HOUSE OF LORDS

Communications and Digital Committee

Corrected oral evidence: Digital Markets, Competition and Consumers Bill

Wednesday 5 July 2023

2.05 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 Healy of Primrose Hill; Lord Kamall; Lord Lipsey; Baroness Wheatcroft.

Evidence Session No. 6 Heard in Public Questions 48 - 63

Witnesses

I: Kevin Hollinrake MP, Parliamentary Under-Secretary of State (Minister for Enterprise, Markets and Small Business), Department for Business and Trade; Matilda Curtis, Deputy Director, Smart Data and Digital Markets, Department for Business and Trade; Paul Scully MP, Parliamentary Under-Secretary of State (Minister for Tech and the Digital Economy), Department for Science, Innovation and Technology; Cora Govett, Deputy Director, Digital Markets, Department for Science, Innovation and Technology.

Examination of witnesses

Kevin Hollinrake MP, Matilda Curtis, Paul Scully MP and Cora Govett.

Q48 **The Chair:** This is the Communications and Digital Select Committee and we are continuing our series of hearings on the Digital Markets, Competition and Consumers Bill. In fact, this is the final session that we will be holding on this topic. We are very pleased to see Minister Hollinrake from the Department for Business and Minister Scully from the Department for Science and—is it Science and Technology?

Paul Scully: Science, Innovation and Technology.

The Chair: Science, Innovation and Technology. We know who you are and we are very grateful to have both of you here. I ask the two officials to state their names, their positions and which department they are from, please.

Cora Govett: Hi there, I am Cora Govett. I am Deputy Director for Digital Markets in the Department for Science, Innovation and Technology.

Matilda Curtis: I am Matilda Curtis, from the Department for Business and Trade, where I am the Deputy Director for Smart Data and Digital Markets.

The Chair: Thank you. You are both very welcome, along with your Ministers, but you will understand that we are directing our questions at the Ministers and expecting the Ministers to respond to us, certainly in the main.

As the Ministers know, this committee supports the legislation; we have been campaigning for it for some time. In the hearings that we have been holding we have been concentrating mainly on Parts 1 and 2, and what we are seeking to achieve today is to find out a little more about how the Government are responding to the concerns of big tech, as well as SMEs and consumer groups, now that the Bill has been published, just to get a better understanding of that detail. We have also, through the course of these sessions, been trying to establish any particular weaknesses, gaps or aspects of the Bill that it is important not to see in any way undermined.

I will kick off. We will start with some big picture-type issues and then we will move into the specifics of the Bill, which will include things such as the participative approach, JR or appeals processes, countervailing benefits and what have you. We will come on to the detail but it would be helpful to start—I am not quite sure whether to direct this at Mr Hollinrake or at Mr Scully—by asking: could you outline the problem that you see this Bill is seeking to address and what is your vision of the solution as a result of this legislation being passed by Parliament?

Paul Scully: Thank you very much. We have been working together on this for some time now. I previously did Minister Hollinrake's job as Minister for Competition and Consumers, working, as he continues to do, on that more traditional approach to working for consumers, fair competition, free markets and fair markets across the business ecosystem.

Digital markets have a particular issue because there are amazing benefits to be had for consumers and businesses to be able to have that conglomeration of data; the ability of big companies to use the portability of your data, being able to use lots of different services with the ease of one phone or one operating system, and so on. However, the entrenchment of power that comes with that for a handful of companies is something that we have to be absolutely alive to. It effectively builds up a "winner takes all" situation, which you do not tend to get in more traditional types of markets.

We want to make sure that we continue to foster innovation. We can have an equal footing without bashing big tech or bringing big companies down, understanding the benefits of that but allowing challenger tech to be able grow to the heights that they want to while understanding that in doing so there will be greater benefits for consumers with increased choice and reduced prices through having that approach. I have always likened it to the fact that if you have an oak tree, it is very difficult for something to grow underneath it. That is not necessarily the fault of the oak tree—it is not a malicious attempt. We are just trying to make sure that plenty of things can bloom in this scenario.

The Chair: Can you give us a sense of what the future might look like?

Paul Scully: We have an amazing tech ecosystem in this country. We are the third country to reach a $1 trillion tech ecosystem after America and China, and we have more unicorns than France and Germany put together. It is about allowing that to continue in a far wider environment, to make sure that tech businesses do not feel they have to sell out to one of the big companies but they can continue to grow and scale. We tend to do business start-ups very well in this country but then they might leave or sell out, go to IPO or sell out to one of the bigger companies. We want to make sure that we are getting more scale-ups because that will benefit the UK economy but also, as I say, have a benefit to the consumer as a whole with greater choice.

Kevin Hollinrake: In answer to your first, broad question, the CMA estimates that between Google and Apple alone in 2021 there were £4 billion of excess profits generated. That inevitably can only come from one place, which is the pockets of consumers, because of a lack of competition. That articulates the scale of the problem, and this legislation is there to tackle that problem.

Q49 **The Chair:** We had the CMA before us yesterday. When I asked Sarah Cardell what good looks like and how they are going to measure success, she talked about better opportunities, competing business models and greater choice. She came up with that yesterday; presumably that is a consequence of discussion.

Paul Scully: I think that is fair. If you look at the concentration of ad revenue, for example, with Google, and some of the marketplace practices and concentration with something like Amazon, that power in one firm that often has a turnover the size of that of a medium-sized country is seriously entrenched. That is what we need to rebalance and recalibrate as best we can in the UK.

Kevin Hollinrake: On that point, it is very important that we measure the results—you are quite right. Alongside this we have a monitoring and evaluation plan that is being rolled out, which will look at the opportunities for start-ups, greater innovation, more consumer choice and lower prices. There will be, hopefully, tangible results of this legislation that we can properly measure and articulate.

Paul Scully: I talked about the fact that it is not bashing big tech; these big companies are often challengers themselves in certain areas. They are massive in certain areas and they are challengers as they are innovating themselves. The bespoke nature of this, with a Digital Markets Unit that is able to see the services that they provide rather than just having one regime that looks at the company, is important to foster innovation in those companies as well as challenger tech companies.

Q50 **The Chair:** When we had the big tech companies before us a couple of weeks ago they were all at pains to tell us that they supported the objectives of the Bill but they did not accept the premise of it, as in they did not believe that the issues that the Bill sought to address arose out of a lack of competition. I am interested in your views on their rejection of the underlying premise of the Bill. Also, what kind of pressure are you facing from these firms now that the Bill has been published? What would you identify as the things on which they are still lobbying as regards changes that they would like to see made to this Bill?

Paul Scully: I will resist the obvious answer to why they might be resisting the premise of the question. There are certain areas that obviously they are particularly concerned about—the appeals process, countervailing benefits, and so on, which I am sure we will get on to in a second.

It is important to say that when we were speaking to a number of companies, as Minister Hollinrake and I did in a few round tables, there are companies that you will have heard of, household names that used to be quite large but are now not because their potential has been dampened and their market value has been squashed because of this entrenched power. With the ongoing nature of their relationship with some of these companies, they did not feel that they were able to give evidence to the Public Bill Committee because they feel that they will put that at risk. That is what I mean about their entrenched power.

There are companies such as the one we can mention, which did give evidence, Kelkoo, a shopping company that was valued in the billions in 2009 and 2010, the biggest shopping comparison site at the time. Now people have barely heard of it because of the dominance, and it has an outstanding court case with Google. That is a very pertinent example.

That is why I am resisting companies that argue against the premise of the question, but clearly we will listen and we want to make sure we get this right. It is a new way of legislating in competition and we want to get it right, not just for the UK. Primarily this is obviously for challenger companies and consumers in the UK, as we have discussed, but we know that other countries are looking at us as well. The Europeans have their regime, the DMA. We want a more flexible, proportionate approach that hopefully other countries can start to emulate so that you do not have 120 different regulatory environments around the world. You have a handful—hopefully, with us as first mover—based around ours, to foster that innovation across the globe as well as in the UK.

Kevin Hollinrake: As Paul says on the Digital Markets Act, countries around the world are looking at this and moving forward—Australia and various other jurisdictions are.

On evidence, I speak a lot to SMEs and small businesses particularly. For any small business trying to trade on Amazon that does not have access to its own customers, you see Amazon self-preferencing. If you ask them whether there is a problem, they will say that there is very much a problem here that needs dealing with, and that is what we intend to do.

Q51 **The Chair:** Before Lord Lipsey asks a supplementary question, if we look at Australia and Canada, where they have introduced quite specific news bargaining codes—not legislation like the kind we have before us but very specifically targeted at those issues and in the context of news—you will know that that resulted in Google and Meta withdrawing news provision on their sites, at least temporarily in the context of Australia. What are you going to do to ensure that, faced with a similar kind of pressure, you will withstand that pressure? Is that something that you see as a threat, and if you think it is a threat in the context of this legislation, how prepared are you to stand up to it?

Paul Scully: We have defined journalism and news in a different way to avoid the situation that they have had in Australia. I might bring in Cora in a minute to cover that.

I am sure that we will get on to appeals in a minute, because that is where the biggest pressure is coming from. It is the obvious point that challenger tech, in particular, needs. The other thing I did not mention at the beginning is that not only is it entrenched power but if things go wrong for challenger tech companies in this space, it happens really quickly because of the pace of technology and the way these markets work. You need redress and the remedy really quickly. When you have one size company that can buy time and another company that cannot afford to do that, that is when we have to be on the side of the smaller companies, the smaller guys, because this is all about rebalancing that market.

It is the same with news. Cora, did you want to come in, particularly about Australia, Canada and the press?

Cora Govett: The key thing to add is your starting point, which is that these are fundamentally different regimes. We are not seeking here to subsidise a particular sector at all. We are trying to address the competition issue, so it is much more narrow. Then the whole regime is designed to incentivise and encourage good negotiation and fair trading. We have this backstop, the final offer mechanism, but we expect that if the regime works as intended, in a way that will never be used. There will be strong incentives through the conduct requirements and through enforcement mechanisms to encourage firms to negotiate and come up with a fair, reasonable price.

Q52 **Lord Lipsey:** You said you were going to be monitoring the results of this closely, which is very welcome. Can you commit to presenting those findings in an appropriate form to Parliament?

Paul Scully: Yes. The CMA has its annual report anyway, which Kevin might want to speak to. As parliamentarians, we do not want to charge the Secretary of State with writing a whole separate report because you are then starting to step into the independence of the CMA, and it is paramount that that remains. However, notifications and the decisions of the DMU will be publicised online. Any remedies, conduct requirements or pro-competition interventions again will be published. However, the CMA itself will also publish an annual report which will be for us, as parliamentarians on both sides, to be able to see, debate and scrutinise, and it will be very much open to review.

Q53 **Baroness Wheatcroft:** You talked about the need for flexibility and for quick solutions. One of the routes towards a quick solution should be negotiation. The CMA was very keen on negotiated solutions but some of the witnesses that we have seen are nervous about the fact that the participatory approach does not appear in the Bill. Their concern is that if it is not in the Bill, the CMA will be reluctant in the end to take that route because of the potential of judicial review or whatever. They cannot see any reason why it is not spelled out in the Bill. Can you explain why it is not?

Paul Scully: It goes through the thread of the Bill. We do not speak about it specifically but the DMU has been set up with the powers and the expectation that it will engage constructively with designated firms and other stakeholders at every stage in this, both when it is making a formal regulatory toolkit and outside that process. It is absolutely designed to support a participative approach, including requirements for rigorous consultations across its decisions.

We have designed it so that the DMU receives expert input at every stage because although the DMU will be resourced and is resourced in its shadow form to have that rigour and expertise within it, clearly this is a big regime, and being bespoke, it will cover lots of different types of services. It is important that it is able to call in that expertise through those consultations and be able to review, adjust, and iterate its decisions and processes as it goes along. Indeed, we will be incentivising the CMA to prioritise constructive engagement because it is important that it can effectively design those interventions in the line of stakeholder views.

Again, we expect the DMU, SMS firms and other stakeholders to work together constructively to resolve potential breaches early because it is to all of their benefit to do so rather than having a protracted approach, especially, as you have said, because of the way we have structured the appeals process.

Baroness Wheatcroft: How will you incentivise the CMA to take this route?

Kevin Hollinrake: It is not a formal incentive and I think it would be difficult to define that in legislation, to be fair, but certainly, as Paul says, we will have the guidance that it produces and the consultations that it is required to put in place, which are there for participatory purposes in the first place. I engage with the CMA a lot. Sarah Cardell, Marcus Bokkerink and I meet often, and it is my experience that the CMA has good dialogue with sectors that they are responsible for. Certainly, the guidance we give it, the formal guidance we give every year and the interactions we have with it, very much encourage that approach. The culture in the organisation supports that approach and we continue to urge it to take that viewpoint.

Baroness Wheatcroft: Guidance is obviously important but my final question is: what is the downside of putting in the Bill that there should be a participatory approach?

Paul Scully: I am not sure how you would define it. If you just put the word "participative" so that someone could do CTRL+F and look it up it might be one thing, but if it is seamed throughout the Bill in terms of consultation and engagement, that seems a better way to have people say, "Fine, this is the particular approach we are taking. We must consult in this way. These are the kind of people that we need to speak to to get the right opinion." It is ingrained rather than specifically looking for the word "participative".

Kevin Hollinrake: One of the downsides might be grounds for pushback from companies that say, "You have not participated in the right way". We have set out what it means in things like guidance and consultation and encouraged that kind of view. We know that there is an inequality of arms here between some of the resources available to big tech and those available to our enforcement bodies. We need to make sure that we do not put them at a disadvantage when they have to take what will be, for some of our big tech, unpopular decisions.

Paul Scully: I do not think you can legislate for constructive engagement. There may be cases when it will be obvious what the problem is and what the remedy will be, for example. We are hoping that the majority will be like that, in which case you will not necessarily need to have a situation where one side is saying, "'Participative' means this and therefore you have to go through a protracted consultation process" if it is blindingly obvious to everybody that, "Here is the harm and that is the remedy". That is why the way we have done it gets what you are asking, without necessarily having that word on the face of the Bill.

Baroness Wheatcroft: "We are not going to negotiate. This is the obvious solution."

Paul Scully: It is apparent to everybody.

Q54 **Baroness Healy of Primrose Hill:** We have heard a lot of evidence from the big tech companies, and they seem to be very unhappy about the judicial review. Why did you decide to set judicial review as the appeal standard rather than a full merits or judicial review-plus? I know you have spoken briefly about it, Mr Scully, but I would be grateful if you could go into more detail.

Paul Scully: I hope you will have heard from Sarah Cardell as well. She gave us on the Bill Committee very good reasoning from her expertise for why judicial review was the right approach, and indeed we heard from a competition lawyer and others. The way that it is set up is that it can consider the legality of the decision clearly, it can include whether the DMU acted lawfully and within its powers, but in some cases it can also look at whether the DMU's decision was proportionate. We believe it is robust and effective enough and that it is consistent with other parts of the competition regime as well.

It does not allow companies to play for time and play for that stage of a full merits appeal that can drag out into months and which is often used almost as a legal weapon to drown out companies with less deep pockets and less time to get that remedy. However, it still allows you to look at some of the merits of the case without going into the nth degree and relitigating the case in its entirety once again.

Some have talked about JR-plus, for example, as a sort of halfway house. This is something that the EU came up with but it does not sit comfortably within our competition regime at the moment. It was an EU construct under the Communications Act. Again, it would mean the creation of a whole new hybrid category of appeal, which could risk uncertainty in how appeals could be conducted. I do not know if you want to add anything, Cora, but we believe that is the right balance.

Cora Govett: That is right. We think that the breadth of the grounds for appeal and the intensity of appeal are proportionate. One of the risks of widening the breadth of the grounds of the appeal would be huge volumes of appeals, which would slow down the regime and risk creating uncertainty. I think you heard from Sarah Cardell yesterday about the change in the tone of engagement away from a participatory approach to a much more adversarial approach. The other dimension that is a consideration is who is actually making the decision. Under on the merits the decision-maker becomes the Competition Appeal Tribunal, and we would worry about some of the inconsistency and incoherence that could create across the regime.

Kevin Hollinrake: I support Paul's point. We have met with the Competition Appeal Tribunal and Sir Marcus Smith on a number of occasions to talk about this issue. They support Paul's point. They are able to look at some of the merits of these judgments without going back to square one with more lawyers, more witnesses and a long evidence process. We know that that is bound to be a tactic of very powerful incumbents who are seeking to further entrench that power or retain it. Who would give that up if they did not have to? We think this is a fair balance between the two.

Paul Scully: It may be a simplistic point of view, but the idea is that if there is something that you are trying to tackle with an intervention because of something that is wrong with the market at a particular time, JR has the appropriate speed, depth and ability. If you are looking at something more punitive, attaching penalties to a company for a bigger breach, that sits within the wider competition regime and full merits can be appropriate in those kinds of situations.

Q55 **Baroness Healy of Primrose Hill:** There will be a lot of pressure on the CMA. How will you ensure that it has adequate resources as the regime is implemented, especially as it has to deal with other challenges such as AI? Do you feel confident that it will be able to undertake this massive task?

Kevin Hollinrake: Yes, we do. It has been initially funded by the Treasury—of course there are 70 people in the DMU already—but there will be a levy on the designated organisations that will pay for its work. To be fair, I do not think it is short of resources, so the levy can flex to make sure that we have the resources in place to make sure that the job is done properly.

Q56 **The Chair:** What about the money that will be raised by the fines? I am sure I know what you are going to tell me about where they will end up, but I wondered whether you had any other ideas and have been trying to argue the case with the Treasury.

Kevin Hollinrake: We have heard this quite a lot in some other legislation we have done: the economic crime and corporate transparency legislation. You do not want to create a perverse incentive for the CMA or the DMU to do something because it will further resource it to build its own empire, if you like. It could be a self-fulfilling prophecy if that happened.

I am sure the answer will be that it will go back into the Treasury, but this is not about trying to extract cash out of big tech to fund public services, be it enforcement bodies or otherwise. This is trying to put money back in the pockets of consumers by creating more competition. That is what we are seeking to do.

Q57 **The Chair:** On the appeals process, we hear loud and clear your view that the JR proposal in the Bill is the one that you are standing firm by. Alongside that, what discussions have you had with the CMA about it strengthening or indeed making more transparent to people its internal processes for decision-making to give those who are subject to its decisions greater confidence in the process that is taken?

Paul Scully: I talked about the fact that the decisions will be published online. Clearly, the decisions will also be notified at every stage to the companies as well. That will be in a wider form because there will be some things that might need to be redacted for commercial purposes for us as members of the public and parliamentarians. However, the companies will get a full report of the decisions because it is important that they understand that, not least so that they do not do it again, frankly.

Kevin Hollinrake: I think the previous approach of the CMA endorses that position. In the quite controversial recent decision on Microsoft and Activision it set out the reasons why it had decided to take the view it had. Obviously, that is subject to appeal, but it set out clearly the entrenchment of power in certain markets, in the future of cloud gaming for example. That is the approach we want it to take, to set out what it perceives as the detriment and why it takes a certain action. I think it has a history of doing that and we expect that to continue.

Paul Scully: That case is a good one to cite for your question, Baroness Stowell, because obviously they are judgment calls. That was a judgment call. The CMA came up with one judgment on that and the EU came up with another judgment based on the same evidence. It was quite a fine line, the way it took, hence that is ongoing as it will look through it. It is important, therefore, that the companies themselves know how that judgment—that hammer—came down on one side of the line or the other.

The Chair: My question on the internal accountability processes of its decision-making is more triggered by the argument of the Furman review. Alongside JR, which was the process that was recommended by them, was a recommendation for strengthening the internal accountability processes in order to be able to demonstrate to an external audience why JR was the right mechanism. Is that something that you have recognised, understood and discussed with the CMA?

Paul Scully: There is plenty we are looking at in the internal governance and accountability of the CMA from the Furman review. The JR process is not something that we came up with lightly. We had wide discussions with the CMA, wider competition lawyers and experts and indeed big tech and challenger tech to make sure we got that balance right. It is consistent with the wider competition regime and we believe it is proportionate. That was our judgment, taken on the back of a lot of advice from the CMA and others.

Q58 **Lord Foster of Bath:** Both of you were very clear in your opening remarks that we need to address the entrenched power of big tech, provide equal opportunity for innovation and enable challengers to grow. However, Mr Scully, you said very clearly that big tech can also be challengers, and that is a concern that you have addressed in Clause 20 with the leveraging principle—Clause 29 in more detail. When we have listened to arguments, particularly from small, would-be challenger companies, they argue that the principle and the power behind it are not strong enough to provide the sort of protection that they believe is needed and they are not going to have the opportunity to grow. How do you respond to them?

Paul Scully: That is another area where we are having pressure from big tech—the countervailing benefits exemption, for example.

Lord Foster of Bath: I think we will come on to that.

Paul Scully: Yes. They are thinking one way and then others, looking purely from the consumer perspective, are thinking in another way, when you are looking at Clause 29. There are balances that we need to look at.

On the anti-leveraging provisions, we know that SMS firms are likely to be active in quite a large range of activities, everything from food shopping in supermarkets through to data centres and lots of different things. We believe that SMS-designated firms may well be, and probably will be, facing healthy competition from other firms in most of those activities.

The DMU can restrict a firm from using its power in one area to enter another if it is seen as abusive. It can set the rules to prevent SMS firms taking action somewhere else in their business to be able to dampen or quash another business, materially increase their power or bolster their strategic significance within a designated activity, but we are going to be targeted and proportionate about it. That is the bespoke nature of the DMU.

Lord Foster of Bath: That is very helpful. Your argument, basically, is that one side of the argument is saying you are not going far enough and the other side of the argument is saying that you are going too far and, therefore, you have got it absolutely right. I hear that argument. We have heard arguments, as you have, from both sides.

Let me give you a specific example. The Coalition for App Fairness suggests that Google or Apple could evade regulation by moving their 30% app store commission, likely to be regulated under the Bill, to a non-regulated area of their business such as an operating licence. They have given one example, and there are many others we have heard, of ways people can evade getting into difficulty. How are you going to address that under the current leveraging principle and Clause 29?

Kevin Hollinrake: That supports the flexibility around this legislation. In contrast, other jurisdictions, such as the European Union, have very specific measures that they require the gatekeepers, as they call them, to undertake, but we are far more flexible in this legislation. If an entity did that, we think that in this legislation we have the flexibility to deal with a different detriment that might occur. We have seen that evidence, but the vast majority of people from those challenger tech organisations who gave evidence to our Bill Committee, and the evidence that Paul and I received prior to this Committee stage starting, were very positive about this legislation.

They are right to present those challenges, and other people have as well in terms of asking whether we have gone far enough in this or that area. As you describe it, people will always have different views depending on their own vested interests, but I think we have struck the right balance in keeping the flexibility within the legislation to make sure that detriment does not occur in other parts of the whole ecosystem.

Paul Scully: It is demonstrating the link and the concern around competition between two otherwise seemingly unrelated activities. It might be about bundling software, tying in software or self-preferencing—all those kinds of examples.

We all remember a few years ago when Microsoft was told about its browser and how it had to give choices and those kind of things. It had to remedy that by giving options to new users of Microsoft Windows, for example, at the time. They could not just use their Microsoft Explorer, as it was at the time, because Netscape Navigator, if you remember that, Firefox, and all those companies were crying foul. It is about that bundling as well as tying into the apps.

Lord Foster of Bath: Yes, I get that. I do not want to pursue it further because other colleagues want to come in, but your answer so far has been that you believe the legislation is flexible enough to deal with all the individual issues that might come up. It would be enormously helpful if you could agree to write to us—as a matter of some urgency, by the way, because we want to finish our report very quickly—and simply say how the flexibility would deal with that one specific example I gave you about the app stores.

Paul Scully: We can do that, Lord Foster. Did you want to come in just briefly?

Cora Govett: It is worth clarifying that leveraging does come into the Bill in a number of ways and we are happy to write on exactly how it applies to that example, but it is leveraging from the designated activity into others and the converse from other activities. Also, the PCIs can apply beyond the designated activity. So it is quite wide-ranging, but we can absolutely write on that particular example.

Kevin Hollinrake: Appropriate competition interventions tackle the source of the problem, whereas conduct requirements tackle the specific harm. That is a combination of two, but we will happily write to you, of course.

Q59 **Lord Hall of Birkenhead:** You have mentioned Clause 29 a number of times, and the arguments you have just been using may be the answers that you give us now. None the less, can we look at Clause 29 and countervailing benefits? We have heard, as you know, from a number of people arguing that this is not tight enough. The Open Markets Institute, for example, said this is a concerning feature of the Bill. We have also had one or two pieces of evidence that ask why it is there in the first place and say we should get rid of it. Mr Scully, do you want to start off with the answer, please?

Paul Scully: We talked about the fact that this is about promoting competition for the benefit of consumers. We need to have consumers right at the heart of that and Mr Hollinrake talked about the potential saving and the benefit for the consumer at the beginning. What we are saying in the Bill is that we will not impose conduct requirements on SMS firms if the conduct itself promotes competition at the expense of innovation, so that we can benefit consumers, but it is a high threshold and there is a robust process around it.

The SMS firm will have to put forward, first of all, evidence that its action brings about benefits for consumers that outweigh the potential harm to competition. The DMU, therefore, must be satisfied that there is no other practical and reasonable way for the firm to be able to achieve the same benefits for consumers with less anti-competitive effect. SMS firms will not be able to use that exemption to stall cases; it can be claimed and used only during a conduct investigation itself. So invoking it will not extend the investigation at all.

We talked about the fact that it is quite high. I am hearing noises off, whether it is Lord Clement-Jones saying that we should get rid of this or, from the other end, some of the big tech companies saying that we should raise it. I think you heard from Will Hayter yesterday in your evidence that the CMA anticipates providing more evidence on how it plans to implement that exemption via guidance, the transparency that you were looking for and making sure that there is stakeholder confidence in that threshold.

You are right: I believe it is the same as we were saying about Clause 20 and leveraging principles—it is a Goldilocks area that I think we have just about got right.

Lord Hall of Birkenhead: It is very interesting that you mention Will Hayter, because a number of people have given evidence or sent in evidence saying that they would like the benefits to be more specific. They would like more work on exactly what that could be to help cases. I think you are suggesting that would be the work of the DMU going forward to give that more certification.

Paul Scully: Yes, absolutely.

Kevin Hollinrake: The requirement is of course for big tech to present the evidence around this. As Minister Scully was saying, the evidence needs to be pretty compelling because of the high threshold. Also, in the definition, there has to be no other practical way to deal with the problem. Those two things combined make it a workable regime that works in the interest of consumers rather than incumbents.

Q60 **Lord Hall of Birkenhead:** One other thing I would love to get your views on—we have heard this and you have kind of referred to it in your evidence so far—is the whole business of spamming: the notion that you could pin down the regulator and its resources with, as some people have said, the "armies" that big tech firms can put against them. We have had evidence from Professor Andriychuk from Newcastle saying that this is one of the areas where he is worried about that happening. What is your view on this?

Paul Scully: Spamming?

Kevin Hollinrake: Do you mean throwing lots of resources at it to tie the regulator up in knots—that kind of thing?

Lord Hall of Birkenhead: Exactly. You can pin down the regulator. It was very interesting to hear Mr Scully saying that there is a time limit on this, but this is an area where you can really pin down the regulator because you have big resources. Big tech has bigger resources than the DMU.

Kevin Hollinrake: We would expect to get that feedback from the DMU and the CMA if that was the case. I have not had that feedback, but we are always happy to listen to feedback from our enforcement bodies. We want to give them the tools that they can use appropriately and properly. We are not against big tech—we massively admire what they have done, the investment they put in, and the benefits to consumers that big tech can bring—but we want to make sure that they do not have unbridled power. We do not want the CMA to have unbridled power either, to be honest. It has a difficult line to walk but resources are an important part of that and we believe it has the resources it will need to be able to do that.

Paul Scully: Cora, have you had any discussions with it about that?

Cora Govett: I will just build on that. It is designed as a safeguard and so, as the Minister says, we would not expect there to be a conduct requirement there if it is not beneficial for consumers. If there is new evidence that emerges that it then becomes beneficial to consumers, we would expect the DMU to vary it or, at the very least, not to investigate it. Again, it comes down to the way in which it operates this participatory approach. It really is a backstop, and the threshold is, as the Ministers have set out, intentionally very, very high. That means that the dialogue and the evidence-gathering on consumer benefits happens at the beginning and throughout, and that is really just a last resort.

Matilda Curtis: That is brought through the consultation mechanism and through the CMA's strategic objective to promote competition for the benefit of consumers, and it is reflected in the strategic steer that the Government give to the CMA every year. That sort of consumer focus comes right through the beginning and this measure. It is important but it is not the most important part of the Bill.

Lord Hall of Birkenhead: Very good. Thank you very much indeed.

Q61 **The Chair:** A moment ago you touched on the power of the CMA. As we draw to a conclusion on this session, I would like to focus on accountability because through this legislation the CMA will get a lot more power than it currently has. I must say that it gave a very good account of itself in the evidence session that we had with it yesterday, but can we talk through a bit how the CMA will be held to account?

It is interesting that we have two government departments involved in this piece of legislation. While I understand that the CMA is an independent regulator and therefore is not operationally accountable to either government department but to Parliament, it would be interesting none the less to understand how you see that separation in your own relationships with the CMA. Also, as we look at Parliament, which of the Select Committees in the Commons will the CMA be accountable to for this part of its regulatory regime? Will it be accountable to the DSIT Committee or to the DBT Committee, if that is what it is called? Do you see what I mean? I am keen to understand how you see it because I think it is incredibly important.

Kevin Hollinrake: Me too. As I say, we do not want to swap one type of unbridled power for another, and I think that is quite right. Parliament is here to scrutinise everything our enforcement bodies do. There is a good reason to make decisions by the CMA independent, of course, to avoid political influence, but there are a couple of different measures that do support that scrutiny and accountability.

The first one is that it is naturally incentivised—totally incentivised without putting it on the face of the Bill—to look at the areas of biggest detriment, because, as Matilda referenced, that is what our strategic steer is there to do. You want to make sure that the CMA is focused on the areas where there is the most consumer harm. That is the natural counterbalance with regard to its activities.

The other place, of course, where all accountability happens in this country, quite rightly, is our court system. The Competition Appeal Tribunal is there to make sure that the CMA is accountable. In the conversations I have had with the Competition Appeal Tribunal, it says, "We will get cases here that we disagree with and if they are doing their job right, we will disagree with probably half of them". That is the accountability mechanism we have right across the land. Again, we have the independence. There is the Secretary of State as a strategic steer—myself and the Secretary of State. I think I am right in saying that the CMA is my responsibility rather than DSIT's.

Paul Scully: It is.

Kevin Hollinrake: So it will come to me, and you would expect the DBT Select Committee it to take a very keen interest in the work of the CMA and the DMU. There is Parliament itself and the annual reporting to Parliament. We would expect it to include what it has done in this area, if it is using its powers appropriately, and for Parliament to respond to those activities.

There is a question somewhere along the line here about wider accountability for regulators to Parliament. This does not just pertain to the CMA. That is probably a discussion for others in a different forum. Others will have different views on that. The Regulatory Reform Group, for example, has proposed a different approach to that, and there is definitely a discussion to have about how we do that. However, there are some good measures in place to make sure the CMA does the right thing and uses its powers appropriately.

Paul Scully: I should say as an aside: Kevin talked about the Competition Appeal Tribunal, which has a hybrid courtroom now. When Newcastle was taken over by the Saudis and that was heard at the CAT hybrid, 35,000 people tuned in every day to the appeals there. There are a lot of Geordies with great competition knowledge. They were very proud that I think that had more spectators than all but the top nine Premier League clubs.

Q62 **The Chair:** That is an interesting factoid that we were not expecting to get today.

On the theme of parliamentary accountability, as Mr Hollinrake has said, it is not just in the context of this Bill. Mr Scully, you are responsible for the Online Safety Bill also and there is a similar question at the moment about Ofcom's accountability and it too being somewhat fractured because of the separation of DCMS from DSIT. More broadly, while you are here, could you tell us what conversations are going on at the moment within Whitehall, understanding, of course, that ultimately it is for Parliament to decide how we hold these bodies to account and the way we structure our own committees? Is this something that you understand, within Whitehall, that the Government has an interest in? It is in your interest that these bodies are seen to be properly accountable for the powers that are being given to them.

Paul Scully: Totally. These questions come up time and again. You are absolutely right and I think Minister Hollinrake talked about the fact that this is a wider issue than just the CMA. Ofcom is a really good example of another regulator where exactly the same questions are being asked.

Yes, we always have quite close conversations with Ofcom, first of all to make sure that it is well resourced, as the question came earlier on, and able to do the job to the best of its ability, and so that we can keep a good handle on it, as parliamentarians and government departments, and set a clear direction of accountability and sets of directions.

It also goes to the wider point of the entire legislative programme. Each piece of legislation, whether it is the Online Safety Bill, the Digital Markets Bill or our approach to AI as outlined in the AI White Paper, needs to have a coherence. A company, whether it is big tech or small tech, will see the whole regulatory piece as one set of regulations. Is it a cost to business or is it giving confidence to consumers and small business? We need to look at the whole jigsaw rather than salami-slicing it. So yes, those questions are always being asked in government, and hopefully, as I say, the approach we are taking is the right one.

Kevin Hollinrake: I met with Lord Tyrie yesterday to discuss this exact point. Obviously, he is a key person within the RRG with Bim Afolami and others, so we are aware of the conversations going on, and my Secretary of State is too, and I am sure that is reflected right across government. Yes, we are very aware of those conversations and the different approaches we might take.

The Chair: Good. That is reassuring to hear. Thank you very much. Sorry, Lord Foster, did you have a supplementary?

Q63 **Lord Foster of Bath:** If I could, I just want to pursue an issue that was raised much earlier, which is the issue of the financial support for the CMA and the DMU and the issue of fines. You were very clear that you did not want to set up a mechanism whereby they went and fined people tons of money because that is the way they get more money, but in fact other regulators have a solution in legislation to deal with this.

Ofcom gives all its money to the Exchequer. There is a great lack of clarity about what the CMA's current arrangement is, but the legislation is absolutely clear for the Gambling Commission. The majority of the money goes to the Exchequer but the Gambling Commission can take a share of its costs in carrying out the investigative work that it does and imposing and enforcing any fine. It seems that since there currently is nothing in the legislation that would provide that sort of support to the DMU and the CMA in the work it is going to do, that would be worth thinking about.

Kevin Hollinrake: We are always happy to think about how we might properly finance our enforcement bodies, given some of the caveats I said earlier about creating perverse outcomes. However, in this space, because of the financial resources of the SMS incumbents, I think that there will be no shortage of money available to properly resource that.

Paul Scully: In the case you talk about of the Gambling Commission, now we are moving towards a statutory levy with gambling, which we did not have before, whereas this has a levy attached to it. So there is already a stream coming directly to fund the process. However, we will reflect on what you said.

The Chair: Thank you again for your evidence today. We will look forward to the letter that you have promised us. Was it on countervailing or leveraging?

Lord Foster of Bath: Leveraging.

Paul Scully: It was the Coalition for App Fairness.

The Chair: If I may, I implore the officials to let us have that ASAP—we will be very grateful.

It has been helpful today to hear you be clear in defending those very important aspects of the Bill that will be subject to quite a lot of pressure, certainly from outside if not necessarily within Parliament. Thank you very much.