HOUSE OF LORDS

Communications and Digital Committee

Corrected oral evidence: Digital Markets, Competition and Consumers Bill

Tuesday 23 May 2023

1.50 pm

Watch the meeting

Members present: Baroness Stowell of Beeston (The Chair); Lord Foster of Bath; Lord Hall of Birkenhead; Baroness Harding of Winscombe; Baroness Healy of Primrose Hill; Lord Kamall; The Lord Bishop of Leeds; Baroness Wheatcroft; Lord Young of Norwood Green.

Evidence Session No. 1 Heard in Public Questions 1 - 9

Witnesses

I: Corie Wright, Vice-President and Global Head of Public Policy, Epic Games, a member of the Coalition for App Fairness; Dirk Auer, Director of Competition Policy, International Center for Law & Economics (ICLE); Mark Scott, Chief Technology Correspondent, Politico.

USE OF THE TRANSCRIPT

This is a corrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.

Examination of witnesses

Corie Wright, Dirk Auer and Mark Scott.

Q1 **The Chair:** This is the Communications and Digital Select Committee and we are starting today a series of hearings, which we describe as legislative scrutiny sessions, about the Digital Markets, Competition and Consumers Bill. I will describe today's hearing as a scene setter, trying to understand the background to the Bill, the problems it seeks to address and the main perspectives—the competing perspectives, perhaps—on the Bill.

For the benefit of people who are tuning in and are interested in our work and how we do it, I should explain that we will be publishing today what we describe as a call for evidence and inviting written submissions on this topic by 12 June. We will have a short break next week for recess and because we have some other business to conclude, but we will reconvene on this topic from 20 June for three weeks, with a range of witnesses from big tech, small businesses, trade and consumer bodies, and, of course, the CMA and Ministers. We will conclude with the committee's collective views being put to government and published before the Summer Recess.

Before I invite today's witnesses to introduce themselves, it might help to say a little bit about the committee's interest in the digital markets Bill and what the Bill is about. If I can quote the Government and their definition, they describe digital markets as "markets where businesses develop and apply new technologies for the benefit of other businesses and consumers, or create brand new products and services using digital capabilities, connecting groups of users in new and innovative ways". Clearly, this is a very important part of the economy. It accounts for lots of jobs and make a huge contribution to the economy. Although there is a wide range of businesses that are involved in digital markets, it is characterised and dominated by a small number of large firms.

Digital regulation has long interested this committee. It has been a strong advocate for the new digital markets unit in the CMA and we welcome the legislation. We are mostly concerned in the sessions we are holding with Parts 1 and 2 of the Bill, which I think will probably be the most contentious. However, as I say, what we want to do today and in the later sessions is to understand the strengths and weaknesses or areas of concern in the Bill and to make sure that we understand everybody's perspective on it.

With that introduction, I will say to our witnesses and anybody else who is in the Room at the moment that we are currently transmitting live on the internet. This session will be recorded, both a video recording and a written transcript, both of which will be available on our website in due course.

Without further ado, let me invite our witnesses to introduce themselves and the organisations that they are here to represent. I will start with Mr Auer.

Dirk Auer: I am the director of policy for a think tank called the International Center for Law & Economics. A little bit about my background: I have been working on competition issues in law firms, as an academic and now in my capacity as director of a think tank for almost 15 years now. I did a PhD on competition law. I teach competition law in Belgium at one university and in France at another university. I also teach the economics of competition law in Belgium. That gives you a little sense of my background.

Corie Wright: I am the vice-president for public policy for Epic Games. Epic is a company that creates immersive virtual worlds. Some of our popular games include "Fortnite", "Rocket League", and "Fall Guys", which is produced by Mediatonic studios right here in London. We are also a member of an organisation called the Coalition for App Fairness, which comprises over 70 app developers, including ones here in the UK, that are pushing for better policies to create fairer, open and competitive mobile markets for app developers.

Mark Scott: I am Politico's chief tech correspondent. I have covered pretty much every single piece of digital legislation coming from London, the EU, the US, Canada, Australia, South Korea and Japan in the last decade. That is not just competition, that is privacy, online safety, online content, competition, and so on. Before I go further, as I am a journalist with lots of knowledge in this space, I am speaking in a personal capacity so this does not affect my own journalistic output, just to make that very clear.

The Chair: We are very grateful to all three of you for giving up your time this afternoon and for being with us. I will move straight to Baroness Harding.

Q2 **Baroness Harding of Winscombe:** First, I should just say that I have to leave early so apologies in advance. It will not be anything that you have said.

If we could start with an overtly scene-setting question, could each of you set out what problem you think the new digital competition legislation is trying to solve? Let us start with Mr Scott. In your view, what is it trying to solve?

Mark Scott: I will try to keep this brief. If you look at where we are currently in the online digital economy, you can see maybe five to eight large companies, primarily American, that have come to dominate spaces, from cloud computing to social networking to e-commerce, and that is just how it is. We can talk about the benefits or the negative effects of that, but it is just because of scale, scope and network effect that we are now in a position where five to eight companies run a lot of the services that we are currently all using.

The issue has been that the competition authorities both here in the UK and elsewhere have failed to keep up, either because they missed the importance of, say, Facebook buying WhatsApp, for reasons we will get into, or because these markets are moving so quickly that inherently regulators cannot keep up. What authorities here in the UK, the EU, even in DC, have come to terms with is that the current system, for the good and for the bad, is not keeping up with the problems or potential pitfalls of this small number of companies having quite a dominant position. I am not saying that is a negative position, it is just a dominant position.

Therefore, what has to happen now is that the competition landscape needs to evolve in some way to keep up with this issue, the idea being that we need to move from looking backwards at both acquisitions and areas of growth to taking a more, as they would say—and I am not a lawyer—ex ante approach of getting ahead of things by saying, "Okay, fine, where do we think the market will go in five years and how do we then intervene ahead of time to effect meaningful change so that a Google or an Amazon or a [another company] does not come to materially affect and dominate an area to the detriment of someone else? That is a very short overview. I hope that that covers it.

Baroness Harding of Winscombe: Beautifully succinct, thank you. Ms Wright, what would you add?

Corie Wright: I would hone in a little bit on where some of the core problems are occurring in the digital ecosystem and specifically with respect to openness and competition in the mobile app ecosystem. The importance of this market cannot be understated. The health of the digital mobile ecosystem is integral to commerce, to economic growth, to innovation and to the dissemination of ideas, and right now it is broken. It is broken in ways that are raising prices for consumers and limiting their choices. It is broken in ways that will also negatively impact the development of the internet going forward.

The source of this breakage is because two companies, Apple and Google, control the vast majority of mobile devices that consumers rely on to access the internet. They can determine what software gets installed on those phones and on what terms. What this means for consumers is a limited choice and prices that go up consistent with that limited choice. What it means for developers, of which Epic is one, is that you are forced to disseminate your mobile application through the Google Play store or Apple's App Store, depending on whether your customer has an iPhone or an Android device. You have to go through their app stores and if you are an application that offers your customer the ability to make digital purchases in their app—this includes products, services and subscriptions to media and entertainment services—you are subject to even more onerous terms and fees. You have to use Apple's in-app payment processing system. You have to use Google's in-app payment processing system. You have to basically give a cut of up to 30% of each of those purchases to Apple and Google.

What you are faced with as a developer, because not submitting to these terms means risking having your product not on a mobile device, is that you have to decide whether to pass that cost to the consumer or eat it yourself and diminish the investment that you are making in your own business and its growth. There is no competitive alternative to go to.

You can see the immediate impact of this dominance. The future impact is also important because consumers are increasingly relying on mobile devices as their primary or their only connection to the internet. If Google and Apple are able to circumscribe that internet experience based on the software and the businesses that are able to get on that phone, it has enormous implications for the success of those businesses and those entrepreneurs and the information that consumers can access.

We are very hopeful that action in this space here in the UK and elsewhere will have a salutary effect on opening this marketplace so that you have competition for consumers and you have a marketplace that is determined by market forces and consumer demand and not just the unilateral decisions of two gatekeepers.

Baroness Harding of Winscombe: Can I just ask you what is probably a very dumb question? What you have just described sounds like quite a classic competition problem. Could you explain to us why we need primary legislation when we already have a competition authority? Why is the CMA not able to address this now?

Corie Wright: I think it touches on something that Mark brought up. It is increasingly difficult and regulators around the world are recognising that ex ante regulation may be far more effective and far more efficient than ad hoc litigation. Particularly in spaces where regulators and policymakers have recognised that there is a persistent, widespread problem that impacts an entire market and consumers, waiting for something bad to happen and then hoping that somebody has the resources and wherewithal to sue and go through the many years and hundreds of millions of dollars to litigate it is not practical. For most small developers, for which I think this legislation would be most beneficial, that litigation is not an option for them. They will not have the resources to see it through. On the consumer side in particular, I think that it is entirely appropriate for policymakers to step in and help set the tone for the type of economic system and the type of growth that they want to see in their jurisdiction.

I would not suggest that competition law is not incredibly appropriate in some of these circumstances, but I do think that it has a tendency to lag behind the trends and the ability for regulators to get ahead of it would have an enormous beneficial impact.

Mark Scott: The Dutch competition authority has taken a case in relation to Apple on this issue and it has taken a long time to get to the point where Apple has said, basically, "We are not going to implement what you asked us to do". If you want to effect change now, there is a benefit to doing it before a problem occurs rather than waiting until it happens to then step in.

Baroness Harding of Winscombe: Mr Auer, you have been very patient. What problem do you think that the Bill is trying to solve?

Dirk Auer: I think that the Bill rests on two really important assumptions. The first one is that big tech firms are as big and as successful as they are today because of anticompetitive conduct—not because their products are better, not because they have somehow outcompeted their rivals, but because of anticompetitive behaviour. That is questionable. If you ask the man on the street what the best search engine out there is, I am pretty sure that everyone will say Google. If you ask what the best smartphone experience is, you can guess at the answers.

The second assumption underlying the Bill—and, again, I think that it is a questionable one—is that the reason competition authorities have failed to bring sufficient cases against the big tech firms is not because the merits of the cases were bad but because somehow it is too difficult to bring a case under competition law, so valid cases are being rejected by courts, so to speak. We spoke about Epic Games. There has been a very big court case in the United States. Epic Games has mostly lost in that case and the ruling is extremely detailed. It goes into detail as to why essentially there is no less restrictive alternative to Apple’s current policy. Any other alternative would mean that users faced much less secure devices and a user experience that would be inferior to what they have now.

Essentially, in deciding whether the DMCC Bill is good or bad, we need to look at these assumptions and question whether you take my position or you take Corie’s position. I think that those are the main questions.

The Chair: We will move on. I am sure that we will pick up some of this in the further questions that we want to explore.

Q3 **Lord Foster of Bath:** Thank you for coming. My question, too, is very open-ended and scene-setting. What are your thoughts on whether the Bill is likely to deliver on its objectives? You might want to comment even on its objectives. In particular, what do you see as the key strengths and weaknesses of it? We have heard—you have already been discussing it—that in an attempt to address dominance there is a problem about growth. You might have views about, for instance, the appeals procedure, whether or not judicial review, or judicial review plus, is a good approach. You may, too, have thoughts about the regulator but I would ask you to leave those because we will ask specific questions about the regulator itself a bit later on. Corie, would you like to start off with your key thoughts on whether or not it will deal with what it should?

Corie Wright: By and large, we are extremely supportive of this legislation. Our primary concern is that it be delayed or watered down through the process. We are very keen to see it move forward in its current incarnation, or stronger.

One thing that I would like to discuss as part of what the Bill does—I will not necessarily speak about the role of the regulator but rather that it sets up an authority granted to an expert agency. On the appropriateness of the CMA to be able to conduct an investigation into these ecosystems, it produced a comprehensive report last June that, in fact, found the opposite of what Dirk just explained, which is that a lot of the security arguments that are advanced in favour of keeping closed ecosystems are largely pretextual and there are ways to achieve them without having the closed system and anticompetitive conduct that I outlined in the beginning. I will not dwell on litigation because the case that has been referenced is ongoing and there are other pieces of litigation that are still at the very beginning.

That is important because it is not clear to me that a non-expert court is in the best position to assess the impact on the overall ecosystem and delve into the security aspects and how that will impact consumers. I do think that there is a place for an expert agency to evaluate those facts, and in this case I think that the DMCC does a good job of delegating authority to that expert agency, including checks and balances on that agency to make sure that it does not overstep its remit or draw arbitrary or disproportionate conclusions.

Lord Foster of Bath: I am grateful for that, although I think that we can pick that up a bit later on in the session. Before I move to Dirk, you did say you would be very supportive of the legislation as it stands or if it were stronger. Is this the area of strength that you are talking about or are there some other areas where you think that it could be stronger?

Corie Wright: Extra protections to ensure that the CMA can build on the extensive report that it already submitted last year and to ensure that it is not delayed by having to revisit conclusions that are already well undergirded and pertinent to this conversation are important. I think that that is permitted in the Bill but I would want to make sure that it was able to hit the ground running, as it were, and to ensure that it can move with speed. We would be very concerned about any efforts through the passage of the Bill to slow down the CMA or to inject process for the sake of delay rather than the sake of the quality of the work of the agency.

Lord Foster of Bath: Dirk, strengths and weaknesses?

Dirk Auer: I think that reasonable people can disagree about the merits of digital markets regulation, but certain aspects of the Bill are beyond that reasonable disagreement. As things stand, the Bill is designed in a way that maximises the CMA's ability to bring infringement decisions. That is not the same thing as maximising outcomes for consumers. More decisions do not necessarily mean better outcomes for consumers.

The biggest area that is problematic is the very limited judicial review of decisions, and it is judicial review in this case. There is a sense when you read the Bill that procedural safeguards and limits are seen as a bug, not a feature, when in fact it is precisely these things that ensure that regulators adopt decisions that ultimately benefit consumers. There are other issues—

Lord Foster of Bath: Sticking with that for a second, the counter to the argument you are making, and we have heard it already, is that in the UK other regulators also operate under the JR appeal system.

Dirk Auer: Yes, but here is a way of putting it. You have two different models of regulation. One would be something like competition law, and you give the regulator an extremely broad scope of what it can do. When you give that broad scope, what you want to do is to at least have some kind of counterweight, which could be a stronger full merits review. Alternatively, you could have a Bill that is extremely tailored and has only certain very limited provisions. Then maybe you would be fine with judicial review, saying, "The Bill is extremely clear. There is no common law of this Bill that needs to be fleshed out and we will go with judicial review".

The problem with the DMCC Bill is that it is extremely broad in its scope, and I can go into why the provisions are extremely vague for the moment and could cover all sorts of business conduct, including legitimate business conduct. You have that breadth on the one hand, but on the other hand you do not have the compensating high level of judicial review that you would want to have when you entrust a regulator with such power. Corie says that it is good and the CMA is a very technically proficient regulator. I do not think that the experience of competition enforcement in the UK, the US or Europe suggests that even really technically proficient enforcers should be given that level of discretion.

Lord Foster of Bath: As a headline now to say yes or no—because, as I said, we can pick this up later on—your argument, as I understand it, is that you are saying that if we were to more tightly curtail the remit of the regulator, then JR is acceptable. But if there is the potential for regulatory creep, then we need to look at a different appeal mechanism.

Dirk Auer: I think that the broader the remit, the tougher we should make it.

Lord Foster of Bath: I am sure that my colleagues will want to pick that up a bit later.

Mark Scott: We need to be very clear that this whole concept of ex ante regulation is brand new in this space and it will not be perfect because regulation, particularly in the digital space, never is. To be very clear, there will be some places where it will make mistakes because that is how it works.

What I like about it compared with, say, the European Union approach is the idea of a bespoke rulebook for individual companies with strategic market status. The reason why I like that is that, again, I am not a technical expert here but I know that Amazon is very different from Apple. Therefore, trying to create a one-size-fits-all approach to what gatekeepers or SMS companies should do will inherently be difficult to enforce because you will have to squeeze everyone into the same definition. I think that the way of looking at this is as long as we define you as an SMS we will then go, "Okay, Alphabet, this is for you". That I think is a very smart way of doing it and, frankly, I think one that the Europeans would have liked to have done if they could go back and do it.

On the weakness, I think that international co-operation is key. That is not just a UK issue. We have seen with the recent Microsoft-Activision case that the FTC and the CMA play a massive role. You would add the Chinese to that in some cases. How that co-operation works to effect meaningful change in global markets is critical to how this works. Does the current Bill bring that out? It does not really say much about it, to be honest. Therefore, it is about the CMA's existing relationship—

Lord Foster of Bath: How could it?

Mark Scott: It could not, so then you are reliant on the CMA, which we will get to, to do that.

Lord Foster of Bath: Within the actual framing of the legislation, this is not really an issue that could be picked up but it is an issue for the regulator to address.

Mark Scott: In the practical nature of how this stuff works, you have three to four regulators worldwide deciding these global deals, at least on the deal side.

The Chair: We have a couple of supplementary questions, first from Lord Kamall and then we will go to the Lord Bishop.

Lord Kamall: Mark, you said that you thought the Europeans would like to do something similar to SMS, if I have that correct. If you look at EU competition law, there is this concept of significant market power, is there not? Why could it not use significant market power? I was interested in your statement there that the Europeans would have liked to have done this, but then I think, "Hold on a minute, they could do this, they have SMP".

Mark Scott: Again, I will not speak for the Commission on this, but my understanding was that the way the CMA could do it is it could create specific rulebooks per company. The way the DMA is set up is that that is not the case. They have to meet these prescribed elements and, therefore, then they cannot do this and they can do that. By contrast, my understanding of the UK approach is that there is more flexibility to define it by company rather than say, "These are the dos and don'ts for everybody, as long as you are a gatekeeper". My concern with that approach is that it is very static, whereas as much as there is some downsides and maybe some discriminatory behaviour between what one company can do and what another company can do in the UK, there is more flexibility for me, which is useful when you are looking to maybe stop anticompetitive behaviour on companies that are very different. Not all tech companies are the same.

Corie Wright: May I offer a supplement that I think goes to the broader question of whether the CMA has too much discretion or not under this Bill? My understanding is similar to Mark's, that some of the discretion is the ability for the CMA to tailor to specific companies and avoid a bad scenario where you have round peg/square hole regulation applied to a company.

It is that coupled with judicial review and the fact that the CMA will be subject to transparent public consultations, answerable to a board, answerable to Parliament, that allays some of my concerns that the CMA and the DMU that is empowered underneath it will behave like a posse of regulatory cowboys who will exact rough justice on companies. I think that there will be oversight on what it does, but part of the flexibility is not to give it carte blanche but to enable it to tailor regulation to fit the company and the harm rather than just level everyone off with the same rules.

Lord Kamall: I will come back to this later in question 4.

Dirk Auer: "Tailored" seems to be a little bit of a misnomer here. When I think of tailored regulation, I think of regulation where ex ante we say, "These will be the rules" and that is what Parliament will vote on. What is happening here is not exactly that. It is saying that we will put in place a procedure whereby the CMA will, in effect, come up with rules and, yes, those rules that it will come up with will be tailored to companies, but it is not like the Bill itself is tailored in its scope. It will be extremely broad and probably much broader at the end of the day than even the European DMA.

Lord Foster of Bath: Sorry, is it not the case that in the SMS designation it can apply to one of the many activities of a company and not to them all? That is the tailoring, is it not?

Dirk Auer: The problem is that there are almost no thresholds. There is basically one quantifiable threshold in the Bill, but for the rest you depend on pretty subjective terms. Again, if you do not have judicial review to flesh out a common law that describes what those terms mean, you are, in effect, giving the regulator, if not carte blanche, very broad powers.

Q4 **The Lord Bishop of Leeds:** I am not technically competent in some of these things, but perhaps we can take a step back to the democratic impact of some of what you have been talking about; we will go back to technicalities. Market dominance means power. It means money. You have spoken about the impact on customers, but in terms of what I might call convenience—the apps that invite us to, for financial benefit, get stuff cheaper than we would have done—what about the democratic impact, particularly your views on the way the Bill is framed in how it gives power to the Secretary of State to change regulation, which means that it is aside from parliamentary scrutiny? One could argue that demands for restoration of parliamentary sovereignty have given way to Executive sovereignty. I wonder whether you could apply that in this case.

The Chair: Who are you aiming that at?

The Lord Bishop of Leeds: All three, but could we start with Corie, then Dirk and then Mark?

Corie Wright: I am happy to, although I am not an expert on parliamentary separation of powers in the UK Government. What I largely view this Bill as doing is empowering the DMU to open up the mobile app marketplace. We have spoken about it primarily in economic terms, but the power that can be exacted by deciding what software and applications get on a phone is very closely related to what innovators and what ideas can get on a phone and are accessible to customers. If that is your primary or your sole access to the internet, the ability of gatekeepers to shut that down can have tremendous impacts on speech, on the dissemination of ideas, on democratic discourse. From my perspective, thinking about it from democratic values, openness and the dissemination of ideas, there is a salutary benefit of the Bill moving forward.

Dirk Auer: I think that the Bill is a kind of, to use popular speak, "go big or go home": let us try to give as much power as we can to the CMA; let us try to give as much power as we can to the Secretary of State. You see the Secretary of State being able to add new types of infringements. You see that in the DMA. I can understand the desire to have regulation that is flexible, but I do not think that that should come at the expense of democratic oversight over who is writing the law and who is enforcing the law. I think that is a real risk.

The Lord Bishop of Leeds: Before we come to you, Mark, someone said earlier that the regulators cannot keep up with the speed of the market. Does this imply that under this regime you would simply get incremental, almost subjective, fiddling with the legislation by the Secretary of State rather than a coherent, strategic approach?

Dirk Auer: I think you are right to point out that there is a trade-off. When you have rules that become very specified to a given firm, to a given market, there is a much larger probability that they will be outdated or irrelevant quickly. That is probably why laws such as tort and civil liability have been around for so long because they are very simple principles that have been applied across the whole economy. I think that that is a risk here and, again, I understand why the legislator would want to add some flexibility, but it seems like a poor way to offset a Bill that could be outdated pretty quickly.

Mark Scott: I am a bit of a strange beast because I am a political tech reporter so I know the tech stuff but I also work for Politico and, therefore, I know the ins and outs of the politics. This does not go just for the competition Bill, it goes for the variety of digitally focused Bills that have come through; the OSB is another one.

It is a massive concern for me. There does need to be more and greater parliamentary oversight and scrutiny. The idea of the Secretary of State in whatever format being able to even fiddle at the edges for political reasons when—let us take the Online Safety Bill as an example. If something egregious happens on social media, it is very easy for a politician to step in and say, "We need to be acting and doing something". You could apply that similarly to a competition issue, although it is probably less emotive. I am concerned about that carte blanche or greater ability for the Government rather than Parliament to step in. Does that mean it will happen? I defer to you, who know this place better than I do, but the ability for the Government to fiddle is a problem.

The Chair: Before I move to Lord Hall, this seems like a good moment for a quick ad break from me to say that the topic that has just been raised is an incredibly important one and one that is very important to this Select Committee and we have raised on several occasions. In the context of the Online Safety Bill, this afternoon we have a group of amendments that are about the Secretary of State's powers and the distribution of power between big tech, Parliament and the Executive. I invite colleagues, if they are available, to make sure to be in the Chamber for that. That is something that in earlier sessions that we had on this topic a year or so ago was very much prevalent then, so it is something that we are very mindful of and will certainly want to explore in further detail as we look at this legislation.

Q5 **Lord Hall of Birkenhead:** As the Chair said at the very beginning, this is an exploratory session to make sure that we are getting our brains around the correct issues. Mark, you have already begun to answer what the divergences are between what we are doing in the UK, potentially, and other jurisdictions. I wonder whether you could help us to look at the way others are seeking to regulate here, their approaches and what the differences are, the pluses and the minuses. Does having regulatory divergence mean handing more power to the five or more big tech companies? Dirk, I will start with you.

Dirk Auer: It is a big question. The best way to understand what is happening today around the globe is to think of two opposite models of regulation. One would be something like competition and antitrust law, and on the other end we have digital markets regulations. As I suggested earlier, there is a dissatisfaction with how competition law is working. People see many of the things that I think of as a feature of competition law as a bug. Basically, enforcers in a given case need to show consumer harm. There is dissatisfaction with that and there have been many answers put forward. The one that is already enacted is the European DMA. How does it compare to European competition law? It does away with all the effect requirements of competition law that you have in Europe and the United States. It tries to make the enforcer's life easier. Whether or not that will ultimately benefit consumers is an open question.

The DMCC is relatively similar to the DMA. They both have this process where you designate firms that have some level of market power. As in the DMA, there is very little way for firms to show a court that they do not have this market power. Both Bills are pretty similar in that respect. Where they diverge is that the DMA has a list of obligations and they are much more precise than the ones in the DMCC—dos and don'ts. Those dos and don'ts apply to all tech firms that are gatekeepers under the DMA. The Commission may say afterwards, "These obligations are more relevant to you or not as relevant to you". The DMCC tries to do that a little bit differently, I think, by saying that instead of having this one-size-fits-all approach, we will have a tailored approach where the CMA will be able to design the conduct that each designated firm will have to comply with.

I hate to say this, but I fear that the DMCC has taken a feature from competition law, which is that it is very broad, and done away with the effects requirements but has not taken the precise wording of the European DMA. I do not want to say that we have the worst of both worlds but there is definitely a risk of mixing loose regulation with not just weak judicial review but standards that are not easily quantifiable or measurable and that companies will not easily be able to appeal a decision on. I think that is a problem.

I will give you one example and then I will let others speak. When the DMCC talks about significant market power, that seems like something that needs to be subject to a merits review. It is an inherently empirical question. I can say that something has significant market power but it does not make it the case. I have gone on a bit, but I think that there is a mix of two things that should not go together.

Lord Hall of Birkenhead: Before I go on to Corie, does it matter that, as it were, the EU is in there first? Does that put us at a disadvantage because we are behind in terms of regulation?

Dirk Auer: I do not think so. I think that the jurisdictions that will do best are the ones that strike an appropriate balance between the interests of platforms on the one hand and edge providers on the other. Those are jurisdictions where, when there is an appropriate balance, there will be more investment from platforms, consumers will have better products, and that will attract investment from foreign firms. Being first I do not think has any impact on that.

Lord Hall of Birkenhead: Corie, the same question to you: what can we learn from other jurisdictions and the way they are handling these issues?

Corie Wright: My overall opinion is that as long as there is the same end goal in mind it is appropriate for individual jurisdictions to decide which vehicle is the best for the local terrain. Certainly, both Mark and Dirk have outlined the differences in the European approach and in the UK approach. There is also a Bill that is being advanced in the United States that focuses on app stores specifically and puts in prescriptive and proscriptive behaviours to what those app stores can do.

Ultimately, though, we are talking about Parliament potentially giving the DMU broad powers. I am less concerned about whether or not you will get to the end goal in time because your regulator has already done a substantial amount of homework and essentially has submitted a report that gives a road map to where it hopes to bring its remedies and put them in place. Those are very aligned with the remedies that we see out of the DMA and with the specific remedies that are being proposed in the US Open App Markets Act, which is to open up app stores to enable consumers to install their own software, to ensure that there are competing payment options, and to ensure that application developers can communicate with their consumers. I am slightly less fussed about which road you take there as long as the ultimate result is a holistic solution.

I do agree with Dirk that the most successful jurisdictions will be those that balance all those interests. Where we may diverge is that I do not think that those interests are currently balanced in most jurisdictions. It is true that the DMA has been passed. It has not yet been implemented, so it is still an open question as to which jurisdiction will reach the end goal first, regardless of who passed their Bill first.

Lord Hall of Birkenhead: Do you think that the size of the market of each jurisdiction is an important factor, then, globally? You seem to be suggesting not.

Corie Wright: It is important. I am not sure that it is determinative. The markets that have regulators and due process, which are generally respected in this space as being advanced thinkers on technology and in the broader ecosystem, will be the ones that set the pace for everyone else.

Lord Hall of Birkenhead: Thank you. That was very clear. Mark, is there anything that you would like to add to what you have said already?

Mark Scott: I have a very cynical approach to this. I look at where regulation and legislation will be passed and, therefore—sorry, Corie—I discount Washington in particular because there are some domestic political issues. The American Innovation and Choice Online Act is a good start, but it will not get done at least before the next presidential election.

Not to get too hipster here, but I would look at Germany and its digitisation Act and the powers it has given its Federal Cartel Office as very akin to what the CMA will get in terms of defining specific companies as dominant and, therefore, what they can and cannot do. It has already made that definition for Apple, Amazon, Google, Alphabet and Meta, so to a degree it is six or 12 months ahead of the UK in that process. Every jurisdiction is different but I think that is more akin to what the UK is looking to do, versus the DMA.

To your question on whether being first matters, I do not think it does, but I do think that the market size matters. As much as the Commission might like to talk about the Brussels effect, I think that is overplayed in this space. To Corie's point—the fact that the CMA is globally respected—it is very unlikely that in the digital markets the UK will be knocked off its pre-eminent space within Europe in the next five years. It will not happen just because of the network effect, so that is not a problem to think about.

I sound like a corporate lobbyist here, but I do worry about regulatory certainty. Leaving aside what Brad Smith said after the Microsoft-Activision ruling, I do think that there is a question when it comes to creating those bespoke rulebooks for the CMA of what that looks like and making sure that that is a transparent process. Even if the companies disagree with how they are defined, there is at least an openness to that process so everyone agrees with the outcome rather than it being some sort of black box.

Q6 **Lord Hall of Birkenhead:** Could I ask you a very specific editorial or journalistic question? It is to do with the Australian model and the mandatory news media bargaining code, which some here—and I have heard from them—have said would be an answer to the problem that we all know about, which is in local media but also in national media, getting value back to pay for proper journalism and its continuation. Are there sufficient powers in what is proposed here for that to be an outcome in the UK if government or the CMA or others were so minded?

Mark Scott: I feel like I am about to be a turkey voting for Christmas and I am definitely speaking in a personal capacity here. I do not think that those publishers' arguments stand much merit. I do not. I look at the shifts in the online advertising world over the last 10 years and the move away from analogue classifieds to Google. As much as there have been some issues around money for publishers and linked taxes and stuff, I think that is overplayed from an industry that is looking for its cut of the pie.

When it comes to the importance of what Australia did, I look at some of the lobbying activities done by certain news organisations around that and as a citizen rather than as a journalist I go, "Well, hang on, who is this actually serving?" As much as I am a journalist and I want to be paid and I think that original content should be paid, I do question the role that publishers have played in all markets on the competition front in the last decade. We should all take every argument from the tech side and from the publishing side with a pinch of salt.

Lord Hall of Birkenhead: If you were a local journalist you might disagree with that.

Mark Scott: Yes, of course.

Lord Hall of Birkenhead: None the less, Corie, could I ask for your views on this? Do you have a view on it?

Corie Wright: I am not close enough to the bargaining code out of Australia to offer you an intelligent opinion here.

Dirk Auer: I completely agree with Mark. It is not clear. It is arguable that there has been a decline of local journalism. If there has been, it is even less clear that it is because of big tech platforms. It is not clear who is benefiting whom—are big tech platforms benefiting journalists or vice versa?—so I do not know why the payments would go from big tech to local journalism. At the end of the day, if you really want to distribute money to local journalism, the right way to do that is via general funding and the state, not by arbitrarily picking a group of firms that are potentially harming local journalism and saying, "You pay for local journalism". I do not think that that is the right way to do it.

Lord Hall of Birkenhead: We could carry on this debate. Thank you very much for your answers.

Q7 **Lord Kamall:** I had better start by declaring a few interests. I was formerly on the TechUK Brexit advisory board. I was on the Coadec advisory board and I have just been asked to go back. I also wrote about EU competition policy and comms years ago. That is not to show off, it is just to ask the questions now.

If you look at the practicalities of implementing this legislation as it is—we know that it is likely to be amended and so on—do you think the measures as it stands are practical and does the CMA have the right capabilities to deliver on this? A slight variation of that, though, is unintended consequences. I think back to the EU case against Microsoft years ago on the operating system, very heavily led by companies such as Google, interestingly enough, against Microsoft, and all that happened was that it had to create a new operating system without the media player and it sold hundreds of copies compared to millions.

It is all very well saying that we do the right thing and we have a ruling on competition, but what are the unintended consequences? However, the main question is the practical problems of implementing it as it is. Maybe we should start from a more positive view, Corie. You seem to be in favour of this, so maybe you will say that there are not that many practical problems and this is great, and that is fine either way.

Corie Wright: To the CMA's capacity and capability, what I will mostly take my guidance from is the report that it put out a year ago. I consider it among the gold standard in thinking about this issue, identifying the problems and identifying solutions.

With respect to whether that can be practically implemented and your reference to the Microsoft case of long ago, I think about the efforts globally on that case, which essentially was an accusation that Microsoft was using its absolute control over devices to control what software people could install on those devices. Where that ultimately netted out was a much more open system that was able to give rise to companies such as Google to come in and offer competitive alternatives and become incredibly popular and successful businesses. Even if we call into question some of the very specific remedies, the collective of what occurred after that case has set the groundwork for tremendous innovation and openness that I think characterises the best parts of the internet today. I am hopeful that with an informed and fact-driven regulator we can craft solutions that will give us that next boost in the internet economy that we enjoyed at the dawn of the internet.

Lord Kamall: Thank you. That is a very positive view. Mark?

Mark Scott: I will try to be positive, too.

Lord Kamall: You do not have to be.

Mark Scott: No, I was just kidding. I think that we all need to be very aware that we do not know the outcome. This is a new way of looking at regulation. We also have to be aware that going back to 2014, if this rulebook was in place would Facebook at the time be able to buy WhatsApp for $19 billion in stock, because the merger threshold had not been met?

Lord Kamall: Or could Google have bought YouTube?

Mark Scott: Exactly, or the litany of other deals that did not work out. There is an open question there. I am not saying one is better than another, but it is something that we need to be conscious of. Therefore, we are reliant on some very smart people at the CMA to figure that out. Are they going to get it right? Maybe, but we just do not know. No one knows. As much as I think that it is a good use of regulatory time to try to get ahead of the markets and figure out, okay, we think that X will be big so we will figure out how this works in the most pro-consumer way, we also need to be conscious that they will get it wrong. That is okay, but it needs to be fixed. To Dirk's point about judicial review, there needs to be a way of quickly correcting that when things go wrong or we get stuck in bad markets for consumers.

Lord Kamall: Before I come to Dirk, I think that it is an interesting point about getting it wrong. Is getting it wrong a bad thing? What I mean by that is: is it part of the discovery process, in your opinion?

Mark Scott: Yes, but how do I speak not unfavourably of the CMA or other regulators? They do not like to say that they are wrong, so it is building that into the process: "Okay, fine, we have looked at this deal or we have looked at this expansion and we have said no. Two years down the pike, we have realised we were wrong. Let us roll that back". History tells me that is not something that regulators like doing. Therefore, building that into the process is very important.

Lord Kamall: Nor do politicians, by the way, but there we are.

Mark Scott: Well, that is true.

Dirk Auer: I will just add that courts provide the feedback loop for regulators to know whether they are right or wrong.

To your point on unintended consequences, or how the Bill will play out, I think that it depends on how you view the current situation. Again, it is what I started with: do we think that big tech firms are big and successful because their products are extremely good or is it because of anticompetitive behaviour? Depending on which of those two things it is, I think that the effects of the Bill will be very different.

I would offer a couple of illustrations that are along the lines of the ones you suggested. You look at the history of competition law in digital markets and it seems that there is this repeating pattern of regulators and rivals getting what they want, winning the cases but that not making a difference. I will go through three cases and I will explain why I think that it is basically because of what I just said, because I think that in those cases the platforms had the better product.

You can look at the two Microsoft cases brought by the EU basically about Microsoft refusing interoperability information to rival browsers, tying the Windows Media Player and the Internet Explorer browser to Microsoft Windows. There were three important remedies in those cases. Each of them failed. One was the one you mentioned, the Windows XPN, telling Microsoft, "You will now sell a copy of Windows without the Windows Media Player baked in". Consumers did not go for that. As you mentioned, it sold about a thousand. I cannot remember the exact number but it was extremely small.

Secondly, the European Commission said to Microsoft, "You must provide interoperability information to rival server software developers". That case was litigated. Microsoft and the developers could never agree on at what price that interoperability information would be provided because, of course, Microsoft had invested in its product and there was no reason for Microsoft to give it away for free. Again, the remedy appears to have been a bust. You get years and years of litigation and by the time the case is finished the market has moved on. The rivals wanted it for free, and that was not going to happen.

The third Microsoft case was on tying the Internet Explorer browser to Microsoft Windows. The Commission says, “Okay, Microsoft, you will offer a choice screen so that when I am a consumer and I boot Windows for the first time, I choose between browser options”. At some point—Microsoft will say it is by mistake; the Commission says it is not by mistake—the browser choice screen disappears. How long did it take for anyone to notice that the browser choice screen disappeared? Months. No one was concerned. At the end of the day, consumers went on with their lives. They were not using the browser choice screen as the regulator might have expected.

Finally, in the last one the European Commission brings proceedings against Google for the Google Shopping Box. When you search for, say, shoes on Google Search, the first result is this Shopping Box that enables you to directly purchase the goods. Rivals say, “We want to be displayed there, too”. I am simplifying but the Commission says, “Yes, Google, you must display rivals”. What happens? Google says, “Okay, fine, we will display rivals but we will charge them a fee to be there because this is our most valuable real estate”. Suddenly, rivals say, “We won the case but essentially we lost because we can never outbid Google to be at the top of the Shopping Box”. I think that you will have these problems here.

Lord Kamall: Can I ask a very quick question? One of the counterarguments that you always hear about technology legislation is to look at the past. I want to know whether you think it is very different. IBM was dominant. People worried about it, antitrust. Microsoft was dominant. What happened is that Google is now dominant. It will all change because there will be new entrants, or are you saying hold on a minute, this time is very different and we do need these specific remedies; otherwise, it will not be the same as before? I will start with you, Corie.

Corie Wright: Because of many of those remedies, and I do not deny that there will be imperfect execution, and the moves that were made to ensure an open ecosystem, that is—Google is not just a new entrant. It was able to be a new entrant and get a foothold in order to build its business. I think that we do see that time and again. Netscape, which was the aggrieved competitor in that case, has gone away. Paving the way for that openness has the opportunity not even just to benefit—and it did not benefit Netscape in that case—the competitor but the broader ecosystem of new entrants that otherwise would not get a foothold in the market.

Lord Kamall: Mark, if we did nothing would we see what people used to criticise about IBM and Microsoft, a new entrant would come in and it is a different issue?

Mark Scott: It is the whole competition is one click away argument.

Lord Kamall: Yes.

Mark Scott: That could have been the case back in, say, the 1960s with IBM, even in the 1990s with the browser wars and so on. I look at the data on the consumer tech side as a different beast. On the consumer side it is becoming progressively more difficult to compete. If you look at what has happened to Snapchat, yes, TikTok has come in, say, on the social media space but you now have Instagram copying many of its services to mimic that. Will that make a difference? I do not know, but I know that the barrier to entry is significantly high. As much as Epic has done a great job of capturing part of the market, there is a reason why it is fighting litigation cases because of that. It is possible that it is becoming progressively more difficult.

Lord Kamall: That is very helpful.

Dirk Auer: I think that Google succeeded for the same reason that OpenAI is succeeding today: it just had an extremely good product. That is why users clicked on Google and that is why today, despite Google's best efforts, most users are opting for OpenAI ChatGPT, not Google Bard.

Lord Kamall: Thank you. That is very helpful.

Q8 **The Chair:** Before I draw it to a close, can I ask a question myself, directed at Mr Auer? It picks up in a way from what you were just discussing.

If I can go back to what you said at the beginning about this legislation in your view being based on bad assumptions, if I can put it like that, that the reason for the success of these firms is because they have been anticompetitive as opposed to offering a good product, and that the cases that have been brought have not succeeded because the cases have not been good cases and the various firms have succeeded in, in your view, proving the merits of what it is that they are doing or offering, if that is your view, I have two questions. Why is competition legislation of the kind that we are examining here being introduced in all the jurisdictions in all parts of the western world? If the problem that this legislation exists to solve is not what you think it is, do you think that there should be no legislation or is this a different problem and you think we have just misunderstood the problem? I have the Chairman's prerogative as to the final question here.

Dirk Auer: Why the pushback? There has always been regulatory pushback against new technologies. You get new firms that emerge. Their founders become very rich and I guess it is frightening to people. I would also add that regulators are not acting in isolation here. They are exchanging ideas, in part at the ICN, for example. That is one thing. The second question you asked, I am sorry?

The Chair: What I am struggling with is that if you think that this is based on bad assumption and the legislation is being introduced in different jurisdictions in any case, is there another problem that you think needs to be the motivating factor underpinning this legislation or do you just think that there should not be this approach to antitrust issues? I can see all my colleagues jumping up around me, but go on, just concentrate on this.

Dirk Auer: I will answer very briefly. I think that whether or not there is regulation is much less important than if there is regulation, it should be evidence-based regulation that has baked into it feedback loops that enable courts to review what the regulator is doing. I think that is most important. At the end of the day, I am personally agnostic between competition law and digital markets regulation. I am not agnostic about having good judicial review.

The Chair: Your main concern is around the process of JR or a merits-based appeal?

Dirk Auer: I think that is the biggest issue. It is not the only issue. It is also about, trying to write a Bill that is in quantifiable terms, that has rules that are more explicit, and more limiting principles written into the rules.

The Chair: I will see whether we can get some quick supplementary questions in before we conclude. I will go first to Baroness Wheatcroft, then to Lord Young and then to Lord Foster.

Baroness Wheatcroft: This is just a very quick one. We have very fast-moving technology, yet we have a regulator that, unlike most regulators that look backward, is trying to shape the industry for the future. I think that you have already intimated that this is something that concerns you, but your experience is across the board in competition law. Is there any sector where a regulator has successfully done that?

Dirk Auer: Everything is arguable and an empirical question, of course, but if you look at utilities regulation, and the economics of that are more widely recognised as being a success, I think that it is because those industries are unlike the tech world, where essentially the network, the infrastructure, has moved much less. It has made it possible for regulators over the years to improve how they regulate these markets. There has been a huge evolution in how we think of regulating things such as broadband markets. I am concerned that those features are not present in tech markets and will make these initiatives or initiatives such as the DMCC not successful.

Baroness Wheatcroft: Thank you. Did anybody else have a view on that? No.

Q9 **Lord Young of Norwood Green:** I am fascinated by the way businesses grow where you least expect them to grow. People are now creating businesses on TikTok. Given that we want businesses to grow, it seems to me that that is a good thing. I am inclining to Dirk's two analyses, one that we are not going to get it right—that is for sure, we are not going to get it right, I certainly think that—and that if there is some scrutiny process that ought to be evidence based. I am fascinated. I read an article recently where there is a son telling his dad, "The way to make your business grow is to just go on to TikTok". He is dismissing it initially and then launches it, and it transforms the business. That is just one example. There are thousands and probably millions. Is that not a good thing?

The Chair: Do you want to aim that at just one person?

Lord Young of Norwood Green: Just a quick comment from them all if they can.

Mark Scott: Growing a business online is a good thing? I am not sure what the question was.

Lord Young of Norwood Green: These things are evolving and businesses are growing as a result of new products emerging. TikTok is not that old, is it?

Mark Scott: The same thing could be said about Facebook when it started in 2003 and then that has become an issue. My issue is not about growing a business, it is more forward-looking. If TikTok does become the same size as Meta, does it then create equally anticompetitive issues that affect the man or his son trying to build a business and, therefore, he cannot access his data and it is taking 30% of his business because of advertising money? It is looking forward to how TikTok or other companies can grow rather than whether it affects the business right now. That would be my view.

Dirk Auer: I think that the TikTok example is a good one. As I see it, TikTok has created a huge market that is beneficial to people but, more importantly for me as a competition person, it was not so long ago that people were saying that Facebook Meta is this unassailable monopoly. TikTok seems to at least in part disprove that and it has at least in part eaten Meta's lunch. I think that is important when we discuss competition policy.

The Chair: Do you want to add anything, Ms Wright?

Corie Wright: Yes, I am happy to. I think that the reason that all three of us are here today is that we want to see environments where all these businesses can thrive. The question that I think is before us today in terms of empowering a regulator is: can it step in effectively when we have gatekeepers that are preventing other businesses thriving?

Apple and Google both make exemplary mobile devices. I have an iPhone. I have a Mac. I love them. The duty of the CMA is not to intervene because Apple makes a good phone and people buy it. The duty is to intervene because Apple makes a good phone and a great operating system but a really crummy app store. However, people still have to use that app store and apps still have to give 30% of their revenues to an app store that they may not want to use for services that they do not need or they do not know what they are. That is the problem that good regulation tries to solve, not punishing people for being successful. Epic is a business; of course we want to be successful. We would like to have healthy growth. The problem is when any business starts leveraging its rightfully achieved popularity in one market and turns it into dominance to suppress competitors in another.

Lord Foster of Bath: I want to pick up on some of the remarks you made earlier about the way in which the cases against big tech firms have sometimes failed. Your argument, Dirk, is that the solution to that, as I understand what you were saying, is that it is vital that we have explicit, quantifiable rules and that cases then brought are evidence-based. I suspect that many of us would agree with that.

However, I have done a lot of work on gambling legislation and the gambling companies in the UK make £14 billion in profits a year. They have tons of dosh and they can use that dosh to employ the very brightest and best minds to develop new products and "get round" whatever rules there are, putting the regulator at a disadvantage. Presumably, that will always be the case in all jurisdictions. Is there any solution other than the one you have offered?

Dirk Auer: I think that competition law and antitrust, for all the negatives that have been said about them, have proven extremely resilient to get at these issues. The first way that cases were brought against the big tech platforms were competition law and antitrust. Competition law, because it relies on these very broad principles, has that flexibility. It is one of the downsides of regulation that inevitably firms will invest huge amounts of money to try to be not regulated and that cuts against regulating.

Mark Scott: Maybe I am showing my non-businessperson brain here, but I do not think that everyone is motivated by making lots of dosh. There is an ability now, particularly with so many ex-platform employees unemployed because of the layoffs, for regulators not only in the UK but elsewhere to take advantage of that and build on the expertise of particularly those who have maybe made their cash in the industry and are looking to do some good. I see what Ofcom has done in terms of who it has hired from the platforms as well as civil society as an exemplar of what could be done for the CMA.

Lord Foster of Bath: That is very helpful. Thank you.

The Chair: That is a good point on which to conclude. I thank Mr Auer, Ms Wright and Mr Scott for their testimony this afternoon. It has been incredibly helpful. As I said at the beginning, I am hugely grateful to all three of you for the time that you have given, not just to appear before us but in preparing to do so as well. I know that this is always a big demand on people and I am very grateful. Thank you very much. Order, order.