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The Rt Hon Baroness Stowell of Beeston MBE
Chair, Communications and Digital Committee
House of Lords
London
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13 September 2023

Dear Baroness Stowell,

Thank you for your letter dated 21 July 2023. We welcome the engagement of the Committee and share your desire to see a swift passage of the Digital Markets, Competition and Consumers Bill through Parliament.

As lead Ministers for the Bill, we are responding to your letter on behalf of the Secretary of State for Business and Trade. We have noted each of your points and would like to respond to each in turn:

1. Objectives and principles

We are grateful for the Committee's support for the Bill, which will establish new, faster, more effective tools to address the unique barriers to competition in digital markets.
The entrenched power of a small number of tech firms in key digital markets is weakening competition across the UK economy. While new technologies bring huge value to consumers and businesses, the specific features of digital markets mean that market power can quickly become entrenched.[1] This new regime will ensure that the DMU (an administrative unit of the CMA) is equipped to address both the causes and consequences of market power in these complex, dynamic markets.

[1] The CMA estimates (based on illustrative analysis) that Google and Apple made UK profits of over £4 billion in 2021 in their mobile businesses alone above the level that would be expected in a competitive market. The impact assessment published alongside the Bill goes into further detail regarding the extent of harm experienced by businesses and consumers as a result of these market features.

2. Judicial review

It is important that the regulator's decisions can be properly reviewed. The judicial review standard will allow the Competition Appeal Tribunal to consider the legality of the CMA's decisions, including whether it acted lawfully, applied proper reasoning, and followed due process, and in many cases whether the CMA's decision was proportionate. We continue to engage with stakeholders on this matter.

3. Countervailing benefits

The countervailing benefits exemption will be a safeguard to ensure that firms are not prevented from developing innovations which are beneficial to consumers. To engage the exemption, SMS firms will need to satisfy the DMU that there are net benefits to consumers from the conduct in question and that there is no better way to achieve those benefits.

4. The 'leveraging principle'

We are pleased that the Committee agrees that clause 20(3)(c) is a proportionate measure and that it should be retained in its current form. This type of conduct requirement functions as part of a broad toolkit with other types of conduct requirement (and with pro-competition interventions), that enables the DMU to address all forms of harmful leveraging in a targeted and proportionate way. As set out in your letter, we anticipate that the DMU will also provide guidance on how it will impose conduct requirements, including how it will address cases of leveraging.

5. Resourcing

We agree on the importance of a properly resourced competition regulator and we have full confidence in the DMU's resourcing model and wider CMA capability. The digital markets regime will be funded by the Treasury, with the majority of its cost recouped by a levy on firms designated with SMS. The value of the levy will be calculated by the CMA, based on the cost of delivering the regime.

There are currently around 70 people working in DMU roles, with more working on digital markets issues across the CMA. The CMA will continue to assess what level of staffing it will need to oversee and enforce the digital markets regime as part of its regular budget-setting process.

6. Speedy implementation

We agree that it is important for the DMU to hit the ground running as soon as possible. The government is working closely with the CMA to ensure the regime can be operational as soon as possible, so that the DMU can begin designation investigations soon after Royal Assent.

Before the regime is operational, the CMA will consult on guidance setting out how the DMU processes will work. This will ensure the regime works in practice for all stakeholders. All designation investigations will be subject to a nine-month statutory deadline; however the DMU may be able to conclude its investigations faster than nine months where it draws on existing evidence gathered in previous functions and market studies. It will be important that the DMU confirms that the evidence remains current and bases its decisions under the new regime on an up-to-date evidence base.

In the meantime, the CMA continues to use its existing tools to promote competition in digital markets. This includes last year’s market studies into music streaming and mobile ecosystems, and a number of antitrust and merger enforcement cases.

7. Accountability

The CMA will be empowered to make significant market interventions with respect to the firms in scope of the regime. We agree that this discretion needs to be matched with robust accountability – from initial decision making to appeals.

The regime will be overseen by the CMA’s Board, which is accountable to Parliament for all decisions made by the regulator. The CMA’s annual report, performance report and accounts are all laid before Parliament, and will include reporting on the operation of the digital markets regime. CMA officials also regularly provide evidence to parliamentary Select Committees.

The Business Secretary appoints the CMA Board and CMA Panel members, as well as providing the CMA with a strategic steer highlighting key areas of focus. As your letter notes, we have ensured the most important decisions under the regime are taken by a Committee or sub-Committee of the Board. Launching major investigations is reserved for the Board, ensuring the highest level of accountability and strategic oversight. A Committee of the Board will oversee the regime’s most significant interventions, such as on SMS designations, conduct requirements and pro-competition interventions. This will provide a balance of independence and expertise. As you know this is different from the independent panel system used for phase 2 merger inquiries and market investigations under the Enterprise Act 2002.

The transparency of DMU procedures and investigations ensures that the regulated businesses, stakeholders and Parliament have the information they need to hold the CMA to account. The DMU will be required to publish guidance on how it will take major decisions and will consult on this guidance before it is finalised. It will also publish statements and notices to inform stakeholders of case-specific developments throughout the delivery of the regime.

We welcome the continued interest of the Committee in the Bill and look forward to its support for the Bill during its Lords passage.

Yours ever,

Kevin

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