HOUSE OF LORDS

Communications and Digital Committee

Uncorrected oral evidence: Digital competition

Tuesday 3 September 2024

2.35 pm

Watch the meeting

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

Evidence Session No. 1 Heard in Public Questions 1 – 14

Witnesses

I: Bakari Middleton, Director of Global Public Policy, Epic Games; Steve Thomas, General Counsel, Kelkoo Group; Matthew Feeney, Head of Tech & Innovation, Centre for Policy Studies; Tom Smith, Partner, Geradin Partners.

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Examination of witnesses

Bakari Middleton, Steve Thomas, Matthew Feeney and Tom Smith.

Q1 **The Chair:** This is the Communications and Digital Committee, and we are pleased to have our first public session of this new Parliament. We are focusing today on digital competition, a topic that this committee has paid a lot of attention to over the last few years. People who are following this will know that, just before Parliament was dissolved, the Digital Markets, Competition and Consumers Bill became an Act.

Today, witnesses will talk to us about the implications of that legislation, now that it has been passed into law, as the regulator, the CMA, starts its work in implementing that legislation. Can the witnesses please introduce themselves and the organisations they are here to represent?

Steve Thomas: I am general counsel to Kelkoo Group. Kelkoo is a price comparison shopping platform, helping consumers to compare prices. For more than the last 10 years we have been trying to deal with self-preferencing on Google search and essentially with the disappearance of Kelkoo and platforms like us from the view of consumers. We are delighted with the passage of the DMCC Act, which we think will really help with this issue, and we are looking forward to the implementation of it and dealing with that problem.

Bakari Middleton: I am the director of global public policy for Epic Games. We build immersive virtual experiences. Some of our most popular games include Fortnite, Rocket League and Fall Guys, which is developed here in the UK at Mediatonic studios. We are also a member of the Coalition for App Fairness, which is a group of about 70-odd companies that are pushing for reform and policy changes to make app development fairer, more open and more competitive.

Tom Smith: I am a competition lawyer and a partner at the law firm Geradin Partners in London. We specialise in competition law and digital regulation. We advise tech companies, normally on the challenger side, against the big tech firms like Google, Apple and Amazon.

Matthew Feeney: I am the head of technology and innovation at the Centre for Policy Studies, which is a think tank here in Westminster.

Q2 **The Chair:** Can I ask the witnesses to sit as close as possible to the mic so that it properly catches what they say? That would be enormously helpful.

Today, we will look at some of the specific issues covered by the legislation, and then at what is happening in other jurisdictions and perhaps at lessons the CMA might take from what is happening with competition in the US and the EU. Finally, we will look at how the CMA will implement this and how we can ensure that, in addressing anti-competitiveness, we in no way undermine the growth potential or new innovation. We will look at how we can ensure that how the CMA operates is accountable.

Can you give us your sense of what the regulators' immediate and medium-term priorities should be for implementing this Act? They have closed the consultation on the guidance, and we have not yet had the final version of it. So they are at the early stages of this, but can you give us a sense of what you think should be their priorities?

Tom Smith: The Act ended up in a good place. It is a good piece of legislation. The CMA has the regime it wanted and needed. Nothing has happened yet, so ideally the CMA will start its first designation investigations as soon as possible. As I am sure many people know, it announced in January that it will do three or four designation investigations in the first year. That is not enough to cover everything that could be covered in the tech sector, so there is a big question about prioritisation there. The regime will be a slow burn; that is unavoidable.

There is a big question of scoping: if the CMA is doing only three or four investigations, it can cover a lot more ground if they are scoped widely, and a lot less ground if they are scoped narrowly. I would encourage it to scope things widely. A list of the immediate and most urgent issues includes mobile ecosystems—that covers operating systems, app stores and mobile browsers—which would be for Google and Apple. The list would also include advertising, Google Search, Google adtech, the display advertising side, and YouTube, as well as Amazon's e-commerce side, including Prime, of course. I hope that would cover the three or four in the first year, and I hope they will not go narrower than that.

The Chair: For the benefit of people's understanding of going broad, as you describe it, and these three areas, as we understand the legislation, we would ultimately expect some if not all of these larger tech firms to have at least part of their businesses designated as having strategic market status. However, to get to that designation, or to the process that would lead to that designation, the regulator has to have inquiries into these market studies in the first instance. You are saying that those studies should be broad so that they cover enough ground to inform the designation process that would follow.

Tom Smith: Yes. The DMCC is activity-based rather than firm-based. Each activity needs to be designated one by one. A key thing is how to define each activity. As every lawyer knows, definitions are very important. If you define something narrowly, you will find lots of things outside the designation. The CMA will not be able to write rules for things outside the designation and will have to rely on the leveraging principle that we may or may not get on to later.

The Chair: We will.

Tom Smith: If the CMA takes a slightly broader view, that will give it licence to write rules across the whole remit of the defined activity, which will give the CMA more flexibility.

Q3 **The Chair:** Mr Feeney, what is your view of where the regulator should focus in the immediate term? Do you have any thoughts on the areas for

it to start that Mr Smith outlined?

Matthew Feeney: I would add social media platforms to the list he outlined. They will continue to be the focus of a lot of worry among regulators across the globe. On specific areas for the CMA to focus on, reading at least the draft guidance I note that, for market definitions for strategic market status, there is work the CMA should continue to do. It should revise some of what it said before.

Likewise, on conduct requirements, more research and work need to be done on defining how companies that generate revenue or work predominantly in different fields none the less offer similar services to market. So when we think about the products and markets of chief concern, we often think of big companies based in California. Although they often produce or sell similar services, they actually generate revenue from different sources: Apple does so by selling hardware, while Alphabet or Google do so through search and advertising. I would like the CMA to look again at that. Those are the main issues. I can go into more detail later, but those are front and centre of my mind at the moment.

The Chair: I seek to clarify your comment about social media. On the markets in which social media firms operate—certainly the mobile ecosystems and the advertising—can you give something specific? I am struggling to understand this. They would be subject to the designation-type process, but is there something in the market investigations that precedes the designation you think should be looked at by the CMA?

Matthew Feeney: Everyone will remember the CMA decision on Meta and Giphy, for example, where the CMA said that its concerns lay in the effect that the merger or acquisition would have on a social media market. It is not clear from analysis that that market is at all similar to the other kinds of markets that the CMA is looking at. A lot of the concern I have stems from the fact that the draft guidance said that, when it comes to SMS designation, the CMA need not necessarily always define exactly what the market is if it determines that it is entrenched or substantial. That was the source of that comment.

The Chair: Mr Thomas, what about you? What are your views on priorities and immediate activity from the CMA?

Steve Thomas: From our perspective there is one major priority: dealing with Google's behaviour in search, particularly its self-preferencing behaviour. We see this in our industry, which is shopping search, and in other areas of vertical search. You might be familiar with travel search, search for hotels, flights or car hire, or local search, where you might look for a local restaurant or a local shop where you might buy something in person. We increasingly see Google displaying its own vertical search services preferentially on the search engine results page, so you type in your search and immediately see an interface that does the same thing that Kelkoo, Booking.com or Yelp might provide you with. That leaches into other areas such as news publishing—something that is quite

different from vertical search but none the less is really impacted by self-preferencing.

We see that developing in the use of AI-generated results. In previous years you might have gone to Google, found an alternative service provider such as Kelkoo, gone to Kelkoo, carried out your search and found what you were looking to shop for or the deal that you were looking for. Then you ended up going to Google and potentially used its service instead of ours, while never seeing one like ours. With the generation of AI search results, you might go to Google and see a single search result, and that is all you are ever able to find. That is a major priority. It is a developing area and what we would think of as low-hanging fruit for the CMA, so something that we hope would be dealt with very quickly.

Bakari Middleton: We believe that the app store issue should be tackled and should be a priority. For too long, Apple and Google have been able to block competition on the distribution of apps, so the only way to get an app on a phone is through Apple's App Store or Google Play. They have also blocked competition on in-app purchases, so the only way to make payments is through Apple's proprietary payment method, and the same for Google. This has led to less innovation, higher prices for consumers, and a lost opportunity for growth.

I am happy to talk here about what the DMCC Act represents and its potential possibility for that growth. The Act could make a lot of things possible. Just a few weeks ago, on 16 August, we launched the Epic Games Store on mobile in the EU because of the Digital Markets Act. This is a relaunch on Android but, critically, the Digital Markets Act made it possible for the first time for alternative marketplaces to exist on Apple's iPhone. That means that there are now fairer terms for developers and consumers. It leads to more money in consumer pockets, more resources for developers to invest, and more growth opportunities for jurisdictions that recognise that there are problems in this market to intervene. The UK has the potential to create the same opportunity for UK consumers and developers if the Act is properly implemented and enforced.

To answer the question, there are three things: speed, specifics and support. We need quick designation of the SMS firms in parallel with conduct requirements. That should be a day one thing on this particular initiative. On specifics, those conduct requirements need to be tailored to address the harms that I mentioned on distribution and payments, and the ability to communicate with your customers. They should also take notice of what has happened in other jurisdictions—I think we will get back to that later: the lack of compliance and the shifting behaviour—to tailor those requirements to address those concerns.

Lastly, on support, I think all of us have seen this play out globally. We can expect Apple and Google to push back significantly against the regulator, compliance and enforcement, so it is crucial that the Government show support to the CMA and the new regime, and send a

clear message that delay and watering down of the Act or circumvention of its intentions will not be tolerated.

The Chair: I do not get any sense that the general election has caused any significant delays to the timeline of the CMA's implementation plan. Has anybody else had any other suggestion of that, or do you expect things to run along similar lines to those you originally expected?

Tom Smith: We see nothing to the contrary, although we have not had a commencement date yet. The CMA said that it would start its designation investigations in November. I believe that is still the plan, but I do not think it will be able to if it does not have a commencement date at that point.

The Chair: I should have said this at the beginning, but I do not know whether any of you have any cases being heard in UK courts at the moment. If you do, obviously we need to avoid sub judice cases. Cases in other jurisdictions are not subject to the same concerns, but I am sure you would all want to be careful if you are involved in any legal activity at the moment.

Q4 **Baroness Harding of Winscombe:** I am interested in any concerns you might have about pitfalls, risks or barriers that the CMA may face. Mr Smith, you started by saying that you thought that this is a good piece of legislation. What are the pitfalls, risks and barriers that the CMA needs to be mindful of?

Tom Smith: It is a good piece of legislation, but there are inherent pitfalls; there is no avoiding that. The main substantive issue is that there is an inherent tension between security and privacy on the one hand and competition on the other. Everyone should accept that the big tech firms have some decent arguments on security and privacy. The CMA's *Mobile Ecosystems* market study report of June 2022 said that these concerns were hugely overstated, but that does not mean that they do not exist at all. There will always be a difficult trade-off when you design these remedies. They will not be easy to design, and the CMA will be up against companies that have every incentive to obstruct and delay. That is the fundamental problem.

Disclosure and transparency are major battlegrounds in all competition cases. The Act ended up in a good place, but I do not think we quite got to full equality between the SMS firms and the non-SMS firms in terms of disclosure, so that is something to look out for. The CMA's guidance document, which was published over the summer, is a very good piece of work, although it referred to the non-SMS firms as third parties to some of these processes. I do not think that was quite the right tenor, in that I do not think they are third parties; they are equal parties that are very much directly affected by what happens.

I hope the CMA will be careful all the way through this to give both sides equal access to data, for example, so that they can make their submissions. Of course, that gives a responsibility on the challenger side

to make sensible submissions to come with fully thought-out proposals and to play a full part, not just to complain about what comes out at the end having not given any good ideas.

Those are the main things. Throughout the political process, the role of public law was downplayed in the arguments about judicial review and merits appeals. Public law plays a very strong role and will be a very strong limiter on what the CMA does. There is a new Court of Appeal judgment in the Cérélia case, which said that the Competition Appeal Tribunal should take a "deep dive" into the evidence and "make an informed judgment as to whether the decision under challenge was properly justified by the evidence".

That is not very far away from looking at the merits of the case, so I think that JR will be a strong oversight throughout this regime. Those are the main things.

Matthew Feeney: That was very comprehensive. I agree with that. I do think that, at least in review of the guidance and tracking the Bill, the issue of judicial review and public law will rear its head down the line, but I have nothing substantive to add to what Mr Smith said.

Q5 **Baroness Harding of Winscombe:** What role do you think we as parliamentarians should be playing to keep the CMA and the ecosystem honest in the face of these challenges?

Matthew Feeney: The Bill is well laid out and the process is moving ahead. I am not sure that there need to be extra carrots or sticks at this stage, but a lot of the proof will be in the pudding, as people say. If submissions need to be timely and not obstructed, there needs to be a degree of transparency, but, so far, there are reasons to be optimistic that things will move ahead.

Bakari Middleton: I think the legislation is in good shape. Again, we would caution the regulator to be concerned about the shifting of anti-competitive behaviour from one part of Apple's or Google's ecosystem to another part.

I hear the concerns about broad designation maybe being grounds for appeal. We have seen Apple and Google appeal designations in other sectors, even when given a two-year lead-time into the digital markets Act, so that may happen regardless. The bigger risk is that there is such a narrow definition of digital activities for Apple or Google that it facilitates the shifting of bad conduct from one sector to another.

As Tom has mentioned, the leveraging principle is in place. I would encourage the DMU, when thinking about designation, to take a holistic approach and look at these dots of the various activities, assess whether there is a nexus of potential abuse, and move accordingly if there is. Similarly, I would encourage it to apply the leveraging principle to remedies. The remedies need to be specific but also flexible enough to address potentially some non-designated activity. Based on our experience, that is something we have seen.

Steve Thomas: Before I answer the question, I want to pick up on Baroness Stowell's point about litigation. Kelkoo is involved in litigation with Google in the English courts in relation to the historic Kelkoo business and the historic travel business. Those are claims for damages that arose out of a European Commission decision on Google Shopping, and we have two similar claims elsewhere in Europe, which I would be happy to give the further details of if required.

In answer to the question on pitfalls, I echo what all the other speakers have said about the potential for delay and using every possible opportunity in the legislation to slow things down, to create confusion and to try to move things from one place to another. We have had specific experience of that throughout the European process on the Google Shopping case that I just mentioned. We had a decision seven years ago and, next Tuesday, we will get the final judgment of the European Court on it. We still do not have an effective remedy in place. That is incredibly frustrating as a business, because we would like to be putting our service in front of consumers and we simply cannot do that. That, for me, is the biggest pitfall: the use—I hesitate to say "abuse"—of process in a way that just prolongs the abuses that have been complained about in the first place. That it is incredibly damaging.

That said, we at Kelkoo are very optimistic about the legislation and about the CMA's ability to understand these markets and these behaviours. In our conversations with it, it has shown a very good understanding of how the game is played and, I would say, probably quite a low tolerance for anyone not playing that game in good faith. From that perspective, we are none the less optimistic about the new legislation.

Q6 **Baroness Harding of Winscombe:** Could I double-click on that? Forgive the digital slang. It is really interesting that you describe delay being the strongest weapon that these tech firms have. That was certainly my experience competing with large incumbents in telecoms; "walking backwards slowly" was what they used to say in BT. What advice would you give the CMA to minimise that risk, based on what you have seen in Europe?

Steve Thomas: It comes back to something that Mr Middleton said about being specific. The issue we have had with Google Shopping is that the Commission's decision was extremely well written—it characterised the problem very well—but the prescribed remedy was, "Stop it". Stopping it does not cover all the things you can do instead that in essence have exactly the same effect.

For me, the way to get around that is to be very specific. The legislation allows the CMA to define conduct requirements. Those conduct requirements will be effective if they are very specific. That is where we have seen problems in the past. Again, Mr Middleton talked about the shifting of things from one part of the business to another. That is another problem we have seen in Google Shopping. We saw things that were once—and still really are—part of a vertical search business like the

one we run shifted into general search, with Google saying, "We're treating everybody equally, because this isn't part of vertical search. This is part of general search, and we're offering the same things to all these vertical search providers". But, actually, it has narrowed our business down to a very thin slice of what we should be doing and prevents us from doing the meat of the business, which is to provide services to consumers.

All of that can be dealt with, first, by being swift and, secondly, by being specific in the conduct requirements—really getting to the heart of the problem. As I said, we are very optimistic that the CMA understands these problems and understands the markets and is able to get to the heart of the issue. We then need to make sure that the conduct requirements also get to the heart of the issue and deal with those things in a specific way so that there is no wiggle room and no ability to move slightly sideways and avoid the impact.

Baroness Harding of Winscombe: Thank you. That is very clear.

Bakari Middleton: The CMA has done a great job of soliciting comprehensive views across these industries from lots of players. I would recommend that they continue that. When designing remedies, it can be particularly helpful to bring in outside stakeholders and independent experts early in the process, because we have seen that you can expect an Apple or a Google to push back and say, "This is technically impossible", or, "This is prohibitively expensive". Having that expertise at the table at the outset, as those remedies are being crafted and iterated, will speed up the ultimate implementation of the remedy.

Q7 **Baroness Wheatcroft:** Kelkoo and Epic are big businesses capable of taking on and challenging the tech giants, but I wonder to what extent it will be a problem for the CMA that smaller businesses will be too frightened to come forward and give evidence because of the potential bullying of big tech?

Steve Thomas: That is certainly a potential problem. It is where coalitions like the Coalition for App Fairness, which was mentioned earlier, can be helpful. Not all members need to be equally visible, but they can all be vocal, feed into those sorts of organisations and have their views known. I do think it is a big problem.

You say that Kelkoo is a big business. We are certainly not as big as someone like Google, but we have enough scale to be able to have people like me whose job it is to talk about and deal with these issues. However, even when I started at Kelkoo back in 2012, we were frightened of going against Google and speaking out publicly for fear of the abuse that we were seeing getting worse.

Those are definite concerns. The CMA is quite good at dealing with this issue and encouraging people to come forward, but industry bodies, like the Coalition for App Fairness and others in this space, can really help with it.

Baroness Wheatcroft: Mr Middleton, can you add to that?

Bakari Middleton: I agree. There is definitely strength in numbers, but it is a legitimate concern. Everything that the CMA and the DMU can do to provide individuals and companies with the confidence that whatever learnings they share will be kept in confidence is important. It is a real concern. I mentioned the shift in conduct. Apple was required via the Digital Markets Act to open up marketplaces, so we can now launch an Epic Games Store. We opened up a developer account in Sweden. This piece is open, but because Apple maintains control over who has a developer account on iOS it was able to cancel our developer account right on the eve of us launching. Fortunately, the Commission stepped in, but again it was not for any technical reason or any real reason; it was because it did not like what our CEO was saying about its lack of compliance in the EU. That shift in behaviour sends a real message to anybody: "Here is what can happen to you if you step up and speak out". It is a legitimate concern.

Baroness Wheatcroft: Mr Smith and Mr Feeney, is there anything that you would like to add to what the CMA could or should do?

Tom Smith: From a legal point of view there is a problem, because Google or whoever has the right to know the case against it and to see the evidence, and the company making the complaint, or just submitting evidence, is very scared of retaliation, so there is a clash of legal principles. It is very difficult to solve that problem. The CMA cannot really legally promise anonymity, because there could be a court order. It is a difficult problem. The CMA's guidance shows that it is well aware of it and that it will protect identity as much as it can—as it already does, by the way—but I do not think you can get away from the problem.

Matthew Feeney: I have nothing to add.

Bakari Middleton: Cancelling a developer account sends a message, but strong enforcement also sends a message. I think smaller companies will be heartened if they see this new unit get off to a great start, make the designations, put the conduct requirements in and hold folks accountable. Smaller entities will be more inclined to come forward if they think the enforcer is working.

Q8 **Lord McNally:** I am impressed by the approval of the CMA so far. It is not always the case in evidence that witnesses give about a regulator. What do you attribute that to? Is it because the powers have been well defined and clearly given, or is it a matter of leadership in the CMA as to its role as a regulator?

Tom Smith: Andrea Coscelli, the previous CEO, was ahead of the game in hiring data scientists and the people who could really get to grips with this. I was at the CMA, just in case you need to know. Then, in 2019, the CMA started the digital advertising market study and really put the effort in to understand the market. It published a 2,000-page report that went down very well. It has done a lot of work to build the right expertise and

put the effort in early. For the last five years, it has been having constructive conversations with companies, which are coming out of these meetings saying, "These guys know what they're talking about". It is a good basis, I think.

The Chair: We will come back to talking about the CMA later, but do add something if you wish, Mr Feeney.

Matthew Feeney: I was just going to say that I hope I did not give the impression that I was too much of a CMA cheerleader. I have been publicly quite critical of some of its decisions, but in my interactions with it and in reading its reports, I have never doubted the smart and dedicated public servants, but they take marching orders from this place and the other side.

The Chair: Thank you. As I say, we will come back to the CMA shortly, but before we do we will look at what is happening in other jurisdictions.

Q9 **Lord Young of Norwood Green:** I shall initially direct my remarks to Bakari. How effective are our existing organisations, such as the UKRI Creative Catalyst programmes and other government initiatives, at addressing these issues?

Bakari Middleton: Sorry, I missed the first part.

Lord Young of Norwood Green: How effective are the existing organisations, such as UKRI?

The Chair: Sorry, we are at a different place in the briefing paper. We are on page 11, which is about learning from the EU and other jurisdictions.

Lord Young of Norwood Green: Then let me rephrase that. I am getting confused about the two questions. What are we learning from the EU and other jurisdictions about how tech firms are responding to regulation? Is there anything the CMA should do or avoid as a consequence?

Bakari Middleton: As I said earlier, expect delays, expect dragging of feet with compliance efforts, and potentially expect conduct to shift. The CMA and the new unit have the advantage of seeing the playbook that Apple and Google have rolled out in the app store context. Again, alternative app store distribution is allowed with the Digital Markets Act, but we now have the imposition of a whole new framework of fees that will tax any new store that wants to launch, like the Epic Games Store or AltStore. They are charged €0.50 for every install for every year.

Any developer that wants to list its software in those alternative stores, once it gets past a certain threshold, is also charged €0.50 a year for every app, install and update. That creates a real financial question for those developers. It is specifically designed to frustrate the goals and intention of the regulator in Europe, and the intention of the DMA. I will not be too prescriptive here, but it is something that the new unit should

consider when designating and proposing conduct requirements and remedies: let us look at what has been done around the rest of the world and figure out ways to tailor these requirements to address it.

Steve Thomas: Kelkoo has been very involved in the anti-trust efforts and the regulation efforts in Europe with the Digital Markets Act. What we have seen very much echoes what Mr Middleton just described. What appears from the outside may not be what it appears from the inside, but it appears from the outside to be a wilful misunderstanding of the problem. The regulator will say, "This is what you have done wrong, this is where the issue is", and what comes back as a remedy is something where the issue remains exactly where it is and some other things happen around the outside that do not really have any effect.

We have been around that cycle many times. We have been through it on anti-trust remedies, and almost 15 years after that case started we have still not got to a place where that is solved. We have new legislation in Europe that is designed to deal with this issue and, despite many conversations between us, the European Commission and Google, we still have not got to a place where there is a reasonable level of compliance with that new legislation. An investigation has been launched under that new legislation, so we are going round the loop again. So far during that investigation, any discussions of potential ways to solve it still do not deal with the central issue, which remains.

This idea of shifting the problem, pretending that it is something else and ignoring the real issue to the point where hopefully everybody gets frustrated and goes home seems to be the central tactic. Again, that comes back to the answer I gave Baroness Harding: it is about being absolutely specific not just about the problem but the solution to that problem to avoid this constant process of delay and going around the same loop time and again. That is where the real lesson to be learned is: the CMA not allowing itself to be subjected to that kind of continuous loop of dealing with the same problem over and over.

Lord Young of Norwood Green: So what is the solution to the problem that prevents this obfuscation?

Steve Thomas: I do not wish to be critical of the process that we have been through in Europe, but the central problem up to this point has been an inability—I think we have the ability now in new legislation in Europe—to define the solution rather than just defining the problem. The CMA now has that in the DMCC Act with the potential to define conduct requirements and the expertise to define them properly, and to set out the behaviours that are expected of the big-tech platforms in the particular areas where they are causing a problem.

So it is just about following through with the use of that power and making sure that it is used effectively, and that the CMA uses its undoubted expertise and its powers in this new legislation to bring about some real change.

Matthew Feeney: I would add only that the DMA and the DMCC treat the different firms and the financial thresholds and conduct requirements differently. It will be interesting for the CMA and all of us to keep an eye on how large firms react when it is possible that some services are available in one jurisdiction and not others, and the legislation does not always align insofar as what they can offer in what market. That could have unintended consequences when firms that are getting bigger in size need to decide when they hit a certain threshold how they are going to react if they want to be in both or more markets. I mention that only because it seems to be something that the CMA should keep a close eye on, but I have not seen much discussed.

Q10 **Lord Young of Norwood Green:** I had one follow-up question, but others might wish to come in. We have Europe with its approach and we have what is happening in the USA. How do you see that? There is quite a contrast, although it is a complicated environment in the USA.

Bakari Middleton: It is disappointing. Epic is a 30 year-old American company. Regarding the game store I mentioned, it is hard to overstate its strategic significance for us—the ability to direct our products directly to consumers and offer a platform for other developers to use. We were not able to launch it in the United States. That is disappointing.

There is legislation pending, which we hope moves quickly. But we launched in Europe and we expect to launch here. We did not want to get ahead of ourselves, but when Royal Assent was achieved, we were immediately out with a tweet saying that we expect to be able to take advantage of this and launch in the UK as soon as the appropriate companies are designated and the conduct requirements are in place.

So we are hopeful. Progress is being made. Obviously, cases are being brought by the enforcer, but taking a piecemeal approach with ad hoc litigation is much slower. It is time-consuming and expensive. Even when the litigant wins, there is a risk that the remedy will apply only to that litigant and not to the whole ecosystem. Not to get into our litigation, but we are pursuing broad injunctive relief to apply to all developers so that everyone can benefit. I still have hope for the US, but we are investing in the jurisdictions that are intervening here to open up competition, and I think the UK can be one of them.

The Lord Bishop of Leeds: I have a quick, and I hope not too naive, question. At the beginning, you were all very confident about the sufficiency of the CMA. Since then, we have heard a long list of potential threats to it. Do you still hold to the assertion made at the beginning of this session that it does not need further attention or development at present? If so, is it really sufficient for the task, given the gaps and threats that you have elucidated?

Q11 **The Chair:** We will come to the CMA issue in a minute, so can you hold that thought? I want to follow up a question on jurisdictional differences before we move on to the CMA. During the passage of the Bill—and, indeed, before that even started—there was concern that the regulatory

regime would not be able to keep pace with the development of technology.

Do you have a similar concern about keeping pace with the changes and what we are seeing emerge, particularly in the US? If some things that are now being proposed in the courts or through the FTC come to pass—breaking up companies, or that sort of thing—is the regime as we see it, the DMCC, flexible enough to deal with a very different kind of tech sector, should that happen as a result of legal or legislative movement, in the US predominantly?

Tom Smith: I think it is. I certainly do not know how to design it better so that it could be better. The timelines under the DMCC are very short. The CMA can flex its rules regularly. It can de-designate if someone ceases to have SMS power. That is on top of all developments in the US, the EU and elsewhere, by the way. Constantly, whenever we have a meeting with the CMA, it asks for a detailed update on other jurisdictions, and we give it to them. So it is on top of it.

Some things move quickly in the tech sector. Some things do not, of course; the app store issues have been the same for a long time. There is a lot of low-hanging fruit and there is actually no problem at all. The CMA is monitoring things like AI and has written a very good, very detailed report on Ai. It is probably premature to start regulating AI, in my view, but the CMA is on top of the issues as they develop. We are as well set up as we can be, but it is obviously difficult.

Q12 **The Chair:** Before we move to the next question it is probably easiest to keep everyone's mind clear to have an answer to the Lord Bishop's question. That is a segway into Lord Hall's category of questions on the CMA. Can you remember what he asked?

Tom Smith: Undoubtedly, in my view, underenforcement is a bigger risk than overenforcement in this regime. That is definitely true. The CMA is very well set up. The regime gives it advantages that the European Commission currently does not have. As regards the DMA in Europe, there are trade-offs. It got the legislation through quickly because it drafted quite broad principles in the legislation. So there was an advantage in that.

The legislation went through quickly, but inherent in that is that one will have a period of uncertainty now, when there is cat and mouse or whack-a-mole, or however you want to label it. The legislation is meant to have been enforced from 7 March. The gatekeeper firms were asked to publish reports on how they were going to comply. It would be pretty naive to think that they would comply in the way that everyone—the regulator and the challenger companies—would want.

Of course there was going to be a period where you have these 11th-hour concessions which Baroness Harding referred to—walking back slowly, that kind of thing. We have that period now. The CMA, on the other hand, can get detail from the start, as Mr Thomas said earlier, and can tweak its rules regularly. So it is in a much better position, and it will

have learned from the European Commission's processes. The CMA already knows all about the core technology fee and all the things that Apple has introduced. There is a lot of hard work to do.

Q13 **Lord Hall of Birkenhead:** Keeping to the theme of the role of the CMA and how it behaves, can we look at the issue of regulation versus innovation? Does one harm the other? This committee has warned in the past that we should not bash big tech but, rather, create conditions for digital innovation and competition. The CMA itself has said that this issue is a false dichotomy; one has to kind of do both.

What are your views on how the CMA should ensure that the new regulations catalyse growth, do not stifle it, and actually help innovation? Mr Feeney, would you like to give us some thoughts on this?

Matthew Feeney: A good place to start would be to be hyper-focused on what markets are of main concern and to take a broad analysis of the intense competition that happens among big tech companies in a variety of different fields. That is important, because we are familiar now with, say, Google Maps and Gmail, forgetting oftentimes that Google started as a search engine that now competes with other tech companies across a whole different set of sectors.

It is not an exaggeration to say that a few years ago when people were thinking about digital competition, no one knew what ChatGPT or large language models would be, and now we see Google, Meta and other companies rushing to compete with Microsoft on AI.

Personally, I think that if the CMA took the view that these household-name companies are already in fierce competition with each other when it comes to a range of different products—streaming, television, headsets, smart speakers, browsers, search engines; all these things—it would make them slightly less keen to intervene in the markets.

There is a risk of regulation stifling innovation. That is a talking point that can sometimes be overdone, but it is worth taking a look at history and thinking about how the development of Google Maps would work today under the current legislative rubric. Undoubtedly it would be harder, and there would be more friction, but we should not forget that these big tech companies are well resourced with lawyers and engineers. They are not the ones, it seems to me, that we should necessarily be the most worried about.

When I look at the environment, I worry more about the Googles of the next decade that at the moment no one hears about. You want to ensure that those that can fiercely compete do not reach a threshold where mountains of regulations come pouring down. That is how I look at it.

Lord Hall of Birkenhead: You said just now that you think the argument about innovation might be overdone. Is it overdone to a degree, or—?

Matthew Feeney: To clarify, it is true in principle. It is not true that every piece of legislation is going to kill innovation; it will be on a case-by-case basis. I say this as someone who works at a free-market think tank and used to work at a libertarian think tank. I take a sceptical view of regulation generally, but it is not an applicable rule across the board, necessarily. My default position is that regulation should be treated with some caution.

Bakari Middleton: Here are some statistics, a bit roughly: 75% of all internet traffic in the UK comes through a smartphone, and roughly 70% of all digital commerce in the UK comes through a smartphone. Yet, looking at history, as Tom mentioned, the app store aspect of this has been frozen for well over a decade. There is no competition, there is no market.

That is not because of any regulatory intervention or any legislation that was passed. It is simply because of Apple's and Google's terms. The lack of innovation in this space is because of them, if innovation is the ability to do something that has not been done before. The launch of EGS in the EU is like, "This is possible. We're able to do it now in the EU", and it will soon be possible in the UK, because it will required to happen in a way that they have not allowed it to happen before.

Lord Hall of Birkenhead: So this comes back the issues the CMA tackles first.

Bakari Middleton: Yes, exactly.

Steve Thomas: I take this one back to very first principles. I firmly believe that innovation comes from competition and that competition requires open markets. Unfortunately, the situation we are in today is that there are several different markets that are so dominated by one or possibly two players that those markets are no longer open. So actually, almost exactly as Mr Middleton said, the lack of innovation in these markets is a result of the lack of innovation and the lack of regulation.

In fact, sensitive regulation, which I think the DMCC Act is—it prioritises competition—is exactly the way to drive innovation, because it is the way to drive competition. I will innovate if I need to do that in order to do something differently or better than one of my competitors in order to attract consumers to my service rather than my competitors'.

Inherent in that is that I am able to compete; it must be worth while for me to innovate. So, for me, that is the central message here. This, done sensitively, will improve competition and improve innovation as a result.

Lord Hall of Birkenhead: That is really clear. Mr Smith?

Tom Smith: I completely agree. Some of the criticisms seem to assume that all innovation in the economy happens within four firms, which of course is not correct; there is a lot of innovation which the restrictions put in place by those four firms are holding back.

If you look at what the CMA has published and has said it might do, it is about removing artificial restrictions. Britain's fintech community loves to be able to operate in the mobile environment, but currently there are restrictions preventing it, as Bakari was saying: when you pay on the App Store, you have to use Apple.

So I do not think we should worry too much about stifling innovation. It is much more likely to enable innovation. The CMA, more than any other body, is concerned about protecting innovation, so it needs to and will look at these things when it is writing rules.

Lord Hall of Birkenhead: So it is not a dichotomy, effectively. You are all saying that it is regulation for innovation.

Tom Smith: Exactly.

Q14 **Lord Hall of Birkenhead:** I will ask about accountability and the CMA. How open and accountable should it be? What is your advice to it, going forward? You were there and part of it.

Tom Smith: I hesitate to advise it, but I am happy to give my view.

Lord Hall of Birkenhead: Oh, go on.

Tom Smith: I say that, but I will do it anyway. When I started, competition law was a little in an ivory tower. The Competition Commission would write wordy reports and rarely block a merger. Nowadays, it is much more in the newspapers and more talked about, and that is a good thing. This is important public policy. It will be a bit of a change for the CMA, because it will be more like a standing regulator—more like Ofcom or Ofwat—than it has been hitherto. Until now, it did a market investigation in a sector and then got out of the sector and went on to the next one. This is a different mindset, and today's CMA seems well geared up for that. It is much more willing than it ever was to get involved with the media and make sure that its message is out there.

I hope and expect that Parliament will retain an interest in the regime. That is a worthwhile focus for Parliament, because it is public policy as well as competition policy. Parliament has a good role to play.

Lord Hall of Birkenhead: Would anyone like to add anything on accountability and openness in how it makes decisions?

Bakari Middleton: It obviously has substantial new powers, but there are checks and balances. Parliament still has oversight, and there is still the board, obviously. We can expect that its efforts will be challenged in court. So I am not too concerned. Again, it has been a good thing that the CMA has taken a broad and comprehensive survey of players in the market, taking their input. That is an aspect of accountability: listening to people in the market to get a sense of what is going on and to make sound decisions. It should continue that.

Steve Thomas: I echo what Mr Middleton said. Openness and accountability can happen before you take a decision and afterwards. Before the CMA takes decisions, its guidance provides many opportunities for the different parties, both the designated firms and what it describes as third parties—other interested parties—to give their views. There is therefore a good degree of openness in the proposed guidance. There is also the opportunity for decisions that people think are wrong to be challenged in the courts. That is the appropriate way to deal with that.

Lord Young of Norwood Green: On that last point, the judicial review process does not exactly have a track record of doing things speedily, so it is bound to introduce a delay—or will it? We cannot stop it—there is a legal requirement—so how can we ensure that it does not?

Steve Thomas: Perhaps you have a different view of undue delay, but in Europe we are about to get a decision on a case that started 15 years ago. By that standard, the UK's judicial review process seems reasonably efficient, which is probably why we are feeling reasonably optimistic about it.

In some respects, that problem is not solvable here. It is a broader public law question to do with the courts' funding and ability to deal with their backlogs. But, broadly speaking, it is easy to overstate those issues. Although they may introduce some delays, they are not nearly as long as the delays we have seen in getting to this point. Therefore, in some ways, anything is an improvement at this stage.

Bakari Middleton: I agree. The standard is preferable to the merit standard that was being considered. Sarah Cardell was here a little over a year ago and said that the merit standard incentivises companies under investigation to drown the regulator in documents and information to delay the CMA from arriving at a final decision for as long as possible. After it finally arrives at that decision after some years, new evidence is introduced when it is appealed in court, inviting the court to relitigate everything and reassess every question that the CMA has decided on over years. The standard in place minimises that. The CMA will not have to relitigate and re-argue decisions made during an investigation in a way that causes significant delay. Again, that delay leads to lost opportunities for growth and innovation; there is a direct connection.

Lord Young of Norwood Green: So you are optimistic.

Tom Smith: I am quite optimistic. Apple appealed the CMA's decision to open a case—not even the result of the case—so we will get lots of litigation here. Your average merger judicial review takes four to six months in the CAT, so it is not too bad. These ones will probably take a little longer, but not years and years. Parliament wisely wrote into the Act that appeals are not suspensory, so an appeal does not automatically suspend the implementation of the remedy. That is a good thing. I think you will find the SMS firms arguing to the CAT that it should use its powers to suspend the implementation of a remedy, especially when it would require a lot of money to be spent, or certainly when it would

require irreversible changes to their business. But at least it is not automatically suspensory.

The Chair: We were resistant to any change to the appeals process, and we are pleased that the JR procedure was maintained in the legislation. Obviously, we would have liked it to have been the same for the fines, but that area got changed.

Mr Smith said that Parliament should retain an interest in the regime. I hope today's session demonstrates that we definitely want to do that. We will of course have the CMA before us at some point over the next period as it proceeds with implementing the legislation. I encouraged a new Select Committee to be established and to devote its attention to digital regulation of all kinds, not just this kind but online safety and others, but sadly I lost that battle. However, we will certainly make sure that this is not completely ignored.

I thank all four witnesses for giving up their time to talk to us. It is immensely helpful. As was acknowledged earlier, although this hearing was not necessarily box office viewing in terms of those tuning in, I know that people are very interested in this. Critically, the CMA will pay a lot of attention to what we have discussed.