



# Communications and Digital Committee

## Uncorrected oral evidence: the Digital Markets Unit

Tuesday 8 February 2022

2.25 pm

Watch the meeting

Members present: Baroness Stowell of Beeston (The Chair); Baroness Buscombe; Baroness Featherstone; Lord Foster of Bath; Lord Griffiths of Burry Port; Lord Hall of Birkenhead; Baroness Harding of Winscombe; Lord Lipsey; Baroness Rebuck; Lord Vaizey of Didcot.

Evidence Session No. 2

Virtual Proceeding

Questions 11 - 21

### Witnesses

I: Dr Andrea Coscelli CBE, Chief Executive Officer, Competition and Markets Authority; Will Hayter, Senior Director, Digital Markets Unit, Competition and Markets Authority.

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## Examination of Witnesses

Dr Andrea Coscelli CBE and Will Hayter.

Q11 **The Chair:** Good afternoon and welcome to this meeting of the Communications and Digital Select Committee. Welcome to Dr Andrea Coscelli and Will Hayter from the Competition and Markets Authority. The sessions today are to follow up on findings and recommendations from two previous inquiries by this committee, one into the future of journalism and the other into the freedom of expression online. In both of those reports, competition issues associated with large digital platforms and search engines were highlighted because of the negative impact they have on new publishers, other content providers and the advertising market, as well as consumers.

In the course of those two inquiries, we acknowledged that the Digital Markets Unit, to be set up by the CMA on a statutory footing, was an appropriate body to have new ex ante regulatory powers, but the committee did call for greater urgency and speed for that unit to be established and for legislation to be brought forward. We are obviously looking forward to any views or insights you can give us as to when that legislation might be coming forward. We have taken note of the recent media reports promising that.

Before we get to future legislation, we want to concentrate on the actions that the CMA is taking now, with the powers that you have. Why not provide us with your assessment of progress on regulatory action and enforcement action in this area?

**Dr Andrea Coscelli:** Good afternoon, everyone. For the last two to three years, we have been very clear that we are following a twin strategy. We are working with the Government to provide advice on the legislation, because we think this is really important for the medium term, and in parallel we are using our existing powers. In practical terms, we also had to navigate the Brexit transition because, as you know, before the EU exit, a lot of these big cases were done by the European Commission for UK consumers as well.

Since January of last year, 13 months ago, we have had the ability to launch new cases. As of now, we have three big antitrust investigations. One is into Apple, on the Apple Store, which is progressing well, and we are working very closely with a number of other international agencies that are dealing with the same issues, as you are aware of.

We have a second investigation into Facebook, now Meta, looking into various practices, such as data collection and use of the data to launch copycat products, competing with alternative products. We launched this investigation in parallel with the European Commission a few months ago, and it is progressing well.

We have a third investigation—this is also relevant, particularly for publishers—into Google and what we call the privacy sandbox, which are essentially a number of commercial decisions that Google is taking to

increase privacy on the Google services but that also have an impact on the competitive dynamics. That is an area where we work very closely with the Information Commissioner's Office. We consulted on a number of commitments that Google offered a few months ago. There are many interested parties. We got quite a few responses back and we hope to conclude the third investigation in the coming weeks.

In parallel, we are obviously looking at mergers, which is clearly one of the core areas. One of the reasons why we are where we are is that there has globally been a degree of underenforcement in merger control in this space. A few months ago, we blocked Meta's acquisition of a competitor called Giphy. Meta has appealed, so we will be in front of the competition tribunal in April, defending that decision. This is the first instance globally where someone has blocked an acquisition by one of the big platforms of one of their competitors.

We are looking at a number of mergers. There have been quite a lot in the fintech space. We are looking at Microsoft buying a company called Nuance, which is the global leader in medical transcription services. As you are aware, a few weeks ago Microsoft announced the acquisition of Activision Blizzard, which is essentially reshaping the whole gaming landscape. These are all big cases that we are doing post Brexit on our own, and we have established a very important role alongside the US agencies and the European Commission. For instance, last night, Nvidia abandoned the acquisition of Arm, which is a very big transaction for semiconductors. We have been working very closely with the US FTC and the European Commission on that particular transaction. There is quite a lot going on in mergers in digital.

We are also using our consumer protection powers. We have ongoing investigations into fake online reviews and social media endorsements. There is quite a bit happening there as well. Finally, we have two ongoing market investigation studies, one into mobile ecosystems, which is a fairly wide piece, looking at the App Store, Google Play, browsers and mobile operating systems. We launched a study a couple of weeks ago into music streaming, which was coming out of the work that the DCMS Select Committee did a few months ago.

We have a fairly big portfolio of cases. We need to also deal with lots of things happening offline, but we have quite a few things on in the digital space.

**The Chair:** It sounds very busy. The witnesses we had in front of us last week were very complimentary about the work that the CMA is doing, particularly in mergers. You just touched on the studies and you mentioned the mobile ecosystems one. There is concern at the moment that you are carrying out studies into some of these important areas, in particular those that this committee referred to in the report that we did into the future of journalism, about the code of conduct and that sort of thing, with the platforms. The studies have taken place, but they have not translated into investigations by you, because you are waiting for the Digital Markets Unit to be established. There is an awful lot of frustration

out there in a lot of the other industries and different markets. I just wondered what you can tell us about what action you are taking in those particular areas.

**Dr Andrea Coscelli:** In many ways, I have a lot of sympathy and frustration in this space, because I think we are all in a place where we believe more should have happened before now. This is clearly an underregulated part of the economy. I have a lot of sympathy for that challenge. I often get challenged on the other side, where people accuse us of overreach. We need to split it into two buckets. One bucket is things about the code of conduct and the payments to publishers from the platforms. That is an area where we essentially do not have the legal powers today to do anything about it. We need the DMU legislation, because otherwise we do not have the powers.

There are only two agencies globally today that have done something relevant in this space. One is the ACCC in Australia, which had new legislation that came in through the Parliament. The second is the French competition authority, where the new EU copyright directive was transported into national legislation in France, whereas the UK decided not to because it wanted flexibility after Brexit. We do not have the powers in that area. We need the legislation.

In online advertising, which is another area where we have been criticised, we have powers to work and do something in that space, so it is a legitimate criticism. We have yet to launch a study because the tool we will be using, the market investigation reference, is not very well suited to complex remedies. It is essentially a one-off intervention. This is the type of area where, because of the changes in technology, it is very hard to imagine that you can come in and dictate very detailed regulations to the platforms, and then for a number of years just have those regulations in place. That is why we are hoping to be able to use the DMU legislation. If there is a continued delay, which is the current position, we will actively discuss it. We are going to have a discussion at our board meeting in March on these exact themes, thinking about the trade-offs of various possible interventions.

There are now active global investigations in the same area, particularly by the Americans. There is active litigation in the US. If the American agencies succeed in that space, we will achieve some very positive results in the UK as well. That is another element of our decision on priorities and what we should focus on. This is very much a new challenge with Brexit. We are doing quite a few things in parallel with others. Similarly to others, we are constantly thinking about the added value of us getting involved versus us waiting and seeing the benefit of an ongoing investigation by someone else.

**The Chair:** If your board were to decide at its March meeting that you were going to do the work that you have just described in the online advertising area, because the DMU legislation is not about to arrive—we know that even when it is introduced it will take a lot of time for it to become implemented and effective—how soon would you move from a

decision at your board meeting to actually doing some work in the online advertising area?

**Dr Andrea Coscelli:** There are two steps to that. The first is essentially just the practicalities of assembling a team, preparing and launching. We are talking weeks, or two or three months max, for that. The second is the timetable for the investigation. Quite interestingly, last week we had a judgment by the specialist tribunal on a challenge from Motorola on a similar market investigation reference that we are currently doing. The tribunal sided with us and quite helpfully tried to strike a sensible balance between the need to get these things going and achieve results, and rights of defence.

These investigations can take up to 18 months. As a board, we will try to shorten that, but the tribunal has been very clear that we need to give all the market participants enough time to feed into that. These are complicated matters. I would say probably two or three months from decision to launch, and then probably a year to 18 months for the actual investigation to take place and conclude.

**The Chair:** Is that why you have been delaying? You have been hoping and waiting for the DMU all the time.

**Dr Andrea Coscelli:** It is more because we know that the final outcome will somehow be imperfect. If there is a big gap between when you can finish and when you have the proper powers, in a sense you pragmatically go for a reasonable compromise. Plan A is to wait and have the proper powers and proper regulation. What we are talking about here essentially is what we would internally call plan B, interventions.

**The Chair:** You will understand that there is an awful lot of anxiety out there at the moment about the delay being caused by a lack of action by the CMA. That is pegged as well to waiting for the legislation.

**Dr Andrea Coscelli:** I completely agree with that.

Q12 **Lord Hall of Birkenhead:** Can I ask you about the issue of news, particularly journalism? You are very clear that you cannot do anything because you do not have the powers, but is there work that you can be doing to prepare for the time when you have the powers, so that things could happen more quickly when you do?

You said something that I thought was really interesting, which was that, in some areas, you will just wait for or look at other work going on in the States, or elsewhere, which then could be useful back here—in my words—to save us doing the work. I am sure that is not how you would put it. Is there any such work going on anywhere that would help to speed up the process of getting some action?

**Dr Andrea Coscelli:** If you look commercially at the situation for publishers, there are three regulatory areas that have an impact. One is payment for news. In response to your first question, we were asked by DCMS to produce some advice for the legislation. We worked with Ofcom

on that and delivered it to DCMS in November. We would now expect DCMS to publish that advice, alongside the response to the consultation, in the coming weeks.

The second area is the privacy sandbox I just mentioned. Interestingly, Google has a number of open investigations in other countries touching on similar issues. Google has publicly said that it is happy to roll out globally what it will agree with us. The CMA will essentially become an oversight body for that implementation globally, which is quite interesting.

The third area is what we call the ad tech supply chain. It is the way online advertising and the auctions operate. That is the area where I was referring to the international work, because a lot of the businesses, which are owned by Google in many cases, are globally integrated, and some of the investigations going on in the US go to the heart of that integration. For instance, if we end up with a break-up of some parts of that ecosystem because of the American intervention, that will be of benefit here as well.

There is a linked issue. If the more sensible outcome is a divestment, the UK represents between 5% and 7% of global revenues in a lot of these markets, where the American market is between 30% and 40%. In a number of these cases, the legal test is about proportionality of remedies. It is quite hard individually for a single agency here, or in France or Germany, to go after a global divestment.

There are a number of considerations that are relevant for our ranking and our decisions on what we do. It is important to go back to the fact that this is the first time in history that competition authorities like ours are dealing with global monopolies. This has never happened before. A lot of the legislation and the thinking that we are applying, which Parliament passed around 20 years ago, was certainly before digital and before these platforms, but also before the idea that they would have to deal with global monopolies or companies with this level of market power. In a sense, that is part of the reason why we need new powers and why our existing powers are important in some areas, but in some other areas are not a great fit for the problems we encounter.

Q13 **Baroness Featherstone:** Did you watch the session that we had with the two experts?

**Dr Andrea Coscelli:** I had a transcript, which I read.

**Baroness Featherstone:** I was somewhat taken aback with the level of criticism they aimed at the CMA. I listen to you and it all sounds completely rational and logical. It is difficult: you have to wait for this, you have to work with those, and there is this going on over there. Do you think any of their criticisms were warranted and, if so, which ones?

**Dr Andrea Coscelli:** Of the two experts, one was a bit more balanced than the other. To be honest, it felt like a bit of a one-off position. I thought that expert was quite aggressive versus us in a way that I do not

usually encounter. If anything, we usually get criticised because we are too interventionist. As an academic, you are on the outside looking in, so criticism is always warranted, but there are lots of complexities that I did not quite recognise in some of the points that were made. It was a bit of a simplistic assessment of the options available to us.

There was very limited regard for some of these international angles, particularly for the point I made, which is a really important one, that we have direct experience of ending up at the end of these market investigation references with complex remedies that date quick quickly. It is never good to intervene in the economy with remedies that you know, after two or three years, are just not going to be the right ones. This legal tool is very rigid.

It is almost like coming back to royal commissions 40 or 50 years ago. There was the idea that you looked at the problem in good faith, came up with some solutions, applied the solutions, and that was the end of it. The reality of the modern economy in some of these complex sectors is such that it is really hard to do a one-off intervention. That is why we work very closely with the FCA and Ofcom to think about the new legislation, so that there is something that is inherently flexible and fits the nature of the problems. With all due respect, I thought some of that criticism was a bit simplistic.

**Will Hayter:** I watched the whole session and, as Andrea is describing, was a little taken aback by the vehemence of some of that criticism. It is all in the nature of these trade-offs we are constantly making on how to use the tools we have and how to deploy the resources we have. The biggest question is whether one should do a market investigation reference on digital advertising, on which parts of it and when.

Andrea has made a number of comments about how suitable the remedies are that you can arrive at, at the end of a market investigation. The other really important difference between the expected DMU regime and that market investigation structure is that these are complex markets, but they are also very interconnected. You have the same big firms with strong positions in a number of related markets. When you do those individual set pieces, it is much more difficult, in the nature of the way the framework is set up, to make those connections between them. The whole idea with the DMU framework is that it is a coherent, holistic system that looks at the thing as a whole.

**Baroness Featherstone:** That is helpful, because I sat here last week listening, thinking, "Oh my God, the CMA has not done anything". That was the kind of impression I got. To be honest, as a member of a Select Committee, it was quite a relief to have someone who had a strong view. I have given you the opportunity to comment on that.

**The Chair:** I am keen to understand, from your perspective, what pressure you are putting on the Government for the legislation that you say you need, in order to be effective in the way that others need you to be. The task force advice came out over a year ago now and the

consultation closed 18 weeks ago. What is the deadline that you are identifying and raising with the Government as to when you need them to come forward with this legislation in order for you to operate in the way that people expect of you?

**Dr Andrea Coscelli:** We are having good conversations with the officials and government, and have been very clear. The other point we have not raised, which is a very important one, is that, when we started, we were operating broadly in parallel with the European legislation on the same issues. We are now materially behind that, which presumably has an impact on what we can actually do. The European Parliament is progressing very speedily on what it calls the Digital Markets Act, which is in many ways the equivalent to this legislation. The French presidency is very keen to conclude by June, so we might have a very important piece of legislation done in Europe in June, which will ask these companies to spend many millions of pounds in compliance and implementation. This is going to reduce the degrees of freedom and the options for Parliament here.

That is a point we have made very clearly. At the same time, it is for our democratically elected Government to decide the ranking of different pieces of legislation. It is not for us to lobby on whether this piece of legislation should come before something on audit or something else. We have been very clear and have had good conversations, but you probably know more than I do about the current plans for the third session of Parliament. We can simply look at scenarios and, as I said to you, I share your frustration. If there are continued delays with the legislation, we are going to do more directly, using our existing powers, than we do otherwise.

At the same time, we receive lots of complaints about cartels and Covid travel refunds. There are lots of other things outside digital that we need to do as a national competition authority. The board is also constantly looking at that. As I said, I share your frustration. I would love to see the legislation. A lot of work and thinking has gone into it, by us and many others. The consultation document produced by the Government in July is a good document. I am really looking forward to seeing the responses and a plan for implementation.

Q14 **Baroness Harding of Winscombe:** I am going to ask a question on the optimistic scenario that the DMU legislation is actually going to come forward. Dr Coscelli, you talked about the practical realities of implementing single interventions in this interwoven digital world. I would like to ask you about the enforcement in this interwoven digital world. What powers for enforcement do you think the DMU is going to need to make this new regime actually work?

**Dr Andrea Coscelli:** We have worked very closely with the FCA and Ofcom on their existing regulatory processes and enforcement. We have direct experience of enforcing our legislation. Our advice from December 2020 has a number of options for enforcement. It seems very clear to us that the powers need to be very substantial. There is an issue with non-



compliance. We recently fined Meta twice for non-compliance during our merger investigation. It has been fined by the European Commission, because it did not comply with previous merger investigations, and fined in the US. There is a history of non-compliance, particularly by some of the big tech platforms. You will have seen this week that the Dutch competition authority has now fined Apple, for the third time, for non-compliance.

There is a cultural problem there. Somehow, we have ended up in a place where some of these companies do not accept that they are massive companies in each of the countries they operate in, so they should have the same level of corporate responsibility that a very big domestic player has. Somehow there is this idea that, because they are global, they should not comply with domestic legislation in various countries, which is completely wrong. Enforcement powers need to be very significant. We are talking about fining powers and proper information gathering powers, because we often have fights about documents that are held in servers outside the jurisdiction.

It is an interesting question about the senior management and to what extent you put the controls that we have in financial services or regulation there, which is a live discussion. Generally, it is really important that a lot of the processes for the DMU and the appeals processes are on strict, short timetables. In the last 20 years of enforcing our legislation and legislation by regulators, we have learned that, if you set clear, short timetables, things happen. Rights of defence are there. It focuses everyone into really discussing the key issues.

In a number of these areas, companies have been allowed to delay and frustrate regulation. If you look at the Google Shopping case in Brussels, which in many ways has been one of the flagship cases, it has taken years to finish and then Google keeps appealing. Every appeal has two or three years between it and the previous one. In a sense, a lot of these decisions become almost of historical value. There are British businesses that complained about some of these Google practices almost 15 years ago and these investigations are not finished yet. It is clearly completely unacceptable. That is why it is really important that the DMU legislation comes in and is very clear about delivering something that really works for consumers and SMEs. The current system we are operating is great for the incumbents and is really poor for SMEs and consumers. We need to be really clear about that.

**Baroness Harding of Winscombe:** Could I ask you just to elaborate on whether there should be power to hold senior managers to account? I will declare my interest as the deputy chair of the Court of the Bank of England. I know a fair bit about the senior managers regime in financial services. Listening to you talk about global monopolies, you could argue that there is a direct parallel to globally systemic financial institutions, where a senior managers regime is now holding named individuals accountable. Tell me a bit more about that live conversation and whether you think that could be applied in digital regulation.

**Dr Andrea Coscelli:** Our view is that this needs to be part of the discussion on the legislation. It is ultimately for you to decide where to draw the line on the balance. We are operating a director disqualification regime, linked to the Competition Act, and we probably have five to 10 directors disqualified every year. It tends to be mainly for cartel cases. That is very powerful. All the conversations we have had with senior lawyers in the UK support the view that executives and board members clearly pay attention if they think there is a serious risk to their career. We obviously had the example in financial services regulation.

The other element to bear in mind is that, because of the history, a lot of these companies have the senior management still very centralised in Silicon Valley, but, just because of the exponential growth, some of these companies are now massive in this and other countries. It feels to me that we should ask for a degree of oversight in the UK for what actually happens in the UK. There are many variants to it, and it is for Government and Parliament to decide exactly what to do, but our view is that we should seriously look into that.

Q15 **Baroness Buscombe:** Dr Coscelli, listening to you, I am thinking that, for the legislation to work, it is going to have to be pretty draconian. Is the legislation being developed more quickly elsewhere very draconian? Also, are these platforms good at paying their fines?

**Dr Andrea Coscelli:** The second one is probably easier. Yes, Meta has decided to pay its fines. Fining powers are really important. These are clearly companies that care massively about compliance in this country. If the proper legislation was in place, compliance would follow. In terms of the legislation in other countries, as of today we have legislation in place Germany and our equivalent in Germany is using that legislation. The second very important reference point is this legislation in Europe that we are talking about. The spirit of what they want to achieve with that is very similar to what we want to achieve here. The mechanism is slightly different because, essentially, the plan is to have more in legislation and almost automatic enforcement.

We proposed, and the Government have accepted this so far, a more flexible system, as the FCA and Ofcom apply. The reason goes back to institutional design. In this country, we have had good examples of high-performing regulators, such as Ofcom and the FCA, which have managed to strike a good balance between trying to be reasonably pro-business and being firm when needed. They have helped make those sectors a success.

The problem in Europe was that they did not want a world where 27 countries had to create regulators to deal with the platform, because we have some very small countries, where, by definition, it will be really hard to ask these small regulators to deal with the companies. They needed something centralised, so they took the view that, in relative terms, what worked for them was to have something a bit more scripted. A number of commentators have criticised that compared to our proposals, because they think our proposals are more bespoke and better fit the complexity

and dynamism of the sector. That is probably true, but at the same time we need results. It might be that, if we keep waiting, it is better to have something that is a bit more rigid and actually happens, as opposed to something that takes a long time to get there.

The jury is still out. That is clearly happening in Europe. We should interpret it in a positive way and see it as a challenge in trying to introduce the legislation, come up with our own proposal and ensure that, in practice, it works and delivers. I am quite confident that the old infrastructure is the right one, but we need the legislation and we need the DMU to do quite a lot of work on top of it. Time matters for that.

**Baroness Buscombe:** I asked the question partly because, in my experience as a lawyer, it is quite difficult to marry flexibility with primary legislation that actually works and delivers the enforcement of compliance required.

**Dr Andrea Coscelli:** It would fit in a bit like in financial services, where you had the legislation setting the broad principles and then you would delegate the regulator to come up with guidance and very specific principles. We have succeeded in employing that approach in other sectors quite well, so we have a good benchmark. It is not easy. These sectors are complicated. Whenever you start thinking about it, there are new questions. There are now discussions about the metaverse, which we have not even thought about. It is not easy.

**Baroness Buscombe:** It is not like legislating for a can of beans. This is something that is changing as we are sitting here. I guess I am saying good luck, but it is important for us to articulate just how complex and challenging this is.

Q16 **Lord Foster of Bath:** I just want to pick up on something you also referred to. We are well aware of the difficulty of persuading the FANGs, the big global monopolies, to pay their fines, constantly chasing them up and all that. You then talked about the possibility of some senior management person having responsibility for compliance and, if the compliance does not occur, you have that individual to go after. On the face of it, that is very appealing. It is already done in a number of other areas.

But in the case of these huge global companies, where managers who come in and are allocated responsibility for compliance can very easily be shipped offshore to another location to carry on their work, how would we manage that? Have the details of that been thought through? Do you have suggestions as to how best we can impose that responsibility on a senior manager with responsibility for compliance, whom we can go after and succeed, and it can make a difference?

**Dr Andrea Coscelli:** These things are doable because they are happening in other sectors. We need to bear in mind that this sector has exploded in the space of 10 or 15 years. The internal governance and internal structures have changed very quickly, but we do have experience

that, when things happen, when transactions are blocked and fines are levied, it makes an impact. To be honest, the conversations we are having with some of these companies are quite constructive. It is a strange combination. Sometimes it is very litigious.

As you all know, the US system is very litigious. That is also a problem for us, because some of the matters we look into are currently in the midst of very aggressive litigation in the US. The companies would potentially be happy to compromise on some things with us, but they cannot because of that. It is a very complicated web of situations, but it seems to me the direction of travel is clear, in that we need to make sure that these companies have the right oversight in the UK, because they are just too big and too important. Every day I receive complaints about some of these commercial behaviours because there are literally thousands of businesses affected every day by the decisions of these companies.

I do not think there is much of a choice. Where we are, we certainly need to intervene and to make sure that a lot of these dynamics work for the benefit of the UK economy as well as of consumers and SMEs. There is a question about how to do it. There are lots of good ideas. We just need to get on and do it through the legislation, and, in parallel, we need to use our existing powers. As I said, we have concrete, empirical evidence that director disqualification orders have a significant impact on the way boards think about compliance and competition law. We would expect the same to happen in this space.

**Lord Griffiths of Burry Port:** I have a simple question. We have got quite used to hearing the rather lovely exploration of the mind and experience of Dr Coscelli, but I am feeling the lack of information from Mr Hayter. I wonder whether you have anything to say.

**Will Hayter:** I am very happy to offer a couple of comments on some of the things we have talked about. As your witnesses said last week, and I would very much agree, any system is only as good as its enforcement. That is what you have been talking about here. On the fining issue, one of the most famous examples is not one where a company did not pay. Two or three years ago, when Facebook agreed a settlement with the FTC of \$5 billion, the share price actually went up. That tells you something about the perception of whether that fine was really a punishment or deterrent. If we are talking about fines of up to a maximum of 10% of global turnover, which is a potential version, given the enormous size and, therefore, revenues of these companies, that could be in the tens of billions. We would expect that to focus the mind a bit.

On the senior managers side, as Andrea has said, this is in play and being discussed. There is lots we can learn, and have been learning, from the financial services model. It may not be quite as simple as mapping it across from that to here, because there are different company structures and different sets of activities, but, as Andrea said, that is all doable and very much in play in terms of the Government's thinking.

Q17 **Baroness Featherstone:** You briefly touched on the ability of these huge tech companies to dodge the appeals process, to extend it for decades, or whatever, with their deep pockets. What can be done to mitigate it? What would you suggest is the right appeal standard that would be most effective to ensure what needs ensuring?

**Dr Andrea Coscelli:** We were very clear in the advice that the timetables need to be quite tight for the DMU processes, and similarly for appeals. As I was saying, there is a specialised tribunal, the Competition Appeal Tribunal, which presumably will be in charge of the appeals. It shares with us the desire to be fast on the appeal. On the existing cases we have, that tribunal is faster than its counterparts in many other countries. There are three levels of appeal. You can appeal to them; if you lose, you go to the Court of Appeal, and then, if you lose, potentially to the Supreme Court.

It is really important that the legislation says it should be a judicial review standard, which is what applies for ex ante regulation, for instance, to Ofcom and the FCA. There could then be a joint exercise by us and the courts to make sure these steps happen quite quickly, because, as I said, every day I see that there are a number of businesses that are not getting a very good deal from the current process. It just takes too long and commercially it is costly, uncertain and slow. It is really not fair on them.

**Will Hayter:** The reason for talking about it not being fair is because it is very asymmetric in effect. If there is the option for a full merits appeal, with all the time that takes, and the opportunity to relitigate and examine the facts all over again, while the detriment is building up, that plays into the hands of the big guy, the incumbent. It is all the people on the receiving end of that who lose out. That is why it is important that, as well as the standard, the appeals be non-suspensory.

**Baroness Featherstone:** That was going to be my next ask. That is your recommendation too.

**Will Hayter:** Yes, to try to avoid that asymmetric set of incentives and the sense of it being a one-way bet for incumbents always to appeal and drag it out, because that plays in their favour.

**The Chair:** I should imagine that you face constant legal challenges from all the organisations you are engaging with. Do you find the threat of legal action ever tempers decisions as to whether you take things on?

**Dr Andrea Coscelli:** We are regarded as a fairly bold agency. Right now, I think we have five cases in the tribunal. We have a case in the Supreme Court later this month. I have very good lawyers, who are pretty robust. There is a significant asymmetry of resources. I was on a call on a case with Facebook a few weeks ago. There were 16 people on the Facebook side, 15 of whom were lawyers from three separate law firms. These companies are extremely profitable. There are lots of smart people out

there who are pretty happy to work for them. It is a very small proportion of their profits to employ them, even if they are quite expensive.

It is a very significant issue. We always try to take the right decision. The problem is that you get to a point where your capacity is exhausted. We cannot have more than seven, eight or nine matters in litigation at any time. It is just too much for us to do. It sometimes has an impact on timeliness and choice of cases. It is really important that the DMU legislation strikes the right balance, because, if the DMU ends up facing many parallel pieces of litigation, it could become paralysed quite quickly, which would not be of any benefit to anyone.

**Baroness Featherstone:** I am surprised they do not headhunt you.

**The Chair:** Maybe that is where he is going.

Q18 **Baroness Rebuck:** This leads nicely to my question about resources that will be required by the DMU as it goes, I hope, swiftly from preparatory to statutory. Back in April, we were told you had about 60 staff and you said at the time that you needed to look at a step change in resourcing to deliver the full programme. I was interested in your latest thinking on that.

**Will Hayter:** The number of around 60 is still pretty accurate for now. We are in the process of doing some recruitment and interviewing at the moment for a small additional number. When there is more certainty on the timing and content of the legislation, that is when that bigger step change will need to happen. The precise numbers and blend of skills depend on what is in the legislation and the balance of the different tools in there. The important thing is that the Government have indicated this as a priority and reflected that in the funding for the CMA. From the recent spending review, the total CMA budget goes to £130 million by 2024-25, which is obviously welcome. That is to cover not just the Digital Markets Unit but the other two new functions, the Office for the Internal Market and the Subsidy Advice Unit. Turning pounds into people is not altogether straightforward. We talked about this a little bit when I gave evidence to you in November, as part of the DRCF.

**Baroness Rebuck:** Indeed, yes. It was one of your biggest delivery risks, in your words.

**Will Hayter:** I have not changed my mind on that. We will need a range of very skilled people—legal, economic, data and technology specialists. In many of those, as we said before, we are competing on Civil Service pay scales in some very hot commercial markets. I should say that, while this particular sample of the CMA does not look very diverse, we are focusing our recruitment efforts on bringing people in from a real mix of backgrounds. That is in terms of how we recruit, but what we can offer as well, which is a really interesting, very supportive place to work with a real sense of public purpose. None the less, those are offsetting factors against some of those commercial challenges.

The early signs of the quality of people coming in and the level of interest are positive, but it remains a massive focus and a big risk. As a competition authority or a regulator, we are even more of a people business than many commercial organisations. We are also recruiting around the nations and regions of the UK. That is into our already established Edinburgh office. We announced a Manchester office shortly after I spoke to you previously and we are expecting to build that up over the coming period. As I said, the precise nature of this, other than knowing that we are going to need to increase significantly, depends on the legislation and its timing.

**Baroness Rebuck:** When you say “significantly”, do you mean double or treble?

**Will Hayter:** It is more than double, probably treble.

**Baroness Rebuck:** My other question was about the plan for the DMU to be company specific, proactive and forward looking, to anticipate harms rather than deal with them after the event. I think these are your words. In our last report, we talked a bit about horizon scanning and anticipation of problems, and we recommended more information-sharing mechanisms and enhanced links with industry and academia. What is your latest thinking on that?

**Will Hayter:** It remains a big priority. Where the CMA and the DMU can add unique value is through our big, in-depth looks into particular markets, when we use the formal information-gathering powers and so forth, but we need to achieve a balance between that depth on particular markets and a real breadth across markets. There are a couple of reasons for that. One is to spot things coming down the track that might either increase market power or be used leverage market power into new markets, and, indeed, developments that might reduce market power, which would be good. Going back to the point I was making earlier, we also need to recognise the interconnected nature of these markets. We need to be joined up in our thinking across different sectors.

We have been increasing our work in this area in a couple of respects, one within the CMA and one in the context of the Digital Regulation Cooperation Forum, which we talked about before. We have a dedicated team of technology insights people in our data, technology and analytics unit. That team is growing. Between that team and the DMU within the CMA, we are going through a really structured process of trying to spot the headline topics that might be important in coming years, think about those more deeply, and think about the competition and the consumer implications. We are looking at data science techniques to apply some quantitative as well as qualitative assessment work. As we head towards the legislation, I hope, coming in, we are assembling a market insights function to regularly pull in market information from outside, in the way that, for example, Ofcom or the FCA would do.

This should also be put in the broader context of our state of competition report. We published the first one towards the end of 2020 and there are

future such iterations to come. Through the DRCF, as we talked about before, and therefore I will not labour it, we are doing our best to make sure that we can make our knowledge there more than the sum of its parts. We launched a DRCF horizon-scanning programme in November, which is a programme of external events, academics, industry participants, et cetera. The first of those we are doing in the spring is on immersive technologies, in which we include the metaverse, but not just the metaverse, as one example. I think Melanie Dawes from Ofcom last week spoke about the DRCF research portal, which will also be launching soon. It is a big programme, through both the CMA and the DRCF.

**Dr Andrea Coscelli:** It is important to bear in mind that, if you are a competition authority like we are today, you do not really do horizon scanning, because essentially you are looking at the whole economy. Culturally, when we get the DMU powers, it will be important for us to become a bit more of a hybrid and learn a lot from Ofcom and the FCA in particular, because they do horizon scanning. That is why we spend a lot of time talking to them. The DRCF is really important for us in that context.

**Lord Vaizey of Didcot:** Will the DRCF publish its metaverse horizon-scanning report?

**Dr Andrea Coscelli:** At the moment, we are looking at these things and we are quite flexible about what we publish and when, but in a sense, if we do anything useful, we try to publish it.

**Lord Vaizey of Didcot:** That would be terrific. Do you explore behavioural remedies with the platforms? You are looking at Facebook and Giphy. Do you try to negotiate with them? Are there ways forward to negotiate behavioural changes? It is a completely open question.

**Dr Andrea Coscelli:** We distinguish between mergers and what we call market investigation interventions. In mergers, we are quite sceptical about behavioural remedies because history has taught us that it is really hard to properly monitor and enforce. We have ended up in a number of markets with underenforcement because of that. If you think about a merger, there is competition; someone wants to buy someone else. In a sense, it should be their responsibility to make sure that this does not distort competition. The remedies need to work and we do not like behavioural remedies.

In market investigation references, for example in online advertising, we accept that there is a problem today. The question is how we fix that. For national problems, we tend to give a preference to divestments. For international ones, for obvious reasons, we think, pragmatically, behavioural remedies often are the right answer. That is where the one-off problem comes in, because a lot of these behavioural remedies are quite difficult to execute. We worry that, just by doing it once, there is a risk it does not quite work. The plan for the DMU would be very much like Ofcom, to set up some remedies, monitor, flex, change and keep working that way.



**Q19 Lord Lipsey:** The task you face in this area is extremely complicated and requires some very delicate decisions. One of the things you lack, which we have identified very clearly, is the legislation on which to base the new DMU. I cannot help but notice that it is now 15 months since you lost your permanent chair, Lord Tyrie. You have had to readvertise for a chair, except the ads have not yet appeared. This seems miles away. Does it not handicap your work that you are not able to have the structure that in most cases is used for tackling things?

**Lord Vaizey of Didcot:** It is very common for regulators these days not to have a chair.

**Lord Lipsey:** That is the problem to which I would like to draw attention. In this particular field, it seems very difficult for you, Dr Coscelli, to both do the job of CEO and, although you have an excellent interim chair, not have a proper chair by your side to help you strike all these difficult balances and considerations.

**Dr Andrea Coscelli:** I completely agree with you that it is not optimal to not have a permanent chair. Factually, the situation is slightly better in the sense that the job has been readvertised and, as far as I understand it, the panel is making progress. It is longlisting the candidates at the moment. I hope, in a couple of months, we should have a new chair.

**Lord Lipsey:** I think Ofcom might have said that about two or three months after Terry Burns went.

**Dr Andrea Coscelli:** It is for BEIS. The only thing we can do is help when these processes happen. It was clearly quite frustrating to have a search that failed, and then the department waited for a few more months to launch the new one. As Mr Vaizey just said, it seems to be common to a number of regulators at the moment. We have a good board.

**Lord Vaizey of Didcot:** I was not trying to get you off the hook, Andrea.

**Q20 Lord Hall of Birkenhead:** Mr Hayter, I go back to this question of how you get the good people to go into the DMU or regulation anywhere, I suppose. I have been slightly toying with the little insight Dr Coscelli gave of Meta with a legion of lawyers versus the regulator. You have ably described how you have to hire within Civil Service rates of pay. You are quite rightly opening offices around the country.

What else can you do to make the offer for the best and the brightest to join you against these legions of Meta, et al? What else can you do to encourage people to come and join? It must be quite difficult to get people under those conditions to join.

**Will Hayter:** It is a challenge. We have had some good success in particular areas. Before the DMU was set up, at Andrea's instigation, we set up the data, technology and analytics unit that I referred to previously, which is data scientists, data engineers, behavioural insights and tech insights people. If anything, in those sets of skills, the

competition with the commercial sector is at the most acute. Stefan Hunt, who has led the set-up of that unit, has been really successful in drawing in an excellent quality of people. You have to try lots of techniques, in terms of the recruitment outreach and the programme, try to get to as many different potential audiences as possible.

As I was touching on, we have to make the most of the offer we can make. That does not mean competing commercially on salary, but we really do think the sense of public purpose and impact is very attractive. We try to be as supportive and flexible a place to work as we can be. The Civil Service is very good at all those sorts of policies. We hope, and I think this is borne out through the current campaigns we are running, the option for working in these other offices around the UK dips into other talent pools. Inevitably, there is no real silver bullet there, but we are just trying to pull all the possible levers to make sure that as many people as possible are hearing about us as a potential destination, and then to be a really attractive place once they hear about us.

**Lord Hall of Birkenhead:** It is hard.

**Dr Andrea Coscelli:** It is hard. As you probably know, both the FCA and Ofcom have an industry levy and have a far greater degree of flexibility. That extra that they can pay does make a difference. It is bit easier for them than it is for us

**Lord Hall of Birkenhead:** Do you need that as well?

**Dr Andrea Coscelli:** In the consultation, the Government are asking whether the DMU should be funded by a levy or by taxpayers. One of the possible advantages of the levy funding model would be to give us greater flexibility. To be honest, the Treasury has been very supportive of the CMA during my tenure. We have always had increases in budget for Brexit and the new functions. The area of discussion is just the flexibility we can have to spend the budget.

In many ways, I am happy with the pounds value of the budget I have. I would rather pay people a bit more and have a slightly smaller institution, but we cannot because of the Civil Service pay scales. I agree with you: the importance of this type of unit and the regulator to the economy is very significant. What would be a fairly limited difference in either budget or flexibility could go a long way in terms of having a really high-quality regulator.

Just adding to what Will was saying, in the DRCF context, with Melanie at Ofcom and Nikhil at the FCA, we are thinking quite a lot about joined-up entry level or graduate programmes. It is about trying to make the offer as attractive as possible. At the end of the day, we all know it is a bit of a scorecard. Pay is one element; there are other elements. We try to work really hard on the other elements, but pay matters as well. It is a question. In a sense, any support from you on this point as the legislation goes through would be very useful.

Q21 **Lord Foster of Bath:** You might want to write to us afterwards, because I know time is very short. Picking up the issue of getting qualified staff, one of the ways you could benefit would be by close co-operation with other regulators around the world. You talked in your mission statement for 2022-23 about your plans to do that. Taking that a stage further, could you tell us—you could perhaps write to us—whether you have had any involvement in all the recent trade deals that the Government are doing? I am particularly thinking of the CPTPP negotiations, in which you are recreating an equivalent to the European Union, where there could well have been an opportunity for major collaboration, but I understand that did not take place.

**Dr Andrea Coscelli:** We will write to you. To be honest, we have not been massively involved on trade deals. The co-operation agreement with the European Commission was really important for us, but we are not talking about it. I hope this will happen. It does have an impact. We are working very closely with agencies globally every day of the week on important deals. The more we can get some of these co-operation agreements advanced, the better it will be. We will write to you with the details on this.

**The Chair:** Thank you. It would be helpful if you were able to follow up in writing on that. We may want to follow up on this session in writing with you, too. The Minister is about to join us. If there is a gap between the situation we are in now and the legislation you need coming into force, I am particularly concerned about what is going to happen in that intervening period to address some of the concerns that different industries are facing and the effects on consumers more generally too. I have noted that you will be leaving your post later this year, so you may not be coming back to the committee to give us evidence again. We certainly wish you well with that.

**Dr Andrea Coscelli:** Thank you very much.

**The Chair:** Thank you again for your evidence today.