PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT
GENERAL COMMITTEES

Public Bill Committee

ENTERPRISE AND REGULATORY REFORM BILL

Thirteenth Sitting

Tuesday 10 July 2012

(Afternoon)

CONTENTS

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Saturday 14 July 2012

STRICT ADHERENCE TO THIS ARRANGEMENT WILL GREATLY FACILITATE THE PROMPT PUBLICATION OF THE BOUND VOLUMES OF PROCEEDINGS IN GENERAL COMMITTEES

The Committee consisted of the following Members:

Chairs: Hugh Bayley, † Mr Graham Brady, Martin Caton, Mr Charles Walker

† Anderson, Mr David *(Blaydon)* (Lab)
† Bingham, Andrew *(High Peak)* (Con)
† Bridgen, Andrew *(North West Leicestershire)* (Con)
† Burt, Lorely *(Solihull)* (LD)
† Carmichael, Neil *(Stroud)* (Con)
† Cryer, John *(Leyton and Wanstead)* (Lab)
† Danczuk, Simon *(Rochdale)* (Lab)
† Davies, Geraint *(Swansea West)* (Lab/Co-op)
† Evans, Graham *(Weaver Vale)* (Con)
† Johnson, Joseph *(Orpington)* (Con)
† Lamb, Norman *(Parliamentary Under-Secretary of State for Business, Innovation and Skills)*
† Morris, Anne Marie *(Newton Abbot)* (Con)
† Mowat, David *(Warrington South)* (Con)
† Murray, Ian *(Edinburgh South)* (Lab)
† O'Donnell, Fiona *(East Lothian)* (Lab)
† Ollerenshaw, Eric *(Lancaster and Fleetwood)* (Con)
† Onwurah, Chi *(Newcastle upon Tyne Central)* (Lab)
Prisk, Mr Mark *(Minister of State, Department for Business, Innovation and Skills)*
† Ruane, Chris *(Vale of Clwyd)* (Lab)
† Simpson, David *(Upper Bann)* (DUP)
Smith, Julian *(Skipton and Ripon)* (Con)
† Wright, Mr Iain *(Hartlepool)* (Lab)
† Wright, Jeremy *(Lord Commissioner of Her Majesty's Treasury)*

James Rhys, Steven Mark, *Committee Clerks*

† attended the Committee

Public Bill Committee

Tuesday 10 July 2012

(Afternoon)

[Mr Graham Brady *in the Chair*]

Enterprise and Regulatory Reform Bill

4.11 pm

Clause 28 ordered to stand part of the Bill.

Schedule 11

Markets: investigation powers

Chi Onwurah (Newcastle upon Tyne Central) (Lab): I beg to move amendment 86, in schedule 11, page 183, leave out lines 18 to 21.

The Chair: With this it will be convenient to discuss amendment 87, in schedule 11, page 186, line 12, leave out from 'exceeding' to end of line 17 and insert—

(None) '10 per cent. of the company's revenues for the previous year, or £30,000 whichever is the higher;

(b) in the case of any amount calculated by reference to a daily rate, an amount per day exceeding 10 per cent. of the company's revenues for the previous year, or £15,000 whichever is the higher; and

(c) in the case of a fixed amount and an amount calculated by reference to a daily rate, a fixed amount exceeding £30,000 or 10 per cent. of the company's revenues for the previous year whichever is the higher, and an amount per day exceeding £15,000 or 10 per cent. of the company's revenues for the previous year whichever is the higher.'.

Chi Onwurah: Thank you, Mr Brady, it is a great pleasure to see you in your place and to serve under you again.

We come to a narrow and somewhat technical measure, which is none the less important for all that, because it seeks to address one of the few failings in the current regime. We are keen to probe the Government's thinking. As discussed, our merger regime is highly regarded throughout the world. The Office of Fair Trading estimates that the merger regime saved the UK customer £127 million—

Mr Iain Wright (Hartlepool) (Lab): How much?

Chi Onwurah: One hundred and twenty-seven million pounds in 2010-11.

The Minister is also right, however, to say that we must not be complacent and that the merger regime can be improved. The regime might be underused at the moment, given the number of references made to the Competition Commission. To date, 11 market investigation references have been made, for in-depth inquiries, fewer than the four references per year initially anticipated.

Among the criticisms of the current merger regime is that it does not give sufficient weight to the public interest, examples of which we covered in a lively debate this morning—in particular the Kraft takeover of Cadbury. Other criticisms concern the ability of the regulator to prevent mergers going ahead, or to take remedial action when a merger happens—we will discuss that under a future amendment—and the speed of the merger regime. We have discussed the proposal of mandatory time lines, but there are also concerns with regard to information gathering. The Bill sets out to streamline information-gathering powers throughout the different phases. So far, so good—we would support that.

The Bill also repeals section 175 of the Enterprise Act 2002, so that failure to comply with an information request from what will be the Competition and Markets Authority will no longer be a criminal offence. Instead, the CMA will have new, civil powers to fine companies that do not comply with its requests. There is, however, no explanation or justification given for the amounts chosen as a maximum fine: for a fixed amount, an amount not exceeding £30,000; and, for an amount calculated by reference to a daily rate, an amount per day not exceeding £15,000. Can the Minister set out his thinking on the fines? Will the Minister explain the amounts chosen? They do not seem a significant threat or deterrent for a financial services company with an annual turnover in the billions of pounds.

4.15 pm

When the accountancy firm Arthur Andersen was found guilty of obstructing justice, when it destroyed Enron documents when on notice of a federal investigation, it faced five years' probation and a fine of $500,000. That was a criminal rather than a merger investigation, but will the Minister justify the limits in the Bill? I understand that the EU increased its maximum fines in 2004, from €50,000—close to the amount proposed by the Minister—to 1% of the aggregate turnover of the companies concerned, while the daily fine was increased to 5% of the aggregate daily turnover. I am sure the Minister has reviewed all relevant examples from across the world and can now set out his thinking for us. Our proposal of a cap of 10% of revenues is, we agree, at the high end in order to concentrate the mind. I look forward to the Minister's explanation.

The Parliamentary Under-Secretary of State for Business, Innovation and Skills (Norman Lamb): It is again a pleasure to serve under you, Mr Brady. I hope you were not too flustered coming from wherever you have been. It is good to see you.

I will first clarify that amendments 86 and 87 apply only to the markets regime. The shadow Minister referred to mergers, but the information-gathering powers and enforcement will in effect be the same across both mergers and markets. The principles apply equally. I thank hon. Members for their suggested amendments. It is important that the CMA has access to relevant information so that it can do its job properly within new statutory time limits.

Clause 28 and schedule 11, which are related, apply information-gathering powers across the end-to-end markets process. Schedule 11 makes provision for enforcement of those information-gathering powers in market studies and investigations. That mirrors the existing civil enforcement

information-gathering powers in phase 2 of the markets regime. Those powers enable the CMA to impose civil penalties on any person who, without excuse, does not provide information when requested. The powers also make it a criminal offence purposefully to alter, suppress or destroy information, which reflects the relative seriousness of such actions.

The proposed amendments seek to strengthen considerably the enforcement powers. Amendment 86 would provide that if a person had failed to comply with an information request under section 174 of the Enterprise Act 2002, and had been found intentionally to alter, suppress or destroy information, that person could be subject to both a financial penalty and criminal proceedings. Currently, when a penalty has already been imposed, the criminal offence does not apply. The amendment would appear to strengthen the deterrent against non-compliance with information requests, and against the more serious activity of purposefully altering, suppressing or destroying information. However, I question the need to strengthen the enforcement powers, which would potentially increase burdens on business. There is always the question of getting the balance right, particularly as the proposal would extend a criminal offence.

As I noted, the information-gathering and enforcement powers are already available to the Competition Commission. They are not used in all inquiries, but are used as necessary. However, it should be noted that the Competition Commission has never imposed penalties for non-compliance with an information request. The penalties have served as a proportionate and robust deterrent to ensure that parties provide the information needed. The Commission's experience has been that, with the potential to impose the civil penalty in the background, parties have complied with information requests.

Amendment 87 would increase the maximum penalty that could be applied in cases where a person has failed to comply with an information request. The Bill provides that the Secretary of State may, by order, set out the maximum penalties that the CMA can impose when an information request has not been complied with. They are as follows: in the case of a fixed amount, the amount cannot exceed £30,000; in the case of a daily rate, the daily amount cannot exceed £15,000; and in the case of a fixed amount and a daily rate, the fixed amount cannot exceed £30,000 and the daily rate cannot exceed £15,000 per day.

The amendment would increase those limits. In the case of the first two instances, the maximum penalty could be up to 10% of the company's revenues for the previous year if that amount is higher, in a particular case, than the amounts listed in legislation. I think the hon. Lady made reference to the EU increasing its penalty to 1%. The Opposition would go 10 times higher than that level to 10%. I strongly urge Opposition Members to reconsider their amendment.

The penalty of 10% of turnover would be an extremely onerous fine for any business. Penalties of that sort should reflect the amount of harm and detriment that a breach might cause. Hon. Members might wish to note that breaches carrying a fine of 10% of turnover include breaches of antitrust—including the most serious infringements of competition law, such as price fixing—and here it would be imposed for failing to comply with information-gathering powers. The harm that those infringements can cause is potentially very large, and therefore the size of the fine is justified. Conversely, I do not think that the mischief we are seeking to avoid here, which is not complying with an information request in a market investigation, warrants this level of potential penalty. It would be highly disproportionate. Moreover, given that the Competition Commission has never used its existing enforcement powers, because the existing level of penalties operates as an effective deterrent, I do not believe that it is in any way necessary. Where is the mischief that we are seeking to cure?

The Government do not believe in enforcement for the sake of enforcement. It is right that measures are proportionate and used only as appropriate. The amendments tabled by Opposition Members would be disproportionate and place unnecessary burdens on business. I therefore hope that they will see that they have gone a wee bit over the top in this particular case, and will be prepared to withdraw amendments 86 and 87.

Chi Onwurah: I thank the Minister for that response, and for clarifying some points with regard to the purposes of the other fines and the frequency with which they are used. I remain of the view that a maximum fine of £30,000 seems insignificant compared with the costs of doing business for many of the companies and organisations that the CMA will be dealing with, but I accept the Minister's assurances that it has proved an adequate deterrent in the past. I accept entirely that a fine of 10% of revenues may be somewhat disproportionate. On that basis, I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Norman Lamb: I beg to move amendment 29, in schedule 11, page 184, line 42, after '140A(2)', insert '(b)'.

The Chair: With this it will be convenient to discuss Government amendments 30 and 31 to 54.

Norman Lamb: This group of amendments has been tabled to close a loophole that has inadvertently arisen as a result of changes the Bill is making. Under existing legislation, the Secretary of State can intervene at certain points in market inquiries on limited public interest grounds set out in legislation. The policy intention has never been to remove that power, which ensures that issues of particular national significance are considered in a transparent way by Ministers who are accountable to Parliament. However, as a result of a number of changes the Bill is making, an unintentional gap has arisen, which means that in cases where the CMA has not published a market study notice, the Secretary of State would be unable to intervene on public interest grounds when he or she could do so in the current regime. For example, the CMA could have a particular market under review and decide that it had sufficient information to refer that market for a more detailed phase 2 investigation, without having first to undertake a market study. In that case, under the Bill, even if there were relevant public interest considerations—around national security, for example—the Secretary of State would have no power to intervene on those grounds and the CMA would have no power to consider the public interest.

[Norman Lamb]

The amendments simply maintain the status quo and close the loophole so that there remains an opportunity for the Secretary of State to intervene in such cases. They do that by making additional provision for the Secretary of State to intervene on public interest grounds in cases where the CMA has not published a market study notice, but is consulting on making a reference. The CMA is obliged to consult on any reference it proposes to make. That should therefore close the gap I described. Unfortunately, given the complexity of the Enterprise Act 2002, that minor change requires consequential amendments, but they are drafted such that whichever route has been taken for a public interest intervention, the procedures that follow should be the same as far as possible.

Neither the amendments nor the Bill will widen the opportunity for Ministers to intervene in market investigations on public interest grounds. Currently, Ministers can intervene only where there are national security considerations—that is not changing. The Secretary of State can intervene only where the CMA is already looking at a potential competition issue in the market—that is not changing. The Secretary of State must accept the findings of the CMA on any competition issues—that is not changing. The amendments will merely preserve the existing power for Ministers to intervene in limited circumstances of significant national importance.

Amendment 29 agreed to.

Amendment made: 30, page 184, line 46, schedule 11, after '140A(2)', insert '(b)'.—*(Norman Lamb.)*

Schedule 11, as amended, agreed to.

Clause 27

PUBLIC INTEREST INTERVENTIONS IN MARKETS INVESTIGATIONS

Amendments made: 31, in clause 27, page 21, line 24, after 'where', insert '—

(a) '.

Amendment 32, in clause 27, page 21, line 25, at end insert '; or

(b) the CMA has begun the process of consultation under section 169 in respect of a decision of the kind mentioned in subsection (6)(a)(i) of that section.'.

Amendment 33, in clause 27, page 21, line 30, after 'permitted period', insert—

', in a case to which this section applies by virtue of paragraph (a) of subsection (A1),'.

Amendment 34, in clause 27, page 21, line 42, after 'period.' insert—

'(1B) For the purposes of subsection (1), the permitted period, in a case to which this section applies by virtue of paragraph (b) of subsection (A1), is the period beginning with the date on which the CMA begins the process of consultation concerned and ending with—

(a) the acceptance by the CMA of an undertaking under section 154 instead of the making of a reference under section 131 in relation to the matter concerned;

(b) the publication of notice of the fact that the CMA has otherwise decided not to make such a reference in relation to the matter; or

(c) the making of such a reference in relation to the matter.'.

Amendment 35, in clause 27, page 22, line 28, leave out 'In subsection (1A)(a), the' and insert 'In this section, a'.

Amendment 36, in clause 27, page 22, line 33, leave out 'subsection (1A)(a)' and insert 'this section'.

Amendment 37, in clause 27, page 22, line 44, at end insert—

'(1A) This section also applies where—

(a) the CMA has conducted a consultation under section 169 in respect of a decision of the kind mentioned in subsection (6)(a)(i) of that section;

(b) the CMA has decided that it should make an ordinary reference or a cross-market reference in relation to the matter concerned under section 131; and

(c) an intervention notice under section 139(1) is in force in relation to the matter at the time when the CMA makes that decision.'.

Amendment 38, in clause 27, page 23, leave out lines 3 to 6 and insert—

'(b) in a case falling within subsection (1), shall not publish the market study report under section 131B(4) and shall instead, within the period mentioned in section 131B(4), give the report to the Secretary of State; and

(c) in a case falling within subsection (1A), shall give to the Secretary of State a document containing—

(i) its decision and the reasons for its decision; and

(ii) such information as the CMA considers appropriate for facilitating a proper understanding of the reasons for its decision.'.

Amendment 39, in clause 27, page 23, line 13, leave out—

'contained in the market study report concerned'.

Amendment 40, in clause 27, page 23, line 20, leave out 'section 131B' and insert 'this Part'.

Amendment 41, in clause 27, page 23, line 23, leave out—

'contained in the market study report'.

Amendment 42, in clause 27, page 23, line 37, leave out—

'market study report concerned contains the decision of the CMA'

and insert—

'decision of the CMA was'.

Amendment 43, in clause 27, page 23, line 40, leave out—

'report contains the decision of the CMA'

and insert—

'decision of the CMA was'.

Amendment 44, in clause 27, page 23, line 43, at beginning insert—

'In a case falling within subsection (1),'.

Amendment 45, in clause 27, page 23, line 45, at end insert—

'( ) In a case falling within subsection (1A), the Secretary of State shall publish the document given to the Secretary of State by the CMA under subsection (2)(c), at the same time as the Secretary of State makes a reference under this section.'.—*(Norman Lamb.)*

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

Chi Onwurah: Clause 27 refers to public interest interventions in markets investigations. The thrust of the clause is to give the CMA powers to report on public interest issues. Currently, the Secretary of State

has the power to call in market inquiries that affect defined public interests. The Competition Commission reports to the Secretary of State on competition matters, which is its area of expertise, and the Secretary of State considers public interest matters, where he or she, being an elected representative and in touch with his or her constituents, supposedly has the expertise. The Secretary of State must accept the CC's competition ruling, but makes his or her own mind up about possible public interest remedies. The Opposition believe that is entirely right, but of course it was the Labour Government who put those highly regarded rules in place.

The Government's response to the consultation said:

"Opinion on proposals to enable the CMA to provide independent reports to Government on public interest issues"

alongside competition issues "was divided."

4.30 pm

I have not read every response, but I have had a good look through a lot of the ones relating to this particular issue, and I suggest that that statement is slightly disingenuous. Few of the responses welcoming the proposed idea argued much in favour of it, whereas those opposed expressed a number of concerns that have not been addressed by the Government at all.

The idea behind the change seems to be to bring it into line with the merger regime. Given the Secretary of State's experience with the public interest test in the merger regime during the proposed BSkyB takeover, I am surprised that he wants to emulate it with market investigations. However, mergers and market investigations are different. There is a reason why Labour left the public interest test with the Secretary of State when we designed the regime. As one consultation response put it, in a merger case,

"as a matter of necessity, competition and public interest issues need to be considered at the same time and having regard to the same facts. In a market context, the justification for joint consideration of public interest issues and competition issues is much less and the risks greater."

To put it another way, public interest issues are relatively simpler to spot and investigate in a merger investigation than in a market investigation. The public interest considerations in a market investigation are numerous and varied. The Government should not simply copy something that works well in one area of competition law and apply it somewhere else.

The Competition Commission is a highly regarded institution. I never miss an opportunity to remind the Government which party designed the current regime.

Mr Iain Wright: Which one?

Chi Onwurah: I believe it was the Labour Government. The regime is internationally recognised, and our international competitors seek to emulate it. One reason is the unrelenting focus on promoting competition for the benefit of consumers. The Opposition are not convinced that the Competition Commission has the expertise to take public interest decisions into account during market investigations.

We discussed at some length concerns that the new CMA might not be properly resourced or skilled to carry out its functions. The Minister has sought repeatedly to assure us that that will indeed be the case. However, had the proposed arrangements been in place in 2010, it is likely that the Independent Commission on Banking would have been put in place by the CMA. Although I accept that such investigations are relatively rare, would the CMA really have had the same resources to devote, and would it have attracted the same level of public interest?

Will the Minister explain how the CMA will absorb or attract the necessary expertise to deal with all the additional considerations to which the public interest requirements will give rise, or will it outsource all those requirements to new members? What additional costs will be associated if the CMA rather than the Secretary of State takes public interest considerations?

I am sure that the Minister will be able to offer assurances, but even if he can, I wonder whether he should. The CMA will, I hope, retain the OFT and CC focus on competition. We have yet to be convinced that broadening the focus will not compromise the CMA's primary function of promoting competition in the interest of the consumer. Of course, there will be occasions when there will be overriding public interest concerns, but surely that is a matter for the Secretary of State. Has he become so out of touch with the public that he feels the need to give away public interest powers to a regulator—a process-focused competition regulator with no experience of public interest tests in market investigations? That brings me to my next point.

The CMA will be tightly focused on competition. We have established that it will focus on enforcing the well-written UK competition laws, but as the Minister made clear in an earlier debate, public interest is a rather vague term, and introducing it in this area is likely to cloud a process we are trying to streamline. He emphasised in an earlier debate the need to focus on competition and competition law, but is the clause not introducing a new, complex and broad area of public interest? We are told that one of the main objectives of this part of the Bill is to speed up the timetable of a highly regarded system. How will adding this test affect that? If we are trying to speed up the market investigation process, we should ensure that the CMA's sole priority is competition, and let the Secretary of State worry about the public interest.

That point was made forcefully by the CBI in our evidence sessions. Katja Hall said:

"Our concern is about the risk of blurring the responsibility of the new Competition and Markets Authority. What is the benefit of giving the CMA the right to look at wider public interest issues rather than just leaving those with the Secretary of State? That would be our concern: why is that change necessary and is there a risk that it would blur the duties of the CMA?"—[*Official Report, Enterprise and Regulatory Reform Public Bill Committee,* 19 June 2012; c. 7, Q12.]

The CBI made a wider point in its written submission to the Committee when it said that it was clear that the CMA should have

"a clear focus on competition".

There is also concern that introducing the fuzzy public interest test in market investigations could undermine confidence in our competition laws. As the CBI said:

"The UK has one of the most highly regarded competition regimes in the world, being robust and free from political interference. Outcomes based on clearly-drafted competition law are more predictable than subjective tests and underpin business confidence and investment. The CBI supports the objective of eliminating duplication and overlap between the"

[Chi Onwurah]

OFT and the CC

"by establishing the CMA: speedier and more efficient processes will reduce costs to business. However, the Bill proposes that in certain cases the CMA will be able to consider the public interest in addition to effects on competition, which could blur what should be the CMA's clear focus on competition. Business will be concerned that this does not mark a retrograde step and believes public interest tests should remain a decision for the Secretary of State."

The phrase "retrograde step" was echoed by the in-house Competition Law Association. We know from earlier sittings that Government Members seem to have developed a dislike of lawyers, or at least they limit the company they keep with lawyers.

Norman Lamb: We are just concerned about excesses.

Chi Onwurah: There are plenty of dissenting views on the matter. In its evidence on the consultation, British Airways said succinctly:

"Public interest issues should be for Ministers who are accountable to Parliament, rather than the CMA which is intended to be a competition law centre of excellence."

At the very least, the situations in which the CMA should report on public interest issues should be tightly limited. Will the Minister make it clear what the limitations are with regard to the proposals for the CMA to report on the public interest?

A further point is that, without political accountability, businesses may not accept the legitimacy of a CMA public interest market ruling, especially if concerns about resources and expertise are not properly addressed. We all accept the need for a balance between public accountability, and expertise and stability. The worry is that the Government may step too far towards establishing a technocracy, which might be less efficient. Establishing what is and is not in the public interest is basically a policy decision, as I hope the Minister agrees. Should we hand over policy decisions to an unelected body? With a debate on Lords reform raging as we speak, it is rather odd that a Liberal Democrat Minister is proposing to remove wide-ranging policy-making decisions from the Secretary of State.

The final concern that I want the Minister to address is how the changes will work with concurrent regulators that already have public interest powers for market investigations. For example, Ofcom has a duty to report on the fulfilment of the public service remit by public sector broadcasters. Will the CMA have a role in that? I look forward to the Minister's assurances.

As I have previously observed, the Government seem to have an obsession with top-down reorganisations—moving responsibilities around like deckchairs on the Titanic. *[Interruption.]* I look forward to the Minister's response. In this case, we must stop and think about what the Government are for and what their purposes are. How does outsourcing the public interest to the CMA send the right message about the responsibility and accountability of the Government? This Government seem rather like those companies that have been invaded by management consultants telling them to focus on their core purpose. They decide to outsource their call centres to one company, their sales fleet to another, their cleaning to a third and their security to a fourth, so that they can focus on what they do best, which is their core purpose. But if looking after the public interest is not the core purpose of the Government, what is their core purpose? How does the Minister justify removing the public interest power from the Government and putting it in an unelected body?

Norman Lamb: I thank the shadow Minister for that philosophical contribution to our discussion. I thought that talking about an obsession with top-down reorganisations was a wonderful example of the pot calling the kettle black after 13 years spent doing exactly that.

I completely share the hon. Lady's view that the primary function of the CMA is the promotion of competition in the interests of the consumer, but let me deal with some of the issues that she raised. As I said, the CMA will be the principal competition authority, with the primary duty to promote competition for the benefit of consumers. It is important to make the point that public interest cases are extremely rare. To date, there has never been a public interest markets case and, in themselves, the changes are unlikely to lead to any increase. We should remember that in markets the only public interest that is identified is national security. The CMA's focus will therefore remain overwhelmingly on its competition responsibilities, so let us keep this debate in proportion.

If a public interest issue were present in relation to national security, it would make sense to look at it, holistically, as part of one process. The Secretary of State already has powers to intervene in certain market investigations on public interest grounds. That power exists now, and it will not be changed by the clause, which simply gives the Secretary of State the option to ask the CMA to examine public interest issues alongside competition ones in a phase 2 market investigation.

4.45 pm

On the hon. Lady's point about the Independent Commission on Banking, there is no reason why that could not be established in the future any more than was the case in the past. That has a number of benefits, not least a more consistent approach to public interest matters across the mergers and markets regime. It will enable a much more holistic consideration of competition and public interest issues, resulting in better informed and more comprehensive recommendations on such cases.

Although such cases are extremely rare, they are, by their nature, of particular significance to the United Kingdom. It is therefore vital that the Secretary of State has access to the best possible expert advice when taking decisions on such cases. For example, as Malcolm Nicholson highlighted in his evidence to the Committee,

"the skill set of an independent regulator of the sort that we have should mean that it is quite well placed to consider public interest issues alongside competition issues. I could certainly conceive of a competition inquiry looking at competition in wholesale and retail energy markets while having regard to security-of-supply considerations…I think there is scope here for doing something quite useful."—[*Official Report, Enterprise and Regulatory Reform Public Bill Committee,* 21 June 2012; c. 111, Q252.]

The introduction of the powers would also mean that there is an option to use the CMA, the premier competition authority, as an alternative to a stand-alone independent inquiry, such as the Independent Commission on Banking

that we have already debated. That is an alternative option, not a replacement of that way forward. It should streamline the processes as well as provide a more straightforward route for fixing competition problems, as measures can be implemented by the CMA itself where necessary, which would not be possible for a stand-alone inquiry group.

I want to clear up a couple of issues that I think have caused confusion. First, the powers will not make it any easier for Ministers to intervene on public interest grounds in the first place. The Secretary of State can make a public interest intervention only where the CMA has already begun a market study, or where it is consulting on making a reference, which is where the CMA already suspects that there may be a competition issue. Currently, the Secretary of State can intervene only where they are issues of national security. We are not changing that, so we do not agree that the changes will lead to any increase in public interest cases.

Secondly, it will not be for the CMA to decide where the balance is between competition and public interest issues. That will remain, as it should be a decision for Ministers, who are accountable to Parliament; that directly addresses the hon. Lady's point. Some people have said that that risks politicising the CMA—I think there was a hint of that in the shadow Minister's contribution—but I disagree. The changes will not affect the independence of the CMA. As I have said, the Secretary of State can make a public interest intervention only where the CMA already suspects that there may be a competition issue. The Secretary of State must accept the findings of the CMA on competition issues. Its independence is absolutely guaranteed. If the CMA finds no competition issue, the matter cannot be referred for further examination. Those principles are not changing either.

Others have said that the CMA lacks the expertise to advise on public interest issues, or that the issues dilute its focus on competition. Again, with respect, I disagree. The Competition Commission is already able to consider public interest issues in the merger regime. The CMA will be the principal competition authority and will have a primary duty to promote competition both within and outside the UK for the benefit of consumers. In cases where there are both competition and public interest aspects, it makes sense to consider the issues in the round, particularly what the most appropriate remedies might be, taking all the issues into account.

The CMA, like the Competition Commission, will have panel members with a wide range of expertise and experience in different industries and markets. If the CMA does not have enough in-depth expertise on a specific public interest matter in question, the clause makes provision for the appointment of a public interest expert or experts, who would work alongside the CMA teams. Whether they work as part of a CMA investigation or independently, it seems that the costs will be the same. The fact that they are part of a holistic exercise, as is intended by the clause, does not cost any more. The changes seek to bring the public interest markets regime into line with the public interest mergers regime, and provide holistic expert recommendations to the Secretary of State on those important cases.

Chi Onwurah: I thank the Minister for his comments. I am glad and relieved to find that we agree on some of the underlying philosophical points and principles, although I am still uncertain about what the Government are trying to achieve. On the one hand he says that such occurrences would be rare, that only one public interest—national security—has been identified, and that he expects such cases to arise infrequently. In that case, however, is it really worth while sending a message about public interest not being with the Secretary of State, and making those changes? On the other hand, he says that it is important that the CMA has the ability to consider the public interest in the round. I found the Minister's example of national security particularly worrying. Some would argue that the Government's first responsibility is to ensure the security of its citizens.

Norman Lamb: I want to make the point that it is not inconsistent, because although such cases are likely to be rare, when they occur they may be quite significant. It therefore makes sense to look at such issues in the round as part of a recommendation to the Secretary of State, who retains political responsibility.

Chi Onwurah: I thank the Minister for that clarification. If I have understood him correctly, the Government argue that such cases will be rare, but that they could be important, but if that is the case, it is also important that the elected Government and the Secretary of State are accountable and take the necessary decisions. In the case of national security, I would consider it even more important for such decisions to be taken by the Government of the day.

Norman Lamb: I want to reiterate the fact that recommendation to the Secretary of the State will take place following consideration of the matter. It remains the Secretary of State's decision and that is not changing in any way.

Chi Onwurah: I thank the Minister for that clarification. The CMA will investigate the public interest but it remains the decision of the Secretary of State. Why is the CMA being asked to investigate the public interest around something like national security, simply because it has expertise in competition? I do not believe that that is a consistent approach. We are keen to support the Government in ensuring that the CMA is highly skilled and has some of the best competition minds in the world, as well as the expertise necessary to deal with, consider and assess competition issues, but we believe that the skills concerning issues of public interest should be found within the Government or perhaps the civil service.

The example of energy provided by the Minister is particularly interesting. Energy is a complex market in competition terms, and Ofgem has many experts, both in technical matters and on energy competition. Should they consider issues of national security? Surely, national security issues to do with the energy markets—security of supply—should be a matter for the Government of the day, as they control the regulation of those markets and relevant policy issues. I am not reassured by the Minister's description, distinguishing between the public interest as the CMA will assess it and the public interest, which is the responsibility of all hon. Members as parliamentarians and for which we should be held accountable.

The final point that the Minister made about rolling over a successful approach for mergers to markets does not recognise the essential difference between the two.

[Chi Onwurah]

The CMA responds to a merger, which is a time-limited affair in comparison with the review of markets. I urge him to consider whether it is appropriate to make such a change for the limited benefits that he has described. If not, we must put the issue to the vote.

Norman Lamb: I am grateful to the shadow Minister for her comments. She talks about the distinction between mergers and markets, but the fact is that the Competition and Markets Authority would be dealing with and looking at public interest issues to do with mergers, which she suggested would be inappropriate. If it can do that in respect of mergers, it seems not to be too great a leap for it to consider competition issues in an investigation into markets.

Her primary concern seemed to be political accountability for public interest issues. However, I have sought to reassure her that political accountability remains, exactly as it is now, with the Secretary of State after receiving a recommendation. It makes sense for competition issues relating to or impacting on public interest to be considered holistically, rather than as two separate processes. That is an option, not an obligation, but in many cases it may make sense for it to be done holistically.

The Secretary of State has to accept the recommendation of the CMA, so far as competition is concerned, but the responsibility for political accountability for public interest remains with the Secretary of State. I hope that, after my responding clearly to the hon. Lady's legitimate concerns, she will see that the proper safeguard is in place to ensure that the matters that she has raised will not arise.

Chi Onwurah: I thank the Minister for his further clarification. I am reassured that he does not think that the clause will result in a change in accountability or a movement of responsibility for the public interest away from the Government. However, I do not agree with his assessment of the effect of the clause. Although the decision-making power remains with the Secretary of State, if the responsibility for assessing the public interest case of markets, which as I have said are different from mergers, is to rest with the Competition and Markets Authority we should put the issue and principle of public interest to the Committee in a vote.

Question put, That the clause, as amended, stand part of the Bill.

The Committee divided: Ayes 12, Noes 7.

Division No. 22]

AYES

Bingham, Andrew	Lamb, Norman
Bridgen, Andrew	Morris, Anne Marie
Burt, Lorely	Mowat, David
Carmichael, Neil	Ollerenshaw, Eric
Evans, Graham	Simpson, David
Johnson, Joseph	Wright, Jeremy

NOES

Anderson, Mr David	Onwurah, Chi
Danczuk, Simon	Ruane, Chris
Davies, Geraint	
Murray, Ian	Wright, Mr Iain

Question accordingly agreed to.

Clause 27, as amended, ordered to stand part of the Bill.

Schedule 10

MARKETS: PUBLIC INTEREST INTERVENTIONS

Amendments made: 46, in schedule 10, page 172, line 8, after 'notice', insert—

'or (as the case may be) the consultation under section 169'.

Amendment 47, in schedule 10, page 172, line 10, after 'notice', insert—

'or (as the case may be) on which the process of consultation began'.

Amendment 48, in schedule 10, page 172, line 38, after 140A(2)' insert '(b)'.

Amendment 49, in schedule 10, page 172, line 41, at end insert—

'(4BA) Subsection (4C) also applies in a case where—

(a) an intervention notice ceases to be in force in accordance with subsection (4A); and

(b) the CMA has, before the time at which the notice ceases to be in force—

(i) decided that it should make an ordinary reference or a cross-market reference under section 131 in relation to the matter concerned; and

(ii) given a document containing its decision, the reasons for it and such information as the CMA considers appropriate for facilitating a proper understanding of the reasons for its decision to the Secretary of State in accordance with section 140A(2)(c).'.

Amendment 50, in schedule 10, page 172, line 47, leave out 'section 131B' and insert 'this Part'.

Amendment 51, in schedule 10, page 178, line 22, leave out 'section 131B' and insert 'this Part'.

Amendment 52, in schedule 10, page 179, line 33, leave out 'section 131B' and insert 'this Part'.

Amendment 53, in schedule 10, page 179, line 38, leave out 'section 131B' and insert 'this Part'.

Amendment 54, in schedule 10, page 181, line 9, at end insert—

'( ) In subsection (7), omit "or (2)(d)".'.—*(Norman Lamb.)*

Schedule 10, as amended, agreed to.

Clause 29

INTERIM MEASURES: PRE-EMPTIVE ACTION: MARKETS

Chi Onwurah: I beg to move amendment 57, in clause 29, page 28, line 11, at end insert—

'(2BA) When subsection (2B) is applied, the relevant authority must publish a cost benefit assessment for the measures applied.'.

I sense that we may be regaining our full strength and although it was a disappointment to see that the numbers have been reduced in the last vote, the Government majority is not increasing. So I will take that. It was seven-ten, as opposed to nine-twelve.

Norman Lamb: It was twelve-seven. That is an increase.

Chi Onwurah: Okay. I misheard. In the hope that the Government Members had been reduced, I heard what I wanted to hear.

We have made substantial progress, and again we come to what is a rather technical amendment but a rather important one. As previously discussed, the UK merger regime is highly regarded throughout the world. I may have already said that the mergers regime is estimated to save the UK consumer £127 million in 2010-11.

Ian Murray (Edinburgh South) (Lab): How much?

Chi Onwurah: One hundred and twenty-seven million pounds. However, the Minister was right to say that we must not be complacent and that the regime can be improved.

One of the key criticisms of the current system is that the regulator has no ability to prevent mergers from going ahead or to take remedial action when a merger happens. The Bill attempts to address that by ensuring that the CMA's powers to impose interim measures include the power to require parties to take steps to reverse pre-emptive action taken, or to reverse the effects of such action following a market investigation reference being made. The intent is to prevent parties from taking pre-emptive action that may impede implementation and measures required by the CMA following an investigation.

We support measures that strengthen the mergers regime and we recognise the concern here. Currently during an antitrust investigation, if evidence comes to light of practices that pose serious irreparable damage to a person or that threaten the public interest, the authorities have powers to impose interim measures. Generally, these are directions that a business has to comply with immediately. We can imagine, for example, an abuse that the authority identifies as predatory pricing, when a competitor lowers prices to drive their competition out of business. One might think that lower prices were good for consumers, but generally the strategy of the company concerned is to raise them once everybody else has gone bust. Without any competition, consumers are forced to pay much higher prices.

Those who have been critical of the Leader of the Opposition's condemnation of predatory capitalism might want to reflect that current competition law recognises that a small minority of companies engage in predatory behaviour. In the case of predatory pricing, by the time the authorities have finished their investigation it may be too late: competitors would have exited the market.

To date, the power has hardly been used, which is one reason why the Government have agreed with the OFT's argument to amend the threshold for interim measures from serious irreparable damage to significant damage. The OFT argued that the current wording prevents the OFT or a sector regulator from making an interim measures direction in cases where the victim of the alleged infringements is likely to suffer significant harm, but there is no current threat of their exiting the market or going out of business.

We support the measures, but we wish to make sure that they are transparent. Our amendment simply requires that the relevant authority must publish a cost-benefit assessment for the interim measures applied to ensure that the measures are not disproportionate and are, at the very least, transparent.

Norman Lamb: I thank Opposition Members for their amendment. First, it is important to note that the Competition Commission and the OFT interpret the existing legislation as already enabling them to reverse pre-emptive actions. The powers are not new. The Bill simply makes it explicit that the powers can be used in all phases of the CMA's work. Clause 29 makes it clear that the CMA's powers to impose interim measures during a market investigation include the power to reverse any pre-emptive action taken by the parties or to reverse the effects of such action. The current legislation is not particularly clear on the issue although, as I have said, the existing bodies interpret the legislation as allowing them to act. We would all agree that clarity and certainty is important both for business and for competition authorities.

Where pre-emptive actions are taken, they can undermine the implementation of remedies following a market investigation. They might include any steps taken to bind an operating unit more closely to a parent company, which would make it harder to separate it if required at the end of the investigation. For example, it might include actions taken by a large organisation to integrate the IT structures or finance functions of its smaller companies, making it harder to sell off any of those companies. Where competition authorities have difficulty in remedying competition problems that they find, it can have detrimental effects on consumers.

The clause ensures the CMA has access to the widest possible toolkit to assist it in addressing competition problems that may be identified during a market investigation. In turn, this will help the CMA choose remedies that are proportionate and appropriate. The amendment imposes a requirement on the CMA to publish a cost-benefit assessment whenever the CMA adopts interim measures to reverse a pre-emptive action during a market investigation.

While I agree with the principle that the CMA should think carefully before it issues an order to reverse a pre-emptive action and in general seek to employ its resources in a cost-effective manner—that is absolutely right—this additional requirement on the CMA is not appropriate. It would be practically difficult for the CMA to publish an accurate cost-benefit assessment at the time of issuing an order to reverse pre-emptive action. At the stage of the market investigation where this measure would be issued, the CMA is unlikely to know the precise detail of the problems that it is trying to solve. Therefore, it would be difficult to assess what harm might be caused to consumers by any problems, which the CMA would need to know to determine the benefits of reversing the pre-emptive action.

David Mowat (Warrington South) (Con): I am surprised by the amendment, which would make it more difficult to reverse a pre-emptive action, which puts something back to how it would have been. Is it not the case that if this amendment was agreed the cost-benefit analysis, which by its definition is somewhat judgmental, could be challenged and therefore stop the pre-emptive action being taken? The amendment would reduce competition and I think that it is wrong on this occasion.

Norman Lamb: That was a fair and reasonable intervention, making a good point. The amendment would also slow the process down. If it has to go through a cost-benefit assessment, it is challengeable through judicial review. If a cost-benefit assessment has to be done before action is taken—that action might be necessary to protect the position and stop the parties doing something that is more difficult to undo—it will be, as my hon. Friend says, more difficult to exercise this important power.

Imposing such a requirement would add an additional and potentially time-consuming burden to the CMA, which needs to be able to act quickly to reverse pre-emptive action in such cases. If the CMA decides that it wants to issue interim measures, it would want to do so as soon as possible at the start of the process, to avoid a situation being created that would make it difficult to resolve any competition problems. The Opposition may reflect that imposing an additional hurdle by making it more difficult to use this important power would not be sensible.

Geraint Davies (Swansea West) (Lab/Co-op): Does the Minister have any plans to put right the previous injustices, where the big supermarkets have predatorily priced out bakers, fishmongers and others and then lifted their prices? Any potential entrant will fear that Tesco or whoever it is will come and do it again. Is there any strategy to right the previous wrongs?

Norman Lamb: It is asking a bit much to reverse things that have happened in the past. We want to get a framework in place that deals effectively with problems that arise in the future to ensure that—we can learn lessons from where the regime was not effective enough in the past—it will be more effective in the future for genuine competition issues.

The requirement would also be costly for the CMA by requiring it to divert resources away from the primary task in hand: the market investigation itself. One of the Government's key aims is to speed up the market investigation process. The amendment goes against that aim by requiring the CMA to allocate resources to the cost-benefit assessment in specific cases. It is worth noting that when the Competition Commission makes its conclusions from a market investigation, including deciding what remedies should be imposed, it undertakes an assessment to ensure the reasonableness and proportionality of the remedy at the end of the process. As part of the process, the Competition Commission assesses the costs and benefits of the remedies. There is more certainty at that point so it can do a proper and sensible exercise, whereas, at the earlier stage, when it is considering interim measures, it is making assumptions, which are difficult to make at that point in time.

5.15 pm

I would expect the CMA to continue to act in the way in which the Competition Commission has done in the past and up until now. Therefore, there is no need to impose an additional requirement on the CMA, as this amendment proposes.

Geraint Davies: I just wanted to know whether the Minister thought that it was reasonable for big multiple groups such as Sainsbury's and Tesco to move into small high street shops, use their economies of scale and actually push out convenience stores across the land. Is that a competitive thing, and are the Government going to do anything about it, or are they just going to sit back and let them take over everything?

Norman Lamb: I suspect that Mr Brady might intervene if I start to develop any further debate on that issue. *[Interruption.]* I am conscious that in all of our communities, such issues arise and cause considerable concern, but they have very little, if anything, to do with this particular amendment. Despite the encouragement of the hon. Member for Swansea West, we should remain focused and disciplined in the way in which we debate these clauses and amendments. I will resist the temptation to go any further and I encourage the shadow Minister to withdraw the amendment.

Chi Onwurah: I thank the Minister for his clarifications. There is a balance to be found between speed and due process. I was somewhat surprised to hear the Minister apparently agree with the hon. Member for Warrington South that the effect of this amendment would be to reduce competition while, at the same time, also agreeing that public bodies, such as the CMA, must give detailed and quantitative consideration to the impact of the measures that they impose. The effect of this amendment would be to require the CMA to publish the internal assessment which, in my expectation and, I believe, the Minister's expectation, it would be doing in any case. If it did not do such an internal assessment, it might find itself subject to judicial review. The imposition of any disproportionate measure by a public body could be a cause for concern.

David Mowat: Let us suppose that I was a major multinational and I came in and started to merge with a smaller company in a way that gave the competition authorities an issue. Here I am doing this merger and I am putting in all the IT systems and all the rest of it in such a way that, if it carries on, I cannot go back to where I was. The CMA says, "Stop, and put it back as it was." How should the CMA make a judgment of the cost of putting the IT systems back as they were? It is reasonable for it to say in this case that the multinational is out of order, and that the pre-emptive stuff needs to happen. I am really surprised to find that the Opposition are arguing against that process and putting hurdles in the way of it.

Chi Onwurah: I have made it clear that I am arguing in favour of having interim measures and transparency. If the CMA has no idea of the costs, even in order of magnitude in terms of assessing what the costs and benefits are, then it is not in a good position to impose those measures. It must have some idea of the costs involved. The second point is that publishing a cost-benefit analysis does not mean that it should not go ahead if the costs outweigh the benefits. It just shows that there has been significant and detailed consideration of the costs and benefits associated with the impact. I would have thought that Government Members would be clamouring to ensure that any public body assessed the impact it would have on businesses and the business environment as well as on the consumer.

Given the Minister's assurances that the CMA will consider in detail the impact of its measures without the need for the amendment, I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 29 ordered to stand part of the Bill.

Clauses 31 to 33 ordered to stand part of the Bill.

Schedule 13 agreed to.

Clauses 34 to 38 ordered to stand part of the Bill.

Clause 39

CARTEL OFFENCE

Chi Onwurah: I beg to move amendment 89, in clause 39, page 35, line 6, at end insert—

'(2A) In subsection (1), after "at least two undertakings (A and B)", insert—

"with the intention of substantially reducing competition.".'.

We have made tremendous progress, Mr Brady, and have come to the last amendment we have tabled to the competition and markets part of the Bill.

Simon Danczuk (Rochdale) (Lab): Shame!

Chi Onwurah: I hear expressions of "Shame!" I know we will be sorry to leave this part behind, but I am happy to leave it by looking at the interesting and important issue of antitrust. Antitrust is one of the most difficult and complex parts of the competition regime. The notion of what antitrust is can be difficult to pin down. It includes enforcing legal prohibitions against anticompetitive business agreements, including cartels, and the abuse of dominant market position. When in Government, we put in place a specific criminal cartel offence against individuals who engage in certain forms of price fixing and other types of what can be termed hardcore cartel activity.

Antitrust laws are necessary because history shows that a small minority of companies will always think it easier to make money by fixing the market rather than by winning customers in open competition. As Richard Whish and David Bailey put it in their textbook on competition law:

"The mysteries of some aspects of competition policy should never be allowed to obscure the most simple fact of all: that competitors are meant to compete with one another for the business of their customers, and not to co-operate with one another to distort the process of competition."

The Labour party believes in a co-operative approach. We were founded on co-operative principles, and many Labour MPs are also Co-operative Members, which I applaud. However, co-operation is a dangerous thing in competition. As Adam Smith stated in "The Wealth of Nations" in 1776:

"People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."

Cartels were recognised and prohibited in Byzantium, and the constitution of Zeno in 483 BC punished the price fixing of clothes, fishes, sea urchins and other goods, which was punished with perpetual exile, usually to Britain. We have spoken of the importance of competition and choice. At the heart of the cartel offence is the desire to limit the choice of consumers. Clause 39 amends the criminal cartel offence established under section 188 of the Enterprise Act 2002, which was passed by the last Labour Government.

Norman Lamb: Just to prove it is so ineffective.

Chi Onwurah: Despite the sedentary comments from the Minister, one legal guide to the 2002 Act, written by Tim Frazer, described the measure as one of the Act's most radical innovations. It is certainly considered one of the most controversial elements of the legislation. In the White Paper preceding the 2002 Act, the then Labour Government identified two possible approaches to establishing the offence. The first was to make it unlawful for a person to participate in a hardcore cartel that had been found to breach the prohibition of such an agreement in competition law. The disadvantage with that approach was that if there had not been a prior determination of an infringement, a court would first have to find that the agreement breached one of them. That could require a lay jury with no competition expertise to consider potentially complex economic arguments. For that reason, the Government at that time proposed that the offence should be defined as a dishonest participation in an agreement.

Frazer gives some background on the perceived advantages to the dishonesty element of the offence, saying:

"The cartel offence is much broader than the classic price-fixing cartel, incorporating a broad range of anti-competitive arrangements such as limiting supply or production, market-sharing, customer sharing and bid-rigging arrangements. Some of these activities are regarded as hard core or per se anti-competitive in other jurisdictions. For example, horizontal price-fixing and bid-rigging arrangements are universally excoriated as being contrary to the requirements of free and competitive markets."

Geraint Davies: Bob Diamond.

Chi Onwurah: Exactly. Frazer continues:

"There are, however, occasions on which customer-sharing and market-sharing arrangements are either not significantly anti-competitive or even may be efficiency enhancing. The requirement on the prosecution to show that the defendant was dishonest means that it is insufficient merely to demonstrate that the defendant agreed to make the arrangements…The breadth of the offence will therefore afford a defence that the parties did not realise what they were doing was dishonest and contrary to the law."

In the Enterprise Act 2002, the then Government decided to include a dishonesty bar to the offence having taken place on the basis that it was possible for people to meet—contrary to what Adam Smith proposed—to make agreements that were not necessarily part of a hardcore cartel. In the Bill, the Government propose to remove the dishonesty element of the offence, which has proved one of the most contentious elements of the Bill's competition proposals.

5.30 pm

The clause also specifies the circumstances in which an offence would not be committed. It lowers the bar by removing dishonesty, but provides a big get-out clause by saying that if customers are given the relevant information about the arrangements before they make a purchase, an offence is not committed.

The Library briefing paper notes politely:

"The Explanatory Notes to the Bill do not give details as to the Government's thinking on how exactly these publication requirements should be crafted, though some details were given in the response document".

Will the Minister give some details of his thinking? The concern is that there has not been much thinking on the issue.

The decision to remove the dishonesty bar has had a mixed reaction. In his evidence to the Committee, Simon Pritchard said:

"My conclusion is that I am in favour of removing dishonesty, because I see the logic, but a lot more work should be done soon to hammer out what you replace it with. Taking the provisions of the Bill and the publication requirements lock, stock and barrel raises a lot of practical issues. I am very sympathetic to the concerns, which are mainstream anti-trust concerns, about how that would work when the rubber hits the road…The reality is a little more complicated when it comes to jury trials, dishonesty and the subjective element of people knowing that what they did was dishonest. On that element, people are very good at rationalising that what they are doing is perhaps not strictly above board or something that they would shout from the rooftops, but nor is it that bad either."—[*Official Report, Enterprise and Regulatory Reform Public Bill Committee,* 21 June 2012; c. 93, Q208.]

Mr Pritchard's point was that the dishonesty offence is subjective and can be difficult to prove, but that something else is needed in its place.

Katja Hall, chief policy officer of the CBI, agreed:

"On this whole issue around the cartel offence and removing dishonesty, I think we understand the intention behind the proposal. We accept that at the moment it is a high hurdle and therefore difficult to prove dishonesty. Our concern is about getting the change, but in a way that is practical for businesses. Our concern is that if you just remove dishonesty and leave it as it is proposed, you will catch a lot of legitimate business activity, such as joint partnerships. Given that the sanctions are so severe"—

it is a criminal offence—

"that is a worry for us and for our members. We would be interested in looking for solutions so that you can get a system that works and can deal appropriately with cartel offences".—[*Official Report, Enterprise and Regulatory Reform Public Bill Committee,* 19 June 2012; c. 7, Q13.]

She suggests using the phrase "intent to deceive".

The problem with the Government's proposals is that although they are lowering the bar to zero so that any group of competitors coming together could be considered cartel activity, their get-out-of-jail-free card—published activities will not be criminalised—is not practical. It simply takes us back to the days of registered cartels as they existed in the 1970s, which was neither successful nor effective.

We agree with the Government that the dishonesty bar is too high. Given the many concerns expressed, it seems that we must replace it with something. Our amendments propose to insert, after "at least two undertakings", the phrase

"with the intention of substantially reducing competition".

That would have the effect of retaining a test, but not one requiring a judgment as subjective as dishonesty. It gets to the heart of the offence: although it is the objective of all competitive companies to reduce competition, hopefully by making the best products, reducing competition through agreement with competitors is and should be the target of legislation.

On the registration of cartel activities, as I have said, we appear to be going back to the Restrictive Trade Practices Act 1956, under which agreements had to be registered with the Registrar of Restrictive Trading Agreements. That function was transferred to the Director General of Fair Trading in 1973. We leave it to the Government to come up with proposals that are more practical, but we have sought to help by suggesting that the company website could be a fitting location, in some cases, to publish competitive agreements. The sites are generally easily searchable, and if all such agreements were located under the heading, "Commercial Arrangements", they would be easy to find for all concerned. That should help ensure that cartel-like activities of undertakings can be easily identified by their customers.

Cartels are like dangerous dogs. They need to be treated with great care and the owners should be held accountable for them. The legislation, however, must not attack the entire dog population. Britain depends on its businesses and their legitimate activities must be supported.

Norman Lamb: I appreciate the shadow Minister's offer to be helpful. We have raced through so many clauses and, despite Opposition Members' protestations, it is clear that they support much of what the Government are doing through the Bill, and I welcome that.

Turning to amendment 89, the shadow Minister referred to the measure's design back in the 2002 Act being described as a radical innovation. It may have been, but the truth is that it has not worked. It has been difficult to pursue prosecutions and he recognises that point, which again, I welcome.

I appreciate why hon. Members may feel that a new mental element needs to be incorporated in the cartel offence to replace "dishonesty", which is what the amendment seeks to do, but I do not think that the change is necessary. The introduction of the amendment's proposed new requirement would make prosecutions more difficult and, in some cases, impossible, even where the individuals concerned should clearly be prosecuted because of the conduct that they have indulged in.

It is worth bearing it in mind that even without dishonesty, there are already clear mental elements to the offence, which the prosecution would have to prove beyond a reasonable doubt. Under the offence, the individual must agree, first of all, with one or more others, that two or more undertakings will engage in one or more of the prohibited cartel activities. Therefore, it is a state of mind that has to be proved, so the prosecution would need to prove to a criminal standard that there was a meeting of minds for a common purpose. Furthermore, for a conviction, it would need to be proved that the individual intended that the arrangements would operate to fix prices; limit or prevent supply or production; divide supply or customers between undertakings; or, be bid-rigging arrangements. A range of different activities fall under the offence, as the shadow Minister mentioned.

It is also worth bearing it in mind that "dishonesty" was not chiefly incorporated in the offence to attach clear moral blame to the conduct, but it was recognised that dishonesty might be a marker to juries of the

offence's serious nature and it might encourage judges to impose deterrent penalties. Reference was instead made to dishonesty not because it was seen to be intimately connected with hardcore cartel conduct, which is inherently damaging in itself, but as a mechanism to ensure certain effects. These were, first, to ensure that benign agreements that would benefit from exemption under the antitrust prohibitions were not criminalised; and secondly, to ensure that the offence could not be classified as "national competition law" for the purposes of EU law. If it were so classified, EU law would most likely operate to prevent individuals engaged in cartels investigated under the civil antitrust prohibition by the European Union from being prosecuted in the UK, which would be wholly counter-productive.

The third reason was to try to make the offence easier to prosecute and reduce the likelihood that juries would have to consider economic evidence. It was felt that dishonesty provided a relatively straightforward test, commonly applied by juries in a host of other offences, for example, under the theft acts.

We believe that those objectives have now been overtaken, or can better be achieved in other ways. Benign agreements can be taken out by the disclosure or publication mechanisms in the Bill. The Court of Appeal decided in the BA case that the cartel offence was not national competition law and their arguments did not depend on dishonesty, so unless the Court of Appeal's ruling were to be overturned by a higher court, the requirement is no longer needed to support that case. As for putting economic evidence before juries, ironically, the existence of the dishonesty requirement has actually opened the way for such evidence to go before juries. The judge trying the BA case decided such evidence was potentially relevant to the question of whether the behaviour had been dishonest.

I have dwelt on those points because they are relevant to amendment 89. In several ways, the amendment would reintroduce or make worse problems that the drafters of the Enterprise Act sought to avoid, not always successfully, and which we believe clause 39 will overcome.

The amendment would require the prosecution to prove, in addition to other requirements, that the defendant intended that the arrangements would substantially reduce competition—that is what it says. That would introduce a significant impediment to prosecutions. Leaving aside the difficulties in assessing another's intentions, competition analysis is a complex area over which highly qualified experts can disagree, especially when it comes to such matters as how substantial an effect on competition an arrangement might be expected to have. One could end up with a whole load of expert evidence being given on that particular point. Putting in place a requirement to prove an intention substantially to impair competition would inevitably open the way to the jury being faced with evaluating complex, and no doubt conflicting, expert economic evidence, clearly significantly increasing the cost to both parties—to the prosecution and to the defence—of the whole exercise. Not unnaturally, they would be inclined to give the defendant the benefit of the doubt, and, of course, the case has to be proved beyond reasonable doubt.

Worse, the amendment would substantially increase the chances that the cartel offence would be classified as "national competition law" under EU Regulation 1/2003. An offence that required proof that a substantial effect on competition was intended would look rather like competition law. If it were brought within the scope of EU law, it would have the effect that a prosecution could not be brought. Let me just explain that. As I have explained, the consequences of that would be that the CMA would most likely be unable to prosecute any individuals where the European Commission was dealing with a case against the undertakings under the regulation. Of course, it tends to be the biggest cartel cases that are being investigated at European level.

This is more than a theoretical concern. The only persons to have been successfully prosecuted under the current offence were involved in a cartel involving marine hose. The civil antitrust case against the undertakings concerned was dealt with by the European Commission. Were the cartel offence to be regarded as national competition law, the OFT would most likely have been prevented from bringing those prosecutions. As I said, it is the only successful case brought. This was a case in which the defendants pleaded guilty and received substantial prison sentences. If accepted, the amendment would significantly increase the chances that the CMA would not be allowed to bring such a case. I am sure that the shadow Minister recognises that that would be a perverse consequence of the amendment. In the light of what I have said, I hope that she will withdraw the amendment.

5.45 pm

Chi Onwurah: I thank the Minister for his clarifications. We are not saying that our proposed wording is the best possible wording for replacing the dishonesty bar, but we are suggesting that it is necessary to add something to his proposals. How would he answer the concerns of the CBI and of the in-house Competition Law Association that the clause, as it is currently drafted, is too wide?

May I also ask the Minister to address the concerns regarding the practicality of the registration of cartel activities? He did not cover that in his speech, but I think that we are debating amendment 59 together with amendment 89.

The Chair: For the guidance of the hon. Lady and of the Committee, we are taking amendments 89 and 59 separately.

Chi Onwurah: In that case, may I therefore ask the Minister to address the concerns of the CBI, British Airways and other bodies? I urge him to consider how the offence might be better worded. It is absolutely right that we wish to ensure that all hard-core cartel activities are caught within the offence, but we do not wish to criminalise legitimate business activities.

Norman Lamb: I am grateful to the shadow Minister for her comments. I understand that she is trying to be constructive and to get to the right conclusion. We have consulted on such issues, and the Government consider that this option provides the best solution to the difficult questions arising from the operation of the cartel offence. However, we are of course always prepared to consider reasoned arguments for incrementally improving the provisions in the Bill. In this case, although I do not

[Norman Lamb]

accept her arguments for the specific change, I will reflect on her points before Report, because we want to ensure that we get the provision absolutely right.

Chi Onwurah: I thank the Minister for saying that he will reflect on the amendment, which means that I have finally achieved that singular honour of having an amendment reflected on. On that basis, I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Chi Onwurah: I beg to move amendment 59, in clause 39, page 35, line 35, at end insert—

'(2A) All "relevant information" must be made available on the undertakings website under the title "commercial arrangements".'.

Thank you for your guidance and understanding, Mr Brady. I will not try the patience of the Committee by repeating some of my earlier comments on the practicality of the registration requirements that will be imposed, and which the amendment is designed to address. The arrangements have been called impractical by many of those who have responded. We helpfully suggest making use of commercial activities sections on websites. We recognise that the amendment relates to the previous amendment, in that information about cartel-like activities needs to be published because the bar has been changed on the dishonesty offence.

Norman Lamb: I thank the shadow Minister for tabling the amendment, but I question whether the additional requirement placed upon undertakings is necessary to achieve the desired publicity for cartel-type arrangements. It would of course be possible for the Secretary of State to specify publication on the undertaking's website in the manner laid down under subsection (1) of new section 188A. In that case, the additional requirement would be wholly nugatory.

In practice, there may be difficulties in specifying electronic publication, which also apply to the requirement in amendment 59. The smallest companies may not have a website—of course, that is changing, but it will be the case for some businesses, although unusual. Even the smallest companies may agree to fix prices; for example, there have been cases of small shops in a particular locality agreeing to abide by common prices. There is also the question of which website is to make the relevant information available. Far from having no websites, big international businesses may have several. In the case of overseas companies, the main website may not be in the UK or even in English.

I do not suggest that those are major problems or that it would be impossible to overcome them, but we do not need to face such difficulties in the Bill. It already clearly provides for customers—those who would be affected by the arrangements—to be informed of relevant information about the arrangements, or for that information to be published in the prescribed manner, for example, when informing customers would not be reasonably practicable or where the arrangements do not envisage that there will be customers, because they would wholly prevent supply. It is not at all clear what advantage there would be in requiring the information to made available on a website in all cases. I therefore hope that the hon. Lady will withdraw amendment 85.

The Chair: It is amendment 59.

Norman Lamb: Thank you, Mr Brady.

Chi Onwurah: I thank the Minister for the points he makes. I recognise that publication on a website would not be without challenges, which would need to be overcome. However, given the criticism of the Government's proposals and their vagueness, a broader solution is required. That said, this amendment relates to amendment 89 in that if the cartel offence was accurately and more narrowly defined, how one published the information about cartel-like activities would not be of such great importance. Having won the agreement of the Minister, for which I am grateful, to take the proposal away for consideration, I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 39 ordered to stand part of the Bill.

Clauses 40 to 43 ordered to stand part of the Bill.

Schedule 14 agreed to.

Clauses 44 to 47 ordered to stand part of the Bill.

Schedule 15

MINOR AND CONSEQUENTIAL AMENDMENTS: PART 4

Amendment made: 55, in schedule 15, page 203, line 29, leave out paragraph (a) and insert—

(a) omit "to the Competition Commission" (in each place where it occurs), and'.—*(Norman Lamb.)*

Schedule 15, as amended, agreed to.

Clause 48 ordered to stand part of the Bill.

Ordered, That further consideration be now adjourned.—*(Jeremy Wright.)*

5.57 pm

Adjourned till Thursday 12 July at Nine o'clock.