



Communications and Digital Committee

Uncorrected oral evidence: the Digital Markets Unit

Tuesday 1 February 2022

2.30 pm

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Members present: Baroness Stowell (The Chair); Baroness Bull; Baroness Buscombe; Baroness Featherstone; Lord Foster of Thames Bank; Baroness Harding of Winscombe; Lord Lipsey; Lord Vaizey of Didcot; Lord Young

Evidence Session No. 1

Heard in Public

Questions 1 - 10

Witnesses

I: Dr Liza Lovdahl Gormsen, Director of the Competition Law Forum and Senior Research Fellow in Competition Law, British Institute of International and Comparative Law; Professor Damien Geradin, Founding Partner, Geradin Partners, Professor of Competition Law and Economics, Tilburg University, Netherlands, and Visiting Professor, University of East Anglia.

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Examination of witnesses

Dr Liza Lovdahl Gormsen and Professor Damien Geradin

Q1 The Chair: Welcome to this meeting of the Communications and Digital Committee. We are broadcasting live on the internet. This session is a follow-up to two previous inquiries that the committee has carried out in the last year or so; one on the future of journalism, the other on the freedom of expression online. Both inquiries flagged the importance of digital competition, the harms caused by the lack of it, and the need for the Government's proposed Digital Markets Unit to be established urgently and for it to be put on a statutory footing so that it has the powers to address serious competition issues in social media, online advertising and across search engines.

Next week, we have representatives from the Competition and Markets Authority and the Digital Minister, Chris Philp, joining us. We have invited them to give us an update and a progress report on how things are going with implementing the Digital Markets Unit. This week, we are joined by two independent competition law experts who gave evidence to both of those inquiries. We have asked them to provide their assessment of progress on these matters. Before we get to our questions, could I welcome both of you warmly and ask you to briefly introduce yourselves, please?

Dr Liza Lovdahl Gormsen: Thank you very much. I am a senior research fellow at the British Institute of International and Comparative Law. I am also a senior advisor to the Financial Conduct Authority.

Professor Damien Geradin: Good afternoon. I am a professor of competition, law and economics at Tilburg University, Netherlands, and a visiting professor of law at the University of East Anglia. I am also a private practitioner, specialised in digital market issues.

Q2 The Chair: Thank you both for giving up the time to be with us this afternoon. I will kick us off and ask a relatively open question to you both. What is your assessment of the progress in improving digital competition by the new Digital Markets Unit and the Government more generally? You may have seen that there has been some media reporting over the last couple of days about what the Government is planning in driving this forward, but please give us your initial assessment as to where things are?

Dr Liza Lovdahl Gormsen: As you know, the DMU is currently operating in a shadow form pending legislation. We have proposed legislation and we have seen some of that, but there is always a balance to be struck between speed and getting things right. This started in March 2019 with the Furman review, which advised the Government to establish the DMU in December 2020. Then, in April 2021, the DMU was launched within the Competition and Markets Authority, and here we are today without any legislation as yet.

I must admit that I think the progress is somewhat slow if we compare it to the EU and its Digital Markets Act, which was launched in December 2020. They are already going through a triologue and the Act will come into force imminently. It is not exactly the same, but it is parallel regulation towards digital platforms. The UK initially had leadership on this, being with very quick with the Furman review in 2018. Since then, we have lagged a little bit behind, and we see that the EU is moving forward and that Germany has also enforced regulation towards digital platforms in the meantime. That is my initial remark.

The Chair: Have you seen the recent reporting of what has come out of DCMS this last couple of days?

Dr Liza Lovdahl Gormsen: Yes, I have. Of course, it is coming, but it has been slow up to now.

Professor Damien Geradin: My assessment is very similar to Dr Gormsen's. Indeed, I testified at the Furman report in 2018 and the UK clearly had the lead. We were discussing things that were not discussed on the continent or anywhere else. Since then, things have stalled a bit. We are almost four years later and there is still no legislation. I must say there is a bit of a British disease, which is consultation on the top of consultation. I have always thought that consultations were good, but there must be a time for action.

In the meantime, the CMA has used its existing powers to launch market studies and anti-trust investigations. It has been working on two market studies, one of which was on online platforms and digital advertising. It was a wonderfully well-organised and informative study, but when it came out in December 2020 I was very disappointed that the CMA decided not to pursue its effort with a market investigation. Had it done so, we would have had remedies in place, or we would be almost there, by now. In fact, we are still waiting for the enabling legislation that will allow the DMU to produce codes of conduct and pro-competition intervention, which means that—if we are optimistic—we may see some remedies in place by the end of 2023 or 2024. It is quite regrettable that the CMA did not seize on the opportunity to proceed more quickly at the time.

There is another market study, this time on mobile ecosystems. The interim report was published in December of last year. Once again, it is a very good piece of work, but this time the CMA is suggesting that it will not continue its efforts with a market investigation and will instead try to address the numerous issues it has identified through codes of conduct and pro-competition intervention. That means that the CMA is doing a lot of good work, but it is putting all its eggs into the DMU basket, which worries me because we have not seen the legislation yet. Hopefully, it will come but, again, it will take time to be adopted. These are complex matters.

The research done by UK officials has been of very high quality and actually has formed the basis of a lot of the work that is done elsewhere.

It is being paid for by the British taxpayer, but the British taxpayer has not seen a lot of benefit from it so far. The European Commission was nowhere in 2018, but it has now taken the lead. I fear a little that although Britain could have been a rule setter, it might end up being a rule taker, because EU legislation will have been in place for quite some time once the DMU is in a position to issue codes of conduct and other interventions.

The Chair: That is a very interesting analysis. Apart from the course of action taken not being as good as you advise it should be, do you also see any negative impacts of the delay caused by the CMA not doing its investigation and not yet having legislated? Have you seen any evidence of actual detrimental effect as a result of this rather slower approach?

Professor Damien Geradin: If I may say so, and I assume that Liza will also have suggestions, I think so, yes. Think about news publishing. We know that news publishers have been challenged in recent years for various reasons. One reason was that their advertising revenues were taken away largely by digital platforms. That was made clear in the market study on online platforms and digital advertising. This market study pointed to several remedies that could have been adopted to improve the situation. As nothing has been done, these problems are still here. News publishers and other publishers—you have publishers of things other than news on the internet—are still suffering from a lack of competition and choice in the space.

It is also true for other markets. App developers have been fighting Apple and Google, which imposed what they see as unfair terms and conditions on them, but, again, every month that passes means that more damage is being done. Liza can speak about this, because she is at the forefront of these issues, but some consumer groups and companies have decided to take the lead and sue these companies in court for damages. That is certainly helpful, but it would have been more helpful to have remedies in place by now. That said, I am not blaming the CMA at all. It is doing its best. The challenge here is that it is taking an awful lot of time to get the legislation ready and passed in Parliament.

Dr Liza Lovdahl Gormsen: I wholeheartedly agree with Professor Geradin in that it is time for the CMA to stop writing reports and actually get some action going. As to your question about what harm has been done by this delay, I agree that it has forced many people to take private action. You cannot expect a public authority like the CMA to do everything, but it has done so little that we now see a lot of private action happening here in the UK before the Competition Appeal Tribunal. It is no small task to get that going, because it is extremely expensive. I must declare that I am a claimant in a case against Facebook which we have brought before the Competition Appeal Tribunal on behalf of 44 million UK users.

This slowness has created harm to UK consumers on a daily basis. They are being exploited by these companies, and for every day we have a delay, the more exploitation there is. Of course, you always have public

enforcement and then you have complementary private enforcement, but right now we have an imbalance where there is more private enforcement in this country than public enforcement.

Without being technical, we have two provisions in competition law: one on cartel agreements, and one on abuse of dominant position. It is the latter that is very apparent in the digital area. Because of that, when it came to cartels you never had to go into an analysis. You had some predefined things where that was always illegal. You did not have that with an abuse of dominance. It is because there has been market failure within this space that regulation is now coming. We are now in this space where we have the DMU and Parliament is forced to legislate in this area simply because of market failure. It is also because the CMA has not done its job. It has not enforced. It has not used the power that has been readily available to it for many years.

The Chair: That is a very powerful testimony. Aside from Facebook, are there any other platforms against which private action has been taken, or is being taken?

Dr Liza Lovdahl Gormsen: Besides Facebook, there is private action against both Google and Apple in the UK courts. These are the three platforms against which private action is being taken as we speak.

Q3 Baroness Harding of Winscombe: I think you almost said this in your last comments, but I just wanted to be clear. Is it your view that the CMA has the powers to act and is not using them, or that we need legislation to give them those powers?

Dr Liza Lovdahl Gormsen: Yes and no. First, let me make the distinction between what we call “ex-post enforcement action”, which is against one company only. These are the powers that they have always had—they have also had the market studies that we have already touched upon in their toolbox—to intervene in the market and across the sector. However, what they have not had so far—at least when it came to abuse of dominance—is the ex-ante regulatory powers which Ofcom, the FCA and other specialist regulators have. As I say, they have not used the powers that they have had. In the private actions that you are seeing now, they could easily have taken action against Facebook, Google and Apple based on their current powers.

The Chair: That is very helpful.

Professor Damien Geradin: If I may, I would like to add a few ideas on this point. It is true that, for a long time, the CMA did not do much in the digital space. In our prior testimonies, especially one that we gave a couple of years ago, we were a bit impatient about the lack of action from the CMA. Very interestingly, since the CMA knows that it will have powers under the DMU regime but does not have them yet, what it is doing—this is quite smart, actually—is using its existing powers, such as the power to launch an investigation against a given company. It has done that, for example, against Facebook and Apple. It also has the power to launch

market studies—it has done two already—to inform the work that it will be allowed to do once it has the powers under the DMU regime.

Over the last couple of years, the CMA has been much more active, I think because it knows that it will have regulatory powers in a couple of years' time—or maybe in a year's time—but it does not want to twist its fingers while it waits. It has used its existing powers to learn and to gather a lot of useful information on these platforms. What is a bit regrettable is that it did not do that earlier. Why it did not, I do not know. The European Commission started doing digital cases 10 years ago. It has always been a bit of a mystery why the CMA was not willing to engage in that space. It used to be part of the European Competition Network, and perhaps it wanted to defer to European Commission, but certainly, since Brexit, it can do what it wants. It is true that it did not do much for a long time, but over the past couple of years it has been much more active.

The Chair: We will ask them why they have not done more when we see them next week.

Dr Liza Lovdahl Gormsen: Having said that, I would agree that it has been more active but in the wrong ways. There is a distinction between exclusionary conduct and exploitative conduct. Exploitative conduct is where you see direct harm to consumers on a daily basis. With exclusionary conduct, you are looking more into whether the incumbent in the market is excluding competitors. Of course, it will eventually be good for consumers if you can maintain efficient competition in the market, but the actions that Professor Geradin correctly says it is taking are in the space of exclusionary conduct and not in relation to exploitation. The private actions that are going on are very much related to the exploitation of consumers.

Having said that, the regulation that is being proposed is not mutually exclusive from enforcement action, which is the power that the CMA already has. Even when the DMU gets regulatory powers, the CMA will still be able to take enforcement actions, because these two instruments are not mutually exclusive.

Lord Young: You said that we lost the lead that we had because we piled consultation on to consultation. This is probably a simplistic question, but could we not copy and paste the German legislation if it is so good?

Professor Damien Geradin: I think the answer is no. You could do it, of course, but I do not think the German legislation is that good, and I do not think it would necessarily fit well into the UK system. We have been asked to think about the second question, which I suppose you will raise at some stage. The approach that has been taken in the UK, which is to focus on codes of conduct and is pro-competition intervention, is very good.

What is being done is very good, and it is probably better than the Digital Markets Act in the European Union or what is done in Germany. Our

complaint is not about the quality of the thinking. It is more about the speed. If this issue had been a bigger priority for the Government, we would have regulation in place by now, because the thinking was already clear three years ago. Of course, there is a reason for it, which is that the Government were more focused on online safety, which is also an important issue.

Interestingly, the European Union worked on online safety and a digital markets Act at the same time, and it gave the priority to the Digital Markets Act because it thought that it was the more pressing issue. By that, I mean that there is a reason why the UK legislation is not in place yet. Whether it is a good reason or a bad reason, I do not know, but I would certainly not wish to copy what is done on the continent, because what is about to be done in the UK is superior.

Q4 Baroness Buscombe: It is a pleasure to see you both again. I will say, on behalf of colleagues, that you bring a terrific incisiveness to what is going on in some ways publicly but also behind the scenes, which helps to move things along. The last two times I have had the pleasure of talking to you, there have been issues of frustration through all this. Your presence here and what you are saying today is tremendously helpful at this time to, hopefully, move things along.

My question turns us to the issue of the ex-ante regulatory powers themselves and whether what we are aiming for will be effective tools to confront exploitation and exclusivity of these platforms. We are planning the Digital Market Unit to have enforceable powers of conduct and make pro-competitive interventions with companies that it identifies as having strategic market status—some of the larger companies, for example. In your view, will the tools that we are proposing be effective?

Also, just a little more thought about what my colleague Lord Young touched on. Clearly, there are already lessons that we can learn from what is happening in the European Commission which, being optimistic, might be quite helpful to us when it comes to what not to include or what we should be doing differently from it. I am pleased to hear that you feel that the quality of the work being done to introduce this legislation is already good.

Dr Liza Lovdahl Gormsen: I was fairly critical in my previous remarks about the speed of this. I would commend the quality, because, compared with the proposal in Europe for a digital markets Act, what is being proposed in this country for the code of conduct and the pro-competition intervention is better. What it does very well is recognise that all these technology companies have vastly different business models. That is very helpful, whereas what is happening in Europe is very broad brush. In a way, the suggested applications are just cutting through all of them. The recognition of the very different business models is very helpful, and the fact that these codes of conduct will be specific to the company in question is very good.

A framework is only as good as its enforcement. I do not think there is anything wrong with the framework the CMA has been given, but the

problem has been the enforcement. You can create a fantastic framework with a code of conduct and pro-competition interventions, but if the DMU decides not to do anything about it or does it very slowly, what does that help?

You can only do so much. With the code of conduct, I can see from what is being suggested by BEIS and what I have seen of the proposals in place that the DMU will be responsible for introducing, monitoring and enforcing that code of conduct. We also need to see how it will monitor the compliance. When, in due course, it imposes a code of conduct on a company, how will it enforce that and how will it monitor compliance? That is important. It is also very important that it provides support and guidance so that firms understand what they are supposed to do.

You asked about the code of conduct and the pro-competitive intervention, but I also think that a lot of the struggle will be to designate the significant market status. There will be quite a lot of debate there, because companies that are designated as having strategic market status will fight that. They may argue that this is one part of the company, not the entire corporation. It will be about jurisdictions, and there will be many issues around that. In the proposed framework, I understand that the designation is supposed to take no more than nine months. They are also saying that this will be evidence-led. I wonder whether being evidence-led and taking no more than nine months is realistic. I hope it is, but it requires the DMU to be well funded and to have the right people with the right skill set in place to understand these markets and to understand what these companies are about. That is in relation to the code of conduct.

On the pro-competition interventions, I wonder how the code of conduct and the pro-competition interventions are interacting. Is the DMU supposed to impose a code of conduct first and then, if that does not work, to do the pro-competition interventions? Is that what is being suggested? Also, if the code of conduct is proving ineffective, does it go to the pro-competition interventions? These are some of the things that we need to iron out.

We also need to understand the proportionality of these pro-competition interventions and whether they are proportionate to the aim that it is trying to achieve. Going back to your question about whether we are lucky that, because we have been fairly slow and Europe is ahead of us, we can look at the mistakes it might make, I have to say that I do not think so, because the systems are fairly different. In that way, I think we will be fine.

The Chair: That is very helpful. You are touching on what I think is the most difficult area, compliance enforcement. In addition, we do not know the degree to which it will be funded. Professor Geradin, responding to what has already been said by Dr Gormsen, do you also feel that the DMU having greater flexibility to be incremental in its approach to the different platforms is a good thing, or will it make it quite difficult to have a level playing field for regulation?

Professor Damien Geradin: No, the strength of what is being proposed in the UK is that it is much more flexible. As Dr Gormsen mentioned, the challenge of the Digital Markets Act is that it is trying to regulate, in pretty much the same way, a series of platforms with very different business models. There is very little in common between a company like Apple and a company like Facebook. It makes much more sense to have a code of conduct focusing for example on app stores, another focusing on e-commerce platforms, and a different one on online advertising.

My colleague said something very important, perhaps the most important thing, about enforcement and compliance. We are facing a major crisis of the rule of law. I say this seriously, and let me explain why. For the first time in history, we are facing companies that have a level of financial strength that is truly unheard of. We are talking about companies with revenues in some cases of more than \$200 billion per year, with a market cap of around \$3 trillion. You can imagine the size of these businesses, and they are clearly testing the rule of law.

I can give you a couple of examples that will show you the magnitude of the problem. I have done a lot of work on app stores. In the interests of full disclosure, I should also say that I advise some associations of app developers and, for a long time, their plan was that app developers should be allowed to use their own payment system for purchases within the app. If you take a subscription to the *Times*, the *Times* should be able to use its own in-app payment system and, due to lobbying efforts in Korea, the law just allowed it to do that. Apple said, "I'm compliant, I don't need to change my business", whereas in fact the law had been adapted to force them to change their business. Six months down the road, they are still not compliant. They have not done anything yet except suggest that at some stage they might comply.

Closer to home, following a decision of the Dutch competition authority sustained by a court in Rotterdam, Apple has been mandated to allow these app developers to use its own in-app payment system. It had until 15 January to do it. Guess what? On 15 January, it had done nothing. It had issued a statement that lacks specifics and was simply made of intentions rather than acts. The only thing the Dutch competition authority could do was to impose on them a fine of €5 million per week of non-compliance. We are talking about a company with a market cap of €3 trillion, so you can perfectly imagine the lack of effect that €5 million a week will have on them. You can see that, in other instances, once the regime is in place, they will obfuscate processes, they will appeal and appeal on appeals and they will play ignorance or make technical challenges or whatever.

That is why two things are needed if you want to succeed, even if you have the best rules, and I think the UK will have excellent rules. First, you need very strong leadership. In passing, I should say that there are two key positions to provide at the CMA. One is that the CMA needs a new chair. The position has been vacant for quite some time. Secondly, the chief executive, Andrea Coscelli, said that he will leave the institution

fairly soon. These appointments need to be filled by people who will be strong-willed and will want to pursue the work of the Government—although they are fully independent—and will want to take action in these important spaces.

There will also need to be tools to force these companies to comply with the law. I am afraid that fines are not sufficient, because they are completely immune to fines. The European Commission in some cases imposed fines of over €2 billion. Did it change anything? No, it changed nothing, because if you have €100 billion in the bank, €2 billion, although it might appear to be a lot of money—it certainly does to me—it does not matter to them. I would emphasise, and this is now the focus of my work, to really think about tools that can force them to comply with the law, simply as you would expect any company or citizen to do.

Baroness Buscombe: That is incredibly helpful. It just leaves me with the thought—you might want to touch on it later—that the answer to all this is technology and interoperability rather than a “bashing over the knuckles,” which will make no difference at all. Thank you both very much.

Q5 Baroness Featherstone: I just wondered what sort of tools you might be considering? What on earth could make these Goliaths come to heel?

Professor Damien Geradin: There are different tools. The UK is a big country with a big digital market. Perhaps you can ignore what is happening in a country like the Netherlands, but in the UK it will be much more difficult. Some degree of fines can be helpful, but they have to be pretty much in the high range. What the Dutch can do is €5 million a week with a capital of €50 million, but it is certainly not enough.

In cases of unwillingness to comply, perhaps one should go for personal sanctions. I am not an expert on personal sanctions in the UK; that is not my specialty. In Korea, Apple started to think about compliance when the Koreans started to think about criminal sanctions for non-compliance. Individual sanctions can make a difference. Fines can make a difference if they are sufficiently high, but some people are much more qualified than I am to think about what can be used within the system. I am not suggesting that fines and sanctions should be applied lightly. There must be due process, and I am sure that these companies will have every opportunity to be heard and to make their points and defend themselves, but when there is a decision, they need to comply. That is a very simple principle.

Baroness Featherstone: I asked that question, because you started by saying that they are undermining the rule of law, and I can think of nothing more serious than that for any democracy trying to be successful.

Professor Damien Geradin: There are two reasons why there is a risk. One is size. At the start of my career, when the European Commission imposed a fine of €50 million on a business that had engaged in cartel, it could literally bring it down. This was the sort of money that was really

worrisome and they would not do it again. Here you are talking about a company with vast resources. We cannot be disconnected from that. You have a bunch of people in the Silicon Valley, people who are incredibly competitive, incredibly wealthy themselves, and who might not feel the same sort of pressure as someone based in the UK would.

Secondly, it is very difficult to monitor compliance, because we are talking about things that are on the web algorithm and various other complicated things. It is much more challenging to monitor compliance when what is asked of the company is to give access to a bridge or a licence to intellectual property rights. It is very easy to see whether you are complying there, but as soon as you deal with digital issues it is vastly more complicated.

Dr Liza Lovdahl Gormsen: I would tend to agree that size is a problem. You would have seen that when your colleague Damian Collins MP was the Chair of DCMS and had an inquiry into this in November 2018. They invited Mark Zuckerberg and he just decided not to show up. That shows a complete lack of respect for any system. That also happened in the US and is happening all over the world. It just means that you are so big that you cannot even be bothered to engage in a dialogue. That is a very sad development altogether. We have gone around for many decades in competition law saying, "Size doesn't really matter. It's the conduct that matters, not the size", but we will probably start to change our view a bit on that.

When it comes to individual sanctions, which Professor Geradin mentioned, that is something that we know about in relation to cartels, so we are no stranger to this. We have had cases in this country such as the Marine hose case and the attempt to get fixed fuel charters between the airlines that were criminal, so we know from competition law that there are personal sanctions. It is not a foreign element in this area of law.

Lord Young: From what you have said, it looks like the USA is struggling with the same problem. It makes me think of when it first introduced the concept of the Plimsoll line on ships. It took quite a long time before companies took it seriously. Ignoring whether Zuckerberg chooses to attend or not, are personal sanctions a possible way forward?

Dr Liza Lovdahl Gormsen: It can be seen in cartel cases such as the Christie's and Sotheby's cartel, where the CEO went to jail for two years. We have precedent for this, and that will bite much more than money does, because, as Professor Geradin has said, money does not always bite very much if you are a very wealthy company.

Professor Damien Geradin: There are also some downsides that we have to think about. The CMA ran some criminal cases that were not always successful because, of course, the burden of proof will typically be very high. Also, there is a difference between cartels and the sort of conduct that we are talking about. Everybody knows that cartels are illegal. People still do them, but it is quite obvious that cartels are always

bad. We are talking about conduct that can be efficient in some cases and not efficient in others. Sometimes it is difficult, even for a competition authority with lots of resources, to distinguish between what is good and what is bad. What I am saying is that at the end of the day we might find a way for these companies to comply. The CMA and the relevant people in the Government know more about the range of sanctions that could be available.

Sometimes you may use what I call a backstop mechanism. This is something that is thought about in the UK. For a long time in Australia, for example, there was a dispute between news publishers and the platforms' overpayment for content. They could not agree, so the Australian Government stepped in and said, "Well, you have to agree, and if you don't agree well, we'll use some other mechanism". The mechanism they came up with was called final offer arbitration, which means that if they could not agree, the publisher and the platform both had to make a final offer and the arbitrator could take only one of those. It is a very effective mechanism, because it forces you to be reasonable. If one side made an offer that is totally unreasonable, for example, the platform could say, "Zero is what I'm willing to pay", while the other side could be much more reasonable, saying, "I'll pay €50 million", in which case you would lose. It proved to be quite effective. News publishers and the platform managed to agree, because they were very fearful of this system.

What I am saying is that you cannot use these sorts of things for everything, but sometimes a simple mechanism will actually stimulate agreement. This is the sort of thing that you may not think about, but in this instance the agreement about what the platforms had to pay for content proved to be a pretty effective tool. Since then, other jurisdictions have been thinking about using that tool. I know that the Government are also thinking about that tool. I have talked to them on a few occasions, and that came up at least in the last talk with them.

Q6 Lord Lipsey: On much the same theme, I would say that we can get into a state of thinking that these companies have us and we cannot do anything about it. I am sure the Rockefellers used to think that in the United States, and the same with post and telecoms in the United States. In the end, the state was able to get them under control. One of the methods, of course, was demerger and opening the gates to new entrants more thoroughly. I wonder if this could play a part here.

Another point about what might work is that one of the problems is that there is not enough public hostility to organisations that act as platforms. We do not like child porn, but other than that, as long as we get our Google free, we seem prepared to have all sorts of exploitation, including the app store scandal whereby somebody monopolises the sale of apps and charges the companies 30% of the money they are making. I wonder whether, in bringing the companies to heel, it might be helpful if their public relations machines were not allowed to climb all over us—as tends to be the case at the moment—and we had some genuine popular campaigning about their defects. They are often lost in the many things

they do provide, but their defects are very large indeed.

Dr Liza Lovdahl Gormsen: I wholeheartedly agree. You touched upon two points there: the merger regime and, of course, what we call the PR. Let me start with the last point and come back to mergers afterwards.

You mentioned that these things are free. I would respectfully disagree. They are free in monetary terms, but they are by no means free because people pay with their data, their time and their attention. We know that the High Court in the *Lloyd v Google* case has said that, "Data is a very valuable asset", and right now they are giving that up for free.

I do think that if consumers and people at large understood what these platforms are actually doing with their data, there would be a huge push against them. I believe we have a huge educational mountain in front of us to try to educate the population at large as to what is actually going on. Some parts of the population understand these things, but the vast majority of the population will not understand how the data is used. They may understand that they give their data to Google in return for a free search engine in monetary terms, but they may not understand that everything they do on the internet and the combination of every website they are using is combined into super-profiles. If people actually knew what their data was being used for, they might not be so happy about these companies.

Going back to the merger regime, I must commend the UK on doing much better than Europe, because when it has looked at imposing regulation in this space, it has thought of looking at the merger regime at the same time. That is hugely important. The EU has said "No, we're not going to look at that", but these two things go hand in hand. It is quite clear that if you approve firm A acquiring firm B and becoming a huge size afterwards, and approve their conduct, what was the point of that in the first place? It is very important that the CMA looks at the merger regime at the same time.

Having been critical of the CMA before, I must say that it is not all that bad, because it is also looking at the merger regime, and this goes hand in hand. It is crucial that these things are thought about together, because how can you unscramble the egg when the egg is scrambled already? It is very difficult to go back. It has been very reluctant to prohibit a lot of the technology mergers that they have allowed to go forward, simply because the regime was not up to the task. The change of the regime would probably help in that respect. That was a very good point.

Professor Damien Geradin: I totally agree with Dr Gormsen on this point. The CMA is now probably the toughest competition authority in the world when it comes to mergers, which is a very good thing. A lot of the problems we see, especially in online advertising, started with mergers that should not have been allowed, and now, of course, it is very hard to fix the problem. It is also true that these platforms have gigantic PR machines, and I am sure that many of their consultants are looking with

displeasure to our testimonies. At the same time, if you look at what happened on the continent with the Digital Markets Act, for example, the CMA has not been very efficient at preventing this piece of legislation being adopted. In fact, there is a very large and somehow unique degree of consensus between the member states of the European Union—France, Germany, the Netherlands and others—over the need to do something about the platforms. It has been true in the European Parliament as well.

I am not an expert on UK politics, but I think there is also a strong desire in policy circles for regulation to be adopted. People have come to realise that something needs to be done to curb the market power of these companies, because they had a free reign for many, many years. They will continue to prosper. That is not the question. The goal should not be to undermine them. The goal is simply to make sure that they allow competition so that there is space for rivals and new entrants, and they are not allowed to exploit their business customers and individual customers. I am sure that if these rules are in place and properly enforced, these companies will still do very well, but hopefully others will also do well, which is the challenge. I am confident that across the world, including in the United States—this is probably the only bipartisan area—the need for reform is agreed on.

Q7 Lord Vaizey of Didcot: Dr Gormsen, I really enjoyed your critique of the Competition and Markets Authority. It will make next week's evidence session with the chief executive a lot more fun. I think they get too involved in their comfort zone of local newspaper mergers and do not necessarily stray too far out of it. This may be going too far, but do you have views on the ICO? I hesitate to use the phrase "back door", but some people have suggested to me that the ICO could have used GDPR, for example, as a way of holding tech companies to account, whether it is the ICO here or other information commissioner's offices in Europe, particularly the Irish Information Commissioner.

The Chair: That question was very well timed.

Dr Liza Lovdahl Gormsen: It is quite clear the ICO has a huge role to play in this space. Personally, I think the ICO has been relatively weak so far. It has limited remedies at hand. What can it do? It can provide 4% of the annual turnover. That is the kind of fine that it can impose. I would say that is no more than a slap on a finger. The ICO remit is GDPR or the equivalent Act here in the UK, so it can only do as much as the Act allows them to do. Again, it comes back to enforcement. We have seen one enforcement action in this country against Facebook for some misleading evidence, and what did it impose? A fine of £500,000.

Lord Vaizey of Didcot: That might have been before they had the turnover powers, but I am not sure.

Dr Liza Lovdahl Gormsen: You have GDPR and anti-trust. These are two different instruments, but they correlate and I do think that the DMU will have to liaise with the ICO and Ofcom and all the other regulators in the country. These platforms operate globally and across markets and

areas of law: data protection law, consumer law, competition law. We cannot pigeonhole it into one area of law. Going back to your question about the ICO, the ICO will also have to look hard at what it has and has not done.

Lord Vaizey of Didcot: Thank you very much. Professor Geradin, at the end of your last answer you talked about the US and bipartisan support for action. It is true that Lina Khan is clearly at the FTC to bash big tech, if I can put it that way. I also gather that Gina Raimondo, the Commerce Secretary, will talk this week about how the DMA is a threat to US companies. It seems to me that there is a slight paradox in the US of wanting to defend its homegrown US companies at the same time as wanting to take on big tech. If you feel comfortable giving views, I will be fascinated by your views on which direction you think the US will go, because I think that will be the ultimate key to unlocking a lot of this.

Professor Damien Geradin: I must say that what Secretary Raimondo did is quite common. I have been in this game for almost 30 years now, and each and every time the European Commission wants to take an initiative or basically file a competition case against large American companies, the relevant politicians or department chiefs in the US will express concerns. They have their own constituencies, so it is quite normal and it is not surprising that they do so. Following these observations, a lot of other politicians in the US have said that they disagree and that this should not be taken as the view of the United States.

What is interesting in the United States is that a range of court actions have been filed by the Department of Justice and by the states, not only Democratic states but actually a lot of red states. Typically, Democrats and Republicans have issues with the platforms for different reasons, but they are, in some ways, battling in the same direction. I would not make too much of the declarations of Secretary Raimondo. I think she has to care for her own constituencies. Obviously big tech funds a lot of politicians, some of whom are actually from California. They have to pay attention to the welfare of these companies, so it is typical and unsurprising. To be honest, on the DMA, it will make no difference, because those in charge at the Council and Parliament have heard that already and it made no difference to them.

Q8 The Chair: Finally, we want to explore your views on the oversight of the DMU. Once it has more powers and is capable of taking the kind of action that we have discussed today, what are your views on the way it might itself be subject to oversight and accountability?

Dr Liza Lovdahl Gormsen: That is hugely important, because we cannot have the DMU running wild. At the end of the day, there needs to be due process, no matter how large the company is. That is important. Usually, these kinds of decisions would be scrutinised by the courts. If any of the companies appeal, the court will scrutinise these, but the proposed framework, as it currently stands, is just to review rather than a full appeal on the merits. In that way, if there is an appeal, the court

can obviously look into the DMUs decisions as long as it is judicial review only. I understand why that is. That is from a time perspective, because otherwise this could go on for years and years and make no progress. I understand the emphasis behind it, but the court can only look into the decision being taken rather than the rights and the wrongs of the conclusion being reached by the DMU. That is one thing.

You can also have what you currently have internally at the CMA, which is independent boards, independent advisers and appeal members. I have not seen that system suggested for the DMU. There could be an internal oversight of independent members, but there is also a court system. The court system was always readily available, but the issue is that it comes into play only if there is an appeal on either side. The system is very new, and as it builds and develops we need to carefully consider whether a full appeal would not be more sensible than judicial review. I am putting it out there. I have not made up my mind entirely, because we do not want platforms to exploit that by prolonging things because of a full merits appeal.

Lord Vaizey of Didcot: It is a nightmare.

Dr Liza Lovdahl Gormsen: Yes, you said the word. The Consumer Rights Act came into force in 2015, and we are now in 2022, so that system has now been in place for six and a half or seven years and is still being built. You see a lot of appeals to the Supreme Court going on at the moment. Until the system settles, it takes a number of years, if not a decade, to understand it. From a time perspective, that is not great, but from a due process perspective we need to carefully consider what it is right for. There could be other oversight mechanisms that rely simply on the court system. My suggestion would be that you have independent panel members like you see in the CMA.

The Chair: Professor Geradin, based on your comments earlier, I should imagine that you may have some views on an appeal system.

Professor Damien Geradin: Yes. I have been in violent agreement with Dr Gormsen on most questions so far, but here I will perhaps say something slightly different. First, the DMU will have significant checks and balances internally. There is the Office of the Chief Economist, the General Counsel, top managers and so on. Very often, regulators are their worst critics. One reason why there may not have been sufficient action in the past is because a lot of actions may have simply been cut by the General Counsel thinking, "Oh, I'm not sure this is such a great case". When you deal with an authority, you see that very often they are really quite sceptical about a complaint. I have never seen many of them going wild. I think the risk is possibly the reverse: that they will be too timid in their actions.

First, on internal checks and balances and on judicial review, I would be strongly in favour of limiting appeals to review grounds. That is, that the appeal will not relitigate the substance of the decision, but only check the legality of the process as is the case for mergers, for example, and not

engage in a full merit appeal. That is important for several reasons. The first is that the full merits appeal is extremely lengthy and costly. A lot of money will go into litigation. You have trials that last four, five, six, seven weeks, where each and every point of the decision is re-debated, and very often that is not the end of the process. The appeal will be appealed and so on and so forth.

Checking the legality of the process and that the DMU has not abused its powers is preferable, because the appeal will be shorter, it will cost less money and it will give large tech companies fewer opportunities to obfuscate the process. You are talking about companies whose legal spending is around \$1 billion per year, so they have a distinct advantage when it comes to litigation. They can spend mindlessly on cases if they think it is in their best interest to do so.

I am in favour of due process and a functional and effective appeal process, but if we need to re-debate the merits of each and every decision, this will never end. I do not think that businesses and individual users will be sufficiently protected, and protected in a timely manner, from the misdeeds of these companies.

Q9 **Baroness Bull:** Unless I misheard, I think you have both talked mostly about appeals and decisions, so the oversight of decisions made. I was struck when the LSE law, technology and society research group, which we heard from in our last inquiry, talked quite rightly about transparency not being a replacement for accountability and oversight. Oversight is also about who sets strategy as well as who legislates over conflict in terms of appeals. Do either of you have thoughts on oversight in that definition of the word, and what is the effective way to have oversight of something that will be granted such a broad level of discretion? Does that make sense?

Dr Liza Lovdahl Gormsen: I am always in favour of transparency. You can never have too much transparency. One could do like other regulators in the country where you have a business plan and you are responsible for that. You have an annual report. You have annual general meetings that are open to the public. All those sorts of mechanisms we know about from the other regulators here in the UK. That will create a level of transparency, and that will always be helpful.

Professor Damien Geradin: I tend to agree. Obviously we want transparency. It is a good thing. It is also good for the regulator itself, because it has to think twice about doing something. So when setting their priorities those must include transparency.

Of course, each regulator must also have discretion over certain issues, such as the sort of cases that it will decide to pursue. They have limited resources, and the level of the resource will always be an issue. Typically, they have to make decisions. They may have to make calls about whether they will try to enforce this conduct over another. The mechanisms that Liza mentioned are very important, but at the end of

the day they still need to have some discretion about how to allocate their resources and set their priorities.

The Chair: Do either of you have any views on the committee's recommendation in our last report just before Christmas of a Joint Committee of both Houses of Parliament to oversee digital regulation, which would include the DMU? Is that something that you have had an opportunity to see, Professor Geradin?

Professor Damien Geradin: That is not within my area of expertise, but I think that makes sense. Some degree of oversight and the solution you propose is certainly desirable.

The Chair: Did you want to say anything, Dr Gormsen? Do not feel you need to.

Dr Liza Lovdahl Gormsen: No.

Q10 **Lord Young:** Do you think that having codes of conduct that included the requirement to behave in an ethical manner in relation to their consumers could have a part to play?

Dr Liza Lovdahl Gormsen: That takes me back to my point about monitoring the compliance. You mentioned ethics. I do not know whether one can talk about ethics when we talk about these companies, to be honest. Could we rely on them self-regulating and actually complying with the code of conduct? I will be extremely pleased if that happens. It probably depends on the stake at the other end. What will be very important are the remedies, the monitoring mechanism and the compliance in place.

Professor Damien Geradin: One area I have done a lot of work on is online advertising. The beauty of litigation is that there is extensive discovery that brings some very interesting documents to the surface. If you look, for example, at the unredacted version of the third amended complaint that was brought by US states against Google, you will be absolutely amazed by what has been going on in the company. I think the reason is simply that for too long these companies have hired extremely intelligent people and given them a mission to optimise but to optimise in favour of Google, not in favour of business consumers like advertisers or publishers. This is one thing that needs to change.

If you look at the conversations that have come to the surface through litigation, you will see that these people did not receive any business ethics training or any compliance training. Visibly, they were just busy trying to foreclose competitors and take advantage of the ignorance of their users. That has to change. That has to come from the company. Again, if there are strong rules and enforcement processes in place, these companies will soon realise that it is in their best interest to strengthen the compliance function within the company. They will react only if they realise that it is in their best economic interest. If it is not, they will do nothing. Sadly, that is my experience. It is not because these companies are populated by bad people—I am sure there are lots of extremely nice

and competent people in them—but I am afraid that the incentives within these groups have too often been driven by short-term profit and not often by the interests of consumers.

In some legislation, especially in the US when it comes to the stock market, these companies have fiduciary duties. They have to operate in the best interests of their consumers. Perhaps something along those lines might help. I am glad that you have a forum now within which regulators will be able to exchange duties, because, as I said in my priority stimulus example, a lot can be learned about financial regulation where, once again, there was a time when the economic interests of large banks were not aligned with their users. I hope they are better aligned today with regulation, although it is certainly not perfect. So, yes, I think the compliance function must be stronger.

Dr Liza Lovdahl Gormsen: I wanted to draw an analogy with what the FCA is doing at the moment, because it is imposing a new consumer duty on the financial services industry. That will require companies that are operating within financial services to have their consumers at the forefront of everything they do. The DMU could probably learn something by looking at what the other regulators are actually doing, because that initiative by the FCA to impose the new consumer duty is very powerful.

The Chair: Thank you. That seems like a good point at which to conclude today's hearing. We are very grateful to both of you. It has been enormously helpful and informative. As one of my colleagues said earlier, it is very helpful to us before we meet the chief executive of the CMA and the Digital Minister next week. We will follow up quite a number of the issues that you have raised with us today with them, so thank you very much indeed.