 25, which places a duty on the CMA to consider, on an ongoing basis, the effectiveness of any conduct requirements in place and how far the designated undertaking is complying with them. The CMA will also need to consider, on an ongoing basis, whether to impose, vary or revoke a conduct requirement, and whether it would be appropriate to take action against a breach of any conduct requirement. It would be helpful for us all to have an idea of how regularly the reviews will happen. It cannot and should not be the case that one SMS firm has its conduct requirements reviewed more regularly than any other, so I am keen to hear the Minister's assessment of how that will work fairly and equitably in practice.

Question put and agreed to.

Clause 21 accordingly ordered to stand part of the Bill.

Ordered, That further consideration be now adjourned. —*(Mike Wood.)*

11.15 am

Adjourned till this day at Two o'clock.

PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT
GENERAL COMMITTEES

Public Bill Committee

DIGITAL MARKETS, COMPETITION AND CONSUMERS BILL

Sixth Sitting

Tuesday 20 June 2023

(Afternoon)

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No proofs can be supplied. Corrections that Members suggest for the final version of the report should be clearly marked in a copy of the report—not telephoned—and must be received in the Editor's Room, House of Commons,

not later than

Saturday 24 June 2023

The Committee consisted of the following Members:

Chairs: Rushanara Ali, † Mr Philip Hollobone, Dame Maria Miller

† Carter, Andy *(Warrington South)* (Con)
† Coyle, Neil *(Bermondsey and Old Southwark)* (Lab)
† Davies-Jones, Alex *(Pontypridd)* (Lab)
Dowd, Peter *(Bootle)* (Lab)
† Firth, Anna *(Southend West)* (Con)
† Ford, Vicky *(Chelmsford)* (Con)
† Foy, Mary Kelly *(City of Durham)* (Lab)
† Hollinrake, Kevin *(Parliamentary Under-Secretary of State for Business and Trade)*
† Malhotra, Seema *(Feltham and Heston)* (Lab/Co-op)
† Mayhew, Jerome *(Broadland)* (Con)
† Mishra, Navendu *(Stockport)* (Lab)
Russell, Dean *(Watford)* (Con)
† Scully, Paul *(Parliamentary Under-Secretary of State for Science, Innovation and Technology)*
† Stevenson, Jane *(Wolverhampton North East)* (Con)
† Thomson, Richard *(Gordon)* (SNP)
† Watling, Giles *(Clacton)* (Con)
† Wood, Mike *(Dudley South)* (Con)

Kevin Maddison, John-Paul Flaherty, Bradley Albrow, *Committee Clerks*

† attended the Committee

Public Bill Committee

Tuesday 20 June 2023

(Afternoon)

[Mr Philip Hollobone *in the Chair*]

Digital Markets, Competition and Consumers Bill

2 pm

The Chair: Clauses 22 to 25 were debated this morning. With the leave of the Committee, I will put the Questions together on clauses 22 to 25 stand part.

Clauses 22 to 25 ordered to stand part of the Bill.

Clause 26

Power to begin a conduct investigation

Question proposed, That the clause stand part of the Bill.

The Chair: With this it will be convenient to discuss clauses 27 to 35 stand part.

The Parliamentary Under-Secretary of State for Science, Innovation and Technology (Paul Scully): It is a pleasure to serve under your chairmanship, Mr Hollobone. Clauses 26 to 35 are about the enforcement of conduct requirements. The participative approach within the pro-competition regime means that the digital markets unit will aim to resolve issues with firms with strategic market status without the need for formal enforcement action. Where that is not possible, clause 26 will empower the DMU to investigate suspected breaches of conduct requirements by SMS firms and, where it finds a breach, consider what action can be taken. That is necessary to ensure that SMS firms comply with requirements.

Opening an investigation allows the DMU to make use of the full range of information-gathering powers set out in chapter 6. Where the DMU begins an investigation, certain information must be given via a notice to the SMS firm, and a summary of that notice must be published. Clause 27 will require that before the DMU can make a finding of the breach, it must consider any representations that an SMS firm makes in relation to the conduct investigation.

Clause 28 will allow the DMU to close a conduct investigation at any time without making a finding as to whether a breach has occurred. The DMU will need to explain why it is closing the investigation and account for its decision. That power is needed as it allows the DMU to react to changes during the investigation process. That could be, for example, needing to divert resources to an emerging high-priority competition issue elsewhere.

Clause 29 sets out the countervailing benefits exemption. The DMU's objective is to promote competition for the benefit of consumers, and that will shape the design of its regulatory interventions, meaning that the DMU will take consumer benefits into account when designing conduct requirements in the first place. However, the inclusion of the countervailing benefits exemption provides a backstop to ensure that, if needed, consumer benefits can be explicitly considered at the enforcement stage, too.

During a conduct investigation, an SMS firm will be able to put forward evidence that its action brings about benefits for consumers that outweigh the potential harm to competition. That will reinforce that consumers are at the heart of the regime. The clause is not about pursuing textbook-perfect economic outcomes; it is about real-world outcomes for consumers.

Clause 30 will place the DMU under a duty to notify an SMS firm of the outcome of a conduct investigation within a six-month investigation period. That will ensure that investigations are executed within reasonable timeframes. That does not apply if the DMU has accepted a voluntary binding commitment from the firm relating to the conduct under investigation, or if the investigation is closed with no findings made. The duty to give a notice to an SMS firm and subsequently publish a summary online is vital to inform the firm under investigation of the outcome and keep relevant parties informed of DMU action.

Clause 31 will give power to the DMU to impose an enforcement order on an SMS firm where it has found a breach of a conduct requirement. Those orders will most often be cease-and-desist orders requiring bad behaviour to stop, but they can also require more complex behavioural changes where that is a more appropriate way to remedy a breach. When imposing or varying an enforcement order, the DMU has a power, rather than a duty, to consult those persons it considers appropriate. That will allow the DMU to consider relevant third-party and SMS representations on proposed enforcement action, while ensuring that enforcement orders requiring the SMS firm to simply stop bad behaviour are not delayed by a requirement to consult.

Clause 32 will grant a power to the DMU to introduce enforcement orders on an interim basis. The DMU needs to be able quickly to address immediate harms that may occur from suspected conduct breaches in order to prevent significant damage, prevent action that would make subsequent remedies ineffective, or protect the public interest. The clause will enable intervention before irreversible change occurs and will ensure that options to restore competition are maintained.

Clause 33 makes provision for the duration of enforcement orders and interim enforcement orders, and for the circumstances in which they cease to have effect. Clause 34 will establish the DMU's power to revoke an enforcement order, ensuring that the enforcement orders in place remain targeted and proportionate. The DMU needs the flexibility to remove enforcement orders where they are no longer appropriate, so that SMS firms are not subject to unnecessary or inappropriate rules.

Finally, to ensure that enforcement orders are effective, targeted and proportionate, it is important that the DMU considers how they function and whether changes are necessary. Clause 35 will require that the DMU monitors the effectiveness of the enforcement orders in place. That includes assessing whether SMS firms are complying with existing enforcement orders, whether variation of an order is required and whether further enforcement action is needed.

In conclusion, clauses 26 to 35 set out robust enforcement provisions to make sure that the impacts of conduct requirements are realised.

Alex Davies-Jones (Pontypridd) (Lab): It is an honour to serve under your chairship this afternoon, Mr Hollobone. With your permission, I will make some brief comments on the clauses, in response to the Minister.

Clause 26 is very welcome. It is an important clause that outlines the circumstances in which the CMA will be able to begin an investigation into a suspected breach of a conduct requirement, more formally referred to in the Bill as a conduct investigation. It is an important and positive addition. For too long, the CMA has not had the legislative teeth to make positive change in our digital markets. Ensuring that it has reasonable and sufficient powers such as those outlined in the clause is central.

Labour particularly welcomes the provisions and thresholds outlined in subsection (1), which make it clear that the decision to begin a conduct investigation will be grounded in empirical evidence, whether from complaints submitted by third parties or from the CMA's own market studies. None of us wants to see overregulation or businesses stifled, but it is important that when the CMA has reasonable grounds to carry out a breach of conduct requirement, it has the tools available to act swiftly.

We note that subsections (3) and (4) outline the requirement for the CMA to give a notice to the undertaking about the investigation and set out the content required for that notice. We welcome the provisions entirely, as we do the clarification on the period in which a statutory investigation can take place. We think six months is reasonable, and we are pleased to see clarity on when the timeframe can be extended—a matter we will come to later when we address clause 102.

The current wording of subsection (6) states:

"As soon as reasonably practicable after giving a conduct investigation notice, the CMA must publish a statement summarising the contents of the conduct investigation notice."

Could the Minister clarify exactly where, and to whom, that notice will be published? As I have previously stated in reference to other parts of the Bill, there are some grounds for making that information public, at least to those who request it. We appreciate the market sensitivities, but ultimately it is businesses that will be facing regulation over their digital practices, broadly for the first time, and they deserve access to that information. It will be a valuable tool for learning and best practice.

I will keep my comments on clause 27 brief because I think, or at least hope, that we all agree that it is an important clause that makes sure that the CMA is required to consider representations from the undertaking being investigated before making a decision on whether the undertaking has breached conduct requirements. I am keen to hear from the Minister exactly what sort of information he believes will be appropriate for the CMA to consider. A balanced approach to the regime is critical, but we do not want the CMA's investigatory powers delayed by big firms who may choose to delay or overwhelm the process in any way. That aside, we support the clause and have not sought to amend it at this stage. Sincere apologies to Committee members for my repetition, but this is a far more collegiate Committee than others I have sat on.

We support clause 28 and its intentions. As we know, the clause provides that the CMA can choose to close a conduct investigation without making a decision about a breach, and sets out the process and timing for giving a notice to the undertaking about the closure and publishing a summary of the notice. We welcome provisions and clarity over this process. The CMA could summarise the contents of the notice provided to the relevant designated undertaking, while allowing it to redact some information for confidentiality purposes. However, we feel that there is a strong argument, once again, for making that information public to anyone who wishes to request a copy.

Labour welcomes the intentions of clause 29, which outlines the procedure that the CMA must follow where a breach of a firm's conduct requirement results in net benefits for consumers. This is an important clause, and it is vital that we have such an exemption to ensure that the regime does not inadvertently harmfully impact consumers. However, the countervailing benefits exemption must not be drawn too broadly. If the exemption is too broad, SMS firms will be able regularly to avoid conduct requirement compliance by citing security and privacy claims, as well as spamming the CMA with numerous studies, thus diverting its resources, which, as we have discussed, are very precious. This would undermine the entire regime by severely limiting the efficacy and efficiency of the conduct requirements. I therefore wonder whether the Minister has considered including in the Bill an exhaustive or non-exhaustive list of acceptable grounds for exemption.

Broadly speaking, though, Labour welcomes the Government's approach, which has similarities with the approach taken in the Competition Act 1998. It would be remiss of me not to remind the Minister that that important Act came into being thanks to a Labour Government. The reality is that Labour has always been committed to getting this balance right. We want to support big businesses, while also protecting consumers and encouraging innovation. These principles do not have to be mutually exclusive. That is why we particularly welcome clause 29(2), which sets out the criteria for the exemption, including that the benefits need to be

"to users or potential users of the digital activity in respect of which the conduct requirement in question applies,"

and must

"outweigh any actual or likely detrimental impact on competition resulting from a breach of the conduct requirement".

As we know, some examples of benefits may include lower prices, higher-quality goods or services, or greater innovation in relation to goods or services.

Clause 29 also makes it clear that it must not be possible to realise the benefits without the conduct, which means that the CMA must be satisfied that there is no other reasonable or practical way for the designated undertaking to achieve the same benefits with less anti-competitive effect. That is an important clarification, which is once again a sensible approach that we feel is crucial to getting the balance of this regime right.

Although I know that colleagues will be aware of the example highlighted to us all in the Bill's explanatory notes about a default internet browser receiving security updates possibly being an exemption, I wonder whether the Minister can give us additional examples of situations in which he would see the clause coming into effect.

[Alex Davies-Jones]

That aside, we support the intentions of clause 29 and see it as a positive step in terms of putting consumers and common sense first.

We see clause 30 as being fairly procedural, in that it outlines the circumstances in which the CMA must give notice about the findings of a conduct investigation. We are pleased to see that a period of six months has been established; none of us wants to see this process going on unnecessarily. We note, however, that in subsection (1), and in the Bill generally, we truly believe that more transparency is required. As it stands, the Bill is missing an opportunity to afford civil society, academics, businesses and consumers alike the opportunity to learn from the regime and ultimately to improve best practice in our digital markets more widely.

We welcome clause 31. However, we note that subsection (4) specifies information that the enforcement must contain, while subsection (5) requires that the CMA

"may consult such persons as the CMA considers appropriate before making an enforcement order",

or varying one. Again, the wording is very subtle, but I am most interested to hear from the Minister exactly why the consultation process is a "may" rather than a "must".

Throughout the Bill in its current form, there appears to be a lack of points for stakeholders to engage with the CMA decisions through consultation. Although the CMA being able to design rules and interventions for each firm could result in more effective remedies, it also increases the risk of regulatory capture, whereby SMS firms write their own rules and get them rubber-stamped by the regulator. That makes proper consultation essential. I would appreciate clarification on that point from the Minister.

Clause 32, as its title suggests, gives the CMA the power to make enforcement orders on an interim basis. This is an important tool to allow the CMA to act rapidly where a potential breach is concerned. It is particularly welcome that subsection (1)(b) lists the circumstances under which interim enforcement orders can be made, and that these are broadly around preventing damage to a person or people, preventing conduct that could reduce the effectiveness of the CMA, or protecting the public interest. It is important for all of us with an interest in the Bill that that is clearly outlined in the Bill, so that is very welcome indeed.

Clause 33 makes provision for enforcement orders and interim enforcement orders to come into force, and outlines the circumstances in which they cease to have effect. We see this clause as, again, a fairly procedural one. We welcome the clarity of subsection (4), which will ultimately enable the CMA to take action against historic breaches. That is imperative, given the pace at which our digital markets and regulated firms can shift. We therefore support the clause and believe that it should stand part of the Bill.

On clause 34, as with previous clauses, there is no need for me to elaborate at great length. In essence, we agree with the clause.

As we know, clause 35 outlines that the CMA must keep the enforcement orders and interim enforcement orders that it has made under review, including whether to vary or revoke them, and also the extent to which undertakings are complying with them and whether further enforcement action needs to be taken. This is an incredibly important point. The CMA must review its own homework, as we expect all regulators to do. However, I wonder what assessment the Minister has made of making those reviews public. The CMA must have a degree of accountability, particularly to Parliament. We feel that that is somewhat lacking in the Bill as it stands.

More widely, that points to the lack of opportunities for stakeholders to engage with the CMA and its decisions through consultation, as I have previously said. This is a significant problem, given the nature of the regime. On the one hand, the flexibility and agency that the DMU has to tailor its regulatory approach depending on the nature of the firm should allow it to design more effective remedies. On the other, it increases the danger of regulatory capture by SMS firms. I would appreciate the Minister clarifying that point so that we get this right.

2.15 pm

Paul Scully: The publication of notices will be online. The reason that there will be two separate versions is that one might be redacted, for example for things like commercial sensitivity, but it is right that the SMS firm understands the full reasons. Beyond that redaction, there will be one separate online publication for people to see, including the challenger firms themselves.

The hon. Lady spoke about the length of time. The DMU will decide the length of the period during which an SMS firm can make representations, because it will vary from case to case. It is not for us to set an arbitrary timeline, because some will be comparatively simple and others will be incredibly complex and technical. That will ensure that the DMU can run investigations efficiently, without unnecessary delays due to late representations, but the DMU has to tell the SMS firm in the notice opening the investigation about the length of the period.

The implementation of any conduct requirements will be preceded by a public consultation, alongside ongoing engagement between the SMS firm and the DMU about compliance with those requirements as part of the regime's participative approach. However, there is no statutory requirement to consult on enforcement orders, because we are giving the DMU the discretion to consult where appropriate. Requiring consultation would not be proportionate for straightforward cease-and-desist orders, for example. Such orders, which we expect to be the majority of orders made, simply require firms to stop breaching the original conduct requirement that has already been consulted on, meaning that undertaking a consultation would be unnecessary.

That is where we are coming from on that—there is no deeper reason beyond ensuring that we can keep things proportionate for all sides. Third parties with a view or with evidence will be able to communicate those to the DMU during the conduct investigation itself, or once the enforcement order statement is published.

Question put and agreed to.

Clause 26 accordingly ordered to stand part of the Bill.

Clauses 27 to 35 ordered to stand part of the Bill.

Clause 36

COMMITMENTS

Question proposed, That the clause stand part of the Bill.

The Chair: With this it will be convenient to discuss the following:

That schedule 1 be the First schedule to the Bill.

Clause 37 stand part.

Paul Scully: I turn to the clauses on commitments related to conduct requirements. The ability of the DMU to accept commitments, which are voluntary and binding obligations, from SMS firms is important to support the participative approach to regulation that I have spoken about. That approach promotes greater efficiency and the swift resolution of investigations.

Clause 36 will allow the DMU to accept commitments from a firm during a conduct investigation. Firms will be able to offer commitments to the DMU to propose a solution to a suspected breach of conduct requirements. There will be robust safeguards in place to ensure that commitments are used appropriately. The DMU will need to publicly consult on any proposal to accept a commitment. Commitments can be varied to reflect changes in circumstances and will remain in force until either the DMU decides to release the SMS firm from the commitment or the conduct requirement to which the commitment relates comes to an end.

Clause 37 will ensure that the DMU is required to monitor the commitments that are accepted. That includes assessing the appropriateness of the commitments; whether SMS firms are complying with the commitments; and whether further enforcement actions are needed. To ensure that commitments are accepted, varied or revoked in a transparent way, schedule 1 sets out the procedures relating to commitments.

The procedures in schedule 1 also apply in relation to commitments for pro-competition interventions, but I will speak about those at a later stage. Schedule 1 ensures that the DMU publishes a notice detailing the commitment or proposed varying or revocation of the commitment and the reasons for its decision. The DMU must also consider any representations made in accordance with the notice before accepting, varying or revoking commitments. Without the ability to accept commitments, the DMU would have to use greater resources to further investigate breaches, and then develop and impose enforcement orders to fix them. The swift and effective resolution through binding commitments will be beneficial for the DMU, affected firms and ultimately consumers.

Alex Davies-Jones: Labour supports the intentions of clause 36, which ensures that the CMA can accept binding voluntary commitments from an undertaking during a conduct investigation to bring the investigation to an end. Once again, we feel that that is critical to a flexible and fair regulatory regime. It is only right that the CMA is empowered to continue an investigation into other behaviour and, when it can, investigate the same behaviour again. Therefore, we particularly welcome subsection (4).

That being said, there is no mention of consultation regarding the accepting of commitments from SMS firms, even though that will close a conduct requirement investigation and the commitments accepted will impact stakeholders. There is also no consultation when the CMA chooses to release an SMS firm from the commitments. Again, we feel that those points are worth clarifying. I would be grateful if the Minister could outline exactly why the Bill fails to place a duty on the CMA to consult appropriately on that important point.

Schedule 1 and its provisions relate to the commitments on firms, and it is very welcome. The schedule outlines the duty on the CMA to publish a notice, and consider any representations made in accordance with the notice that are not withdrawn. That is a logical and sensible approach. We also welcome the range of provisions in the schedule that provide extensive clarity on the CMA's responsibilities in relation to its decision making. We have repeatedly called for more clarity with a number of amendments, so I hope the Minister will carefully consider our reasonable requests. Overall, schedule 1 is an important part of the Bill that further clarifies the CMA's responsibilities, and we support its inclusion.

Without mirroring the comments that were made when we considered clause 25, Labour supports clause 37. It is vital for the regime to function now and into the future that the CMA has a duty to review those commitments. I am interested to know the Minister's thoughts on how frequent the reviews should be, but ultimately this is the right approach if we are to ensure and encourage total compliance. I hope that the Minister will assure us that the Government are open to improving the Bill when it comes to transparency, including parliamentary oversight. With that in mind, we do not have any specific amendments to clause 37 at this stage, but that could change.

Paul Scully: To answer the hon. Lady's point about consultation in clause 36, I will point her to schedule 1(2), which requires the DMU to consult on commitments before they are accepted or varied. Although that requirement is not in clause 36, it is in schedule 1.

Question put and agreed to.

Clause 36 accordingly ordered to stand part of the Bill.

Schedule 1 agreed to.

Clause 37 ordered to stand part of the Bill.

Clause 38

POWER TO ADOPT FINAL OFFER MECHANISM

Paul Scully: I beg to move amendment 1, in clause 38, page 20, line 32, leave out "proposed".

See the explanatory statement for Amendment 4.

The Chair: With this it will be convenient to discuss the following:

Government amendments 2 to 4.

Government amendment 45.

Government amendment 6.

Government amendments 8 and 9.

Government amendment 11.

Paul Scully: Government amendment 4 redefines what transactions can be dealt with under the final offer mechanism. It is accompanied by several consequential amendments to clauses 38 to 41. One of the conditions for the use of the final offer mechanism as currently drafted is that it can be used only in relation to a "proposed" transaction, where an SMS firm provides goods or services to the third party, or uses or acquires goods or services from the third party.

However, for the final offer mechanism to be most effective, it is crucial that the definition of "transaction" includes the future performance of an existing transaction, as well as new transactions that will happen in the future. That will ensure that parties who are already transacting with each other but on unfair and unreasonable payment terms are not excluded by the conditions for using the final offer mechanism. These are consequential, technical amendments that have been produced alongside feedback from the CMA.

Alex Davies-Jones: We welcome the first group of Government amendments, which we see as important clarifications to ensure that the final offer mechanism can be applied in relation to the future performance of an ongoing transaction. We support their inclusion, as those changes should stand part of the Bill.

Amendment 1 agreed to.

Amendments made: 2, in clause 38, page 21, line 1, leave out "proposed".

See the explanatory statement for Amendment 4.

Amendment 3, in clause 38, page 21, line 7, leave out "proposed".

See the explanatory statement for Amendment 4.

Amendment 4, in clause 38, page 21, line 13, at end insert—

"(4A) In subsection (1), 'transaction' means—

(a) a future transaction, or

(b) the future performance of an ongoing transaction,

whether in accordance with a contract or otherwise."

This amendment, together with Amendments 1, 2, 3, 6, 8, 9, 11 and 45 means that the final offer mechanism could be applied in relation to the future performance of an ongoing transaction.

Amendment 45, in clause 38, page 21, leave out line 20 and insert—

"'the transaction' means the transaction mentioned"—*(Paul Scully.)*

See the explanatory statement for Amendment 4.

Question proposed, That the clause, as amended, stand part of the Bill.

The Chair: With this it will be convenient to discuss the following:

Clause 39 stand part.

Government amendment 7.

Government amendment 10.

Clauses 40 to 43 stand part.

Government new clause 1—*Decision not to make final offer order—*

New clause 3—*CMA annual report on final offer mechanism—*

'(1) The CMA must, once a year, produce a report about the final offer mechanism.

(2) Each report must include information about—

(a) the number of final offer orders the CMA has made over the previous year;

(b) for each final offer order—

(i) the amount of time taken between final offer initiation notice being given and the final offer order being made.

(ii) whether bids were submitted by both the undertaking and the third party, and

(iii) the outcome of the process; and

(3) The CMA may provide the information in such a way as to withhold any details that the CMA considers to be commercially sensitive.

(4) The first report must be published and laid before both Houses of Parliament within one year of this Act being passed.'

This new clause requires the CMA to publish an annual report on the workings of the final offer mechanism. The report will be made publicly available and will be laid in both Houses of Parliament.

Paul Scully: Clauses 38 to 43 will allow the DMU to use the final offer mechanism as a backstop enforcement measure to other regulatory tools. The final offer mechanism will help the DMU to resolve breaches of conduct requirements requiring fair and reasonable payment terms when there has been sustained non-compliance by an SMS firm. The inclusion of these clauses in the Bill is essential to provide the DMU with a more effective alternative to setting prices directly, which could be complex and time-consuming in fast-moving digital markets.

The final offer mechanism is a backstop that can be used when normal enforcement processes have not brought about a timely resolution. The DMU must prevent SMS firms from imposing unfair and unreasonable terms in the first place and incentivise constructive negotiations. That will ultimately drive the best outcomes for consumers, which is why there is a high threshold set out in clause 38 for the use of the final offer mechanism.

On the occasions when the tool is used, the DMU will ask the SMS firm and relevant third party to each submit what they believe are fair payment terms—their final offers—and the DMU will then choose one. The regulator will not be able to amend or replace the offers. To ensure the timely resolution of the breach, clause 40 establishes that the upper time limit for the entire final offer process is six months, as well as providing for a power for the Secretary of State to amend that time limit in future. The clauses also establish clear requirements on the DMU to publish key notices and statements upon issuing any orders, ensuring public transparency and accountability about the tool's use.

It is important when discussing these clauses to mention the role of the DMU in facilitating the preparation of the final offers. Under clause 39, the DMU can both gather and share crucial information between the two parties, allowing both sides to prepare a well evidenced final offer. The outcome of the final offer mechanism will be confirmed through a final offer order, which will instruct the SMS firm to give effect to the terms decided through the tool.

Government amendment 7 makes provision for how final offer payment terms are to be given effect for the purposes of the transaction. The amendment makes explicit that the final offer order will not set out specific terms that must be incorporated word for word into the terms of the transaction; rather it will set out the outcome for the transaction for the SMS firm to achieve.

I therefore encourage Members to support its inclusion. The clauses also contain key provisions for ensuring that the use of this tool is proportionate, allowing the DMU to revoke a final offer order where there has been a material change in circumstances.

On that topic, I turn to Government amendment 10 and new clause 1. Taken together, they will ensure that the DMU can end the final offer mechanism without making a final offer order, at any time after giving a final offer initiation notice where there has been a material change in circumstances. Such a change in circumstances may include a privately negotiated agreement being reached between the disputing parties, or evidence of duress becoming known to the DMU. This amendment will therefore ensure the tool is not used where it is not appropriate to do so, and that the DMU has suitable flexibility to make that decision. I therefore invite the Committee to support these clauses and the relevant Government amendments.

2.30 pm

Finally, on new clause 3 I fully recognise the importance of transparency in a regime in general, and regarding the use of this novel tool in particular. However, the Bill as drafted already contains a robust process for ensuring transparency on the rare occasions that this tool will be needed through the clear public statements published by the DMU at significant points in the process, including about any final offer orders made. Those statements will provide information about the operation of the final offer mechanism in practice, ensuring clarity as to how and when the tool is being used for the sake of stakeholders, as well as interested parliamentarians. That is in addition to the annual report already prepared and delivered to Parliament by the CMA, which will also cover its activities under the regime. As such, an additional annual report would not offer Parliament any greater insight into the use of that tool, and therefore I do not believe that the new clause would provide any additional benefit. I hope that the hon. Lady feels able to withdraw it.

Alex Davies-Jones: As we know, there are several provisions contained in the Bill that could form the basis of new rules regulating agreements between UK news media and digital platforms, akin to the news media bargaining code in Australia. However, the formulation of those rules will be at the discretion of the DMU, and would apply on a case-by-case basis. As we have debated, the Bill currently enables the DMU to impose conduct requirements that are for the purposes of obliging undertakings to

"trade on fair and reasonable terms".

Those undertakings could also be obliged by the DMU to not carry on activities other than their digital activities in a way that could be anti-competitive. That could be the case where carrying out that non-digital activity is likely to increase an undertaking's market power materially or bolster the strategic significance of its position in relation to its digital activity.

The Bill also provides an arbitration process called a final offer mechanism. Under that mechanism, the DMU will invite the SMS firms and third parties to submit a payment terms offer that they regard as fair and reasonable. The DMU is then required to choose one party's offer only, without any ability to determine alternative offers. That process has been adopted in Australia for the purpose of arbitrating bargains between digital platforms and news media providers, although it has not yet been used. While there is no provision for a media bargaining code in the Bill, the mere existence of this mechanism will hopefully drive tech platforms to negotiate sincerely with media providers in that context to reach an agreement independently, rather than risk the CMA choosing the final offer. We entirely welcome this clause, and the additional relevant ones to follow.

In the digital media sector, Google and Meta's overwhelming market power means that publishers are not compensated fairly for the significant value that their content creates for platforms, which is estimated at about £1 billion per year here in the UK. Google Search and Meta's Facebook rely on news publishers to attract and engage users, as professional news content is reliable and regularly updated. It is absolutely right that the CMA will be empowered to make pro-competition interventions. While the conduct reviews will hopefully prevent the worst abuses of market power, PCIs will allow the DMU to implement remedies that address the root cause of that market power. For example, a CR could prevent an SMS firm from self-preferencing its own businesses in the digital advertising market, which has negative impacts including locking businesses into products and taking an unfairly large cut of revenues, whereas a PCI could require a functional separation to remove the incentive for self-preferencing. Labour sees that as a hugely important tool. We want to see and support an empowered DMU, so we are pleased to support the clause and believe it should stand part of the Bill.

Again, we see clause 39 as important: it sets out the process that the CMA must follow if it decides to use a final offer mechanism. In theory, the DMU should support publishers, who will now be able to negotiate fair and reasonable terms for the value that news content brings to platforms. If SMS firms refuse to comply, a final offer mechanism will be available, with each party submitting bids and the fairest offer being selected. The DMU will ensure that publishers receive a fair share of revenues for the advertising that is shown around their content. Publishers will also be able to receive user data when consumers interact with their content on platform services, in a manner compliant with data protection law. In theory, unfair commissions on app store sales will be prevented, ensuring that publishers can build sustainable digital subscription businesses.

These are all very welcome developments indeed. We particularly welcome subsection (3), under which the CMA must specify if it is considering taking any other action to address the underlying cause of the breach that led to the use of the FOM—for example, a pro-competition order instructing a designated undertaking to provide access for third parties to consumer data held by that undertaking, which could rebalance bargaining power within that digital activity. It will come as no surprise that I ask the Minister, once again, to clarify whether such statements will be published in the public domain. This important point is worth clarifying, so I look forward to hearing about the adequacy of the transparency provisions in this part of the Bill.

Government amendments 7 and 10 are linked to Government new clause 1. They clarify that parties can still settle outside formal processes once the FOM stage

[Alex Davies-Jones]

has begun. Given that the aim of the final offer mechanism is to incentivise parties to come to a deal without direct CMA intervention, it seems right that parties are still able to come to a deal outside this formal process. This may allow for more favourable terms to be reached, as the platforms will be under pressure in the FOM process, and it will mean that publishers can avoid the uncertainty of the CMA picking one of the two offers.

There will always be a concern that the asymmetry of resources might mean that publishers compromise too far when faced with the uncertainty of an FOM decision but, ultimately, Labour supported these provisions when they appeared in clause 40, and moving them to ensure that a deal can be reached outside the FOM at any time after a final offer intention notice has been issued seems to make good sense. We therefore support the Government amendments.

Unsurprisingly, Labour also welcomes clause 40, which establishes the process that the CMA must follow with regard to the outcome of the FOM process. We need not go into much detail on this clause, as we view it as a fairly standard and effective way of ensuring that proposed transactions are fairly processed by the CMA.

At this point, I must press home the wider importance of these final offer mechanisms because, if they are implemented correctly, they could have incredibly positive benefits. Indeed, we know that Google and Meta have attempted to ward off fair negotiations in Australia and Canada by restricting, or threatening to restrict, access to domestic trusted news, which is the antidote to online disinformation. Denying citizens access to reliable information to avoid payment serves only to emphasise the primacy that these firms place on profit, rather than citizens' interests. The Government should not give in to similar threats here in the UK, and I hope the Minister is listening.

As the EU and other jurisdictions have forged ahead with similar, but less agile and effective, digital competition regulations, there is a danger that the UK will become a rule taker, not a rule maker. Delayed or weakened legislation will leave UK businesses at a competitive disadvantage internationally, and will deny UK consumers lower prices and more innovative products. In contrast, a strong, forward-looking DMU regulation will ensure that digital markets live up to their potential, allowing consumers to enjoy the full benefits that technology can deliver. I hope that the Minister can reassure us that the Government will not bow to pressure and that the CMA will rightly be compelled to intervene where necessary.

Labour supports the intention of clause 41, which we also see as standard practice. Colleagues will note that subsection (1) provides that a final offer order must impose obligations on the designated undertaking that the CMA considers appropriate for giving effect to the final offer payment terms it has decided, and they must be included in the proposed transaction.

Again, subsection (2) sets out exactly what information the CMA must give to the parties, and we welcome the provision. I further note that subsection (3) requires the CMA to publish a statement summarising the final offer order, and this transparency is also welcome. It is unclear who will have access to these statements, so I am keen to hear the Minister's assessment of the value of making such documents public to anyone who wishes to seek them. This aside, we support clause 41 and believe it should stand part of the Bill.

Labour supports clause 42 and particularly welcomes subsection (3). This is an important clause as it empowers the CMA to take action on both historical and live breaches. Concerns reported to us by tech companies include requiring clarity on the terms of these final offer mechanisms. It is well known that many users sign up to digital platforms, via terms and conditions, to access a service with no monetary exchange as part of the agreement. Does the Minister see this counting as a contract that is challengeable via the final offer mechanism under the DMU regime? Although the regime appears clear, the final offer mechanism relates to pricing disputes and there are concerns that it could be drawn wider. Clarity on this point is vital and is worth establishing on the record, so I am keen for the Minister to address it.

I do not have any specific comments to make on clause 43. As we have previously said, Labour believes it is important that the CMA must be legally obliged to keep these final offer orders under constant review. This is the nature of a workable, agile regime, and we therefore support the clause standing part.

We tabled new clause 3 to require the CMA to publish an annual report on the workings of the final offer mechanism. This report should be made publicly available and should be laid in both Houses so that Parliament has its say.

We recognise that the final offer mechanism is fairly unique, and it is therefore only right that the CMA is required to update the House each year, with findings on the number of SMS firms that are subject to these investigations. The Minister mentioned that the CMA will be obliged to provide an annual report to Parliament; I want it to be clear that what we have set out in new clause 1 on the final offer mechanism would be part of that report so that Parliament could scrutinise how many were made, for example. This would add to and support the other transparency measures we have pursued, so I hope the Minister not dismiss the new clause, but will consider it carefully. We feel that that is an important matter to get on record in any annual review.

Paul Scully: I appreciate the spirit in which the hon. Lady has engaged in our debate on these clauses. I shall try to answer her questions in turn.

Publication will be online, so people will be able to see it. It will be public. The hon. Lady's second question was: will I listen? Absolutely yes, I will. On her third question—will I not bow? I will bow to her, but not to pressure, because I think we have largely got this right. I cannot remember her last question—

Alex Davies-Jones: It was about new clause 3.

Paul Scully: Oh yes. It is important that we examine the efficacy of the final offer mechanism, so it is appropriate that that will be covered in the CMA's review of all its work, and that we will get to see and assess that work as well. I can stand here and tell the Committee that I think we have got it right now, but things change. Yes, it is flexible, and yes, it is proportionate, but we want to make sure that it stays world beating.

Question put and agreed to.

Clause 38 accordingly ordered to stand part of the Bill.

Clause 39

FINAL OFFER MECHANISM

Amendment made: 6, in clause 39, page 21, line 32, leave out "proposed".*—(Paul Scully.)*

See the explanatory statement for Amendment 4.

Clause 39, as amended, ordered to stand part of the Bill.

Clause 40

FINAL OFFERS: OUTCOME

Amendments made: 7, in clause 40, page 22, line 25, leave out

"included as terms of"

and insert

"given effect for the purposes of".

This amendment means that terms as to payment are to be given effect for the purposes of the transaction, or of any substantially similar transaction, rather than having to be "included" as terms of the transaction.

Amendment 8, in clause 40, page 22, line 26, leave out "proposed".

See the explanatory statement for Amendment 4.

Amendment 9, in clause 40, page 22, line 28, leave out "proposed".

See the explanatory statement for Amendment 4.

Amendment 10, in clause 40, page 22, line 36, leave out subsections (6) to (10).*—(Paul Scully.)*

See the explanatory statement for NC1.

Clause 40, as amended, ordered to stand part of the Bill.

Clause 41

FINAL OFFER ORDERS: SUPPLEMENTARY

Amendment made: 11, in clause 41, page 23, line 19, leave out "proposed".*—(Paul Scully.)*

See the explanatory statement for Amendment 4.

Clause 41, as amended, ordered to stand part of the Bill.

Clauses 42 and 43 ordered to stand part of the Bill.

Ordered, That further consideration be now adjourned. *—(Mike Wood.)*

2.44 pm

Adjourned till Thursday 22 June at half-past Eleven o'clock.

Written evidence reported to the House

DMCCB18 Open Markets Institute (supplementary submission)

DMCCB19 Public Interest News Foundation and Impress

DMCCB20 Which? (supplementary submission)

DMCCB21 UK Interactive Entertainment Association (Ukie)

DMCCB22 Online Dating Association

DMCCB23 Financial Times

DMCCB24 Publishers Association

DMCCB25 Telegraph Media Group

PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT
GENERAL COMMITTEES

Public Bill Committee

DIGITAL MARKETS, COMPETITION AND CONSUMERS BILL

Seventh Sitting

Thursday 22 June 2023

(Morning)

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No proofs can be supplied. Corrections that Members suggest for the final version of the report should be clearly marked in a copy of the report—not telephoned—and must be received in the Editor's Room, House of Commons,

not later than

Monday 26 June 2023

The Committee consisted of the following Members:

Chairs: Rushanara Ali, † Mr Philip Hollobone, Dame Maria Miller

† Carter, Andy *(Warrington South)* (Con)
† Coyle, Neil *(Bermondsey and Old Southwark)* (Lab)
† Davies-Jones, Alex *(Pontypridd)* (Lab)
† Dowd, Peter *(Bootle)* (Lab)
† Firth, Anna *(Southend West)* (Con)
† Ford, Vicky *(Chelmsford)* (Con)
Foy, Mary Kelly *(City of Durham)* (Lab)
† Hollinrake, Kevin *(Parliamentary Under-Secretary of State for Business and Trade)*
† Malhotra, Seema *(Feltham and Heston)* (Lab/Co-op)
Mayhew, Jerome *(Broadland)* (Con)
† Mishra, Navendu *(Stockport)* (Lab)
Russell, Dean *(Watford)* (Con)
† Scully, Paul *(Parliamentary Under-Secretary of State for Science, Innovation and Technology)*
Stevenson, Jane *(Wolverhampton North East)* (Con)
† Thomson, Richard *(Gordon)* (SNP)
† Watling, Giles *(Clacton)* (Con)
† Wood, Mike *(Dudley South)* (Con)

Kevin Maddison, John-Paul Flaherty, Bradley Albrow, *Committee Clerks*

† attended the Committee

Public Bill Committee

Thursday 22 June 2023

(Morning)

[Mr Philip Hollobone *in the Chair*]

Digital Markets, Competition and Consumers Bill

11.30 am

The Chair: Before we begin, I have a few reminders: please switch electronic devices to silent, no food or drinks apart from the water provided, and please send speaking notes to hansardnotes@parliament.uk.

Clause 44

Power to make pro-competition interventions

Question proposed, That the clause stand part of the Bill.

The Chair: With this it will be convenient to discuss the following:

Government amendment 12.

Clauses 45 to 54 stand part.

The Parliamentary Under-Secretary of State for Science, Innovation and Technology (Paul Scully): To create self-sustaining and dynamic competition in UK digital markets, we must address the sources of SMS—strategic market status— firms' substantial and entrenched power in digital markets. Clause 44 gives the digital markets unit the power to address competition problems in digital markets through pro-competition interventions, which the DMU can make where factors relating to a digital activity undertaken by a SMS firm prevent, restrict or distort competition in that digital activity. That is known as an adverse effect on competition. The concept is already used for market investigations under the Competition and Markets Authority's existing markets regime. Government amendment 12 is a technical amendment relating to PCI investigations.

Turning to clauses 45 to 54, PCIs are fundamental to the new digital markets regime. They will address the root causes of market power that can lead to one or two large firms dominating, to the detriment of consumers and businesses in the UK. Clause 45 empowers the DMU to open a PCI investigation into suspected competition problems related to designated digital activities.

Clause 46 describes the process relating to PCI investigations. Under clause 47, the DMU will be required to carry out a public consultation on a proposed PCI decision before concluding its investigation and giving notice of final PCI decisions. Clause 48 provides the procedure for the DMU to give notice of its decision when concluding a PCI investigation. When the DMU decides to make a PCI, it must do so within four months of the PCI decision.

Pro-competition orders, set out in clause 49, are the means by which the DMU can require a firm to take, or refrain from taking, specific actions. That includes orders on a trial basis. They are vital in converting the DMU's PCI decision, from clause 48, into an operationable remedy.

To effectively address the sources of competition problems in digital markets, PCIs should be iterative and targeted, so the DMU will be able to replace pro-competition orders. That is provided for in clause 50, which will allow the DMU to initially apply lighter touch remedies and then assess their effectiveness before introducing stronger measures if necessary.

Clause 51 gives the DMU the power to revoke a pro-competition order where it deems it inappropriate to vary the order through replacement, or where the order has addressed the competition problem and is no longer required. That ensures that PCIs remain effective and proportionate and can respond to changes in the market.

Clause 52 provides that before making or revoking a pro-competition order, the DMU must carry out a public consultation. The DMU will be under both a general and specific duty to monitor and review pro-competition orders provided for in clause 53.

Finally, SMS firms should be able to offer commitments to the DMU to propose a solution to a competition problem. That supports a participative approach to regulation, which is set out in clause 54.

Alex Davies-Jones (Pontypridd) (Lab): We will of course look properly at the issue of consumer protections later in the Bill, and my hon. Friend the Member for Feltham and Heston has a number of contributions to add on that topic.

Clause 44 is important in putting consumer rights at the heart of the Bill, as it enables the CMA to remedy competition problems by making direct interventions. In contrast to conduct requirements, PCIs are interventions by the CMA to remedy an adverse effect on competition by addressing the root causes of an undertaking's entrenched market power. The CMA will need to take into account the benefits that UK users may get from the factors having an adverse effect on competition.

We note that there is no defined list of PCI remedies, but that they may include behavioural and structural remedies. Will the Minister update us on his assessment of the value of adding a list of potential remedies to the Bill? Some companies we have spoken to feel that that would be helpful to understand just how these interventions will work in practice. However, we believe that the PCI is an exceptionally useful tool and a big advantage over the EU Digital Markets Act, as it will be able to go further than the conduct requirements and address the root causes of entrenched market power.

As it stands, the Bill outlines that the CMA may make a PCI where it considers that a factor or combination of factors relating to a relevant digital activity is having an adverse effect on competition, also known as the AEC test. The AEC test is in line with the legal test in the existing market investigation regime; by contrast, the digital markets taskforce recommended an AECC test—an adverse effect on competition or consumers test—enabling the CMA to address consumer harm without always needing to show that competition has been undermined. Similar to a supplementary duty to have regard for the interests of citizens, that would give

the DMU broader scope to intervene beyond its traditional focus on competition. Can the Minister outline exactly why the AEC test was chosen over the AECC test?

Labour supports the intention behind Government amendment 12, which confirms that the CMA will be able to begin a PCI investigation into a designated firm, even when it has previously made a decision not to do so. We see that as integral to the CMA's powers, and we will support the amendment.

We see clause 45 as fleshing out the legal powers that the CMA will need to draw on in the event of a formal investigation. We welcome clarification that the CMA will form its initial view of the competition problem on the basis of available evidence, such as that arising from complaints submitted by third parties, from the CMA's market studies or from referrals of information from other regulators. Labour has heard from some tech companies that although pro-competition interventions are viewed as a major advantage of the UK's regime, companies are concerned about the broader effects they could have on markets, and urge for thorough consultation and for a graduated approach to the potential severity of the intervention. I am therefore keen to hear the Minister's thoughts about this issue, as it is important for all concerned that we get some clarity.

Clause 46 is an important clause for designated undertakings that may find themselves subject to a PCI investigation. We welcome provisions that ensure the CMA will be under a duty to publish a summary of the PCI notice as soon as it is able to do so. The Minister will not be surprised that we are keen to understand more about that and what it will look like in practice. Where exactly will the summary be published? Will it be made available to others who wish to view it? We welcome subsection (2), because it is important that the CMA has the power to update a PCI investigation notice when it needs to do so. That is outlined in subsection (3), which is an important point to note.

Lastly, clause 46(4) places a duty on the CMA to publish a notice of investigation as soon as practicable. Again, can the Minister confirm whether that will be public? There is a theme in my questions to the Minister about the public transparency of such documents. Naturally, we understand that some information will obviously need to be redacted, but there is plenty of value in improving transparency.

We welcome the principles in clause 47, which we have long called for, because the regime will be effective only if consultation is truly at its heart. However, we have concerns about how the conduct requirements and PCIs will run alongside one another. In the Bill's current drafting, it is unclear by what metrics the CMA will determine whether a CR or PCI is appropriate, and it will have discretion to choose. We could very well find ourselves in a position whereby the CMA will generally implement a CR first and see whether it is having an impact, before beginning a PCI investigation. If the CMA chooses to focus on CRs initially, it could allow SMS firms to maintain much of their entrenched market power before taking action. To improve the effectiveness of the regime, one potential option that has been raised with us is for the CMA to be required to consider whether a PCI investigation and PCI remedy may be more effective early on, or complementary to a CR, when constructing a CR. I would be grateful if the Minister could give us some thoughts on that and explain whether he will be able to instruct the CMA on which one would be best to carry out first.

Other issues that have been raised with us relate to clarity on a number of points, and I hope the Minister can provide that clarity. First, can PCIs be introduced only after conduct requirements have been imposed, rather than the alternative that is alongside them? Secondly, what is the exact purpose of the revocation process? Does it mean that PCIs cannot be adapted while they are in effect, as indicated in the Government's consultation process, and that the CMA would have to restart the process—meaning there would be an investigation, a consultation, a decision and then an order—before introducing a new PCI? It feels like that could cause delay and uncertainty in the regime, which could ultimately impact its effectiveness. I look forward to hearing the Minister's thoughts on those specific points.

Labour sees clause 48 as fairly standard in outlining the procedure for concluding a PCI investigation. It is important that the process is outlined on the face of the Bill, and we welcome confirmation of the length and period of investigation, and of the period in which the CMA has to consult and issue a pro-competition order where required. Those are important timeframes, which Labour supports.

We note clause 48(7), which states:

"As soon as reasonably practicable after giving a notice under subsection (1) or (6), the CMA must publish a copy of the notice."

Again, that is a key point that I want to prod the Minister on. What is his assessment of

"as soon as reasonably practicable"?

What will that be and who will the CMA be publishing the statement for?

We welcome clause 49, which outlines the way in which pro-competition orders will work in practice. In relation to clause 50, I would be grateful if the Minister could confirm whether the replacement of a PCI as outlined in the clause will require revocation, as set out in clause 51, and a fresh process involving an investigation, consultation, decision and order? Alternatively, will the process be to revise an existing PCI and will that be sped up? We do not want any delay in that happening. That is the point I am trying to make, so will the Minister elaborate on what evidence is needed to justify a revocation of that kind?

I hope the Minister will respond to my points. We support the broad intentions of the remaining clauses in this group and are therefore happy to support their full inclusion in the Bill.

Paul Scully *rose—*

The Chair: Order. I am a bear of little brain. If somebody does not stand, I do not know that they want to speak.

Seema Malhotra (Feltham and Heston) (Lab/Co-op) *rose—*

The Chair: I call Seema Malhotra.

Seema Malhotra: I just wanted to make a general point in relation to the DMU's powers, because they are wider and there is a question about mechanisms to

[Seema Malhotra]

address the scrutiny and accountability of DMU decisions. We support the PCI framework and the flexibility, but on the way in which decisions can be made about PCI notices, the changes to allow greater flexibility and changes to orders made, there is the potential for a lot more flexibility, but there is the balance of certainty and scrutiny. Can the Minister address how there will be greater opportunity for scrutiny, transparency and accountability over the DMU's use of the greater powers?

Paul Scully: I will try to cover as many of those points as I can. On the difference between AEC and AECC and adverse effects on consumers and competition, that is effectively built into the regime, anyway. The DMU's objective is to promote competition for the benefit of consumers, and that must shape the design of all its regulatory interventions, including for PCIs. Under the current drafting, the DMU is able to address the detrimental effects of a competition problem on consumers. The issue is terminology rather than anything else.

The hon. Lady asked about how PCIs will be published. They can be introduced after CR and can be published alongside them, because speed is important, which it is important to highlight. She also asked about where PCIs will be published, which I can summarise. A PCI notice launches an investigation and a summary of that will be published, with the firm having had the full notice.

Seema Malhotra: Will the Minister confirm how soon that will happen? There is a four-month timeline after that full consultation and then the pro-competition orders or alternatives. In terms of the public—

Paul Scully: That is a fair point. The best I can say is as soon as is practicable. I talked about the fact that speed is important, but it really depends on the complexity of the case and what needs to be in the summary, how quickly it will take to summarise and so on. There is a drive to get on with this as quickly as possible. The theme throughout the entire framework of the Bill is that detriment happens at speed in digital markets and we have to crack on and get those PCIs in place should they be required.

The decision notices for PCIs will go to the firm first. The full document will be published and an order will be introduced. A summary will be published. Should the PCI be replaced, an order revoked or should there be an acceptance of varying commitments on a PCI, the full document will be published.

The CMA can consult on an order as part of the earlier PCI decision, so the four months may not be necessary. Those timetables are there as a maximum, depending on the complexities.

Seema Malhotra: I would like to pick up on the point about pro-competition orders and the consultation. Clause 49(4) states:

"The provision that may be made in reliance on subsection (3) includes provision requiring an undertaking to act differently in respect of different users or customers (and such provision may be by reference to a description of users or customers, to absolute numbers of users or customers, or to a proportion of the undertaking's total number of users or customers)."

That appears both broad and specific. Interested parties may want clarity, so is it expected that that detail will be discussed and consulted on?

Paul Scully: The way that consultation is done depends. If there is something starkly obvious to everyone, it may be that only minimal consultation is needed. If it is more technical, it will need to be more in depth, which is why we are not being prescriptive from the centre. It is up to the DMU to consider this.

The hon. Lady also asked about a list of PCIs and potential PCIs. It is very much for the DMU to address the recourse to a designated firm's market dominance. Examples of PCIs that could be introduced include choice remedies that will allow users to make an active choice in the digital services that they use. PCIs could, for example, compel a designated firm to present users with different options for their preferred web browser, and we heard evidence on that from Gener8. Instead of defaulting to a particular browser, PCIs could include interoperability remedies that will enable users to use goods and services from different providers as opposed to being locked into one provider. For example, the DMU might require users of different instant messaging services to be able to communicate with one another.

The DMU could introduce data portability remedies, which would make it easier for users to switch providers. Such remedies could, for example, require a designated firm to make it possible for its users to download and export data to a new phone with a different operating system. PCIs could include data access remedies, which would level the playing field by requiring designated firms to share their data with competitors, which could include the data that large search engines have on users' search history. Separation remedies would require designated firms to run different aspects of their businesses independently, so that dominant firms cannot use market power in one part of the business to gain power in another, which might involve requiring data stores for different services to be separated. It could require the firm to sell off a part of its business altogether.

Those are examples, but that was not a prescriptive or exhaustive list of PCIs. They are very much up to the DMU to frame depending on the technology and the market dominance that they are trying to remedy.

The Chair: The hon. Lady is looking at me in a funny way.

Seema Malhotra: I seek your guidance, Mr Hollobone. I was just wondering about process. I had one last question for the Minister; I thought that he was continuing his speech, but he has finished it.

The Chair: One last question.

Seema Malhotra: I seek clarification from the Minister on clause 51(8), which reads:

"The fact that a pro-competition order ceases to have effect does not affect the exercise of any functions in relation to a breach or possible breach of that order."

I assume that is referring to historical breaches, but I seek clarification on that because it is not in the wording of the clause.

Paul Scully: Yes, that is the case.

Question put and agreed to.

Clause 44 accordingly ordered to stand part of the Bill.

Clause 45

POWER TO BEGIN A PCI INVESTIGATION ETC

Amendment made: 12, in clause 45, page 25, line 18, at end insert—

"(3) The CMA may begin a PCI investigation in relation to a designated undertaking even if it has previously made a decision not to make a PCI in respect of that undertaking."—*(Paul Scully.)*

This amendment confirms that the CMA can begin a PCI investigation in relation to a designated undertaking even if it has previously made a decision not to make a PCI in respect of that undertaking.

Clause 45, as amended, ordered to stand part of the Bill.

Clauses 46 to 54 ordered to stand part of the Bill.

Clause 55

DUTY TO REPORT POSSIBLE MERGERS ETC

Question proposed, That the clause stand part of the Bill.

The Chair: With this it will be convenient to discuss the following:

Clauses 56 to 59 stand part.

That schedule 2 be the Second schedule to the Bill.

Clauses 60 to 66 stand part.

Paul Scully: These clauses comprise chapter 5, "Mergers", and schedule 2 provides further detail needed for chapter 5 to function smoothly.

Clause 55 establishes a requirement for SMS firms to report possible mergers involving them that have the potential to harm competition in the UK to the CMA before they can be completed. Unlike most merger regimes, at the moment there is no obligation in the UK to notify mergers to the CMA, but firms may choose to voluntarily notify the CMA of a merger in order to receive a binding decision from the CMA on it. In digital markets, this is a very different thing, because of the speed with which it can happen and the entrenchment of power, which we have discussed at length. That is why it is important that the CMA has the opportunity to review potentially harmful mergers involving SMS firms before it is too late. This light-touch reporting requirement is designed to focus on only those possible SMS firm mergers with the potential to give rise to competition concerns.

The mergers will need to be reported only if three conditions are met, such as when the SMS firms will obtain qualifying status through holding shares or voting rights in a target firm that is a UK-connected body corporate. I will set out further detail on the former when I explain clause 56. The latter means any body corporate that carries on activities in the UK or supplies goods or services to the UK, or which has a subsidiary that does so. The consideration provided by the SMS firm for the holding of shares or voting rights must also be at least £25 million. Similar conditions will also apply for the reporting of possible mergers involving an SMS firm participating in a joint venture. When an SMS firm is part of a larger corporate group, the requirement to report will instead apply to all the bodies corporate that make up the group. In those situations, the question will generally be whether the group as a whole will meet the conditions I have set out. When I say "an SMS firm" in debates on this chapter in part 1 of the Bill, it means an SMS firm or any larger corporate group it is part of.

The reporting process should take a maximum of 10 working days. Once a report has been submitted, the CMA will have up to five working days to determine whether the report is sufficient and must therefore be accepted. Following acceptance, the CMA will have a further five working days to review the information in the report before the possible merger can be completed. If the CMA identifies a reported merger as potentially problematic, it can use its powers under the general merger regime to investigate the merger as it would any other type of merger.

Clause 56 defines qualifying status. Under the merger regime, control over a target firm or joint venture vehicle must be acquired or increased for a merger to take place. That is for the CMA to determine on a case-by-case basis. One of the ways control can be exercised is through a shareholding or through voting rights. In order to capture acquisitions of control over target firms based on shares or voting rights, clause 56 provides that SMS firms will acquire qualifying status in a target firm when the percentage of the shares or voting rights they hold in the firm crosses any of the thresholds in subsection (1)—that is, when the percentage moves from less than 15% to 15% or more; from 25% or less to more than 25%; or from 50% or less to more than 50%. These thresholds have been chosen specifically to capture circumstances in which different levels of control recognised under the merger regime are likely to be acquired by an SMS firm.

Clause 57 sets out what is meant by the "value of consideration", which is necessary to determine whether a possible merger meets the £25 million threshold for reporting set out in clause 55. Clause 58 places several requirements on the CMA with regard to the notice it is required to make, setting out the parameters of the report that SMS firms will be required to provide to the CMA about a possible merger. The clause requires the CMA—to pre-empt a possible question—to publish online a notice setting out what information must be included in a report and what form a report must take. We decided, in subsection (2), to limit what the CMA may require in the report to only that information considered necessary to decide whether to initiate a merger investigation or make a hold separate order under the general merger regime while an investigation is ongoing.

Clause 59 sets out further detail of when and how reporting requirements will apply. Schedule 2 provides further detail as to when interests like shareholdings and rights, such as voting rights, are treated as held in a target firm or joint venture vehicle for the purposes of the duty to report a possible merger in clause 55. Clause 60 places time limits and procedural requirements on the CMA once it has received a report. Clause 61 makes it clear that a reportable event must not take place until the reporting requirements set out in the chapter are met. Clause 62 clarifies when a possible merger is considered as taking place for the purposes of the

[Paul Scully]

reporting requirements. Clause 63 permits SMS firms to authorise third parties to act on their behalf—specifically, to give a report to the CMA about a possible merger and to receive the notice of acceptance or rejection from the CMA. In general, those third parties are likely to be legal representatives.

Clause 64 sets out the review process for non-penalty decisions made by the CMA in connection with the chapter. We will talk about appeals and the wider area later on, but if a person is aggrieved by the decision made by the CMA in connection with a reporting requirement that is not a penalty decision, they can apply to the Competition Appeal Tribunal for a review of that decision. The Competition Appeal Tribunal will apply the same principles as would be applied by a court on an application for judicial review. A full merits appeal process will apply to penalty decisions made by the CMA in connection with this chapter, as it does to penalty decisions under the wider merger regime.

Clause 65 provides the Secretary of State with powers to make regulations in relation to the duty to report. It also sets out which procedure-specific regulations are subject to that. It is appropriate that the Secretary of State has the power to make regulations on the duty to report. Operational experience may reveal that the criteria needs to be changed for the reporting process to continue to function effectively. Clause 66 places a duty on the CMA to monitor and enforce the merger reporting requirements. It goes no further than requiring the CMA to consider exercising its investigative and enforcement powers where it is aware of a basis for doing so.

Alex Davies-Jones: I am grateful to the Minister for outlining chapter 5 and we welcome the provisions. None of us want to see potential loopholes or designated undertakings being able to avoid their responsibilities thanks to a merger, so we see clause 55 and many of the clauses that follow in this chapter as being eminently important. More specifically, the clause sets out the circumstances in which designated undertakings or, where designated undertakings are part of a group, group members—see clause 114—will have a duty to report a possible merger involving a reportable event to the CMA before it takes place.

We welcome the clarification that there will be two categories. The first is concerned with designated undertakings or groups reaching certain percentage thresholds of the shares or voting rights held in certain bodies corporate with links to the United Kingdom. The second is concerned with designated undertakings or group members forming certain joint venture vehicles that are intended or expected to have links to the United Kingdom. We recognise the role of a minimum value requirement, which will also apply in relation to the consideration provided for the relevant shares or voting rights, or in relation to the formation of the joint venture vehicle.

We see the clause as important in clarifying where the line will be drawn for possible mergers in relation to this regime, and agree with the drafting, which sets the value of the merger as being at least £25 million. We feel that is a fair value, so we support the clause and have not sought to amend it at this stage. The same can be said for clauses 56 to 59. As we know, one of the strategic recommendations of the Digital Competition Expert Panel's Furman report suggested that legislation adapting the merger control rules—so that the CMA could more effectively challenge mergers that could be detrimental to consumer welfare—was required. So we see clause 56, which sets out the circumstances in which a designated undertaking or group will have qualifying status in relation to a UK-connected body corporate or joint venture vehicle, as being vital to ensuring that mergers are covered by this legislation more widely.

12 noon

Turning to clause 57, I note that subsection (3) creates a delegated power for the Secretary of State to make regulations setting out

"further provision about how the value of—

(a) consideration,

(b) capital, or

(c) assets,

is to be calculated for the purposes of"

the duty to report.

Although I welcome the clarification that this power is subject to the negative procedure, as per subsection (5), I wonder whether the Minister could elaborate on exactly how it will work in practice. Could he give us an example whereby he deems that the Secretary of State of the day would want to draw on this delegated power, and what the ensuing regulations may or may not look like?

Clause 58 concerns the "Content of report", which is important, and we welcome its inclusion in the Bill. As the Minister confirmed, it means that the CMA will have to set out a notice, which will be published online, as well as setting out the required form and content of a report. That is a sensible approach and we welcome the transparency of the clause.

However, I draw the Minister's attention to subsections (3) and (5). Subsection (3) reads:

"The CMA may from time to time replace the notice."

Can he say in what circumstances that may occur and whether there will be a limit on how many notices may be replaced?

Subsection (5) reads:

"The CMA must consult—

(a) the Secretary of State, and

(b) such other persons as it considers appropriate,

before making or replacing a notice under this section."

We welcome consultation—that has been a regular theme of our debates in this Committee so far—but we find it curious why no other individuals or bodies have been named at this point. It is of course important that the Secretary of State plays a role here, but can the Minister elaborate on which other individuals he envisages will also fall under this subsection and that therefore will also have a role in the consultation?

Turning to clause 59 and schedule 2, we see these as reasonable and sensible, so we have not sought to amend them. Similarly, we support clauses 60 to 66, which broadly relate to the duties around report timings. We have not sought to amend them at this stage and they should stand part of the Bill.

Paul Scully: Regarding the hon. Member's questions about the Secretary of State having the powers to amend things, I cannot give her an example but it very much goes back to what I was saying in a previous

debate, namely that digital markets change really quickly and it is just so that the Secretary of State has the power to amend things quickly and so that the reporting criteria may develop and evolve over a period of time, so that they can remain relevant in the long term.

Clearly, we have safeguards in the process there, so the Secretary of State will need to consult the CMA. This is not just an isolated decision-making process; the CMA has expertise in this area, but it will be for the Secretary of State to focus on the decision. The CMA will be able to provide the expert advice, ensuring that amendments can correctly reflect the changing landscape, and Parliament will clearly need to approve any amendment.

Regarding the notice that the hon. Member was talking about, again it is appropriate for the CMA to set out by notice what a report must contain. The CMA has considerable expertise in the assessment of mergers, so it is well-placed to decide what information it needs to make an assessment. So, the approach that we are suggesting here is consistent with the wider merger regime, whereby the CMA sets out what information should be included in a voluntary merger notification.

Question put and agreed to.

Clause 55 accordingly ordered to stand part of the Bill.

Clauses 56 to 59 ordered to stand part of the Bill.

Schedule 2 agreed to.

Clauses 60 to 66 ordered to stand part of the Bill.

Clause 67

POWER TO REQUIRE INFORMATION

Question proposed, That the clause stand part of the Bill.

The Chair: With this it will be convenient to discuss clause 68 stand part.

Paul Scully: Clearly the DMU needs to have access to the correct information to ensure its work is evidence-based. Clause 67 allows the DMU to request information it needs to either exercise, or decide whether to exercise, any of its digital markets functions. That includes information in any form, such as data, internal documents and forecasts. The clause also includes new powers to investigate the outputs of algorithms by requiring SMS firms to generate information and to carry out tests and demonstrations of technical processes.

Clause 68 allows the DMU to require that an SMS firm names a senior manager to be responsible for ensuring that the firm complies with a specific information request. The DMU will be able to impose a penalty on the named senior manager where they have failed, without reasonable excuse, to prevent the SMS firm from failing to comply with the request for information. Personal liability will help to embed a culture of compliance within strategic market status firms.

Alex Davies-Jones: Clause 67 is an important starting point as it gives the CMA powers to require the provision of information from designated undertakings and any other person believed to hold material needed for it to operate the regime. That includes any information in any form, which might include data, correspondence, forecasts and estimates.

We welcome the clarity that the CMA will be able to specify the format in which the information must be provided. That is a very important point that we feel will be critical to ensuring timely responses from designated undertakings. We have seen the dangers of what can happen when we allow these big firms to overwhelm with the provision of data in complex formats and in incredible quantities in legal proceedings around online safety, and we do not want to see the same negative consequences here.

We welcome subsection (4), which, importantly, includes provisions that will enable the CMA to compel evidence collection by requiring a person to collect and retain information that it may not otherwise collect and retain. In addition, subsection (7) specifies that the CMA can require the recipient of an information notice to give the CMA information, either in physical or electronic form, which is located outside the UK. That is an important point worth touching on.

We know that these SMS firms have a global reach. We do not want to be in a position whereby the CMA cannot access information just because it is held overseas. This is a sensible and crucial clause to ensure the CMA has the appropriate teeth and power to act when it needs to.

We are also pleased to see clause 68 included in the Bill, which references a point that Labour have repeatedly called for in other legislation. Without these provisions and the ability to name an individual, big companies will typically not take their responsibilities seriously. We therefore welcome confirmation that a penalty may be imposed on a named senior manager of a designated undertaking that fails to comply with an information notice—a point we will address later, when we discuss clause 85.

Ultimately, we feel that the provisions are in line with other regulated sectors, principally financial services, where regulation imposes specific duties on directors and senior management of financial institutions, and those responsible individuals face repercussions if they do not comply.

I feel we have lots to learn here from looking to other regulated industries. For example, in financial services regulation, the Financial Conduct Authority uses a range of personal accountability regimes, including the senior managers and certification regime, which is an overarching framework for all staff in financial services industries. The regime aims to

"encourage a culture of staff at all levels taking personal responsibility for their actions and make sure firms and staff clearly understand and can demonstrate where responsibility lies".

If only we could have that approach to other legislation on online safety. We therefore support clause 68—we see it as standard—and have not sought to amend it at this stage.

Question put and agreed to.

Clause 67 accordingly ordered to stand part of the Bill.

Clause 68 ordered to stand part of the Bill.

Clause 69

POWER OF ACCESS

Paul Scully: I beg to move amendment 13, in clause 69, page 39, line 18, after "access" insert "business".

This amendment limits the power of the CMA to require access to premises so that it may be used only in relation to business premises.

The Chair: With this it will be convenient to discuss Government amendments 14 to 24.

Paul Scully: Government amendments 13 to 24 remove possible ambiguities about the scope of the power of access, and of a firm's duty to co-operate with a skilled person, so that they are aligned with similar Digital Markets Unit information-gathering tools. Clause 69 allows the DMU to require firm-led tests or demonstrations under the DMU's supervision. That backstop power of access will be available when a strategic market status firm fails to comply with an information notice or with the duty to assist a skilled person. Clause 77 introduces a power for the DMU to appoint a skilled person to produce a report on an aspect of an SMS firm, or a firm subject to an SMS assessment. There will be a duty on the firm to co-operate with the skilled person, including by giving them access to their premises.

These essential clauses ensure that the DMU has the right powers, but it is important to ensure that those powers are proportionate and appropriately constrained. Government amendments 13 and 16 limit the DMU's power of access to business premises, rather than allowing access to all premises. That ensures that the power cannot be interpreted as allowing access to domestic premises and maintains consistency with the restrictions on the DMU's powers of entry. Government amendments 17 to 20 and 22 are consequential.

Neil Coyle (Bermondsey and Old Southwark) (Lab): The Minister will have heard the witnesses last week, including witnesses from trading standards. Will the amendments in this grouping be replicated to address the concerns of trading standards and ensure equivalence across the regulatory powers?

Paul Scully: We listened to the evidence and considered that, and we will reflect on that in our further consideration of the Bill. It was interesting to hear the evidence last week.

Neil Coyle: Is the Minister suggesting that the equivalent powers to access information, which were specifically addressed last week by trading standards representatives, will be covered by this legislation?

Paul Scully: I am saying that the amendments that we are discussing in this grouping are specifically about domestic and business premises. I am just keeping to the narrow scope of the amendments. As for the wider evidence that we heard last week, we will clearly reflect on that and work out any other parts of the legislation; I was being really specific about what these amendments do.

Government amendment 21 limits a firm's duty to give access to a skilled person, so that it is access to business premises only, to ensure consistency with other DMU and wider CMA investigatory powers. Government amendment 14 to clause 69 limits the power of the DMU to access persons to a power to access individuals, and Government amendment 23 limits the firm's duty to assist a skilled person to a duty to assist a skilled individual. Those changes clarify the scope of the power and the duty, as a person includes a legal person, such as a company. The clauses already specify that the DMU or skilled person can require access to a designated firm's premises, equipment, services and information. Limiting access to individuals—or natural persons—is a more accurate reflection of the policy intention of the clauses.

Finally, Government amendments 15 and 24 clarify that the DMU may access individuals or business premises only in the UK, and similarly that a firm's duty to assist a skilled person by giving them access applies only to individuals and business premises in the UK. The DMU's powers of entry allow entry to domestic premises only under a warrant, under clause 73. Its interview and entry powers may also be exercised only in respect of individuals and premises in the UK. Government amendments 13 to 24 will preserve those important limits on the DMU's powers and ensure consistency across the DMU's information-gathering toolkit.

Neil Coyle: I am hoping for clarity. I think there were attempts to get information to the Minister when I intervened before. Last week, trading standards specifically asked for the powers that are being discussed in these amendments. I appreciate that this grouping is for a different regulatory body, but does the Minister aim to set up equivalence for regulatory bodies, or is the new body to have greater powers than an existing body with a similar purpose?

Paul Scully: I am trying to remain specific, rather than widening the discussion to other regulatory issues, because the provisions must be specific to the matter that we are discussing; I think I am correct in saying that. Effectively, this grouping tries to narrow down the enforcement powers; it clarifies that they relate to business premises, and apply within the UK, rather than extraterritorially. That is why I hope that hon. Members will support these Government amendments.

12.15 pm

Alex Davies-Jones: The Opposition believe that clause 69 is crucial to the Government's policy objective of empowering the Competition and Markets Authority, and ensuring that it can enforce its regime and proactively address the root causes of competition issues in digital markets.

The clause builds on clause 68 and gives the CMA the power to require a designated undertaking to obtain, generate, collect or retain specified information or to conduct a specified demonstration or test of a business system or process under the supervision of the CMA. Specifically, the power can be exercised when the designated undertaking has failed to comply with a previous request for information under an information notice or to provide sufficient assistance to a skilled person. We welcome those provisions. We also welcome the clarity provided by the clause about when the CMA can use the powers, which is when companies have failed to comply with other requirements. None of us wants the CMA to take an overly heavy-handed approach, but it must be compelled and empowered to act where necessary.

We understand that the powers in subsections (2) and (3) will be used rarely, but it is important that they be in the Bill. They are also an important step in ensuring that big strategic market status firms, which for too long have gone unregulated, cannot bypass the regime by concealing information or operating systems. It is vital that the Government do not give in here, so I urge the Minister to ensure that they do not. I imagine that there

is heavy pressure from firms that will be captured by the provisions, but the Government must not cave in or weaken this regime; I hope the Minister can reassure us that they will not. That being said, we welcome the clause and have not sought to amend it at this stage.

Government amendments 13 and 14 clarify that the CMA's access rights will be used only in relation to business premises. We see that as appropriate. Government amendments 15 to 23 are technical changes that we are happy to support. Government amendment 24 is an important clarification that limits duties to inside the UK, which again is a sensible inclusion that Labour supports.

Mr Hollobone, would you like me to discuss clause 70, or finish there?

The Chair: We will wait for that treat.

Paul Scully: To answer the one easier question that the hon. Lady asked, I can assure her that we will not weaken the provisions.

Amendment 13 agreed to.

Amendments made: 14, in clause 69, page 39, line 18, leave out "persons" and insert "individuals".

This amendment limits the power of the CMA to require access to persons so that it may be used only in relation to persons who are individuals.

Amendment 15, in clause 69, page 39, line 33, at end insert—

"(5) The powers conferred by this section are not exercisable in relation to premises, equipment or individuals outside the United Kingdom.

(6) But the powers conferred by this section are exercisable in relation to information and services whether stored or provided within or outside the United Kingdom."

This amendment limits the power of the CMA to require access to premises, equipment or individuals so that it may not be used to require access to premises, equipment or individuals outside the United Kingdom.

Amendment 16, in clause 69, page 39, line 33, at end insert—

"(7) In this Chapter, 'business premises' means premises (or any part of premises) not used as a dwelling."—*(Paul Scully.)*

This amendment is consequential on Amendment 13 and moves the definition of "business premises" from clause 72 to clause 69.

Question proposed, That the clause, as amended, stand part of the Bill.

The Chair: With this it will be convenient to discuss clauses 70 to 76 stand part.

Paul Scully: Clause 69 is a backstop power enabling the Digital Markets Unit to supervise firm-led tests and demonstrations, either at a firm's premises or remotely. It will be available only in limited cases in which an SMS firm has not complied with an information notice or a duty to assist a skilled person. It provides an efficient way for the DMU to get the information that it needs without placing an undue burden on firms.

Clause 70 allows the DMU to require an interview with any individual in the UK with information relevant to a digital markets investigation. That will enable the DMU to gather vital evidence that is held by individuals with relevant knowledge, rather than in digital or physical forms. Clause 71 protects individuals who are compelled to give testimony under clause 70 from self-incrimination. It limits the circumstances in which the DMU can use an individual's interview statement as evidence against them in a criminal prosecution. Clause 72 allows the DMU to enter business premises without a warrant for the purposes of a breach investigation. It ensures that the DMU can collect information that is being withheld by an SMS firm that is accessible only on the premises. Without that power, there would be greater risk that a firm could destroy or interfere with material relevant to an investigation.

Clause 73 allows the DMU to enter business and domestic premises for the purposes of a breach investigation, after obtaining a warrant from the High Court, Court of Session or Competition Appeal Tribunal. The DMU must also establish that a firm has failed to comply with previous information requests, or that no other powers would secure the necessary evidence, and establish reasonable suspicion that the information is relevant to the investigation. Clause 74 contains supplementary requirements for how the DMU must exercise its power to enter premises under a warrant. It also clarifies the extraterritorial scope of that power. The DMU will not be able to enter premises outside the United Kingdom under clause 73, but it can access information regardless of where it is physically stored.

Clause 75 allows the DMU to take copies of, or extracts from, information and sift it off site when exercising its power to enter either business or domestic premises under a warrant, if it is unsure whether the information falls within the scope of the investigation. Clause 76 ensures that the DMU follows established judicial procedures when applying for a warrant to enter premises. It requires the DMU to follow the rules of the High Court, Court of Session or Competition Appeal Tribunal; that provides vital checks and balances.

These clauses are largely modelled on the CMA's existing information-gathering powers, and they will be subject to the same robust safeguards. They also give the DMU new powers to scrutinise the output of algorithms in clause 69, and enhanced powers in clause 73 to access information that is stored on remote servers but accessible over the internet. It is important to recognise that without those powers, the DMU's interventions would not be well evidenced or enforceable.

Alex Davies-Jones: I was champing at the bit to talk about these clauses. However, I will keep my comments brief because much of Labour's thoughts align with our thoughts on previous clauses.

Clause 70 gives the CMA the power to require any individual to attend an interview and answer questions for the purposes of a digital markets investigation. That is consistent with the amendments to section 26A of the Competition Act 1998. We welcome those, so it is only right that the powers appear in this legislation, too. These are basic powers and the clause is fairly procedural. The CMA must have the power to give notice to any individual with information relevant to a digital markets investigation, requiring them to answer relevant questions at a place or in a manner specified in the notice. That is fundamental for an empowered regulator. We support the approach, so we have not sought to amend the clause at this stage. We also support the intentions of

[Alex Davies-Jones]

clause 71, and we believe that the approach is fair and reasonable. The clause is important for clarity. We welcome its inclusion in the Bill and we have not sought to amend it at this stage.

Turning to clause 72, it is right and proper that the CMA must have reasonable grounds to suspect that information relevant to the breach investigation can be accessed from or on the premises. We support that common-sense approach. The provisions are in line with those for other regimes, and will be important in ensuring that if the CMA is required take action for the purposes of a breach investigation, it can do so in a timely and effective manner. We support the clause and have not sought to amend it.

We also support the intentions of clause 73, which gives the CMA the power to enter business and domestic premises under a warrant, without notice and using reasonable force, for the purposes of a breach investigation. Again, the CMA has powers of entry under a warrant through sections 28 and 28A of the Competition Act 1998. It will come as no surprise, given that we support provisions for the CMA to act without a warrant, that we agree that it should be able to act with one. We value the clarification that the CMA must prove that there are reasonable grounds to act. If it has to, it can call on individuals who have expertise that is not available in the CMA but is required if the terms of the warrant are to be fully carried out. That will allow the CMA to act rapidly, which, given the level of these breaches, is vital. We therefore support this clause standing part of the Bill.

Clause 74 sets out the supplementary requirements to the CMA's power to enter premises under a warrant. We welcome the transparency afforded by subsection (1), and the clarification that although the CMA cannot enter premises outside the United Kingdom, as outlined in subsection (6), it can access information regardless of where it is physically stored. That is an important point, given the nature of SMS firms and their global holdings. For those reasons, Labour is happy to support the clause standing part of the Bill.

Clause 75 makes necessary amendments to a range of sections of the Criminal and Justice and Police Act 2001 to enable the CMA to seize information and take copies of, or extracts from, information when exercising its power under clause 73 to enter business and domestic premises with a warrant. It is a practical clause that aligns with the CMA's power to seize documents from business premises under section 28 of the Competition Act 1998. We therefore believe that the clause should stand part of the Bill.

Clause 76 requires the CMA to follow the rules of the High Court, the Court of Session or the CAT when making an application. We see it as a natural consequential clause and will therefore support it.

Seema Malhotra: May I make one additional comment? We received evidence from trading standards about their access to information that could be stored online in order for them to undertake some of their responsibilities. Has any consideration been given to whether the search powers that the CMA will be given could be extended to trading standards, which sometimes undertake very similar areas of work?

Paul Scully: I note that if there were a word cloud of comments from the hon. Member for Pontypridd, "We are not amending at this stage" would be quite high up. Duly noted.

On the matter raised by the hon. Member for Feltham and Heston, I will write to her with more detail, because I think we are talking about two different regimes across two different Departments. I do not want to pre-empt what my hon. Friend the Member for Thirsk and Malton may do with trading standards. These provisions relate specifically to CMA powers, which is why I am remaining in that narrow tramline. I will write to the hon. Member for Feltham and Heston about the wider trading standards regime.

Question put and agreed to.

Clause 69, as amended, accordingly ordered to stand part of the Bill.

Clauses 70 and 71 ordered to stand part of the Bill.

Clause 72

POWER TO ENTER BUSINESS PREMISES WITHOUT A WARRANT

Amendments made: 17, in clause 72, page 40, line 31, after "premises" insert "(see section 69(7))".

This amendment is consequential on Amendment 16.

Amendment 18, in clause 72, page 41, leave out lines 40 and 41.—*(Paul Scully.)*

This amendment is consequential on Amendment 16.

Clause 72, as amended, ordered to stand part of the Bill.

Clause 73

POWER TO ENTER PREMISES UNDER A WARRANT

Amendments made: 19, in clause 73, page 43, leave out line 22.

This amendment is consequential on Amendment 16.

Amendment 20, in clause 73, page 43, line 33, after "business premises" insert "(see section 69(7))".—*(Paul Scully.)*

This amendment is consequential on Amendment 16.

Clause 73, as amended, ordered to stand part of the Bill.

Clauses 74 to 76 ordered to stand part of the Bill.

Clause 77

REPORTS BY SKILLED PERSONS

Amendments made: 21, in clause 77, page 47, line 3, after "such" insert "business".

This amendment limits the duty to assist a skilled person by giving access to premises so that it applies only in relation to business premises.

Amendment 22, in clause 77, page 47, line 3, after "premises" insert "(see section 69(7))".

This amendment is consequential on Amendment 16.

Amendment 23, in clause 77, page 47, line 4, leave out "persons" and insert "individuals".

This amendment limits the duty to assist a skilled person by giving access to persons so that it applies only in relation to persons who are individuals.

Amendment 24, in clause 77, page 47, line 5, at end insert—

"(13) The duty in section 77(12) does not include a duty to give access to premises, equipment or individuals outside the United Kingdom.

(14) But the duty in section 77(12) does include a duty to give access to information and services whether stored or provided within or outside the United Kingdom."—*(Paul Scully.)*

This amendment limits the duty to assist a skilled person by giving access to premises, equipment or individuals so that it does not include a duty to give access to premises, equipment or individuals outside the United Kingdom.

Question proposed, That the clause, as amended, stand part of the Bill.

The Chair: With this it will be convenient to discuss clauses 78 to 80 stand part.

Paul Scully: Clauses 77 to 80 introduce the final elements to support the DMU's investigatory powers.

Clause 77 will give the DMU the power to authorise a skilled person to provide a report to it in relation to an SMS firm, or firm subject to an SMS investigation, on a matter relevant to the operation of the regime. That is needed to give the DMU access to expert reports to enable it to interpret technical information gathered when carrying out its digital markets functions.

Clause 78 will impose a legal duty on certain people to preserve evidence that is relevant to a digital markets investigation or to a compliance report in relation to an SMS firm. That duty will also apply when the DMU is providing investigative assistance to an overseas regulator. That will ensure that no party may destroy, conceal or falsify any relevant evidence without reasonable excuse.

12.30 pm

Clause 79 will prevent the DMU from requiring any person to provide any information that is subject to legal professional privilege or, in Scotland, to confidentiality of communications. It will also prevent the DMU from seizing or taking copies or extracts from such material. An exception is made, however, where it is not practicable to separate privileged information from non-privileged information. In such cases, the information will be subject to the safeguards under part 2—"Powers of seizure"—of the Criminal Justice and Police Act 2001. Legal professional privilege is a fundamental principle of justice that ensures that parties' rights to a fair trial and privacy are protected. That is because legal advice is confidential to the client to whom it is given.

Clause 80 will give the DMU the power to publish a notice of any decision to assist a regulator in another country with an investigation. That ensures that the DMU cannot be sued for defamation as a result of publishing a notice of a decision to provide investigative assistance, provided it is in line with the requirements set out in the clause. It is essential that the DMU is able to support other regulators without undue fear of legal action, which might limit its ability to assist in pursuing challenging international cases effectively.

Seema Malhotra: It is a pleasure to speak to this group of clauses on behalf of my hon. Friend the Member for Pontypridd, who is speaking in another debate.

We support clause 77, which will give the CMA the power to require a skilled person, which could be a legal or other person, to provide a report to it on a matter relevant to the operation of the regime. That is in line with other regimes of that nature, and we therefore support its inclusion.

The clarity afforded by subsection (1), which sets out that the CMA can use this power in

"exercising, or deciding whether to exercise, any of its digital markets functions",

is welcome. It is also right that the CMA can exercise the power only in relation to a designated undertaking or an undertaking subject to an SMS investigation.

In order to ensure no unnecessary delay, subsections (2) and (3), which will give the CMA the power to appoint a skilled person to provide a report and give notice of the appointment and other relevant matters to the undertaking in question, while also specifying the form of a report, are an important inclusion. That aligns well with subsection (12), which imposes a duty on the designated undertaking or undertaking subject to an SMS investigation, and any person connected to those undertakings, to assist the skilled person in any way reasonably required to prepare the report.

One hopes that designated undertakings would co-operate in such instances, but it is welcome and helpful to have their obligations outlined as they are in clause 77. Clarity on the consequences of failing to comply, in the form of penalties or other enforcement provisions, is also an important and positive step. Labour has therefore not sought to amend the clause at this stage; we believe it should stand part of the Bill, as drafted.

As with any regulatory regime, the CMA should of course preserve relevant evidence. Clause 78 is integral, because it places a legal duty to preserve evidence that is relevant to a digital markets investigation, a compliance report by a designated undertaking, and evidence where the CMA is providing investigative assistance to an overseas regulator. The Bill also confirms that where the CMA has made a formal request for information, there are penalties for non-compliance, or for falsifying, concealing or destroying information.

Labour supports the purpose of clause 78, which is to preserve evidence before and after the CMA has made a formal request. We believe that it is consistent with the existing duty to preserve evidence under section 201(4) of the Enterprise Act 2002 on cartel offence investigations. We note, however, that the duties within this clause do not apply

"where the person has a reasonable excuse to do so."

I—and, I am sure, others—would welcome clarification from the Minister on that point. We support the intentions of the clause and have therefore not sought to amend it at this stage, but I would appreciate further clarity on the definition and how it will work in practice.

Clause 79 is helpful because it specifies that the CMA cannot require any information subject to legal and professional privilege, or, in Scotland, confidentiality of communications. That is an important point to make and is in line with similar regimes. We support the clarity outlined in subsection (2), which specifies that the limitation applies to producing, taking possession of, and taking copies of or extracts from a privileged communication. I do not need to elaborate much further here. Labour considers this to be a fairly standard procedure and we therefore support clause 79 stand part.

Finally, clause 80 gives the CMA the power to publish a notice of any decision to use its investigatory powers under the digital markets regime to assist an investigation by the regulator in another jurisdiction. The notice may

[Seema Malhotra]

include the regulator that the CMA is assisting, the undertaking that is the subject of investigation, and the matter for which the undertaking is under investigation. Labour welcomes the transparency measures here.

My question is about why that approach has not been afforded to the CMA's domestic work on digital markets. If the CMA is able to support overseas regulators in ways that might identify the undertaking, I am unclear as to why the CMA is not compelled in the same way for issues that might arise in the UK. I am interested to hear the Minister's thoughts on that point, because it is an important one for companies likely to be captured in the SMS definition and for challenger firms that might one day find themselves subject to these regulations, too.

Paul Scully: I thank the hon. Lady. I will probably write to her with examples of where that measure might come in. As I have said, it does not come in if there is an exemption for people with a reasonable excuse. I am not fleet enough of foot to come up with a good example for her at the moment, but I will certainly write to her.

On the domestic situation for the DMU, I will, again, probably write to the hon. Lady, but my interpretation is that it is easier to deal with the potential for defamation and so on when someone has full control of the case in one jurisdiction. If we are working across jurisdictions internationally it is more complex, so the protections need to be there.

Question put and agreed to.

Clause 77, as amended, ordered to stand part of the Bill.

Clauses 78 to 80 ordered to stand part of the Bill.

Ordered, That further consideration be now adjourned. *—(Mike Wood.)*

12.39 pm

Adjourned till this day at Two o'clock.

PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT
GENERAL COMMITTEES

Public Bill Committee

DIGITAL MARKETS, COMPETITION AND CONSUMERS BILL

Eighth Sitting

Thursday 22 June 2023

(Afternoon)

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No proofs can be supplied. Corrections that Members suggest for the final version of the report should be clearly marked in a copy of the report—not telephoned—and must be received in the Editor's Room, House of Commons,

not later than

Monday 26 June 2023

The Committee consisted of the following Members:

Chairs: Rushanara Ali, Mr Philip Hollobone, †Dame Maria Miller

† Carter, Andy *(Warrington South)* (Con)
† Coyle, Neil *(Bermondsey and Old Southwark)* (Lab)
Davies-Jones, Alex *(Pontypridd)* (Lab)
† Dowd, Peter *(Bootle)* (Lab)
Firth, Anna *(Southend West)* (Con)
† Ford, Vicky *(Chelmsford)* (Con)
Foy, Mary Kelly *(City of Durham)* (Lab)
† Hollinrake, Kevin *(Parliamentary Under-Secretary of State for Business and Trade)*
† Malhotra, Seema *(Feltham and Heston)* (Lab/Co-op)
Mayhew, Jerome *(Broadland)* (Con)
† Mishra, Navendu *(Stockport)* (Lab)
† Russell, Dean *(Watford)* (Con)
† Scully, Paul *(Parliamentary Under-Secretary of State for Science, Innovation and Technology)*
† Stevenson, Jane *(Wolverhampton North East)* (Con)
† Thomson, Richard *(Gordon)* (SNP)
Watling, Giles *(Clacton)* (Con)
† Wood, Mike *(Dudley South)* (Con)

Kevin Maddison, John-Paul Flaherty, Bradley Albrow, *Committee Clerks*

† attended the Committee

Public Bill Committee

Thursday 22 June 2023

(Afternoon)

[Dame Maria Miller *in the Chair*]

Digital Markets, Competition and Consumers Bill

Clause 81

Nominated officer

2 pm

The Parliamentary Under-Secretary of State for Science, Innovation and Technology (Paul Scully): I beg to move amendment 25, clause 81, page 49, line 15, at end insert—

"(d) a requirement in a direction under section 87 of EA 2002 (delegated power of directions) given by virtue of a pro-competition order (see section 49(1))."

This amendment makes a requirement in a direction under section 87 of the Enterprise Act 2002 given by virtue of a pro-competition order a related requirement for the purposes of this clause.

The Chair: With this it will be convenient to discuss the following:

Clause stand part.

Clause 82 stand part.

Paul Scully: Government amendment 25 seeks to correct the list of "related requirements" in clause 81 to include pro-competition order directions. The Competition and Markets Authority has the power to impose directions on a firm with strategic market status to take specific action to come into regulatory compliance with a PCO, under section 87 of the Enterprise Act 2002.

As currently drafted, a nominated officer would not be responsible for a direction issued in relation to a PCO because this is not listed as a "related requirement". The amendment will clarify that nominated officers will be responsible for directions issued in relation to a PCO to which they are assigned by the SMS firm, and that compliance reports in clause 82 will have to cover these directions. The amendment will ensure that the digital markets unit is able to monitor whether an undertaking is complying with directions issued in relation to a PCO. I hope that the Committee will accept the amendment.

Clauses 81 places requirements on SMS firms to assign appropriate senior managers as "nominated officers" to monitor compliance with specific regulatory requirements. That will help to facilitate co-operation between SMS firms and the DMU and ensure that information included in compliance reports is accurate and complete, and that reports are submitted to the DMU in a timely manner. SMS firms will be required to assign nominated officers in respect of each conduct requirement, pro-competition order or commitment made in lieu of a pro-competition order. A nominated officer appointed in relation to a conduct requirement will be automatically responsible for overseeing compliance with any subsequent orders that are imposed by the DMU in relation to that conduct requirement.

Clause 82 place requirements on SMS firms to submit compliance reports to the DMU. A compliance reporting obligation can be imposed by the DMU in relation to conduct requirements and PCOs, and can be extended to cover additional requirements related to those requirements, such as an enforcement order in relation to a conduct requirement. Compliance reports can also be imposed when a firm has had a binding commitment accepted by the DMU, in lieu of the DMU imposing a pro-competition order. A compliance report will include details of how the firm has complied and will continue to comply with the regulatory requirement and any related requirements. Reports will also set out the extent to which the nominated officer assigned to the particular regulatory requirement considers that the firm has complied with that requirement. Information in compliance reports will be essential to the DMU's assessment of whether an SMS firm is complying with the regime, and will enable the DMU to take swift where it identifies risk of non-compliance.

Seema Malhotra (Feltham and Heston) (Lab/Co-op): It is a pleasure to speak to the amendment and clauses on behalf of my hon. Friend the Member for Pontypridd, and I will be brief. Government amendment makes a requirement in a direction under section 87 of the Enterprise Act, given by virtue of a pro-competition order a related requirement for the purposes of clause 82.

Labour supports clause 81, which requires a designated undertaking to assign an appropriate senior manager to the role of "nominated officer" when the CMA imposes a digital markets requirement, for the purpose of monitoring the undertaking's compliance with that requirement. We strongly believe this level of personal liability is required for big tech firms, which have dominated for too long, to listen and engage fully with this regime. We welcome clarity such as that in subsection (2), which sets out the tasks of the nominated officer and requires them to carry out those tasks in relation to

"digital markets requirements and all related requirements".

It makes sense that if a nominated officer is assigned to a conduct requirement, they are automatically assigned to any subsequent enforcement orders made in connection to it. We therefore support clause 81 and have not sought to amend it at this stage.

Government amendment 25 makes a change to the Enterprise Act to bring the provisions in line with the current Bill. We support its inclusion. It is vital that existing legislation is brought in line if this regime is going to work to its full effect.

Labour sees compliance reports and the formal duties outlined in clause 82, which ultimately require designated undertakings to provide the CMA with reports setting out how they are complying with requirements imposed upon them, as a natural step in the implementation of this regime. For transparency, accountability and fairness all round it is right that the CMA has a duty to notify a designated undertaking of any compliance reporting requirements and will specify in the notice when reports should be submitted, what information they should contain and what form they should take. Labour has long called for those powers, and we have also argued

that they should be flexible, so we are pleased to see provisions that allow the CMA to alter the reporting requirements on a designated undertaking by giving the undertaking a further notice.

Specifically interesting to see in the Bill are the provisions around subsection (5), which permit the CMA to require a designated undertaking to publish a compliance report or a summary of that report. Will the Minister confirm the form and the location that he feels would be suitable for such reports to be published?

We recognise that the provisions in clause 82 allow for the version the designated undertaking is required to publish to be different from the version provided in private to the CMA under subsection (1). For example, some information may be redacted for confidentiality purposes. It is still unclear, though, exactly where the report will be published, so it would be helpful to have the Minister's response on that point.

Paul Scully: The CMA could ask for a public version to be published on its website. It will be reported to the firm in full, but the majority of the publication in all such things will be online.

Amendment 25 agreed to.

Clause 81, as amended, ordered to stand part of the Bill.

Clause 82 ordered to stand part of the Bill.

Clause 83

Penalties for failure to comply with competition requirements

Paul Scully: I beg to move amendment 26, in clause 83, page 50, line 11, leave out "a designated" and insert "an".

This amendment, together with Amendments 27, 28, 29, 30, 31, 32 and 33 confirms that a penalty can be imposed on an undertaking that has ceased to be a designated undertaking in respect of things done (or not done) while the undertaking was a designated undertaking.

The Chair: With this it will be convenient to discuss Government amendments 27 to 33.

Paul Scully: Government amendment 26 seeks to clarify that the CMA can impose a penalty on a former SMS firm that no longer has strategic market status in relation to conduct that occurred before the designation ended or in relation to breaches of obligations that exist after the designation ends. With that aim, the amendment, together with its related amendments, replace the wording "a designated undertaking" with "an undertaking" in clauses 83 and 86. That ensures the change relates to penalties for failure to comply with competition requirements, as well as any penalties for failure to comply with investigative requirements. I hope the Committee will support the amendments.

Seema Malhotra: I thank the Minister for his remarks. We certainly support these Government amendments, and I will reserve the rest of my comments for the clause stand part debate.

Amendment 26 agreed to.

Amendments made: 27, in clause 83, page 50, line 23, leave out "a designated" and insert "an".

See the explanatory statement for Amendment 26.

Amendment 28, in clause 83, page 50, line 24, leave out "designated".

See the explanatory statement for Amendment 26.

Amendment 29, in clause 83, page 50, line 26, leave out "a designated" and insert "an".

See the explanatory statement for Amendment 26.

Amendment 30, in clause 83, page 50, line 28, leave out "designated". —*(Paul Scully.)*

See the explanatory statement for Amendment 26.

Question proposed, That the clause stand part of the Bill.

The Chair: With this it will be convenient to discuss clauses 84 to 90 stand part.

Paul Scully: Clause 83 allows the DMU to impose penalties on SMS firms where it is satisfied that the firm breached a regulatory requirement without reasonable excuse. Clause 84 sets the maximum penalties that the DMU can impose under clause 83. Substantial financial penalties are necessary to deter and tackle non-compliance, especially given the size of the firms in scope and the significant advantages that such firms could accrue from breaching the regime. Where an SMS firm has failed to comply with a conduct requirement or a merger reporting requirement, the DMU will be able to fine the firm by up to 10% of its worldwide turnover.

For other types of breaches, such as breaches of remedies, the DMU can impose a penalty of up to 5% of a firm's daily worldwide turnover for each day of continue non-compliance, in addition to fixed penalties of up to 10% of worldwide turnover. That is needed, because remedies represent specific actions that an SMS firm should carry out once an investigation has found an issue. Breaches should be addressed promptly, and punished accordingly if they are not. The DMU will have the discretion to choose whether to impose a fixed penalty, a daily rate or a combination of both, depending on the breach, and it will be expected to take a proportionate approach when imposing penalties. The penalty levels will help prevent SMS firms from absorbing financial penalties as a cost of doing business.

Clause 85 sets out that the DMU can impose penalties on firms or individuals where they have, without reasonable excuse, failed to comply with an investigatory power or a compliance reporting obligation, or provided false or misleading information to the DMU or another person while knowing that the information would be given to the DMU to be used in connection with any of its functions. In certain circumstances, the DMU will be able to impose financial penalties on senior managers assigned to an information request that has not been complied with, nominated officers assigned to a regulatory requirement for which a compliance reporting requirement has not been complied with, and individuals who have obstructed an officer of the DMU while entering premises under the powers set out in chapter 6 of the Bill. Having senior liability for the provision of information will help to ensure that a culture of compliance is embedded in SMS firms.

Clause 86 sets the maximum fixed and daily-rate penalties that the DMU can impose under clause 85. For firms, the DMU can impose a fixed penalty of up to 1% of a firm's worldwide turnover, a daily penalty of up to 5% of a firm's daily turnover for each day that non-compliance continues, or a combination of both. For individuals, the DMU can impose fixed penalties of up to £30,000, daily penalties of up to £15,000 each day,

[Paul Scully]

or a combination of both. The clause also grants the Secretary of State the power to amend the maximum penalties.

Clause 87 sets out the procedural requirements that the DMU must follow when issuing a penalty notice. It also sets out provisions relating to the payment and recovery of penalties. The clause applies sections 112, 113 and 115 of the Enterprise Act 2002 to penalties imposed by the DMU under clauses 83 and 85. Those sections cover procedural requirements when issuing a penalty, the payment of a penalty and interest by instalments, and the procedure for recovering a penalty that has not been paid. Clause 87 also states that challenges to merger-related penalty decisions made under clauses 83(4) and 85 should be brought under the existing merger review provisions set out in section 114 of the Enterprise Act.

Clause 88 sets out how the DMU will calculate the daily rates and turnover for the purpose of imposing a monetary penalty, so that there is clarity about the period of time that daily penalties will cover and when they will cease to accumulate. The ability to change how turnover is to be calculated is crucial to ensuring that the machine is flexible and can be updated in the future to reflect changes.

2.15 pm

Clause 89 requires the DMU to publish a statement of policy in relation to the exercise of its powers to impose penalties. That statement must set out the considerations that it will take into account when determining whether to impose a penalty, and the penalty amount. It also requires the DMU to consult the Secretary of State and other persons the DMU considers appropriate when preparing the statement. The Secretary of State must give their approval before the DMU may publish that statement.

The DMU may revise the statement of policy in line with changing circumstances following the same process. When issuing penalties, the DMU must take into account the most recently published statement of policy. That will provide transparency and clarity around its decision-making processes in relation to the issuing of penalties.

Clause 90 ensures that a person cannot be punished twice for the same breach where both criminal and civil punishments are available in the regime. The clause sets out that where a person has been found guilty of a criminal offence, the DMU cannot impose a civil penalty on them for the same act or omission. It also sets out the reverse: where a person has paid a civil penalty for an act of the kind referenced under clause 85—penalties for failure to comply with investigative requirements—they cannot be criminally convicted for that same offence. However, the clause does not prevent criminal or civil proceedings from being started where, respectively, a penalty has been imposed but not paid or someone has been charged but not convicted.

Seema Malhotra: It is a pleasure to speak to this group of amendments on behalf of my hon. Friend the Member for Pontypridd, who is still in the debate in the Chamber. As we know, the clause sets out that the CMA can impose monetary penalties on a designated undertaking where it is satisfied that the undertaking has breached a regulatory requirement, including for merger reporting and commitments, without reasonable excuse.

The clause's wording affords substantial flexibility. Indeed, the provisions are in place only when the designated undertaking has failed to comply "without reasonable excuse". None of us wants designated firms to be able to block action with excuses, so it would be helpful to hear how the Minister would quantify a reasonable excuse. That said, the Opposition welcome the clause, which is central to the regime. The ability to impose a penalty where appropriate is an important power that we hope will go some way towards encouraging companies to work with the regulator. For those reasons, we will not oppose it.

I turn to amendments 26 to 33, some of which we have already debated. It is helpful that we have made those amendments to ensure that a penalty can be imposed on an undertaking that was once designated and therefore captured by the regime but now no longer to subject to it. That will assist in capturing historical offences of failure to comply and goes to the heart of the importance of compliance.

Clause 84 outlines the maximum penalties that the CMA can impose. As we know, the CMA can impose penalties of up to 10% of worldwide turnover and, in the case of breaches of orders or commitments, of up to 5% of daily worldwide turnover for each day that a breach continues. Subsections (2) and (3) state that the CMA will, in most situations, have the discretion to choose whether to impose a fixed penalty, a daily-rate penalty or both. However, where an undertaking breaches a conduct requirement as opposed to an enforcement order or breaches any requirements under chapter 5 on mergers, the CMA will be able to impose only a fixed penalty.

The Opposition welcome these provisions. They afford the CMA flexibility and discretion, and we believe that financial penalties are an important power for any regulator to be able to impose. We therefore support the clause and do not seek to amend it. As with other formal liabilities, Labour believes that the CMA absolutely should be able to impose penalties on designated undertakings or individuals within them for failing to comply with certain investigative requirements. The powers are important to the regime and we welcome their inclusion.

In addition, clarity on exactly what will constitute, or be defined as failure to comply, is also helpful. We know that actions such as providing false or misleading information in the course of an investigation, or in relation to compliance reporting, will fall under this definition. That is a sensible approach, which we support.

Furthermore, clause 85(2) clearly sets out the circumstances in which the CMA can impose civil sanctions against either a named senior manager assigned to an information request or a nominated officer with relation to a compliance report. We feel that that personal duty is crucial to the success of the regime, as we hope that it will act as a deterrent, as companies will want to avoid personal duties, and that such a level of personal liability is crucial for SMS firms to take the CMA's powers and regulatory regime seriously. We therefore support clause 85 and its intentions and believe it should stand part of the Bill.

Clause 86 establishes the maximum fixed and daily rate penalties that the CMA can impose under clause 85 on undertakings and individuals. As outlined in clause 86(3), under the provisions, the CMA may impose a fixed penalty on an undertaking of up to 1% of the undertaking's worldwide turnover, or a daily penalty of up to 5% of the undertaking's daily worldwide turnover for each day of non-compliance, or both. Similarly, subsection (6) sets out that the CMA may impose a fixed penalty on an individual of up to £30,000, or a daily penalty of £15,000, or both. We welcome that clarity on the face of the Bill. Labour has been clear for some time now that financial penalties are vital for compliance, and that the CMA must have the statutory footing to be able to impose them in the most severe cases of non-compliance.

We further note clause 86(7) to (9), setting out that the Secretary of State has the power to amend the maximum amounts of penalty that can be imposed on an individual. Naturally, that is a point that I must press the Minister on: in what circumstances does he imagine that the Secretary of State would make such changes? It is an interesting power to ascribe to one individual, therefore we welcome subsection (8), which states that the Secretary of State must consult the CMA and such other persons as the Secretary of State considers appropriate before making the regulations. We therefore support clause 86 and believe it should stand part of the Bill unamended. Labour sees clause 86 as fairly procedural, setting out which sections of the Enterprise Act 2002 apply for penalties imposed under clause 83 or clause 85 of the Bill.

I will keep my comments on clause 87 brief as we see it as clarification rather than contentious, in particular given that we agree with the Government's approach more broadly on enforcement and appeals. My one plea to the Minister is that he and his colleagues in the Department do not bow down to likely pressure from big SMS firms.

We appreciate that in recent months we have faced headlines about some tech companies threatening to withdraw from the UK if provisions on online safety become—as they see it—too cumbersome. However, when it comes to regulating the online space more widely, whether in our digital markets or through safety provisions, we know that companies have remained unregulated for too long, and that that is having a massive impact on consumers. That applies to all of us in Committee and the hundreds of thousands of constituents across the country we represent. That said, we support clause 87 and have not sought to amend it.

Clause 88, too, we see as fairly standard, in that it sets out exactly how the CMA will calculate daily rates and turnover for the purpose of imposing a monetary penalty. This clause clarifies that daily penalties will accumulate until the person complies with the requirement—for example that the requested information is provided—or, where the penalty is incurred in relation to an overseas investigation, when the overseas regulator no longer requires assistance.

Labour further welcomes the fact that clause 88 will give the CMA the discretion to determine an earlier date for the amount payable in order to prevent that amount from accumulating. We of course hope that application of the provisions will rarely be required, but they are welcome additions to have on the face of the Bill.

Lastly, we note that clause 88(2) to (4) gives the Secretary of State the power to specify how turnover is calculated in secondary legislation. Again, I would welcome some clarity on this point. I wonder whether the Minister can further clarify in exactly what circumstances he envisions these powers will be required and, if he can confirm whether, when the Secretary of State has to draw upon those powers, what action will be taken to ensure the secondary legislation required is not subject to further delay? That point aside, we understand the need for clause 88 and welcome its inclusion in the Bill.

Clause 89 is important in that it places a statutory duty on the CMA to prepare and publish a statement of policy in relation to the exercise of powers to impose a penalty under clauses 83 and 85. In doing so, the statement must include considerations around whether a penalty should be imposed, as well as details of the nature and amount of any such penalty. We welcome the provisions in subsection (3) that confirm that the CMA may revise its statement of policy and, where it does so, must publish the revised statement.

We also feel that the requirement of the CMA to consult the Secretary of State before publishing a statement is an important step. However, Labour feels some clarity is needed here to establish exactly when and where that statement will be published. Will the Minister confirm the timelines for when the CMA will be required to publish the statements? It is important that there is no delay; any specific timelines will be gratefully received. Following those assurances from the Minister, I am sure we will be happy to support the clause standing part of the Bill.

Lastly, we see clause 90 as a standard clarification that ensures that where a person has been found guilty of a criminal offence committed under clauses 91, 92 or 93, which we will soon debate, they will not be required to pay a civil penalty for that same offence. It is also right that where a person has paid a civil penalty for an act of the kind referenced under clause 85, they cannot be criminally convicted for that same offence. We also welcome the clarity that the clause does not prevent criminal or civil proceedings from being started where, respectively, a penalty has been imposed but not paid or someone has been charged but not convicted.

Again, we hope that these clauses will never have to be enforced in reality, but they are important additions and Labour support them, given the importance of ensuring the CMA has the teeth to implement this regulatory regime in full.

Paul Scully: The hon. Lady mentioned "without reasonable excuse". The onus is on SMS firms to prove that they have an excuse for committing a breach. That approach reflects the bespoke targeted nature of the regime, which means that firms should be fully aware of whether they are compliant. That same threshold is used in the competition regime already for breaches of specific directions and commitments; other prohibitions in the competition regime are more high level than any other obligations within the digital markets regime, making it harder for firms to assess their own compliance and therefore requiring a different legal threshold.

[Paul Scully]

On updating penalty limits, and the Secretary of State's power to do so, it is important that the new regulatory regime is agile, flexible and can be adapted to changing circumstances. The power is the same as is already used under the Enterprise Act 2002, which ensures consistency across the legislation and will ensure that the power remains an effective enforcement mechanism in the future. The Secretary of State must consult the DMU and other persons before making changes to the penalty levels. Importantly, proposed changes will be subject to the affirmative procedure and will need to be approved in Parliament. Another hon. Member asked about where the policy will be published; again, that will be online and in full. Clearly, that will be as soon as is practicable, because we want to keep the pace of the policy as fast as possible, in order to keep up to date with any detriment to especially challenging tech, and obviously to consumers as a consequence.

The hon. Member for Feltham and Heston asked about the power to update turnover and how that might be calculated. It is really important that in this area the regulatory regime remains agile and flexible, and granting the Secretary of State the power to specify how turnover is calculated in secondary legislation will allow any future changes in accounting principles, for example, to be taken into account to ensure that these calculations remain relevant. Again, that power is the same as that already used under section 94A of the Enterprise Act 2002, ensuring consistency across the two pieces of legislation.

Question put and agreed to.

Clause 83, as amended, accordingly ordered to stand part of the Bill.

Clauses 84 and 85 ordered to stand part of the Bill.

Clause 86

AMOUNT OF PENALTIES UNDER SECTION 85

Amendments made: 31, in clause 86, page 52, line 29, leave out "a designated" and insert "an".

See the explanatory statement for Amendment 26.

Amendment 32, in clause 86, page 52, line 31, leave out "designated".

See the explanatory statement for Amendment 26.

Amendment 33, in clause 86, page 52, line 33, leave out "designated".—*(Paul Scully.)*

See the explanatory statement for Amendment 26.

Clause 86, as amended, ordered to stand part of the Bill.

Clauses 87 to 90 ordered to stand part of the Bill.

Ordered, That further consideration be now adjourned. —*(Mike Wood.)*

2.31 pm

Committee rose.

Written evidence reported to the House

DMCCB26 Cleary Gottlieb Steen & Hamilton LLP

DMCCB27 Online Travel UK

DMCCB28 Motion Picture Association

DMCCB29 Microsoft

DMCCB30 Google

DMCCB31 Taylor Wessing LLP

DMCCB32 Match Group (supplementary submission)

DMCCB33 Spotify

DMCCB34 People's Postcode Lottery

DMCCB35 Competition and Markets Authority (CMA)

PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT
GENERAL COMMITTEES

Public Bill Committee

DIGITAL MARKETS, COMPETITION AND CONSUMERS BILL

Ninth Sitting

Tuesday 27 June 2023

(Morning)

CONTENTS

No proofs can be supplied. Corrections that Members suggest for the final version of the report should be clearly marked in a copy of the report—not telephoned—and must be received in the Editor's Room, House of Commons,

not later than

Saturday 1 July 2023

The Committee consisted of the following Members:

Chairs: Rushanara Ali, † Mr Philip Hollobone, Dame Maria Miller

† Carter, Andy *(Warrington South)* (Con)
† Coyle, Neil *(Bermondsey and Old Southwark)* (Lab)
† Davies-Jones, Alex *(Pontypridd)* (Lab)
Dowd, Peter *(Bootle)* (Lab)
Firth, Anna *(Southend West)* (Con)
† Ford, Vicky *(Chelmsford)* (Con)
† Foy, Mary Kelly *(City of Durham)* (Lab)
Hollinrake, Kevin *(Parliamentary Under-Secretary of State for Business and Trade)*
† Malhotra, Seema *(Feltham and Heston)* (Lab/Co-op)
† Mayhew, Jerome *(Broadland)* (Con)
† Mishra, Navendu *(Stockport)* (Lab)
† Russell, Dean *(Watford)* (Con)
† Scully, Paul *(Parliamentary Under-Secretary of State for Science, Innovation and Technology)*
† Stevenson, Jane *(Wolverhampton North East)* (Con)
† Thomson, Richard *(Gordon)* (SNP)
Watling, Giles *(Clacton)* (Con)
† Wood, Mike *(Dudley South)* (Con)

Kevin Maddison, John-Paul Flaherty, Bradley Albrow, *Committee Clerks*

† attended the Committee

Public Bill Committee

Tuesday 27 June 2023

(Morning)

[Philip Hollobone *in the Chair*]

Digital Markets, Competition and Consumers Bill

9.25 am

The Chair: Before we begin, I remind Members to please switch electronic devices to silent. There is to be no food or drinks, except the water provided. Please send speaking notes to hansardnotes@parliament.uk.

Clause 91

Destroying or falsifying information

Question proposed, That the clause stand part of the Bill.

The Chair: With this it will be convenient to discuss the following:

Clauses 92 and 93 stand part.

Government amendment 34.

Clauses 94 to 96 stand part.

The Parliamentary Under-Secretary of State for Science, Innovation and Technology (Paul Scully): Let me cover the criminal offences in the regime, which largely mirror existing powers that the Competition and Markets Authority has in the Competition Act 1998. Criminal liability is important for deterring serious acts of misconduct in the context of information gathering and compliance monitoring, and will help to ensure that the digital markets unit can access relevant information.

Clause 91 makes it a criminal offence for an individual or firm to intentionally or recklessly destroy information, conceal information, provide false information, or cause or permit any of those actions. Those offences apply in relation to any of the powers provided for in chapter 6, which concerns information gathering and compliance reports.

Clause 92 makes it a criminal offence for a person to knowingly or recklessly give false or misleading information to the DMU in connection with any of its digital markets functions. It is also an offence for a person to knowingly or recklessly give false or misleading information to another person, knowing that it will be used by the DMU.

Clause 93 makes it a criminal offence for an individual to intentionally obstruct an officer of the DMU when lawfully entering a premises with or without a warrant.

Government amendment 34 seeks to clarify that named senior managers for information requests and nominated officers cannot be held criminally liable for not fulfilling their duties in those roles. As drafted, clause 94(2) broadens the definition of an officer of a body corporate. That would mean that individuals assigned to those roles could risk facing criminal proceedings on the basis of their assignment to the role. It has always been the policy intention that a named senior manager or nominated officer should face a civil penalty only where a firm with strategic market status has failed to comply with a relevant information request or compliance report and where the named individual failed, without reasonable excuse, to prevent that failure from occurring. The amendment would not prevent a senior manager or a nominated officer from facing criminal proceedings if they happen to also qualify as an officer of a body corporate under clause 94. I therefore hope that the Committee will support the amendment.

Clause 94 sets out that, in certain circumstances, where a body corporate commits a criminal offence, an officer of the body corporate can also be held criminally responsible. An officer of a body corporate can be, but is not limited to, a director, manager or secretary. An officer can be held criminally liable where the body corporate commits a criminal offence and the offence is attributable to that officer's consent, connivance or neglect on their part. That will help to encourage officers in firms to take personal responsibility for their actions and will ensure that they are held accountable for any serious information offences.

Clause 95 limits the extraterritorial application of certain offences in the Bill, and I will set out our wider approach to extraterritoriality when we debate clause 110. Specifically, clause 95 states that a person cannot commit any of the part 1 criminal offences unless they have a UK connection, which is established when the person is a UK national, is habitually resident in the UK, or is a body incorporated under UK law. We have carefully considered the options and implications of restricting the extraterritorial application of criminal offences in this way. Although it is crucial that the CMA may apply its powers extraterritorially, they must be used only when strictly necessary and when a sufficient connection exists with the UK. In circumstances in which the person does not have a sufficient connection with the UK for the purpose of committing an offence, the CMA will still be able to enforce breaches of information requirements using civil penalties. That approach will ensure that, in exercising its powers, the CMA is respectful of the territorial jurisdiction of other nations.

Finally, clause 96 sets out the punishments that can be imposed by the relevant courts on conviction of a criminal offence under clauses 91 to 93. Any person found guilty of one of those offences is liable on summary conviction to a fine. In England and Wales, that will be of an unlimited amount, and in Scotland or Northern Ireland it will be up to the statutory maximum. On conviction on indictment, a person is liable to imprisonment for up to two years, a fine or both.

Alex Davies-Jones (Pontypridd) (Lab): I welcome the clauses in this grouping that outline the criminal offences, as the Minister has explained. We welcome their inclusion for clarity, and we are also grateful that they broaden the scope of the Bill to include specific provisions, particularly in clause 94.

We support the clarity and intention of Government amendment 34. It is important that the term "officer" has its usual meaning in relation to offences committed by officers as well as bodies corporate. This is an important clarification and we are grateful to the Minister for tabling the amendment.

Question put and agreed to.

Clause 91 accordingly ordered to stand part of the Bill.

Clauses 92 and 93 ordered to stand part of the Bill.

Clause 94

OFFENCES BY OFFICERS OF A BODY CORPORATE ETC

Amendment made: 34, in clause 94, page 56, line 14, leave out subsection (2).—*(Paul Scully.)*

This amendment removes a gloss on the definition of "officer" of a body corporate so that the term has its usual meaning in relation to offences committed by officers as well as bodies corporate.

Clause 94, as amended, ordered to stand part of the Bill.

Clauses 95 and 96 ordered to stand part of the Bill.

Clause 97

DIRECTOR DISQUALIFICATION

Question proposed, That the clause stand part of the Bill.

The Chair: With this it will be convenient to discuss the following:

Government amendments 35 and 36.

Clauses 98 to 101 stand part.

Paul Scully: I will now cover the remaining enforcement measures in the regime, and the appeals process. Clause 97 gives power to the DMU to apply to the court to disqualify a director of a UK-registered company that forms part of a firm with strategic market status, where that firm has breached the digital markets regime. That will allow the DMU to use the Company Directors Disqualification Act 1986, as the CMA does currently under the Competition Act 1998, when an SMS firm infringes the regime and the director's conduct makes them unfit to be involved in the management of a company. That helps to protect UK businesses and the public from individuals who abuse their role and status as directors.

Government amendment 35 clarifies that costs relating to a court order under clause 98 can be made against any person that has breached the relevant requirement, whether or not they are an undertaking. The amendment changes the wording in subsection (3) to reflect the rest of the clause, which applies to persons—in practice, meaning a legal entity forming part of an SMS firm. I hope the Committee supports the amendment.

Government amendment 36 seeks to clarify in clause 98 that where a firm is responsible for the failure to comply with a relevant requirement, a costs order can be made against any officer of the relevant firm.

Clause 98 allows the DMU to apply for a court order where an SMS firm fails to comply with a regulatory requirement and, where relevant, a subsequent order or commitment intended to bring them back into compliance. A breach of a court order is a serious offence that can eventually lead to an unlimited fine and/or imprisonment for officers of the undertaking in question if it is not complied with. The threat of a court order is a key backstop for ensuring SMS firms comply with the regime.

Clause 99 makes explicit provision to allow parties to seek redress privately if they suffer harm or loss when an SMS firm breaches a requirement imposed by the DMU. Redress will be available when an SMS firm breaches a conduct requirement, pro-competition intervention or commitment to the DMU.

Clause 100 sets out that the CMA's final breach decisions are binding on the courts and the Competition Appeal Tribunal to which redress claims can be made. The court or tribunal will only consider what a suitable remedy would be. That will encourage harmed parties to assist the DMU during investigations into suspected breaches of the regime.

Clauses 99 and 100 strike the right balance of ensuring there is a clear and effective route to redress, while ensuring that the regime's focus is on public enforcement.

Clause 101 provides that decisions of the DMU, made in connection with its digital markets functions, can be appealed to the Competition Appeal Tribunal. When deciding these challenges, the CAT will apply judicial review principles. Valid grounds for appealing decisions of the DMU could include challenging whether it acted lawfully and within its powers, applied proper reasoning or followed due process, as well as, in some circumstances, whether the DMU's decision was proportionate. That is with the exception of decisions relating to mergers, which will be brought under the existing process for merger appeals set out in the Enterprise Act 2002. That will ensure that there is a consistent appeals regime for all merger decisions.

Judicial review will allow for appropriate scrutiny of the DMU's decisions in the digital markets regime, ensuring that the DMU is accountable for those decisions, that they are fairly and lawfully taken, and that the rights of businesses are protected. I am sure we all remember the oral evidence: the majority of people in front of us were clear that this was the right approach, and was proportionate.

Alex Davies-Jones: Clause 97 is important in that, as the Minister said, it enables the disqualification of a person from being a director as a consequence of their involvement in an infringement of a requirement relating to conduct requirements or pro-competition interventions. Labour sees that as an important step in ensuring that individuals who have not abided by the terms of this regime are not able to continue in their role. The clause specifically inserts new text into the Company Directors Disqualification Act which allows for these provisions. We welcome that this disqualification can be for up to 15 years—a significant yet fair period—and support the Government's approach. We therefore support clause 97 in its entirety and think that it should stand part of the Bill. I am pleased to confirm that we also support Government amendments 35 and 36.

I will now move on to clauses 98 to 101. On clause 98, we particularly agree with the logical step set out in subsection (1). Its clarification means that, in the event of any initial breach of a conduct requirement that occurs before an enforcement order has been put in place or a commitment has been accepted, it cannot be enforced with a court order. We also agree with the intentions of subsection (3). Again, these are sensible approaches which we support. On the whole, we believe clause 98 to be an important step in establishing and rooting the CMA's powers on a statutory footing. For that reason, we are happy to support it standing part of the Bill.

A fair regulatory regime must include provisions around seeking compensation, so we welcome clause 99. We particularly welcome subsection (2). We further

[Alex Davies-Jones]

welcome the clarity that subsection (4) affords. Again, these are simple clauses that we see as logical and sensible. We are happy to see their inclusion.

I now come to the most important clause in the Bill: clause 101. The Minister will be pleased to know that I have plenty to say on it. Subsections (8) to (10) provide that decisions of the CAT may be appealed to the appellate court for that jurisdiction. That is an incredibly important point and one which the Government must maintain. The DMU will ultimately have the power to make pro-competitive interventions to reduce SMS firms' market power and to review more of their mergers. That means that they will be able to make significant changes to SMS firms' business models with the objective of opening up their ecosystems and levelling the playing field for other businesses. The benefits of doing so are significant, and I am sure we will touch on them in sessions to come.

In the current version of this Bill, the standard of review that applies to DMU decisions is the judicial review standard generally used for authorities that make forward-looking assessments, rather than the "merits" standard used for certain competition law enforcement decisions by the CMA. That means that parties will be able to apply to the Competition Appeal Tribunal to review the legality of the DMU's decisions, focusing on the principles of irrationality, illegality and procedural impropriety. That is an extremely important point and is consistent with other regimes, so the Government must not bow down to pressure here and adopt a "merits" appeals approach. As the Minister quite rightly said, we heard from countless witnesses during our oral evidence sessions who said the same.

We know that judicial review appeals are more streamlined than merits appeals and they can last a matter of days, rather than weeks, years or even decades. Under this Government, our courts are already facing significant backlogs—perhaps the less said about that the better—but there is no reason why we should subject this regime and the appeals principle to even further delay. We recognise the pressure that the Government are under here; clearly, potential SMS firms and their advocates oppose the adoption of the JR standard. It is obvious that a company that may be negatively impacted by this new regime would seek to obstruct or delay it by arguing for an appeals process that incorporates a consideration of the merits of the case.

However, Labour strongly believes that the current drafting is fair and well aligned with other regulatory regimes. For far too long, big tech has had the ear of this Government and has been able to force the hand of many of the Minister's colleagues when it comes to online safety provisions. The Minister must reassure us that that will not be the case. I look forward to his confirmation.

Paul Scully: I appreciate the hon. Lady's approach to the appeals standard, which she has taken in regard to the measures throughout the Bill. The Government speak to larger companies and smaller challenger companies, because it is really important that we get this right. I can assure the hon. Lady that there is no way we are going to weaken the appeals structure. We will always make sure that we listen and do things fairly. In no way will the structure be watered down such that challenger tech cannot come through. It is important we ensure that the Bill in its final form is the best it can be and is fair and proportionate.

Question put and agreed to.

Clause 97 accordingly ordered to stand part of the Bill.

Clause 98

ENFORCEMENT OF REQUIREMENTS

Amendments made: 35, in clause 98, page 58, line 23, leave out "undertaking" and insert "person".

The requirements to which clause 98 relates can apply to persons other than undertakings. This amendment clarifies that a costs order under this clause can be made against any person, whether or not they are an undertaking, who fails to comply with a requirement.

Amendment 36, in clause 98, page 58, line 25, leave out paragraph (b) and insert—

"(b) where the person responsible for the failure is an undertaking, any officer of a body corporate that is or is comprised in that undertaking."—*(Paul Scully.)*

This amendment clarifies the circumstances in which a costs order under this clause can be made against an officer of a body corporate.

Clause 98, as amended, ordered to stand part of the Bill.

Clauses 99 to 101 ordered to stand part of the Bill.

Clause 102

EXTENSION ETC OF PERIODS

Question proposed, That the clause stand part of the Bill.

The Chair: With this it will be convenient to discuss the following:

Clause 103 stand part.

Government amendment 37.

Clauses 104 to 109 stand part.

Government amendment 38.

Clauses 110 to 114 stand part.

Government amendment 39.

Clause 115 stand part.

New clause 4—*Annual report on operation of CMA functions*—

"(1) The Secretary of State must, at least once a year, produce a report on the operation of the CMA's functions under Part 1 of this Act.

(2) Each report must include an assessment of the following matters—

(a) the outcomes of SMS investigations carried out by the CMA, with regard to the number of undertakings found—

(i) to have SMS, and

(ii) not to have SMS;

(b) the extent to which designated undertakings have fulfilled any conduct requirements imposed by the CMA; and

(c) the effectiveness of any pro-competition interventions made by the CMA.

(3) The first report must be published and laid before Parliament within one year of this Act being passed."

This new clause requires the Secretary of State to produce an annual report on the operation of the CMA's functions under Part 1. The report will be made publicly available and will be laid in Parliament.

Paul Scully: Clauses 102 to 115 deal with the administration of the regime and some technical matters. Clause 102 provides the DMU with the ability to extend investigations for strategic market status, conduct and pro-competition interventions, including the use of the final offer mechanism, for up to three months for special reasons. If a firm does not comply with information or interview requests, the deadlines can be extended until compliance is achieved. Clause 103 supports that measure by clarifying that special reasons extensions can be used once per investigation and specifying how total extension periods are calculated. Together, that provides clarity for firms on how investigations will be run and ensures that the implementation of extensions by the DMU is consistent.

Clause 104 sets out who will be permitted to take decisions in the new regime. It reserves the launch of strategic market status and pro-competition investigations to the CMA board, and further specified regulatory decisions to the board and one of its committees. The committee's membership is constrained to provide a balance of independence and expertise.

Government amendment 37 amends clause 104 and requires that the continued application of existing obligations at the point of further designation, or transitional arrangements at the end of designation, are decisions reserved for the CMA board or its committees. That will ensure consistency across the introduction of obligations on firms.

Clause 105 sets out the manner in which a notice may be given to SMS firms or other relevant parties in relation to its functions under the digital markets regime. The provision is necessary to prevent parties frustrating investigations by claiming that they have not received a notice or that it has not been given to them in the proper way.

Clause 106 creates a statutory duty for the DMU to consult key regulators on significant proposed actions that engage their regulatory interests where it is relevant and proportionate to do so. Those regulators are the Information Commissioner, Financial Conduct Authority, Ofcom, Prudential Regulation Authority and the Bank of England. That ensures that the DMU can draw on expertise, avoid negatively impacting the interests of other regulators and prevent conflicting interventions.

Clause 107 creates a formal mechanism for the Financial Conduct Authority or Ofcom to make a recommendation to the CMA for it to exercise a significant digital markets function. That will ensure that the FCA and Ofcom, as concurrent competition regulators, have a clear and transparent process to refer cases to the DMU.

Clause 108 extends existing information-sharing provisions in part 9 of the Enterprise Act 2002. It ensures that information can be shared between the CMA and other relevant regulators to help them to carry out their statutory functions. The CMA will be able to disclose information to SMS firms or third parties to enable them to respond to allegations, seek legal advice or make appeals.

9.45 am

Clause 109 gives the CMA a power to collect a levy from firms that have been designated with strategic market status. The CMA will design the levy and publish rules for its administration, laying a draft in Parliament in the process. That allows the CMA to recoup costs associated with delivering the regime, ensuring value for money for taxpayers.

Clause 110 clarifies the extraterritorial application of the digital markets regime and sets out the circumstances in which the CMA can give a notice, such as a penalty notice, overseas. The regime will by default have extraterritorial scope—with certain exceptions to limit the scope to what is strictly necessary. Government amendment 38 corrects a minor gap in the Bill. It allows for a notice requiring the provision of information to be given to a named senior manager or nominated officer who is overseas. This is in circumstances in which the CMA is "considering" whether to impose a penalty on them, rather than only if a penalty has already been imposed on them. It would be necessary if the CMA needed information to determine whether a penalty should be imposed on those individuals for failing to fulfil their role.

Clause 111 ensures that the CMA is protected against legal action for defamation as a result of delivering the digital markets regime. This matches long-standing provision in the Competition Act 1998 and the Enterprise Act 2002. Clause 112 sets out how the CMA must undertake its duties to consult and publish statements online in the course of delivering the digital markets regime. It must have regard to confidentiality and timing, and ensure that consultation materials include relevant background and rationale. That ensures that consultation invites relevant, productive and timely evidence. Clause 113 mandates that the CMA must publish guidance on how it will exercise its powers under the digital markets regime and sets out the relevant requirements. The CMA must consult before new or replacement guidance is published. This ensures that the CMA is transparent about the interpretation of this legislation and its approach to the delivery of the regime.

Clause 114 sets out when an undertaking is part of a group for the purposes of part 1 of the Bill. An undertaking is part of a group if corporate bodies within the undertaking are members of the group along with other corporate bodies. The term "group" is used in some part 1 provisions, in particular in clause 7 in relation to the turnover condition and in chapter 5 in relation to the merger reporting requirements.

Clause 115 is a technical clause, providing interpretations for key terms and concepts used throughout the Bill, to give consistency and legal certainty about their meaning. Government amendment 39 to this clause is minor and technical. It is necessary to make the definition of "relevant service or digital content" in clause 115 consistent with the definition of a digital activity in clause 3(1). I hope that amendments 37 to 39 will be accepted.

New clause 4 would require the Secretary of State to produce an annual report on the operation of the new digital markets regime. The production of such a report by Government would undermine the CMA's operational independence and could prejudice its enforcement decisions. It is important that the CMA publishes its own annual report, performance report and accounts, which will cover the operation of the digital markets regime. It is right that that is the approach that we take, that we remain with the CMA doing that, and it is right that it is Parliament, rather than the Secretary of State, that holds it to account for that.

Alex Davies-Jones: Clause 102 is incredibly important if the CMA and, subsequently, the DMU are to be able to be an accountable body that consumers and businesses—and parliamentarians—have confidence in. This clause allows the CMA to extend various deadlines in part 1 of the Bill by up to three months where there are "special reasons" to do so. Those may include, for example, illness in the CMA investigation team. These are important provisions to ensure that the CMA is able to extend relevant investigations by up to three months.

We think it reasonable that the clause does not define the exact parameters of "special reasons". We support a common-sense approach and therefore anticipate that those would include matters such as the illness or incapacity of members of an investigation team that has seriously impeded their work, and an unexpected event such as a merger of competitors. We further support the need for the CMA to publish a notice to trigger an extension under this clause. However, the Minister knows how important it is that these notices are made public, so I hope that he can clarify that that will be the case here.

It is right and proper that subsection (7) outlines the interaction between SMS investigations and active SMS designations. If the CMA is carrying out a further SMS investigation for a designated undertaking and needs to extend it, that investigation may not conclude until the original designation has expired, meaning the undertaking would fall outside the regime before the need for continued SMS designation is confirmed. The clause enables the SMS designation to be extended to match the length of the SMS investigation period and is a sensible approach that Labour supports.

We also welcome the provisions around clause 103, allowing the CMA to extend an SMS designation by up to three months. That speaks to the nature of an agile and flexible regime, which we ultimately all want and support. Government amendment 37 prevents decisions about whether and how to exercise the power in clause 17 being delegated to a member of the CMA's board or a member of staff of the CMA. We consider that to be an appropriate response.

Clause 104 is crucial all round because it explains how decisions will be made under the digital markets regime and has practical applications in establishing exactly how the functions within the CMA will be able to operate when implementing the legislation. Notably, subsections (1) to (5) provide the CMA with the ability to create groups. The CMA must state the function for which such a group is established and the group will be required to fulfil that function. Can the Minister confirm where that information will be reported? Again, it will be helpful for us all to understand how that will work in practice.

We also value the clarifications outlined in the clause, which establish that to be eligible to carry out the functions under subsection (2A), a committee must include at least two CMA board members, which can include the chair. Furthermore, a majority of the committee's membership must be non-staff or CMA panel members. We welcome the clarification that any changes of this nature would need to be laid before and approved by each House of Parliament before being enacted. Can the Minister confirm whether the Secretary of State will be required to be consulted under the provisions? That aside, we support the clause and believe it should stand part of the Bill.

We support clause 105 and welcome the clarification that a notice may be given to the particular individuals specified in subsections (3) to (5). This is an important clause that will allow the CMA to fulfil its obligations as the regulator. We also welcome clause 106, which outlines the requirements that will ensure the CMA has to consult specific named regulators, and welcome the clarity that those five regulators are the Bank of England, the Financial Conduct Authority, the Information Commissioner, the Prudential Regulation Authority and Ofcom. It is positive that they are outlined in the Bill. They are all established and relevant regulators that are subject to their own vast regulatory regimes, so Labour supports their involvement in assisting the CMA to regulate the regime proposed in the Bill. Again, we feel that subsection (6) is fair and reasonable. We particularly approve the fact that it is proportionate and we are happy to support it.

If clause 106 forces the CMA to consult the specific named regulators, it is only right that clause 107 sets out the formal mechanisms to be exercised under their regulatory digital markets function and that they are in the Bill too. We welcome the clarification on the timeframes, particularly around the fact that the CMA must respond to each relevant regulator within 90 days, setting out what action, if any, it has taken or will take and the reasons for that decision. It is important that those time periods are established in the Bill so as not to delay the CMA in taking action on a firm that is not operating in alignment with the regime.

For transparency purposes, we are also pleased to see the summaries of the CMA's responses and that they must be published online. I am sure the Minister is pleased that that is included. We will come on to that matter as we address further clauses, particularly clause 112.

We welcome clause 108, which we see as a procedural clause that additionally extends current provisions to enable information sharing between the CMA and the Information Commissioner's Office where that facilitates the exercising of one of their respective statutory functions, and we support the clause's intentions. Information sharing must be encouraged between the agencies to allow for a regulatory regime to work in practice and be robust. It is right that the clause makes amendments to the Communications Act 2003 and the Enterprise Act 2002, which we see as vital for the regime to work in practice. We therefore support the clauses and believe they should stand part of the Bill as fully drafted.

Labour fully supports the provisions in the Bill to ensure the CMA has sufficient power to collect a levy from designated undertakings to recoup the costs associated with delivering the digital markets regime. We see that as a positive and effective way of encouraging compliance, but also an important way of generating funds to ensure the sustainability of the digital markets regime more widely. The polluter pays model is commonplace in a wide range of policy areas and it can be immensely effective. We therefore welcome the provisions in full. I do not need to address each subsection individually because the overall message is the same. SMS firms should absolutely pay a levy. For far too long they have got away with having considerable power and profit, and the time for them to have a statutory obligation to support measures such as those outlined in the Bill is well overdue.

We support the provisions in Government amendment 38, which we hope will go some way to assist should penalties have to be invoked by the CMA. The amendment permits notices to be served on people outside the UK if the CMA is considering imposing a penalty. Again, that is appropriate, and the Minister can be assured of our support. We feel that the provisions in clause 110 are fair and in alignment with similar regimes already in place, so we are happy to support it too. This is all becoming very collegiate.

Clause 111 protects the CMA against legal action for defamation as a result of its exercise of functions under the digital markets provisions in this part, and we support it entirely.

We welcome the provisions outlined in clause 112, which confirms the CMA's duties to consult and publish statements online. As the Minister will be aware, any measures around transparency must factor in an element of consultation and transparency, so we welcome the clarifications that clause 112 affords. Colleagues will note that subsection (1) makes provision for when the CMA consults and publishes a statement. We think that it makes perfect sense. We are happy to support it, and wish to see that transparency echoed throughout the Bill.

Clause 113 is again welcome because it sets out the CMA's obligation to publish guidance. It is important to have confirmation that the CMA will be able to revise or replace any guidance that it publishes, but must publish the revised or replacement guidance. While we recognise that that could include industry associations with a particular interest in the specific guidance in question, I would be grateful if the Minister would clarify whether others may be consulted in the instance of revised guidance being published? That aside, we support the intention behind clause 113 and believe that it should stand part of the Bill.

Clause 114 is particularly important. In the case of a large corporate group whereby a designated undertaking may be part of a wider body, it is important that that is defined within the Bill and interpreted when used throughout the Bill. Turning to Government amendment 39, we of course support the need to ensure that the definition of

"relevant service or digital content"

is consistent with the definition of "digital activity", so we will support the amendment. We welcome clause 115 and do not disagree with any of the definitions outlined therein. We see them as fairly standard, as long as they are applied with common sense. We therefore fully support the clause.

Lastly, turning to new clause 4, we have already touched on this to some extent in previous debates. The aim of the new clause is clear: we want there to be more transparency over the function of the CMA's regime. Particularly when it is in its infancy, the information will be extremely useful to businesses, civil society, academics and parliamentarians alike. It will also be important for other jurisdictions to have a meaningful way of understanding the regime, particularly if we want it to be world leading, when considering options for their own legislation.

I hear the Minister's comments regarding replication of work and the need for the independence of the CMA, but it is right that Parliament has that scrutiny and overview. I would welcome his commitment to ensure that Parliament will have a mechanism by which to review the activity of the CMA via a regular report. If he could commit to me that that will be the case, we will not need to press the new clause to a vote.

Paul Scully: I thank the hon. Lady for her approach. Let me answer some of her questions. Notices will be made public, and information about the groups will be reported online. Under clause 104, the Secretary of State would not need to be consulted because, again, it is an independent regulator, so mandatory consultation with the Secretary of State is not necessarily appropriate. On clause 113 and who will be consulted on the revised guidance beyond industry, it will be relevant stakeholders, such as SMS firms themselves, other regulators such as Ofcom and the ICO, businesses likely to be affected by the decisions, and consumer groups. A wide-ranging consultation will be required to ensure that the regime works properly.

I think I can give the hon. Lady the assurance that she is looking for on new clause 4. It is really important that Parliament continues to be able to scrutinise the regime effectively. I do not think that it is appropriate to take the approach that the Secretary of State needs to do another form. It is less to do with duplication; it is more to do with the fact that if the Secretary of State is putting forward his or her own report, that might undermine the report that the CMA is doing. The CMA has an annual report, which it will publish at the end of each financial year. It will include a survey of developments relating to its functions, assessments of its performance against its objectives and enforcement activity, and a summary of key decisions and financial expenditure. That should be enough for Parliament to scrutinise that report and the work of the CMA and the DMU. I am happy to give that assurance that Parliament has that scrutiny and oversight.

10 am

Question put and agreed to.

Clause 102 accordingly ordered to stand part of the Bill.

Clause 103 ordered to stand part of the Bill.

Clause 104

EXERCISE AND DELEGATION OF FUNCTIONS

Amendment made: 37, in clause 104, page 63, line 31, at end insert—

"(aa) what, if any, provision to make in reliance on section 17 of the 2023 Act;"—*(Paul Scully.)*

This amendment prevents decisions about whether and how to exercise the power in clause 17 being delegated to a member of the CMA Board or a member of the staff of the CMA.

Clause 104, as amended, ordered to stand part of the Bill.

Clauses 105 to 109 ordered to stand part of the Bill.

Clause 110

EXTRA-TERRITORIAL APPLICATION

Amendment made: 38, in clause 110, page 69, line 15, after "imposed" insert "or is considering imposing".—*(Paul Scully.)*

This amendment permits notices such as information notices to be served on a person outside the United Kingdom if the CMA is considering imposing a penalty under clause 85(2) or (3) as the case may be.

Clause 110, as amended, ordered to stand part of the Bill.

Clauses 111 to 114 ordered to stand part of the Bill.

Clause 115

GENERAL INTERPRETATION

Amendment made: 39, in clause 115, page 72, line 42, leave out "anything else done" and insert

"any other activity carried out". *—(Paul Scully.)*

This amendment makes the definition of "relevant service or digital content" consistent with the definition of "digital activity" in clause 3(1).

Clause 115, as amended, ordered to stand part of the Bill.

Clauses 116

REMOVAL OF REQUIREMENT FOR AGREEMENTS ETC TO BE IMPLEMENTED IN THE UK

Question proposed, That the clause stand part of the Bill.

The Chair: With this it will be convenient to discuss the following:

Clauses 117 to 121 stand part.

That schedule 3 be the Third schedule to the Bill.

Clauses 122 and 123 stand part.

Clauses 134 and 135 stand part.

Paul Scully: I hope my voice will stand up to this level of scrutiny. Part 2 of the Bill focuses on the UK's existing competition regime. First, I will explain that while the CMA is the principal regulator responsible for the public enforcement of the prohibitions in part 1 of the Competition Act 1998, its functions are also exercisable concurrently by sector regulators, such as Ofgem and Ofcom, among others. The measures in clauses 116 to 120 and clause 135, and when we reach them clauses 136 and 137 and schedules 8, 9 and 11, affect the CMA and sector regulators. For the sake of brevity, I will just refer to the CMA.

Clause 116 extends the territorial reach of the chapter 1 prohibition in the Competition Act 1998. The prohibition relates to anti-competitive agreements, decisions by associations of undertakings or concerted practices, hereafter simply referred to as agreements. The chapter 1 prohibition captures agreements that have as their object or effect the prevention, restriction or distortion of competition within the UK, and which may affect trade within the UK. Currently, it is limited to agreements that are, or are intended to be, implemented within the UK. The extension in reach of the chapter 1 prohibition means that agreements implemented, or intended to be implemented, outside the UK are also captured, but only where they would be likely to have immediate, substantial and foreseeable effects on trade within the UK.

Clause 117 introduces a new duty to preserve documents on persons who know or suspect that an investigation is being, or is likely to be, carried out under the Competition Act 1998. The duty will apply from when a person knows or suspects that an investigation by the CMA is under way or likely to occur. Where a person has a reasonable excuse for not complying with the duty, no liability for a penalty will arise. A reasonable excuse could include something out of an individual's control, such as an IT failure.

Clause 118 strengthens the CMA's powers to require the production of electronic information stored remotely—for example, in the cloud—when executing warrants to enter business or domestic premises. Under this reform, the CMA will be able to require the production of information for the purposes of its investigation without needing to demonstrate when making the request the specific relevance of the particular dataset to be produced. It will then be able to take copies or extracts only of information that is relevant to the investigation. The CMA will also be able to operate equipment to produce remotely stored information itself. Clause 134 makes similar amendments to the CMA's power to require the production of electronic information when executing a warrant during an investigation into a suspected criminal cartel offence under part 6 of the Enterprise Act 2002.

Clause 119 amends part 1 of schedule 1 to the Criminal Justice and Police Act 2001, to include the power of the CMA to undertake an inspection of domestic premises, under section 28A of the Competition Act 1998. That means that when the CMA undertakes an inspection of domestic premises, it will have access to the same seize and sift powers as are already available to it when it inspects business premises under a warrant.

Clause 135 also concerns the CMA's investigative powers. First, it expands the CMA's power to require persons to answer questions for the purposes of a Competition Act 1998 investigation, so that it applies regardless of whether the person has a connection to a business under investigation. The CMA will be able to require individuals to answer questions only where they have information that is relevant to an investigation. Secondly, the clause amends the CMA's powers to require individuals to answer questions across its Enterprise Act 2002 markets and mergers and Competition Act 1998 functions, so that it can specify that interviews for those purposes should take place remotely.

Clause 120 amends the standard of review applied by the Competition Appeal Tribunal in appeals against interim measure decisions from full merits to judicial review. Interim measures are temporary directions that the CMA has the power to give during an investigation under the Competition Act 1998. To be an effective tool in fast-moving modern markets, it is essential that interim measures can be implemented efficiently. Judicial review will provide a flexible and proportionate standard of review, ensuring the CMA is held accountable appropriately for its decisions.

Clause 121 introduces schedule 3 to the Bill, which amends the Competition Act 1998 to empower the Competition Appeal Tribunal to grant declaratory relief in private actions claims under the Competition Act 1998. Declaratory relief is a remedy that involves a court making a legally binding statement on the application of the law to a set of facts.

Clause 122 gives the Competition Appeal Tribunal, the High Court of England and Wales, the Court of Session and sheriff courts in Scotland and the High Court in Northern Ireland the ability to award exemplary damages in private competition claims. This will help deter and punish particularly egregious conduct and ensure that those impacted by the most reckless breaches of competition law can be awarded additional damages.

Clause 123 amends section 71 of the Serious Organised Crime and Police Act 2005 to designate the CMA as a specified prosecutor. This designation will allow the CMA to enter into formal agreements with an offender who has assisted or offered to assist its criminal cartel offence investigations. For example, if it considered it appropriate, the CMA could agree not to use specified information against them in any criminal proceedings. Agreements to provide assistance can also be taken into account by the courts when sentencing an offender, or their sentence could be referred back to the court for review. These measures do not enable the CMA to offer immunity from prosecution.

Alex Davies-Jones: Part 2 focuses on the competition elements of the Bill. I am pleased to see clause 116, which expands the territorial reach of parts of the Competition Act 1998. Labour recognises the importance of ensuring that legislation already on the statute book is aligned with the intentions behind the Bill, because we understand that regulation of our digital markets will draw on existing competition law. We therefore welcome the clause, which will expand chapter 1 of the 1998 Act. The chapter 1 of the 1998 Act considers only undertakings and decisions that might affect trade within the UK, and which have as their object or effect the prevention, restriction or distortion of competition. At the moment, those behaviours are prohibited only where they are, or are intended to be, implemented in the United Kingdom, but we need to consider the impact of agreements, decisions and practices that might affect trade within the United Kingdom. Subsection (2) of the clause will replace the existing section of the 1998 Act to ensure that a consideration of the effect on trade will be considered. That is particularly important in the context of digital markets because they operate on a global level.

The clause goes some way to address the lack of futureproofing in the Bill more widely. The Minister knows my thoughts on that, and knows the Bill should go further in that regard. That aside, we welcome subsection (3), which will repeal the existing equivalent in the 1998 Act. The introduction of the qualified test will ensure that UK trade and businesses and consumers based in the United Kingdom, are protected from any detrimental effects of anti-competitive conduct, regardless of where that conduct takes place. That is welcome, and we consider the measure to strike a positive balance.

We welcome the clarity and the changes to the 1998 Act that will bring important provisions of the Bill into line with existing legislation. We have therefore not sought to amend the Bill, and we support those measures being part of it.

Clause 117 is important in that, once again, it will amend part 1 of the 1998 Act. We know that big companies can often be smart in concealing, or even overloading, information relevant to regulatory regimes, and we have seen that happen time and again when it comes to online safety. Labour does not want the same detrimental behaviours to be allowed to continue within this regime. We therefore welcome the provisions in the clause, particularly proposed new section 25B, which sets it out that the duty applies where

"a person knows or suspects that an investigation by the CMA… is… or is likely to be carried out."

The inclusion of a person "suspecting" is important, and, in theory, it will push companies to abide by their duties. Recently, we have seen those at the heart of Government in the news owing to their failure to produce vital documents in investigations of the covid-19 pandemic, so it is very welcome indeed that the Government appear to have learned their lessons and worked to ensure that designated companies will not be able to circumvent the regime, as a former Prime Minister has attempted to do.

Let me get back to the Bill and the matters at hand. In practice, those duties will arise where a business receives a case initiation letter from the CMA, so it will be perfectly aware that its conduct is under investigation. Such duties might further arise when, for example, an individual working for a business is aware that a customer has reported their suspicions of price fixing, and that the customer has been interviewed by the CMA, or members of an anti-competitive agreement have been "tipped off" that a member of the agreement has blown the whistle to the CMA. Those are important clarifications, which we welcome. We therefore support their inclusion in the Bill.

We support clause 118, which specifically amends sections 28 and 28A of the 1998 Act, and we support the clarity with respect to the execution of such warrants—for example, a named CMA officer has the power to require the production of information that is held electronically and is accessible from the premises. It is a positive step to have these amendments to the 1998 Act, which will expand the powers of the court or the CAT to grant a warrant to the CMA based on the fact that there are reasonable grounds to suspect that there are documents relating to an investigation that are accessible from the premises, when the other criteria set out in the section are met. Those powers will apply to any information stored electronically, and we hope and expect that the provisions of the clause will rarely be used. Despite that, we fully support their inclusion. It is right and appropriate that businesses and other jurisdictions looking closely at the Bill have a sense of the process that will result in the event of the CMA being forced to act on a warrant. The clause and others in this part of the Bill are an important part of ensuring compliance, and we therefore welcome the provisions in full.

Clause 119 is, once again, an important clause that will amend existing legislation. The powers of seizure conferred by section 28 of the 1998 Act are already specified for the purposes of section 50 of the Criminal Justice and Police Act 2001, so the amendment will align the powers available to the CMA whether it is inspecting business or domestic premises under a warrant, and it will make consequential changes in the light of those made by clause 118. These practical clauses will make important changes to legislation to bring other provisions in line with the Bill.

10.15 am

Clause 120 is incredibly important because it will change the standard of review to be applied by the CAT on appeals against interim measures directions under

section 35 of the 1998 Act. The Minister knows that Labour feels passionately that judicial review is the correct approach, so again I press him not to weaken the measures in the other place. As we know, under section 35 of the Competition Act 1998, when an investigation has been commenced but not completed, the CMA has the power to issue directions, known as interim measures, for the purpose of preventing significant damage to a particular person or category of person or protecting the public interest. Clause 120(1) amends section 46 of the Competition Act 1998 to make it clear that a decision either to make or to not make interim measures can be appealed to the CAT by any party to an agreement in respect of which the CMA has made such a decision. We welcome that clarification. Subsections (2) to (4) contain important points, which we also welcome. I would be grateful if the Minister could reassure us that those provisions will not be weakened and that the appeals process will not be reduced to a merits-based process in the other place. To be clear, if I have not already been clear, we fully support clause 120 and its intentions.

We welcome the provisions in schedule 3, which gives the CAT the power to make legally binding statements on the application of the law to a particular set of facts. Particularly helpful is paragraph 4, which inserts proposed new section 47DA into the Competition Act. The proposed new section provides clarification and enables legislative parity across the UK, particularly with Scotland and England and Wales. That is welcome for the legislation to work as intended.

I do not feel that I need to go into any further detail about our support for the other clauses in the grouping, but I wish to make a point about clause 134 in regard to the Serious Fraud Office's investigations of suspected cartel offences. The clause will enable a named CMA officer to require the production of information that is held electronically and accessible during an inspection under a warrant. It would also expand the powers of the High Court and the CAT in England and Wales and Northern Ireland, and the sheriff in Scotland, to grant a warrant if necessary. We support those provisions in their entirety. It is important that the CMA is able to act in the most serious of circumstances.

Finally, Labour supports the intentions of clause 135; of course there should be provisions in the Bill about the attendance of witnesses, as outlined in the clause. We see those as sensible and a key focus if the regime is to work in practice.

Question put and agreed to.

Clause 116 accordingly ordered to stand part of the Bill.

Clauses 117 to 121 ordered to stand part of the Bill.

Schedule 3 agreed to.

Clauses 122 and 123 ordered to stand part of the Bill.

Clause 124

RELEVANT MERGER SITUATIONS AND SPECIAL MERGER SITUATIONS

Question proposed, That the clause stand part of the Bill.

The Chair: With this it will be convenient to discuss the following:

That schedule 4 be the Fourth schedule to the Bill.

Clause 125 stand part.

That schedule 5 be the Fifth schedule to the Bill.

Clauses 126 to 128 stand part.

Paul Scully: Chapter 2 of part 2 upgrades and refines UK merger control to ensure it remains the best in class. Clause 124 and schedule 4 amend the thresholds for merger review to focus the UK's merger regime on reviewing the transactions that have the potential to have the most marked impact on competition in UK markets.

The Bill makes three changes to those thresholds. First, it introduces a new acquirer-focused threshold, which gives the CMA clear jurisdiction over transactions in which a very large business with a UK turnover of more than £350 million, and at least a 33% share of supply, acquires another business. The new threshold will allow the CMA to review potentially harmful transactions—for example, a business with significant market power in one part of a supply chain acquiring a business in another and then being able to leverage its market power across that supply chain.

Secondly, the Bill increases the turnover test level from £70 million to £100 million. That adjustment limits merger review of cases that are less likely to be harmful, maintaining the balance intended when the UK's merger regime was created. Thirdly, it introduces a safe harbour for transactions where all parties have a UK turnover of no more than £10 million. For the first time, therefore, small and micro enterprises merging with each other can be certain that they will not be captured by UK merger control.

Clause 125 and schedule 5 introduce a fast-track procedure to allow certain mergers to be expedited to an in-depth, or phase 2, investigation. That is intended to increase flexibility and deliver more efficient merger investigations. Now, when the CMA investigates a merger, initially it has to undertake a phase 1 investigation lasting up to 40 working days before it can refer the transaction for an in-depth phase 2 investigation. Merger parties, however, may be aware early in the process that their merger is likely to require an in-depth investigation by the CMA. In such cases, moving quickly to phase 2 will significantly speed up the overall process. Let me be clear: the fast track is not a suitable process for all mergers that the CMA reviews. However, in some cases, it will be a valuable tool to save time and resources for all involved, especially if parties request a fast track early on.

Clause 126 enables merger parties and the CMA to extend existing statutory time limits for merger reviews by mutual agreement where appropriate. The increased flexibility that that provides will ultimately help to resolve cases more effectively and, in some cases, more quickly. Clause 127 enables the CMA and merger parties to extend the time limits of merger review in public interest cases. Unlike in a normal merger review, however, the Secretary of State has an important role in decision making in public interest cases. This clause therefore sets up a key additional requirement for such cases: the CMA can only make or cancel an extension if the Secretary of State also consents. Clause 128 replaces the requirement for the CMA to publish the merger notice in the *London Gazette*, *Edinburgh Gazette* and *Belfast Gazette* with a requirement to do so online.

Alex Davies-Jones: Labour welcomes the provisions in the clause which establish that transactions within jurisdiction can be reviewed by the CMA, although no obligations or requirements are imposed on businesses by being in scope. Schedule 4 introduces the new acquirer-focused threshold, as well as introducing a small merger safe harbour that is primarily targeted at reducing the regulatory burden faced by small and micro businesses—the burden that we heard about in our evidence sessions. We support the clause standing part.

Schedule 4 makes several changes to the thresholds, which determine what transactions are within the jurisdiction of UK merger control. As I have noted already, the UK's merger control regime is voluntary, meaning that there is never on obligation to notify a transaction to the CMA. However, when the existing jurisdictional thresholds in the Enterprise Act 2002 are met, the CMA may review a transaction even if it is not notified. The CMA has such jurisdiction if: the target's UK turnover in its most recently completed financial year exceeded £70 million; or the parties have a combined share of supply of 25% or more in relation to any product or service in the UK or a substantial part of the UK. This schedule will clarify some significant changes to those thresholds, which Labour welcomes.

Schedule 4 introduces a new threshold that will grant the CMA jurisdiction to review transactions where one party has a UK share supply of at least 33% and UK turnover exceeding £350 million. We see the new threshold as largely capturing killer acquisitions, in which a larger firm acquires a smaller and possibly innovative firm, potentially with a view to eliminating the threat of future competition. The CMA's existing 25% share-of-supply threshold has already shown itself to be flexible in capturing many such transactions, but it is estimated that the new threshold will lead to an increase of between two and five phase 1 cases per year. That is to be applauded.

The new £350 million threshold is aimed at expanding the CMA's jurisdiction, but other sections of schedule 4 seek to reduce the burden on merging companies by removing certain transactions from the CMA's jurisdiction. By increasing the target turnover threshold from £70 million to £100 million, it is estimated that the changes to the turnover test will lead to a reduction of two or three phase 1 cases per year. In addition, the Government have proposed an interesting solution with the introduction of a safe harbour threshold to the existing share-of-supply test where, even if the 25% share of supply threshold is met, the CMA would not have jurisdiction if no party to the transaction had more than £10 million of UK turnover.

Labour recognises that it would be inappropriate to burden the CMA unnecessarily, but we are keen to have an understanding of how schedule 4 will operate in practice. Has the Minister considered introducing an annual reporting mechanism that would allow for more transparency on whether the approach is working? That aside, we certainly and carefully support the intentions of this schedule.

We welcome the provisions of clause 125 and are pleased to see that particular attention has been given to merger situations. Labour recognises that designated companies often buy other companies or merge with them, so it is only right that the CMA is empowered with the appropriate tools to investigate in such circumstances, where necessary. As we know, at present the UK's merger control regime is voluntary, meaning that there is never an obligation to notify the CMA of a transaction. However, as I have said, when the thresholds in the Enterprise Act are met, the CMA may review a transaction despite not having being notified of it.

Clause 125 is relevant because it amends part 3 of the Enterprise Act to enable the CMA to fast-track a merger to an in-depth phase 2 investigation if it receives a request from the parties involved to do so. That is an important step in streamlining merger review procedures and timelines by removing certain statutory duties on the CMA that currently limit the benefits and use of the existing, non-statutory fast-track procedures. This fast-track process gives the CMA more flexibility to deliver quicker and more efficient merger investigations without prejudicing the quality of the review. We welcome the clarifications in clause 125 and support its standing part of the Bill.

We welcome schedule 5, which amends the Enterprise Act to enable the CMA to fast-track these mergers. In particular, we support the clarification that the CMA may launch a phase 2 investigation only if it believes that a completed or anticipated merger has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom. We also support the clarification of the circumstances in which the CMA can accept a fast-track reference request.

When making these decisions, the CMA must have regard to whether the merger could raise public interest issues or whether a special public interest intervention has been launched under provisions in the Enterprise Act, to ensure that no case is unduly fast-tracked. Schedule 5 is important and will be central to ensuring the CMA can work at pace in the case of any merger requiring investigation. We welcome and support it.

Labour fully supports the intentions of clause 126. The timetable for phase 2 investigations is important for the timely resolution of merger investigations, and we believe the approach outlined to be sensible. As it stands, section 39 of the Enterprise Act, which outlines time limits, requires the CMA to publish its report on a merger reference within 24 weeks of the date of the reference. Clause 126(2) amends that provision to give the CMA the power to extend the period if necessary. We welcome the clarity that the length of an extension has to be agreed between the CMA and parties involved in the potential merger.

We also acknowledge that, while the Bill does not specify circumstances in which the CMA and the parties involved in a merger can agree an extension, an extension is most likely to be helpful in support of early consideration of remedies or in multi-jurisdictional mergers that are being reviewed in other countries in parallel to the UK. We welcome that distinction. Labour has consistently said that for the regime to work in practice it must be flexible. We see clause 126 as an important step towards that aim and are therefore happy to support its inclusion in the Bill.

As I said with respect to clause 126, Labour supports flexibility to extend time limits, and we feel that is particularly important where there is a public interest to do so. That is why we support clause 127. The clause amends chapter 2 of part 3 of the Enterprise Act, which sets out that the Secretary of State may intervene in the consideration of a merger where the Secretary of State

[Alex Davies-Jones]

believes it raises a public interest consideration that needs to be taken into account. We feel that this is an appropriate and proportionate way of ensuring accountability for public interest interventions, and that the Secretary of State should be empowered to do so. We therefore support the intentions of clause 127 and, again, believe that it should stand part of the Bill.

Finally, clause 128 replaces the obligation on the CMA in section 96(5) of the Enterprise Act to publish the latest form of the merger notice

"in the London, Edinburgh and Belfast Gazettes"

with an obligation to publish it online. We welcome that transparency. The Minister knows my views on transparency with respect to the Bill more widely. I wish that provision about online publication was replicated elsewhere in the Bill, so that information is available to anyone who wishes to see it. We welcome clause 128 and hope to see it replicated.

Paul Scully: Indeed, a lot of the publication is done online, as we have discussed, even if that is not stated specifically in the Bill. I hope the hon. Lady takes heart in that.

The hon. Lady asked specifically about schedule 4 and safe harbours. Clearly, we would expect the CMA and the Government to review the merger review thresholds regularly, and there are powers to amend the thresholds if and when it is considered appropriate to reflect economic developments or, indeed, because of the experience of enforcing the thresholds, as she rightly said. The CMA board is accountable to Parliament, as we have described. We expect that, through its annual plan and performance reports, Parliament will be able to scrutinise the decisions that have been taken.

Question put and agreed to.

Clause 124 accordingly ordered to stand part of the Bill.

Schedule 4 agreed to.

Clause 125 ordered to stand part of the Bill.

Schedule 5 agreed to.

Clauses 126 to 128 ordered to stand part of the Bill.

Clause 129

MARKET STUDIES: REMOVAL OF TIME-LIMIT ON PRE-REFERENCE CONSULTATION

Question proposed, That the clause stand part of the Bill.

10.30 am

The Chair: With this it will be convenient to discuss the following:

Clauses 130 and 131 stand part.

That schedule 6 be the Sixth schedule to the Bill.

Clause 132 stand part.

That schedule 7 be the Seventh schedule to the Bill.

Clause 133 stand part.

Paul Scully: The UK's markets regime is the CMA's most powerful tool for promoting competition in UK markets. Clauses 129 to 133 reform the markets regime, ensuring that it is effective, focused and proportionate.

Clause 129 reforms the market study process. Currently, the CMA or sector regulator must start a consultation on making a market investigation reference, or decide not to make a reference, within six months of the start of a market study. That timeframe is unduly restrictive. The clause removes the six-month time limit, giving flexibility for the consultation to start at the most appropriate point. It allows extra time to gather evidence, ensuring that information that comes to light later on can be considered.

Clause 130 makes amendments so that references can be targeted appropriately, to better define the scope of the investigation required. It further narrows the questions that the CMA group must consider, reflecting the scope set out in the reference. This will allow the CMA to ensure that its work is targeted effectively, which will benefit businesses and investors.

Clause 131 introduces schedule 6, which expands the use of voluntary undertakings that remedy competition harms. The clause allows the CMA to accept such undertakings at any stage in the market inquiries process. This includes the acceptance of partial undertakings that address some features causing concerns in a market, but not all. The flexibility to take issues "off the table" by accepting such undertakings, alongside the amendments made by clause 132 regarding narrowing the scope of investigations, will help to provide greater flexibility in the regime. We recognise that voluntary undertakings will not be appropriate in every case. Where they are appropriate, they will drive efficiencies and enable faster results. They will also help to tackle competition problems and any resulting consumer harm as quickly as possible.

Clause 132 introduces schedule 7, which gives new powers to the CMA to conduct trials of certain types of remedies at the conclusion of a market investigation where an adverse effect on competition has been identified. That will help to ensure that any final remedy is suitable and effective. For now, the power to trial remedies will be limited to solutions that relate to the provision or publication of information to consumers. That is the area where trials are most likely to be useful and enables a proportionate approach to introducing this new power. The Secretary of State will be able to expand the scope of remedies to trial in future, subject to the draft affirmative procedure.

Clause 133 gives the CMA new powers to amend ineffective remedies where less than 10 years has passed since the original market investigation. Where the CMA decides that remedies have been ineffective and should be varied, it will be required to consult with affected businesses before reaching a final decision on whether to vary a remedy, and to conclude the variation within six months. In cases where the Secretary of State has accepted or imposed remedies, the CMA will provide advice to the Secretary of State. This new power will be constrained by a mandatory two-year cooling-off period, beginning at the end of a remedy review.

Alex Davies-Jones: I will speak briefly to clause 129 before addressing our thoughts on the rest of the group. Labour supports the intentions of the measures in the group, and we have not sought to amend them at this stage.

The removal of the time restriction outlined in clause 129 gives the CMA flexibility and more time to gather evidence to determine when the consultation process

should commence. That is something I think we can all get behind and fully support.

Schedule 6 outlines the process by which the CMA will be able to accept voluntary commitments during all stages of a market study and a market investigation. It allows the CMA to accept partial undertakings, to narrow the issues that require further investigation. We see these features as central to a flexible regime that firms want to easily engage with. That must be at the heart of any fully functioning and appropriate regime.

Clause 132 and schedule 7, which are incredibly welcome, provide that the CMA may be required by the Secretary of State to conduct trials of remedies before setting a final remedy package. We recognise that since this is a new regime, the regulator may benefit from such trial remedies, and it is important that the CMA has the legislative teeth and support to do so.

We therefore support the measures in the group. We have not sought to amend them, and we believe that they should stand part of the Bill.

Question put and agreed to.

Clause 129 accordingly ordered to stand part of the Bill.

Clauses 130 and 131 ordered to stand part of the Bill.

Schedule 6 agreed to.

Clause 132 ordered to stand part of the Bill.

Schedule 7 agreed to.

Clauses 133 to 135 ordered to stand part of the Bill.

Ordered, That further consideration be now adjourned. —*(Mike Wood.)*

10.38 am

Adjourned till this day at Two o'clock.

PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT
GENERAL COMMITTEES

Public Bill Committee

DIGITAL MARKETS, COMPETITION AND CONSUMERS BILL

Tenth Sitting

Tuesday 27 June 2023

(Afternoon)

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No proofs can be supplied. Corrections that Members suggest for the final version of the report should be clearly marked in a copy of the report—not telephoned—and must be received in the Editor's Room, House of Commons,

not later than

Saturday 1 July 2023

The Committee consisted of the following Members:

Chairs: † Rushanara Ali, Mr Philip Hollobone, Dame Maria Miller

† Carter, Andy *(Warrington South)* (Con)
† Coyle, Neil *(Bermondsey and Old Southwark)* (Lab)
† Davies-Jones, Alex *(Pontypridd)* (Lab)
Dowd, Peter *(Bootle)* (Lab)
† Firth, Anna *(Southend West)* (Con)
Ford, Vicky *(Chelmsford)* (Con)
† Foy, Mary Kelly *(City of Durham)* (Lab)
Hollinrake, Kevin *(Parliamentary Under-Secretary of State for Business and Trade)*
† Malhotra, Seema *(Feltham and Heston)* (Lab/Co-op)
Mayhew, Jerome *(Broadland)* (Con)
† Mishra, Navendu *(Stockport)* (Lab)
† Russell, Dean *(Watford)* (Con)
† Scully, Paul *(Parliamentary Under-Secretary of State for Science, Innovation and Technology)*
† Stevenson, Jane *(Wolverhampton North East)* (Con)
† Thomson, Richard *(Gordon)* (SNP)
† Watling, Giles *(Clacton)* (Con)
† Wood, Mike *(Dudley South)* (Con)

Kevin Maddison, John-Paul Flaherty, Bradley Albrow, *Committee Clerks*

† attended the Committee

Public Bill Committee

Tuesday 27 June 2023

(Afternoon)

[Rushanara Ali *in the Chair*]

Digital Markets, Competition and Consumers Bill

Clause 136

Civil penalties etc in connection with competition matters

2.4 pm

Question proposed, That the clause stand part of the Bill.

The Chair: With this it will be convenient to discuss the following:

That schedule 8 be the Eighth schedule to the Bill.

That schedule 9 be the Ninth schedule to the Bill.

That schedule 10 be the Tenth schedule to the Bill.

Clause 137 stand part.

That schedule 11 be the Eleventh schedule to the Bill.

Clause 138 stand part.

Government amendments 40 to 44.

That schedule 12 be the Twelfth schedule to the Bill.

The Parliamentary Under-Secretary of State for Science, Innovation and Technology (Paul Scully): The final clauses in part 2 concern measures that cut across the Competition and Markets Authority's competition tools. Clause 136 introduces schedules 8 to 10 to the Bill. The Competition Act 1998 and parts 3 and 4 of the Enterprise Act 2002 already allow the CMA to impose civil penalties for non-compliance with information requirements. The destruction of documents that have been required to be produced, and the provision of false or misleading information, are criminal offences, but schedule 8 introduces powers for that conduct to be subject to civil penalties. It also reforms existing civil penalties to ensure that the maximum penalties are set at an appropriate level.

Schedule 9 introduces powers enabling civil penalties to be imposed for breaches of competition remedies. Competition remedies are interim measures, commitments and directions under the Competition Act 1998 and interim measures, undertakings or orders under parts 3 and 4 of the Enterprise Act 2002. Schedules 8 and 9 also enable the Secretary of State and Ofcom to impose penalties if they are given false or misleading information in relation to their functions under the relevant regimes. They also give the Secretary of State the power to impose penalties to enforce compliance with remedies accepted or imposed in relation to mergers and markets with public interest considerations. Civil penalties will be applicable unless the party has a reasonable excuse, and that will be assessed case by case.

The maximum penalty for an undertaking or person who owns or controls an enterprise that is not complying with information requirements is 1% of the business's worldwide turnover. Daily penalties of up to 5% of worldwide daily turnover will also be available in some cases while the non-compliance continues. For breach of remedies, the maximum penalty is set at 5% of worldwide turnover and daily penalties of up to 5% of worldwide daily turnover while the breach continues. The penalties imposed on other persons, who will generally be individuals, are capped at £30,000, or up to £15,000 daily while the breach continues. The CMA is required to produce statements of policy regarding the operation of its penalty powers. In doing so, it must consult the sector regulators and receive approval from the Secretary of State. Schedule 10 amends the legislation that gives the sector regulators their concurrent competition powers, so that they need not unnecessarily duplicate the work that they need to do to prepare statements of policy.

Clause 137 introduces schedule 11, which amends the Competition Act 1998 and parts 3 and 4 of the Enterprise Act 2002 to make express provision regarding the giving of information notices outside the United Kingdom. The schedule enables the CMA to give an information notice to a person who is the subject of a Competition Act 1998 investigation, or a person who is or has been a party to a merger review. The schedule also enables the CMA to give information notices to third parties with a defined UK connection. Compliance will be enforceable through the civil penalty regime. The schedule also amends provisions on methods of serving documents to reflect modern business practices; for example, it allows service of documents via email.

Government amendments 40 to 44 are technical drafting amendments to schedule 12. The schedule, which is introduced by clause 138, applies appropriate parliamentary procedures to new regulation-making powers created by the Bill, and makes other consequential and technical amendments. I commend the amendments to the Committee and hope that the clauses will stand part of the Bill.

Alex Davies-Jones (Pontypridd) (Lab): Labour supports the intention behind the provisions in this grouping. Of course there should be provisions about the attendance of witnesses, as outlined in clause 135. The same can be said about ensuring that the Bill has sufficient legal powers on civil penalties, should the need for them arise in the regime. The provisions in clause 136 and schedules 8 to 10 are adequate, and we support them. The same can be said for clause 137 and schedule 11, which make provisions regarding the service of documents and the extraterrestrial—sorry, extraterritorial; I know we are talking about digital markets, but we have not reached that far yet—application of notices under part 1 of the Competition Act 1998 and parts 3 and 4 of the Enterprise Act 2002. Of course those laws must work in alignment with the intentions of the Bill. Clause 138, Government amendments 40 to 44 and schedule 12 are all sensible, and part of a rigorous procedure, so we do not oppose them.

Question put and agreed to.

Clause 136 accordingly ordered to stand part of the Bill.

Schedules 8 to 10 agreed to.

Clause 137 ordered to stand part of the Bill.

Schedule 11 agreed to.

Clause 138 ordered to stand part of the Bill.

Schedule 12

ORDERS AND REGULATIONS UNDER CA 1998 AND EA 2002

Amendments made: 40, in schedule 12, page 284, line 5, at end insert—

"(1A) In subsection (4) omit ', 94A(6)'."

This amendment removes a reference in section 124(4) of the Enterprise Act 2002 to section 94A(6) of that Act, which is being repealed by paragraph 11 of Schedule 9 to the Bill.

Amendment 41, in schedule 12, page 284, line 7, at end insert—

"(aa) omit ', 94A(3) or (6)';".

This amendment removes a reference in section 124(5) of the Enterprise Act 2002 to section 94A(3) and (6) of that Act, which are being repealed by paragraph 11 of Schedule 9 to the Bill.

Amendment 42, in schedule 12, page 284, line 12, after "section" insert "94AB(9) or".

This amendment corrects a drafting omission by providing that regulations under section 94AB(9) of the Enterprise Act 2002 (inserted by paragraph 11 of Schedule 9 to the Bill) are subject to annulment in pursuance of a resolution of either House of Parliament.

Amendment 43, in schedule 12, page 285, line 10, after "section" insert "167B(9) or".

This amendment corrects a drafting omission by providing that regulations under section 167B(9) of the Enterprise Act 2002 (inserted by paragraph 17 of Schedule 9 to the Bill) are subject to annulment in pursuance of a resolution of either House of Parliament.

Amendment 44, in schedule 12, page 285, line 23, at end insert—

"(8A) In subsection (10), for '174D' substitute '174A(10)'."—*(Paul Scully.)*

Paragraph 26 of Schedule 8 to the Bill inserts a new subsection (10) into section 174A of the Enterprise Act 2002 which replaces the existing provision made by section 174D(10) of that Act (which is being repealed by paragraph 28(12) of that Schedule). This amendment amends the Enterprise Act 2002 to replace a reference in section 181(10) of that Act to the latter provision with a reference to the former.

Schedule 12, as amended, agreed to.

Clause 139

OVERVIEW

Question proposed, That the clause stand part of the Bill.

The Chair: With this it will be convenient to discuss the following:

Government amendment 59.

Clauses 140 to 142 stand part.

That schedule 13 be the Thirteenth schedule to the Bill.

That schedule 14 be the Fourteenth schedule to the Bill.

Clause 201 stand part.

Paul Scully: Part 3 of the Bill provides for two regimes for the civil enforcement of consumer protection law: a court-based regime and a direct enforcement regime for the CMA.

Clause 139 provides an overview of part 3. Clause 140 sets out the scope of the court-based and CMA direct enforcement regimes. First, the regimes are limited broadly to the trader's acts or omissions that amount to commercial practices—that is, interactions between traders and consumers. Secondly, to be subject to enforcement action, a commercial practice must harm the collective interests of consumers. Thirdly, the scope of the laws that can be enforced remains broadly the same as that which can be enforced under current law. Government amendment 59 ensures that the Bill reflects existing law, namely the Consumer Protection from Unfair Trading Regulations 2008.

Clause 141 provides for an infringing practice to be in scope of enforcement if the trader committing it meets at least one of the following conditions: the trader has a place of business in the UK; the trader carries on business in the UK; or where the infringing commercial practice occurs as part of activities directed to consumers in the UK by any means. Those tests mean that the jurisdictional scope of the current court-based enforcement regime for consumer law is replicated.

Clause 142 limits the application of the enforcement regimes to a commercial practice that breaches an enactment, obligation or rule of law listed in schedules 13 or 14 to the Bill.

Clause 201 gives a delegated power to the Secretary of State to amend schedules 13 and 14—that is, to add, remove or vary the enactments and enforcer authorisations listed in those schedules. The continuing effectiveness of both regimes will depend on their ability to adapt to reflect the evolution of consumer protection law over time. As new consumer protection laws are made and old ones repealed, there must be a mechanism to ensure that they fall into or out of the scope of the enforcement regimes. If the enforcement landscape and the remits of individual enforcers change, there must be a facility to reflect those changes in the statutory framework. The power is subject to the affirmative procedure, so hon. Members will have due opportunity to scrutinise any provisions made under it.

Schedule 13 lists the enactments, obligations and rules of law that may be enforced through the court-based regime, which replaces part 8 of the Enterprise Act 2002 for conduct going forward. The schedule also makes clear which enforcers may enforce each enactment.

Schedule 14 sets out which enactments the CMA may enforce through its new direct enforcement powers. Its scope comprises core consumer protection legislation and a limited number of sector-specific regulations where CMA direct enforcement is desirable. That reflects the CMA's specific remit and competence to tackle market-level issues that adversely affect consumers or affect their ability to make choices.

2.15 pm

Seema Malhotra (Feltham and Heston) (Lab/Co-op): It is a pleasure to serve under your chairship, Ms Ali. I thank the Minister for his opening remarks, and it is a pleasure to follow my hon. Friend the Member for Pontypridd in speaking on this important Bill.

Clause 139 provides an overview of the structure of part 3, which sets out the court-based regime for the civil enforcement of consumer protection law to protect the collective interests of consumers. As the Minister said, that allows for two regimes of civil enforcement—a simplified courts-based regime and the CMA's direct enforcement regime.

[Seema Malhotra]

The regime provides for consumer law enforcers to apply for, and the courts to make, enforcement orders, interim enforcement orders, online interface orders, to which only the CMA may apply, and interim online interface orders to which, again, only the CMA may apply. An enforcer or the court could decide to accept an undertaking from the enforcement subject instead of issuing an order, a mechanism that there should be the option for and is in line with the participative approach of working in the Bill.

Chapter 3 would also provide for certain enforcers—defined in clause 143, which we will go on to debate—and the court to attach remedies, known as "enhanced consumer measures", to enforcement orders and undertakings. Importantly, chapter 3 would provide new powers for the courts to impose monetary penalties on enforcement subjects who have infringed the consumer protection laws within scope of part 3.

I wish to signal the Opposition's broad support for part 3 and the measures it introduces to ensure swifter enforcement of consumer protection law and more effective redress for consumers. That is a sentiment shared by consumer groups. As one example, the written evidence submitted by Consumer Scotland expressed broad support for part 3, noting how it:

"simplifies and bolsters the enforcement of penalties for relevant infringements of consumer protection law under part 8 of the Enterprise Act 2002."

I hope we will work constructively through the Committee to ensure that the consumer provisions in the Bill are as robust and fair as possible, and that we will not see the watering down of any measures currently drafted.

Clause 140 defines the scope of the enforcement regime set out by part 3. It sets out how a trader has committed an infringement of the part 3 enforcement regime if their act or omission harms the collective interests of consumers, as well as meeting the UK connection conditions set out in clauses 141, and the specified prohibition condition set out in clause 142.

The Opposition support clause 140 as a necessary element in introducing a robust enforcement regime. It is a stronger consumer protection, which acts where a continuation or repetition of an act, such as misleading information or an omission of information, could continue to harm future customers unless remedied. However, I ask the Minister for clarity on one aspect of the provision. As well as setting out the scope of enforcement, the clause in subsection (2) also defines relevant terms such as "trader" and "consumer". The explanatory note states that in relation to the definition of "consumer":

"A consumer must be an individual and so excludes body corporates. The individual must be acting wholly or mainly outside of their business."

While it is welcome that individual consumers are being protected through the enforcement regime, could the Minister clarify where that leaves small businesses or the self-employed? The notes suggest that the individual is still a consumer when acting for dual purposes. It is clear to me, as a shadow Minister for business looking at the needs of small businesses in particular, that plenty of British businesses are negatively impacted by rogue traders supplying them, whether with office equipment or digital services. There is a segment of those businesses that could be caught inside or outside the definition depending on its interpretation.

It would be helpful if the Minister clarified whether the Government plan, for example, for microbusiness customers to be included in the consumer protection regime. Who would decide if it was 60% consumer or 60% business for the purposes of this legislation? It may be a product that is being delivered, and the business may be run from home. I would be grateful for the Minister's comment and clarification on that point.

Amendment 59 replaces "trader" with "person". It ensures that the definition of commercial practice for the purposes of part 3 of the Bill includes an act or omission by a trader relating to the promotion or supply of a consumer's product to another consumer. I would welcome some clarification from the Minister. Will the amendment mean that where a consumer or private individual commits what would be an infringement by a trader when selling a product to another consumer—for instance through eBay or Facebook Marketplace—they are liable for enforcement action, as a business would be? This is an important area of protection for consumers, so I would be interested to hear more about how it would work in practice. If I understand the provision correctly, it could significantly expand the enforcement regime beyond just businesses.

Clause 141 sets out how traders meet the UK connection condition, which, as set out in clause 140, forms part of the scope of the enforcement regime. It sets out how a commercial practice meets the UK connection condition if at least one of three conditions are met. Those conditions are that the trader has a place of business in the UK, that the trader carries on business in the UK, meaning that their business operates in the UK, perhaps without an office, or that the trader carries on activities that are in any way directed to consumers in the UK. The conditions are necessarily broad but important for the protection of UK consumers. We support clause 141.

Clause 142 defines the specified prohibition condition, which is the final condition setting out the scope of the enforcement regime in part 3. In short, the clause sets out that a commercial practice meets this condition if it breaches provisions listed in schedule 13 and 14. Schedule 13 sets out the enactments, obligations and rules of law to which the court-based enforcement regime applies. The list is very comprehensive, and we support its contents. In particular, we note that chapters 1 to 4 of part 4 of the Bill are included in the schedule, which is welcome. I would welcome assurances from the Minister that the Government consulted widely among stakeholders regarding the compiling of the enactments of the schedule, so that we can be confident that there are no omissions. In addition, I invite the Minister to correct me if I am wrong in my understanding of how the schedule could be amended. There are other schedules with delegated powers, but I wanted to understand what the process would be here if there was a question of needing to amend the schedule if legislation were updated in the future. I would be grateful for clarification on that.

Similarly to schedule 13, schedule 14 lists the enactments to which the CMA's direct enforcement regime applies. Like schedule 13, this schedule appears to be comprehensively drawn and is thus supported by the Opposition. I note that it also makes reference to other measures of the Bill that will be going through. On the theme of seeking clarity from the Minister, I would welcome assurances that a wide range of stakeholders and legislation has been consulted and reviewed to

ensure that this is a comprehensive schedule. I would also ask what the process is for updating the schedule if required in the future.

Clause 143 lists public designated enforcers who would be able to use the court-based enforcement regime. We are pleased to see that this includes the CMA, trading standards, the Financial Conduct Authority, the Information Commissioner's Office and Ofcom, among others. Certain private designated enforcers would also be able to use the court-based regime, such as the Consumers' Association. We welcome the clause and the inclusion of a comprehensive list of public designated enforcers, but have the Government consulted with the groups they are planning to include in the clause? Were any groups or bodies that expressed an interest in being designated enforcers omitted from the clause?

Subsection (3) gives the Secretary of State a delegated power to add to or remove a body as a public or private designated enforcer, or to amend its entry. Regulations made under the clause would be subject to the affirmative procedure. However, the power could not be used to remove or vary the enforcement powers of the CMA, trading standards or the Department for the Economy in Northern Ireland. We welcome the protection of those bodies' powers, but I would like clarification from the Minister on private designated enforcers.

The clause names the Consumers' Association as a private designated enforcer, but no other group. While I note the criteria in clause 144 for designating a body as a private designated enforcer, it would nevertheless be helpful if the Minister spelled out how a body becomes a private designated enforcer. Would it have to apply? I would also be grateful for clarification of the basis on which the Secretary of State may remove, or seek to remove, a public or private designated enforcer—an issue that I will discuss further.

Clause 144 specifies the criteria that must be satisfied for the Secretary of State to designate a body as a private designated enforcer. This is an important clause. The criteria establish certain minimum standards of governance, transparency and competence that a person must meet to carry out enforcement action, and we welcome the clause. However, I refer the Minister to my question about how the Government expect people to become private enforcers. Would there be an application? Perhaps he would set out the process, and the basis on which he envisages withdrawing designation from an enforcer. Would that be because some conditions are no longer met? Would it be because some sort of complaint is received? It would be helpful to understand how those changes could be made.

Clause 145 identifies the categories of person an application for an enforcement order could be made against, and the types of infringements that they must have committed. An enforcer, as designated by clauses 143 or 144, would be able to apply to the court for an enforcement order or an interim enforcement order if the enforcer considers that they have engaged in, are engaging in or are likely to engage in a commercial practice that constitutes a relevant infringement, or if they are an accessory to such a practice.

We welcome the clause, but I would welcome further clarification on a few issues. First, the legislation states that

"an enforcer may make an application in respect of a relevant infringement".

Did the Government consider changing "may" to "must", or are they confident that enforcers will always apply for enforcement in cases where they have identified an infringement? I would welcome hearing the reasoning behind the choice made. Secondly, subsection (4) limits the power to apply for the imposition of a monetary penalty to public designated enforcers. Would the Minister clarify why that power has been withheld from private designated enforcers?

2.30 pm

Paul Scully: Let me try to cover some of those questions. On microbusinesses and small business, this is effectively a standard definition that, yes, does exclude microbusinesses, because it replicates provisions in the Enterprise Act. The obvious question then is, "How do microbusinesses and small businesses get any redress in these examples?" but the business protection regulations would cover that, and they are not within the scope of this change. However, any of the changes that the hon. Lady requested would largely come under the affirmative procedure.

The hon. Lady also asked whether the Government had consulted widely on these enactments. Although we consulted widely on the Bill when I was a Minister in the Department for Business, Energy and Industrial Strategy, these provisions just restate existing law, so we just wrote that into the Bill, instead of spreading the provisions across statutory instruments. It would therefore not necessarily have been particularly informative to have consulted on them.

The hon. Lady asked about private designated enforcers and how an enforcer might be added to the list. The Secretary of State can by regulations add applicants as private designated enforcers that are able to use the court-based enforcement regime. Again, those regulations would be subject to the affirmative procedure, to ensure appropriate parliamentary scrutiny. Any organisation applying for that status would need to provide evidence to the Secretary of State that it meets the designation criteria in clause 144(1), which would likely include evidence as to its legal status and constitution, a list of directors, examples of where it has protected the collective interests of consumers, and so on.

The Secretary of State will in due course set out more detailed guidance on the evidence and information that applicant organisations should provide when seeking designation. The Government clearly want to guarantee that those designated are able to protect the collective interests of consumers but are prevented from using that privileged position to seek any commercial gain or competitive advantage. They therefore intend that any private designated enforcer that fails to meet the criteria would have its designation altered or withdrawn by the Secretary of State.

Question put and agreed to.

Clause 139 accordingly ordered to stand part of the Bill.

Clause 140

RELEVANT INFRINGEMENTS

Amendment made: 59, in clause 140, page 88, line 18, leave out "trader" and insert "person".—*(Paul Scully.)*

This amendment ensures that the definition of "commercial practice" for the purposes of Part 3 of the Bill includes an act or omission by a trader relating to the promotion or supply of a consumer's product to another consumer.

Clause 140, as amended, ordered to stand part of the Bill.

Clauses 141 and 142 ordered to stand part of the Bill.

Schedules 13 and 14 agreed to.

Clause 143

ENFORCERS

Question proposed, That the clause stand part of the Bill.

The Chair: With this it will be convenient to discuss clause 144 stand part.

Paul Scully: Clauses 143 and 144 set out the public and private bodies that have enforcement powers under the court-based enforcement regime, which we have touched on, and restate and update part 8 of the Enterprise Act 2002.

Clause 143 sets out two categories of enforcer: public designated enforcers and private designated enforcers. The clause also gives the Secretary of State powers to add or remove a public designated enforcer or to amend its entry, and to add, remove or vary the entry of a person as private designated enforcer. These powers are subject to criteria set out in clause 144.

Neil Coyle (Bermondsey and Old Southwark) (Lab): Is there a reason why trading standards is not on this list? It would be the go-to for a consumer or business under existing law, so why is it absent from this list?

Paul Scully: As I say, we are essentially bringing across the existing law, but there is no reason why the Secretary of State cannot look at that in time. In clause 144, we are setting out the detail and criteria that must be met when a person who is not a public body is added by the Secretary of State as a private designated enforcer.

Neil Coyle: If a consumer believes that they have been sold something that is counterfeit or damaging, which might meet the "detrimental effects" test, where would they go to find out how to address that issue? If a British company has a licence and a trademark, and it sees someone selling fake goods online, thereby undermining the company's work and trademark in the UK, how does it go about addressing that? In the evidence session, a question was asked about raising awareness of changes to legislation. Could the Minister take a brief moment to explain those two routes to getting change?

Paul Scully: If I have got this right, that goes back to the hon. Gentleman's previous example. Let me correct my earlier comments. I talked about the fact that we are bringing existing legislation across into the Bill. The local trading standards enforcement regime comes under weights and measures, which is specified in the Bill. It is an old term for a modern-day service, and it is encapsulated in the regime. Clearly, businesses will go through the traditional routes to get consumer redress, which can include going through the trading standards regime.

Neil Coyle: When witnesses from trading standards sat here two weeks ago, John Herriman and David MacKenzie told us that there needed to be an awareness-raising campaign about the changes. Has the Minister done that, or is that intended to come after the enactment of the Bill? How will that come about?

Paul Scully: A lot of that will be done through our relationship with Citizens Advice and trading standards. When I covered this brief a year ago and held the position currently held by the Under-Secretary of State for Business and Trade, my hon. Friend the Member for Thirsk and Malton (Kevin Hollinrake), we continually did work for consumers, whether that was on this kind of redress, work through the CMA or work through Citizens Advice and trading standards. Clearly, given that we are changing the regime to make things faster and more effective, we will want to shout about it, because people need to be aware of it, and that will be part of a wider awareness scheme. I cannot give the hon. Gentleman chapter and verse on the campaign, because I am not running it.

Neil Coyle: Perhaps rather than chapter and verse, just one sentence would be fine. Will the Government resource Citizens Advice to provide the new information on a whole new legislative change in consumer rights?

Paul Scully: As I say, the Government do a lot of work jointly with Citizens Advice to market, campaign on, and raise awareness of these regimes.

Neil Coyle: Apologies for coming back on this, but that is not an answer. Citizens Advice came to the Work and Pensions Committee just a few weeks ago to say that its advisers, many of whom are volunteers, face the most dire circumstances of their 80-year history; the circumstances are worse than they were during the second world war. That is its assessment of the financial situation that its bureaux face in trying to help people. Is the Minister saying that Citizens Advice will be resourced to provide the additional information?

Paul Scully: I will not conflate this issue with the matter of the resources for Citizens Advice's broader work, but we already work with Citizens Advice to raise awareness of its work, and will continue to do that together. On any additional duties, clearly we want to make sure that Citizens Advice is as well resourced as it can be. A lot of its work is essentially similar to what is proposed, but we are trying to make it faster for it to offer remediation. That is the whole purpose of this work. We are simplifying and consolidating the criteria that apply under the current court-based regime. That guarantees that those designated as private enforcers will have the independence, competence and expertise required to protect consumers and their independence.

Question put and agreed to.

Clause 143 accordingly ordered to stand part of the Bill.

Clause 144 ordered to stand part of the Bill.

Clause 145

APPLICATIONS

Question proposed, That the clause stand part of the Bill.

The Chair: With this it will be convenient to discuss the following:

Clauses 146 to 154 stand part.

Clause 169 stand part.

Paul Scully: Clauses 145 to 154 restate and update provisions in part 8 of the Enterprise Act 2002. They empower consumer enforcers to apply for, and the civil courts to make, court orders to prevent or stop infringing practices.

Clause 145 provides enforcers with the power to apply to court for an enforcement order or an interim enforcement order. An application may be made where a person has engaged in, is engaging in or is likely to engage in an infringing practice, or is an accessory to such a practice. The clause also gives public designated enforcers a new power to apply for the imposition of a monetary penalty for past or continuing infringing practices.

Clause 146 maintains the CMA's leadership and co-ordination role by empowering it to give directions to other enforcers regarding who can make an application to court.

To ensure applications to court are made only when necessary, clause 147 requires enforcers to engage in appropriate consultation with the suspected infringing party or accessory before making an application for an enforcement order or interim enforcement order.

Clause 148 empowers the court, in response to an application under clause 145, to make an enforcement order against a person it finds has engaged, is engaging or is likely to engage in an infringing practice or is an accessory to such. As an alternative to making an order, the court may accept an undertaking from the infringer or accessory. Orders or undertakings must direct the subject to achieve compliance with the law.

Clause 149 gives the court a discretionary power to include enhanced consumer measures that it considers to be just, reasonable and proportionate in an enforcement order or an undertaking. Enhanced consumer measures, which are defined in clause 213, are steps an infringer or accessory may be required to take to provide redress to affected consumers, ensure compliance with the law, or offer consumers more effective choice. They are vital to ensuring that consumers are compensated and that infringements are remedied.

Clause 150 gives the court a new power to impose a monetary penalty of up to £300,000 or 10% of the recipient's global turnover—whichever is higher—for past or continuing infringing practices. This provision is at the heart of the Bill's reforms to consumer protection. It is imperative that there are consequences for breaking UK consumer law to signal that illegal practices will not be tolerated. Recognising that these penalties may be significant, the clause gives the recipient the right to appeal the decision to impose the penalty, its nature or the amount on the merits, in addition to their existing appeal rights.

Clause 151 empowers the court to make an interim enforcement order or accept an undertaking against a suspected infringer or accessory. To exercise the power, the court must consider it expedient that the infringing practice is prohibited or prevented immediately, and a final order must be likely to be granted.

Clause 152 gives the CMA the power to apply to court for an online interface order, or an interim online interface order. It can do that where it considers a person has engaged in, is engaging in, or is likely to engage in, an infringing practice. The reach of online traders and the complexity of the online marketplace has increased. That makes it more critical than ever that the CMA has the power to apply to the court to address infringing content online.

Clause 153 provides for courts to make online interface orders to require changes to online content and interfaces. This could include content removal, displaying warnings, restricting access or deleting a domain name. These powers are available only when the order is necessary to avoid the risk of serious harm to the collective interests of consumers and when there are no other available means within this chapter that would be wholly effective in stopping the infringement.

Clause 154 empowers the court to make interim online interface orders where it is expedient that the infringing practice is stopped or prohibited immediately and a final online interface order would be likely to be granted.

Clause 169 sets out two conditions that must be met before enhanced consumer measures can be included: in an undertaking given to a private designated enforcer, or in an undertaking given to the court or an order made by the court following an application by a private designated enforcer. The clause provides the framework to ensure that where enhanced consumer measures are used by private designated enforcers, it is done appropriately and with the end goal of solely benefiting consumers.

2.45 pm

Seema Malhotra: I have already made some remarks on clause 145, but I will just echo my final question. I asked the Minister about the power for public designated enforcers to apply for the imposition of a monetary penalty and why that power has been withheld from private designated enforcers. Clause 146 refers to CMA directions to other enforcers. As the Minister has outlined, the clause introduces provisions such that if an enforcer other than the CMA seeks similar action on applying for an enforcement order for a particular infringement, it may direct which enforcer can make the application. That could lead to, for example, the CMA directing that an application for an order can be made only by itself.

We support the clause, but does the Minister's Department expect the CMA to engage constructively with other enforcers to ensure that the most suitable enforcer is the one that is allowed to make the application? The underlying policy argument is important; we would not want to see multiple enforcers seeking to take action against the same business for the same infringement. I would like some clarity on how that is expected to work.

Clause 147 would provide that where an enforcer thinks a relevant infringement has occurred or is likely to occur, it must consult the enforcement subject before making an application for an enforcement. Subsection (2) introduces a requirement on the enforcer to alert the enforcement subject to the possibility of a monetary penalty being sought alongside an enforcement order. The explanatory notes state that the policy intent is that prior consultation may quickly lead to the relevant infringement ending and make court action unnecessary. We welcome the clause as a necessary part of the enforcement process, and in the spirit of opportunity for co-operation that underpins the new regime.

Under clause 148, the court would be able to make an enforcement order if, on an application from an enforcer under clause 145, it finds that the enforcement subject

[Seema Malhotra]

has engaged, is engaging or is likely to engage in a commercial practice that constitutes a relevant infringement or is an accessory to the infringing practice. As an alternative to an order, the court would be able to accept an undertaking. Under subsection (3), in determining whether to make an enforcement order the court would have to take into consideration whether the enforcement subject had given an undertaking under clause 155 to a public designated enforcer, or clause 177 in respect of the infringing practice. Where the court makes an enforcement order, it would be required under this clause to indicate the nature of the infringing practice and direct the enforcement subject to comply. We strongly welcome the clause. It is a necessary step in ensuring that the courts have adequate enforcement powers over companies that are causing detriment to consumers.

I have a question for the Minister regarding clause 148(8). It states that as part of an enforcement order, an undertaking may include a further undertaking by the respondent to publish "the order" and "a corrective statement". As the explanatory notes state, the policy intent behind the subsection is to prevent the company

"further distorting consumers' purchasing decisions"

by making them aware that a company has had to change its practices. I welcome the subsection as a common-sense step to ensure full clarity for consumers in instances in which enforcement action has been taken, but will the Minister clarify whether he expects the court always to require the publication of the order and a corrective statement? Surely, it would be simpler and better for the consumer for that undertaking to be included in every enforcement order, so that there was confidence that the consumer will be as informed as possible.

Clause 149 will enable the court to include, in an enforcement order or interim order, a requirement to take, as part of enforcement orders,

"such enhanced consumer measures as the court considers just and reasonable."

The court would first have to consider whether the proposed measures were proportionate and in doing so consider

"the likely benefit of the measures to consumers…the costs likely to be incurred by"

the enforcement agent and

"the likely cost to consumers of obtaining the benefit of the measures."

We welcome the clause as a further necessary element of the consumer protection and enforcement regime that we are seeking to deliver.

Clause 150 confers a new power on courts to impose a monetary penalty on a company for infringing consumer protection regulations. The Opposition welcome the clause, but why has it taken so long to get to this point? Turning to the details of the monetary penalties, subsection (5) sets out that, where the enforcement subject has a turnover that can be determined, a fixed amount penalty must not exceed £300,000 or, if higher, 10% of the total value of the enforcement subject's turnover. We support those penalty thresholds, but could the Minister expand on why the legislation has landed on £300,000 as a maximum penalty if it is less than 10% of the company's turnover? Is that an arbitrary figure or one that has been consulted on and calculated to ensure the maximum deterrent so that companies do not infringe the legislation? Will the Minister clarify the source of the figure?

Finally, I would welcome further clarification from the Minister on clause 150(8), which provides an enforcement subject who is required to pay a monetary penalty with a right to appeal the decision to impose a penalty, its nature or amount on the merits, in addition to their existing appeal rights. I would be grateful if the Minister could clarify the appeals threshold, which appears to be different from the judicial review threshold for companies with strategic market status, as set out earlier in the Bill. Was the threshold set for an informed reason? There seems to be a lower threshold for consumer protection infringements.

In addition, has the Minister considered whether the more merits-based approach could lead to companies, particularly larger ones with significant legal capacity, drawing out the process of monetary penalties being imposed on them by pursuing lengthy court appeals? I want to ensure that we have understood the matter correctly, so I would welcome the Minister's clarifying the point and saying whether those are unfounded concerns. If they are well founded, we want to have a look at the issue more closely. In short, the Opposition welcome the clause, because we want to ensure that the measure is a robust as possible in deterring companies from engaging in practices that harm consumers.

Under clause 151, the court will be able to make an interim enforcement order on an enforcement subject. It will be able to make such an order if it considers that the subject

"has engaged…or is likely to engage in a commercial practice which constitutes a relevant infringement".

In addition, interim orders can be made if

"it appears to the court that if the application had been an application for an enforcement order it would be likely to be granted, and…the court considers it is expedient that the infringing practice is prohibited or prevented immediately."

That includes being able to make an interim enforcement order without notice.

We welcome the clause in principle, as a positive contribution to ensuring that swift action is taken where necessary to protect consumers. However, it would be helpful if the Minister could clarify the scope or give examples of how the power may be used. Examples specified in the Bill papers include preventing a misleading advert from being made public and enforcing the withdrawal of unsafe goods, but it would be helpful to understand the threshold for an order to be made without notice. Is it, for example, where there is current or imminent harm? It is important that that is clarified so that consumers and those who would be enforcement subjects can understand how the power could be used by the court, and so that there is no question about scope.

Clause 152 enables the CMA to apply to the court for an online interface order or interim online interface order in respect of a person that it considers has engaged, is engaging or is likely to engage in a practice that constitutes a relevant infringement. Subsection (3) sets out a jurisdictional test that limits the CMA's power to apply for an order in respect of a third party overseas; it may do so only if the person is a UK national, the

person is habitually resident in the UK, the firm is established in the UK, or the firm carries on business in the UK.

Is the Minister confident that those criteria cover all scenarios in which companies could be involved in misleading practices towards UK consumers, whether they are resident here or not? Why is it just the CMA that has the power to make such applications, and not other public or private enforcers, such as trading standards or local weights and measures authorities? We welcome clause 152, but it would be helpful to understand that further. There has been some discussion of the important role of local trading standards in our enforcement regimes.

Clause 153, which necessarily follows clause 152, gives the court a discretionary power to make an online interface order in response to an application from the CMA under clause 152. We welcome clause 153 and recognise the importance of including digital practices that harm consumers. However, as with clause 152, will the Minister expand on why local weights and measures authorities will not be given powers to apply for orders alongside the CMA?

The Bill represents an opportunity to update the powers of trading standards so that they can operate more effectively in the 21st century. The Chartered Trading Standards Institute notes that officers regularly have to exercise powers of physical entry in order to seize documents that they may wish to use in criminal proceedings, but it also raises the issues that officers have accessing filed documents that are not physical. My question is about how trading standards powers should be reviewed and updated in line with those of other enforcers, and the opportunity to do that in the context of the Bill.

Finally, under clause 154, following an application from the CMA, the court will be able to grant an interim online interface order, where it is considered that a final online interface order would likely be granted but that an interim order is needed to end an infringement immediately. Subsection (2) will permit the court to grant an interim order without giving notice to the enforcement target.

We welcome the provisions, but I have similar questions —they are relevant—to those I asked about the earlier clauses.

3 pm

Paul Scully: Let me try to cover as many of those questions as I can. The hon. Lady asked about the possibility of multiple enforcers in process at the same time. In effect, we are restating the existing arrangements, which have been working. They work with the CMA as the gatekeeper, so the CMA would have to be notified when action has been taken—it can filter anything going on in that regard—and it would have to co-ordinate the approach.

On clause 148, and court powers to make orders and penalties, the hon. Lady talked about subsection (9) on whether an undertaking may include a trader publishing it in a corrective statement and whether I, as a Minister, would always expect that to happen. It is discretionary. The enforcer may require that as appropriate.

On the penalties, the £300,000 basically sits in the middle of the pack internationally. If we look at the regimes around the world, where penalties are imposed on individuals, New Zealand's consumer protection system has £100,000 and Canada's consumer regime has £450,000. We sit within that, looking at the international comparators.

Seema Malhotra: Is the Minister saying that the decision to go with the £300,000 was just because it was in the middle of the pack?

Paul Scully: It was a fair balance after looking at international regimes—a fair comparison with similar regimes around the world. Similarly, the 10% penalty is reflected in penalties across other regimes.

The hon. Lady also asked about the CMA being able to enforce and why private enforcers did not have the same powers. Only the CMA may impose penalties. Private enforcers may seek a penalty in court, but the CMA is the only body able to issue penalties directly.

Finally—I have probably missed a couple of questions, but I will review them later just in case—on the interim notes, the hon. Lady made a fair point about stopping the immediate harm. I talked about domain names, as well as removing adverts and such things. It is about being able to act quickly. The whole point about the changes to the regime is to ensure that we make it not only as effective as possible in the modern world, but as fast as possible.

Question put and agreed to.

Clause 145 accordingly ordered to stand part of the Bill.

Clauses 146 to 154 ordered to stand part of the Bill.

Clause 155

ACCEPTANCE OF UNDERTAKINGS BY ENFORCERS

Question proposed, That the clause stand part of the Bill.

The Chair: With this it will be convenient to debate clauses 156 to 160 stand part of the Bill.

Paul Scully: Clauses 155 to 160 restate and enhance provisions in part 8 of the Enterprise Act 2002 that govern the acceptance and enforcement of undertakings by enforcers and the courts.

Clause 155 provides a power for enforcers to accept, vary and release an undertaking from an infringer or accessory. Undertakings may be accepted only where they include provisions that will stop or prevent the allegedly infringing practices. The clause will allow enforcers to continue using co-operative enforcement means, which can lead to faster resolution of consumer harms and reduce the volume of applications for court orders.

Clause 156 enables enforcers to include enhanced consumer measures in undertakings accepted under clause 155. Enforcers must consider those measures to be just, reasonable and proportionate. Clause 157 sets out requirements for enforcers when varying or releasing undertakings that ensure procedural fairness for enforcement subjects. Clause 158 allows for further court proceedings for breaches of undertakings and orders made by the court, giving the court a new power to impose a civil monetary penalty for the breach of an undertaking given to the court.

[Paul Scully]

Clause 159 allows a public designated enforcer to make an application to the court for a consumer protection order if it considers that an undertaking given to it has been breached. If the court is satisfied that that is the case, it may make the requested order, impose a monetary penalty or both. A penalty may be imposed only in cases where the breach was without reasonable excuse.

Clause 160 sets out the types of penalties and the maximum penalty amounts that can be imposed by the court for failure to comply with undertakings given to it or to public designated enforcers. The court has the discretion to impose a fixed amount penalty of up to £150,000 or 5% of global turnover, or a daily rate penalty of up to £15,000 or 5% of global turnover accruing over the days when non-compliance continues, or a combination of both.

Seema Malhotra: Clause 155 provides that where an enforcer could make an application to the court for an enforcement order or an interim enforcement order, it may accept an undertaking from the enforcement subject. Subsection (2) sets out the scope of such an undertaking, which is the infringer or the accessory agreeing not to continue or repeat the infringing practice. The Opposition strongly support the clause as it provides necessary flexibility in the consumer protection regime.

We heard during evidence, particularly from the CMA, that the ability for companies to work co-operatively with enforcers to comply with the new regime is an important part of having the fairest and best possible enforcement regime. Where possible, we should ensure that enforcement is done through co-operation. In evidence to the Committee, the CMA said:

"This is not a regime where we want to operate behind closed doors. The whole design of the regime is a participative approach where we will engage with a broad range of stakeholders, businesses and consumers as we consult on designation, design the conduct requirements, and then enforce against them."—[*Official Report, Digital Markets, Competition and Consumers Public Bill Committee,* 13 June 2023; c. 6, Q2.]

As a result, we welcome the clause.

Clause 156 enables an enforcer to include enhanced consumer measures as part of an undertaking from a company, if the enforcer considers them just and reasonable. The enforcer will be obliged to consider the likely benefits and costs of the measures as part of its assessment of their proportionality. In particular, it will consider the costs of the measures themselves to the enforcement subject, as well as the administrative costs. As with clause 149, we welcome clause 156 as a further necessary element of the new consumer protection regime.

Clause 157 sets out the process to be followed when an enforcer proposes to materially vary or release an undertaking that it has previously accepted. Specifically, the process requires the enforcer to give notice to the respondent of its intention to vary or release an undertaking, and to consider any representations made in accordance with the notice. The notice must include the time by which representations may be made to the enforcer. We welcome this clause, which provides clarity for the enforcement regime, the enforcement subject and the consumer in the event of a necessary change. What timescale does the Minister expect the process to work to in most cases, or will it be entirely up to the enforcer? It would help both Parliament and the enforcement bodies to understand the timings envisaged in this process, to be sure that they strike the right balance between being flexible and proportionate and are fair to both the enforcement subject and consumers.

Clause 158 would apply in circumstances where the court makes a consumer protection order against an enforcement subject or a member of its corporate group, or where it has accepted an undertaking. In the event of a failure to comply with the order or undertaking, the clause enables the enforcer that made the original application or any other enforcer to make a further application to the same court. In effect, the court will be able to act in respect of not only non-compliance with an undertaking, but the infringing practice and any related consent or connivance with it by an accessory. The court will be empowered to impose a monetary penalty, regardless of whether the enforcement subject has a reasonable excuse for non-compliance, reflecting the serious nature of breaching an undertaking given to the court. We welcome the clause as a way of providing robust enforcement and punishment mechanisms for failure to comply with the regime, but I would welcome clarification from the Minister on subsection (8). Like clause 150, that subsection provides an enforcement subject who is required to pay a monetary penalty the right to appeal the decision to impose a penalty, its nature or amount on the merits, in relation to their existing appeal rights. I am not sure I completely grasped his previous argument on whether there is a lower appeals standard for those elements of the Bill?

Clause 159, similar to clause 158, sets out the process for when a company fails to comply with an undertaking accepted by the enforcer or the courts. The powers granted to the courts and the process by which the enforcer must apply reflect the provisions in clause 158 and, in the same way, we welcome them. However, the same question is raised about what looks like a lower threshold for appeals than in other parts of the Bill.

Finally, clause 160 sets out further details around the monetary penalties the courts may impose for failures to comply under clauses 158 and 159. We welcome any steps to improve enforcement action through the imposition of monetary penalties and therefore support the clause in principle. Despite that welcome, I must ask the Minister why, when it comes to failure to comply with undertakings, the monetary penalty in the clause, which is £150,000, is less than that in clause 150, where the court can issue penalties of up to £300,000? Similarly, clause 160 refers to 5% of the company's turnover versus 10% in clause 150. I may not understand some of the Government's rationale behind those different amounts. What are the reasons for the differences in the thresholds and those lower amounts?

Paul Scully: I picked up three questions. The reason the hon. Lady could not follow my argument about appeals from the first bit was because that was the bit I forgot to answer. I will cover that because they relate to the same thing.

Timescales will be up to the enforcer. None is set, but there is a general duty of expedition on the CMA set by the Bill overall. On appeals as they relate to both sections—

3.15 pm

Seema Malhotra: Is the timescale deliberate, or has the question simply not been fully addressed? It is important to ensure clear expectations of the timing of some of these processes.

Paul Scully: I think the reason is the wide range of remediation events that may come before the enforcer to tackle, so they are being given that flexibility, but with an understanding that there is a general rule of expedition on the CMA. That is why we have approached this as we have.

The appeals regime is very different from the bits of the digital markets regime that we talked about earlier. In that case we were talking about a small number of firms with strategic market status, whereas any trader can be subject to this regime. The new monetary penalties that we are introducing are significant. A merits-based appeal is therefore important, because of the range of different-sized companies involved, to ensure fairness and to make sure that the issues involved relate to settled law rather than novel regulations covering digital conduct. Appeals are less likely to be disproportionately lengthy, because the digital market involves a more novel approach, which is why we were worried about extended appeal processes.

As for why thresholds are lower in this part of the Bill than for infringements, infringements, at £300,000, are clearly more serious. What we are talking about here—a breach of undertaking to a court—is still serious, but if someone is stepping down, we believe it is more proportionate to set the threshold at the slightly lower amount of £150,000.

Question put and agreed to.

Clause 155 accordingly ordered to stand part of the Bill.

Clauses 156 to 160 ordered to stand part of the Bill.

Clause 161

NOTIFICATION REQUIREMENTS: APPLICATIONS

Question proposed, That the clause stand part of the Bill.

The Chair: With this it will be convenient to consider clauses 162 to 164 stand part.

Paul Scully: Clauses 161 to 164 restate and update provisions in part 8 of the Enterprise Act 2002 that enable the CMA to perform co-ordination functions across the consumer enforcement landscape. This will help to prevent duplication of enforcement, which imposes an unnecessary burden on traders and wastes public money.

Clause 161 requires enforcers to notify the CMA of their intention to apply for certain court orders. Clause 162 imposes a requirement on enforcers to inform the CMA of any undertakings given to them. Clause 163 imposes a requirement on trading standards departments in England and Wales to notify the CMA if they intend to start proceedings for an offence under an enactment listed in part 1 of schedule 13 to the Bill. Clause 164 empowers UK courts to notify the CMA of relevant convictions and judgments. Bringing convictions and judgments to the attention of the CMA that it might not otherwise be aware of will allow the CMA to consider exercising its enforcement power under this part of the Bill.

Seema Malhotra: It is a pleasure to speak to clause 161 and the other clauses in this group. Under clause 161, as the Minister outlined, enforcers would be able to notify the CMA before applying for an enforcement order, and could only apply for an order 14 days later, or seven days later when applying for an interim order. The powers also allow the CMA to agree to shorten these wait times. The Bill's explanatory notes explain:

"The policy intent underlying the notification requirement in this clause is for the CMA to be able to perform a coordinating role in relation to enforcement under this Part. The notification requirement will enable the CMA to facilitate the sharing of information between enforcers",

and that is outlined as mitigating

"the risk of traders facing multiple actions in relation to the same infringing practice"

—a point that we have raised before. We are supportive of the clause and the principle of enabling the enforcement regime and ensuring that it is joined up and efficient in practice. I seek the Minister's clarification on whether the Government have had discussions with other public enforcers on the provisions in the clause. Is it the case, as he has said before, that the CMA broadly has a co-ordinating role and other powers, and is that carrying on an existing practice and pattern of engagement between those enforcing bodies?

Clause 162 requires enforcers to notify the CMA of the terms of any undertaking given to it under clause 155 and of the identity of the persons giving it. Again, that is important to enable the CMA to fulfil its co-ordination role. As with clause 161, we support the provisions in the clause. Clause 163 introduces provisions requiring local weights and measures authorities, such as local trading standards bodies, to give the CMA notice of its intention to start proceedings for an offence under schedule 13, which we have debated. The authority must also notify the CMA of the outcome of those proceedings.

The policy intent, as explained by the explanatory notes, is to enable the CMA to play its co-ordinated role granted to it in previous clauses. The notes provide a potential example whereby the CMA could inform one authority that another is prosecuting, or that an enforcement order has been granted in respect of the same infringing practice. That is an important part of the co-ordinating role because it demonstrates that it is not just about the CMA being informed, but the CMA ensuring that other relevant enforcers are informed of what other enforcers are doing. That is then a streamlined and efficient process that does not hit the enforcement subject more than once on the same matter.

Clause 164 confers a power on the courts to notify the CMA of convictions and judgments it makes that may not have been bought to its attention. That is a common-sense provision. However, I would welcome further clarification from the Minister specifically on subsection (2). It states that the court

"may make arrangements to bring the… judgment to the attention of the CMA".

We know the strain and pressures that our court system is under. I ask the Minister why the provision introduces a power as opposed to a duty. If the CMA is to have, as

[Seema Malhotra]

is intended, a co-ordinating role where it is in the picture on all the relevant information related to those enforcement subjects, are there any circumstances in which the Government believe the courts may not need to inform the CMA? In that case, could the Government clarify what those circumstances might be, or where they might consider it not necessary for the CMA to have this information if it considers it to not be relevant to the function it carries out?

We need to remember that this is not just a function being carried out for today; this is where the CMA will be able to have a record of enforcement measures, any breaches and any other information that would be relevant to any considerations in the future. I would be grateful to understand from the Minister why that important and common-sense provision is a power as opposed to a duty.

Paul Scully: The CMA being able to issue permission to bring enforcement procedures is consistent with the position under part 8 of the Enterprise Act 2002. We respect and understand the expertise of all enforcers, including sector regulators, so the CMA is playing a co-ordination role to effectively share information between enforcers, and guarantee that enforcement actions are not duplicated. That will mitigate the risk of a trader facing multiple actions for the same infringement practices. The Government have discussed the provisions with other enforcers, and the CMA already has memorandums of understanding with other enforcers.

On the question of why there is a new reporting requirement in clause 164, actually it is not new. It was already established under part 8 of the Enterprise Act. Again, it ensures that the CMA can consider exercising its enforcement powers where appropriate. It only gives the court the power to notify judgments and convictions to the CMA. It is already there under the Enterprise Act, and that is why we have brought it in here.

Seema Malhotra: Perhaps I could put the point about power versus duty to the Minister again? I understand that many aspects of the Bill have been brought together from other areas of legislation. We have to ask the question within the context of the new regime, which is different to how the situation was prior to the legislation coming in, whether that is worth reviewing. We are talking about a regime in which the CMA is now a co-ordinating body, in which there may be different ways action can be taken and where information from the court could be material. There is not as much of a duty to pass that information on under clause 164, but that could be relevant information that is not there for a matter in the future.

I again draw the Minister's attention to the massive backlog we have in the courts, and the administrative challenges with some of those procedures. The best intentions may not be a reality, and that may then have consequences for the regime we are trying to set up to be as robust, predictable and efficient as possible.

Paul Scully: I take the hon. Lady's point, but I would say that it has been directly transposed. It is a power not a duty in the Enterprise Act, and that is where we have worked from.

Neil Coyle: There is an alternative. There was a suggestion from trading standards representatives of a take-down power, which would bypass the longer route that adds an administrative burden and places the onus on businesses and individuals. Can the Minister explain or furnish us in writing as to the rationale for not seeking the take-down power and a more immediate means of addressing a problem?

Paul Scully: I or the relevant Minister will certainly write to the hon. Gentleman on that basis.

Question put and agreed to.

Clause 161 accordingly ordered to stand part of the Bill.

Clauses 162 to 164 ordered to stand part of the Bill.

Ordered, That further consideration be now adjourned. —(*Mike Wood.*)

3.29 pm

Adjourned till Thursday 29 June at half-past Eleven o'clock.

Written evidence to be reported to the House

DMCCB36 Santander UK plc

DMCCB37 Information Commissioner

DMCCB38 techUK (supplementary submission)

DMCCB39 The Startup Coalition

DMCCB40 Sky

DMCCB41 Paramount

PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT
GENERAL COMMITTEES

Public Bill Committee

DIGITAL MARKETS, COMPETITION AND CONSUMERS BILL

Eleventh Sitting

Thursday 29 June 2023

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No proofs can be supplied. Corrections that Members suggest for the final version of the report should be clearly marked in a copy of the report—not telephoned—and must be received in the Editor's Room, House of Commons,

not later than

Monday 3 July 2023

The Committee consisted of the following Members:

Chairs: Rushanara Ali, Mr Philip Hollobone, †Dame Maria Miller

Carter, Andy *(Warrington South)* (Con)
† Coyle, Neil *(Bermondsey and Old Southwark)* (Lab)
Davies-Jones, Alex *(Pontypridd)* (Lab)
Dowd, Peter *(Bootle)* (Lab)
† Firth, Anna *(Southend West)* (Con)
† Ford, Vicky *(Chelmsford)* (Con)
Foy, Mary Kelly *(City of Durham)* (Lab)
† Hollinrake, Kevin *(Parliamentary Under-Secretary of State for Business and Trade)*
† Malhotra, Seema *(Feltham and Heston)* (Lab/Co-op)
Mayhew, Jerome *(Broadland)* (Con)
† Mishra, Navendu *(Stockport)* (Lab)
Russell, Dean *(Watford)* (Con)
Scully, Paul *(Parliamentary Under-Secretary of State for Science, Innovation and Technology)*
† Stevenson, Jane *(Wolverhampton North East)* (Con)
Thomson, Richard *(Gordon)* (SNP)
† Watling, Giles *(Clacton)* (Con)
† Wood, Mike *(Dudley South)* (Con)

Kevin Maddison, John-Paul Flaherty, Bradley Albrow, *Committee Clerks*

† attended the Committee

Public Bill Committee

Thursday 29 June 2023

[Dame Maria Miller *in the Chair*]

Digital Markets, Competition and Consumers Bill

11.30 am

The Chair: I have a few reminders. Members should switch all electronic devices to silent. No food or drink is permitted except the water provided. As ever, *Hansard* colleagues would be grateful for Members' speaking notes.

Clause 165

Appropriate court

Question proposed, That the clause stand part of the Bill.

The Chair: With this it will be convenient to discuss the following:

Clauses 166 to 168 stand part.

Clauses 170 and 171 stand part.

The Parliamentary Under-Secretary of State for Business and Trade (Kevin Hollinrake): It is a pleasure to see you in the Chair, Dame Maria. The clauses restate and update the Enterprise Act 2002. Clause 165 sets out which courts in the UK have jurisdiction to hear and determine applications for consumer protection orders. The globalised nature of modern business means that a trader with UK consumers may well not have a place of business or carry on business in any part of the UK. The clause provides that in those circumstances the relevant consumer's place of domicile will determine which UK court has jurisdiction.

Clause 166 will extend the effect of consumer protection orders made by a court with jurisdiction in one part of the UK to other parts of the UK, as if the order were made in those other parts. That eliminates any jurisdictional gap within the UK and restates and consolidates relevant sections of the Enterprise Act 2002.

Clause 167 will allow evidence from previous court proceedings to be admitted in evidence for the purpose of proving that infringing conduct has occurred under this part. Convictions in the criminal courts and any relevant findings in the civil courts are admissible to prove that a person has engaged in an infringing practice or has been an accessory to such a practice.

Neil Coyle (Bermondsey and Old Southwark) (Lab): I wonder whether the Minister could pinpoint where in the Bill's impact assessment documents the estimates are for the number of cases that the Government expect under this legislation, the average time for a case to be heard and the amount that the Government will be resourcing courts?

Kevin Hollinrake: What a helpful question. I do not have those figures to hand, but I am happy to write to the hon. Member if we cannot find the information for him today. I am grateful for his intervention.

Clause 168 will give the court a discretionary power to make some or all of the requirements of a consumer protection order, including monetary penalties, binding on other members of the interconnected corporate group of the infringer. This power will prevent complex corporate structures from frustrating the ability of enforcement interventions to protect consumers and law-abiding traders. The exercise of the power is subject to two important conditions: first, that the infringing company meets the definition of a member of an interconnected corporate group at the time the order is made or at any time when the order is in force, and secondly that the court may make an order binding on other members of the same corporate group only if it considers it just, reasonable and proportionate. That will require an objective assessment on the facts of each case.

Clause 170 will apply where the court is considering an application for a consumer protection order made in relation to a suspected breach of unfair trading prohibitions. It will empower the court to compel traders to substantiate any factual claim made as part of their commercial practices. The burden of proving the accuracy of claims is on the trader. The clause is crucial to stopping unscrupulous traders making wild promises or getting the enforcer bogged down in disproving claims that should be backed up by evidence.

Clause 171 makes an exception to exempt the Crown from the monetary penalties that the court may impose under chapter 3 when it is engaging as a trader in commercial transactions with consumers.

I commend the clauses to the Committee.

Seema Malhotra (Feltham and Heston) (Lab/Co-op): It is a pleasure to serve under your chairship today, Dame Maria. I thank the Minister for his opening remarks.

The Opposition recognise that clauses 165 to 167 are technical clauses. Clause 165 will provide the criteria to determine which courts within the UK have jurisdiction to hear and determine applications for consumer protection orders. It provides that where the respondent does not have a place of business in the UK, the appropriate court is where a relevant consumer is domiciled. This is a common-sense clause, and we support its inclusion in the Bill.

Clause 166 will have the effect of enabling a consumer protection order made in a court in England and Wales, Scotland or Northern Ireland to have effect in each of the constituent nations of the UK. This is a technical clause that the Opposition support.

Clause 167 will allow convictions in criminal courts and findings in civil courts to be admitted in evidence for the purpose of proving that infringing conduct has occurred. The explanatory notes confirm that it will still be necessary to prove that the conduct harmed the collective interests of consumers.

We recognise that these technical clauses are important for the implementation and operation of the new consumer protection regime enacted by this part of the Bill. We therefore support their inclusion.

My hon. Friend the Member for Bermondsey and Old Southwark made a point about case numbers and court resourcing. We expect demand on the courts to increase. The last thing that the Minister will want to see is the effective implementation of the regime, or confidence in it, being undermined because the courts cannot take on cases at speed when they might need to do so. I would welcome the Minister's response on the issue of court capacity, support and resources.

Clause 168 will introduce provisions such that when a court makes a consumer protection order against a corporate body that is or becomes a member of a group of interconnected bodies corporate, the court has a discretionary power to direct that the order is binding upon one or more other members of the same corporate group. Subsection (6) defines two or more bodies corporate as interconnected bodies corporate

"if one of them is a subsidiary of the other, or…if both of them are subsidiaries of the same body corporate."

Under the clause, a court would be able to make part or all of the order binding on other members of the group where the court considers it just, reasonable and proportionate to do so. The explanatory notes state that when considering whether to extend an order to another group member, the court might take into consideration whether the other member was the brains behind or benefited from the infringement, and whether the extension would help to ensure that financial penalties are paid.

Clause 168 will provide a more robust consumer enforcement regime, helping to prevent companies from restructuring to avoid liabilities and ensuring that significant deterrents are in place to prevent companies from infringing regulations of the new regime. We support the clause.

Clause 169, "Enhanced consumer measures: private designated enforcers", sets out two conditions that must be met before enhanced consumer measures can be included in an undertaking either given to a private designated enforcer or given through the court via an application from a private enforcer.

The first condition

"is that the private designated enforcer is specified…in regulations made by the Secretary of State"

to act as a private enforcer. In our debates on clauses 143 and 144, I raised questions with the Minister's colleague the hon. Member for Sutton and Cheam about the process of becoming a private designated enforcer. However, I would welcome further clarification from the Minister of how he envisages the process of a private enforcer working in practice. I am not very clear on whether that is through an application or via the discretion of the Secretary of State; it would be helpful and important to clarify that point to ensure that clause 169 is effective in enabling private designated enforcers, so we can be sure we know who they may be in future, and to include enhanced consumer measures in an undertaking.

The second condition, rightly,

"is that the enhanced consumer measures do not directly benefit the private designated enforcer or an associated undertaking."

Will the Minister clarify some matters in relation to subsections (7) and (8)? Private designated enforcers must have regard to any relevant advice or guidance given by a primary authority. Could he perhaps illustrate that with an example of a primary authority within the meaning of subsection (7)(a) and a situation in which that may occur, so we are clear about the intentions for how the clause will be used?

Clause 170, "Substantiation of claims", will enable the court to require evidence from traders to substantiate the factual claims used in their commercial practices with consumers when an application for a consumer protection order has been made against those traders. Under subsection (3), it is for the court to decide whether any evidence provided is adequate. If the court decides that it is not, or if no evidence is produced, the court can determine that the claim is inaccurate. This provision will ensure that the burden of proof regarding the accuracy of claims rests with the trader. In effect, claims must be based on evidence that can be verified by the court.

The explanatory notes specifically mention environmental claims—sometimes referred to as greenwashing—and claims about the health benefits of goods as examples where substantiation of claims may be required. Greenwashing generally refers to claims made about the positive impact of a product or service on the environment that could be seen as misleading or untrue. This is a growing area of concern under competition law. We have not tabled amendments at this point, but it is an important area in this and other legislation.

The Government and the EU have announced proposals to introduce new legal instruments to address alleged greenwashing. Ultimately, legislation to regulate claims that businesses in Europe can make in their consumer communications would come into force, as is already the case in France. A European Commission study in 2020 highlighted that 53.3% of examined environmental claims in the EU were found to be vague, misleading or unfounded, and 40% were unsubstantiated. This policy issue has highlighted the absence of common rules for companies making voluntary green claims, which, in a sense, leads to greenwashing. The uneven playing field in the market is to the disadvantage of genuinely sustainable companies. It also has an impact on how effectively consumers can make their purchase decisions.

EU proposals for the green claims directive outline that before companies communicate any of the covered types of green claims to consumers, any such claims would need to be independently verified and proven with scientific evidence. As part of scientific analysis, companies would identify the environmental impacts that are actually relevant to their products, as well as any possible trade-offs, in order to give a full and accurate picture.

There have been calls to review how comparisons between products and organisations should be made, based on equivalent information and data. There have also been calls to look at regulating environmental labels, outlining the fact that there are over 230 different labels, which, according to evidence, leads to consumer confusion and distrust. The Competition and Markets Authority published the green claims code in September 2021. It has also been investigating the sustainability claims of major household brands, and how products and services claiming to be eco-friendly are marketed.

This is a newer area, and as we move towards achieving our net zero targets it is going to become increasingly important to how the marketplace is defined. It is important to know and be ahead of where consumers might be being misled. Some of the work in the run-up to COP26 and since has been welcome, but we cannot take our foot off the accelerator.

11.45 am

Clause 170 is welcome. It seeks to ensure that the burden of proof is on the trader, as opposed to on the enforcer, which in practice should lead to greater protection for consumers and more robust defences against rogue traders. The vital question, however, is about how that sits alongside ensuring that our codes and regulations are sufficiently in place and that there are trusted communications to consumers.

The explanatory notes on clause 170 highlight that, while evidence should be verifiable by the courts, there is

"no equivalent obligation for the trader to provide documentation or other supporting evidence to consumers."

Will the Minister clarify the Government's policy on communications and the evidencing of standards and of claims to consumers, so that we head this issue off at the pass and so that we do not see cases in court that would not have got there if the prevention of unsubstantiated claims to consumers had been more robust?

Clause 171 confirms that the Crown, meaning the state, is bound by provisions in this chapter concerning consumer protection orders and undertakings. It also states that the Crown is not liable for any monetary penalty granted under the chapter. My inquiry is general, to understand the effect of the clause more clearly: will the Minister expand on examples of where the Crown may be bound by these provisions? It might be helpful to understand what is covered. Is it simply procedural, or is there content that we should be aware of? I would welcome the Minister's clarification of these clauses.

Neil Coyle: I did not intend to speak, but I want to press the Minister on the approach that the Government are choosing to adopt in this group of clauses. What the Bill intends is welcome, as we have heard from witnesses and from elsewhere. Fundamentally, customers want quick redress, and businesses want justice and the removal of counterfeit or fake products that undermine their licences and appropriate trading. The Government's approach—specifically in these clauses, heading for the courts—ignores the backlog that my hon. Friend the Member for Feltham and Heston has spoken about.

On Tuesday, we heard from the Minister for London that the Government did not have an agreement with Citizens Advice, or funding set aside for Citizens Advice, to support people to take a case through the courts. I was promised some further information that has not arrived yet; I do not know whether it is in the snail mail or the Minister's crayons ran out or something, but I hope it is coming.

As has been raised this morning, there is no information yet from the Government about their expectations for how many cases will be taken to court, how that will have an impact on the backlog, or what the cost will be to Government or individuals. The reason people will end up at Citizens Advice is that they are seeking legal information; Citizens Advice needs to be resourced to support people and to take cases. In connection with this group of clauses, we are not hearing what the Government intend to do to support cases that need to be taken.

And, of course, it takes time. In the time that someone is going through the process—potentially for months and months—products that are dangerous to individuals might still be online. I am keen to hear from the Minister what will happen in the interim. What is to stop sellers and online marketplaces continuing to retail products that are dangerous to individuals or are counterfeit goods?

We will come to this next week, I think, but there is an alternative: the take-down power suggested by trading standards. With what is out there currently and what the Bill intends, we hear lots of analogies about the wild west, but it all feels a bit as if, instead of getting a Clint Eastwood figure to address the problems, we are getting a Deputy Dawg. Will the Minister say why the Government chose a costly court process—costly to Government and to individuals, as well as more time-consuming—rather than a specific measure that allows for a body already set out in a schedule to require the removal of information on products that are known to be faulty or counterfeit?

Kevin Hollinrake: On resourcing, the hon. Members for Feltham and Heston and for Bermondsey and Old Southwark were both right to mention the courts backlog. If my ministerial colleague, the Under-Secretary of State for Science, Innovation and Technology, the hon. Member for Sutton and Cheam, committed to write to the hon. Gentleman, I am sure that he will do that. It has not come across my desk yet, but there will be no delay when it does, short of ensuring that it answers the hon. Gentleman's questions.

One thing to say about that, of course, is that the fact that we are putting in place a direct enforcement regime may well ease the pressures on the courts, because the CMA can take action without recourse to them. That should help by ensuring that not all such cases need to go to court.

On private enforcement, and how it would work, it could happen on the basis of an enforcer's application, or on the Secretary of State's initiative after consultation with a proposed enforcer. I think that the only private designated enforcer currently is Which?. I hope that that answers the question of the hon. Member for Feltham and Heston.

On the hon. Lady's points about a primary authority, a primary authority can be a local authority, it could provide information about the business to enforcing authorities and help direct their efforts to improve regulatory efficiencies.

On greenwashing, she is right that the CMA is conducting an investigation into ASOS, Boohoo and Asda. We have the green claims code to try to ensure that there are standards in this area. The Government policy in this area, of course, is that misleading information is already a breach of existing consumer laws. The CMA has issued guidance to help businesses to comply with existing obligations in that green claims code.

The hon. Member for Bermondsey and Old Southwark asked about product safety. Rather than Deputy Dawg, I would use the analogy of Clint Eastwood in "The Good, the Bad and the Ugly". We are working very hard on this, in terms of product safety. The Office for Product Safety and Standards, which I work very closely with, comes under my remit. It has put a huge amount of time and effort into market surveillance and ensuring that products online are safe.

We have real concerns over whether that is the case, of course, and we recently met with Amazon to discuss that issue. We have also met with eBay, Wish and other

platforms to point out their responsibilities. As far as we are concerned, as distributors they have responsibilities to proactively remove unsafe content. As the hon. Gentleman knows—I have said this to him before—we intend to look at that again through the product safety review, which we are about to announce, and that should clarify those responsibilities and ensure that unsafe products do not hit the marketplace in the first place.

I take the points on takedown powers very seriously, and I heard the same evidence from trading standards that the hon. Gentleman heard. We are keen to look at that matter and, again, it might involve another layer of enforcement so that we can then try to prevent those unsafe products from hitting marketplaces across the UK. Trading standards has the capacity to do that for individual websites, but I understand that there are wider concerns regarding other areas of online activity that we are keen to address.

Seema Malhotra: I thank the Minister for his comments relating to the calls from trading standards to strengthen the legislation, which I also support. Could the Minister perhaps clarify a couple of points?

On greenwashing, my point was about how robust our regime will be in making sure that the green claims code, and how that is implemented, will be sufficient to ensure more compliance—either with the code or with any other ways in which we are going to be taking forward legislation on this—so that we do not have to do a lot more by way of enforcement. That would clearly not be the best outcome in the long term for consumers. Having the information up front and ensuring that labelling and other matters are much more robust is better than having challenges later on, with the associated costs of taking things through the courts. My question was more about how this all sits together, and whether the Government have an overall strategy, which I think is quite important.

Finally, on the product safety review, it has been "about to be published shortly" for quite a long time. Is it coming shortly?

Kevin Hollinrake: Yes, it is coming shortly.

Turning to greenwashing, we take the matter very seriously, and there are two ways to deal with it. We can do ex ante regulation, which involves building a huge bureaucracy around a certain system and people checking everything, or we can put in an ex post regulation deterrent regime, which involves a code or set of standards that companies should adhere to, and then an enforcement regime that takes breaches of the code very seriously and applies penalties to organisations that do not meet the standards. The latter is a more efficient and effective way to regulate, and that is the approach we are taking. That should prove a deterrent and prevent people from doing the wrong thing in the first place.

Question put and agreed to.

Clause 165 accordingly ordered to stand part of the Bill.

Clauses 166 to 171 ordered to stand part of the Bill.

Clause 172

Power of CMA to investigate suspected infringements

Question proposed, That the clause stand part of the Bill.

The Chair: With this it will be convenient to discuss that clauses 173 to 176 stand part.

Kevin Hollinrake: Clauses 172 to 176 set out a range of new enforcement powers for the CMA to determine whether certain consumer laws have been breached and, if so, to direct compliance and impose remedies and penalties. These powers correspond to powers available to the civil courts under chapter 3 of this part of the Bill to make consumer protection orders, but are available in relation to certain consumer protection laws only.

Clause 172 gives power to the CMA to conduct an investigation into suspected infringements under its direct enforcement regime. This acts as a trigger for the use of the CMA's direct enforcement powers under chapter 4 of part 3. To use its direct enforcement powers, the CMA must have reasonable grounds for suspecting an infringing practice has occurred, is occurring, or is likely to occur.

Clause 173 allows the CMA to issue provisional infringement notices to enforcement subjects. It provides that enforcement subjects have a right to know the claims against them and be given an opportunity to make representations in a meaningful manner before a final decision is taken by the CMA. That ensures that the direct enforcement process is fair, with appropriate safeguards to protect the legitimate rights of the enforcement subject.

Clause 174 is fundamental to the direct enforcement regime and gives the CMA a discretionary power to issue a final infringement notice. To do so, the CMA must be satisfied that the infringing conduct has occurred, is occurring or is likely to occur. As well as giving directions to prevent or stop infringing practices or require enhanced consumer measures, a final infringement order may impose monetary penalties. That may be up to £300,000 or, if it is higher, 10% of the subject's total turnover, in relation to past or ongoing infringing conduct.

Clause 175 empowers the CMA to include enhanced consumer measures as part of a final infringement notice if it considers them to be just, reasonable and proportionate.

Clause 176 empowers the CMA to issue an online interface notice to avoid the risk of serious harm to the collective interest of consumers. To exercise that power, the CMA needs to be satisfied that no other tools under the direct enforcement regime, nor the court's power to make interim online interface orders, would be wholly effective.

An online interface notice may be given to the infringer or to any relevant third party. For example, an online interface notice may require a third party to remove, modify or restrict access to content that can be found on an online interface, such as a website. An online interface notice may be given to an overseas third party if the third party satisfies the UK connection test at subsection (3)(c). This clause therefore takes into account the global nature of online commerce, but does not give the CMA unfettered extraterritorial jurisdiction. I hope hon. Members will agree that it is appropriate that this provision has cross-border reach to websites, platforms and applications that direct their business activities to consumers in the United Kingdom.

12 noon

Seema Malhotra: Clause 172 introduces provisions empowering the CMA to begin an investigation where it has reasonable grounds for expecting that a person has

[Seema Malhotra]

engaged, is engaging or is likely to engage in a commercial practice that would be considered a relevant infringement. That power acts as a trigger for the use of the CMA's direct enforcement powers. Under subsection (3), the CMA would be able to publish a notice of investigations setting out what and whom it is investigating and indicating the investigation timetable. If, after giving such a notice, the CMA decides to close the investigation, it would be required to publish a notice of termination.

The clause is welcome. It is a vital part of the new consumer protection regime, and we need to ensure is properly enforced. While I am glad the provisions are being introduced, I note again that it will be a long time before they are in operation. It is not until 2025 that some of the provisions come into force.

It does not appear that publishing of the notice of investigation would be mandatory in all cases. Are there any times or examples of when a notice should not be published? If so, could the Minister share those with the Committee?

Under clause 173, the CMA would be empowered to give an enforcement subject a provisional infringement notice where the CMA has started an investigation under clause 172, which continues. The provisional infringement notice would need to contain certain information, including the grounds on which it is given and the enforcement subject's acts or omissions that give rise to the CMA belief that there has been an infringement. It must also include the CMA's proposed directions specifying the conduct required to ensure compliance. If the proposed directions include enhanced consumer measures considered by the CMA to be just, reasonable and proportionate, the notice will also need to state that and include details of those measures.

The notice must also include the process for the enforcement subject to make representations to the CMA about the notice, including the means by which and the time by which representations must be made by the enforcement subject. That must also include a hearing if the enforcement subject decides to make an oral representation and, if the CMA is considering monetary penalties, the detail of that penalty.

This is an important clause in enabling co-operation through the enforcement regime, but I would welcome clarification in a few areas. Subsection (3) sets out how the CMA may give the respondent a notice. Are there any scenarios in which the CMA will not need to give the respondent an infringement notice? If not, is this intended to be a power rather than a duty?

Subsection (4) states that the infringement notice must specify the time by which representations must be made. Does the Minister have in mind an expected time range for those representations to be made? I am sure that there is an intention that this all happens as quickly as possible, but there is no specification or guidance as to what some of the timelines might be. It would be helpful to understand the Minister's intentions on that further.

Clause 174 grants the CMA a discretionary power to issue a final infringement notice to the enforcement subject. In deciding whether to issue a final infringement notice, the CMA will be required, under the clause, to consider whether an undertaking has been given and, if so, whether the enforcement subject has complied with its terms. A final infringement notice may impose on the enforcement subject a requirement to comply with such directions as the CMA considers appropriate to rectify an infringement and achieve compliance, and/or a requirement to pay a monetary penalty. Subsection (6) sets out that the monetary penalty must be a fixed amount not exceeding £300,000—I think that was described in earlier discussions as the middle of the pack—or, if higher, 10% of the total value of the enforcement subject's turnover.

Under subsection (8), a final infringement notice could require the enforcement subject to publish the notice and a corrective statement. I ask the Minister—again, in the interests of transparency—why this subsection says "may require" rather than "will require". I ask in the interests of consistency and transparency for consumers, so I would be grateful for the Minister's response.

Clause 175 empowers the CMA to include in a final infringement notice enhanced consumer measures that it considers to be just, reasonable and proportionate. This clause is welcomed by the Opposition as an important part of the consumer protection regime.

Under clause 176, the CMA will be able to issue an online interface notice to any person whom the CMA believes has engaged, is engaging or is likely to engage in a relevant infringement. This includes third parties with a connection to the UK—for example, UK nationals and residents, UK-established businesses, and businesses carrying on business in the UK or targeting UK consumers. The purpose of this notice would be to prevent serious harm to consumers where there has been or is likely to be an infringing practice. In effect, the notice would force the infringer or any third party to take down content that is harmful to consumers. Subsection (4) sets out what the directions could include: removing content from, or modifying content on, an online interface; disabling or restricting access to an online interface; displaying a warning to consumers accessing an online interface; and deleting a fully qualified domain name.

Use of those powers has been described as a last resort. Will the Minister clarify whether this would therefore be after a period of notices and whether there is a timeline in which it might be undertaken? If a business was not responsive, would the Minister expect relatively quick use of the powers in order to protect consumers and to deter any further consumer detriment? Also, is it the Minister's intention that the powers are just for the CMA? Considering some of the discussion that we have been having in relation to trading standards, I wonder whether use of the powers may be open in the future to other enforcers.

Kevin Hollinrake: In terms of publication of a notice, I think that that is a judgment for the CMA. There may be public interest in making a notice public—for example, to inform traders or consumers about practices of concern. Why would it not publish a notice? Well, it might be, for example, that that might prejudice the CMA's investigation, which is clearly not something that we would want to happen.

The hon. Lady asked about the timescale for response. That will be something that the CMA consults on, in terms of how the process will happen, and stakeholders will be able to input into that consultation. However, we expect clear timelines to be set for responses.

Why would the CMA not give an infringement notice? Well, it might be that it decides, for example, that another enforcer might be better placed to take forward enforcement in that area. Circumstances will vary widely from case to case, and the CMA will be the best judge of whether publication is desirable in any given situation.

What about other consumer enforcers? We believe that the CMA has a leading and co-ordinating role in both the public enforcement of consumer law and in tackling market-wide practices that hinder consumer choice. The new direct enforcement model will enable the CMA to act faster and take on more cases on behalf of the public, resulting in an estimated further tens of millions—or potentially hundreds of millions—of pounds of direct benefit to consumers. Improving the speed and responsiveness of the CMA's interventions has the greatest potential to safeguard the wider interests of consumers right across the economy.

Question put and agreed to.

Clause 172 accordingly ordered to stand part of the Bill.

Clauses 173 to 176 ordered to stand part of the Bill.

Clause 177

UNDERTAKINGS

Kevin Hollinrake: I beg to move amendment 60, in clause 177, page 118, line 12, at end insert—

"(2A) Subsections (1) to (6) of section 156 (inclusion of enhanced consumer measures in undertakings) apply to an undertaking under this section as they apply to an undertaking under section 155(2)."

This amendment ensures that requirements imposed by undertakings given under clause 177 may include the taking of enhanced consumer measures (as defined by clause 213).

The Chair: With this it will be convenient to discuss the following:

Clauses 177 to 180 stand part.

Government amendment 61.

Clauses 181 and 182 stand part.

Kevin Hollinrake: Government amendments 60 and 61, and clauses 177 to 182, govern the acceptance and enforcement of undertakings by the CMA under its direct enforcement regime. Clause 177 provides a framework for the CMA to accept an undertaking as an alternative to giving a final infringement notice or online interface notice. The CMA may not accept undertakings unless they include provisions that effectively stop the conduct of concern. The more co-operative nature of the undertakings procedure can lead to faster resolution of consumer protection concerns and shorten the enforcement process.

Government amendment 60 adds a provision to clause 177 empowering the CMA to include enhanced consumer measures—or ECMs—in undertakings that it accepts under its direct enforcement powers. The power to add ECMs to undertakings is available to the CMA, and other enforcers in the court-based regime, under clauses 155(3) and 156 of the Bill. The inclusion of ECMs in undertakings has been a valuable part of the toolkit available under the court-based regime. The amendment makes it expressly clear that the power already available in the court-based regime is also available to the CMA under its direct enforcement powers under chapter 4 of part 3.

Clause 178 prevents the CMA, once it accepts an undertaking under clause 177, from giving a final infringement notice or an online interface notice to the same enforcement subject in relation to the same matter. The CMA can still give those notices if they relate to matters or persons not addressed in the undertaking, if circumstances have materially changed since the undertaking was accepted, or if the CMA suspects the undertaking has been breached or was based on false or misleading information.

Clause 179 sets out the process that the CMA must follow to make a material variation or to release a person from an undertaking once it has been accepted. The clause is important for procedural fairness, and ensures that the CMA cannot significantly modify or release persons from undertakings without giving notice to the other party and considering their views. Clause 180 allows the CMA to start a process to enforce compliance if it has reasonable grounds to believe that a person has breached at least one term of an undertaking. As with the majority of the CMA's direct enforcement powers under this part, any assertion or sanctions for wrongdoing must be preceded by a provisional notice. That includes, for example, proposed directions and proposed penalties, and an invitation to make representations.

12.15 pm

Government amendment 61 adds a provision to clause 181 to require that the CMA must specify in a final breach of undertakings enforcement notice the main details of the appeal rights available to the enforcement subject. The aim of that provision is to ensure that the right to appeal CMA decisions is clear. Clause 181 gives the CMA a discretionary power to issue a final breach of undertakings enforcement notice. Such a notice can be given only after the CMA has issued a provisional breach of undertakings enforcement notice and has considered any representations made.

Neil Coyle: Within clause 181 there is the option for someone who is potentially identified as selling rogue or dangerous products to use a reasonable excuse. Can the Minister better define what a reasonable excuse might be? Companies and individuals could choose to prolong the timeframe involved in order to sell more goods that are hooky while the process is followed.

Kevin Hollinrake: As I said earlier, there are measures to ensure that any representations are given earnestly. A reasonable excuse might be that the trader was not aware of some of the difficulties surrounding the product. There may be various circumstances. When implementing and enforcing legislation, we always try to ensure that the CMA can apply discretion in different circumstances where an honest mistake has occurred.

Neil Coyle: To be clear, I am not looking for a list of what companies or individuals might use as an excuse for selling dangerous goods; I wondered whether the Minister would set out the timeframe, as the clause, and

[Neil Coyle]

associated clauses, are not clear about how long companies and individuals get to provide information or remove dangerous products. What is there to prevent someone from saying, for example, "We have this product on our online marketplace, but it is manufactured in another country. We have been trying to contact the manufacturer, and it has taken some time to identify the specific individual."? In that time, of course, the individual could have sold more counterfeit and dangerous goods, or have changed their email and other addresses in order to avoid the removal of their products online.

Kevin Hollinrake: We are now getting into the weeds of this. We have similar views about online marketplaces and their responsibilities. In our view, their responsibility as a distributor requires them to ensure that products are safe before they are placed on the marketplace in the first place. There should be no excuse for a distributor not checking the validity of a standards marking, for example. That is a responsibility that I have discussed with various platforms. We want to get to the position where products are verified before they enter the marketplace, through checks and balances. Rather than working reactively, platforms should work proactively in such instances, but part of that crosses over into work that we are doing in the product safety review, which we have discussed previously and will, I am sure, discuss again.

If the CMA is satisfied that a breach occurred without a reasonable excuse it can impose a penalty. That ensures that there are meaningful consequences to breaching an undertaking, to deter unscrupulous traders. Clause 182 states the types of penalties and the maximum penalty amounts that can be imposed by the CMA through a final breach of undertakings enforcement notice. The penalty imposed can be the higher of a fixed amount up to £150,000 or 5% of total turnover. A daily rate penalty can be up to £15,000 or 5% of the total value of the daily turnover, whichever is higher, accruing over the days in which non-compliance continues. Both a fixed amount and a daily rate penalty may be imposed, but they must not exceed the fixed amounts that I have just referenced. I hope that hon. Members will support Government amendment 60, and clauses 177 to 182 standing part of the Bill.

Seema Malhotra: The Opposition support the inclusion of clause 177. We welcome any measures that enable co-operation between enforcement bodies and subjects. I will, however, ask the Minister about timescales. The legislation as it stands contains little in the way of specifying timescales. The Minister might tell me again that this might be relevant for the consultation that the CMA undertakes on the process, but I think this will end up being relevant also for the resources that are in place, the expectations of how quickly all the procedures will be able to operate, and certainly how long it could take during the course of an initial infringement notice and a final infringement notice to reach an undertaking.

Although the inclusion of these provisions is necessary to make the regime a co-operative one, it is important that their inclusion in the Bill does not lead to unnecessary delay by enforcement subjects who might have no genuine intention to reach a commitment with the CMA. I would welcome the Minister explaining how he believes that will operate effectively.

Government amendment 60 ensures that the requirements imposed by undertakings given under clause 177 may include the taking of enhanced consumer measures, as defined by clause 213. We welcome this amendment, which should bring further consistency in the enforcement regime.

Clause 178 is consequential on clause 177. It prevents the CMA, once it has accepted an undertaking under clause 177, from giving a final infringement notice or an online interface notice to the same enforcement subject in relation to the same matter. The explanatory notes explain that the underlying policy intent is that undertakings are an alternative to final infringement or online interface notices and therefore the effect is that a person cannot be subjected to multiple enforcement resolutions of the same matter. Subsection (3) provides the necessary flexibility for the CMA. The CMA can still give a final infringement notice or an online interface notice to the extent that it deals with different matters from the undertaking. We welcome the clause.

Clause 179 sets out the process to be followed when the CMA needs to change or end an undertaking. Where the CMA proposes to accept a material variation of an undertaking or to discharge an undertaking, under this clause the CMA would be required to first give notice to the enforcement subject. If, after considering any representations made in accordance with the notice the CMA decides to take the proposed action, it would have to give further notice to the enforcement subject of that decision. We think this is an important clause.

Under clause 180, the CMA would be able to give a provisional breach of the undertakings enforcement notice where it has reasonable grounds to believe that the enforcement subject has failed to comply with one or more of the terms of the undertaking. It also sets out what the provisional breach of an enforcement notice must include. We welcome this clause as an important provision. It is important for the CMA to be clear on its intentions, for the enforcement subject to have no means of saying it was a misunderstanding, and for transparency for consumers.

Clause 181 introduces provisions enabling the CMA to issue a final breach of undertakings enforcement notice in circumstances where the deadline for the enforcement subject to make representations to the CMA in accordance with the first notice has expired, and if, after considering representations, the CMA is satisfied that the enforcement subject has committed an infringement. The clause also lists what must be included in the enforcement notice.

Subsection (4) lays out the threshold for a monetary penalty. It states that the penalty

> "may be imposed only if the CMA is satisfied that the failure in question is without reasonable excuse."

Like my hon. Friend the Member for Bermondsey and Old Southwark, I want the Minister to expand on the word "reasonable". Will further definition be required? Does he think there will be some case law or further guidance? This is an important matter, because it can lead to questions about whether the CMA's interpretation of "reasonable" is reasonable. We do not want to go down that route; we want a clear regime that provides

less wriggle room for enforcement subjects that have no intention of complying and will use any excuse not to do so. I hope the Minister will look at that further and will give the House confidence that the apparent vagueness of the term will not enable companies that are in breach of their undertaking to escape the monetary penalties that, under the regime, they ought to pay.

Government amendment 61 requires that the information contained in a final breach of undertakings enforcement notice includes information about rights of appeal. We welcome it as a common-sense addition to what must be included in the final breach notice.

Clause 182 sets out the maximum monetary penalty that can be imposed for a breach of undertakings notice under clause 181. It amounts to a fixed amount of £150,000 or, if higher, 5% of the total value of the enforcement subject's turnover. In the case of a daily rate, it is £15,000 or, if higher, 5% of the total value of the daily turnover of the enforcement subject. We have debated that previously. I assume that that amount relates to this being an enforcement penalty. Will the CMA continue to be the only body that has such fining powers? Will other enforcers, such as trading standards, be able to pursue penalties only through other routes? I would appreciate clarification from the Minister on that.

Kevin Hollinrake: The Opposition make a reasonable point about the reasonable excuse. We have left the threshold pretty broad to reflect the range of situations that could prevent compliance. We feel that a closed list on the face of the Bill would bind the CMA's hands and make the measure less effective. As hon. Members know, the Bill requires the CMA, in the guidance on exercising its direct enforcement functions that it produces under clause 205, to provide information about the factors it takes into account in determining whether a reasonable excuse exists, and that will include examples.

The hon. Lady asked how soon after a provisional notice the CMA will issue a final breach of undertakings enforcement notice. She pre-empted my response to that: it will, again, be subject to consultation. Of course, it is at the discretion of the CMA. The CMA will set out its approach to determining the period within which representations have to be made in forthcoming guidance, preceded by the public consultation.

12.30 pm

Seema Malhotra: I will take what the Minister said on reasonableness, and we will have a look at it. We may return to this matter, in order to ensure that there is not a gap between what an enforcement subject could argue and what the CMA intends, but I thank him for his response.

Kevin Hollinrake: It is perfectly reasonable that we have that debate, but we will do so we when we discuss clause 205. It is right that the Opposition challenge us and the CMA to ensure that the guidance is clear, and covers all bases.

Amendment 60 agreed to.

Clause 177, as amended, ordered to stand part of the Bill.

Clauses 178 to 180 ordered to stand part of the Bill.

Clause 181

FINAL BREACH OF UNDERTAKINGS ENFORCEMENT NOTICE

Amendment made: 61, in clause 181, page 121, line 28, at end insert—

"(e) state that the respondent has a right to appeal against the notice and the main details of that right (so far as not stated in accordance with paragraph (d))."—*(Kevin Hollinrake.)*

This amendment requires that the information contained in a final breach of undertakings enforcement notice includes information about rights of appeal.

Clause 181, as amended, ordered to stand part of the Bill.

Clause 182 ordered to stand part of the Bill.

Clause 183

PROVISIONAL BREACH OF DIRECTIONS ENFORCEMENT NOTICE

Question proposed, That the clause stand part of the Bill.

The Chair: With this it will be convenient to discuss that clauses 184 to 188 stand part.

Kevin Hollinrake: Clauses 183 to 188 principally deal with the enforcement of directions imposed by the CMA in its final infringement notices, online interface notices, and final breach of undertakings enforcement notices. Clause 183 empowers the CMA to enforce compliance with enforcement directions by giving a provisional breach of directions enforcement notice. That allows the enforcement subject to know the case against them and to make representations.

Clause 184 allows the CMA to give a final breach of directions enforcement notice, if it is satisfied that a direction has been fully or partially breached without a reasonable excuse. The notice must follow a provisional breach of directions enforcement notice and can be given only after the period to make representations has expired and the CMA has considered any representations received. Given the seriousness of the situation and the late stage in the process of enforcing compliance with consumer protection law, the Bill sets out that the CMA will impose a monetary penalty each time it gives a final notice under the clause.

Clause 185 provides for the types of penalties and the maximum penalty amounts that can be imposed by the CMA through a final breach of directions enforcement notice. The total penalty amount can be a fixed amount up to £150,000 or 5% of total turnover, whichever is higher. It can also be a daily rate penalty up to £15,000 or 5% of the total value of the daily turnover, whichever is higher, and accruing over the days while non-compliance continues. It can also be a combination of both, but that must not exceed the maximum penalty amounts in both separate cases.

Clause 186 gives the CMA an alternative means of enforcing compliance with directions given in final infringement notices, online interface notices and final breach of undertakings enforcement notices by enabling applications to court for an order to require compliance. It also provides a backstop power for the CMA to apply

[Kevin Hollinrake]

for a court order where it considers a person has failed to comply with a direction given in a final breach of directions enforcement notice.

Clause 187 gives the CMA the power to require evidence from the enforcement subject to substantiate factual claims made as part of its commercial practices under investigation. This applies where the CMA gives a provisional notice concerning a suspected breach of the unfair trading prohibitions in chapter 1 of part 4 of the Bill. By placing the burden of proving the accuracy of claims on the trader, the clause is crucial in stopping unscrupulous traders from spreading wild promises or getting the CMA bogged down in disproving claims that should be backed up by evidence.

Clause 188 sets out the process that the CMA must follow for proposing to materially vary or revoke any directions. The clause gives flexibility to the CMA to direct compliance while requiring it to provide a sufficient notice period and clear information to guarantee fairness to the person involved.

Seema Malhotra: Clause 183, in conjunction with clause 184, sets out the CMA's powers to enforce compliance with enforcement directions. It introduces provisions enabling the CMA to issue a provisional breach of directions enforcement notice where it has reasonable grounds to believe that the enforcement subject has without reasonable excuse failed to comply with the direction. We support the clause.

Under clause 184, the CMA would be able issue a final breach of directions enforcement notice requiring the payment of a monetary penalty upon completion of the process laid out in the clause. We support this clause. Clause 185 is consequential on clause 184 and sets out the maximum monetary penalty that the CMA may impose for a breach under clause 184. Again, we support the clause.

Clause 186 provides the CMA with the power to apply to an appropriate court when a person or company has failed to comply with a direction given under clause 184. Under the clause, the CMA would be able to apply to the court for an enforcement order, an interim enforcement order, an online interface order or an interim online interface order. That would enable the court to act in respect of any practice or conduct that would amount to a "relevant infringement" by making a consumer protection order in addition to or instead of making an order in respect of the breach of directions. We welcome this clause, as it provides a necessary backstop for the CMA to enforce its judgments and penalties.

Clause 187 would enable the CMA to require evidence from traders substantiating the factual claims used in their commercial practices with consumers, which are at issue in a provisional notice involving alleged contravention of the new consumer protection regime. Where the CMA has issued a provisional notice to an enforcement subject and the enforcement subject makes representations to the CMA in response to that notice, the CMA may require the enforcement subject to provide evidence as to the accuracy of any claim made. For the reasons that we debated earlier, we welcome this clause and this power as they will enable the CMA to carry out its functions more effectively on behalf of consumers.

Clause 188 introduces provisions enabling the CMA to make a material variation of, or to revoke, directions that it has given under other clauses as specified. We support the inclusion of clause 188 in the Bill. I hope that what the clause provides for will be able to be done at speed and that we do not see any delays in the use of these powers where needed.

Question put and agreed to.

Clause 183 accordingly ordered to stand part of the Bill.

Clauses 184 to 188 ordered to stand part of the Bill.

Clause 189

PROVISIONAL FALSE INFORMATION ENFORCEMENT NOTICE

Question proposed, That the clause stand part of the Bill.

The Chair: With this it will be convenient to discuss clause 190 stand part.

Kevin Hollinrake: I notice that England just bowled Australia out, which is very good news.

The Chair: Let us stick to the important information.

Kevin Hollinrake: Of course—sorry, Dame Maria.

Clauses 189 and 190 empower the CMA to give a provisional false information enforcement notice, followed by a final notice imposing a monetary penalty of up to £30,000 or, if higher, 1% of total turnover. They allow the CMA to enforce against, and penalise, the provision of materially false or misleading information to the CMA without reasonable excuse.

Seema Malhotra: Clause 189 introduces provisions granting the CMA a discretionary power to issue a provisional false information enforcement notice if it has reasonable grounds to believe that a person has provided to the CMA materially false or misleading information. It also lists what would be included in this enforcement notice. It would obviously be a really serious matter if false or misleading information was provided to the CMA. We therefore support this clause.

Clause 190 enables the CMA to issue a final false information enforcement notice. This clause is consequent on clause 189 and we therefore welcome its inclusion in the Bill. Clause 190(4) sets out the maximum monetary penalty for a false information infringement. It is important that there is a sufficient deterrent and also the ability for significant enforcement where it is found that false information has been provided to the CMA and that has been proven.

Question put and agreed to.

Clause 189 accordingly ordered to stand part of the Bill.

Clause 190 ordered to stand part of the Bill.

Clause 191

STATEMENT OF POLICY IN RELATION TO MONETARY PENALTIES

Question proposed, That the clause stand part of the Bill.

The Chair: With this it will be convenient to discuss clauses 192 to 199 stand part.

Kevin Hollinrake: Clauses 191 to 194 cover appeal rights and other requirements for the CMA that will ensure that it exercises its direct enforcement powers proportionately and transparently. I will also discuss clauses 195 to 199, which make supplementary provision for the monetary penalties imposable by the CMA and the civil courts under part 3 of the Bill.

Clause 191 requires the CMA to produce and publish a statement of policy relating to its exercise of powers to impose monetary penalties. The statement of policy must cover the considerations relevant to whether to impose a penalty and the nature and amount of the penalty. When preparing or revising that statement, the CMA must consult the Secretary of State and other relevant stakeholders. The statement, or its revised form, cannot be published without the Secretary of State's approval. Finally, the CMA will be required to have regard to the most recent published statement approved by the Secretary of State when deciding whether to impose penalties under this chapter, as well as deciding the penalty's nature and amount.

12.45 pm

Clause 192 gives the CMA a discretionary power to make some or all the requirements of a final notice binding on other members of the same interconnected corporate group as the infringer. That prevents complex corporate structures frustrating the ability of enforcement interventions to protect consumers and law-abiding traders.

The exercise of that power is subject to two important conditions. First, the infringing company must meet the definition of being a member of an interconnected corporate group at the time the final notice is given or at any time when the requirements under the notice are in force. Secondly, the CMA may only make the requirements of a final notice binding on other members of the same corporate group if it considers it just, reasonable and proportionate.

Clause 193 requires the CMA to do two things to assist with the monitoring and evaluation of the direct enforcement regime. First, the CMA must keep a record of undertakings it has accepted and directions it has given under the direct enforcement regime set out in this chapter. It must also keep a record of the reviews done of their effectiveness. Secondly, if requested by the Secretary of State, the CMA is required to prepare a report on the effectiveness of the undertakings and directions given, and the number and outcome of appeals. Such reports will support the Secretary of State to keep abreast of the outcomes of te CMA's exercise of its direct enforcement functions.

Clause 194 provides for appeals to the court against certain direct enforcement decisions taken by the CMA. These appeals will be heard on the merits, meaning the appeal courts will have a broad jurisdiction to review and uphold or change the CMA's decisions. The clause allows for appeals on the grounds that the CMA's decision was wrong or unreasonable and also provides protections so that appellants only incur the financial impacts of the CMA's first instance decisions if and when an appeal court upholds them.

Clause 195 requires that a court order or a CMA final notice imposing a monetary penalty states certain critical information, such as key details about the recipient's right of appeal.

Clause 196 provides that for the purposes of part 3, a person's turnover includes the person's worldwide turnover, as well as that of any persons who control or are controlled by the recipient of the penalty. The provision will enable the imposition of penalties large enough to be an effective disincentive. Those who direct wrongdoing, or benefit from the profits of wrongdoing, will be considered when deciding the level of penalties. The clause also gives the Secretary of State power to make regulations setting out methodologies for determining an entity's turnover. That power allows the Secretary of State to set out the technical details that will facilitate the predictable and consistent functioning of the new regime. It will also make the regime more responsive to changes in corporate and accounting practices, ensuring that any changes to the reporting of turnover can be accommodated within updated regulations.

Clause 197 gives the Secretary of State the power to make regulations amending the maximum amounts for fixed and daily penalties imposable under this part of the Bill. Such regulations may not be made before the Secretary of State consults with relevant parties and will be subject to the affirmative procedure.

Clause 198 empowers the CMA to recover unpaid penalties, with interest, as a civil debt through the courts. The CMA will only be empowered to recover unpaid penalties once the period for bringing an appeal has expired and any appeal has been decided. The clause supports the functioning of the monetary penalties provisions, while also requiring the CMA to consider the effect of the recovery of a penalty on the enforcement subject's ability to pay compensation.

Clause 199 provides for ancillary matters relating to the monetary penalty powers, such as interest, the effect of related court applications and appeals, payment by firms other than bodies corporate and where sums received from penalties must be paid. Essentially, the purpose of this clause is to provide important clarity on operational matters, to allow the new monetary penalty powers to function smoothly.

Seema Malhotra: Clause 191 requires the CMA to produce and publish a statement of policy regarding its powers to impose monetary penalties under this part. When the CMA decides on a penalty, it must take into account the statement. The Opposition strongly welcome the clause because it greatly increases the transparency of the monetary penalty system. It should ensure that there is clarity around the regime, thereby increasing its legitimacy. I would be grateful if the Minister will comment on the timeframe to which he expects the statement of policy to be published, whether it will follow a period of consultation, and where it will be published. Will it be publicly available, and will it be laid before this House?

[Seema Malhotra]

Clause 192 introduces provisions giving the CMA a discretionary power to make the requirements of a final enforcement notice binding upon one or more members of the same interconnected corporate group, where the CMA considers it just, reasonable and proportionate to do so. We welcome that common-sense addition to the Bill. Clause 193 on record-keeping and reporting requirements introduces important transparency into the enforcement process. As such, we welcome its inclusion. It requires the CMA to keep a record of the undertakings that it has accepted, the enforcement directions that it has given, and reviews that it has carried out in relation to the effectiveness of such undertakings and directions.

Subsection (2) introduces provisions requiring the CMA to prepare a report for the Secretary of State on the effectiveness of undertakings and enforcement directions, and the number and outcome of appeals under clause 194. That again is important because it will enable the Government to continue to monitor the effectiveness of the new regime after Royal Assent. The question is whether it goes far enough. We have not tabled amendments to the clause. It is important to begin a discussion, which we will continue as we consider further parts of the Bill, about the reporting, and the transparency of how the measures are used in the CMA's operations in practice.

Subsection (2) states:

"If requested to do so by the Secretary of State, the CMA must prepare a report on…the effectiveness of undertakings and…the number and outcome of appeals brought under section 194",

yet we do not know what the Secretary of State might intend in relation to that. The wording implies that the report is not a duty on the CMA, but that the CMA has a duty to keep the information. If somebody deems that information to be in the public interest, or parliamentarians want to know what is happening under the regime, would they be required to undertake freedom of information requests? That does not seem appropriate. If the CMA collects that information, it ought to prepare a report to which Parliament has access.

It would be helpful for the Minister to inform the Committee what the Government intend in terms of report requests by the Secretary of State, and what information he would expect the CMA to share in relation to the regime, and the operation of some of the powers in the Bill. Does he agree that it would be in Parliament's interest to have sight of that information? I would be grateful for his response on whether clause 193(2) should go further.

Clause 194 introduces provisions that would ensure that all appeals of CMA first-instance direct enforcement decisions are heard by the court. Under the clause, a person may appeal against a decision to impose a monetary penalty, the nature or amount of any such penalty and the giving of directions. We welcome the principle of the clause in allowing for a right of appeal. Again, we have questions on a timeframe for that and whether it will be part of the CMA's consultations, as the Minister has alluded to, in relation to some of the operations of the regime.

Clause 195 sets out the information that must be included in an order made by the court, or a final notice given by the CMA, that includes a requirement to pay a monetary penalty. The information includes the amount of the penalty, the grounds of the penalty, details such as when it is to be paid and so on. Subsections (3) and (4) additionally set a time limit of 14 days from when the order is imposed for enforcement subjects to apply to change the date or dates by which the penalty must be paid. We welcome the inclusion of the clause in the Bill.

Clause 196 introduces a definition of turnover into the bill for the purpose of calculating a penalty based on turnover. This appears to be a technical clause, specifically in the inclusion of turnover both in and outside the United Kingdom in applying the definition. Subsections (3) and (4) grant the Secretary of State delegated powers to make further regulations on how a person is to be treated as controlled by another person, and to make provision for determining the turnover of a person for the purposes of this part. I must ask the Minister: why is it that these further regulations have been left to secondary legislation and are not on the face of the Bill? I would be grateful if he could confirm and explain that, and also clarify why these powers are subject to the negative procedure rather than the affirmative. We have not sought to amend the clause, but we want to understand the reasons behind it so that we are confident that it should go forward unamended.

Clause 197 introduces a delegated power to the Secretary of State to make regulations to amend the maximum fixed penalties and daily penalties in this part. The regulations will be laid subject to the affirmative procedure, which we welcome. The explanatory notes state:

"The effect would be that any updated amounts specified by the Secretary of State will offset the erosion of the real value of the fixed maxima through inflation."

That is important, particularly in the current context of spiralling inflation after the disastrous economic management of successive Governments over the last 13 years. Can the Minister provide any clarification on how regularly the amendments will be made? Will it be yearly, or more or less frequently? I would be grateful for the Minister's confirmation of that, so that it is clear for the House and the CMA.

Under clause 198, "Recovery of monetary penalties", when the deadline for an enforcement subject to make an appeal against a monetary penalty has expired, or when an appeal has been made and rejected, the CMA would be able to commence proceedings to recover the penalty and any unpaid interest as a civil debt. We welcome the clause and its detail as a necessary element of a new, more robust regime.

Clause 199 introduces provisions setting out further details regarding the payment of monetary penalties. It provides for interest at the statutory rate to be incurred on the balance if the penalty imposed is not paid by the deadline. In addition, it sets out how the penalty is not payable while an appeal application is ongoing. We welcome the clause, but I seek some assurance from the Minister that appeal applications will have a timeline, and will not lead to lengthy, protracted processes, and payments going unpaid because of them.

1 pm

Kevin Hollinrake: I fear that I may have missed one or two of the hon. Lady's points, but I think I got most of them. Guidance under clause 191 will be publicly consulted on, giving those potentially affected by it an opportunity

to comment directly. That consultation will happen post Royal Assent, and when finalised it will be published on the CMA's website. On the Secretary of State requesting reports, clearly we do not know what we do not know. The Secretary of State has flexibility on when they might consider that a report is required under clause 193. The CMA already publishes regular impact assessments and other public reports, including its annual report to Parliament, and scrutiny will continue by traditional means, such as through Select Committees.

Seema Malhotra: The Minister will know that so much has gone to the Business and Trade Committee that there will be great concern about how frequently, and in what level of detail, it will be able to scrutinise all the work done under the regime. It will be a pretty tall order to do that job. I have a question for the Minister that I think is important. We have heard in previous debates about the frequency of reporting and what would be in the CMA's report for all the new regimes and units that it will undertake. We obviously do not want to overload the CMA with unnecessary reporting, but there should be an expectation about what might be in the annual report, and there should be clarity on what the Secretary of State might expect in a report on the new regime.

Surely Ministers will want to have confidence in what is happening under the regime, and to have some data reported to them if the CMA is collecting it. Will the Secretary of State expect a, perhaps annual, report on the new regime, perhaps for a few years, to know whether it is operating effectively? Secondly, will clause 193(2) give the Secretary of State the ability to request additional or more detailed reports if there are concerns about aspects of the regime's implementation? I understand the power to ask for more reports, but not having any report requested through the course of the implementation of the operations strikes me as a serious gap, particularly—

The Chair: Order. Shall we get the Minister to reply?

Kevin Hollinrake: I thought that perhaps I had to intervene on the hon. Lady.

Seema Malhotra: Particularly in relation to the early implementation of the regime—I was on my last sentence.

Kevin Hollinrake: That was a very comprehensive intervention. I think that we are saying the same thing. Of course the CMA will continue to report annually, and of course we would expect it to report on the new powers that it has been granted through the Bill. In addition to that, the Bill gives the Secretary of State the power to request additional reports as he or she sees fit. We think that that achieves an appropriate balance. We do not think that it is right to get in the way of the CMA doing its job by obliging it to report on a more frequent basis. Of course, as part of my role, or my successor's role if I move from this position back to the Back Benches or wherever, we regularly have meetings with the CMA to discuss its activities and where it is using its powers. Indeed, we write an annual letter to the CMA, which sets out where we expect its focus to lie.

The hon. Lady asked a fair question about the appeals timelines. They will not be consulted on, but they will be subject to the civil procedure rules, and relevant rules in other UK jurisdictions. The civil procedure rules will be amended as part of the implementation of the provisions through the Civil Procedure Rule Committee in the usual way. Of course, we will want appeals to take place as expeditiously as possible, provided that they are fair.

Question put and agreed to.

Clause 191 accordingly ordered to stand part of the Bill.

Clauses 192 to 199 ordered to stand part of the Bill.

Clause 200

INVESTIGATORY POWERS OF ENFORCERS

Question proposed, That the clause stand part of the Bill.

The Chair: With this it will be convenient to discuss that schedule 15 be the Fifteenth schedule to the Bill.

Kevin Hollinrake: Clause 200 introduces schedule 15 to the Bill, which contains amendments to schedule 5 to the Consumer Rights Act 2015, relating to the investigatory powers of consumer protection enforcers. Schedule 15 amends provisions in schedule 5 to the Consumer Rights Act to ensure the enforceability of statutory information notices given to a person under paragraph 14 of schedule 5.

The amendments made through schedule 15 come in two parts. First, we are providing the courts with a new power to impose a civil monetary penalty where the court finds there has been non-compliance, without reasonable excuse, with an information notice given by any consumer enforcer. Secondly, we are providing a new direct enforcement power for the CMA to decide whether an enforcement notice it has issued has been complied with and, if not, to impose a civil monetary penalty for any non-compliance without reasonable excuse.

The schedule also sets out the extraterritorial reach of enforcers' power to request information by notice. We are legislating to ensure that enforcers can obtain all the necessary information from parties in and outside the UK to inform their analysis and ascertain breaches of the law, subject to certain conditions. The schedule also ensures that a warrant may be granted in relation to material that may be remotely stored in the cloud but still be accessible from the premises. I hope hon. Members agree that the schedule completes the largely successful modernisation of the investigatory powers of consumer law enforcers made by the Consumer Rights Act in 2015.

Seema Malhotra: Clause 200 introduces schedule 15 to the Bill, which amends schedule 5 of the Consumer Rights Act 2015, which in turn details the information-gathering powers available to consumer enforcers for the purposes of civil enforcement of consumer protection law. We support the clause, but I will make a few more remarks on schedule 15.

Schedule 15 makes limited amendments to schedule 5 of the Consumer Rights Act 2015 so that an enforcement notice would have to specify the circumstances in which

[Seema Malhotra]

non-compliance with the enforcement notice could result in a financial penalty. The amendments would apply where an enforcer has given an information notice to a person and the enforcer considers that the respondent has, without reasonable excuse, failed to comply with the notice. In such circumstances, the enforcer would be able to make an application to the court.

The Opposition welcome the schedule, but there are questions related to those we have asked in relation to other clauses, specifically around the absence in the Bill of the updating of trading standards authorities' powers for the digital economy and the 21st century. That is important. We have raised before the ability for trading standards to obtain information online and so on. Can the Minister have a look at that in more detail? In the course of further clauses next week, we may come on to some other amendments as well, but I would be grateful for the Minister's response.

Kevin Hollinrake: It is our contention that trading standards do have the powers that they need to access information. There are concerns; I have concerns—I want to ensure that trading standards have sufficient powers in terms of take-down powers. That is something that we are looking at and, as the hon. Lady says, is probably something that we will discuss as the Bill proceeds.

Question put and agreed to.

Clause 200 accordingly ordered to stand part of the Bill.

Schedule 15 agreed to.

Clause 201 ordered to stand part of the Bill.

Clause 202

NOTICES UNDER THIS PART

Question proposed, That the clause stand part of the Bill.

The Chair: With this it will be convenient to discuss the following:

Clauses 203 to 207 stand part.

Government amendments 62 to 64.

That schedule 16 be the Sixteenth schedule to the Bill.

Clause 208 stand part.

Government amendment 65.

That schedule 17 be the Seventeenth schedule to the Bill.

Clauses 209 to 215 stand part.

Kevin Hollinrake: Clause 202 provides for the practicalities of giving notices. It sets out the permissible means for the CMA and other enforcers to give a notice: by delivering it to the person; by leaving it at the person's address; by post; or by email.

Clause 203 empowers the CMA to make rules about procedural and other matters in connection with its direct enforcement functions. This clause expressly permits the CMA to delegate decision making for its direct enforcement functions to its board, panel and/or staff. The clause provides the CMA with a vital tool with which it can establish the technical details of a robust and predictable direct enforcement process that will achieve the stronger enforcement that we need without compromising fair process or certainty for traders.

Clause 204 requires that the CMA's rules must be publicly consulted on, and given the approval of the Secretary of State through regulations, before coming into force. Public consultation will ensure that the views of all stakeholders, including consumer groups and traders, are adequately considered as rules are prepared. The Secretary of State also has the ongoing power to vary or revoke rules, which will ensure that the wider needs of the economy continue to be reflected in the operation of the direct enforcement regime. This clause ensures that the CMA's discretion to make technical rules governing its direct enforcement functions is exercised in a balanced way that serves the needs of the economy.

Clause 205 requires the CMA to prepare and publish guidance about its general approach to the carrying out of its direct enforcement functions, and to keep under review the guidance, which it may update from time to time. The CMA is required to publicly consult, and obtain the Secretary of State's approval, before issuing its first guidance.

Clause 206 provides that, for the purposes of the law of defamation, absolute privilege applies to anything done by the CMA in the exercise of its direct enforcement functions. There are strong precedents for that approach: judicial or tribunal proceedings are protected from defamation. There is also protection from defamation for the CMA's direct enforcement regime for competition law and its merger and market investigation powers. Those suspected of infringing are not unfairly prejudiced by this clause, which merely reflects the long-standing principle that the exercise of regulatory and judicial functions should not give rise to defamation claims.

Clause 207 formally introduces schedule 16 and its contents within the body of the Bill. Schedule 16 makes numerous minor and consequential amendments to other legislation. This schedule is important to provide for the smooth functioning of the enforcement regimes and to ensure legislative consistency.

Government amendments 62 and 63 add a reference to chapters 3 and 4 of part 3 of the Bill to schedule 14 to the Enterprise Act 2002. These amendments will ensure legislative consistency.

Government amendment 64 is a consequential amendment. It includes part 4 of the Bill in the list of enactments in respect of which investigatory powers under schedule 5 to the Consumer Rights Act 2015 are conferred.

Clause 208 introduces schedule 17, which makes transitional and saving provision in relation to the court-based and CMA direct enforcement regimes. Schedule 17 provides for the general rule that the new law will apply to conduct that takes place on or after the commencement date of chapters 3 and 4 of part 3 of the Bill. Conversely, as a general rule, the "old law"—that is, part 8 of the Enterprise Act 2002 and related provisions—will continue to apply to conduct that takes place before the commencement date of chapters 3 and 4 in part 3 of the Bill.

Schedule 17 also makes specific rules for continuing conduct that is essentially an act or omission that starts before the new law has commenced but is repeated or continues after the new law's commencement. In such a

scenario, as well as applying to the post-commencement conduct, the new law will apply to the pre-commencement conduct for the purpose of enabling enforcement action under part 3 of the Bill.

However, no requirements or penalties can be imposed on a person for the pre-commencement parts of the continuing conduct, unless such a requirement is already imposable under part 8 of the Enterprise Act 2002. Similarly, the court and the CMA will not be able to use their new powers to impose penalties for breaches of any undertakings given under part 8 of the 2002 Act.

1.15 pm

Government amendment 65 specifies that schedule 5 to the Consumer Rights Act 2015, as it has effect before the commencement of the Bill, is a provision related to part 8 of the 2002 Act. Clause 209 sets out how

"supply of goods or digital content"

should be interpreted. It makes it clear that for the purposes of this part of the Bill, supplying goods and digital content includes seeking to supply goods and digital content.

Clause 210 sets out how "supply of services" should be interpreted. It provides that the act of supplying or receiving services is not necessary to bring a person within scope of the Bill. Seeking to do so will satisfy references in the Bill to a person who supplies or receives goods or digital content. The clause also clarifies that the supply of services includes the broad category of

"performing for gain or reward any activity other than the supply of goods or digital content".

That provision helps to ensure that the part 3 enforcement regimes have a sufficiently wide application in relation to services.

Clause 211 provides that accessories to an infringing commercial practice engaged in by a body corporate can be subject to enforcement action. This clause and clause 212 replace section 222 in part 8 of the Enterprise Act 2002. Clause 211 also sets out the conditions that must be satisfied for a person to be an accessory to a past or ongoing commercial practice by a body corporate. Where the infringer is a body corporate, an accessory to the infringing practice is a person who has a special relationship with the infringer and has consented or connived in the commercial practice. Enforcement against accessories is essential to facilitate enforcement against bodies with complex corporate structures and where directors, shareholders or other bodies corporate may direct or influence infringing practices.

Clause 212 defines what is meant by "special relationship" in the context of the preceding clause. A person has a special relationship with a body corporate in two scenarios: where they are a controller of the body corporate; or where they are an officer of the body corporate, such as a director, manager, secretary or similar, or where they purport to act in such a capacity. Taken as a whole, these detailed provisions reflect the starting position that those who either direct or influence the commission of infringing practices should be held liable for them.

Clause 213 defines enhanced consumer measures, or ECMs. The clause provides that there are three types of ECM: first, redress measures, which require payment of compensation or the making of some other form of redress; secondly, compliance measures, which require the taking of steps to prevent or reduce the risk of future infringement; and, thirdly, choice measures, which are intended to facilitate effective consumer choice. The clause establishes a common threshold for when redress measures can be used—namely, where affected consumers have suffered loss as a result of the infringing conduct or where they have been affected in any other way by the conduct. The result is that redress measures are not limited to consumers who have suffered a financial loss.

Clause 214 gives definitions or interpretative guidance for those words and terms. Many of the definitions are self-explanatory, but I draw hon. Members' attention to the definition of "business". The definition is non-exhaustive and widely drawn to capture any kind of gain or reward. As under the existing definition of "business" under part 8 of the Enterprise Act 2002, monetary payment is not a prerequisite, and so for example a service carried out in exchange for the consumer's data or for reputational advantage would also qualify. The Government's intent is to give part 3 of the Bill a wide scope, so that any infringing commercial practice that harms the collective interests of consumers may be enforced against.

Clause 215 acts as an interpretation aid. It lists certain important or technical words and expressions used in part 3 and refers the reader to the clause that defines or gives guidance on the interpretation of said word or expression.

I hope that the Committee accepts Government amendments 62 to 65, and I commend clauses 202 to 215 and schedules 16 and 17 to the Committee.

Seema Malhotra: Clause 202 sets out the process for giving notices under part 3 to persons within and outside of the UK, including business entities registered or operating outside the UK. It defines acceptable means of service and the meaning of a recipient's proper address. We welcome the clause.

Clause 203 allows the CMA to make rules, subject to approval by the Secretary of State through secondary legislation, to set out the procedural administrative details of the CMA's enforcement regime. The rules supplement the framework provided in chapter 4 of part 3. We welcome the clause and the clarification, and also the important points made in the explanatory notes, including the point that the rules will cover "arrangements for complaints' handling". The clause is a common-sense provision.

Clause 204 sets out the process for the exercise of the rule-making power under clause 203. We welcome the fact that the CMA will be required to consult with stakeholders during the preparation of the rules, and we discussed that in relation to earlier clauses. The CMA will also be required to obtain the Secretary of State's approval before bringing any rule into operation or varying a rule. We welcome that measure too.

Under 204(5), the Secretary of State will be empowered to vary or revoke rules or to direct the CMA to vary or revoke rules, and regulations made under the clause will be subject to the negative parliamentary procedure. Although we welcome the clause, will the Minister clarify why that has been left to the negative procedure? The inclusion of affirmative and negative procedures in the Bill seems to be slightly random, so I would be grateful for that clarification.

[Seema Malhotra]

Under clause 205, the CMA will be required to prepare and publish guidance about its general approach to carrying out its direct enforcement functions. The guidance will provide more detailed information to traders and other stakeholders about how the direct enforcement regime would work in practice. The Opposition welcome the clause because it introduces more transparency and clarity into the regime, but will the Minister tell the Committee what timeframe is considered appropriate for the publication of the guidance? He said that he saw publication happening after Royal Assent, but does he expect it to happen within a certain period of time? I am sure that he wants the legislation to be implemented as soon as possible, as do I.

Clause 206 would protect the CMA against actions for defamation as a result of the exercise of functions under part 3. We welcome the clause. It is important that the CMA is protected in carrying out its job as the co-ordinating enforcement authority.

Clause 207 introduces schedule 16, which contains minor and consequential amendment in relation to part 3. We support schedule 16 and do not consider the consequential amendments contentious. We also support Government amendments 62 and 63.

Clause 208 introduces schedule 17, which provides transitional and saving provisions in connection with part 3. Those provisions concern the operation of the new law introduced by chapter 3 and CMA direct enforcement powers under chapter 4 of part 3. They also relate to the operation of the old law, which constitutes part 8 of the Enterprise Act 2002. It lays out how the new law would apply to conduct that takes place on or after the commencement date of the Bill, and to conduct of concern that a person is likely to engage in, where such conduct is likely to take place on or after the commencement date. The old law would continue to apply to conduct that takes place before the commencement date, as well as to various other forms of conduct. We welcome this technical schedule and clarification, and we support amendment 65.

Clause 209 introduces definitions for references to supply of goods or digital content as used across part 3 and we support the clause. Clause 210 defines how references to the supply of services should be construed across part 3 and we support the clause. Clause 211 defines what is meant by an accessory to the commercial practice of a body corporate. Will the Minister clarify whether he is confident the clause adequately captures anyone who may act as an accessory and how the definition was brought together? Was it through consultation? That will provide full clarity on what constitutes an accessory.

Clause 212 defines what constitutes having a special relationship with a body corporate, covering two scenarios outlined by the Minister. As such, we support its inclusion in the Bill. Clause 213 defines three types of enhanced consumer measures, referred to as redress, compliance and choice measures. I am grateful to the Minister for outlining some detail on that and the definitions, so that those set out in subsections (2) to (4) are straightforward and clear, and that that also applies to their interpretation by consumers. We thus welcome the clause's inclusion in the Bill.

Clause 214 defines other terms for the purposes of this part, including the definitions of "businesses", "goods", "enforcement orders", "subsidiary" and "supply", which are important, and we support their inclusion. Further, clause 215 sets out an index of defined expressions and we welcome and support it.

Kevin Hollinrake: I will make a couple of points, the first of which is on the negative procedure. On regulations, there is a combination in clause 204 of public consultation followed by review by the Secretary of State, which will allow for a significant level of scrutiny. On that basis, we feel the negative procedure is justified and appropriate.

On the guidance, the CMA must undertake several actions, including a public consultation on the practices. This may take some time, and we expect that the guidance may be ready by autumn 2024, but that will depend upon a number of factors. We clearly want it in place as quickly as possible, but we must ensure that it is fit for purpose.

The definition of "accessory" in clause 211 is consistent with, and restates with minor clarifications, the current definition in part 8 of the Enterprise Act 2002.

Question put and agreed to.

Clause 202 accordingly ordered to stand part of the Bill.

Clauses 203 to 207 ordered to stand part of the Bill.

Schedule 16

PART 3: MINOR AND CONSEQUENTIAL AMENDMENTS

Amendments made: 62, in schedule 16, page 329, line 17, leave out sub-paragraph (b).

See explanatory statement for Amendment 63.

Amendment 63, in schedule 16, page 329, line 23, at end insert—

"5A In Schedule 14 (provisions about disclosure of information) at the appropriate place insert—

'Chapters 3 and 4 of Part 3 of the Digital Markets, Competition and Consumers Act 2023.'".

This amendment, which is made for drafting consistency, inserts a reference to Chapters 3 and 4 of Part 3 of the Bill into Schedule 14 to the Enterprise Act 2002 instead of achieving the same effect by adding that reference into section 238(1) of that Act.

Amendment 64, in schedule 16, page 337, line 2, at end insert—

"Part 4 of the Digital Markets, Competition and Consumers Act 2023.".—*(Kevin Hollinrake.)*

This amendment adds Part 4 of the Bill to the list of enactments in the new paragraph 20A of Schedule 5 to the Consumer Rights Act 2015 (inserted by paragraph 8(10) of Schedule 16), with the effect that authorised enforcers will be able to exercise the investigatory powers conferred by Part 4 of Schedule 5 to CRA 2015 in connection with infringements of Part 4 of the Bill.

Schedule 16, as amended, agreed to.

Clause 208 ordered to stand part of the Bill.

Schedule 17

PART 3: TRANSITIONAL AND SAVING PROVISIONS IN RELATION TO PART 3

Amendment made: 65, in schedule 17, page 338, line 1, leave out from "means" to end of line 11 and insert "—

(a) Part 8 of EA 2002, as that Part had effect immediately before the commencement date, and

(b) any provisions of law (including in particular Schedule 5 to CRA 2015) relating to Part 8 of EA 2002, as those provisions had effect immediately before the commencement date.".—*(Kevin Hollinrake.)*

This amendment clarifies that the definition of "the old law" for the purposes of the transitional provisions in Schedule 17 to the Bill includes Schedule 5 to the Consumer Rights Act 2015 (which confers investigatory powers on enforcers).

Schedule 17, as amended, agreed to.

Clauses 209 to 215 ordered to stand part of the Bill.

Ordered,

That the Order of the Committee of 13 June be varied by the omission from paragraph 1(f) of "and 2.00 pm".—*(Mike Wood.)*

Ordered, That further consideration be now adjourned. —*(Mike Wood.)*

1.32 pm

Adjourned till Tuesday 4 July at twenty-five minutes past Nine o'clock.

Written evidence reported to the House

DMCCB42 Authors' Licensing and Collecting Society ALS

DMCCB43 Beer52 Limited

DMCCB44 Shoosmiths LLP

DMCCB45 Amazon