



Communications and Digital Committee

Corrected oral evidence: The Digital Markets, Consumer and Competition Bill

Tuesday 20 June 2023

3.35 pm

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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 Lipsey; Baroness Wheatcroft.

Evidence Session No. 3

Heard in Public

Questions 18 - 29

Witnesses

[I](#): Kyle Andeer, Vice President, Products & Regulatory Law, Apple Legal; Matt Foster, UK Policy Manager, Meta; Monica Ariño, Director for Public Policy, Amazon; Tom Morrison-Bell, Government Affairs and Public Policy Manager, Google; Chloe MacEwen, Senior Director UK Government Affairs, Microsoft.

USE OF THE TRANSCRIPT

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

Examination of witnesses

Kyle Andeer, Matt Foster, Monica Ariño, Tom Morrison-Bell and Chloe MacEwen.

Q18 The Chair: This is our second session today as part of our hearing on digital markets. I will ask the witnesses to introduce themselves in a moment, but this is very much about getting the perspective of the big tech businesses. It is important for me to make it clear that as a committee, in supporting the legislation that is before Parliament now, we have always been clear that this is not legislation that we consider to be anti big tech. We are concerned to ensure that we have digital market conditions that are fair and provide opportunity for competition for the wider benefit of the UK economy and consumers.

I will ask our witnesses to introduce themselves. Please state your name and your organisation. I think that we are familiar enough with your businesses, so you just need to tell the committee the organisation you are here representing.

Chloe MacEwen: I am senior director, UK Government affairs at Microsoft.

Tom Morrison-Bell: I am from Google.

Kyle Andeer: I am from Apple. I am responsible for our products in regulatory legal function, which includes supporting our thousands of engineers creating our unique products, as well as privacy and competition law.

Monica Ariño: I am responsible for public policy for Amazon here in the UK. Before Amazon, I worked at BT and at the telecoms regulator Ofcom.

Matt Foster: I am UK policy manager at Meta.

Q19 The Chair: It is great to have you all with us. I will get started. I will ask each of you to give me your response in turn. I am interested to know, first of all, whether you support the underlying premise of this legislation that what we experience at the moment is insufficient competition in digital markets, and that that lack of competition is hampering innovation and the opportunity for new entrants into the market.

Chloe MacEwen: Thank you so much for the invitation to appear today. We have to remember that this is the UK's first formal framework for digital competition, so this is a huge development in digital markets.

At Microsoft, we believe in principles-based regulation. We support the existence of this Bill and we think that it is an important plank for the UK to achieve its ambition to be an AI, science and technology superpower. Remembering that it is that first formal UK framework, we think that the Bill needs to strike a fair balance between businesses and consumers, and we think that there is a real need for proportionality in that. I understand that we will come on later in today's session to discuss some of the improvements that we might suggest to this Bill to make it succeed in its objectives.

The Chair: But you support the underlying premise of it.

Chloe MacEwen: It is fair to say that we support the objectives. It is a very broad-brush statement to say that there is a lack of competition. We think that digital markets move very quickly and that these tools, which will allow a very flexible and, we hope, proportionate approach, will allow problems, to the extent they exist, to be addressed.

Tom Morrison-Bell: Thank you for the question. We respect the fact that the Government are bringing forward this Bill and the ambitions as set out by the Minister in Second Reading at the Dispatch Box, which are to make sure that you have a flexible regime that is pro-innovation and does not lead to blanket obligations across firms or unduly burdensome requirements. We strongly believe that our products are excellent and that people use them because they think that they are the best. For example, the CMA digital advertising market study found Google Search results to be the best results of search engines out there. We think that people use our products because they are excellent.

We think that the Bill gives huge and open-ended powers to the DMU, which will be highly discretionary, and there is a question here about achieving those ambitions. We believe it requires greater checks and balances on the DMU. Largely, there are three areas that we are happy to discuss where we think the Bill could be strengthened. The first is on the appeals process, which—

The Chair: We will come on to those. That is fine. I am just trying to get to whether you actually agree with the premise of the legislation.

Kyle Andeer: Thank you again for the invitation to appear. I think we certainly agree with the objectives in looking for ways to enhance both competition and innovation. I know that this committee has heard from those who have criticised aspects of our business, most namely the app store, and have suggested that in some way it has stifled competition or innovation. I think that the objective facts clearly state otherwise. We do not think that that is true when it comes to the app store or any of our products. We compete very aggressively in every market. When you look at the facts around the app store, we have gone from 500 apps 15 years ago to 1.8 million today. If you look at the developers that make up the store, 85% of them pay nothing to Apple in terms of offering their apps. It has been an incredibly vibrant and competitive marketplace.

Even here in the UK we see benefits. If you just look at the last four years in terms of innovation, 600,000 new developers have emerged on the iOS ecosystem and they have realised incredible value. Over £38 billion of value has flown through the app store to developers, so it has been an incredible engine of success, innovation and competition. I know that we will talk about some of the specifics around the Bill and we certainly have some concerns there, but I think in terms of the criticisms of Apple, frankly, we do not think they are well founded or based or grounded in evidence.

The Chair: On the apps in particular, from evidence that we have heard I think that there would be a lot of agreement on what you have said

about the opportunity that the app store creates for businesses and, indeed, for consumers. The problem that people point to is the terms and conditions that they are compelled to comply with to feature on the app store. As you have raised it, how do you respond to that specific problem as a competition problem?

Kyle Andeer: I look at it, first and foremost, in the way we think about our services, which is putting the consumer first. We have a number of policies and rules in place to ensure that what we sell through the app store and what we license through our developer programme is used appropriately. So yes, we have rules around security, privacy and we have rules around how the apps are supposed to work to deter fraudulent activity. Just last year we deterred over \$2 billion-worth of fraudulent activity on the app store. So, there are very real concerns when you talk about an ecosystem that has over 38 million registered developers and over 1.8 million apps, and so we do manage that system.

I know the commission structure has been a subject of some criticism, particularly from some of the billion-dollar companies that have built successful businesses in part because of the access they have through the app store. As I said, we have a business model that has been long standing, from the very beginning, when we had just 500 apps, that says if you are selling digital goods and content you are subject to a 30% commission. If not, you are not paying anything to Apple. That has evolved into a model in which you have 85% of apps and developers in the store are paying zero.

The vast majority that are paying a commission are now eligible for new programmes we have introduced, that has taken that commission from 30% down to 15%. It's only the most successful, most well-financed billion-dollar companies that are paying that 30% commission. And there is an incredible amount of value they get from being on the app store: things like the 150,000 APIs we make available and the software tools and services we make available, in addition to the more than 175 countries that we operate the app store in.

The Chair: Nobody is denying the technology, the development and the opportunities that businesses such as yours have created for others. A point that is raised alongside the one that I made a moment ago is that the lack of choice for developers between the different app stores that are available to them—yourselves or Google—is where there is concern in the competition context.

Kyle Andeer: I think one of the experiences that we have had from where we sit in terms of making sure that we get the very best apps on the App Store and the very best developers on the app store is that we are competing in a much broader landscape. We are trying to convince game developers who are focused on Sony or Microsoft's Xbox to bring their games to iOS. We are talking about bringing people who have subscriptions or other offerings and bringing them from one platform to ours. And so I think if you look at it from a developer perspective, they have an ever-growing number of options for them. So, from our perspective anyway, we are competing not just with Google but we are

competing with a whole host of platform owners to make sure that we get the very best software applications on our devices.

The Chair: Ms Ariño, what about Amazon? Do you agree with the underlying premise of the Bill? I think that maybe you have issues with Apple on apps.

Monica Ariño: Thank you for the invitation to provide evidence. Amazon supports the pro-innovation, pro-competition and pro-consumer vision of this Bill. Our concern is more about the disconnect between that vision and the Bill as drafted. Previous witnesses alluded to the broad discretion that the CMA will have in how it chooses to use its powers. It can decide what sectors of the entire economy to look at, what companies to designate and what rules to impose, and it can vary those rules over time. That allows for a targeted, flexible and future-proof regime, and that intention is certainly welcome rather than a one size fits all.

However, there are insufficient safeguards in the Bill to ensure that consumer interests are put at the heart of the analysis. There are no requirements for the CMA to look at actual or potential consumer harm when it decides which companies to designate, nor when it decides what a code of conduct should look like. That consumer analysis comes later in the process with PCIs. There are no requirements to evaluate or demonstrate that the proposed interventions will address the harm that has been identified and no obligation to conduct impact assessments.

I have no doubt that the CMA will look at that consumer impact because that is what it does, but it is important that we make that explicit in the Bill. Otherwise, we are creating a lot of uncertainty and regulatory unpredictability with this entirely novel regime. That is compounded by the lack of full merits appeals, but I know that we will come to that later.

The Chair: We will come to the specifics of the legislation. The bell that you are hearing at the moment is a Division in the Commons, so we are ignoring that for now. Mr Foster, what about Meta? Do you agree with the underlying premise of the Bill?

Matt Foster: I will keep it relatively short. We support the objective of fair and open competition in markets, and in that sense we support the objectives of the Bill. Obviously, it is up to individual jurisdictions to decide how to do that. We have seen it being done differently in Germany and the EU, and the US is taking a slightly different approach.

The UK's approach has clear merits in being tailored and bespoke, recognising that the business models of all of us here today are quite different, despite what seem to be some similarities. We also respect and appreciate the focus that has been put on the DMU being an expert body, as Baroness Wheatcroft talked about earlier. The importance of recruiting and retaining the right people cannot be understated.

As others have said, it is about the checks, balances and safeguards to make sure that the regulator is delivering on the Government's and Parliament's intent, particularly around innovation, security, privacy and freedom of contract. Those are the things that we would like to see tightened up in the Bill.

Q20 The Chair: So everybody agrees on the objectives of the Bill. You have various points that you want to make about the legislation itself, which we will come to in the course of the next questions, but I have not heard from any of you that you disagree with the underlying premise of the Bill.

Before I move on to my colleagues, I will ask a supplementary of Mr Morrison-Bell. You raised in your answer to my question the effectiveness of Google as a search engine as a way of illustrating why, in your view, the services are popular with users and, therefore, the benefits of the current situation as opposed to a lack of competition being detrimental to consumers. It was a shame that you were not in the room for our previous panel, because we raised this with our earlier witnesses. One of the arguments that we heard from them was that although what you said may be true in the search framework, for the businesses that appear at the top—this is a site comparison—of a Google search if somebody is looking to buy a tennis racquet or whatever, if they were to use a comparison website, so another click, it might provide their services at a lower cost as they would not have to meet Google's terms and conditions. That would potentially mean a lower price for consumers. How do you respond to that argument as a response to your own perspective on the power of Google?

Tom Morrison-Bell: I am familiar with where the point comes from. This refers to the Google Shopping case specifically, and very specifically Google Shopping ads that were at the top of Google. A remedy was agreed with the European Commission in 2017 to make sure that that did not distort competition, and that has been in place since 2017. A set of regulatory commitments and remedies are currently in place and satisfy the regulator—as in the European Commission—that that behaviour is appropriate.

The Chair: Would you concede that services might be better for consumers if there were more competition in this area, if somebody was looking for comparisons?

Tom Morrison-Bell: There is quite a lot of evidence that shows that search has a deflationary impact on prices. There is a body of evidence that shows that when consumers go on to search engines and do multiple searches for products, they tend to find cheaper prices than they do, say, in the real world. There is a strong case that products like Google Search—other search engines are available—deliver substantial consumer value.

Q21 Baroness Harding of Winscombe: I am hopeful that you will find the second question easier to give a straight answer to, because I think we all know what you think of what I am about to ask. It is about the judicial review standard. You have all alluded in different ways to having some concerns about it. If you do, could you set out why and what you think we should do instead?

Kyle Andeer: Happy to start. I did not really address it in my opening. From our perspective, this legislation is granting sweeping authority to

the regulator. It will have the ability to designate and the ability to make up the rules, and it will be the one enforcing the rules. It is sweeping authority. From our perspective, there is a meaningful need for a check and balance here.

As far as we understand the JR standard, it is more focused on process and procedure. So, from our perspective, there really needs to be a strong, merits-based review that focuses on the evidence supporting the outcomes here. We are talking about very significant potential decisions and very far-reaching consequences, when you think about not simply competition but also what the impact is on things like security, privacy and consumer protection. And so, from our perspective, given what is at stake, we want to ensure that we not only get to an outcome quickly but that we get to the right outcome. These should be of at least equal importance. And in order to ensure that, I think we need to have a merits-based review here.

Baroness Harding of Winscombe: Does anyone on the panel disagree?

Tom Morrison-Bell: I would add that there are strong principled reasons for merits appeals as well. First, you have heard from us all about this perspective of a need for checks and balances, given the broad and discretionary powers, which are also forward looking. It is important to remember that these will prohibit companies from taking certain actions up front.

The former head of the Government Legal Service, Sir Jonathan Jones, wrote a paper in March about the appeal standard in the DMU. He said that this raises a concern for due process, given that imbalance. In both 2013 and 2019, the Government looked at whether to reduce the appeal standard in the Competition Act 1998, which is appeal on the merits. The interventions that the DMU will make are much more akin to the interventions that exist in the Competition Act at the moment. The Government said, in 2013 and 2019, that it was not appropriate to lower the standard in the Competition Act to judicial review, which included direct interventions from the Competition Appeal Tribunal itself, saying that there are not good grounds for moving this down. There are strong, principled reasons as to why this is an important standard in these cases.

Chloe MacEwen: I will add a couple of points. There are a number of ways of achieving a speedy process. One of the points raised in objection to full merits is the point about speed. That is certainly not something that we recognise, because you could find yourself in a situation where a particular set of circumstances go to the court, the court is then able to make the final determination and the matter is at an end, whereas with the judicial review standard the case will have to be remitted and the decision remade, which would take longer.

Looking at it from Microsoft's perspective, we are very conscious of the UK's ambitions, especially for new investment and for science and tech superpower status. We are quite supportive of regulation, but we are less sure about uncertainty. Building in fair checks and balances and fair

due process in a completely new and untested system seems like a fairly reasonable thing to ask for.

The other thing that we have put into our written submission is a request for proportionality. Other regulators have a duty to abide with principles of best regulatory practice, and that is—

Baroness Harding of Winscombe: Could we just stay on judicial review for this point? I am conscious that everyone wants to say something and I have some follow-up questions.

Chloe MacEwen: Okay. I hope that we can come back to that.

Monica Ariño: I will start by saying that ideally we would not end up in an appeal process. That is not a good outcome for anyone. However, this is a very novel and untested regime, so Amazon thinks that full merits is very important because the CMA is bound to make mistakes. It is important that we get to the right outcome, and the right outcome for consumers. That is why this matters.

I agree that there is no trade-off between speed and accuracy, and there are a number of ways in which the concerns that have been expressed a number of times can be mitigated. For example, you could time limit the full merits appeal, ensure that it is fast-tracked, or introduce a full merits appeal for the initial years of the regime as it beds in and then review whether that is the right standard. That has happened. I am more familiar with the Ofcom regime, but that is how Ofcom started operating in its incarnation for many years. It developed that expertise through those appeals.

Appeal standards matter because they create within the regulator a discipline to look at the evidence and to make the right decision. It is not only about delays or not delays; it is about robust evidence-making and the right outcomes for consumers.

Matt Foster: We heard in the previous session that JR is widely used. That is right. It is used across regulation, but this is the first instance where severe sanctions and penalties are involved and the accused party is not allowed to make its case for why that might not be the right outcome. This will be the first that does not permit the appeals body to look at whether the regulator made the right or wrong decision.

It is not just about us here today. The Bill makes it clear that third parties and others affected by the decision of the DMU can decide to appeal as well, so if a publisher or a small business does not like what the DMU decided about a particular instance, it can trigger that appeal. Being able to make your case is key.

Quickly on timing: you also heard that one of the reasons why we may choose to bog things down is to put off enforcement, but enforcement does not wait. If you look at Clause 101, enforcement is non-suspensory. Enforcement carries on throughout the course of the appeal, so it is in everyone's interest to end the appeal more quickly.

I have one final point. I think you heard a couple of weeks ago from Epic Games about the expertise and whether a court knows better than the

expert DMU. The answer is probably not, but that is where merits comes in. Only under a merits-based appeal system can you bring in expert witnesses, address them and consider that as part of the appeals process. Those are important points to add.

Q22 **Baroness Harding of Winscombe:** Thank you, all. That was incredibly clear. I will put to you the counterargument that we heard in the previous panel—I think Mr Foster is the only one who heard it—and a follow-up question to that. I come at this having been in a regulated company that lived in both a full merits, so JR+, and a JR regime. I understand the strengths and weaknesses of both of them.

The concern we have just heard is that, fundamentally, a full merits regime favours people with very deep legal pockets: the more money you have to spend the more you can keep fighting and fighting. Also, the more money the regulated companies have to spend, the more cautious the regulator is in a full merits regime, because it has very small legal budgets and cannot afford to get caught in multiple full merits appeals.

In our previous session, we heard a very compelling argument that there is a balance of risk: the risk that the CMA is wrong, which you have argued, versus the risk of the sheer size of the legal budgets that the companies in front of us have that mean that nothing happens because you can fight your way through legally. I would like you to answer how you would counter that argument, but can you first tell me how much you spend on lawyers? I am intrigued to know how much Amazon, Apple, Google, Microsoft and Meta spend on legal in a year.

Matt Foster: I put my hand up not to volunteer for the number necessarily, because I do not have that to hand, but I am happy to see whether I can follow up in writing on that specific. It is a fair concern that we might bog things down. We talked about the Google case. The EU is different, but if I was a small business I would be severely concerned by that. It is not beyond the realms of possibility that Meta might bring a case against one of the colleagues on the panel today if we have issues.

The core of that is timing. From what I heard from the previous session and what we have heard before, and I think Chloe from Microsoft—

Baroness Harding of Winscombe: I do not think it is just timing. If I could afford only one KC and you can afford 10, you benefit by a short period because you can spend more in that given period.

Matt Foster: I will return with two points. The first is that it is quite established in the UK and international case law that competition enforcement has slightly special status. It is quasi-criminal and it triggers the Human Rights Act in various ways, particularly Article 6 of the European Convention on Human Rights, where the court needs to be given full jurisdiction to look at the cases in front of it because the sanctions imposed and the accusation of wrongdoing are quite severe. That might already trigger the need for the Competition Appeal Tribunal to consider the merits. More importantly, it nods to the importance and the seriousness of the allegations or accusations. We would be remiss

not to look after our users and the businesses that rely on us if we did not put up a strong defence if we believe it to be wrong.

Although it may not be entirely about timing, that is certainly one of the things that has been put forward. From Meta's point of view, we agree with that. You can put in strict time limits. Research published only yesterday from Linklaters shows that JR is not quicker than merits anyway, so in many ways it is a moot point. You can build into the legislation, or through standing CAT rules, which the Business Secretary can update through Section 15 of the Enterprise Act, to make the entire process quicker. We would support that. It does not benefit anyone to be bogged down in litigation for a long time.

Baroness Harding of Winscombe: Could I ask Mr Andeer to answer my question? I tried to find this out online and I have two facts to help you. One is that in I think 2021, Apple's group legal counsel—I probably have the wrong title—was paid \$26 million a year, which I suspect is larger than the whole of the CMA's legal budget. Another fact is that their predecessor five or seven years ago—again I might have the timing wrong—claimed that Apple had a \$1 billion per year legal budget. How far off am I?

Kyle Andeer: Suddenly I feel underpaid.

Baroness Harding of Winscombe: All of us do, I fear.

Kyle Andeer: We are a company that faces a lot of intellectual property litigation. We produce things like the iPad, the iPhone, a lot of products, so we defend literally hundreds of cases a year from an IP litigation perspective.

When we are thinking about from a competition or regulatory perspective, Apple's goal has never been to litigate these things. We have always looked to reach a constructive engagement, whether it is the competition law enforcer or the regulator. If you look at our history, there are not a lot of cases in which we have litigated these types of issues. Our focus is on how we get to the right outcome with the regulator. And we do think picking up on a point that Monica made, we think that, in getting to the right outcome, it helps to have at least some backstop when it comes to a merits-based review, particularly in a regime like this where you are granting such sweeping authority to the regulator.

Baroness Harding of Winscombe: Would anyone else like to comment? Is there a good argument to the fact that your pockets are so much deeper?

Chloe MacEwen: I would add one point, because you mentioned risks and trade-offs. That is important, but there might be an additional dimension of risk that we need to think about. As I mentioned, we see this Bill as one plank of an overall policy objective, which is to make the UK an attractive place to do business and to support its science and tech superpower ambitions, which are, on the part of the Government and the Opposition, to push towards a greater ambition in AI. We need to think

about what this regime does to attract businesses to innovate and invest. It is not only small businesses that innovate but big businesses too.

A fair, proportionate and reasonable regime is in everybody's interests. I do not think anybody is asking for a regime where the DMU would somehow be able to cut corners. Surely that would not be right. We are asking for something that is proportionate and fair, and that seems reasonable. We are certainly happy to work with the committee. In our written evidence, we have put forward a compromise suggestion, as Monica from Amazon mentioned. We hear the concern, so how about having one system of full merits for the first 10 years, and then reconsidering if the feeling is that this is will somehow be abused? I do not think it should be too controversial to say that the evidence should be tested, given we have CA98 cases, given we are talking about the removal of property rights and very sizeable fines. Strong systems make for strong regulators that are accountable and transparent. That will attract businesses and drive competition.

The Chair: Can I ask a couple of quick supplementaries? We are probably about to hear the bell. If I may ask Ms MacEwen, for Microsoft the position seems—I apologise to our witnesses; I will adjourn this hearing and then we will return after the Division.

The committee suspended for a Division in the House.

Q23 **The Chair:** My apologies again for that short adjournment. I was in the middle of asking a supplementary question of Ms MacEwen; I have a further one on this topic for the wider panel as well. The question I was going to ask Ms MacEwen is that Microsoft's view on JR seems to have changed. I was curious to understand why, because, as I understand it, in the submission made to the CMA when it was doing its consultation back in 2019-20, Microsoft stated that the determination of strategic market status, proposed codes of conduct and other interventions "should be subject to independent judicial review", whereas clearly you have set out a different view now. What has changed?

Chloe MacEwen: Let me clarify that; I am grateful that you raised it. There is quite an important linguistic difference to make between American English and English English, because I specifically went back to the team in the US and asked them. As you read that sentence, "We support independent judicial review" means, in American English, "We support independent judicial scrutiny"—that is, the review of a decision by a judge. "Judicial review" in America means something altogether different from the accepted public administrative law term here.

I specifically went back to the team on that; I am happy to write to you about it if you need further clarification but I have already checked that. The department also raised that with me and I have raised it with colleagues in Redmond. We are strongly of the view that we support judicial scrutiny. What we call it is a different matter.

Q24 **The Chair:** Understood. Thank you for that clarification. My wider question is that, in the previous hearing, we heard witnesses' support for

a regulatory approach that would be more participative, and for earlier engagement of the regulator and the different parties to arrive at outcomes that may be in dispute. This is something that should prevent the need for judicial review or appeals. What is your view on that, and how much are you willing to commit to that approach?

Chloe MacEwen: We certainly endorse a participative approach. It is important to talk very carefully about how that works. You do not negotiate with a gun to your head, so if you are threatened with something that will not induce a very good participative approach. That is a separate point, because there was a lot of talk about participative approach on the EU Digital Markets Act, but the legislation was rather deep, in the end.

On the merits of the participative approach, we think that is vital. Microsoft has already had a lot of engagement with the Digital Markets Unit and we have been very impressed with the quality of the people. We think that it has deep expertise of the markets and it needs to be properly staffed.

On how the participative approach will work, it is important to set out a framework that works and builds trust. In the EU regime, of which there has been no mention here, there is access to file, so if you speak to an EU regulator it discloses all of the material it has so that you can see it. The UK is extremely transparent as well, but that does not exist as a thing, so that might be one element that we could consider to build trust between the parties.

The Chair: Can I take views on participative approach from the other witnesses, then I will move on? Mr Morrison-Bell, could I just ask you to be brief.

Tom Morrison-Bell: It is one of the procedural innovations that the Government are hanging their hat on to be quick and pro-innovation. In Google, we have a good example where we have undergone that through something called Privacy Sandbox. We want to phase out third-party cookies to better protect user privacy on our products, but that has an impact on advertising. We went to the CMA and the ICO to make sure that they were happy that there was no adverse impact on competition from the technologies we are developing, and similarly that the ICO was satisfied with the privacy element. The CMA have held that up as a good example of how the participative approach could work.

One thing I will add, which touches on the Bill and the participative approach, is that the Bill allows for private parties to bring cases directly to the court—either the High Court or the CAT—before the Digital Markets Unit has found you in breach of a conduct requirement. If the participative approach is meant to be this procedural innovation at the heart of things, that provision risks creating conflicting or incoherent compliance requirements on companies. We could have been six or eight months into the participative approach, discussing commitments and remedies on how that would work with the CMA, when a party goes to the court, the court hears it over half a morning as opposed to six or eight months, there is an injunction that you have to do it differently and

suddenly the participative approach is sidestepped. We strongly believe that, where private parties bring cases, that should follow on from when the DMU has found you in breach of the code, otherwise you might unpick this participative approach.

Kyle Andeer: I think here really the devil is in the details. I think certainly from Apple's perspective, we are committed to constructive engagement with the regulator. When it comes to third parties, I think our concern is: will it be the most well-financed, well-to-do companies, like an Epic or a Tinder, who have the loudest voice at the table? That is a concern, because when you think about the app store, for example, we have millions of developers. Our focus is on not just the largest but it's the overall ecosystem to ensure that it is thriving and an opportunity for even the smallest developers.

I think you also need to think about it from a consumer perspective: how do they have a real voice at the table? Because at the end of the day the whole process here should be designed to ensure consumers realise the benefit, not an individual well-financed multinational company. And so, I think how it gets structured and how it gets set up is incredibly important to ensure that, whatever the outcome is, it balances all the various competing interests, not just the interests of a few.

Monica Ariño: Thank you for the question; it is an important one. The relationship that we have with the CMA and other regulators is important, and we value the dialogue that the DMU has initiated with us as it prepares to get these powers. We have been meeting it regularly. It is a constructive dialogue and one that we welcome. We hope that that will continue.

Good relationships are no substitute for good regulatory regimes and good regulatory practice. That is why I come back to the importance of ensuring that the CMA, as well-resourced as it will be and as expert as it is, is guided in how it chooses to exercise those powers. Its choices need to be informed by certain criteria so that the court, whatever the appeals regime, can assess against those criteria.

One of my major concerns is a bit about appeals but also the safeguards against which those appeals will be heard. The consumer analysis is often missing throughout the Bill. I encourage the committee to try to embed and make more explicit that the CMA needs to look at the impact on competition, consumers and innovation in its analysis.

I have mentioned innovation. If you will allow me one small point, there has been a lot of talk about innovation being important to this Bill and the Government having a pro-innovation vision. The word "innovation" does not appear once in this Bill—well, it appears only once, but as part of the name of the department that is sponsoring the Bill. Of course the CMA will look at innovation—competition and innovation go hand in hand—but if this regime is to be in place for many years, we want that to be made explicit so that that accountability gap can be bridged.

Matt Foster: We have broad support for the participative approach. It is a healthy direction for regulation more broadly. We have a good

relationship with the CMA and the DMU, and it continues to get stronger. We hope they feel the same way. I do not think it erodes the case for the decisions of the DMU needing to have adequate scrutiny applied to them. Ultimately, we can talk for six months about how we disagree and still end up disagreeing. It should be for an appropriately empowered court to consider whether the DMU has made the right decision.

Q25 Lord Foster of Bath: Thank you all for coming. We have a clear idea of your broad concerns about the Bill as it stands: the Bill gives the CMA and DMU open-ended powers; it gives broad discretion without sufficient safeguards; and it grants the CMA sweeping subjective authority without sufficient guardrails, which you collectively all say will lead to regulatory unpredictability, business uncertainty and harm innovation. That seems to sum up all of your written comments and what you said.

The question is: with the exception of the area of litigation procedures, can you very quickly summarise what key things you want to put in the Bill to overcome the problems that you have described? I know you have referred to some in the written evidence you have already submitted—perhaps summarise those and add any others. Could you leave out any reference to intellectual property, which I want to come back to as a subsidiary question? Chloe, you started talking about proportionality, best regulatory practice and so on earlier and then were a bit cut off. This is your opportunity to finish what you were going to say earlier.

Chloe MacEwen: Thank you very much for the opportunity. There are a few areas where we think there can be improvement other than the full merits appeal. Those are: a proportionality requirement so that there is a scale, so the deeper the intervention, the greater the evidence required; access to file, so that there is complete transparency about the evidence relied on by the regulator; and I mentioned the principle of better regulatory standards that applies to all regulators. That seems to be a bit of a lacuna in that it does not apply in this Bill. That would allow proportionality in the assessment and, as I mentioned in written evidence, the evidential standard. We suggest a strong and compelling evidential standard for decisions that are taken.

Tom Morrison-Bell: We would agree with the same things as Microsoft. In addition, I have heard scepticism about the countervailing benefits exemption. It is important to dwell on that. It is a long-standing exemption that exists in competition law, which is ultimately designed to make sure that consumers do not suffer if regulators over-enforce the law. That is another one in addition to merits.

As it is currently constructed, we do not think that it will work because it has broadly been lifted from a backward-looking ex post regime and just airlifted and dropped into a forward-looking ex ante regime. It gets a bit technical, but that creates coherence issues around how that exemption would work. We have heard a lot about adversarial discussions, about, “Company this thinks that”, “Are your pockets too big for this” and what the large companies do. If you go back to the Furman review, the founding principle is that consumer welfare is the right standard for motivating this legislation in this regime. It is important. These products,

represented across the board, drive a huge amount of consumer benefit in the UK.

Lord Foster of Bath: I want to stop you on that particular point about the exemptions. To summarise the evidence we have received from a large number of people, it says that they are unhappy with it too, largely because it is so broad an exemption that it gives big tech firms like yours a loophole to avoid the spirit of the legislation.

Tom Morrison-Bell: With respect, we disagree with that quite firmly in our submission. I am happy to try to distil that quickly, if time allows.

Lord Foster of Bath: Very quickly.

Tom Morrison-Bell: There are two issues. The first is the standard indispensability, so the accessibility of it. That standard—proving that this is the only possible way that you can deliver the consumer benefit—has only ever been met twice, I think, in competition or in an objective justification defence. People who say it is a loophole are missing the facts there for a start. It is right that that standard is very high.

Secondly, there is a coherence question. This comes back to where we started at the beginning. This is a forward-looking regime. It is very different from traditional competition rules, which are backward looking. Crudely, the way that a backward-looking regime traditionally works is that the regulator finds evidence of harm and produces a large effect analysis to say, "This is where the harm is". A company might then say, "Well, I want to avail of an objective justification defence or countervailing benefits defence; I will produce a large analysis". The court then has to balance between whether the consumer benefit outweighs the adverse impact on competition.

Those analyses are not being produced in this regime because everything flows from the SMS designation process at the beginning. That does not require the regulator to consider up front the consumer benefit of these areas. There will be no ability to balance these two parts, which is what the courts typically do in these defences. That is missing here.

Lord Foster of Bath: That is helpful, thank you.

Kyle Andeer: Briefly in the interests of time, I think picking up on a point that Tom just made, one of the core issues we see with the legislation is that, as these conduct requirements are developed, the objectives are too narrow. And so, we would want to see some explicit recognition that values that are important to consumers, particularly our consumers, like security and privacy are being taken into account. Those can be done in one—an explicit recognition. It can also be done to ensure that the regulator—in this case, the CMA—is engaging with regulators with subject matter expertise, whether that's the ICO from a privacy perspective, or Ofcom, or the FCA or others that obviously have some jurisdiction here to make sure their interests are fully taken into account. And we think that can be done through some formal reference offer or reference mechanism. In the interests of time, I think that is probably the most critical.

Monica Ariño: In addition to appeals, I recommend that clearer thresholds, similar to the ones in Clause 44 for pro-competitive interventions, are introduced at the designation stage and the code drafting stage. Those are simple analyses, similar to the one Tom has described on the adverse impact on competition and consumer benefits.

I recommend that the CMA is required to conduct impact assessments, either on the specific interventions or cumulatively on the regime over time. I recommend the committee looks at Clause 20(3)(c), which introduces what has been described as a permission to innovate. This clause would require designated companies, before they launch a product or introduce a change to an existing product in an area that is not designated—that is, an area where in theory there is no problem—to go to the CMA and ask that that innovation is cleared in advance, but there is no link to market power or leveraging in that context. It is a very broadly drafted provision. That will create friction and might disincentivise innovation from happening in the first place or happening here, which would be unfortunate.

Finally, there is another clause that has not been debated very much but is important to bring the committee's attention to, which is Clause 67. This allows the CMA, in the pursuit of its activities or when it is deciding whether to exercise its powers, to require companies to run potentially live experiments on some or all of its users so that they can gather information. That is a very broad power that can disrupt the customer experience. That concerns us.

Of course I understand that the CMA needs information-gathering powers. I have been a regulator myself. It is essential that there is information symmetry, but the CMA has broad and extensive information-gathering powers already, and more that are coming with this Bill. Clause 67 takes that beyond. It is an example—not the only one—of where the balance is not struck in a way that is fair and proportionate and which would affect not just the companies represented here today but potentially the entire economy for many years to come. That is why the Bill matters.

Matt Foster: I will just add to the private enforcement point. We have already touched on it, but I think the premise of this regime is that these issues are challenging, complex and dynamic, and you need an expert unit to look at it. Having a route where they are cut out of the process does not seem to make sense, so where there is private enforcement it should be routed through DMU. I thought I would mention that.

Secondly—again, others have talked about it—if this is really about consumers then that needs to be spelled out more clearly in the Bill, such that the Government and Parliament can hold the CMA to account to make sure it is delivering against its statutory duties to support innovation, security and privacy, and that it is factoring these things in when it makes decisions about interventions. There can be competing interests between competition, privacy and security and other things.

The third one I will touch on—it may overlap with IP so tell me if it does—is the final offer mechanism and related provisions, and the

potential to force a company into commercial agreements in which it has no interest and there is no perceived value within the company. We would seek protection of freedom of contracts in there so that businesses can decide who they do and do not do business with.

- Q26 **Lord Foster of Bath:** Thank you all very much. I did warn that there was one other issue I want to pick up. I turn to a small section in Mr Andeer's written submission: "We believe the Bill's failure to specify protections for intellectual property would undermine incentives to innovate. At a minimum, the DMCC Bill should require the CMA to consider the potential impact of its decisions on intellectual property and innovation". Could you build on that a little bit, then I have a specific question I want to ask?

Kyle Andeer: Yeah absolutely. So, every developer selling an app on the iOS system through the app store has to first take a licence to Apple. And there are certain restrictions in terms of what they have access to because there are certain technologies and features that pose real risks, as we've mentioned, whether from a security or a privacy perspective, or just for the overall integrity of the system. So, we do have a number of protections in place to ensure that, as a developer creates an application for iOS—or any of our products, frankly—it is not harming either the system, our consumers or our devices.

And so that grant of intellectual property, there are developers, unsurprisingly, who would like to have greater access to what we have built. They would like to have greater access to the technology and decide how they want to use it. That is a risk. If this regulation is used to force us to provide greater access or broader access to our proprietary technology, we think that does infringe and impinge on our fundamental rights to intellectual property.

- Q27 **Lord Foster of Bath:** That is very helpful. I am very grateful for that because the whole development of AI will clearly begin to figure very highly in our thinking about the details of this Bill. This is an issue we have talked about privately in the committee. Of course, AI is fundamentally about data collection and what you do with it. The question then arises: will the firms that are gathering data to produce their AI products be required to get licences for that intellectual property? I am interested in Apple's view. Do you think that Apple, in developing AI products, should be required to get licences for the data it collects?

Kyle Andeer: Certainly from our perspective, regardless of what product we are developing or selling, we will always, as a practice, make sure that we are compensating rights holders. That is true in terms of us developing a music business or a television business. All of our various services we have negotiated with the rights holder to make sure that we have appropriate rights to distribute that content.

And so, as we think about AI, or as anyone thinks about AI, they should be thinking about: do we have the right intellectual property rights? Are

we respecting privacy? Are we doing this in a way that is respectful of existing laws and regulations and, more fundamentally, people's rights?

Lord Foster of Bath: That is helpful. To the rest of the witnesses, say yes or no very quickly: do you agree with that answer for your own company?

Chloe MacEwen: I want to say a bit about how the AI models work so that we make sure that we are thinking about the data and the rights in the right way. If what you are talking about is a large language model that sits in the middle of the text stack, so you will have applications built on top and you will have the large language model. I think that is what you are asking about: how is the model trained? Yes, the models are trained in accordance with all applicable laws and payments to rights holders. At the bottom, you will have the infrastructure, the data centres and the cloud where they sit. That will be a different thing again.

Lord Foster of Bath: You would also want to maintain the IP of the product that is ultimately developed, which we would understand.

Chloe MacEwan: I am not sure I understand quite what you are getting at.

Lord Foster of Bath: Mr Morrison-Bell, just a yes or no quickly whether you agree with Mr Andeer.

Tom Morrison-Bell: We always seek to be compliant with intellectual property laws when training our models.

Monica Ariño: I agree with that statement, but I am not sure I fully understood what your broader question on AI was. It is an important question. We have been using AI for many years and we do that very responsibly. I would like to come back to the committee with a full, detailed answer on that question.

Lord Foster of Bath: That would be very helpful, if you would.

Matt Foster: We obviously agree on compliance: we remain compliant with all applicable laws. Again, as with Monica, if I could write in more detail that would be helpful.

Lord Foster of Bath: That would be very helpful.

Q28 **Lord Hall of Birkenhead:** This is another question where we will go down the line. It is on the EU's Digital Markets Act. I think Chloe mentioned disclosure as one difference. Can you say where you think the EU Digital Markets Act is better than the Bill that we will be considering? At the same time, does regulatory divergence in that sense matter? Is it a problem?

Matt Foster: It will not surprise you to hear that something we think is better in the DMA is that the EU has not chosen to erode rights of defence. There is still a fundamental focus on due process: reviewing the merits and facts of decisions and whether they are right or wrong. You will have heard from others, and you will probably hear again today, that what the DMA does is very specific in the provisions: we have a clear idea of what regulations we will be bound by. It is the opposite end of

the spectrum from what we have with the DMU, where we are empowering the regulator to decide what that looks like later. We absolutely see value in a more bespoke and tailored approach to each business model, but necessarily with that comes a little bit more uncertainty until we have the piece of paper that tells us what regulation we are bound by. Those are two key areas.

The answer to your question on whether divergence matters is that it can. It very much depends on the specific provision. That is a not cop-out, but if two regulators are trying to achieve the same aim but take two very different technical solutions, the companies affected by that necessarily need to consider, "Can we afford to comply with that or do we just need to exit the product from it because we cannot meet that bar?" That is where regulatory dialogue between the Commission and the CMA will be important to make sure that we are not creating these big rifts.

Lord Hall of Birkenhead: We heard elsewhere from evidence that market size does not matter. Is that the case with the regulator, or does it?

Matt Foster: Again, I am not trying to cop out, but it depends. It depends on the compliance costs. Indeed, some products work better in some markets or jurisdictions than they do in others. When deciding whether a product is worth introducing, you have to think about whether it is right for the market. I would not say that it is right to say it does not depend. It is not the case that we add one line of code and everything is fixed; it takes a lot of effort, time and money to introduce this. The legal risk is particularly high, especially if you do not have confidence that there is an appeals process that can catch the mistakes when they happen.

Monica Ariño: I will start with the second question first. We operate in a lot of different countries; we see a lot of different regulatory approaches. What matters is not so much divergence but clarity and regulatory predictability. That is important for us. We always put the customer first in how we comply with the laws of different countries.

I would not describe the EU or the UK regime as better; they are just very different. The EU has chosen to go for more definitive and prescriptive rules that apply equally to all companies. The UK has a choice now, and it prefers a more tailored and bespoke approach. What is important is that that approach preserves the regulatory clarity and predictability that has historically been one of the main reasons why we have invested so heavily in the UK. It is one of the main attractions, and why we have been here 25 years, invested £56 billion since 2010 and have 75,000 employees here at the moment. We want that clarity and predictability to continue so that we can continue to invest, innovate and deliver for customers.

Lord Hall of Birkenhead: Matt said that that clarity will take some time with the model here. Is that a problem for you?

Monica Ariño: It will take time. For that reason, I think that merits appeals would allow for that to bed in, but it might not just be a matter of time because you still need a good law. It is not a question of getting more expertise or seeing some cases or precedent; you need greater balances, which we have discussed at length with this committee from the get-go, if you want to have that clarity long term.

Kyle Andeer: Again, I will take your second question first, around divergence. Which at least from our perspective, the risk is not so much an Apple risk; it is more on the developers and the consumers who use our products. And so, I think one of the concerns we have when it comes to different regulatory regimes in different countries—building on the point around different standards and different levels of certainty—is that there will be a balkanisation. One of the great strengths, at least from our perspective, of things like the app store is that it is available in more than 175 countries around the world. If we are moving to a regime in which there will be different rules, different practices, different standards, suddenly you are talking about maybe 10 different or 15 different.

That will create real costs for us but, frankly, we can incur those costs. More importantly, it will incur costs for developers who today just have to create it once and distribute it everywhere. Going forward, there might have to be a need for multiple versions. That will have a disproportionate impact on the smallest and start-up developers.

In terms of the first question, I would simply say the lack of structure in this Bill is a challenge. It is particularly a challenge when it comes to a company like Apple, which is making hardware products. When we are developing the next iPhone, the next Mac, not to mention something like the Vision Pro, we are thinking about it years in advance. And so, the uncertainty about what the rules are has a real impact on our product development. We are thinking about innovations in technologies that we want to bring to market in 2026. However, we do not really know what the rules are under this particular piece of legislation. And that does cause us some concern.

Tom Morrison-Bell: As you can imagine, coming towards the end of the line, there is not a huge amount different, but it is probably worth dwelling again on this participative approach. We have had an interesting and successful example through Privacy Sandbox. It is also true to say that that required us to do extra things to deliver innovation that we think would be important for our consumers.

Again, it comes back to the checks and balances: do you want a regime that has consumers and consumer welfare at the heart? Is that delivered by having the right checks and balances, the consumer benefits exemption that can allow the regulator to properly take into account consumer benefits when constructing forward-looking conduct requirements on companies? Do you make sure that that participative approach is at the centre so that the DMU is not inadvertently sidestepped when parties go to court and then potentially gives conflicting compliance requirements for companies?

Chloe MacEwen: To add something on the differences between the DMA and the UK system, what is clever about the UK system is that it is quite outcome-focused and principles-based. That builds in flexibility and a bit of future-proofing. If applied properly it ought to allow innovation, unlike a system that has very hard dos and don'ts, which introduces an element of rigidity. But the devil is in the detail: you want to be able to have that outcome-focused and principles-based regulation, with the trust to get the investment into the UK and the certainty and the strong regulatory accountability so that you know it is a strong regime, and that companies will not hold back on investment decisions, will not be chilled—Monica mentioned Clause 20(3)(c)—and have the confidence to introduce new products. It is different.

Your other question was on divergence. Yes, these are global markets and global products. This is all interoperable. Divergence is not the objective here. The CMA has a digital strategy, where it speaks about the importance of dialogue with other regulators and international regulators. We absolutely support that.

Lord Hall of Birkenhead: How does the CMA compare with its international comparators? Is it seen as being strong, or good? How is it seen? You have worked in a number of different places.

Chloe MacEwen: I have worked at the Competition Commission and the OFT. They are fantastic institutions that are globally recognised for their talent.

Q29 **The Chair:** I am very grateful to all of you for your time and your patience. Reflecting on what has been said, some of your answers seem to suggest that the main lens through which you are looking at this is perhaps the impact on yourselves, which I can understand, and therefore what impact you have on the smaller players that use your services and platforms.

In the context of innovation and investment—you have talked about the potential chilling effect on Microsoft or Amazon—what are your thoughts on the chilling effect on investment on SMEs? It may be that there is a world out there where other businesses are not investing but might if there was an opportunity to compete on some of these services that are currently not available to them.

Chloe MacEwen: I hear what you are saying. Let me set out a bit how Microsoft sees itself. To put it in simplistic terms, we are a platform company: we provide building blocks for others to take and to build things with them. We understand that there is a dependency between what we do and what they do, and when they succeed we succeed.

We do not accept the premise that you need to somehow cut off a bit of a big company to make a small company grow in its place. We believe that innovation by big companies will help spur innovation by others as well. We have a wide network of customers and partners across the UK, and we power them for their success. That will be even more important in the new more AI-enabled world, where we will have people building things on top of other layers that are built on top of other layers again.

We think that this premise of lopping off one bit for others to grow does not reflect the real digital transformation that we are now going through.

The Chair: It is not necessarily about lopping something off; it is about making sure that the opportunity is not closed down by virtue of the dominance and power of an existing player. It is not necessarily about shutting something down or removing an opportunity but about potentially increasing competition so that you can still innovate yourselves and invest but you are inspired by more competition. It is a basic competition argument.

Chloe MacEwen: I do not have a particular perspective on that and it does not sound unreasonable. As far as Microsoft is concerned, it is not something I recognise as a particular concern that is currently addressed at us. When we make these remarks about chilling, it is not about what it does to these companies but about what it does to the market as a whole, and what decisions other companies take about where to base themselves and what regime applies because of things they see in the economy at large. I can only agree with you that it is not just about us; it is about the economy as a whole. Getting this system right, getting it strong and accountable, is a good thing for everybody.

The Chair: Does anybody else want to add anything on that particular point before I close?

Kyle Andeer: The only thing I would add there is you know in terms of creating an environment for SMEs and start-ups, we have approached this always at the app store in terms of building a trusted platform. The reason that consumers download millions of apps every day is in part because they trust that Apple has taken a look at this and stands behind to some extent what is available on the marketplace at the app store.

A concern that we have is that if these rules start to change, if our policies around privacy and security are undermined by this regulation then that has a disproportionate impact on the small and mid-sized entrepreneurs who are just getting their start. It may favour the wealthy, well-known developers. That is not really our focus; it is how do we create an environment where everyone has an opportunity. And we have done that over the years by treating them all the same. Everyone is subject to the same rules, the same policies and the same business model. That has led to, at least from our perspective, incredible growth in terms of competition and innovation.

The Chair: I will draw the session to a close. Thank you for being here today. I am hugely grateful. I do not know that we have ever had a Select Committee in Parliament before where we have had all five of the big tech companies represented together. It is good of you all to agree to it today. I hope this will not be the final time that we see you, because we will be doing an inquiry in the second half of the year about large language models. I am sure that we will be very interested to have you before us again to talk about that.