



Communications and Digital Committee

Corrected oral evidence: Digital Markets, Competition and Consumers Bill

Tuesday 27 June 2023

2.15 pm

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Members present: Baroness Stowell of Beeston (The Chair); Baroness Fraser of Cragmaddie; Lord Griffiths of Burry Port; Lord Hall of Birkenhead; Baroness Healy of Primrose Hill; Lord Kamall; Lord Lipsey; Baroness Wheatcroft; Lord Young of Norwood Green.

Evidence Session No. 4

Heard in Public

Questions 30 - 37

Witnesses

I: Dr Liza Lovdahl Gormsen, Director of the Competition Law Forum and Senior Research Fellow in Competition Law, British Institute of International and Comparative Law (BIICL); Professor Damien Geradin, founding partner, Geradin Partners, Professor of Competition Law and Economics, Tilburg University, and Visiting Professor, University College London.

USE OF THE TRANSCRIPT

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

Examination of witnesses

Dr Liza Lovdahl Gormsen and Professor Damien Geradin.

Q30 **The Chair:** The Communications and Digital Committee is continuing with public hearings on the Digital Markets, Competition and Consumers Bill, which is currently working its way through Parliament. We have one panel today, with two witnesses, both of whom are joining us online. I invite the witnesses to please introduce themselves briefly by setting out their credentials for giving evidence to us today.

Dr Liza Lovdahl Gormsen: Good afternoon. I am a senior research fellow at the British Institute of International and Comparative Law, and a senior adviser at the Financial Conduct Authority.

The Chair: Thank you very much. Professor Geradin.

Professor Damien Geradin: I am a partner in a firm that is called Geradin Partners. I am also a professor of law and economics at Tilburg University in the Netherlands and at the University of East Anglia.

Q31 **The Chair:** Very good. Thank you both very much for being with us. As I said, we have been holding hearings on the digital markets legislation and have had before us a range of witnesses: representatives of large tech firms, as well as some small technical new entrants, tech businesses and others operating in the digital markets who feel very much affected by the power and dominance of the larger players. We have heard a range of different views.

Today, we want to concentrate on some of the more contentious issues that are reflected in the Bill and discuss some of those areas, given the competing claims and perspectives that we have heard from our different witnesses. You will not be surprised to hear that I will start by asking about the appeals standard in the Bill, which, as you know, is currently a judicial review appeals standard. How important or otherwise do you consider that to be to the good functioning of the legislation?

Professor Damien Geradin: I think maintaining judicial review as currently set out in the Bill is critical, because time is critical. I have been involved in almost all the large competition cases involving large tech companies, in the European Union and the UK. What has always been extremely challenging for companies seeking relief is the fact that the timeframe was inadequate.

I testified before the Furman commission four or five years ago and there was a general consensus, which I think you can see in the Furman report, that competition law was inadequate to address the market power of big tech firms because it was a slow tool. Investigations were extremely complex, and when a decision was adopted, sometimes five, six or seven years after the initiation of the complaint or case, either the complainant company was bankrupt and had disappeared from the market or it was still there but the market had tipped and it was therefore no longer open to competition.

So I think there is a consensus among experts that time is of the essence. That is why judicial review is the right standard. It is because allowing an appeal on the merits would mean losing more time. The CMA would have to devote significant resources to the appeal. It would be another way for big tech to delay things and force authorities to spend more money, and so on. There are other reasons, besides timing.

The Chair: Before you move off timing, some of the big tech witnesses question the issue of timing and suggest that JRs are not necessarily shorter than appeals on their merits. Do you have a view on that?

Professor Damien Geradin: I do not have any statistics, but I am quite confident that JR is shorter, because it is much more focused. Reviewing the merits means that points of fact and detail will need to go through another debate in court. It would be interesting to look at the data, but personally, and for reasons of logic, I think JR is shorter. But there are other reasons, which is why, even if time were not the main issue, it would still be preferable to go for judicial review.

The first reason is that a merits appeal would change the dynamics when it comes to developing codes of conduct or pro-competition intervention. It would reduce the incentives for big tech firms to collaborate with the CMA to get sensible rules of conduct adopted. They would probably not produce some of the evidence, preferring to keep it for the appeal. If the idea is to have a more collaborative approach—something found in the Furman report and discussed in various reports submitted in consultation—a merits appeal would be negative, from that standpoint.

The merits approach would also create a scenario in which a company would have two bites of the cherry. First, there would be discussions within the procedures of the DMA regime. Then everything would be rediscussed in court. It is much simpler to have one discussion and then a JR appeal to make sure that the CMA is not able to engage in misuse of power, and so on.

I believe there is a third reason, which is that it will increase the efficiency of the system. The firms will know—this is linked to the first reason I gave—that they need to collaborate in order to come up with rules that make sense. It is only in the case of abuse or other procedural problems that they will be able to appeal.

For all those reasons, I believe that JR is superior to a review of the merits. I should also say that JR is not novel. It is the standard that is applied when a company wants to contest a decision of the regulator. It is also applied in cases where the regulator adopts forward-looking approaches. For example, it applies to Ofcom in a number of scenarios.

Abroad—even under the DMA in Europe—the grounds on which companies will be able to appeal will be limited to a certain number of specific grounds, such as errors of law, lack of competence, infringement of procedural rules, and misuse of power. It is a standard that I think has been widely applied and has functioned well. For all those reasons, JR is preferable to a review on the merits.

The Chair: On your last point, making comparisons with the EU, some of

our witnesses have said that the UK's approach to appeals is quite different from the approach in Europe, which is on merits. From what you have said, that is not correct.

Professor Damien Geradin: That is not my understanding.

The Chair: Maybe I just misunderstood the way they explained it to me.

Dr Gormsen, still on judicial review, do you want to add to what Professor Geradin has said or to say anything different?

Dr Liza Lovdahl Gormsen: I have been before this committee several times, including with Professor Geradin, and we tend to agree on many things, but on this point I respectfully disagree. The important thing is that he is talking about administrative efficiency, which needs to be balanced against effective judicial protection of the companies. I do not work in private practice, so I do not represent any tech companies or have skin in the game. It is a matter of law. The UK has always prided itself on upholding the rule of law and, despite Brexit, we are still party to the European Convention on Human Rights—not the charter but the convention—which includes access to a fair trial. I am sure you know all this already and that it is not new to you, but it is still very important that there is effective judicial protection of those who are accused of something.

To pick up on the point about time, I agree with Professor Geradin that time is critical, but the courts are very capable of carrying out case management. It is for the court to be strict on timelines. I have no doubt that courts in the UK are capable of case management, so that things do not run amok and take too long.

Professor Geradin touched on the money. One can ask the tech companies to pay costs on both sides. That might be a sacrifice for them. I would go for a time-limited full merits review. We might say that until the very new system is embedded, and we understand where we are going with it, we will have, let us say, five to seven years—I am taking numbers out of thin air. Let us go for a time limit of seven years and then have a review of how the system has worked. We could therefore end up with judicial review if we are happy with where the boundaries have been drawn. I think it is important for the court to be part of aligning those boundaries. That is why I would prefer a time-limited full merits review.

We have seen this before. Damien mentioned a similar situation involving Ofcom. There was a full merits review and a time-limited period of 10 years. After that period it went to judicial review-plus; that is called the hybrid model. That is where I will land on that.

The Chair: So that I am clear on your opinion, you mentioned the so-called judicial review-plus type of model. Do you propose using that straightaway, or do you suggest full merits? Some people describe these things in different ways. With a JR-plus there would be a full merits system, but in a time-limited way that would then switch to JR, or there might, as you say, be a hybrid-type approach.

Dr Liza Lovdahl Gormsen: That is exactly what I mean. JR-plus is where you have a time-limited full merits review, until we understand where the limits of this very new regulation are. When the court has set those boundaries and the system has embedded itself, we can go to JR.

Q32 **The Chair:** Professor Geradin, you may have something further to say on that. We will come back later to the collaborative approach that you mentioned in the context of a participative type of approach to regulation. There are those who are very pro the judicial review system but sympathetic to the need for greater accountability of the CMA, in that they express concerns about the power of the CMA and who holds it to account sufficiently if it is to make big decisions whose rightness may be open to question down the line. What is your view on internal accountability for decision-making at the CMA? I understand that that featured in the Furman review, but it does not get much focus now that we are talking about the appeals process.

Professor Damien Geradin: My experience with the CMA is, first, that it is a very professional organisation. I think it knows what it is doing. It has unique expertise. It has built a level of expertise that is second to none, especially when compared with that currently available at the European Commission. So I am very confident about its level of expertise.

On checks and balances, I have never worked for the CMA, so it is difficult for me to opine on that. My inclination is to say that, seen from the outside, it looks like a fair institution. Of course, people often focus on the cases that are run by the CMA, but I know from good sources that there are many cases it decides not to run because the evidence is thought insufficient. So it is not as if the CMA is known for running wild.

Of course, in some cases the parties may believe that the CMA has been strict, but in other instances it has taken a pragmatic approach, such as to accept commitments from the parties. We saw that recently with the Privacy Sandbox in the case of Google. More recently, it also indicated an inclination to accept commitments from Google. By the way, I criticised that approach, because I thought it was not strict enough. It is an institution that is really quite professional. Obviously, there are many constituencies, and there are many filters before a decision is adopted.

I would like to come back on a couple of comments made by my colleague Liza. It is true that 99% of the time we agree on things, but on this we seem to disagree. I am quite struck by the idea that review on the merits will be essential for human rights reasons. That suggests that the current standard of review for decisions taken by public authorities would breach human rights. That would raise very significant questions. I sympathise with human rights and the right to a fair trial, but at the same time I am struck by the allegation that JR would not satisfy the human rights standards found in the European Convention on Human Rights.

Perhaps one reason why we tend to disagree is that I have spent a lot of time litigating these cases and I see multiple attempts to make things

difficult for the regulator—to delay things for ever, to drag feet and not participate, and to appeal and appeal again, and act strategically. To some extent I have lost trust in the ability of big tech companies to play fairly—or at least some of them; I do not think they should all be put in the same bag. Some are more collaborative than others, but there are at least a few that are usually unwilling to collaborate or play ball with regulators.

Dr Liza Lovdahl Gormsen: I would like to pick up quickly on the human rights point. What is very different in this Bill is that individuals in the companies can be held responsible. The CMA can impose a penalty on the individual if she or he does not comply with the requirements. That is where the human rights angle comes in—not so much in relation to the company.

The Chair: As we proceed, we will pick up some of these themes, as I said before, particularly the incentives to collaborate. It is an important point. We know that the CMA has expressed the concern on the difference between full merits and JR that, from its perspective as the regulator, full merits could be a disincentive to collaboration. We will be able to ask the CMA directly about that when it is before us.

Q33 **Baroness Fraser of Cragmaddie:** We have had various discussions about whether this Bill is forward-thinking enough. I want in particular to come to the question about whether it is forward-thinking enough on the leveraging principle. We have heard a range of views from various companies. Big tech, for example, is worried that it will have to ask permission to innovate or that innovation will be stifled. On the other hand, if it is worried about its investment, what about everyone else's? Other people have expressed the view to us that the Bill takes a narrow approach to the leveraging issue, and that the DMU will find that it is bogged down—a bit like the topic we have just been discussing with JRs—and unable to address issues because of legal arguments about where something sits.

I would like to hear your view. Should the leveraging principle be retained, deleted, strengthened, or weakened? What are your thoughts?

Professor Damien Geradin: I think the leveraging principle should be strengthened. Let me explain why. The strategy that is common to big tech companies is to leverage their market power on a given market to another market. This can be done in multiple ways. In fact, many of the competition cases that have seen the light of day in the past 20 years are cases involving market leveraging. For example, if you have market power in market A, you will use it to invade another market and conquer it. You can do that in multiple ways. You can, for example, tie a product on which you have a dominant position to another product in a market that you would like to conquer. It is really part of the competition problems that we see on a daily basis in these markets.

It seems to me that the provision that deals with leveraging is a bit narrow. I am concerned that it may not be sufficient to capture leveraging scenarios where you use your market power in a market that

would fall under the scope of the DMU regime to gain market power in a sector that is not covered by the regime. In fact, the regime is well thought through. It is not excessively broad, because it targets only certain activities. You do not designate a company—Google or Meta. You will designate Google only for certain activities, which in my view is the way to go, because some of these companies are very strong in some markets and much less strong in others. You do not want to regulate everything they do. That would be a waste.

As a counterpart to the fact that the Bill is very tailored, the CMA needs to be able to capture behaviour that has an impact outside these markets. It is typically what happens on a regular basis. The relevant provision is Clause 20(3)(c), which ends with the phrase “in relation to the relevant ... activity”. I think the language should be broadened, although not excessively. I do not have an amendment to propose, but I think we should make sure that it is able to capture the sort of behaviour I have described.

Also, there is a risk that if the CMA’s focus is limited to these regulated activities, some companies may decide to switch some provisions or restrictions to activities that are unregulated. On top of that, unlike the DMA, there is, as far as I can tell, no anti-circumvention provision, which means that there may be a temptation by some companies to play clever and engage in leveraging activities without the CMA being able to capture them.

Baroness Fraser of Craigmaddie: Thank you. Dr Gormsen, do you think it is too narrow?

Dr Liza Lovdahl Gormsen: The concept of leveraging is not new. It is a concept that the CMA has known for a long time. Therefore, the way the Bill deals with leveraging, as it is, is perfectly fine. One would imagine that the DMU and the CMA are clever enough to look into disruptive innovation and look at the ecosystem in the round, meaning that they do not look just at what is happening right here today; they look at what other markets, with a business model like this, they could branch out to. Therefore, if things become too prescriptive in a Bill, it takes away from the regulator’s ability to look at disruptive innovation in the future. I think the drafting as it stands is sufficient. I would not strengthen or narrow it; I would keep it as it is.

The Chair: One of the common complaints that we have heard is about the 30% charge that Apple’s App Store and Google’s Google Play make. The fear is that it will be possible to shift the principle of charging to another part of their operation, which would not be caught by the strategic market status. Is what you are saying that, in your view, that fear is met by the legislation as it currently stands?

Dr Liza Lovdahl Gormsen: Yes, because it is not only the designated activity but a related digital activity. Clause 10(4) talks about a “further SMS investigation” into a related digital activity. The CMA can designate a specific activity for a number of years, and if it suddenly sees that the sort of behaviour that you mentioned is happening, it would probably be a related digital activity that it could capture under this. But who knows?

I do not know how this will be interpreted by the courts in the future, because we do not know how it will work in real life.

The Chair: Do you disagree, Professor Geradin?

Professor Damien Geradin: I do.

Dr Liza Lovdahl Gormsen: He says it should be strengthened, and I am just saying that it is fine as it is.

The Chair: Okay.

Professor Damien Geradin: Let me respond to a couple of points. The final part of the provision in Clause 20(3)(c) says that an undertaking's regulated activity will fall under the regime if it will "bolster the strategic significance of its position, in relation to the relevant digital activity". I am talking about an attempt to use the market power in that activity to expand it to another activity.

I have heard some companies say, "It will kill innovation". I am based in Brussels but have an office in London. Some of these companies were predicting doom. They have said for a long time that it will be the end of innovation. No: the matter is simply to prevent them engaging in an anti-competitive course of conduct. Nobody will ever be prevented from innovating; we are just trying to control their market power in the most efficient way. Rather than betting on the potential offered by other provisions, I would prefer to have effective language in the provision that deals with this problem.

The Chair: I may want to come back to that, but let us move on to Lord Hall and countervailing benefits; it is getting very technical.

Q34 **Lord Hall of Birkenhead:** On we go to another clause with which we would like your help in deciding whether it is too tough: Clause 29 on countervailing benefits, and the firm having to successfully prove that its actions are "indispensable and proportionate".

We have had evidence from the Open Markets Institute, from Rocio Concha from Which? last week, and from Telegraph Media Group, and they have all suggested that the exemption is too broad and should be narrowed. We have also had evidence suggesting that the clause should be got rid of altogether. Could you help us with what we should be considering here?

Dr Liza Lovdahl Gormsen: Any exemption in law has to be interpreted narrowly. That is a general principle of law. If I may, I will make an analogy to objective justification, which is a concept we know under competition law enforcement. I know this is regulation and not competition enforcement. Nevertheless, if we pull objective justification from there, it has been extremely difficult for dominant undertakings to use that principle of objective justification, which is an exemption principle. Here we have countervailing benefits, which is a kind of exemption, so it should stay in the Bill but be interpreted in a narrow fashion. The regulators are quite capable of doing that, and so are the courts.

Lord Hall of Birkenhead: To be clear, are you saying that the exemption should stay but we should find some way of narrowing it down?

Dr Liza Lovdahl Gormsen: No, I do not think that it is for the legislator to find a way to narrow it down.

Lord Hall of Birkenhead: It is for the regulator.

Dr Liza Lovdahl Gormsen: It for the CMA and the DMU to interpret this in a narrow way. It has been very difficult in the past for dominant undertakings to make use of objective justifications, so it will be very difficult for companies with strategic market status to make use of countervailing benefits. I do not think the legislator needs to do anything in the Bill because the regulators are capable of interpreting this in a narrow fashion, which they have done in competition enforcement.

Lord Hall of Birkenhead: What is the argument against removing this clause altogether?

Dr Liza Lovdahl Gormsen: There should always be an exemption, because in one out of a hundred cases there could be a benefit. We will know only when the system has embedded itself and experience tells us that this or that happened, but it could be that once in a blue moon there is a benefit and it would be a shame to close the door to that.

Lord Hall of Birkenhead: Thank you very much. Professor Geradin, what is your view on this?

Professor Damien Geradin: I tend to agree on this point. Again, the reason is based on my experience. It is extremely rare for a company to succeed in proving, for example, that the conduct "is indispensable and proportionate" or "does not eliminate or prevent effective competition"—to use some of the terms mentioned in Clause 29. Historically, these exemptions exist, as in competition law, in relevant EU law and in the Competition Act, and they have always been interpreted in a restrictive manner. Exemptions are interpreted narrowly.

I am not opposed to this exception, for much the same reason as Liza Lovdahl Gormsen mentioned: there might be a situation where a different practice is a source of efficiency or can be objectively justified. Of course, it will be for the CMA to look with a critical eye at some of the arguments that will be made. For example, for some time Apple has made fairly aggressive arguments over security, safety, privacy and so on. In its report on mobile ecosystems, the CMA took a very sceptical view of those arguments.

Generally, although I am in favour of strong enforcement, I think it is reasonable to maintain an exception in the legislation.

Lord Hall of Birkenhead: You have both suggested that the usage of this would be once in a blue moon, or not very often. We have also heard evidence that suggests that this might be one of the areas where big tech firms could spam the DMU with volumes of material, but I think you have both suggested that this is not likely to be the case.

Professor Damien Geradin: If you are defence counsel, most of the time you will throw the kitchen sink at it—you will try absolutely everything. That is your duty as defence counsel. Institutions such as the CMA have been in charge for a long time; they have seen it before. They usually know when some of the arguments lack credibility, so I am quite confident that they would take the right decision.

This is another reason why I am sceptical about a review on the merits. It means that this sort of technical evidence will be reviewed once by technical experts—the DMU has data scientists, engineers, economists and so on—and then it would have to be reviewed again by non-technical experts, which means people like me: lawyers and judges. I would prefer to have an exception in the system that obliges the CMA to look into the sort of evidence that will prevent it, but then combine it with JR so that we are not hearing and rehearing arguments, which, by the way, we have been hearing for the past five years through the various consultations carried out before we reached this point.

Lord Hall of Birkenhead: Thank you both.

Q35 **Baroness Healy of Primrose Hill:** Is there sufficient focus on promoting consumer benefits and avoiding consumer harm through the Bill, and not just on the one-off occasion when the countervailing benefits might be of use?

Dr Liza Lovdahl Gormsen: Thank you for the question. This is a very large Bill, and it considers consumers to a great extent compared to what we have seen in anti-trust or competition enforcement. It is very good on the consumer harm side. The question is all about how it will be applied. Legislators can sit and draft Bills endlessly and put everything into them, word by word, but it all comes down to the question of how they will be enforced or regulated, and how they will go about doing it. Therefore, as it stands, it is doing consumers a service, not a disservice.

Professor Damien Geradin: Consumers are at the centre of the Bill—even in the title of the Bill. Certainly, they have not been ignored by the legislation. At the same time, although obviously we are focused on consumers, it is also important to focus on the companies that depend on big tech companies. They face hurdles and difficulties and have to pay very high fees and commissions, so I am also concerned about smaller companies that depend on the platform.

Generally, in society, there is the idea that Apple, Google and Meta are innovative. To some extent they are, although, in some cases—I am thinking about Apple—you have the impression that, these days, it is more a wealth-management company than a real innovator.

There is a ton of innovation coming from app developers and small creative tech companies in the UK, creating jobs in the UK and partnering with institutions in the UK. When I read the Bill, I have consumers in mind, obviously, but I also have these companies in mind because they are fundamental to economic success in the UK, on the continent and elsewhere.

Baroness Healy of Primrose Hill: Thank you very much.

The Chair: We heard the argument from larger businesses that consumers very much welcome the quality of their services and the products they make, and the integrated nature of some of this innovation, so to disaggregate some of this in a way SMEs or the smaller start-up businesses would like so that they had the opportunity to enter into those markets would be of detriment to consumers. That was the big tech argument. The smaller businesses were much more of the view that there is an opportunity here for the competition that they provide to encourage greater innovation than might otherwise exist. There is a difference in perspective about what competition means, depending on whether it is a big business or a small entrant trying to make their mark.

Professor Damien Geradin: Regulation is not binary. There are good arguments on all sides. If you create an ecosystem, it generates benefits. You have products that work seamlessly together, and consumers appreciate that. It gets problematic when you have a strategy that prevents smaller firms from competing. Generally, we can agree with arguments made by large tech companies that their products and ecosystem offer significant benefits to users, while at the same time sympathising with the concern of smaller companies that cannot penetrate markets because they are locked out.

Q36 **Baroness Wheatcroft:** That last comment sums up the difficulty at the heart of this: it is not entirely clear what the Government want to achieve with the Bill, given the contradiction that you have just pointed out.

I would like to concentrate on the right for individuals to bring cases, whether you think that will happen and is possible, or whether, instead, there ought to be a right for smaller businesses to act collaboratively to challenge the bigger businesses. On the other hand, will there be a risk, as some of the big tech companies feel, of those companies bringing cases simply to try to frustrate their rivals and hold them back? Might it be a risk that progress will be frustrated by the effort to allow people to challenge companies rather than leaving regulation to the CMA?

If that is the case, how does that impact on the proactive conciliatory approach that the CMA is also keen to adopt in trying to come up with negotiated settlements rather than hefty penalties? Might that process be frustrated if, mid-negotiation, some group or individual launches a case against a big tech company? Might that send everything back to the starting point?

While you are pondering that, could you also enlighten us as to what you really think the proactive conciliatory approach is or should be, and whether it should be spelt out in the Bill?

Dr Liza Lovdahl Gormsen: That was many questions and many points together. I will attempt to answer some of them. You said that in the process companies might try to frustrate their rivals. I am sure that will happen, and I have no doubt that is also happening in pharmaceutical markets when they are trying to keep competitors out. No matter how

well you construct a Bill, it would be difficult to avoid that, because the very nature of the competitive process is to become the strongest and leave everybody else behind.

On what they can do, there is always the option of going to court no matter what the CMA is doing. They can always go to court in parallel with what is happening at the CMA. It is obviously extremely costly for individuals. If they are frustrated by any process, they can always take private action, and this Bill does not prevent that.

On your point about negotiated settlements and proactive conciliatory approaches, a settlement will be difficult. I have not said this before, but I must comment that this is a very good Bill. Perhaps people do not understand the objective of the Bill, but, as I see it, it is to curtail the power of certain firms that have gatekeeping powers over certain parts of the economy. To be honest, it is a successful Bill in that way.

How we will do settlements, whether it will be a good process, and whether they will come in and have a good dialogue with the regulators, only time will tell. I would hope that companies with strategic market status also have an interest in getting this done in such a way when they have been designated an activity. The CMA has the power to de-designate such an activity, and that is a powerful thing. If you stop doing the things, you might be de-designated quicker than otherwise. Therefore, the fact that this Bill allows for de-designating of certain activities in itself should be a carrot for those companies to go in with the right mindset and be proactive in the conciliation.

Baroness Wheatcroft: Just on that point, do you think that the conciliatory negotiating process is therefore really important and should be put on the face of the Bill—because at the moment it is not?

Dr Liza Lovdahl Gormsen: I would hope that this Bill does not get much longer than it already is. I would hope that the things that are already in the Bill now would incentivise them to come to the negotiating table with the right mindset. Of course, one can always be cynical and say they will do everything they can to frustrate the process, but in that way they will not be de-designated. Then the DMU and the CMA can keep designating, and they can do it again after the five years and they can draw in more activities. One would hope that this Bill has enough teeth to not have to put in such a provision.

Baroness Wheatcroft: Thank you very much. Professor Geradin, could you start by addressing that last point? We heard in our previous session some concern that, if the conciliatory process was not in the Bill, the CMA might be somewhat reluctant to follow that route and be more inclined to go the punitive route.

Professor Damien Geradin: To be honest, I think the system is built around the idea of a dialogue between the regulator and the companies. I do not have any amendment to suggest. My experience is that dialogue is often difficult, and that is for a couple of reasons.

One is the view of the world of some of these companies. I am always struck when I speak with American colleagues, especially on the west

coast, by the level of detestation they have vis-à-vis the state and regulators. They think they should be free to do what they want. They think regulators do not know what they are talking about and should leave them free. If that is the view of your management, although it may deny that is its view, it is very difficult for the people on the ground to be collaborative because they will be criticised for being weak or for giving way to the regulators.

In theory, I think participation and collaboration are better. In practice, I think it is difficult. For philosophical reasons and for practical reasons, the incentives of these companies and the lawyers who advise them are just to make things complicated. They fight. They want to maximise. Compromise is not something they typically enjoy unless they are in a corner and have no other choice.

To pick up on your other questions, it is unavoidable that, for the reasons I have mentioned, some of these companies will litigate and will challenge each and every decision. We are already seeing that in the European Union. Today, a company decided to challenge its designation under the DSA. We will see all of that in the future, and I do not think you can prevent it. That is also why I think JR is probably better—because there will be a lot of litigation, it will be complex litigation and so on.

As to the right of individuals to litigate, either private citizens or smaller companies, I am in favour of it. Why? First, because I think it is your right. You should be able to go to court. If you have a frivolous case it will be treated as such, but if you have a good case it will get the attention it deserves. It is true for consumers. You have very successful consumer organisations in the UK such as Which?; they can litigate if they want to. In the case of individual companies, I do not think you should think that they will flood the system with litigation. It is extremely expensive to litigate in the UK, so a small company cannot afford to do that. On top of that, they are usually fearful; they are very concerned that there might be retribution.

There will be cases where a company has a very strong feeling that it should seek relief and will find the resources perhaps with the help of a litigation funder to bring a case to court, but those cases will be the exception rather than the rule because of the cost, the difficulty and so on.

Baroness Wheatcroft: Would it be fair to say that in those circumstances a group of small businesses with similar interests should be allowed to come together to bring an action?

Professor Damien Geradin: That is true, because I have seen in my career many instances where the regulator would have liked to act but could not act because it had limited resources. It could not take each and every case. I have spoken several times with heads of regulatory authorities who said, "I had to pass on that case simply because our team was full". Allowing individuals to litigate is a safety valve in the system. As I said, it is not as if you would have thousands of cases,

because of the cost and difficulties of running such cases, but it is important to give them the ability to do that.

Baroness Wheatcroft: That is really helpful. Thank you.

Q37 **The Chair:** I am very grateful to both of you for giving up your time and joining us today. It is always incredibly helpful to get your expertise on these matters. Before we close, is there anything we have not covered that you want to flag to us at this juncture? We have covered quite a lot of ground, so do not feel you have to.

Professor Damien Geradin: This Bill is the outcome of many years of work by the CMA and the UK Government. Liza mentioned earlier that she thought it was an important and quality piece of legislation. I tend to agree with that. I hope it will go smoothly through Parliament even if there are some issues that lead to debate.

I also think it is important to focus on very large companies and make sure that not too many companies will be regulated; otherwise, the resources will be too scarce. Let us focus on the very large companies.

Apart from that, thank you very much for having me. I think it is the third time that I have appeared before the committee, and I always enjoy it.

The Chair: We do too. Dr Gormsen, thank you too. Is there anything you wanted to add?

Dr Liza Lovdahl Gormsen: Unfortunately, it was a slow start, because Europe raced ahead of us on similar things, but, leaving that to one side, I must say that what came out of waiting was a very balanced Bill. It is a very big Bill—a long Bill—but it is a good one. The big test will always be how it will be applied. I hope that the CMA and the DMU will be prepared for when it gets Royal Assent. Very much like Professor Geradin, I want to thank you very much for inviting me to the session today. I have also enjoyed it very much on previous occasions.

The Chair: The last time you were before us, we were campaigning for the Bill to be brought forward, and soon after that it received a mention in the Queen's Speech. Then we went through a period where it disappeared out of sight—we thought for ever—so it is nice that, now you are back before us, we actually have a Bill and it is in Parliament. That is real progress. Thank you again, both of you, for your evidence today. I hope to see you again.

Professor Damien Geradin: Thank you.

Dr Liza Lovdahl Gormsen: Thank you.