HOUSE OF COMMONS

Business, Energy and Industrial Strategy Committee

Oral evidence: Post-pandemic economic growth: State Aid and Post-Brexit Competition Policy, HC 742

Tuesday 2 November 2021

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Watch the meeting

Members present: Darren Jones (Chair); Richard Fuller; Ms Nusrat Ghani; Mark Jenkinson; Mark Pawsey.

Questions 1 – 47

Witnesses

I: George Peretz QC, Joint Chair, Joint Working Party of UK Bars and Law Societies on Competition Law, and Joint Convenor, UK State Aid Law Association; John Penrose MP, Prime Minister's Anti-Corruption Champion.

Examination of Witnesses

Witnesses: George Peretz and John Penrose.

Q1 **Chair:** Welcome to this morning's session of the Business, Energy and Industrial Strategy Select Committee for our first hearing in our new inquiry on the future of competition policy post-Brexit. For this scene-setting kick-off session, I am delighted to welcome John Penrose, the Member for Weston-super-Mare, who has written a report for Government on the future of competition and consumer policy—there in hand—and George Peretz QC, who works at the Bars and Law Societies on competition and state aid policy. Good morning to both of you.

Just to kick us off, this whole inquiry, as well as the consultation from the BEIS Department, is built on the premise that, now that the UK has left the European Union, we have opportunities to reform competition and consumer policy in the interests of the British economy and British consumers. First of all, John, what are those opportunities?

John Penrose: They are really quite profound but there are some equivalent sets of threats that we need to worry about too. For example, now that the responsibility for what was previously done by EU competition authorities is resting back in the UK post Brexit, we need to upgrade the existing UK competition authorities in order to be able to cope with that extra workload.

It also means that we can take our competition authorities, which are not just the CMA and the Competition Appeal Tribunal, but also the economic regulators, for example, which cover a whole swathe of our economy and most of the utilities—energy, water, transport and so forth—and make them work more quickly and make them more pro-competitive. Ultimately, the point is that, if you have a heavy regulatory burden in order to deliver competition, you are not going to be as efficient or as productive an economy as one that achieves the same things with less red tape and less cost, and that does it more quickly and more digitally.

There is a big opportunity to upgrade ourselves for competition 2.0, but, equally, we need to be careful because we are not quite in the top rank as things stand and, if we just carry on as we are, we will not get back there.

Q2 **Chair:** Who is above us in the rankings?

John Penrose: This is not just my personal view; there are some international rankings. If you look at what other competition practitioners say, they tend to put the USA, the EU, France, Germany and Australia ahead of us. We are pretty good and I do not want to underplay it. We have a lot to be proud of and to build on, but there are a few people who are marginally ahead of us.

Q3 **Chair:** George Peretz, what are our post-Brexit opportunities?

George Peretz: Opportunities and challenges probably go together. John is absolutely right to point out the challenge to the CMA and the other regulators of having to do more work, because they will be dealing with huge international mergers that previously went to the European Commission and with huge international cartels that were previously dealt with by the Commission. They will have to work out how to co-ordinate with the Commission on many of those inquiries, and that will raise various issues, so there is going to be a resourcing question.

At the same time, as it happens, the CMA has also been given a whole lot of new work to do in relation to subsidy control and the internal market Bill, so that is another challenge.

There is an issue about the substantive rules: what exactly are the competition rules? We have modelled our competition rules on EU competition rules, and deliberately so. We tied our boat, as it were, to the big ship of European competition law, and that has gotten us to where we are. The boat is now untied. We are where we are because of EU competition law, but we now have to decide whether to follow the EU boat or to set off in our own direction on a number of issues.

We can talk about the details of that later, but, as always with these questions of divergence, there is a trade-off between, on the one hand, costs brought by divergence, because businesses have to take advice about two separate regimes, which means two sets of lawyers' fees instead of one and two sets of things for businesses to worry about. On the other hand, there are opportunities, particularly as the EU ship itself, to continue the metaphor, may head off in a direction that is not quite designed for us, because we are no longer formulating where it goes, so we may find we want to head off in a slightly different direction.

Q4 **Chair:** Whether it is ours or the European Union's, there will be divergence. Is this debate about us ultimately having to stay pretty close to where the European Union is untrue?

George Peretz: At the moment, in the way the Competition Act has been amended, the default position is probably that we stay with the EU. The courts will certainly look very carefully at new ECJ jurisprudence on competition law issues and, other things being equal, may well follow that, but there are certainly areas that you could point to where divergence is perhaps more likely.

The obvious area is distribution rules, where the EU always has had a slightly idiosyncratic approach, largely because it is concerned with internal market issues and avoiding barriers within the internal market. For example, it looks very disapprovingly at distribution practices that allocate exclusive territories to particular retailers or dealers. We do not have those concerns, so we may move in a slightly more liberal direction on that sort of issue as time passes. There may be other areas. It is slightly difficult to predict, as always with these things, where the EU law

is going, so one does not quite know whether we will want to go along with it or not.

Q5 **Chair:** You just made reference to the courts looking at ECJ jurisprudence. Politically, if that were to continue, that would cause some contention, certainly here in Parliament. We inherited the acquis at the point of leaving the EU, but, if you could just explain that a little further for us, why would British courts be looking in the future at ECJ jurisprudence?

George Peretz: Certainly in the field of competition law, it is quite common for courts around the world to look at other courts' jurisprudence, because you are often dealing with very similar issues. Is an agreement anticompetitive? Is a particular type of conduct anticompetitive? Any sensible court will look very carefully at what other courts have done.

As it happens, I have recently been acting for the European Commission in relation to what are called "pay for delay" cases—agreements between pharmaceutical companies and generics that, essentially, pay the generics to stay out of the market for a while. The theory of what in the EU system will be called abuse of dominant position was originally developed in the United States by a Supreme Court judgment called Actavis.

Although the European Court of Justice judgments on the "pay for delay" issue do not cite Actavis, because the European Court of Justice never cites any other court, the judges were certainly made aware of it during the hearings. If an English court were now looking at this issue cold, they would look at the judgments of the US Supreme Court and the ECJ, and they might look at judgments in Australia. It just part of a process of looking around and seeing what other jurisdictions do.

The courts are well aware of the political sensitivities and very well aware that Parliament has told them not to regard ECJ judgments as binding. If I, as counsel, were trying to rely on an ECJ judgment, I would do so with a certain amount of tentativeness, being aware of that. If one sits back and thinks about it, it must be right for our courts to look at what the ECJ has done in relation to comparable problems, just as it looks at what the US Supreme Court or the Australian High Court may have done on the same issues.

Q6 **Chair:** John Penrose, these rules, institutions and frameworks are important for the functioning of a modern economy, but what are the benefits for the public and our constituents in doing this work?

John Penrose: They are huge, because a really high-quality set of competition institutions delivers a more competitive economy. What that means is a whole series of things. It means that, ultimately, our economy grows more quickly. We have a long-term productivity problem in the UK economy, which has been much studied and commented on, and more

competition would be one of the major things we could do to iron that out. It could also help with levelling up. At the moment, if you look at the productivity of the UK economy, London and the south-east are world class, and then it gets progressively less competitive and less productive as you go further out into other parts of the UK. Increasingly competitive animal spirits outside London and the south-east could be a major part of that.

Equally importantly, if you have a faster-growing economy, it is ultimately the thing that pays for all the public services that we all care about, underpins the long-term viability of the organisations that give us all our jobs and stops us being hollowed out by foreign competitors eroding their position, stealing market share and taking jobs offshore.

Q7 **Mark Pawsey:** If I could follow up on that, you said that a competitive economy grows more quickly, but the business conditions over the last 18 months have been exceptional, as businesses have had to deal with the Covid crisis. Maybe a coming-together, for example, on issues like food distribution might be seen to be better for the country as a whole than having businesses continuing to compete with one another. How should those tensions be managed and what has been the experience over the last 18 months?

John Penrose: I am sure I was not the only person in this room who, when they heard the news about a temporary relaxation or suspension of some of the Competition Act requirements in things like distribution, will have raised their eyebrows. It is justifiable to do that in the very short term when you are faced with a crisis like a pandemic, because everybody needs to put their shoulder to their wheel and to pull together. It is essential to get everybody trying to do one thing really quickly and really efficiently.

That said, if you start to do that in normal times and over the longer term, none of us needs to be criminal geniuses to work out that it is the sort of thing that can easily curdle into producers ganging up against consumers. Ultimately, the bit I should have added in response to the Chair's earlier question is that, if you have a competitive economy, it means lower prices and better products for all of us. There is no point in having competition unless you do it for the benefit of consumers, rather than producers or monopolists.

Q8 **Mark Pawsey:** Was there any evidence of producers ganging up against consumers?

John Penrose: I have not seen any. It is probably a bit early to say if there is anything from during the pandemic. More broadly, there is always evidence of that sort of thing happening and being a tendency; otherwise people like George Peretz would never be in work. Yes, it is always a temptation, it is always a danger and it is always happening. The point about having good competition authorities is to make sure that you stamp on it and design it out as much as you can.

Q9 **Mark Pawsey:** Was it right to suspend competition policy?

John Penrose: As a temporary emergency measure, yes, I am sure we can all live with it and, yes, it was probably necessary. As anything other than a temporary emergency measure, it is pretty dangerous.

George Peretz: It is probably worth saying something about what "suspend competition policy" meant. Competition law is not stupid. It is recognised that there are all sorts of reasons why businesses need to talk to each other and that, in exceptional circumstances, businesses may need to talk to each other about things that would normally be frowned on. If you have a shortage of some essential product, it may make sense for the manufacturers of that product to talk to each other in order to make sure that there are adequate supplies in different parts of the country. Normally, you would be horrified at the idea of manufacturers talking to each other about where they were supplying, but, in those circumstances, it may be fine.

Just as a matter of general competition law, to simplify it, you can always try to justify any type of agreement, if you can show that it is beneficial overall. What the Government did by suspending the competition rules was, effectively, to provide a safe harbour. They were saying to business, "You do not need to worry about what the CMA will say about whether what you are doing is justified, so you do not need to rely on your legal adviser", which is inevitably going to have a caveat in it.

Your lawyers would say, "Yes, I think the CMA would probably agree that this was necessary but I cannot be absolutely certain and there is a risk". You replace that uncertainty by saying, "Here is a safe harbour. Provided you stick within the framework laid down in the rule, you can talk to each other about these things as much as you like and you do not need to worry about your lawyers' advice", which, inevitably, will have caveats at the end saying, "I cannot be absolutely certain that the CMA will like this".

Q10 **Mark Pawsey:** John, is there a danger that, if during something like a pandemic these people who would not normally talk to one another start talking to one another, they form relationships and might assume that that is the new norm?

John Penrose: Yes, that is always the danger. That is why it is really important to say "temporary, emergency and not to become the norm", for precisely the reason you just described.

Q11 **Mark Pawsey:** What about consumer protections? There is some evidence that people who paid deposits to go on holiday did not get their deposits back. Are there consumer protections adequately in place? Should we be doing more to protect consumers who might feel that they have been ripped off and that businesses have taken advantage of the fact that we are in the midst of a pandemic?

John Penrose: There was some good work by the CMA and others to try to make sure that people got their money back from airlines, and bits and pieces like that. There was genuinely proper redress being provided in real time or pretty close to it, so some good things happened.

However, as a broader point, one of the recommendations I made in my report is that the CMA's consumer powers, which are currently a slightly pale imitation of its other powers in antitrust and elsewhere in its work, need to be upgraded because, in general, those powers are less effective.

Q12 **Mark Pawsey:** Were they adequate before the pandemic or was there evidence that they needed beefing up beforehand?

John Penrose: My recommendations here were based on a much longer-run, broader and more fundamental point. It did reasonably well with what it had during the pandemic, but there is a fundamental point that it just needs an upgrade and needs to be much stronger.

Q13 **Ms Ghani:** Mr Penrose, I do not think I am misquoting your comment that the CMA powers were inadequate prior to the pandemic. Would you use a stronger word than "inadequate" when it comes to looking at products that are made available to consumers via social media platforms? There seems to be a huge rise in tech companies but not a huge rise in understanding or authority of the CMA.

John Penrose: Yes, absolutely. It is worth remembering that our last Competition Act in this country was, I think, in 1997.

Ms Ghani: It is important to note that: 1997.

John Penrose: I am corrected by my learned friend on my right: 1998. That is before the internet got going. It is before Uber, Google, Facebook or any of these things. We are working with an analogue system in an increasingly digital world. Parts of it still work fine, because some of the things that were wrong before in the analogue economy are still wrong in a slightly different format in the digital economy, but it is clear that we have to update the thing and to catch up.

There is some good work already underway. For example, the CMA is setting up the Digital Markets Unit, which I argue needs to be renamed, but it is a step in the right direction. That will not have teeth until we have a new piece of primary legislation. You do not have to use primary legislation for everything—there is a whole series of things that we can do by changes to memoranda of understanding and secondary legislation—but we are going to have to have an upgrade, and quickly.

Q14 **Ms Ghani:** Mr Peretz, I will come to you because you are a man of words and you will probably come up with a more powerful word than "inadequate". If we are looking at digital services, we have consumers paying attention and their data being moved on. At the moment, legislation dates back to 1997. Give us some of your powerful words on this.

George Peretz: I suppose I tend to separate issues into consumer issues and competition law issues. I am a competition lawyer rather than a consumer lawyer, but I will say a bit more about consumer law aspects. To a large extent, you can use the tools that we have to deal with a lot of digital market issues. For example, the merger control regime can deal with acquisitions by the big digital players. There has been concern that some acquisitions that should have been picked up were not, but that is probably more of a fault of decision-making rather than the fault of the regime.

Q15 **Ms Ghani:** Do you want to give us an example of those?

George Peretz: The well-known one is Facebook and Instagram, and there seems to be a consensus now that that should have been picked up but was not. There was no jurisdictional problem under the old regime and, indeed, it was looked at. It is just that a lot of people think the decision was wrong. There are always evident difficulties in a fast-moving market in terms of looking at the position now and trying to predict what it will look like in four or five years' time. Sometimes, no matter how perfect your regime, decision-makers are going to get it wrong. To be fair, it was not just the UK regime that got it wrong. It was looked at across the world.

If you are thinking about the way in which big digital companies use or misuse their monopoly position, you have abuse of dominance rules. There is certainly a strong case for specific digital market regulation. BEIS has its consultation paper on that. The proposed regime is beginning to take shape. It will require legislation, because it is going to give a whole lot of new powers to the CMA to apply the law.

You have to define who you are going to catch. Unless you are simply going to write Google, Amazon, Facebook and Apple into the legislation, you have to think of some form of test that catches them, and perhaps other people you want to catch, but which does not catch people who you do not want to catch. There is that design issue.

You then have to give the CMA powers to set out a code. As a general point, you as parliamentarians need to think about the extent to which you are happy for very important regulatory decisions—legislation, effectively, because that is what the CMA will be doing—to be done without your having a direct input into it. There is a constitutional question that is there in the background of some of the reforms that have been proposed. There are questions for you as MPs about the extent to which you are happy for law-making to be done by a body, the CMA, that is neither elected nor even accountable to you in the way that Ministers are.

Ms Ghani: Who regulates the regulator becomes an issue.

George Peretz: Who regulates the regulators? It is always a good question.

Q16 **Ms Ghani:** I am going to have to be very brief with the rest of my questions and ask for brief answers. Otherwise, I will run out of time, but go ahead, Mr Penrose.

John Penrose: Can I just back up what George was saying there? The risk with the new Digital Markets Unit is of regulatory creep, as he was just describing, and of its mandate being gently but inexorably ratcheted up and expanded. You can see that that has already happened over a period of decades, where the same powers already exist and have done for a while in the economic regulators. If you look at the amount of time and expense it now takes for them to take a price decision, it is thousands of times more expensive and slower compared to what it was 20, 30 or 40 years ago.

The danger is that, unless we have this new set of powers in the Digital Markets Unit very closely ringfenced, and with some very serious checks on what it is allowed to do when it extends its powers and how we whittle them back—some processes are needed, which I have recommended in my report—you are going to end up with creep and, in 40 years' time, our successors but two are all going to be sitting there thinking, "Why on earth were they not bright enough to have put those things in place?"

Ms Ghani: We do not want to dissuade people from being innovative or continuing to invest.

John Penrose: Exactly.

Q17 **Ms Ghani:** Mr Penrose, this work is taking place in the States at the moment. Are we just so far behind what is being discussed and legislated in the States?

John Penrose: Do you mean the digital markets stuff?

Ms Ghani: Yes.

John Penrose: It is happening everywhere but I do not think that we are necessarily massively behind. It is a developing area of competition thought. In fact, we have done quite a lot of work in this country. We have brought across Professor Jason Furman, who produced the Furman report, and done quite a lot of work within the CMA since then as well.

There is no national premium on thought leadership, and there is an opportunity here for the UK to perhaps become one of the thought leaders. If we can move more quickly, be a bit nimbler and get to the right decisions more quickly than some of the other competition authorities that we have just been discussing in some of the other jurisdictions, we might be able to set an example and lead the world's thinking in this area, providing we are quick and right.

Q18 **Ms Ghani:** That is, hopefully, what we are trying to do with this inquiry. I just want to focus on the consumer's point of view and I will come to you first, Mr Peretz. Which sectors or markets in competition policy are failing consumers the most? Who is the weakest link in the chain here?

George Peretz: I will be slightly careful about them, because any of them could walk through the door and be my client.

Ms Ghani: Shall I pass to Mr Penrose?

George Peretz: There is a lot of concern about the power of the big digital companies. One can see problems in all sorts of areas. If we think of the areas that the Competition and Markets Authority has looked at recently, there was a very big, in-depth report into the energy sector, but it would be overoptimistic to say that that solved all the competition problems in that sector which are going to come back in all sorts of ways.

There is a lot of unhappiness with competition in the water industry. It is a political point but, for what it is worth, I agree with John when he urged, in the regulated sectors, that the regulators be focused on trying to introduce competition where possible. In areas like telecoms and, to some extent, airports, that just happened. In water, it is very difficult to do, because of the infrastructure. That is a long-running problem.

Competition problems can blow up anywhere, even in areas as traditional as funerals, which is a market that has existed for centuries. There can be difficult problems there, partly linked to problems that are almost consumer issues, the basic point being that, for obvious reasons, people do not shop around very much when they are purchasing a funeral, because they do not want to.

Ms Ghani: These are all key services or industries. Everything that you have talked about is critical to how people conduct their lives.

George Peretz: Indeed.

Q19 **Ms Ghani:** Funeral services is something I had not read up on. Do you have anything else to add, Mr Penrose, to what Mr Peretz has said?

John Penrose: I would just say that there are a couple of high-risk areas to look at. One is anything where there is a network monopoly, so that is most of the utilities, which already have economic regulators. Those economic regulators were set up because there is a network monopoly embedded in the core of them. The rest of the industry may be fine, but the network monopoly is where you end up with consumers being ripped off, or being in danger of being ripped off, because of the network monopoly powers.

There is also a problem with any industry where there is information asymmetry: where the seller knows an awful lot more about it than the buyer, because they can bury rip-offs in small print. That is most common in the financial services sector, historically—that is why we have the Financial Conduct Authority—but it is not exclusively confined to it.

The third area that I would mention is one that you have already been asking about, which is where there are new network monopolies being developed in the digital world, in industries that did not exist before. That

is just a modern example of the old-fashioned network monopoly problems, but coming up in a different flavour.

Q20 **Ms Ghani:** You talked about a problem that we have right now with new tech, but I am going to take you all the way back to 2008 and the recession. The CMA's *State of UK Competition* report found that, since the 2008 recession, levels of competition have still not fully recovered, which is remarkable, if we think about where we were then and where we are now. What are the consequences of this for both businesses and the consumer, Mr Penrose?

John Penrose: The consequences are that, if you are an entrepreneur trying to launch a new, plucky start-up to bring the latest app or new product to your potential customers, you are going to find it harder. It is going to be much more difficult, because the chances are that one of the incumbents can gang up on you. If you are a consumer, it means that, therefore, you will not have the benefits of those kinds of new products being brought to you, and that the companies that are currently selling you things are just a bit fatter and happier. They are not having to pedal so hard to delight you every day, because they are not so worried about losing your business. It is as basic but as fundamental as that.

Q21 **Ms Ghani:** Mr Peretz, can you offer us any insight into what policies are required in order to restore the pre-recession levels of competition that Mr Penrose just mentioned?

George Peretz: There are a range of views, and I am conscious that I am talking, as it were, on behalf of the law profession and competition lawyers as a whole, so I do not want to exceed my remit too much. I have a couple of, I hope, relatively uncontroversial points.

One probably is a little bit controversial, given the context, but the point is uncontroversial enough. Trade barriers are a problem, because, if you make life difficult for foreign companies to enter the market, that can insulate some British companies that could benefit from a bit of foreign competition. One of the challenges of post-Brexit policy is that, while I am conscious that views on Brexit differ, it is objectively true and hardly capable of being denied that there has been a raising of barriers between the UK and the EU. That may be offset to some extent by a reduction in barriers between the UK and other countries.

Trade policy and competition policy interrelate, and the more trade you have, the more competition you have. Indeed, one of the reasons that economists say that trade is good is that it generates more competition. It is a foundation of a lot of the models that predict greater economic growth if you have lower trade barriers. That is one thing you can do.

You have to, as John did, look at competition enforcement, to make sure that it is fast and sufficiently deterrent, but also, on the other hand, that it does not prevent businesses from doing things that they should be doing that are pro-competitive, because they are worried that they will be

found to be doing something that is anti-competitive. Getting that balance right is important.

Q22 **Ms Ghani:** Thank you for being so frank, Mr Peretz. I always think it is best to ask the lawyers where the loopholes are. My final question is to you, Mr Penrose. In the *State of UK Competition* report published back in 2020, the CMA noted that there are significant differences in who experiences worse outcomes from markets, such as those from low-income households and the elderly. How can we ensure that we are counteracting some of these differences? I want to talk about real world markets and online markets, because there is a huge issue about people having access to information, the confidence to make choices and even the ability to choose.

John Penrose: The last two points are absolutely central. It does not matter if you are online or in the analogue world: you need to have trust in the legitimacy and accuracy of what you are being told about the product or service you are buying, knowing that it is going to have to be true and, if it is not, that you have some sort of consumer redress. You can take it to a small claims court or to an ombudsman. There is a cheap and cheerful but effective way of getting fast replacement of the faulty part or whatever it might be.

Knowing all of that stuff is essential not only for consumers but also for our economy, because it means that the economy just works more quickly. With all due respect to the legal profession, you do not have to reach for your lawyer when you are buying a slice of toast, because you know you have a highly efficient way of solving any problems that might arise. That is a much better way to run a country, to run society and to run an economy, and it makes us more productive, so you want to have that.

The danger, particularly for the online world, is that, while, for reputable firms, there is plenty of that kind of consumer redress available and, where something goes wrong, if you have bought something from a reputable supplier on Amazon, you can get your money back or a replacement, there are an awful lot of scams out there. There are an awful lot of things that are not reliable and just a lower degree of trust—and rightly, at the moment—that everything you read online is going to be correct, because it flipping well is not, some of the time. That is the danger.

The trust in the legitimacy of the system, and, therefore, the belief that you can get consumer redress when you need it when something has gone wrong, all needs to be upgraded in the online world, so that it matches what we have, over decades, grown to expect in the traditional analogue world as well.

Q23 **Chair:** I just want to clarify. We have spoken a lot this morning about how effective competition and competition policy will benefit consumers and the economy. We have talked a little bit about consumer rights

legislation. I want to unpack that a bit between effective enforcement of the legislation and the rules that we have inherited from the European Union. We have inherited a lot of consumer rights legislation from the EU on goods, services, digital content and digital services.

Are both of you saying that the regulatory framework for consumer rights and protections is broadly okay, and that the issue is just the enforcement of those rights, or do you think that, if we do get a piece of primary legislation, we need to look at consumer rights as well as competition policy and enforcement?

John Penrose: My report is quite explicit in saying that the consumer powers, which are part of the consumer rights stuff, of the CMA need to be upgraded. It is definitely both of those issues that you just raised that need to be improved, as well as, in the digital world, some of the ways that we enforce things—things like small claims courts and alternative redress systems. Quite a lot of the time nowadays, if I want to get something replaced online, I can do that at 3 am via an app with a reputable company.

If, though, I am dealing with somebody who requires a bit more pressure in order to do the right thing for me, and I have to go to an ombudsman, to alternative redress or to a small claims court, would it not be great if they were as digital too and I could do them at 3 am, 24/7, if I needed to? People are starting to expect that in all other areas of their life. It worries me that some of the basic bits of consumer redress need to be upgraded to take care of that and to keep pace with what people are expecting elsewhere.

George Peretz: I agree with a lot of that. I am not a consumer lawyer, and the joint working party is composed of competition lawyers, not consumer lawyers. Broadly, as it happens, most of us thought that the suggestions in the BEIS consultation paper and a lot of what John was saying about consumer law, for what it is worth, are important and right.

There are really two aspects to this. One is whether, at an individual level, the dispute resolution mechanisms, which can either be the state's one—the courts—or ones set up by trade bodies, are offering consumers an adequate service. There is a lot to be said that they are not.

As it happens, I tried to use the small claims court during the pandemic to get some airline ticket refunds. As a lawyer, I was pretty comfortable using the process, but you had to pay proportionately quite a lot of money to start the process off, which was a bit of a disincentive, and you had to be prepared to set out your case, which is something that I found easy but other people might find trickier. The process took an awfully long time before it got anywhere, which is a real problem. As a user, as it were, I read what John said about the small claims procedure with a certain amount of sympathy, and there is a lot that industries can do to have informal mechanisms of their own that they set up.

The other aspect is looking at systemic issues: if companies are systematically behaving badly to consumers, what could be done? There is pretty much a consensus that the CMA's powers, which are aimed to deal, in a systemic way, with companies whose business models are about exploiting consumers, need beefing up substantially. I was a lawyer at the OFT back in the 1990s, with some extremely antique powers that just took ages. When you got there, it was essentially a "don't do that again" order, which was then quite difficult to enforce. Things have improved a bit but not that much, and there is a lot to be said for beefing the powers up further.

Q24 **Chair:** John, you talked about the front door for consumers. If they are not going to the small claims court and are not in a regulated sector where there is a complaints system that is approved by the regulator, and an ombudsman if that is exhausted, people may have heard of trading standards but they do not really know to go there. For individuals pursuing their individual complaints, as opposed to the collective, systemic actions, you have put forward some recommendations to improve that for people.

John Penrose: Yes, I did. In parentheses on the way past, there are plenty of examples of really good ombudsman schemes that are outside the regulated sector as well. Good ombudsman schemes can apply right the way across the rest of the economy, and I think they should.

You are right: things like trading standards probably need quite a serious upgrade. At the moment, there are some good examples of trading standards offices around the country, but there are also examples of where the service has been quite hollowed out, depending on how enlightened your local council is. In some cases, it is still fairly strong, has real teeth and claws, and does a decent job for local consumers. In other places, it is a bit of a paper tiger.

What I am suggesting in here is that we create a new statutory duty as a minimum service level for trading standards, so that, if all else fails and push comes to shove, you have a local trading standards office that is up to the task, if needed. It is important that it is local, because another issue is that, for small-scale, local anti-competitive behaviour—if all the estate agents in a particular area decided to gang up together, or all the local hotels, or whatever it might be—quite a lot of those things will be too small for the CMA to take very much notice of. It will not move the dial on its radar. You need to have something that does proper local enforcement, if necessary.

For those two reasons, you need to have more even and, on average, higher-quality trading standards offices around the country, even though some of them are already good.

Q25 **Richard Fuller:** Mr Peretz, you mentioned some of the new challenges for the CMA: resources for its current work, new and additional responsibilities, and defining what the competition rules may be post-

Brexit. Mr Penrose talked about two decades since the last significant piece of legislation to give some direction. You have talked about some of the pressures of digital coming up the same standards as analogue sectors. Are we asking too much of the CMA?

George Peretz: It is a very impressive organisation in many ways. It has some very good people working for it. There are resource issues. It is not quite right to say that there has been no competition legislation since 1998. The Competition Act was in 1998, but there was also the Enterprise Act in 2002, which made quite important reforms, although not on the prohibitions. Then there was the Enterprise and Regulatory Reform Act of 2013, which created the CMA. Before then, there was the Office of Fair Trading. It reformed the institutions but also had some procedural changes. There has been competition reform since 1998, but the basic structure has been in place since then.

Back to the question of whether the CMA is up to the job, I think it is. There are always questions about resources, but it is a body that has now been doing its job for a long time. It has worked out the mix of expertise that it needs and how to operate the regime as effectively as it can within existing constraints. We can talk about the reforms that I and the joint working party would like to see to make things faster and more effective, but within the current legal regime the CMA does pretty well.

Q26 **Richard Fuller:** I will go to Mr Penrose but I may come back to you on this question. Mr Penrose, many who supported leave in the referendum anticipated that there would be a regulatory reforming zeal post departure of the European Union, but we note that the search for a chair of the Competition and Markets Authority commenced nearly a year ago. In fact, Chair, I think that we were supposed to do pre-hearings in June of this year. We still do not have a chair and I think that someone stated that the current CEO may not seek another term when he steps down in July of next year. Where is the oomph?

John Penrose: That is a very fair question. To your earlier question of whether the CMA is up to it, yes, it is, but it needs some oomph and it needs to upgrade itself. We cannot afford to let it not do that, because of all these extra responsibilities post Brexit and post pandemic that we need it to take. I am not critical of the individuals within the CMA, who are very impressive, but I would be a little less sanguine than George was just now about how the CMA and CAT in particular work.

If you talk to the people who use the system—not the people who operate it or who are inside the organisations, or the lawyers who appear in front of them, but the businessmen and women and the investors who need fast, certain decisions in order to make business decisions—they say, "The process of getting to a decision, too often, within Britain's competition decision-making bodies is just too slow in the digital world and is getting left behind by the digital world, which is moving more and more quickly".

What businesspeople and investors need for most decisions, apart from the really complicated ones, is certainty within weeks or months, not years, and that is not happening at the moment. As I said, that is not a criticism of the individuals within the system, but it just illustrates how much of an upgrade we need.

Q27 **Richard Fuller:** What is the solution then?

John Penrose: I have made a series of recommendations about specific changes, but the broadest one, in management consultant speak, is a core process redesign. It probably needs to be chaired by a retired judge who is used to boiling cases down to their fundamental essentials, saying, "There are 101 different issues here but only four that are going to make the difference and decide this case, so ignore the other 97. We are going to focus on those four".

They need to do that from day one of an inquiry and get to the point—or to what lawyers who I have spoken to call the killing ground—really quickly. They need to ignore all the other stuff and say, "That is interesting but not relevant" and, therefore, get to an answer much more quickly. It is perfectly doable and there is a lot of goodwill for it, but you need to get them to work out the details.

Q28 **Richard Fuller:** Just so I am clear, when you say core process reform, were you referring to how they look at individual cases or to how the CMA does its job overall?

John Penrose: In this case, the answer to that is both. It is how CMA and CAT between them, for a complete case that starts in CMA and ends up at CAT, can get through that process really quickly, without any diminution in the quality of the justice, and get to the right answer much more quickly and much more cheaply as a result.

George Peretz: John sets out the challenge, which is the pipeline between the start of an investigation or the lodging of a complaint and the result, and trying to make that pipe as short as possible.

One reform that John touches on and that the JWP has backed for some time is trying to get rid of what is, at the moment, a major roadblock in Competition Act cases, which is the process of writing an enormous decision. When we set up the regime in 1998, effectively, we took the EU administrative law model, where everything is centred on the Commission as the main decision-taker. There is a lot of EU law about procedural safeguards in front of the Commission, because the Commission is at the heart of the EU regime, with a certain amount of fairly light supervision from the European courts.

We took that regime, which involved the immense burden of writing an enormous decision that deals with all points that have been made by all the affected parties. We then put on top of that a whole English trial litigation system, where courts, when they deal with factual questions, expect witnesses and a certain amount of cross-examination, and expect,

if there are conflicts of expert evidence, to have the experts in the court dealing with it. That is just how the English procedure works, not how the general court works, because it is a different model.

In any English or Scottish system—I have to remember I am representing Scottish law societies as well—you have the process of a trial of some sense. It is occasionally suggested that we move from a merits review to a judicial review model, but that does not really help with the sort of thing you are looking at. When you are in the game of imposing very large fines on companies, you are in, effectively, a penal context. When you get into that context, even a judicial review is going to involve pretty intensive scrutiny and quite a lot of time.

The problem that we have is this immense process leading up to a decision. You then plonk on top a whole elaborate process of litigation and a trial, so you have both. It is a sort of monster that has been put together, with two different animals sewn up rather inelegantly. What do you do about that? That is the pipeline.

What is the solution? You will not really be able to deal with the English trial bit, because, in the end, if you are imposing huge fines on companies, they want their day in court, and the legitimacy of the regime depends on them having their day in court.

What you can do is try to get rid of the doorstop of the decision. CMA decisions now run to 1,500 pages, with huge annexes dealing not with technical points but with the essential parts of the case. I am tempted to compare it to Tolstoy writing *War and Peace*, but Tolstoy, when he was writing *War and Peace*, did not have to check case law and make sure that he was answering every single point put to him by the parties.

It is a huge effort, which is largely wasted, because, if the decision is then appealed, the Competition Appeal Tribunal reaches a judgment, and everyone who then wants to look at what was decided just looks at the judgment. The decisions sit in the archives.

Q29 **Richard Fuller:** The solution is—

George Peretz: You want to get rid of the decision, and that means, effectively, moving to a more prosecutorial model. The first stage in the process at the moment is that the CMA issues what is called a statement of objections, which is its preliminary theory of the case. What we would say is that you stop there. The CMA presents its preliminary theory of the case, which, if you like, becomes the indictment. You then put the matter in front of the CAT. It is much easier for courts to manage the huge volume of stuff that gets thrown at the authorities when you have a Competition Act case.

Inevitably, if you are saying that a huge multinational company is going to be paying fines of hundreds of millions of pounds, they will throw the book. They will employ expensive lawyers like me. They will get people

like me to write immensely long submissions. When writing a decision, the CMA feels it has to go through every single word of those submissions and make sure that it has answered them. No court ever does that. No court judgment, even in a hugely contested case involving billions, writes a judgment that is as long as *War and Peace*. If they tried, the Court of Appeal would have a screaming fit.

What courts do is fillet. The judge will say, "I am not really interested in that aspect of the case, Mr Peretz. Could you concentrate on this bit, please?" They will manage the case and make it manageable, and it will be dealt with. You get the whole thing done much more quickly.

Richard Fuller: In the interests of time, Mr Penrose, I am coming to you anyway, so you can add in then.

John Penrose: All I would put across the Committee's bows is that that is not an uncontroversial solution.

Q30 **Richard Fuller:** I want to come to the regulated areas, Mr Penrose. In your report, you said, "Outside the network monopolies with their regulated asset bases, there is no inherent reason why most of the rest of each of these sectors"—meaning regulated sectors—"shouldn't become a normally-competitive industry, with the same high standards, strong competition and consumer powers", and then you had some suggestions. What suggestions do you have for how the competition can be better promoted in these regulated sectors? What would you like to see?

John Penrose: To be fair, there are a couple of sectors where this process has already begun and has worked quite well. The best is probably the airlines and airports sector, where, broadly speaking, most of the airports, apart from the network monopoly that is inherent in the hub at Heathrow and a little bit in Gatwick, are largely competitive. All the other airports are pretty competitive and are deregulated to become "normally competitive" already, so it can be done. There is a similar sort of thing already underway in large chunks of Ofcom's telecoms responsibilities as well, so it can be done.

There is a fairly straightforward process that you could apply, and I am suggesting we should, which is to say that, for each of these industries, you go to the sector regulator and say, "You are all starting from slightly different places. Water is much less competitive at the moment than telecoms. You are all beginning in different places. You all have slightly different legal powers.

"Come up with a tailored plan that says, 'It is going to take us two years or three years'—or however long it is—'to get as much of this market that is not a network monopoly or something that is inherently difficult to make competitive, and here are the steps we are going to take to get all the rest of this industry to become competitive, step by step. Here are the extra powers we are going to introduce. Here is the competition we are going to encourage. Here is the standardisation of interoperability, so

that there are fewer competitive barriers. Here is what we are going to do. At the end of that process, we are going to be able to hand back responsibility for this bit of telecoms, that bit of energy or this piece of water to the CMA, because it will be fully competitive and it will not need upfront, heavy-duty, ex ante regulation'".

That is the stuff that we need to be worried about, because that is the thing that creates burdens, slows down industries and makes them less competitive, and puts consumers at risk if it is not there. But once you have made it fully competitive, tell everybody in advance, publish the plan, so everyone can invest on the back of it and make their plans together, and businesses can get everything lined up.

At the end of it, the good news is that it does not take primary legislation. All it takes is a letter to the existing memorandum of understanding between Ofwat, Ofcom, Ofgem or whoever it is and the CMA, and they just adjust the memorandum of understanding. It takes place immediately on that basis.

Q31 **Richard Fuller:** That is a very clear and purposeful recommendation, Mr Penrose. I think we have 94 regulators, I picked off the website, not all of them economic, and 510 agencies that are listed on the Government's website, not all of them economic. For the purposes of competition, a number of agencies are out there that do affect competition. Where is the annual scorecard for their performance in the public domain? Where is the annual review, along the lines of what Mr Penrose was suggesting, Mr Peretz, of whether they are engaging in scope creep or whether, indeed, they could be handing back? Where is the pro-competition assessment for those regulatory agencies? Where can I find that?

George Peretz: I am afraid I cannot really help you with that. I simply do not know if there is any such thing. I may be told that there is, but I am not aware of it.

Q32 **Richard Fuller:** In your work as an expert in competition law, the role of regulators has, presumably, quite a significant effect on that.

George Peretz: Yes.

Q33 **Richard Fuller:** Do you not think it is odd that you do not have to hand the annual handbook of regulator performance that you can review and use to assess the performance of competition policies in the UK?

George Peretz: You have their annual reports, although they, of course, are marking their own homework.

Richard Fuller: Yes, exactly.

George Peretz: But there is quite a lot of objective information in those reports. You can see things like the number of cases handled, the speed of cases and so on. I am certainly not aware of such a scorecard, because you have to set up an agency or somebody has to do the work to generate it.

Q34 **Richard Fuller:** Could the RPC be expanded to cover that or are those different roles?

John Penrose: The RPC does really important work. It is probably not quite what you are describing but it is absolutely essential for driving better regulation and reducing regulatory burdens without cutting standards. It is adjacent to what you are describing. It is absolutely essential that we upgrade our better regulation processes within Westminster and Whitehall. That will get us quite a long way to what you are describing. You will still have a whole host of non-economic regulators that are doing important work for the right reasons but may not be taking enough account of the burdens that they are creating, which is why a proper red tape regime, with one in, two out, and no exceptions, and proper teeth and claws to it, is absolutely essential.

It is one of the things I am most worried about, because we have gone backwards in the last couple of years in that area compared to where we were before. While I do not want to minimise it, it is never easy. The whole purpose of Westminster and Whitehall is to create new rules, not to get rid of old ones; that is a fundamental cultural issue. Therefore, it makes it difficult but also essential to have a better regulatory regime that genuinely works and stops that particular juggernaut from moving inexorably down the track.

George Peretz: One problem with regulatory creep is that it does not necessarily always manifest itself in visible changes in rules. It can manifest itself in information requests, for example, and this is a real concern among a lot of business. It is a routine complaint of every client I have ever had who has been involved in a merger inquiry that the demands for information that come out of the CMA are regarded as excessive.

When I was at the OFT and then a lawyer in the 1990s in merger control, for example, it never occurred to us to ask for disclosure of internal company documents. It was probably wrong for it not to occur to us. There is scope for some of that, but now it is the opposite extreme and, as soon as you get into a merger inquiry, you get this demand for huge disclosure of any conceivably relevant internal document, which is akin to a major litigation disclosure exercise. It is a huge burden of work.

Sometimes it is helped by modern digital techniques, but sometimes the fact that you have so much in the way of electronic documentation makes it more labour intensive than physically going through paper. It is a huge exercise and often completely unnecessary, because, in the end, the answer to a merger question is not even what the company might have thought it was doing, or what some salesperson within the company might have thought was the consequence. It is an economic analysis. It is an objective question.

There is a concern about that. More routinely in Competition Act issues, there are just huge demands for information, and not necessarily even

directed at the people who are the subject of the investigation, but often third parties who are caught up in it and find the whole process very burdensome. It is very difficult to track that. The only way of finding out is to listen to people like me, and it is all a bit anecdotal, but, between us, we can see a trend to huge information demands.

Q35 **Mark Jenkinson:** I just want to return to a couple of things that we have touched on. First, Mr Peretz, you mentioned the BEIS consultation on reforming competition. What is your assessment of those proposals? Could they be better enhanced to provide a better competition policy regime or do they offer sufficient benefit to consumers, for example?

George Peretz: There is a lot in those proposals. As the joint working party, we produced a response to them, which I am sure the Committee has available; I can send a copy to them. I will not have time to go through everything that we said there, but I will try to concentrate on the main points.

Looking at the suite of competition powers that the CMA currently has, one of them is the Competition Act, which is, essentially, often described as an ex post regime. It is about picking up anti-competitive conduct that is already in the rules, as it were—things like cartels or excessive pricing by powerful companies.

How do you improve that regime? I have already talked about our suggested move to a prosecutorial model, which is not picked up or suggested by BEIS. It offers suggestions such as a better mechanism for interim measures. At the moment, CMA has an interim measures power, which is to act immediately in response to what seems to it to be, for example, a big, dominant company behaving badly, but it hardly ever uses it.

In fact, when I am advising clients who are concerned that they are at the wrong end of practice like that, my advice to them is this: "Do not bother going to the CMA. Just go straight to court, because you have a directly effective right that you can cite in court and get an injunction". That carries various risks and costs for the company, so it would be better for the CMA to be able to deal with things, particularly if the company is not at the wrong end of it and is prepared to put its hand in its pocket.

We suggested, effectively, that the CMA perhaps be given power to apply to the court itself in the way that a company could, and that would be quite a speedy, effective technique. I do not think that the CMA is that keen on that idea, but that is a possibility.

In relation to market investigations, this is a fairly unique and beneficial feature of the UK competition law regime, in that it allows the competition authorities to look at a sector of the economy—it could be banks, beer, energy or funerals—to see if there are adverse things that companies are doing in that area that are anti-competitive in a broad

sense, not illegal in the sense of contrary to the Competition Act, but practices that have the effect of stifling or limiting competition, and to give them a law-making power to deal with that. Those investigations have, over the years, produced very significant changes in the way industries are organised.

As an example, a long time ago now, under the previous regime, the whole system of beer ties between brewers and landlords was put to an end by the predecessor of what are now market investigation powers. That has huge effects on an industry that is extremely important to almost all of your constituents, so these powers are very significant. At the moment, the process takes quite a long time. Can you speed it up?

There is a balance to be struck. Some of the proposals that BEIS put forward would allow the CMA to take really quite dramatic action very early on, which we thought was really inappropriate, because, effectively, it is a law-making power. You may say it is fine for a body of bureaucrats to have a law-making power, but you have to be very careful about what the scope of that power is and what the processes are that you need to go through to exercise it. You do not want to shortcut the processes; otherwise a lot of the law changes are going to be wrong and it is not going to command the consent of those who are affected by it.

One of the strengths of the current system is that you have a fairly lengthy process, but it is a pretty in-depth review. There are lots of internal checks. The CMA does the first stage. A panel of people from within the CMA but who are independent come in and do the second phase. In the end, businesses that go through that process feel that the process is legitimate, because they have been listened to, even if what they say has not been accepted at the end of the day. When you are thinking about this as a law-making process, the fact that the process produces a result that most people involved in it feel is legitimate, even if they do not agree with it, is rather important, so there are dangers in shortcutting the process.

BEIS suggests reducing the role of the panel. In fact, the CMA is not that keen on reducing the role of the panel. We thought it was not right to reduce the role of the panel, but you need a balance. If you want the detailed paper, I will send it to you. I am conscious that I have already been going on for far too long, but there is a lot of detail in it. Broadly, we think that there are a lot of things in there that are a good idea and would speed things up, but there are things that we are not so enthusiastic about.

Q36 **Mark Jenkinson:** Mr Penrose, what is your view on the consultation?

John Penrose: It is an important and welcome step in the right direction. I do not think it will take the trick completely. There are a whole series of things that it does not yet cover but needs to. For example, it does not deal with the things that we have been talking about around sorting the economic regulators out. It does not necessarily deal

with some things that are going to require primary legislation in due course. We are going to need, as we said at the start, a new Competition Act, so there are some things there.

As a starting point to try to do parts, at least, of the core process redesign, in order to solve some of the problems we were talking about earlier, it is very welcome. It is not quite the full Monty though. If they really want to do this, even when they have done all the things that they eventually conclude from this consultation, they are going to say, "Yes, but we are still not at the stage, are we, where we can come up with most decisions being weeks or months and creating certainty for investors and businesspeople?"

They are going to have to come back and stick a bunch of very senior lawyers, investors, businesspeople and CMA and CAT people in a room, with a big pot of coffee and a retired judge who is very used to running cases very efficiently and driving them demandingly. We are going to have to lock the door and wait until they have solved those remaining problems, and the smoke coming out of the top of the Sistine Chapel goes white. It is a useful first step but they are going to have to do more.

Q37 **Mark Jenkinson:** I just want to move to your *Power to the People* report, which we have touched on a couple of times. It was noted by the former CMA chair that distrust of markets can cause major challenges for competition policy, and you also note that trust and confidence in the legal and complaints system is important for consumers. How best can we foster and increase this trust?

John Penrose: We covered a little bit of that in some of the earlier things we were talking about. I will not repeat them now, but they were the points we were making earlier about better redress from ombudsmen and alternative redress systems, stronger trading standards bodies—those things really matter—and upgrading the consumer powers of the CMA. That will all help, so I will not repeat that now.

There are, however, a couple of other bits and pieces where the world is moving on and the digital economy is developing, which we need to be really alive to, trying to look upwind to find where the problems are occurring. I mentioned earlier on that there is a problem where there is information asymmetry, where sellers know more than buyers and can hide rip-offs in the small print. That is one crucial area that, if left unchecked, could easily multiply across the digital economy.

For example, anytime any of us signs up for wi-fi in a local hotel, on a train or at a sports event, there are pages and pages of terms and conditions that none of us ever reads. To give you a horrifying example, somebody ran a test—thankfully, a harmless one—online, where buried in the terms and conditions was the pledge to hand over your firstborn and 98% of people signed it. There is a real problem with that, which is going to get bigger, because of online, rather than smaller.

There are things that you can do to sort that out. You can do things with minimum legal standards for contracts, saying that some things are not allowed. That already exists, to an extent. There are unfair contract terms and things like that, but you are probably going to need to upgrade that. You can probably do things as well with fairness tests, and there are some suggestions in here about how we can come up with a rule of thumb for businesspeople, so that they do not have to reach for brilliant and expensive lawyers like George every time, but can work it out so that they are, broadly speaking, going to be right most of the time just by applying a decision rule in their heads.

You can also do things with some of the online decision helpers such as AutoSergei and the price comparison sites. You can see a world where, given a bit of artificial intelligence and so forth, in a few years' time, you might be able to get them to take some quite complicated bits of advice and provide consumers with high-quality advice, which will level the playing field and make it harder for sellers to bury rip-offs in the small print.

There is also sludge. If you are familiar with nudge theory, which is about trying to persuade people to do things, sludge is nudging for evil. It is trying to persuade you to do the wrong things for yourself. At a very junior level—this is not an example of evil—if you have ever tried to sign up to something like Amazon Prime and then unsigned from it, it is a heck of a lot harder to get out of it than it was to get in. That is not a very evil example of sludge, but you can see how that can get further. We need to have ways of measuring sludge and saying, "At some point, it becomes genuinely a major problem for consumers and erodes trust as well".

Those are all things where we need to upgrade our understanding. We need to keep clever people at the CMA and elsewhere, and perhaps on this Committee, to say that we are going to need to have some new ways of dealing with old problems that have fresh legs in the digital economy. None of these is new in principle, but they are all new in the way they are being applied in the digital economy, and we are going to have to have ways of thinking about how to cope with them, so that consumers know they can trust the online world in the same way they can trust the offline world. At the moment, that is not there.

George Peretz: John gave the example in his paper of the contract to hand over the firstborn. As far as I am aware, none of my clients has a contract that says that, so I think I can say without too much concern that that would not be enforceable under all the Unfair Contract Terms Act, the Unfair Contract Terms Directive and the Unfair Terms in Consumer Contracts Regulations.

The CMA and the OFT have done quite a lot of useful work under the Unfair Terms in Consumer Contracts Regulations of going around

businesses and picking up some of the most horrendous contracts—not quite handing over the firstborn but quite horrendous terms.

Q38 **Mark Jenkinson:** But it is the case that the unfair terms end up in contracts in the full knowledge that they are unfair.

George Peretz: Any business that writes long terms and conditions ought to be aware—although sometimes they or the person writing them are not—and any lawyer who drafts them should be aware that you can put anything in your contract. John is right: we have all had experience that we sign things that we have not yet read. Even as a lawyer, I frequently sign things that I have not read. You just do not have time to do anything else.

Somebody who is drafting those, if they are doing their job properly, ought to be very conscious that there are limits in what you can put in them set out in law—the Unfair Contract Terms Act and Unfair Terms in Consumer Contracts Regulations. But, life being what it is, people do not always get the law right, and a lot of consumers have no idea. They think, "If it is in the contract, it must be binding".

As I said, I am not a consumer lawyer but it always irritates me when you go into shops and see a sign saying, "No refunds, no exchanges". You just cannot put that up, and it annoys me, because it shows either, "Yes, we know what the law is but we do not care" or just complete ignorance of the law. Frankly, nobody selling anything should be quite that ignorant of the law. Of course, they also rely on consumers, not themselves, saying, "That notice is not right, is it?" There is a role for education as well. The CMA has tried over the years to look at that as well.

Q39 **Mark Jenkinson:** I have lost count of the number of arguments I have had over cash refunds for faulty goods. I had a question on the Competition Act, but I think we have touched on that quite considerably. I have one final question to Mr Penrose. You chose not to take forward some of the recommendations from Lord Tyrie's 2019 letter to the Secretary of State, such as proposals for greater liability on individuals and boards of limited liability companies for competition law breaches. What was the reasoning behind not taking those forward?

John Penrose: I spoke quite extensively to Lord Tyrie, along with a whole series of other experts, while I was writing the report. The reason why I cherrypicked it a little bit is because there were a series of what I will call straightforward, no regrets things, which everybody agrees should be done, and those are the ones that I specifically recommended in the report. I will not summarise them again here, but you can see them very quickly.

Andrew Tyrie's letter is twenty-something pages long and pretty dense, with an awful lot of stuff in it. Of the remainder, quite a lot would be swept up into my recommendation for the core process redesign. You

have to take some of them and say, "If I change this piece of the process, it will reduce some other piece of legal protection and, therefore, you need to change that bit too", so there is a whole series of interrelated ones. Frankly, you need to be a legal procedural expert to know whether you are striking the right balance.

Some of them are to do with, as George was saying earlier on, making CMA work more quickly, but they would create real concerns in other quarters that that might translate as reducing the checks and balances on CMA's use of its powers. Some of them were quite controversial as well. I wrapped a collection of them together in the core process redesign and said, "You have to take all of these as a group, because they all have trade-offs between each other and there are some very important principles of justice. If you strike the wrong balance in them by doing one and not the other, you might accidentally cause real harm".

Q40 **Chair:** We have talked a little about the number of jobs the CMA has to do, and you often get into this discussion about when something is too big versus how many smaller things you need to do the job. Does the CMA need to be split up?

George Peretz: I suppose that raises the question of where you would split it. The split that is usually suggested is between competition and consumer policy. As I said, I used to work for the OFT. It was a long time ago but it certainly struck me then that there was a lot to be said for keeping both roles within the same body. There is a tendency for competition regulators to get a bit abstracted by fascinating economic theories and abstruse arguments, and it gets a little detached from the real world. One advantage of it having a consumer arm is that it pulls the competition part of the operation to look at the sorts of competition issues that really affect consumers. It helps with the prioritisation.

There are also a lot of areas where there is an overlap between consumer policy and competition policy. Most obviously, if you are thinking about bad behaviour by very big companies, you can often look at that both through a competition lens—it is an abuse of their dominant position—and through a consumer lens, and say that they are doing things that are contrary to consumer law, data protection law, particularly in digital markets, or other areas. When you are trying to problem solve, it is useful to be able to look at all aspects to decide which tools you are going to use.

If you have a regulator that is just a competition regulator, everything it looks at becomes a competition problem. It is the old phenomenon: if all you have is a hammer, every problem becomes a nail. If it covers a bit a wider suite of perspectives and remedies, you are more likely to tailor the tool to what the right one is to deal with the particular problem you have in front of you.

Q41 **Chair:** Do you agree?

John Penrose: Yes. The simple answer to your question is no: it should not be split. As George rightly pointed out, competition and consumer policy must go together. The whole point of competition is for the benefit of consumers. I was always taught in business that structure and form should follow function. In other words, the thing you need to do to fix CMA and CAT is this core process redesign I was talking about. Do that and most of it will work. At the end of it, once you have a redesigned organisation doing a redesigned process, if you then decide you want to make some organisational changes within it, that is the point you do it. You do not start off by doing the organisational changes first before you have even worked out how you want to do the job.

Q42 **Chair:** Presumably, therefore, you agree with the approach being taken on the Digital Markets Unit and the Digital Regulation Cooperation Forum, where all the regulators are coming together to talk about digital issues without the idea that there should be a new digital regulator.

John Penrose: Yes, for a couple of reasons. One is that, because the entire economy is digitising, if you have a digital regulator, pretty soon it hollows out the CMA and becomes the new CMA, which is just a silliness. Another is that we do not know what the new digital market and the new digital economy are going to look like in the end. We are partway through that process but still have an awfully long way to run. Who knows what it will look like in the end? Again, focus on doing what you are trying to do, and the structure of the institution will fall out at the end of that process, once you have got the rest of it right.

Q43 **Chair:** George Peretz, I noticed last week that the CMA levied a pretty hefty fine on Facebook for not doing what the CMA asked it to do. When we talk about digital markets, we are talking about multinational companies, often based in the United States. Do we really have the power and influence here, through what we are trying to do, to have an impact on these companies, or do we need some new powers?

George Peretz: The context of that fine is really interesting. It is an interesting merger case: Facebook's attempt to buy Giphy, which is a supplier of GIFs. Quite often on Twitter or something, someone puts a GIF, which is a short bit of movement. The CMA has, in fact, gone slightly out on a limb internationally. This is a major international merger, but the CMA picked it up and said, "We see a problem here", where other entities have not. The way our jurisdictional rules currently work means that they found it was within their jurisdiction and, as I said, they have gone somewhat out on a limb.

I am not involved with the case, so I can comment to the effect that Facebook is plainly very angry, to use a non-technical term, at what has happened. You get the flavour of that from its successive appeals to the Competition Appeal Tribunal about what is being done to it.

The fine arose out of what is called an interim remedy. Facebook had bought Giphy before the CMA intervened and, in those cases, what the

CMA does is impose "hold separate" orders. It is one of those areas that, over the years, have become more and more onerous for the companies concerned. It used to be fairly light touch but is now extremely interventionist, with frequent reporting obligations and demands to provide information about separation.

Facebook clearly felt that it was completely unacceptable that the CMA was demanding all this information, no doubt large parts of it coming from the United States. It looks from the decision as if it has stonewalled, to some extent—that is, of course, just hearing what the CMA says about it—and, therefore, got a very huge fine. It is huge, largely because, if you are going to penalise a company the size of Facebook, you really do have to fine it a large amount of money. Otherwise, it just does not notice.

It is an interesting context. The CMA seems to have a certain amount of courage in its mergers jurisdiction. It is prepared to tackle problems that nobody else seems to pick up. There are, though, limits and dangers with that, and there will be cases where the CMA will need to ask itself, "Do we really want to be the only competition authority taking this point?" against some of these enormous companies that, in many ways, are comparable to countries in their size and power. It will be interesting to see how that develops.

So far, it seems to have a certain amount of courage, but the problem with courage is that it can turn into foolhardiness. We will have to wait and see.

Q44 **Chair:** International collaboration is, therefore, an interesting point between the European Commission, the FTC and others. We have touched a little bit on oversight of the CMA and its interventionist approach in some measures and a quasi-legislative approach in others. Clearly, there is a conversation for us to have on the Committee corridor here in Parliament about how we have proper oversight of regulators, but I am just interested in whether either of you have any specific views about how we ought to be doing that.

John Penrose: I have a couple of recommendations in my report specifically about the upfront, ex ante powers that we are about to give to the new Digital Markets Unit in the CMA. What I have suggested there is that, first, those expanded powers will have to require primary legislation. They will anyway, so we will all get a chance to say whether we are happy with those as MPs at the time.

Once we have given those powers to the CMA, they need to be framed in a couple of very important ways. One is that they should be last resort powers, only to be used if it cannot get to the right answer using its normal competition powers. The danger of the upfront stuff is that it is quicker and easier. It is quite a heady drug for any regulator to have in its medicine cabinet, so they need to be last resort powers.

They need to be subject to the better regulation rules, when I was talking about the need to be upgraded. That should apply to both the economic regulators and this new unit in CMA, so that they come back regularly to look at the size and scope of the burdens that they are imposing.

Equally, every time a new digital monopoly appears—and there will be new ones that appear as the digital economy develops—in an industry or company that has not been invented yet and none of us has ever heard of, we are going to need to add those new digital monopolies to the scope of the Digital Markets Unit in order to allow those powers to be applied. That should not happen just on the say so of the Digital Markets Unit or of the CMA. I am arguing that that should come to Parliament, perhaps with secondary legislation or some sort of process, where we all get a chance to say, "Hang on a second—is this really necessary?"

I am also suggesting that, when something stops being a monopoly—and they need to have the legal duty to try to erode monopoly powers so that things stop being monopolies over time, rather than just becoming frozen forever—they should have the power to take them out of scope. They should not need to come to Parliament for that, if they are saying, "We do not need that power for this monopoly in this company anymore". They should just be able to write that off, but they should write a letter and make it clear in public that that is what they have done.

All of those are essential bits of mechanisms to stop Henry VIII clauses and all those other things, in order that we do not get regulatory creep and ever-expanding regulatory burdens.

Q45 **Chair:** Is there any role for the House of Lords? You talked about MPs and the House of Commons there.

John Penrose: The primary legislation point will clearly have to go through both Houses of Parliament. If we had a secondary legislation process for expanding or reducing scope, I would envisage that that would be the normally secondary legislation process.

Q46 **Chair:** So, if we are using primary or secondary legislation, you do not think there needs to be, for example, a joint committee that looks at these issues.

John Penrose: That is well beyond my paygrade and I would leave that to the parliamentary procedural experts to decide.

Q47 **Chair:** Very good. I have one last question for you, John Penrose. You were asked by the Prime Minister to do this report. We have talked about legislation. Have you been given any commitments about when we might expect some legislation?

John Penrose: I have no precise dates. It would probably be lèse-majesté to reveal the contents of any future Queen's Speech. However, it is pretty clear to any independent observer that they can go quite a long way and are clearly trying to do so with things like the

consultation, which we have talked about already, without necessarily needing primary legislation, but you are going to have to have some, because otherwise the Digital Markets Unit will not have the legal powers that it is going to need.

There is going to have to be a Competition Act. My guess is that it will be in the next Session. No one will give anybody a firm date at the moment, and we will not know until Her Majesty turns up and does the speech, but it is pretty clear that that is going to happen one way or another and cannot be avoided.

Chair: That will bring this initial session to an end. George Peretz and John Penrose, thank you for your time and your evidence today. Thank you as always to colleagues and clerks.