



HOUSE OF LORDS

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Internal Market Sub-Committee

Inquiry on

ONLINE PLATFORMS AND THE EU DIGITAL SINGLE MARKET

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Witnesses: Matthew Fell, Richard French and Antony Walker

USE OF THE TRANSCRIPT

This is a corrected transcript of evidence taken in public and webcast on
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Members present

Lord Whitty (Chairman)
Lord Aberdare
Baroness Donaghy
Lord Freeman
Lord German
Lord Green of Hurstpierpoint
Lord Mawson
Lord Rees of Ludlow
Lord Wei

Examination of Witnesses

Matthew Fell, Director for Competitive Markets, CBI, **Richard French**,¹ Legal Director, Digital Catapult, and **Antony Walker**, CEO, TechUK

Q33 The Chairman: Good afternoon, and welcome. Thanks very much indeed for coming and for being on time. We have a number of questions. We are looking to hear from you as representatives of various aspects of industry and services that have a lot to do with platforms.

In one sense we are looking to you as the industrial and business users of these facilities, but obviously, in this rapidly changing world, your relationship with those platforms will change in different circumstances.

The issue of online platforms is being seen by the Commission as a potential problem in relation to competition and to the dominance of some of the platform sectors by large American companies. I will kick off with my first question. The Commission says that European countries lag behind the US in the digital economy because of the EU's "fragmented markets". Do you think that is the reality? Is that the main reason why there are relatively few large European-based platforms, or are there other factors? Are there regulatory factors at an EU or national level that cause problems? In any case, should we worry? Who would like to kick off on that?

Matthew Fell: I will have the first crack at that.

The Chairman: Thank you very much. Perhaps you could give us a few sentences to introduce yourself. We have your biography, but let us have it in your own words.

Matthew Fell: I am Matthew Fell, Director for competitive markets at the CBI. My job is to champion scale-up businesses across a range of business sectors, including the digital and creative ones, hence the interest in this inquiry.

In answer to the question about whether the EU lags behind the US because of its relatively fragmented markets, I would say that that is, in part, the reason. It is one of the reasons why

¹ Derek McAuley, Specialist Advisor to the Committee on this inquiry, is acquainted with Richard French.

we see big opportunities and a big prize in a digital single market to harness those 500 million or so consumers if we get that properly integrated. But that it is not the only reason why the EU does not have companies of this scale. There are a few other factors, including the broad business environment that all companies operate in. That is particularly important for skills, infrastructure, access to funding and so on, which are important factors too. In addition, the nature of regulation is important. There is good reason why, even within the EU, the UK is a perhaps a little more advanced than some other member states. In recent times, we have had an approach towards new, innovative digital sectors that I would characterise as watching these sectors and developments carefully and closely but regulating later if there is a problem. That approach has served the UK well relative to other EU member states.

So in answer to your question, fragmentation is part of the issue, but it is not the only part.

The Chairman: Thank you very much.

Antony Walker: I am Antony Walker, Deputy CEO of TechUK, which is the technology trade association for the UK.

Technology and digital love scale, so the size and scale of the US market have been important, particularly in the last phase of the digital revolution, which was really about consumer-facing services and innovation in that consumer market. The scale of the US has been very important. However, I would suggest that the US market is not always as harmonised as people in Europe think. There is actually lots of fragmentation in the US.

A big differentiator, especially in the north-east US and California, is one of attitude to risk and innovation, which really embraces the potential for new and innovative change and then looks to exploit it. That is seen at the regulatory level but also at an investor level and in the funding that is available to new companies coming in with big new ideas.

On the regulation side, someone recently described the US approach, when contrasting the EU and the US, as being permissive but accountable versus a European approach that is a little more towards the regulation of a free market. Having a risk-based approach to regulating fast-changing markets means that sometimes some of the outcomes are probably linked to that difference.

Finally, Europe is better at this than we often think. Since 2000, we have had 40-plus unicorn businesses—tech businesses with a valuation of over \$1 billion—and almost half of those come from the UK. Europe and the UK have done well, and there are lots of examples of very successful large-scale digital businesses that are indeed growing.

Richard French: I am Richard French, legal director of the Digital Catapult.

I do not have a great deal to add to what my fellow panellists have already said, except on that last point about the number of \$1 billion companies, otherwise known as unicorns. While we lag behind, even in the last year the European Union has, I believe, created 13 \$1 billion companies against the US figure of 22. Yes, there is a lag, but there is life in the European Union's business creation model. As to whether the cause is down to fragmentation, while in our view we would not describe the European Union as fragmented,

it is clearly not as cohesive as the United States. That goes without saying. Just as an example, an OECD study brought to light the fact that across the European Union there are many different R&D tax credit schemes. There is no single R&D tax credit scheme. The UK has one, which is relatively successful, and France has one, but not all European countries have such a tax credit scheme for encouraging investment in research and development. That is something that I hold up as an example of fragmentation.

On the question of areas to look at, let us look at financial regulations. It is actually quite difficult to set up a small investment fund in this country. The FCA, the relevant regulator, makes it very difficult for people to club together to create an investment fund. It is very easy to do that in the US by comparison. In 2011-12, President Obama signed into law the JOBS Act, or the Jumpstart Our Business Startups Act, which is widely accredited with contributing to an increase in the creation of large tech businesses in the US. That was only in 2011.

Q34 Lord Aberdare: Can I ask you about the digital single market strategy, and how you think it will help UK and European businesses and start-ups to succeed and grow? What specific aspects of the strategy do you see as the most important in that regard?

Matthew Fell: Overall, from a CBI perspective we view the digital single market as offering a big growth opportunity, and one that the UK ought to fare well out of. To go back to the starting point, that single market of 500 million or so consumers ought to be a big opportunity.

There are two critical areas where we think that could really help. First, it could help to support what is already extensive private sector investment into digital infrastructure, both by making it easy to unlock private sector investment and by reaching parts of the EU where that on its own is not necessarily commercially viable. The second area where it could particularly help is the harmonisation of some aspects of consumer law, particularly those that do not lend themselves to the digital environment, such as requirements to physically be present in some markets. That seems a little curious for digital platforms, for example. I think there are a number of areas in which the digital single market could help to take us a stride forward.

Equally, there are areas to watch where it could be damaging as well as beneficial. I mentioned that the UK, for example, ought to have the most to gain, because we are, by quite a long way, the member state in the European Union that does the most e-commerce transactions. The figure for the total number of retail transactions done online in the UK is in the mid-teens, but it is not out of single digits yet across Europe as a whole. Also, the creative and content industries are an area in which the UK is a genuine world-class industry that significantly outstrips anything else across Europe. On those issues, I think there are potential reforms to copyright coming down the track that could be damaging to those business models. There are potential pitfalls to watch out for in calibrating really carefully any data protection measures that give the legitimate and right levels of consumer protection on the one hand but do not choke-off and stifle innovation for business models on the other, as well as many upsides that a digital single market could offer.

Antony Walker: I absolutely agree. The UK should be the country that can benefit most from getting the digital single market right and building a scale market. There clearly are positive aspects to that.

To go back to the previous question, one thing that concerned us—this goes back to the Commission's original publication on the DSM—is that while there was early discussion of some of the economic value that could stem from a digital single market, very quickly the document jumped to problems, issues and concerns without necessarily really setting out the opportunity more clearly and focusing on the positive elements that could underpin success. This slight fixation on trying to predict and understand every potential problem that could emerge in a very fast-changing market is problematic. There is a danger that you pre-empt issues rather than just wait and see whether they emerge. That is problematic.

The other issue is that there is clearly a strong focus, as we see with this consultation, on the role that a small number of very large firms play in this market. Again, there is a real danger of unintended consequences if we seek to use non-competition means to address issues that are fundamentally competition concerns. In this digital market, the internet and so on, when you regulate for one or two or three or four companies, you end up regulating for everybody. We need to be very clear about making sure that we are using the right tools for the job. If we have competition concerns, let us focus on using competition tools. As Matthew said, if there are issues about consumer protection, let us focus on consumer protection. If it is about data protection, we have those data protection tools at hand as well. The Commission would do well to keep distinct the tools that it has in its kit-bag.

Richard French: In answer to the first question, our view is undoubtedly yes: the digital single market strategy will help EU and UK businesses to succeed. As to which aspects are most important, in our view the greater effort to harmonise the treatment of personal data is a very positive sign. The initiative to create a market, or to facilitate the free flow of data in the European Union, which I imagine is a riff on the single market imperative for the free movement of capital and people so we now have the free movement of data, is very positive.

We would also put forward the initiative for a European cloud. That, too, is of great benefit to UK and EU businesses. For example, once the DSM gets going, start-ups will not have to go to the default of Amazon. Amazon is a great service, and I am sure my fellow panellists know of businesses that use Amazon, but at the moment Amazon is really the only game in town for high-quality levels of service and a good-value cloud. It would be a real benefit to UK and European businesses to be able to keep their data sets and workloads onshore, if you like, within the European Union. That would address in one go concerns about the exporting of European personal data outside the European Union and the support of European cloud business.

Q35 Lord Freeman: Perhaps I could ask a very simple question of each member of the panel. Within the field of online platforms and the digital single market, what are the particular strengths and weaknesses of the UK contribution?

Matthew Fell: One particular strength of the UK in a digital single market is that we are the world leader in e-commerce, or retail transactions online. That is a real strength of the UK.

As I mentioned in response to the previous question, the content and creative industries are another example of an area where the UK is world class. We are one of only three exporters in the world that are a net exporter of music, for example. There are things that we in the UK ought to be able to take advantage of and win at. Those are areas that I would point to in which the UK has natural strengths.

Lord Freeman: What about the weaknesses?

Matthew Fell: Notwithstanding Richard's remark about the extent to which companies in the EU and the UK scale-up, I think that the weakness, particularly relative to the US market, is our ability and capability to break through into those genuinely global organisations, particularly in a digital world. That is something that we aspire to. We have managed to move from start-up to scale-up. The next step would be to move from scale-up to really big global players.

Richard French: To build on the point about being world leaders in e-commerce, the level of technological adoption in this country—for example, the number of smartphones in circulation or the number of people who are internet savvy—is, in our view, definitely a strength. As a weakness—we may come to this later—although there are sources for access to financial capital to assist businesses to grow, there is not, for example, the equivalent of the NASDAQ exchange in Europe. Over the last 20 years, the NASDAQ has proven to be a very popular and powerful source of funding, specifically for technology companies. As you may know, there was an experiment with a European NASDAQ. That was closed down just after the dotcom boom, in about 2002, together with all the others, including the Nouveau market in France. These specialist stock markets were specifically created to bring much needed capital to small tech companies. With the exception of AIM in this country, the Alternative Investment Market, they have all been closed. I would advance that as a weakness. If one is the owner or founder of a business and is looking for new capital, it is not easy to come by.

The Chairman: I should have said that there is no need for everybody to come in on every question, but if you want to—

Antony Walker: I think you could draw quite a big, interesting Venn diagram of the UK's strengths, because they are multiple: an open, dynamic economy; the English language; technology excellence; real creative genius; a population of early adopters that has now been there for 20-odd years, pioneering the adoption of new technologies; a broadly pragmatic approach to regulation; and a growing investor ecosystem. These are all key components.

Look at FinTech, for example. With FinTech, the UK now clearly has a world leader, with its combination of technology expertise and expertise in financial services coming together. If you look at those new FinTech start-ups and scale-up stories, the really interesting thing is how many of them have founders from outside the UK. People have come in, and they have understood tech and financial services, and that is what drew them to London. They have then seen an opportunity in things that were done inefficiently or ineffectively. That is where they had the creativity and ideas and were then able to launch their services. I would also say that because of the international nature of the UK labour market, they find a ready

market for taking up new services. I would add that migration aspect, which I think has been very important, certainly to some of the success that we see at the moment in London.

Q36 Lord Green of Hurstpierpoint: I would like to dig a bit more into this question of what inhibits the growth of European homegrown tech companies. We are all familiar with some of the issues: the capital barrier that you referred to is quite a well-recognised phenomenon. It is encouraging to hear that the unicorn track record appears to be picking up momentum. I had not heard those statistics, particularly the recent ones. As an aside, I was not clear whether the 13 European ones this year were included in the 40 that Matthew mentioned.

Richard French: I think the figures are that in the last 10 years there have been about 40; 13 in the last year.

Lord Green of Hurstpierpoint: Which, all things being equal, would suggest a momentum that is rather encouraging, as well as that relationship to the US, which does not sound so bad. Nevertheless, at least as of now, the fact is that it is the US that has spawned the really large companies, and we all know their names. We also observe a tendency for companies to sell out, even as soon as two or three years in when they get to the first £100 million of turnover. Is this about culture, about taking your gains off the table while they are still there and monetisable? Is it something about the capital markets? What, in your view, seems to cause this propensity to sell out? We have seen it again and again in this country: companies build up quite a name and then suddenly sell out to an American buyer. Often the brand then disappears and the mind of management, you suspect, sometimes moves too. Is this a transient phenomenon or something more deep-rooted that we ought to pick up on?

Antony Walker: That is a very difficult question to unpack. There are all sorts of issues at play. Some of those are cultural, in both the business community and the finance community in the UK. There is no doubt that technology businesses have to scale and need the financial resources to scale. That is one key issue. But they also need the market to scale into. For both those reasons, we see businesses being bought out by companies in the US, or indeed just moving to the US.

The situation is changing somewhat, for all the reasons that we have just been talking about. There is growing evidence of individual founders and financiers showing more of a commitment to growing businesses and taking them to that next scale up in the UK.

That is on the vendor side of the equation. There is also the buyer side, and the companies that actually acquire those small businesses are often willing to pay quite a high premium for them. Two things are involved there. Larger businesses recognise that smaller companies can innovate more quickly and in a very fast-moving market. They seek to buy that innovation and bring it in-house, knowing that they could not generate similar innovation themselves. Of course, the one that the competition authorities must be very vigilant about is the opportunity to buy out competition when that arises. It is very difficult sometimes to discern between the two, but they are critical issues to understand.

Matthew Fell: A culture does exist in the UK of a bit of a propensity to peak out or cash-in early.

There is something in the point about innovation, which Antony just discussed. That is not unique to the UK. This is a sector and a type of business that is ferociously innovative, and a lot of that innovation takes place in early-stage or start-up businesses. One way in which larger businesses can stay ahead is by being acquisitive for that innovation.

The final piece comes back to the funding, and that is something in which the UK and the EU are quite different from the United States. Richard talked about the NASDAQ and listed companies, but even before that the venture capital markets, for example, were less developed and less well tapped across the European Union than in the United States. If you looked at the global share of venture capital markets, you would see that the US snaffles up a good chunk of those. Somewhere in the order of two-thirds, 70%, of global VC² money heads to the US. That tells a story.

Richard French: Stripping out the personal lifestyle reasons to try to focus just on the rational and on technology businesses that are more akin to online platforms, there are two interesting statistics. In February this year, the *FT* reported that US VCs were behind more than 50 % of London start-ups (by value). The *FT* expressed the opinion that that was largely because there was very little European competition. So the European VC presence is there, but it is not as vigorous as the US VC presence. That may well go back to the hollowing out of the European VC industry post-2002 and the dotcom boom, to go back to the point I made earlier. A lot of those specialist skills—bankers, people who could do the due diligence and people who understood the technology and could quickly decide what to do—have been largely lost in Europe because of that hollowing out of the investment industry at the beginning of the millennium.

The second point is that, statistically, the three biggest buyers of European tech companies are Google, Facebook and Microsoft. To go back to my earlier point about stripping out the personal and lifestyle reasons, if you are going for valuation, it is just a matter of dollars and a cheque book. Between them, Google, Facebook and Microsoft have billions of dollars on their balance sheets. They also have an advantage, although I am not saying exclusively so, because of the nature of their business. We all know what Google is. I do not have any evidence for this, but there is no reason to suspect that Google, because it is connected to billions of people, does not take advantage of that deeper insight and spot the opportunities before the rest of the market does. That merits more research. I do not have any evidence for that and I might be joining up the dots and coming up with the wrong answer, but there has to be a connection between those three businesses between them accounting for more than two-thirds of the largest (by value) tech business acquisitions in the last two years.

Lord Green of Hurstpierpoint: It is a virtuous circle. They also, perhaps because of that, have the advantage of very high PEs³, which makes the acquisition look like petty cash to them very often.

Lord Rees of Ludlow: I have similar concerns about biotech start-ups being taken over. Is there much difference in the context of these sectors compared to biotech? Perhaps there is because of the dominance of the three big partners, which Mr French just mentioned.

² Venture Capital

³ Price-to-Earnings Ratios

Richard French: I am not sure that I am competent to answer that question, as biotech is not really my field. I make just one observation. In any industry, there are insiders—directors sit on boards and very often act as an effective communication channel. I am sure that that is just as true in biotech as in tech. The advantage for some of these other companies that I have mentioned is that, by their very nature, they are networked businesses. A network is much more valuable the more connections that you have. Imagine if you and I were the only people with a telephone. That would be quite useful, but not very useful. I suspect that that is another factor, but it merits more research. I would not want to stick my neck out more than that.

Antony Walker: There is nothing intrinsically unusual about very large businesses emerging, particularly in new markets. That does not necessarily mean to say that there are therefore a whole set of problems that have been undiscovered. We need to be careful about linking the size of some of these companies to particular problems.

Q37 Baroness Donaghy: You all deal with different business communities. From your perspectives, what are the main benefits of online platforms?

Matthew Fell: There are benefits and drawbacks. The benefits for consumers are principally ones of convenience. An online platform offers them access to a greater range of choice than they might necessarily have just by physically interacting with businesses on a high street, for example. Some of the advantages that data offer are more customisation and personalisation to individuals' needs, so there are a number upsides for consumers. For businesses, one thing that an online platform offers is a lower barrier to market entry, because there are typically lower costs to get your goods or service to market and you can access a very large customer base in a way that you could not do with just a physical presence, for example. There are upsides for both businesses and consumers, as well as a few downsides, which we may well come on to in the remainder of the conversation.

Richard French: We do a lot of work with start-ups. If I answer the question in the context of the benefits to those start-ups, there are three primary ones. A lot of the organisations that we have been talking about have put into the market open public APIs—application programming interfaces. For example, Google Maps is available as an API for free. If I was a small business and I wanted to put some kind of “locate me” feature on my website, I could just use the Google Maps API. That is very valuable and a great benefit to businesses. That is just one example of 14,000 public APIs that are available. LinkedIn is another example. Facebook is also available as an API. The second benefit to these start-ups is that they get very low-cost access to big supply chains. If start-ups are writing an app—a fitness, health or well-being app, for example—they can put it into the iTunes App Store or on Google Play and they can get access to hundreds of millions of consumers. All the iPhone owners in the world can see that app for a very low cost. That is a big benefit for start-ups that want to access that marketplace.

The final benefit, which may be less obvious, is that organisations such as Google, Facebook and Yahoo! have contributed immeasurably to the supply of open source software. A lot of cloud services, including Amazon's, run on open source software that was contributed by companies such as Google, Facebook and Yahoo!. Hadoop, which is very important for big-

data analytics, is open-sourced from one of those companies; it is based on Google technology. So those are big, positive benefits for start-ups.

Antony Walker: This is akin to asking 100 years ago what the benefits are of electricity, as they are so broad and diverse. Consumers have benefited from incredible amounts of innovation in the last 20, 10 or five years. I have had to pay a remarkably small amount of money to participate in and have access to all that innovation. The nature of the way in which these services are provided, most of them being free at the point of use, means that the speed of innovation and adoption is very quick, so there is a lot of benefit there—essentially a consumer surplus, which I think would be difficult to measure but is very substantial.

On the business side, I think of platforms as Lego blocks or building blocks that, if you are setting up, running, building or transforming a business, you can use to plug in and to provide you with basic functions and abilities right across your business. I am thinking about your ability to use internet platforms to promote and raise awareness of your business. Services like PayPal are very low-cost ways of processing payments. There are back-office functions, with things like QuickBooks, which provide simple accounting software for very small companies. If you want to run an event, you can use something like Eventbrite, so that you do not have to have a big events team or events software—you can just use a piece of technology on a pay-as-you-go basis. You can go from zero to having a business with a global presence literally in days. That is a massive transformation in the business world, which we are only just starting to understand. My organisation has 850 companies, from the largest platforms to a very long tail of smaller and medium-sized companies. Every single one of those companies uses multiple platforms to run its business. It drives efficiency and it drives productivity. It enables companies to focus on the things that are special about them and to drive the innovation that they seeking without having to focus so much energy on doing all these other things.

Q38 Lord Mawson: While the European Commission recognises the benefits of online platforms, it is concerned about the dominance and market power of some of the big players. What is your view? Are those concerns legitimate? What are the implications, I wonder myself, on different political views of the world? One wonders whether behind all this there is a worry that some of these platforms are in danger sometimes of endlessly narrowing down what one can believe about the world. Is that true?

Antony Walker: On the last point, I would say that the reverse is true. Some of these platforms are opening up information to people in ways that are totally unprecedented. The way in which people use these platforms is a separate question from the one about the information that these companies open up to people. There is lots of evidence to suggest that this phenomenon of multihoming is very real. There is lots of evidence that consumers use multiple platforms to do similar tasks. The same is true of businesses. People can jump between platforms and move between platforms, so there is an element of competition. As I said, just because there is scale does not necessarily mean that there is a problem and just because there is dominance does not necessarily mean that there is a problem. It means that regulators should be paying close attention to those companies and understanding what is going on, because, if there is dominance, those companies have to take and show great care that they are not abusing their position. There is a distinction to be made in

relation to the size of the companies—whether they are indeed dominant within their market and whether they are fundamentally abusing their dominance. I would argue that that issue of abuse can be irrespective of size. A small platform can be dominant in one particular small market and can be at risk of abusing its position. I think that the Competition and Markets Authority in the UK has been very good at looking at some of those instances, identifying real problems and then being very swift to address those problems. On these issues, regulators need to be very aware of what is going on, very informed about what is going on and highly vigilant. They should respond only when they see real issues of harm and real problems, but then act swiftly and decisively in those situations.

The Chairman: Lord Wei, would you like to ask your question, which carries on from precisely that point?

Q39 Lord Wei: The hospitality industry and booksellers have argued that big platforms have become so dominant that they have no alternative way to access the market and have to accept the terms and conditions that are offered, however onerous. Is this a problem that you recognise?

Matthew Fell: Perhaps I can answer both aspects of the question and talk about where there are issues that I think are legitimate concerns. One area is best addressed through transparency for consumers. This applies mostly to price comparison websites and so on. The public must be well informed about what they are viewing when they look on those comparison websites. It is really important to get to the bottom of that on a transparency basis. If I go online, just by virtue of having checked out one of these sites, have I absolutely guaranteed I am getting the best price available? That is not necessarily so, because not every provider of those products or services will be signed up to that comparison website. It is a bit like pacing up only one side of the high street without checking out what is across the road. A bit of transparency is important so that consumers are aware of what they are buying into.

You made a specific point about whether this is the only way to access a channel to market. For me, that is absolutely an issue of competition. That should be the test, essentially. I do not think that the digital world is particularly different from the physical retail environment in that sense. You would be a little concerned in the physical retail world if there was only one outlet by which you could get your goods to market. The same is true in the digital environment. I see competition as the best tool available. If there is a concern, that is the lens through which I would seek to address it.

Lord Wei: I just want to follow up quickly on that. In some of these industries more than others, the competition issue seems to work for consumers: I can buy things online or book a hotel online, and I can do so from a range of different sites. However, as a hotel provider or an author, there seems to be only one major player for my entire industry to get to market. Is that a concern? There seems to be less choice to get to market than for people to buy those items. There is a distinction.

Matthew Fell: If that is the case, that should be a legitimate competition issue because the long-term health of the consumer is at interest. It is also a legitimate area for the competition authorities to look at to ensure the long-term health of supply chains, as well as the immediate-term consumer concern. The scenario that you described essentially means

that there is great lowest cost, until it is effectively not there at all. The long-term health and sustainability of supply chains is very important, and that should very much be on the radar of competition authorities, as well as the immediate-term price issue for consumers. That is how that should be addressed.

Antony Walker: It is also a very good example of the benefit of looking at very specific issues and problems within specific markets where it is highly likely that issues will arise at different times, as opposed to the approach of looking in a very generic way at the nature of digital platform businesses. There are so many diverse businesses doing different things in different markets, so when you look at that broad spread it is very hard to be generic about the issues. But when you can be specific and identify a problem within a particular market, there is absolutely no reason why our competition regulators cannot act swiftly upon it.

Richard French: We have heard academics talk about the fact that it is a property of businesses built on the internet for the winner to take all—certainly there is evidence of that. Whether that is anti-competitive is not for me to say. However, it certainly should be something that the competition authorities look into. As I said, it is a property of internet businesses. So for musicians, we are working with some start-ups that are creatives. They are faced with either engaging with Apple or one of the other streaming sites, such as Spotify, of which there are not many. You may have seen in the newspapers last week that a French music streaming company called Deezer pulled its IPO at the very last stage. There was some commentary that it was pulled because it could not get the valuation because there was a lack of confidence that Deezer could break into that market.

As a lawyer and a member of the Bar, I believe in the rule of law and the authorities being equipped to uphold the law. The difficulty with all these questions around the dominance of the market—there is a difference between dominance and abuse of dominance—is that the regulators do not have the classical tools for spotting abuse. A lot of these services are free, so there are no price signals going into the market. I used to work at Cisco and at Xerox; both big organisations with a big market share. We sold our products; they were not funded by advertising. It becomes harder for the authorities to judge the behaviours of a seller if there are no price signals going into the market. There are other costs, which are, shall we say, less observable. It means that the regulators need all the help that they can get: they need good people and they need new tools to protect the consumer. Ultimately, this is about protecting the consumer with lower prices and choice. Arguably, in some markets, there is not the choice.

The Chairman: Another legal issue is the parity clauses.

Q40 Lord German: Can I drill down into this a bit further? I am fascinated by this idea that you cannot touch things in the marketplace generically, to use Antony's word. However, there are examples of industries in particular sectors that are subject to price parity clauses. You cannot offer a hotel room unless it is at the price that the platforms can offer you. That is one example. How do you square the generic versus the specific where clearly a very major player, or players, is dominating the marketplace and not permitting businesses to operate a price system of their own for the remaining slots in the market?

The other two panellists have said several times that where there is abuse of power, dominance and scale, the authorities should act. But how do you draw the line? What is abuse?

Antony Walker: I am quite glad that I do not have to square the circle. It is the role of our competition authorities to do that. In the last year, the CMA has demonstrated its ability to do so in a number of instances. From the perspective of the industry and a business organisation, we fundamentally believe in the importance, power and significance of competition. Therefore, if real evidence is emerging of specific problems in a particular market, those problems may be apparent in a number of markets. I see no reason why our competition authorities do not have the tools to be able to address that.

I agree with Richard that there is a need to make sure that competition authorities are able to understand these markets and that transparency should be pursued by everyone; transparency is the best disinfectant in all these areas. However, I see nothing that merits an additional or new regulatory response to what is, in my words, generic, and that would apply to the concept of platforms. That is where I differentiate.

Matthew Fell: In saying whether there is an issue or not, I would link the two questions. I think a problem exists where you have a parity clause situation in which that is the only perceived channel to market. It is less of an issue if there is one of either a number of platforms or a number of different distribution channels. If a company chooses to sign up to a platform as one of a range of options available to it and is then bound by a parity clause, that is less problematic. If the only feasible channel to market is to sign up to a platform and then also to be required to sign up to a parity clause, that feels to me to be a more legitimate issue for a competition authority to look at. Again, I come back to the point about competition and would say that that, combined with a parity clause, is the most problematic combination.

Lord German: I presume you mean by that that a cartel could also operate on platforms to create these clauses.

Matthew Fell: The situation I was describing is that if any company feels that it has no legitimate choice and cannot feasibly go somewhere else to get its products or services to market, that is the issue. Does that legitimate choice exist?

Richard French: My only observation would be that often, not exclusively, these clauses arise in a contractual situation where there is an asymmetry of power; there is a very large organisation on the one hand and a very small organisation on the other—an entrepreneur, a creator, the owner of a B&B. It could be a games developer. Microsoft X-Box, by the way, is the classic parity clause case; small indie games developers, two or three guys, have a game that they have sold to Microsoft X-Box and Microsoft says, “You can’t offer it at a lower price anywhere else”. There is, as I say, the caveat “not always”, but in that situation there is an argument that the big organisation is just exploiting that asymmetry. It assumes that the games company does not have access to the legal skills and so forth to form a view, to mount an argument, even to read the contract to spot the point. I would hope that everyone in the room today would agree that the exploitation of that asymmetry of power is the wrong type of behaviour. I was a lawyer acting for Cisco and we had customers, including the Government I should say, asking us for a most favoured nation clause. In fact, that used to

be called an “English clause”, for those of you who are interested in this. The Government were not alone in asking us for these types of clauses. Of course we always took the view, “We’re ever so sorry, but we’re not going to agree to that. It’s just not worth doing that. We’re not going to go there at all”. We were a big organisation and we had lawyers who could spot these points and mount the argument, but the evidence is that these clauses are in situations where there is an asymmetry of negotiation power.

Q41 The Chairman: Thanks very much. Could I raise another issue that arises, which is not so much about competition than consumer protection in relation to data? Although there is not usually a price, there is the price of consumers providing data to the organisations, and it is not clear whether the legislation on how you collect and use the data is actually operating. Would you say that regulators should step in and specify higher standards in relation to data collection and use?

Richard French: We would, and we do, (speaking for Digital Catapult). In fact, this is an area where we are front and centre in trying to change minds and behaviour. There is no question in my mind that the new regulation that is coming is a great step forward, but just to build on that, the long-term costs to society and to the welfare of citizens in having organisations accumulate large quantities of data remain to be seen—the latent effects. If we were talking about product liability, we would be talking about a latent defect in a product. The watchwords for the data that is captured should be that it is “necessary” and “proportionate”, and that the organisation should be “accountable”. I think that the new regulation is true to those standards, but we remain concerned. In fact, our own report earlier this year, when we surveyed many thousands of people, showed that there is still a great deal of ignorance—I mean that in the genuine sense of the word: that there is a lack of understanding. The authorities, the Government, still have a lot to do to educate people, and there should be greater clarity and maybe even kitemarks—that type of idea—on websites and so forth that really give citizens a view as to the degrees of data that are being captured.

I have not even mentioned security. I know that the cyber threat is not before the Committee today, but the sheer concentration of data in a small number of hands is notable. We would not build liners to cross the ocean or aircraft unless we believed they were safe. I do not think that society understands this yet. We have not yet figured out the right level of safeness for the data that is being accumulated.

Matthew Fell: I will offer a couple of additional perspectives on that, if I may. One is that alongside those downside risks we should not underestimate the upside benefits that data offers us as well, whether it is the convenience and choice on offer to me as a consumer or making advances in health or in other sectors where data richness can really offer a benefit. So there is an upside benefit as well as a downside risk to managing data.

The other element I want to offer up is the importance of trust between businesses and consumers. That factor is more important than anything that regulation could specify, whatever level or threshold it takes you to. The biggest risk to businesses is if they lose the trust of consumers, and that increasingly is to do with how they look after your data. When that trust is gone, that is so damaging to businesses, much more so than any regulatory consequences, financial fine or something of that order. Companies really are well advised

to treat that data well and to look after it well. That, for me, will always keep it ahead of wherever regulation might take it or specify it.

Antony Walker: I would add that this is clearly one of the most important and significant questions of the digital world that we live in in terms of how the rules and obligations are placed on those who collect, store and process personal data, particularly sensitive personal data. It has been the subject of a very prolonged European legislative process. We are getting close to the culmination of that process—the Parliament, the Commission and Council are currently in trialogue, trying to finalise a draft regulation. For TechUK, the jury is still out on the net value and benefit of that regulation. It will depend on the outcome of those trialogue negotiations. Our view, broadly, is that the Member States have come to quite a positive and sensible view, but we are not as confident about the European Parliament’s position on the regulation. There is a lot yet to be seen in what will come out of it.

We could talk at length about the implications of the GDPR. I come back to the point I made earlier about the potential for unintended consequences. One of the requirements within the Parliament’s text is for a broad range of consents to be sought from the data subject almost every time any additional processing is done on their personal data—that is laudable, and I understand why you might assume it—but the consequence of doing so is that consumers could end up being completely inundated by requests for consent, particularly in an intensive type of environment. Potentially, that becomes really difficult to manage for the consumer and you end up with a real risk of two things: either consumers withdraw because they are overburdened by requests for consents and do not know what to do, so they do not give their consent; or they give meaningless consents and simply tick things away. We all tick that little box that says, “Are you aware of your cookies on this website?”. We all do it. From our view, meaningless consent is not a good place to be. We worry about that, and that is just one example.

The other point is unintended consequences, of course. Many services will be required to request consent from customers for whom they have no personal, contact, data. They will be required to collect and store even more data in order to subsequently go back to those people to ask for their consent. So you may have a situation where an unintended consequence of the regulation is the collection and storage of more personal data than is perhaps necessary. It is not a trade-off. We have to achieve the twin objectives of securing privacy and people’s fundamental rights while also ensuring that we have an environment that enables the continuation of the innovation that we all as citizens benefit from on a daily basis.

The Chairman: Thank you very much. We are virtually at the end. I have one final question, from Lord Green.

Q42 Lord Green of Hurstpierpoint: In a sense, this question responds to the last few minutes of discussion. I think everybody in the room agrees that it is important for the competition authorities to be vigilant and, where there are obvious, clear-cut cases of abuse of monopoly position or buying power, to act accordingly. I think we also broadly agree that this is happening in a fast-moving, rapidly changing environment, such as the digital world, and is difficult to do, the more so because there is an opacity about it, since many of the services are not charged for. All this makes use of the competition tool certainly necessary

but actually difficult. I think I deduced from the last few minutes of conversation, with its emphasis on trust and unintended consequences, a suspicion about whether any further regulation is a good idea. Therefore, my question is: am I right in deducing that sense? Would it really be your collective view that so long as competition authorities are competently staffed and agile in their vigilance, and leaving aside the fact that we are now largely done with data protection, there is not much more that we need to do? Or are there two or three obvious things that the Commission should be driving for in the regulatory domain?

Matthew Fell: From a CBI perspective, I would say yes, the right response is to ensure that the competition authorities are properly skilled and agile, and that stands a better chance of success than trying to regulate something that is inherently fast-moving and very innovative. I think that would be the better option.

Richard French: In my view, to address everything that you have outlined as necessary factors in a balancing exercise, the greater insight is into what is going on within these companies before the fact, rather than after the fact. A lot of competition investigations take years to complete. They start with an analysis of the economics. That takes a long time—not because the economists do not know what they are doing: it just takes a long time. For companies of a certain size, maybe part of the answer lies in their being more transparent operationally about what they are doing—I hesitate to say a different type of audit process, but some kind of behind-the-scenes inspection of what they are doing and why they are doing it. As I say, historically, there used to be pricing signals—refusal to deal—but that is not what is happening now, because they are largely ad funded. So I think that some kind of operational inspection as they go might be a consideration. We feel very strongly, regarding the welfare of the citizen, that there should be a welfare test, if I might put it like that. Ultimately, the accumulation of data should satisfy a welfare test. Organisations collect data for their own purposes, to improve their own products and services and to forecast the future, but what about the welfare of the citizen? I am taking that away from competition; that is a different area. It is about weighing up the welfare. It is enshrined to some degree in the current Data Protection Act 1998. In one of the Schedule 2 conditions, the legitimate interests of the data controller have to be balanced with the legitimate interests of the data subject. It is in that legislation. I am not answering your question directly; I am obliquely pointing at a solution that lies outside of competition—a different way of weighing up that balance.

Antony Walker: I would distinguish between the three things. Do we need new data protection law? Yes, I think we do. I think the existing law has been quite enduring but it is clearly somewhat outdated now. I think we are getting close to that. Very significantly, the legitimate interests test remains within the new regulation. We are nearly there, but we are not yet completely there. I wonder whether it will be an issue that we return to relatively quickly, because I think this will remain a very live issue for years ahead. I am not sure that the regulation will address every issue that needs to be addressed.

In terms of consumer protection, there are lots of issues where there is a need to update the legal framework and make sure that it is fit for purpose for the types of transaction and the way in which people operate on a daily basis.

In terms of competition, I am not sure that there is a need for any specific additional competition powers. I do not hear the UK competition regulator making an argument for additional new powers. I do think that they need the skills and resources, and they should be able to draw upon people who have a background and a career working within some of these companies. I fundamentally believe that transparency is incredibly important here, and the industry itself must continue to try to shed more light on how it addresses some of these issues on a daily basis.

The Chairman: Thank you all very much. Unless there is anything that you feel you have not covered that you want to mention, we will let you go now. If anything occurs to you subsequently, please let us know. We are about to have a session with the UK competition regulator, so we will see how he sees it from his side of the universe. Thank you very much indeed.