HOUSE OF LORDS

Communications and Digital Committee

Corrected oral evidence: Digital Markets, Competition and Consumers Bill

Tuesday 4 July 2023

2.30 pm

Watch the meeting

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

Evidence Session No. 5 Heard in Public Questions 38 - 47

Witnesses

I: Sarah Cardell, Chief Executive Officer, Competition and Markets Authority; Will Hayter, Senior Director, Digital Markets Unit, Competition and Markets Authority; Felicity Algate, Director, Digital Markets Unit, Competition and Markets Authority.

USE OF THE TRANSCRIPT

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

Examination of witnesses

Sarah Cardell, Will Hayter and Felicity Algate.

Q38 **The Chair:** This is the Communications and Digital Select Committee. We are continuing our series of hearings into the Digital Markets, Competition and Consumers Bill. We have the Competition and Markets Authority with us today. Could I invite the witnesses to state their name and the position that they hold within the CMA? Ms Cardell, I will start with you.

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

Will Hayter: I am senior director for the Digital Markets Unit at the CMA.

Felicity Algate: I am a director in the Digital Markets Unit.

Q39 **The Chair:** We are very pleased to have all three of you here. We have been holding sessions with various interested parties and what we want to do today, by having the regulator here, is to discuss with you how you will be applying this legislation once it is passed by Parliament. We will go through a series of different categories of questions. We will come in a moment to decision-making, particularly around the participative approach. We will then move to appeals and then some of the specific, contentious elements of the legislation on which conflicting positions have been expressed by the witnesses that we have had before us. Then we will get to regulatory divergence.

I would like to start off with the bigger picture because the CMA, through this legislation, will be getting quite significant new powers. First, I would like to know from you, Ms Cardell, how you would define in your own words the problem that this legislation is an answer to. What is the strategic goal that you seek to achieve and that will be influencing how you go about your work?

Sarah Cardell: Of course. Put simply, the issue is that we see that digital markets—I am sure that the Committee has heard this from others, but it bears repeating—can deliver and are delivering phenomenal good for people and for businesses. They are creating great opportunities for new and different businesses to innovate, to bring products and services to market in different ways, and for people to be able to access those services and products in a whole manner of ways. However, there are features of those markets that in some cases are what deliver those benefits but can also bring real competition concerns.

That includes the way that these markets evolve with networks. If you take a social messaging site, for example, the fact that you build up a network of users where people have a strong preference to be on that network can make it a lot harder for a competitor to come in and compete on a level playing field to get access to those consumers. You have network effects. You have economies of scale where, as these businesses scale up, it becomes almost a self-fulfilling prophecy that they develop that scale, they develop that competitive position, and it becomes harder for others to compete effectively against that.

You also have economies of scope that can then evolve across different services and products, creating what we often call ecosystems, which become increasingly impenetrable for others. As well as creating a competitive disadvantage for other businesses, it often also creates dependencies because these ecosystems have built up and you have a number of potential satellite businesses, with satellite products and services, that want to operate utilising those ecosystems. It can be very difficult for them to get that access on what they perceive to be fair and reasonable terms to offer their products and services in an unencumbered way—one where they are most free to innovate and develop.

You can see these features of the market that can create real problems for competing and dependent businesses, and create challenges for consumers, who at first blush will often think, "This is great. Why would I want to go somewhere else? I have this fully packaged-up service offering for me. What more could I want?" But because of the way that the market evolves, they are not presented with alternative services in an equally accessible way, so over time you risk a reduction in choice for consumers and elevated prices, because you do not have that intensity of competition.

That, in a sense, is the market dilemma and I think it is a particular feature of these digital markets because of the scale, scope and speed with which the markets develop and evolve. That makes it more challenging for us as a traditional competition agency to tackle those problems.

When we look at the toolkit that we have at the moment—and we are utilising those tools, I think, as effectively as we possibly can—we have two main levers of influence. We have our set-piece market studies and market investigations, which enable us to take a market and do a thorough study of it. The work that we did on digital advertising is a good example. At the end of the day, that produces a set of recommendations, or it may produce some specific intervention, but they are locked at a moment in time. It does not give us the ability to continue to iterate, develop and evolve as a regulator as we see that market evolving, too. It is a set-piece intervention.

The same is true to some extent with our Competition Act investigations, where we have to look very specifically at an individual piece of conduct. Is a company abusing its dominant position in relation to a particular market or in particular conduct? It is very much a backward-looking investigation. Typically, for us, that investigation will take two or three years, at best, and then be litigated heavily in the courts, taking another two, three or four years there. You are often looking at a long-running case that will take maybe seven years to resolve. That is the position we face now. This legislation introduces quite a transformative approach to tackling these issues, enabling us to look at the issues that we see both existing and emerging across digital markets and to tackle them in a much more agile and forward-looking way—a way that is much more targeted and proportionate.

That takes me to your question around the vision. What do we think are the defining characteristics of this regime? I think that that agility and proportionality are key. This is a regime that is designed to unleash these digital markets, to make sure that they are able to deliver the full benefits of competition for all market participants, all businesses, large and small, and for all consumers who engage in these markets. It is very much a pro-competition regime. It is also, therefore, a pro-growth, pro-innovation and pro-investment regime. Sometimes we hear this discussion about there being a tension between the two. Actually, for me, it is very clear that if we have a regime that supports competition, it supports investment, innovation and growth. Those all go together. However, it is really important that this is done in a targeted way. We do not want a heavy-handed, overly interventionist approach.

We are looking here at a regime that targets specifically those businesses that have substantial and entrenched market power. It sets a very high threshold for intervention in terms of a turnover of £25 billion globally, or £1 billion UK turnover, and we are targeting specific companies and activities. It is not an all-encompassing regulatory regime. We are looking at specific companies and, within that, specific designated activities, and then bespoke conduct requirements that are targeted at the particular behaviours where we have concerns. We will have the ability to evolve over time. It is not locked at a moment in time, which is critical because these are such fast-moving markets that it needs to have that agility and forward-looking element.

Finally—I know we will probably come on to this in more detail—we come to this concept of a participative approach. One of the challenges that we have at the moment, when I am running the CMA, is that we often get locked into these very adversarial processes. Those are not the best ways to resolve issues in these markets. Again, a key characteristic for me is that this is a regime that encourages resolution. It encourages us to work with participants across the markets, large and small, and for the most part to agree solutions. Of course, some issues will be contested; that is inevitable, but we want to narrow those down and to encourage that resolution.

My last point is: what does good look like at the end of the day? What is the step change that we should expect to see? I think that we will see a series of outcomes evolve over several years, but in the early years what I would expect to see and what we should be held to account on is that we have identified and focused on some priority areas, some priority markets where we can see a material change in the ability for businesses to engage in those markets; that where they have dependencies they can get access on fair and reasonable terms; that they are feeling that they have better opportunities to open up, expand and grow their business; where we can see greater emergence of competing business models and an opening up of ecosystems; and where we can see that consumers are getting greater choice, are benefiting from a wider range of products and services and have greater ability to switch between them. Those for me are some of the key measures of success.

Q40 **The Chair:** Thank you for that. As you say, we will come on to the participative approach in a moment, but at the end there you touched on accountability and how success will be measured if these are the goals that you are seeking to achieve. What thought have you given to how you can demonstrate greater accountability, as I say, taking note of the fact that one of the concerns that is exercising people is that this will be a regulator with a huge amount of power that it has not had before?

Sarah Cardell: It is an absolutely central challenge and one that we take very seriously. We recognise that these are very substantial powers and that we must be held accountable for the way that we are exercising them. It operates on a number of levels. The way I tend to think about it is: accountability for the choices that we make in terms of how we prioritise the work that we are doing and the areas that we choose to focus on; accountability in terms of the way that we operate, and a key aspect there is around clarity, certainty, predictability and the ability for stakeholders to understand what to expect from us; and then, ultimately, accountability for the outcomes that we are delivering. I leave to one side at the moment the judicial accountability and scrutiny, which is obviously a separate but related point.

When we are looking at the priorities that we are choosing to focus on, the CMA already sets out its areas of concern in its annual plan and its strategy. As we think about preparing for the Digital Markets Unit, we will be developing, exposing and sharing our strategy more broadly as to those areas of focus. Of course, at the end of the day we will have to take choices, using the legal powers, about which companies and activities we want to designate first. We will need to go through a process to do that, but it will be a very transparent process and one where we will be held to account through every step of it.

It will be important for us to set clear guidance and that is written into the regime. That guidance will operate across a number of levels. There will be guidance about how the regime works as a whole, and about how we will go about the individual designations, then obviously we will have specific guidance that relates to the conduct requirement. As we go through the process of building this regime up over the next 12 to 24 months, the layers of clarity about how we will be operating and the rules that we will establish will be set out through guidance—through conduct requirements—and will create a framework against which we will be able to be held to account, both in explaining the work that we are doing but also through appropriate judicial scrutiny.

Finally, in terms of the outcomes, it will be clear as we go through the process whether we are delivering against those outcomes and we will need to report on that in a number of forms. We would expect to do so, naturally, through our annual report. We produce something called the *State of UK Competition* report, which looks across the economy at the state of competition. That already has a section on digital markets. I expect that we would build that up going forward. There is also scrutiny by parliamentary committees, which will be a very important feature of that accountability going forward. It is important to think about a layered approach to that accountability and how that comes together as a whole, as I say, alongside the judicial scrutiny.

The Chair: That is really helpful. Not to pre-empt questions about the judicial review, I just wondered, as part of that enhanced accountability, if you have already thought about—I am sure you have—the internal accountability for your decision-making processes. I note that while the Furman review recommended the judicial review process for appeals, there was a proposal to strengthen your internal processes. As I say, we can come on to this in more detail later, but is that something that you see very much as part of the accountability?

Sarah Cardell: It absolutely is. Within the CMA, we already operate with a high degree of checks and balances and scrutiny. We have our legal service function—I used to have the role of general counsel—and we have our chief economist function, and they both have an important role in providing that scrutiny.

Particularly when it comes to decision-making, it is set out in the Bill that almost all the most significant decisions will be reserved either to the full board or to a board committee, and that board committee will comprise a majority of non-executive or panel members. It will be very important that the executive plays its role in that decision-making because we—I—have accountability for those decisions, too, but that will provide that broader scrutiny and those checks and balances within the CMA structure. Ultimately, the board as a whole is accountable for those critical decisions.

The Chair: As I said at the beginning, one of the things that is in most people's minds is getting these extra powers and a demonstration from the CMA of the need to be transparent as far as possible, to give people the assurance they need that that is something you understand.

Sarah Cardell: It is paramount. It is absolutely critical and there are lots of different vehicles through which we can do that, as I say, such as guidance. The other thing to say is that we already have a huge amount of stakeholder interaction. This is not a regime that will be operating behind closed doors. The whole ethos of this regime is to be open, engaged and transparent, setting out how we intend to operate, the rules of the road. It is about having that engagement, with regular reports back, and having that layering of decision-making as well. There are many ways to build up that accountability to create something that is robust internally and then has that external oversight as well.

The Chair: Let us move on to some specifics.

Q41 **Lord Kamall:** Before I start, I should declare two interests. I have recently been appointed a non-executive director at the Department for Business and Trade and I have also been invited to be an unpaid adviser to the Coalition for a Digital Economy. I am waiting for ACOBA advice on that.

I want to continue the conversation about a participative approach. I will direct my questions to you, Ms Cardell, but if Mr Hayter or Ms Algate want to come in, please feel free. Do you think that the provisions in the Bill empower the CMA to take a participative approach? If it is not explicit in the Bill and there are not, say, references to some examples of the participative approach—I think about some of the discussions between small firms and significant market share firms, and informal resolutions—is there a risk that the participative approach could be bypassed?

There are lots of questions but I will stop on this one: if you have a participative approach, how do you make sure that it is not seen as a cosy relationship and that you can be transparent about it with potential competitors and other firms? While they may well understand the need for a participative approach and it is good that you are having these ongoing conversations, some people may feel it might be too cosy. I will leave that and you can decide who to pass that to.

Sarah Cardell: I will start with Ms Algate and I might come back in at the end.

Felicity Algate: Thank you for the question. It is worth saying that while the "participative approach" was a specific phrase in the task force advice, it is nothing new in terms of good regulatory practice. As Sarah has already outlined, it is about building effective and co-operative relationships with parties across all ranges, from SMS firms to potentially smaller firms and, crucially, consumer organisations and business representatives. This is something that, as we have discussed, we are already doing explicitly building into the work of the Digital Markets Unit. We have a stakeholder team and we hold regular meetings with the largest firms at both very senior and a more working level.

Within this, we are very conscious of this need for transparency. On your point about the danger of having too cosy a relationship, it is about being transparent but also making sure that we talk to a wide range of participants to check that we are not just hearing the views of those with the deepest pockets. You can see how you would get particular viewpoints depending on who you are talking to.

We are already doing a lot of this stuff, as well as the stuff that Sarah has talked about. We regularly talk to industry bodies because, on your point about SMEs, obviously they have quite significant constraints on their resources to talk to us. In many cases, some of the work we are doing may not be directly relevant; therefore, it is even less realistic to expect them to proactively keep an eye on what we are doing. What we do there is talk to industry bodies like the British Chambers of Commerce, Institute of Directors and Federation of Small Businesses—the more general business bodies—but also sector-specific organisations and within the devolved nations, making sure that we have a whole view. This ties back into Sarah's point on understanding how we prioritise our work, as well.

To answer your question about it not being set out in the Bill, you are right. Within the Bill, there are actually sufficient provisions that it can be used as a framework to build the participative approach. For each stage of the regime—the SMS designation, conduct requirements, pro-competitive interventions—there are requirements to publicly consult, and one thing we are currently thinking about is what that means in order to be a meaningful consultation. Again, we are talking to stakeholders about that. I think that I have answered all your questions but let me know if you have any follow-ups.

Lord Kamall: No, that is fine. Ms Cardell, did you want to come back in there?

Sarah Cardell: It was just on striking the balance between this ongoing, constructive engagement, which is critical to making the regime successful and resolving things quickly, and at the same time having sufficient distance. That is where the internal decision-making structure also comes into play because we would expect to have ongoing relationships that are working through questions such as, "How are the conduct requirements applying here? Is this conduct in practice meeting the requirements or not? What is needed? Can we adjust this without needing to resort to enforcement action?". If not, we get into a more formal process of enforcement.

When we get to the point of taking decisions, we have a structured decision-making process that elevates out of those day-to-day relationships, particularly when you are getting up to the board committee and the board for the really significant decisions. That is one of the real benefits of the regime where you have the DMU sitting within the CMA, because it is the CMA board as a whole that will be taking those decisions, or the committee. You will have the benefit of that broader oversight to provide that check and balance.

Lord Kamall: Thank you. I have taken up enough time, but I will just leave a thought with you that may come up again in some of the conversations around JR—judicial review. If your processes are scrutinised as a result of a judicial review, might you be under pressure to abandon the participative approach and take the Bill by the letter of the law, as it were, bearing in mind what Ms Algate has already said? I will not ask for the answer to that now but maybe bear that in mind if anyone comes back to JR.

Q42 **Lord Lipsey:** I hear all you say and I am sure you mean it but, on the other hand, around us we see tumbling regulator after regulator that has been captured by the organisations it is trying to regulate, water being the supremely prominent example at the moment. What institutional safeguards can you have against that form of regulatory capture, which has infected our regulatory system very seriously?

Sarah Cardell: I have a couple of thoughts and Will might want to come in, too. I would reiterate the point I have just made: that there is something quite unique about the structure, with the DMU sitting within the CMA. It is not simply a sector regulator. The CMA is grounded as a cross-economy agency and, therefore, we come from a cultural starting point of not building up the symbiotic relationship that is perhaps seen in sector regulators. The fact that you have the CMA board and executive sitting across this will be an important check to that. The dynamism of this market also probably brings out a distinction from some of the other, more traditional regulated sectors, as you will have innovators and challengers. You will have a desire to develop and evolve the industry that will be pushing constantly at the door to challenge any development of that kind of cosy relationship.

The third point that I would highlight is that, of course, these are global markets. Again, that is very different from some of our traditional regulated sectors where we are looking at domestic markets. If we ended up in a world where we had an excessively cosy relationship in the UK—we will probably get on to this a little bit with international alignment or divergence later—and that was producing poor outcomes for UK businesses and UK consumers, in this global market you would be looking around the world and saying, "Why is the UK doing this so much worse than the US or the EU?", or whichever other jurisdiction it may be. That provides another benchmark and reference point. Because they are the same players and the same markets, it is somewhat different from some of the more traditional regulated sectors.

Will Hayter: I just have one or two points. It is absolutely the case that if the participative approach turns into a cosy, captured relationship then we will have failed at that point. Sarah has already highlighted one important issue, which is that we in the DMU team fully expect to be kept on the straight and narrow by our colleagues in the more traditional enforcement parts of the CMA. It is really helpful to have that cross-fertilisation of skills and attitudes. Also, one difference here is that this is a regulator that will have a relationship with several firms, rather than one particular firm or a set of firms in one given sector. Indeed, sometimes we hear from those big firms about one another, which is another mechanism to keep us honest.

Finally, I can offer you one live example to test us on, if you like: the current commitments we have from Google on its Google Privacy Sandbox. This is about the removal of third-party cookies from Chrome, where we took commitments under the Competition Act and are engaged at the moment in the process of overseeing the way that Google is implementing those changes. This goes back to what Felicity was talking about: you would expect us to be in very regular contact with Google about how those APIs are developing and so forth, but we are in very regular contact as well with a number of the counterparties—the ad-tech providers, complainants and so forth—to make sure we get that balanced view. We are also starting to do what we hope to do much more fully under this new framework, which is to use testing and trialling of remedies in a live environment to make sure that we are getting the remedies as close as possible to being the right ones.

The Chair: On what you were just saying, Mr Hayter, one of our witnesses, in the context of strategic market status, was concerned about that process not getting sufficient information about what the CMA is considering to inform its decisions, and asked whether there was more that it could be made aware of to help contribute its views to decisions that you may reach on that. Apparently, under the Bill's proposals the third parties get only a summary, which is what is available to the general public. There is nothing that allows them to get more information about what is informing your decisions about strategic market status. You look like you are not sure.

Will Hayter: No, there are provisions in the Bill but then, as Felicity says, we are planning to build an awful lot on top of that in terms of guidance that will be developed. It would be premature to try to produce that now, as the Bill is still going through, but as it makes its way through, guidance on how we will assess SMS, as in the procedure that we will use to do that, the substance of that assessment, the factors that we will take into account, the moments during the nine-month time limit that different kinds of companies will be able to get involved, what information we would be looking to receive and what we would be looking to provide at various points—

The Chair: But at the moment you are not concerned that the Bill is too restrictive on how you might engage third parties when you are making these decisions?

Will Hayter: No, absolutely not. In a number of areas, including some of the things we have covered already, the Bill is a minimum, on top of which we can build greater levels of transparency. That is exactly what we plan to do, particularly through that guidance process.

The Chair: I have one final question. You mentioned Google. In its evidence to us, it expressed—which is slightly ironic, as it is engaged with you on Sandbox—some concern about the participative approach when it is possible for a claimant to go straight to the courts and challenge. I wondered if that tension was one that you were aware of and had any views on.

Will Hayter: We have heard that same concern as well. Sarah might pick that one up.

Sarah Cardell: There is a slightly broader point. This is on the ability to seek private damages, effectively.

The Chair: Yes.

Sarah Cardell: In principle, private damages are an important aspect of the regime. The ability for a third party to seek redress directly is important and complementary. I do think that it is important, particularly in the early days, that we are mindful of the way the regime is operating to ensure that it is consistent and does not undermine the central driver. There is a risk of that but it is perfectly manageable. For example, as we are developing the conduct requirements and the guidance around those, what weight that guidance might have for courts is a good question. You would hope that, to take a hypothetical example, if we have reached a view with a company that what it is doing is sufficient to fulfil the conduct requirements and we think that is in line with our guidance, that should carry some weight.

There will be levers for us to utilise to influence that. The weight that the guidance might have would be one. The ability for us to intervene directly in private damages actions would be another. It is an important point to have an eye to, so that it complements rather than cutting across.

Q43 **Baroness Harding of Winscombe:** I would like to focus on the judicial review appeal standard, if I may. Could we start with an open question? Do you think that a judicial review standard is the right appeal standard and, if so, why?

Sarah Cardell: My starting point is that it is absolutely critical—to go back to the point on accountability before—that we are subject to robust and effective judicial scrutiny. That goes without saying but it bears repeating.

I do think that judicial review is the right standard here. The reason is that it creates an environment where we are absolutely held to account in how we have exercised our legal functions—not just in terms of process and procedure, by the way, because people sometimes think that judicial review is simply limited to checking whether we have followed the right processes. It is far more than that. It looks at procedural aspects but also at whether we have adopted the right analytical framework and how we have gone about weighing and evaluating the evidence, but it does that from a review perspective.

The contrast is what is known colloquially as the full merits system. The full merits system is effectively a full rehearing of the decision, which essentially means that our decision is largely put aside, the parties go to court and they relitigate the entire matter. We have that system at the moment for our Competition Act cases, which means that it operates from the outset as an adversarial system. To go to Lord Kamall's question earlier, that fundamentally changes the incentives and objectives of the regime. What we are looking for here is a regime that enables us, quickly and effectively, to tackle the competition concerns that we have identified, while giving parties, large and small, the opportunity to exercise their rights of defence, and to do this in an agile way that is sufficiently forward-looking, given the dynamism of the market.

If you move to a full merits system, it is to one which is fundamentally adversarial. Our experience with Competition Act cases is not just that the litigation phase takes an awful lot longer but that the investigative phase does so, too. Parties in our investigative phase are pushing back all the time, saying: "You haven't checked this, you haven't asked this, you haven't turned this or that stone". Rather than seeking, for the most part, to work with us collaboratively—and we have exceptions; the Privacy Sandbox is a good example of that—they are litigating and fighting every step of the way. That is not to say that they should not be able to exercise their rights of defence and disagree with us. Of course they can, but it sets the system up in a fundamentally different way.

If we are looking for a participative approach, and to have a model that seeks to maximise alignment and minimise conflict, then the JR model is much better suited to it. It is also much better suited to resolving things at pace and in a forward-looking way. I think that the last thing any of us wants is a case that takes four, five, six or seven years to resolve in a rapidly developing market, where, frankly, by that point, even if you have resolved the issue, it is far too late.

Baroness Harding of Winscombe: I wonder if we could pick up on two of the criticisms that we have heard of a judicial review approach. One–you have sort of alluded to this but perhaps you could expand—is that it is light touch in comparison with a full merits approach. The other is that because this regime is so expansive and unprecedented, it is unlikely that a judicial review approach will give sufficient scope to explore and examine where the decisions are right or wrong, as we are learning. Could you comment on those two criticisms of the approach?

Sarah Cardell: On the light touch, I just do not believe that is the case. Judicial review operates across a number of our functions already. Our merger control decisions and our markets decisions are subject to judicial review. Several other regulators are subject to judicial review as well. Let me take our merger cases as an example. I will not go into the detail of the case but probably many, if not all, committee members are aware that we are being challenged at the moment on our decision in relation to Microsoft. That is a judicial review challenge. It will be an incredibly intense and complex review of our decision. There is no sense that that will be a light-touch review.

One that I am perhaps able to talk about in a little more detail is the challenge that we had last year in relation to our decision to block Meta/Facebook’s acquisition of Giphy. That decision—that judgment on judicial review grounds—was more than 100 pages long, if you look at it. More than 50 pages dealt with our analytical approach, the framework that we applied. It looked at the framework that we had set out in our guidance. Was that the right framework? Had we applied it in practice? The judge gave us some helpful inputs as to how he thought we should revise and develop that approach, then looked at the evidence that we had relied on and how that fitted, or not, with that analytical framework and how we had weighed it up. There is no sense to me that that does not provide a sufficiently robust frame of reference. It is fairly well acknowledged that the JR standard is quite a fluid standard. It is not full merits or a full rehearing—by definition, it is a review—but it is not a light-touch review in my opinion.

On whether it provides sufficient checks, given the novelty of the regime, that is a very good question. It is important that, as we discussed, we are subject to appropriate checks and balances and accountability, and the legal scrutiny is one part of that. It is important to look at that accountability in the round, as Will and Felicity have said. As we build up our guidance and set out our processes, there will be a lot of clarity about that and a lot of accountability for us to operate in line with that guidance.

What feels at the moment to people like a huge black hole of uncertainty will be filled a lot over the next 12 months, as that is populated with guidance and as people can start to see how this regime will build and develop in practice. There is an understandable nervousness that this is something new and significant, and that we need to be held to account. But we take very seriously the exercise of our functions and we will not be hasty in overstepping the mark.

I would urge caution in an approach that has been suggested, which is that you should over gold-plate at the start while the regime beds in, because the need for action in the early years is so strong that if you over-constrain early on, it would just become a self-defeating regime. It is absolutely critical that we are held to account in the exercise of our functions, legally and more broadly. There are many levers for doing that but curtailing our ability to operate effectively will not be in the best interest of this regime.

Baroness Harding of Winscombe: I am mindful of time but, again, you alluded to this. I am keen to understand the extent to which a full merits regime would curtail your activity. Could you give us a sense of the differential in resource requirements, time and money if you were subject to a full merits system versus a judicial review system?

Sarah Cardell: We can certainly come back with a bit more detail on the nuts and bolts of that answer—

Baroness Harding of Winscombe: That would be helpful.

Sarah Cardell: I will perhaps try to bring it alive a little bit more. It is not even just about any single decision; it is thinking about how the regime will operate as a whole and all the decisions that we will be taking through this process. If we are developing conduct requirements, we will want to work with the participative approach to develop what the industry participants agree are sound requirements. If we have judicial review of the imposition of conduct requirements, that will ensure that we are operating within the bounds of the law, applying the guidance in the right way and have come up with a reasonable and rational approach to doing that, but it will create an environment where our stakeholders want to work with us to do that.

If there is a prospect of effectively putting all that decision-making in the hands of the court, you are extending the whole process. It is also questionable—maybe Will could talk to this—as to the degree of detail that we would have in devising conduct requirements, for example. They will be detailed requirements and we are building up an awful lot of expertise within the DMU to do that. I am not sure that effectively situating that decision-making with a full merits hearing in a court will create the right environment to be taking those well-informed decisions, rather than the court reviewing the decisions, which is absolutely the right thing to be doing. Will, do you want to add to that at all?

Will Hayter: To try to bring it to life a bit with a concrete example as to how this might play out, if there is a set of conduct requirements for a given company for a particular activity, we might be talking in the order of 10 to 15 pages of requirements that apply in that context. On each one of those, we will have had to weigh up very carefully a whole set of evidence and different considerations around the law and the economics.

There might be a lot of complicated data science behind it or some behavioural science. We already have a good set of people with those various skills and we will be building up more of that over time, as this builds towards the kick-off date.

As Sarah has been explaining, it makes an awful lot more sense in the system as a whole for the court to look at the set of requirements that we have put in place, see if we have done a decent job and check the evidence we have brought to bear, and how we have gone about thinking about it, rather than itself trying to rewrite that set of requirements. It is a review, rather than the court redoing all that work.

Sarah Cardell: The court as reviewer or almost the court as decision-maker is perhaps a way to think about it.

Baroness Harding of Winscombe: It would be very helpful if you could write to us to give us a sense of the time consequences and the cost consequences to yourselves if it was a full merits regime versus JR.

Sarah Cardell: I am very happy to do that.

Q44 **Lord Hall of Birkenhead:** My question is on Clause 29. I would like a bit of detail on your judgments, your views and your feelings about the countervailing benefits exemption. We have had a lot of evidence around this, mainly but not entirely suggesting that it needs to be tightened up. Open Markets Institute, for example, said it was "one of the most concerning features of the Bill". Others are arguing that there is too much leeway here and that the benefits that the firms can use ought to be more defined. Others, such as Rocio Concha from Which?, said that we do not need it and should get rid of it altogether. Sarah Cardell, what is your view of this clause?

Sarah Cardell: I might ask Will to answer this one if that is okay.

Will Hayter: We are very much aware of the criticisms—in both directions, I should say. There are those people who say that the bar here is too high and it is too late in the process, and then, as you have described, there are people who say—

Lord Hall of Birkenhead: If we could go through, first, the people who are saying it needs to be tightened, and then come back—

Will Hayter: I will try to strike a bit of a balance. The overall point here is that it is important that we think of benefits from particular conduct through the whole process. The countervailing benefits exemption, as it is called, or Clause 29, is not the only place where we would expect to think about those benefits. In setting the conduct requirements or in designing a pro-competitive intervention, we would very much expect to be thinking about the harms to competition but also the benefits from the particular type of conduct. It is important to be able to do that.

We think, however, that it is important to be able to have that exemption as a backstop, if you like. In terms of where it is in the process, we set the conduct requirements, check compliance against them and then, at the point of perhaps opening an enforcement process on a particular conduct requirement, that is when the countervailing benefits exemption comes in. It is important to have that so as not to be forced to slavishly take a positive enforcement finding in circumstances where we think that, in the context, on the balance of the benefits from a particular type of behaviour and the harms, it is merited.

Lord Hall of Birkenhead: I am not quite clear. I understand that you think it should be there, but do you think that it needs more definition—to be more tightly defined—or not?

Will Hayter: It is already a high bar. We are essentially happy with the bar as it has been set. This is one of those areas where we would expect to expand upon that by giving more detail in guidance as to how we see it. We think it is important that it is a high bar because there are risks to this. If this is just an opportunity for the SMS firm to have another go at redesigning the conduct requirements or to swamp us with reams of economic submissions about why its particular conduct is fine, delaying the process and adding uncertainty ad infinitum, then that would be a problem.

That is where the current drafting represents a high bar, and suitably so, at this backstop stage in the process. It uses the word "indispensable", the test being, therefore, that the purported consumer benefits can be delivered in no other way than through the conduct identified, and that the benefits from the conduct outweigh the harms from it. We think that it should be and is a high bar, but there is obviously more to be built on as the guidance goes through.

Lord Hall of Birkenhead: Apple and Google argue that the high bar is too high and will restrict innovation and so on. What would your argument be?

Will Hayter: If this were the only place that we could think about countervailing benefits in the whole system, then yes, I might agree that it could be a problem. As I have explained, we will be thinking about those benefits all the way through, particularly at that conduct requirement-setting stage. I think that Apple talked about the benefits of privacy and security from some of the arrangements in the way it does its business. If we were to designate Apple with SMS and be looking at conduct requirements, I would fully expect in that requirement-setting process, during the SMS assessment, to have an awful lot of discussions with Apple about precisely those benefits and to take decisions about setting those requirements only having taken those into account.

Lord Hall of Birkenhead: You mentioned the concern about spamming—I think that you put it as "overwhelming"—with its volumes of studies and stuff on consumer benefits. Sarah Cardell, do you have any concerns about the weight of evidence of the spam—I am using the word that has been said to us—that could be used against you under this Bill from the big firms?

Sarah Cardell: At risk of going back to the conversation we were just having, this does link back a little bit to the discussion about appeal standards. We want to make sure that we have a full set of evidence before us and that we can look at that carefully and thoroughly, examine it and reach a final view.

Again, to this point about incentives, in our Competition Act cases at the moment, where we have a full merits review, we find that there is a very strong incentive to—I will use the word—spam, so as to drown us, frankly, in material that jams up the system and makes it incredibly difficult to move forward and draw the investigation to a conclusion. Then when we do that and take our final decision, we find new evidence being introduced in the litigation process in an attempt to re-run, effectively through a new decision-maker, all the arguments that we have considered very carefully, weighed up and assessed.

The order of magnitude challenge that we face already in our cases, compared to the challenge that we will face with these big tech companies, is off the charts. There is a public resourcing challenge here, if I am candid, and we want this to be an agile regime. The whole point of moving from a Competition Act case, which takes five years and in which we can tackle only one issue at a time, to a regime that enables us to look holistically at a set of issues in a market is to enable us to do that and then move on, subject to an appropriate check. It is a real risk.

Lord Hall of Birkenhead: You said "a public resourcing challenge", which I thought was very interesting. Does that mean that when you look at the armies—

Sarah Cardell: Yes.

Lord Hall of Birkenhead: Do you have enough qualified people, people with the right resources, to take them on?

Sarah Cardell: We will never have the armies that these incredibly well-resourced companies have. To take the example that we are facing at the moment—and this is, by the way, on a JR case—we are up against seven of the most prominent KCs in the country acting for Microsoft and Activision, and because of the timing of the case we have been incredibly constrained to find even one who can act for us and do so at the rates that we pay. There is an inherent imbalance in the system and we have to accept that, but we need to make sure that we are still able to fulfil our responsibilities. That is partly about institutional design and regime design. It is also partly about resourcing.

I am confident on our resourcing position at the moment. We have had good discussions with Treasury. We have had an uplift in our funding to support the expansion of the DMU. Will and Felicity and others have been doing a great job on recruiting in, so we already have 70 or so people working within what we call the shadow DMU; the plan is to get that up to about 200. We are recruiting across the UK and building up a big hub in Manchester. We have lots of plans to recruit not just lawyers and economists but, as Will said, data scientists, data engineers and tech specialists. I am confident but it will be an uphill battle, there is no doubt about that.

Lord Hall of Birkenhead: Pay is an issue, clearly.

Sarah Cardell: Pay is an issue.

Q45 **Baroness Wheatcroft:** On that last point, I have some sympathy with you over the imbalance. We had a couple of sessions last week and the week before, when the big tech companies were all represented by people who had worked in the public sector beforehand and had been poached. That is something you must face all the time. They will use every weapon that they can. I would like to explore a little with you the principle of leverage and how far you think the companies will try to exploit that to get around what you are trying to achieve, and continue to increase their market power by building up the areas that are outside the regulated areas.

Sarah Cardell: I might say a little in general terms just to expand on that discussion about the imbalance, and then Will might come in a bit more on the specifics, if that is okay.

We have discussed the imbalance. That is there. It is just worth highlighting—I know you have heard this from others as well—that it is not just about an imbalance between us and the big tech companies. It is also about an imbalance between them and the range of smaller, and not so small, other companies that are active in these markets, which cannot divert armies of internal and external resource. Frankly, they are also nervous about putting their heads above the parapet and airing their concerns. That is an important point to reference as well.

Baroness Wheatcroft: It is why we need the new regime.

Sarah Cardell: It is why we need the new regime, and for it to work in such a way that people have trust and confidence in it while we are still held to account for it.

Will Hayter: Sarah used the term "ecosystems" earlier and it is clear that in these markets and firms, all the many connections between different services are a fundamental part of how competition works. There are three types of connections between different services, if taking the SMS framework. You could have connections between non-SMS and non-SMS services, you could have potential leveraging from SMS services to non-SMS services, and you could have non-SMS services being used to support SMS services. The non-SMS to non-SMS bid is easy to deal with because, as long as you have done the SMS assessment right, we will be leaving those entirely alone because there is no market power.

The non-SMS to SMS piece is picked up in Clause 20(3)(c), which is about the use of a non-SMS service to, as it were, shore up an SMS service. There have been various comments on that and we might get on to those a bit more, but we think that this is important and you can see examples of how that could be used. To use a slightly notional example, imagine that you had a powerful position in search and a less powerful position in voice assistants, but that the default search engine on your voice assistant was the core search position. Even if we had not designated the voice assistant, it might still be important to ensure that there is a choice of search engines on that voice assistant. That is just an illustrative example.

An important part of that clause, however, is the use of the word "materially". That effect has to be material, as in it cannot just be any old connection between a non-SMS service and an SMS one. There has to be a material effect in terms of that non-SMS service shoring up the more powerful position.

Baroness Wheatcroft: What would the definition of "material" be?

Will Hayter: That is one of those points which is definitely for the guidance—for us to think about and explain more to the outside world. But to give some sense of what it could be: the numbers of people using that other service, perhaps, or the extent of connection between it and the core service, perhaps, just to give a couple of thoughts. Again, if another service over here might connect back in some way to the SMS one but it is very small, and that connection is a bit tangential, then we should, again, probably be leaving that kind of thing well alone.

Baroness Wheatcroft: The evidence that we had on this varied. There were those who felt that the Bill itself needed to be strengthened on this point and that that might make your task easier, but others felt quite confident that you would be able to use what was in the Bill to secure the desired result. Is there any way you think that this particular aspect of the Bill could be strengthened to give you an easier run?

Will Hayter: Again, the general picture on the Bill is that we think it is well drafted. We have worked quite closely with the Government on it, and it gives us sufficient basis to proceed and a sufficient foundation upon which to build the guidance. There is a broad point on the Bill as a whole, which is a clamour for more certainty—I think you heard that from some of the big tech firms last week. Conceivably, there would be a way to provide ultimate certainty, but that would require writing every single requirement in detail in the Bill. I, for one, would not want to attempt to do that in a way that still stood the test of time in five years, or even two.

Again, we think it is important that the Bill sets out the key principles and the broad points at a high level, like the fact that there is a materiality threshold on that particular requirement. It is then for us to build on that and to explain how we think that ought to work in guidance, and indeed that may change over time. As we explore the first, second or third of those kinds of examples, we might find that the guidance we wrote at first needs tweaking, but that is a lot easier to do than tweaking the statute.

The Chair: I will intervene here because I am conscious that we have moved on to the legislation and we are expecting a Division. Make any brief final exchange if you want to, as I did not want to cut you off if there was something critical you wanted to ask, but I am conscious that we are up against the clock now.

Baroness Wheatcroft: It is a very quick one. The big tech companies, as you will be well aware, have said that this clause and the way it is interpreted could well quash innovation. Is that being fair?

Will Hayter: We certainly do not think so. This whole Bill, as Sarah said earlier, is here to try to support innovation—to free up markets to enable that innovation to come through. The phrase I have heard as an accusation on this part is "permission to innovate", which I reject very strongly. Again, once you reflect on the explanation I have just tried to give and on the fact that, again, we will expand on this in guidance, you can see that this would be a specific, quite targeted requirement. The notion that an SMS firm would have to come to us and check that it could start some new product in furthering its business is just nonsense.

Q46 **Lord Young of Norwood Green:** If you are looking for the perfect Bill, good luck on that journey. I sympathise with you. We continue to look for them, though, in the House of Lords.

What are the risks and potential consequences of international regulatory divergence? If requirements between jurisdictions vary, is there a risk that smaller UK businesses are more likely to be burdened? I want to give you a quote here from Microsoft, which noted the risk of regulatory divergence, arguing that, "It is important that the CMA does not exercise its discretion in a way that is at total odds with international regulators".

Sarah Cardell: I will offer a couple of general comments and then Will can pick up a bit more of the detail in relation to the DMU specifically. Obviously, this is quite a hot topic at the moment, more broadly for us, in terms of international divergence. As I mentioned earlier, these are global markets and it is a shared interest for regulators and agencies across the globe—and for businesses across the globe—that there is a high degree of convergence. I think that there is a very aligned expectation around that. Certainly, given the regulatory community that we are operating in, we have a lot of opportunities to discuss with a whole host of agencies which are looking at similar measures, in many cases, and definitely looking at the same issues.

The topic of alignment or divergence is an important one, but it is important that the starting point is a high expectation around alignment and common approaches because we would recognise that there are potential costs to divergence. There are, by the way, also potential opportunities from divergence, evidently. I do not think that it is as simple as expecting to see one simple, blanket approach across the globe.

Will Hayter: We certainly will not be pursuing divergence just for the sake of it, but we will be thinking about the needs of UK people, businesses, and the economy in the setting of these rules. We will not necessarily just copy and paste what exists elsewhere.

Lord Young of Norwood Green: I am glad to hear you make that point.

Will Hayter: It is, of course, all down to the specifics of the remedies in the particular case. Indeed, there are also factors relating to how the firms respond. Will they take the remedy that has been applied in one place and roll it out more broadly, or will they seek to take a minimalist approach to local compliance? Again, the Google Privacy Sandbox is an interesting example, where Google has, of its own accord, said that it will roll out what it agrees with us globally. If you like, there is a regulatory economy of scale there to some extent, in that we are able to take that one on and, I hope, achieve some positive results for other markets as well.

As Sarah says, there are big opportunities. While we very much take our own decisions, we expect to learn a lot from our fellow regulators around the world, both on particular approaches, remedies and so forth, and on the understanding of markets. There may be some strength in numbers, in that collectively we are able to achieve more than any one of us would be able to on our own. We already put a lot of effort into a whole range of collaboration with others around the world through the G7. A couple of years ago that was part of the UK presidency and it has been continued through the German and Japanese presidencies, specifically for digital competition issues, as well as the OECD and the International Competition Network.

An important thing that the Bill is helping with is in creating better infrastructure for formal co-operation. We are doing more informal collaboration with many of the groups I described, but we rightly cannot exchange confidential information. That needs more structured agreements between jurisdictions, whether it is with the EU or elsewhere. That is a work in progress but where the Bill is, again, laying good foundations.

Lord Young of Norwood Green: Do you think that SMS firms will be constrained in trying to operate across local boundaries?

Will Hayter: Obviously, if there is divergence for divergence's sake and that creates a mishmash of clashing obligations in different countries, that is not a desirable outcome. However, I would note that one of those companies just passed $3 trillion in market capitalisation, and I suspect they are able to handle at least some level of divergence and compliance costs. We take very seriously those compliance costs and again will not be diverging just for the sake of it, but there are differences between markets. You should not necessarily expect everything to be identical in every country.

Lord Young of Norwood Green: Thank you. I will leave it at that point.

Q47 **The Chair:** I would like to thank all three of you for your evidence today. As we wrap up, I am grateful that you will follow up in writing, as you have committed to, with more information on the differences in resource required to facilitate either a JR or a full merit.

There was also one quite interesting thing that you said, Ms Cardell, when answering questions about JR. You referenced concerns about "gold plate" in the context of JR. It would be quite helpful for you to be a bit more specific as to what your fear is in that context. Because I am not entirely sure what time the Division Bell will go, if you were able to set that out in writing it would be helpful. However, do you have a brief response you would like to offer at this point, just to explain what that meant?

Sarah Cardell: In essence, we absolutely need to do a thorough and effective job to make sure that we have a sound evidence base for our decisions, that they are robust and that we have tested all the relevant issues. What we find when we face the prospect of a full merits review in our Competition Act cases is that it can be incredibly difficult simply to draw the line at that very reasonable stopping point, because there is a pressure to constantly iterate, review, check and consider certain points. At the end of the day, you have to stop at some point because otherwise you cannot move on to the many other pressing issues that you need to tackle.

If we think about JR, it is about: have we reasonably and rationally considered the relevant evidence? Is there anything that we have obviously missed? Is there anything that we have obviously given insufficient weight to? It gives a degree of discretion to our judgments while still giving appropriate scrutiny and review. Whereas with full merits, because you are effectively rehearing the whole case, it is then open to the judge to hear a whole host of new evidence that is put forward on a host of new issues, or to rehearse certain issues over and over again. In one individual case you might think that maybe it does not matter so much, but if that is the model that the regime is built on, you are tilting the whole regime to that process.

The Chair: I thought that you might be trying to signal to us that you did not want conditions being applied to the JR approach that would be some sort of concessions, as it were. I thought that was what you might mean by gold plating.

Sarah Cardell: No, it is more about having the ability to call time on an investigation and know that you have done a good, thorough and sound job—and if you have not, you should absolutely be held accountable for that—but not to have that full investigation effectively rerun through the court.

The Chair: Lord Kamall, very briefly.

Lord Kamall: I would request that you write to us about this. The argument is sometimes made that we do not need any of this, as we are one click away from competition. The whole idea is: look at the technical field, because in technology firms come and go all the time, and that will happen with this. I would be very interested if you can write to us with your rebuttal to that, or your view on it.

Sarah Cardell: Yes.

The Chair: Thank you again, all three of you, very much. I will bring this to order. I am sure we will see you again in a different context before too long.