



HOUSE OF LORDS

The Rt Hon Baroness Stowell of Beeston MBE
Chair of the Communications and Digital Committee
House of Lords
London SW1A 0PW
Tel: 020 7219 2922
Email: holcommunications@parliament.uk

The Rt Hon Kemi Badenoch MP
Secretary of State for Business and Trade
Department for Business and Trade
Old Admiralty Building
Admiralty Place
London
SW1A 2DY

21 July 2023

Dear Secretary of State,

I write regarding the Digital Markets, Competition and Consumers Bill.

Background

This Committee has taken a keen interest in digital markets. We have regularly called for such a Bill to be introduced and have followed its development closely.

We took evidence on Parts 1 and 2 of the Bill. We heard from competition law experts, UK tech businesses and start-ups, consumer advocates, big tech firms,¹ the Competition and Markets Authority (CMA) and Ministers Kevin Hollinrake MP and Paul Scully MP.

Overall we conclude that the Bill's objectives are sound and its measures are broadly proportionate. Some further actions would be helpful, as we set out below, while other potential changes to the Bill should be resisted.

Timely implementation is key. The UK is already falling behind the EU in addressing digital competition challenges and the harm to UK businesses and consumers is mounting. We urge you to pursue a swift passage of the Bill through Parliament.

I. Objectives and principles

We were pleased to hear that Apple, Google, Amazon, Microsoft and Meta welcomed the intent behind the Bill, even if they did not agree with all its details.²

This Bill must not be seen as an exercise in 'bashing big tech'. Rather, it is about creating the conditions for optimal digital innovation and competition. This will help UK tech businesses thrive and ensure consumers benefit from more choice and lower prices. We agree with

¹ Google, Apple, Microsoft, Meta and Amazon

² [Q 19](#) (Chloe MacEwen, Tom Morrison-Bell, Kyle Andeer, Monica Ariño, Matt Foster)



HOUSE OF LORDS

Microsoft that the Bill is also “an important plank for the UK to achieve its ambition to be an AI, science and technology superpower.”³

We heard arguments that big tech firms are successful and face limited competition by virtue of their superior products and customer service, rather than because of faults in the digital ecosystem.⁴ We agree that digital regulation should not penalise successful businesses on the basis of size. But the analyses from the CMA and other experts provide compelling evidence that there is insufficient competition in digital markets, which leads to adverse outcomes for the UK economy.⁵ A range of organisations (of all sizes) provided us with evidence of how big tech market dominance has led to increased costs, barriers to entry, restricted innovation and product development, fewer opportunities and incentives to scale up, and poorer outcomes for consumers.⁶

The need for pro-competition legislation to improve digital competition is clear. The Bill’s objectives and principles are sound and provide a good basis for regulation.

2. Judicial review

The Bill provides for a judicial review process to challenge the regulator’s decisions. Big tech firms told us their priority was to see this changed to a full merits appeal. Others said such a change would fundamentally undermine the functioning of the legislation. We received evidence from a wide range of organisations who support the current judicial review standards, including Radiocentre, Epic Games, Match Group, and the Publishers Association.⁷ The News Media Association, Which?, Gener8, Kelkoo and Professor Damien Geradin were also united in their support of judicial review in our oral evidence sessions.⁸

The case for change

Kyle Andeer, Vice President of Products & Regulatory Law at Apple Legal, said the Bill granted “sweeping authority” to the regulator to create and enforce the rules without sufficient opportunity to challenge its decisions.⁹ Monica Ariño, Director of Public Policy at Amazon, said that a full merits appeal would provide a stronger check on the regulator given the potential for mistakes in a novel regime.¹⁰ We heard further arguments from Google

³ [Q 19](#)

⁴ [Q 2](#) (Dirk Auer)

⁵ HM Treasury (2019) [Unlocking digital competition, Report of the Digital Competition Expert Panel](#); CMA (2020) [Online platforms and digital advertising: Market study final report](#); John Penrose MP (2021) [Power to the people: independent report on competition policy](#); CMA (2022) [Mobile ecosystems: Market study final report](#)

⁶ [Q 2](#) (Corie Wright), [Q 10](#) (Richard Stables, Rocio Concha, Tom Fish)

⁷ Written evidence from Radiocentre ([DCC0009](#)), Epic Games ([DCC0012](#)), Match Group ([DCC0018](#)) and the Publishers Association ([DCC0019](#))

⁸ [Q 12](#) (Richard Stables), [Q 14](#) (Rocio Concha, Owen Meredith), [Q 15](#) (Tom Fish), [Q 31](#) (Professor Damien Geradin)

⁹ [Q 21](#)

¹⁰ [Q 21](#)



HOUSE OF LORDS

and Meta about the principles behind a merits appeal,¹¹ and the value of having a more comprehensive review of the evidence.¹² Microsoft said concerns about overly lengthy appeals processes were “not something that we recognise”.¹³ Other suggestions for changing the appeals process included imposing a time limit on proceedings, or introducing a hybrid version (so-called JR+).¹⁴

The case for maintaining judicial review standard

Against this, we heard that changing the judicial review standard to involve a full merits appeal would fundamentally undermine the viability of the whole regime.

Speed and regulatory capacity were among the key arguments. Many stakeholders said that, in order to keep up with fast-moving markets and deliver effective enforcement, the Digital Markets Unit (DMU) will need to move at pace and have sufficient resources to address priority issues. Professor Damien Geradin said that, in his experience, a legal challenge typically involved five years or more of litigation, by which time the complainant was either bankrupt or the market had moved on. He argued:

“there is a consensus among experts that time is of the essence. That is why judicial review is the right standard ... [whereas] allowing an appeal on the merits would mean losing more time. The CMA would have to devote significant resources to the appeal. It would be another way for big tech to delay things and force authorities to spend more money”.¹⁵

Richard Stables, CEO of Kelkoo, likewise argued that the judicial review standard is “a world-renowned standard and it is quick and it is fair”. He believed a full merits review would effectively mean contested issues had to be relitigated which “just delays everything”.¹⁶ Corie Wright of Epic Games noted that the regulator had better technical expertise than a court to evaluate the details of complex digital ecosystems, which suggests the judicial review standard would be more appropriate.¹⁷

Several witnesses argued the judicial review standard had demonstrated its robustness and value in comparable regulatory regimes.¹⁸ Rocio Concha of Which? argued that “judicial review is not a lightweight standard. It is a thorough standard and it is what we have at the moment for similar decisions that the CMA has to make”.¹⁹ Sarah Cardell, CEO of the

¹¹ [Q 21](#)

¹² [Q 21](#)

¹³ [Q 21-22](#)

¹⁴ [Q 21](#) (Monica Ariño). Judicial Review plus (JR+) might involve appeals about basic processes (for example the regulator’s approach to asking for information) being subject to the shorter Judicial Review approach. More significant decisions (such as issuing major fines) might involve the longer merits-based appeal. Some have proposed that the Government could introduce a time limit on JR+ appeals to answer concerns about lengthy processes.

¹⁵ [Q 31](#)

¹⁶ [Q 14](#)

¹⁷ [Q 3](#)

¹⁸ Written evidence from the Coalition for App Fairness ([DCC0004](#)), Epic Games ([DCC0012](#)), the News Media Association ([DCC0016](#)) and the Publishers Association ([DCC0019](#)); [Q 31](#) (Professor Damien Geradin), [Q 54](#) (Paul Scully MP)

¹⁹ [Q 14](#)



HOUSE OF LORDS

CMA, noted that the recent judicial review of the Giphy merger involved a judgment “more than 100 pages long ... More than 50 pages dealt with our analytical approach, the framework that we applied ... There is no sense to me that that does not provide a sufficiently robust frame of reference.”²⁰

It is not only a question of speed. We heard that the judicial review standard would incentivise firms to be forthcoming from the outset, whereas a full merits appeal would create incentives for firms to be adversarial in preparing for protracted litigation and contesting all available issues. Sarah Cardell noted that the CMA’s experience of Competition Act cases showed that full merits litigation took “an awful lot longer” because parties were “fighting every step of the way”:

“That is not to say that they should not be able to exercise their rights of defence and disagree with us. Of course they can, but it sets the system up in a fundamentally different way. If we are looking for a participative approach, and to have a model that seeks to maximise alignment and minimise conflict, then the judicial review model is much better suited”.²¹

Conclusion

The balance of evidence is clear that judicial review is the appropriate standard.

We are not persuaded by suggestions for a JR+ model, or a full merits appeal with time limits. This would still create perverse incentives which undermine the Bill’s aims for a collaborative and participative approach. And imposing time limits would significantly condense the time available for the regulator without reducing the workload: regulatory overburdening, poor quality work and unsatisfactory outcomes are likely to result.

The judicial review standard is appropriate and must be maintained. The Government should resist any move towards a full merits appeal, including a time-limited full merits appeal.

3. Countervailing benefits

We heard a range of views on the countervailing benefits exemption in clause 29. This provides a defence to a firm accused of breaching a Conduct Requirement²² if it can show its actions provide sufficient consumer benefit. The action must be shown to be “indispensable and proportionate” to the realisation of the benefits.²³

We heard concerns that the exemption could provide big tech firms with a loophole to avoid compliance by citing consumer benefits.²⁴ Google disagreed “quite firmly” with this

²⁰ [Q 43](#)

²¹ [Q 43](#)

²² Under the Bill, once a firm is designated as having Strategic Market Status in a specific digital activity, the CMA would have the power to impose Conduct Requirements on that firm in the form of obligations or restrictions.

²³ [Digital Markets, Competition and Consumers Bill](#), clause 29 [Bill 350 (2022-23)]

²⁴ [Q 12](#) (Rocio Concha), Open Markets Institute ([DC0013](#))



HOUSE OF LORDS

suggestion. Tom Morrison-Bell maintained that the test for the exemption was extremely high and was rarely met in comparable cases.²⁵

Some stakeholders argued that the exemption could allow big tech firms to “spam” the regulator by overwhelming officials with studies about consumer benefit.²⁶ However, the CMA expressed confidence that the threshold for using the exemption was proportionate and that it could handle the anticipated resource requirements.²⁷

We noted that the exemption is designed as a backstop rather than an initial enforcement measure: the CMA is expected to take consumer benefit into account throughout its work. Paul Scully MP told us there were various measures to ensure the CMA would not impose conduct requirements in the first place if the requirements would promote competition at the expense of innovation and consumer benefit.²⁸ We expect the CMA to set out in further guidance how it will prioritise consumer benefit throughout its implementation of the regime.

The countervailing benefits exemption provides a proportionate backstop as long as the threshold for using it remains high. The Government should resist any changes that would lower the threshold.

4. Leveraging principle

Tackling anti-competitive leveraging behaviour is a key part of the Bill. We heard concern that leveraging activity may not be fully addressed by clause 20(3)(c): firms with strategic market status (SMS) might still use their market power in a designated activity to entrench their position in a non-designated activity.

Owen Meredith of the News Media Association thought the bar was too high for appropriate regulatory intervention:

“the CMA should be able to act where a designated company’s activity in a non-designated area is related to a harm that is being caused in that area. As an example ... if Apple was designated for its App Store but was using contracts within Apple News to force unfair terms on publishers relating to how they use the App Store, the CMA needs to be able to address that concern.”²⁹

This issue deserves attention but we do not believe it fundamentally undermines the objectives of the regime. The Bill should remain proportionate and targeted; not all eventualities need to be addressed directly on the face of the Bill. We note there are additional measures elsewhere which may address these concerns.³⁰ The CMA argued that it

²⁵ [Q 25](#) (Tom Morrison-Bell)

²⁶ Written evidence from Professor Oles Andriychuk ([DCC0001](#))

²⁷ [Q 44](#)

²⁸ [Q 59](#)

²⁹ [Q 13](#)

³⁰ Supplementary written evidence from the Department for Science, Innovation and Technology. See also clause 20(3)(b) and (d) of the Bill.

would have sufficient powers to deal with leveraging activity and that it could detail in forthcoming guidance how it would deal with potential cases of concern.³¹

The leveraging principle is a proportionate measure and should be retained in its current form.

We recommend the CMA provides detailed guidance on how it will deal with leveraging in both SMS to non-SMS activity and vice versa.

5. Resourcing

There is significant inequality of resources between the CMA and SMS businesses.³² The CMA's funding increase to staff the DMU is welcome. Sarah Cardell was "confident" about the DMU's resourcing at the moment but noted there would be an "uphill battle" to secure relevant technical specialists over the long term given the level of competition to recruit for these roles.³³

The overall benefit to the UK economy from having a well-resourced competition regulator should not be underestimated. We recommend the Treasury keeps the DMU's resourcing under review.

6. Speedy implementation

The speed of implementation will be important given the pace of market developments. Some stakeholders have raised concerns that, while the CMA has conducted extensive prior work on digital markets, it may not be able to make use of this when designating SMS or imposing conduct requirements.³⁴ The Coalition for App Fairness raised concerns that the DMU "will face strong calls from the SMS firms to start with a blank piece of paper, despite the DMU operating in 'shadow form' for the past two years."³⁵ Some previous work may be out of date. Nevertheless we hope that, where appropriate, the CMA's extensive previous work can inform its SMS designations and decisions on appropriate regulatory intervention.

The UK has fallen behind other jurisdictions in tackling digital competition issues. The DMU needs to hit the ground running. It should be able to draw on its extensive existing work when the new regime comes into force.

7. Accountability

The CMA is receiving substantial new powers. Transparency and accountability will be key to maintaining public confidence in its work.

³¹ [Q 45](#)

³² [Q 53](#) (Kevin Hollinrake MP)

³³ [Q 44](#)

³⁴ Written evidence from DMG Media ([DCC0003](#)) the Coalition for App Fairness ([DCC004](#))

³⁵ Written evidence from the Coalition for App Fairness ([DCC004](#))



HOUSE OF LORDS

The courts can hold the CMA accountable for the legality of its decisions and processes. Parliament has a key role to play in holding the CMA accountable for its priorities and outcomes, and ensuring there is predictability and stability for stakeholders.

It will be important that the CMA communicates its priorities, work programmes and decisions regularly to external stakeholders and Parliament. This should include information about internal governance processes, where appropriate. Sarah Cardell, Chief Executive of the CMA noted that under the Bill:

“almost all the most significant decisions will be reserved either to the full board or to a board committee, and that board committee will comprise a majority of non-executive or panel members ... that will provide that broader scrutiny and those checks and balances within the CMA structure. Ultimately, the board as a whole is accountable for those critical decisions.”³⁶

Setting out these internal checks and balances clearly will help stakeholders have confidence that the CMA is tackling the right issues in an appropriate way.

The CMA will need to be proactive in ensuring that its new powers are accompanied by clear stakeholder communications and transparent accountability processes. We expect Parliament to play a key role in keeping the work of the CMA under review and holding its leadership to account.

I am copying this letter to the CMA leadership. I look forward to hearing from you.

Yours sincerely,

BARONESS STOWELL OF BEESTON

³⁶ [Q 40](#)



HOUSE OF LORDS

Annex I: declaration of interests

A full list of Members' interests can be found in the Register of Lords' Interests:

<https://members.parliament.uk/members/lords/interests/register-of-lords-interests>

Baroness Featherstone

No relevant interests declared

Lord Foster of Bath

No relevant interests declared

Baroness Fraser of Cragmaddie

Board Member of Creative Scotland

Lord Griffiths of Burry Port

No relevant interests declared

Lord Hall of Birkenhead

No relevant interests declared

Baroness Harding of Winscombe

Family member is a non-executive director of Ofcom

Baroness Healy of Primrose Hill

No relevant interests declared

Lord Kamall

Member of the advisory council of the Startup Coalition

Former member of techUK Brexit advisory committee

Former member of Coalition for a Digital Economy advisory board (also invited to re-join)

Non executive director at the Department for Business and Trade

The Lord Bishop of Leeds

No relevant interests declared

Lord Lipsey

No relevant interests declared

Baroness Stowell of Beeston (Chair)

No relevant interests declared

Baroness Wheatcroft

Chair, Appointments and Oversight Committee of the Financial Times



Lord Young of Norwood Green

No relevant interests declared