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PARLIAMENTARY DEBATES
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HOUSE OF LORDS

OFFICIAL REPORT

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The following abbreviations are used to show a Member's party affiliation:

Abbreviation	Party/Group
CB	Cross Bench
Con	Conservative
DUP	Democratic Unionist Party
GP	Green Party
Ind Lab	Independent Labour
Ind SD	Independent Social Democrat
Ind UU	Independent Ulster Unionist
Lab	Labour
Lab Co-op	Labour and Co-operative Party
LD	Liberal Democrat
Non-afl	Non-affiliated
PC	Plaid Cymru
UUP	Ulster Unionist Party

No party affiliation is given for Members serving the House in a formal capacity or for the Lords spiritual.

House of Lords

Monday 11 March 2024

2.30 pm

Prayers—read by the Lord Bishop of Leicester.

Introduction: Lord Petitgas

2.38 pm

Franck Robert Marie Petitgas, having been created Baron Petitgas, of Bosham in the County of West Sussex, was introduced and took the oath, supported by Lord Hill of Oareford and Lord Johnson of Lainston, and signed an undertaking to abide by the Code of Conduct.

Introduction: Lord Marks of Hale

2.43 pm

Stuart Adam Marks, CBE, having been created Baron Marks of Hale, of Hale in the County of Greater Manchester, was introduced and took the oath, supported by Lord Leigh of Hurley and Baroness Williams of Trafford, and signed an undertaking to abide by the Code of Conduct.

Death of a Member: Lord McAvoy

Announcement

2.48 pm

The Senior Deputy Speaker (Lord Gardiner of Kimble): My Lords, I regret to inform the House of the death of the noble Lord, Lord McAvoy, on Friday 8 March. On behalf of the House, I extend our condolences to the noble Lord's family and friends.

Prioritising Early Childhood: Academy of Medical Sciences Report

Question

2.48 pm

Asked by ***Lord Hunt of Kings Heath***

To ask His Majesty's Government what assessment they have made of the report of the Academy of Medical Sciences *Prioritising early childhood to promote the nation's health, wellbeing and prosperity*, published on 5 February, particularly regarding children under 5.

The Parliamentary Under-Secretary of State, Department of Health and Social Care (Lord Markham) (Con): The Government welcome the report. We have taken significant action to improve children's health in the early years. This includes reducing sugar in children's food, supporting healthy diets for families from lower-income households through schemes such as Healthy Start, and investing record amounts into children's and young people's mental health services and around £300 million in the family hubs and Start for Life programmes. We are also improving children's oral health through our dentistry recovery plan.

Lord Hunt of Kings Heath (Lab): My Lords, I pay tribute to my noble friend Lord McAvoy, who was an incredible parliamentary servant in both Houses over many years.

I thank the Minister, but he will be aware that we have a frightening number of people of working age who are not able to work because of long-term illness. The implication of the academy report is that we are storing up huge problems for the future. As one example, 20% of under-fives are obese or overweight. If the Government are so keen to take action, why have they postponed the implementation of their obesity strategy, which would start to take action against unhealthy food and encourage young people towards more exercise and a healthier lifestyle?

Lord Markham (Con): First, I add condolences from myself and this side of the House for Lord McAvoy.

Secondly, I am grateful for the direction of the report. I think that we all agree that early investment in childhood, and in young people, is vital. That is what our vision for the first 1,001 critical days is all about. A lot of the things in the report are helpful. I must admit that I did not recognise that particular stat, because rather than it being one in five children suffering from obesity at age five, the latest report—and it is an extensive study—shows that it is less than one in 10. It is the lowest number since 2006-07. So, in the area of obesity, we can show that our plans are working. I say again: we have the lowest level of obesity among reception age children since 2006-07.

Baroness Jenkin of Kennington (Con): My Lords, the Food, Diet and Obesity Select Committee, which is one of the new ad hoc committees, took evidence last week from specialists in childhood, early years, and school food. The situation is grave, as the noble Lord, Lord Hunt, said. Some 80% of the food that children eat is ultra-processed—we have no idea what the long-term consequences will be. May I encourage the Minister to look again at the figures and the ultra-processed foods that we are feeding children—the health consequences of which are not yet understood?

Lord Markham (Con): I assure my noble friend that the numbers are correct; they are the lowest since 2006-07. I can also assure her that free school meals are at their highest level ever, at 33%. The whole idea behind those programmes, as well as the Healthy Start in school and the five-a-day, is to give children healthy diets early on, exactly as my noble friend says.

Lord Allan of Hallam (LD): My Lords, I echo the condolences to Lord McAvoy's family from these Benches. I always enjoyed working with him in another place.

On the Question before us, the Government have rightly been bigging up the digital revolution in the NHS, but many of the basic building blocks are still not there. Does the Minister agree that it would be helpful for the health of infants for there to be a digital red book, rather than relying on parents carrying around a physical one? Can he give a timescale for when we will move on from endless pilots and aspirational announcements to this being widely available?

Lord Markham (Con): I totally agree. Funnily enough, I was talking to Minister Leadsom about this subject just this morning. It is complex, because all parents need proxy access so that they can get those digital records for their children automatically. It is something we are working towards. The Pharmacy First initiative, whereby you can write data from a pharmacist immediately into GP records, will help because it will give a road map to do that for children and babies from hospital. It is something we are working on, and I will give details of the timeline in writing.

Lord Patel (CB): My Lords, I declare an interest. I am a fellow of the Academy of Medical Sciences, which produced this seminal report addressing issues related to child health. I will pick up two points that the Minister might comment on. Although he is implementing what we already know from research works in improving children's health, we have no strategy for the implementation of good practice. My second point is about research into the early years. Diseases that people may develop later in life can occur as a result of epigenetic influences during the early years that alter the genome, yet research into childhood accounts for 5% of total government research funding.

Lord Markham (Con): I totally agree about the importance of research and data. We have spent about £580 million on research in the children and young persons' space since 2020. As per the earlier question, data is vital to this. I saw a fascinating example just a couple of weeks ago in the Cambridge Research Centre concerning young children. It is using data to construct what it calls "virtual children", to look at rare diseases, how they progress and different treatments that can be tried. It is truly revolutionary and something I totally support.

Lord Rooker (Lab): My Lords, I distinctly heard my noble friend Lord Hunt describe these children as obese and overweight. The Minister has addressed only obesity. You can be overweight without being obese, but it means you are on the way to obesity. That is the serious problem.

Lord Markham (Con): I think we all agree that it is a very serious problem, so I do not want to diminish that. I was trying to demonstrate that the steps we are taking—there is a lot to do in this space—are having an effect. Noble Lords have heard me say before that our reformulation efforts mean that everything from Mars Bars and Snickers to all sorts of other foods are having the sugar content taken out, so we can make sure they are healthier for people to enjoy.

Lord Bird (CB): My Lords, have the Government looked at the idea of bringing back something like Sure Start? I was involved in Sure Start, and I saw people breaking down poverty in their lives because of children coming in and mixing with other healthy children. It was wonderful. Can we look again at Sure Start?

Lord Markham (Con): One of the recommendations of the report is a cross-cutting approach of the kind the noble Lord mentioned to avoid silos. The family hubs we are investing in alongside the Department for Education are trying to do exactly that sort of thing to make sure the healthy start for life exists.

Baroness Merron (Lab): My Lords, these Benches will greatly miss my noble friend Lord McAvoy. I had the pleasure and education of serving with him as a Whip in the other place. May his memory be for a blessing.

The Academy of Medical Sciences report highlights the importance of continuity of maternity care, which can reduce the likelihood of pre-term birth by 24%. Given that premature babies are more likely to have complications that affect vision, hearing, movement, learning and behaviour, which will all impact later life, what steps are the Government taking to increase the number of women receiving dedicated midwifery support throughout their pregnancies?

Lord Markham (Con): I agree with the noble Baroness and my noble friend Lady Cumberlege about the importance of continuity of care in the maternity space. We are investing resources as part of the long-term workforce plan to increase the number of people trained in maternity and in this area generally. To give another example, we are investing in family nurses by increasing the number of training places by 74%, because it is understood that we need the workforce to provide all these services in an ever more complex world.

Lord Sterling of Plaistow (Con): My Lords, is not one of the problems that children today do not get anything like the exercise we used to do in the old days?

Lord Markham (Con): Wearing the tie I was awarded for being man of the match in the rugby against the Irish parliament this weekend, which we won, I totally agree about the importance of exercise in all walks of life. Social prescribing is vital. We are expanding the number of PE services available for children, because exercise is vital.

The Lord Bishop of Leicester: My Lords, there is strong evidence that in the early 2000s increases in child benefits led to an increase in the amount parents spent on fruit and vegetables and books and toys for their children. What assessment have the Government made of the impact of the two-child limit on benefits and, in particular, on the health and well-being of the 1.5 million children affected?

Lord Markham (Con): We recognise very much, as said in the report, the importance of poverty in all this. We have seen the number children in absolute poverty decrease by 400,000 since 2010, which is a significant reduction. The Chancellor's announcement last week showed the importance we place on child benefit in getting money to people to help. It is a very important area.

809 Naval Air Squadron

Question

2.59 pm

Asked by ***Lord West of Spithead***

To ask His Majesty's Government when they plan on 809 Naval Air Squadron being fully operational with a full complement of aircraft.

The Minister of State, Ministry of Defence (The Earl of Minto) (Con): My Lords, 809 Naval Air Squadron has been stood up as a joint Royal Navy and RAF front-line F35B Lightning squadron. The squadron's force growth, strength and capabilities will continue to increase throughout this and next year. This will enable the first operational deployment of the squadron as planned as part of the carrier strike group 2025 air group.

Lord West of Spithead (Lab): My Lords, it is absolutely extraordinary in this highly volatile and dangerous world, as recognised by a number of senior people in government, that there was no extra money for defence in the Budget. It is very difficult to understand. Symptomatic of that blindness to defence spending is the length of time that it has taken to build up the air groups for carrier strike, which are well behind time. It illustrates a peacetime mindset but, I am afraid, we are now in a world where one cannot have a peacetime mindset. The disgraceful issue over pilot training and the slow rate of delivery of airframes could have been overcome if we had approached it in the right way. I think the Minister understands the shortage of cash for defence, although he cannot say much sitting on the Front Bench. Can he confirm that, when 809 and 617 deploy under the deployment plan in 2025—it was announced by the Prime Minister and the Secretary of State for Defence in Japan—there will be 12 aircraft from each squadron on board the ship?

The Earl of Minto (Con): My Lords, the noble Lord makes a very good point about additional funds for defence; I think we are all in the same area on this. The problem is that resources are finite. There are strong arguments in all sorts of different directions. The Prime Minister has given a clear indication to reach 2.5%; it looks as though this year will end up at about 2.3%. As far as the two squadrons are concerned, the answer is yes: there will be up to 12 aircraft in each squadron by the time the carrier force is ready to go.

Lord Soames of Fletching (Con): My Lords, will my noble friend confirm that there will be, and is, a pipeline of training sufficient for the pilots of both the Royal Air Force and the Fleet Air Arm to cover these mythical beasts?

The Earl of Minto (Con): My Lords, the training programme is in line with the build-up of aircraft. While it is not an easy thing to get right, the aircraft will certainly be capable of being manned.

Lord Lee of Trafford (LD): My Lords, in 2022 the then Defence Secretary, Ben Wallace, told the International Relations and Defence Select Committee that the RAF training programme was "lacking" and

"not in the place I would like it to be".

Apparently, at that stage we had only 30 British pilots who could fly the F35s. Has the situation improved? How many pilots have we got at present who can fly the F35s? Can he also please tell us what aircraft are currently deployed in the Falklands?

The Earl of Minto (Con): My Lords, on the number of pilots going through training, as I have said, the Lightning Force continues to grow its pilot numbers and graduate additional pilots in the operational conversion unit in line with the planned force growth. The pilots are in training. I will write to the noble Lord and let him know exactly how many pilots we have available at the moment. His second question was about the Falklands. My understanding is that there are four Typhoon FGR4s based in the Falklands and a Voyager tanker based at Mount Pleasant in the South Atlantic.

Lord Trefgarne (Con): My Lords, can my noble friend confirm that naval forces are being deployed urgently to the eastern Mediterranean to protect the cargo ships taking the urgently needed food supplies from Cyprus to Gaza?

The Earl of Minto (Con): My Lords, I understand that this is the case. Sometimes I think we forget just how incredibly amenable and spread our forces are. We have 22 ships and submarines on order or under construction. The Army is globally deployed across 67 countries, with 14,000 troops on exercises and operations throughout Europe. We certainly fulfil all our role as part of NATO and in the safety of security of this country. We also involve ourselves in issues such as combating the Houthi rebels and the other issues we are facing around the world.

Lord Reid of Cardowan (Lab): My Lords, could the Minister have another try at answering the question from my noble friend Lord West? He asked if the Minister could confirm that both squadrons will have 12 aircraft. If I heard the Minister correctly, he said that there would be "up to" 12, which of course could mean two. Could he give a straight answer to my noble friend?

The Earl of Minto (Con): The noble Lord is quite right; I did say up to 12. The whole point of this is that the forces we have need to be flexible and interchangeable. By the end of 2025, we will have two squadrons in full operation. We will have 48 aircraft by the end of 2025, and I am assured that there will be up to 12 aircraft in each squadron which are capable at any one time. I am absolutely certain that there will be a lot more than two in each.

Lord Empey (UUP): My Lords, is my noble friend happy that we have chosen a situation where there is only one aircraft in the world that can fly off our carriers? It is a very expensive aircraft which is in short

[Lord Empey]
supply. Is it not inevitable that we will have to modify these aircraft carriers so that they can fly off catapult-launched aircraft?

The Earl of Minto (Con): My Lords, the noble Lord has greater knowledge than I have in this area. As far as the Lightning is concerned, we are fully committed to the 138, as we originally set out. We will have 48 by the end of 2025 and another 27 by the early 2030s. As far as flexibility on the aircraft is concerned, I shall have to find out the full detail and write.

Baroness Anderson of Stoke-on-Trent (Lab): I remind the House of my registered interests, specifically my roles with the Royal Navy. Last year, the Defence Select Committee in the other place highlighted that the proposed cuts to the F35B and Typhoon fleets, as outlined in the defence Command Paper, would significantly undermine our ability to exert combat mass in conflict. What risk analysis has the MoD undertaken to assess the value of high-capability platforms versus airframe mass in peer-to-peer conflict? Where is the balance between sovereign capability and sovereign mass?

The Earl of Minto (Con): My Lords, the noble Baroness asked a very detailed question. The key is that, as the threat changes, we need to change the capability to meet it. We work on very long lead times. All these aircraft are extremely complicated and need to be adjusted to meet the particular threat as it comes through. Through the relationship with Lockheed Martin and the Joint Program Office, we are trying to understand what the delay on some of the deliveries is. However, we do not currently anticipate a shortfall in the ability to build the UK Lightning Force to full operational capability by the end of 2025.

Earl Attlee (Con): My Lords, what is the point of having all the platforms that my noble friend the Minister referred to if we cannot improve the terms and conditions of service for the ratings, to retain them so that they can man the platforms?

The Earl of Minto (Con): My noble friend makes a very good point. I think we addressed this last week or the week before. An enormous amount of work is being undertaken on the question of recruitment and, particularly, retention, to ensure that the terms and conditions of employment within His Majesty's Armed Forces are fit for purpose.

Operation Conifer

Question

3.09 pm

Asked by ***Lord Lexden***

To ask His Majesty's Government whether they plan to appoint a senior lawyer to review the seven allegations against Sir Edward Heath left unresolved at the end of Operation Conifer in 2017.

The Parliamentary Under-Secretary of State, Home Office (Lord Sharpe of Epsom) (Con): My Lords, the Government have no plans to appoint a senior lawyer to review the outstanding allegations against Sir Edward Heath. It remains for the local police and crime commissioner to consider whether an inquiry, or any other form of further review, is necessary.

Lord Lexden (Con): My Lords, I am accustomed to disappointing replies, but I had hoped for something a little more positive on this occasion. I remind the House of the wide cross-party support that has been expressed on numerous occasions for action to address the grave harm done to the reputation of Sir Edward Heath by the failure of the police investigation in Wiltshire to clear up all the foul allegations made against him long after his death. Is it not important to remember that four of the seven unresolved allegations to which my Question refers could not possibly be true, as I made clear in a debate in January? There is good reason to suppose that the other allegations are also groundless, which is why a limited review of these seven unresolved allegations is imperative.

Lord Sharpe of Epsom (Con): My Lords, in October 2018, the then Home Secretary, Sir Sajid Javid, wrote to Lord Armstrong following a meeting with him and other Peers to discuss Operation Conifer and related matters. In that correspondence, the then Home Secretary wrote:

"As I think you would agree, the real issue here is not so much Operation Conifer itself, but the inconclusive nature of its findings and what you describe as 'the cloud of suspicion that … continues to hang over Sir Edward Heath's memory and reputation' … it is not clear to what extent a further review of the existing evidence by a judge or retired prosecutor would resolve this. It remains my view that the handling of this is properly a matter for the local PCC and that it would not be appropriate for me to seek to persuade him how he should go about it".

That largely remains the case, and the current Home Secretary wrote in answer to a Parliamentary Question on 7 February that

"the Government has no plans to commission a review of either the conduct of the investigation … or the findings".

We are aware of no direct precedent for the type of review that my noble friend calls for. However, I am happy to ask officials to look into this to see whether it is either possible or viable, and I will report back in due course.

The Senior Deputy Speaker (Lord Gardiner of Kimble): My Lords, the noble Lord, Lord Campbell-Savours, is taking part remotely. I invite him to speak.

Lord Campbell-Savours (Lab) [V]: My Lords, why perpetuate the existence of these allegations by refusing to establish the independent review we have all called for for years? No one has ever produced a shred of evidence. The allegations are based on the early ranting of Carl Beech, a proven liar now languishing in prison. What possible benefit is to be gained by leaving on the table accusations that tarnish the reputation of a former British Prime Minister, over which historians will argue? I simply cannot understand the Government's hesitation, and neither can anybody else I speak to.

Lord Sharpe of Epsom (Con): The noble Lord obviously makes a good point, and I have just committed that we will certainly look into this. But, as he will be aware, there were a number of forms of scrutiny during the investigation. There was an independent scrutiny panel

to ensure proportionality. There were two reviews by Operation Hydrant, in September 2016 and May 2017, which concluded that the investigation was proportionate, legitimate and in accordance with national guidance. There was a review in January 2017 by HMICFRS, as it was then, into whether the resources assigned to the investigation by the Home Office were being deployed in accordance with value for money principles. In November 2017, the PCC referred two matters concerning the then chief constable to the IOPC. This has been extensively looked at by external and independent bodies already, but we will, as I say, look into the possibility or viability of other reviews.

Lord Birt (CB): My Lords, for decades, Edward Heath was guarded day and night by police and supported by domestic staff. As a young television producer, I met him many times. Indeed, I made a one-hour documentary about him while he was Prime Minister, spending a lot of time in his presence and talking widely, during the course of the making of this, to many people who knew him well. I find it hard to believe—indeed, I think it is impossible—that Edward Heath was a practising paedophile, and it is deeply unjust that a shadow of suspicion should be allowed to hang over him unresolved. We have a dreadful record in this country—a long list in recent times—of wrongs that have not been righted. Please can we put this wrong right?

Lord Sharpe of Epsom (Con): My Lords, I reiterate that the investigation summary closure report stressed that no inference of guilt should be drawn from the conclusion that Sir Edward would have been interviewed in a very few cases. I shall not go further to comment on the operational nature of the original investigation.

Lord Sherbourne of Didsbury (Con): My Lords, is not there a puzzle here, in that the Home Secretary, James Cleverly, is a decent and fair man? Surely he understands that it is unacceptable that a former Prime Minister, a man of great integrity, should still have these unsubstantiated allegations circulating around him, which could besmirch his reputation. Does my noble friend the Minister not agree? If he could come to this House to say that the Home Secretary is taking action on this point, it would command great support across all parts of the House.

Lord Sharpe of Epsom (Con): Well, as I have said, and I say again to my noble friend, I have heard the strength of feeling in the House on a number of occasions, which is why I asked the Home Secretary to review the *Hansard* of our recent debate in some detail. He replied to that debate on 7 February, and I really cannot improve on what he said.

Lord Dholakia (LD): My Lords, the noble Lord, Lord Lexden, is right to be disappointed with the reply that he received from the Minister. No police service has a right to review its own special operation. In this country, we have what we commonly call the police conduct authority. Would the Minister recommend to the authority that it looks at the results of the Conifer investigation to see whether the decision that it reached was legal, honest, decent and true?

Lord Sharpe of Epsom (Con): My Lords, I remind the noble Lord that I have just gone through the various forms of independent scrutiny to which this investigation was subject in some detail, and I shall not refer to it again. As I say, the IOPC and others have looked into this in some detail.

Lord Bach (Lab): My Lords, is the Minister aware that, at the end of his response to the noble Lord, Lord Lexden, he seemed to throw out just a little bit of encouraging information. I welcome that, and hope that the Minister goes back, recognising the very widespread feeling around this House that justice has not been done to the reputation of a Prime Minister who has been unfairly treated, right up to this time. It is important that justice is done soon, rather than the issue hanging on for year after year of non-action.

Lord Sharpe of Epsom (Con): I can only repeat that I have said that I shall ask officials to look into the possibility or viability of this—I cannot possibly prejudge what they may come back to me with, but I shall come back to the House in due course.

Lord Butler of Brockwell (CB): My Lords, I hope that the noble Lord, Lord Lexden, and the House take a little encouragement from what the Minister said today. When the noble Lord, Lord Lexden, had his last debate, I entered the debate thinking that it was not worth having the expense of a public inquiry into reports that nobody believed, and I was persuaded by the debate that we could not leave this injustice on the table. This suggestion seems to me to be an economical way of disposing of it—a report by a distinguished lawyer. Could the Minister please encourage the Home Secretary to look very carefully at that and allow it to happen?

Lord Sharpe of Epsom (Con): I cannot honestly say whether it would be economic or not, for obvious reasons—I do not know yet. But I shall certainly make the strength of feeling known once again to the Home Secretary.

Lord Hunt of Wirral (Con): I recognise now that my noble friend the Minister is aware that the mood and will of this House is very much behind my noble friend Lord Lexden and his call for justice. Whatever his briefings may say, there really has been no independent investigation of the flawed processes of Operation Conifer. As the noble Lord, Lord Butler of Brockwell, has just said, perhaps there is at last an opportunity. Please would my noble friend the Minister take every advantage of this opportunity and put right the injustice that we all feel so deeply has been done?

Lord Sharpe of Epsom (Con): Well, once again I hear what my noble friend says, and I shall certainly do my best to represent the views that have been very firmly expressed in the House by taking them back to the Home Secretary and the Home Office.

Lord Watts (Lab): My Lords, is it not the case that this is not a unique case? The problem is that names are released before people are charged. Is it not about time that we looked at that as an issue, not just for this case but for many others?

Lord Sharpe of Epsom (Con): The noble Lord raises a very interesting point and, again, I will take that back.

Regulator of Community Interest Companies

Question

3.19 pm

Asked by ***Lord Harris of Haringey***

To ask His Majesty's Government what assessment they have made of the adequacy of the powers and resources of the Regulator of Community Interest Companies.

Lord Harris of Haringey (Lab): My Lords, in begging leave to ask the Question standing in my name on the Order Paper, I refer to my interests in the register as chair of the Fundraising Regulator, which oversees charitable fundraising.

The Minister of State, Department for Business and Trade (Lord Johnson of Lainston) (Con): The regulator is funded on a cost-recovery basis from fees and has significant powers, including the ability to investigate and dismiss directors. Community interest companies have been an enormous success since their introduction almost 20 years ago. There are now around 31,000 CICs delivering substantial benefits to communities throughout the UK. My department maintains ongoing dialogue with the regulator to ensure that this growing market continues to have the appropriate oversight applied.

Lord Harris of Haringey (Lab): The very phrase "community interest company" generates a warm feeling among the public. It makes the organisations concerned sound like charities. But charities are subject to charity law and to regulation, in particular about how they fundraise or raise money on the street; they require licences and are obliged to follow a code of conduct. Why does the Minister think that there are organisations that decide they do not wish to register as charities but as community interest companies? Why are they trying to avoid that sort of regulation to protect the public? If he wants an example, perhaps he should look at the Inside Success Union, which has ignored a whole series of complaints against it. Why does the Minister think that is adequate?

Lord Johnson of Lainston (Con): I congratulate the noble Lord, Lord Harris of Haringey, if I may, on his work to oversee the Fundraising Regulator. The comments he has made and recent example that he has just given are things that we take very seriously. I have communicated with the registrar at Companies House today and she is also ensuring that she is available for further inquiries relating to this particular situation. However, without giving too long an answer, community interest companies are a fabulous idea. They allow social entrepreneurs to take up opportunities in their community, to distribute dividends back into the company and to incentivise people to invest in social benefit. Communities across the country have benefited from these fabulous concepts, and we want to do more. They have been growing in number every year—we now have just over 30,000; I think that they have doubled in the past four years—and, frankly, this Government will do everything we can to see them continue and flourish.

Lord Razzall (LD): My Lords, first, to follow on from the noble Lord's question, bearing in mind that this has been going on—as the Minister indicates—for over 20 years, does the Minister not think that it might now be time to update the community interest test with clearer guidelines, which might meet some of the points that the noble Lord, Lord Harris, has made? Secondly, does the Minister not think that this might be an opportunity to increase the annual turnover test to encourage small companies to become CICs and to register accordingly?

Lord Johnson of Lainston (Con): I am grateful to the noble Lord for his input in this important area. These principles absolutely need to be kept under review. I have looked into this myself in great detail; only 38 complaints were made last year about these entities, which, considering there are 31,000, is not a significant amount. I do not believe that any CIC has been struck off the company register. We have updated the procedures around Companies House—director verification, statements of accounts, and so on—which will also apply to CICs. I am therefore very hopeful that we will see continuing reforms. I refer back to my original comment about the work that the noble Lord, Lord Harris, is doing to regulate fundraising. That is a separate point that is not necessarily related to company law, and we fully support his efforts in trying to make sure that it is properly regulated and ordered.

Lord Leong (Lab): My Lords, as the Minister said, there are 31,000 CICs in the UK. They deliver significant benefits to communities across sectors including the environment, education, health and sports. However, the number of CICs being dissolved is increasing year on year, reaching an alarming 3,100 last year. What assessment have the Government made of whether dissolutions are the result of fraudulent activities, potentially putting community assets at risk?

Lord Johnson of Lainston (Con): I thank the noble Lord, Lord Leong, for that point. This is not an assessment that the Government have undertaken; it is the responsibility of Companies House. With more data now available following our reforms, the registrar will be able to undertake this research. I would say, however, that this is a sector where there will be relatively high turnover. A lot of these are social businesses with very limited amounts of capital; some are experimental and it is absolutely right that they behave like companies, with the element of success or failure. Ultimately, the number of CICs is growing every year, in significant compensation for those that are being dissolved, and we are very pleased to see that.

Baroness Bennett of Manor Castle (GP): My Lords, the rules allow for 35% of a CIC's distributable profits in one year to be paid out in private dividends. What figures do the Government have on the average amount across the sector that is being paid out in dividends, and how is that monitored?

Lord Johnson of Lainston (Con): The noble Baroness asks a good question. This is information I requested today, ahead of this Question, but have not yet received, so I will be delighted to provide that to her and other noble Lords. I am also interested in looking at some of the CICs which have become multimillion-dollar enterprises. This is not just a café or a local book-lending club, although those are to be lauded; they are significant community health businesses providing enormous value to the local community and to patients, and sometimes doing things differently and innovatively. This is charity entrepreneurship of the sort that this Government support.

Lord Harris of Haringey (Lab): My Lords, I hesitate to prolong this, but the Inside Success Union is not the only example of a community interest company that has decided that it does not wish to be subject to regulation, in particular concerning raising money directly from the public. The Minister talked about the relatively small number of complaints received by the regulator. Is he aware that the regulator prides herself, in her last annual report, on the fact that she did not open any investigations into the complaints received? Surely we would expect a regulator to take those responsibilities more seriously.

Lord Johnson of Lainston (Con): I am not delighted to hear that phrased in that way, but the noble Lord is right to suggest that these complaints should be properly investigated. I have received reassurance today personally from the registrar, Louise Smyth, who I believe does an extremely good job running Companies House, that any allegations around the behaviour of CICs in relation to their relationship with Companies House will be thoroughly investigated. It is important that we do not confuse this with their work in terms of fundraising, which the noble Lord has done an extremely good job of investigating. Of course, the Government support having a well-regulated fundraising sector so that all charities can operate effectively and the public can have trust in the philanthropic sector.

Lord Naseby (Con): I thank my noble friend and the Government for the support they have given to the whole mutual movement and the support they are giving now to these community groups. There is a move in the country, and any of us who live outside London know that there is considerable interest in this sort of newish structure. Certainly, on behalf of those in Bedfordshire and Northamptonshire, I say a huge thank you to His Majesty's Government.

Lord Johnson of Lainston (Con): I am extremely grateful to the noble Lord for his comments. As he well knows, I support the mutual movement wholeheartedly. It actually goes hand-in-hand with CICs, and this Government are doing all we can to get more money into the philanthropic sector. My own office, the Office for Investment, working with my new noble friend Lord Petitgas, has been working very hard internationally to get more donors into the UK. I also congratulate the chairman of the Charity Commission, Orlando Fraser, who has been doing an excellent job in ensuring that our charity sector is seen as a beacon around the world.

Lord Berkeley (Lab): My Lords, I declare an interest as a board member of a CIC. We were trying to buy a village shop in Cornwall which was about to close down and we found the regulations and the structure very easy to operate and it worked very well. But there are an awful lot of other pubs and shops in Cornwall and other places that are on the brink of financial failure at the moment and it is very important that CICs exist to help them. At the same time, when you are doing this with not very much money, my noble friend's Question about regulation is also very important. We need the comfort to know that the regulator is doing its job properly if this is really going to work, as it needs to.

Lord Johnson of Lainston (Con): I thank the noble Lord for those comments. Of course, I wholeheartedly agree that it is very important that CICs have the confidence of the public. People are going to invest in them and they are expected to operate at the highest possible level of probity and integrity. That does not mean to say that all of them will be a success, but the principles of combining philanthropy with private enterprise, with the outcomes that that has achieved in a very easy to operate and low-cost format, seems to have been enormously successful. It is something that we want to continue, but I am very aware of the comments made to me today and I will make sure that they are passed on to the relevant authorities.

Lord Vaizey of Didcot (Con): My Lords, my noble friend the Minister mentioned the importance of philanthropy. Echoing the spirit of these questions, I congratulate him wholeheartedly on a recent advertisement I spotted inviting appointments to an office of philanthropy for inward investment. It is a very perceptive move for the Government to have a strategy to contact foundations around the world to encourage them to invest in the UK's cutting-edge science, for which we are justly world renowned.

Lord Johnson of Lainston (Con): My noble friend, as always, says wise words in a passionate manner and I congratulate him on them. I appreciate the salience of raising the Office for Investment's philanthropic division in this House. It is important that we are able to project the extraordinary opportunities for venture philanthropists in the United Kingdom and I call on Members on all sides of the House to assist me in projecting our incredible philanthropy opportunities to the rest of the world.

Digital Markets, Competition and Consumers Bill

Report (1st Day)

3.31 pm

Relevant documents: 3rd and 13th Reports from the Delegated Powers Committee. Northern Ireland Legislative Consent sought

Clause 6: Position of strategic significance

Amendment 1

Moved by ***Viscount Camrose***

1: Clause 6, page 4, line 3, leave out subsections (2) and (3)

Member's explanatory statement

This amendment would remove the power for the Secretary of State to amend the conditions in subsection (1) by statutory instrument.

The Parliamentary Under-Secretary of State, Department for Science, Innovation and Technology (Viscount Camrose) (Con): My Lords, I am delighted that we have made it to Report and look forward to today's debate. Before we get under way, I express my sincere thanks to all noble Lords who took part in Committee and to those with whom I have had the pleasure of discussing a number of issues that have arisen since then. I am extremely grateful for the constructive, collaborative nature of those discussions. It is clear to me that the broad support for this Bill across the House and the desire to see it pass swiftly remain undiminished, which is great to see.

The Government have tabled a number of amendments to improve the clarity and accountability of the regime. I turn first to the amendment to the Henry VIII power in Clause 6. This clause would originally have given the Secretary of State the power to amend by regulations the position of strategic significance conditions in the Bill, to allow them to be updated to account for future changes to digital markets. The Government recognise that Henry VIII powers should be used only where absolutely necessary. I noted the strength of feeling on this issue in Committee and the concerns that the power could be used to introduce broad changes to the framework of the regime. The DPRRC also noted this point in its report on the Bill, for which my noble friend Lord Offord and I were very grateful. Reflecting that strategic significance criteria have been designed to be suitably broad and technology agnostic, we are content to remove this power. Amendment 1 will do that, so I hope that noble Lords will support it.

Amendment 42 ensures that non-commercial organisations acting in a non-commercial capacity will be subject to fines with the same fixed statutory maximum amounts and/or maximum daily amounts as individuals. We expect it to be extremely rare that the CMA would ever need to fine these organisations, but the Bill should provide for all circumstances. These organisations could be subject to financial penalties for investigative breaches—for example, providing false or misleading information to the CMA.

Amendment 40 clarifies that all individuals—including, for example, sole proprietors—will be subject to penalties with fixed statutory maximum amounts and/or maximum daily amounts. Amendment 41 removes a superfluous subsection in the same clause. I hope noble Lords will support these amendments.

Amendment 48 will ensure that private actions relating to the digital markets regime can be transferred between the Competition Appeal Tribunal and the relevant court. This will reflect current practice for competition cases. Effective co-operation and information sharing between regulators is vital to ensuring efficient and coherent interventions under the digital markets regime.

Amendments 160 and 161, under the Wireless Telegraphy Act 2006 and the Postal Services Act 2011 respectively, will allow Ofcom to share information it holds with the CMA where it is necessary for the CMA to discharge its digital markets functions. Ofcom is likely to hold relevant information under these Acts that would be valuable to support work relating to, for example, mobile ecosystems and e-commerce. The amendments will also help prevent unnecessary and duplicative information requests by the CMA. The Government have also put forward Amendments 50, 53 and 159 to improve the Bill's clarity.

Amendment 58 will ensure that the existing provision in Clause 116—which prevents information the CMA holds as part of an investigation being subject to a disclosure order—cannot be circumvented by instead seeking disclosure from another party that holds the same information.

I hope that, for the reasons I have set out, noble Lords will support the government amendments. I beg to move.

Lord Faulks (Non-Afl): My Lords, Amendments 13 and 35 are in my name and those of the noble Baronesses, Lady Stowell and Lady Jones of Whitchurch, and the noble Lord, Lord Clement-Jones.

The Bill has been welcomed across the House and it represents a crucial step forward in regulating the digital market. I pay tribute to the level of engagement that has taken place with Ministers and officials. We have had some excellent and well-informed debates in Grand Committee. However, good though this Bill is, it is capable of improvement. I refer to my interests in the register. I am not a competition lawyer, but I do have experience of judicial review and of the operation of the Human Rights Act. I was also chair of the Independent Review of Administrative Law, which reported a few years ago.

My Amendment 13 is concerned with the use in the Bill of the word "proportionate". Despite some heavy lobbying of the Government by big tech, the right to appeal against an intervention by the CMA will engage the judicial review test, rather than a merits test, except as to penalty. Later amendments will probe the appeal test further.

The original adjective in the Bill was "appropriate". The word "proportionate" replaced it at a late stage of the Bill's progress through the Commons. Why? I am afraid I have yet to receive a satisfactory answer. In Grand Committee, the noble Lord, Lord Lansley, referred to a letter from the Minister about the change. However, it did nothing to allay concerns that the change was a response to lobbying by big tech.

According to one view, it is an innocuous change; indeed, one would expect an intervention to be proportionate. The word also has a reasonable legal pedigree: for example, you can defend yourself against attack providing your response is proportionate to the attack. Whether your response is proportionate will be a question of fact, or for a jury to decide.

Judicial review, however, is not primarily concerned with the facts of a decision but with the process whereby the decision is made. Classically, the courts got involved only if a decision was so unreasonable that no reasonable public body could have reached it.

The scope of judicial review has expanded to include challenges based on, for example, irrationality or failure to take into account relevant considerations. There are other grounds, but all are concerned with how the decision is reached rather than whether the court agrees with the factual findings.

Since the enactment of the Human Rights Act, the concept of proportionality has entered the law in relation to judicial review, but only in limited circumstances. I will quote the most recent addition of *De Smith's Judicial Review*, as I did in Committee, which is generally regarded as the leading textbook in this area:

> "Domestic courts are required to review the proportionality of decisions and enactments in two main categories of case: cases involving prima facie infringements of Convention rights and cases involving EU law".

There are those who think that proportionality should be the test in all cases of judicial review, but that is not the law.

I cannot immediately see why an appeal in the context of the Bill should involve a convention right, but they have a habit of appearing in all sorts of places. If convention rights are engaged, proportionality comes into the analysis anyway. I understand that the Government consider that an appeal may well involve A1P1—Article 1 of the first protocol of the ECHR—which is concerned with the arbitrary inference with property rights.

To speak of human rights in the context of enormous companies such as Google, Apple or Meta is certainly counterintuitive; I do not think that that is what the framers of the European convention had in mind after the Second World War. Last week, Apple was fined €1.8 billion under the European Union's regulation on market abuse, and there is an appeal. That perhaps gives us an idea of the context of human rights in this area.

If—and this is a big "if"—the courts consider that the convention is engaged, there will be considerations of proportionality. Amendment 35, which I believe is consequential to Amendment 13, raises precisely the same point in a further context. In choosing to put the word "proportionality" into the legislation, a court might well conclude that Parliament had deliberately used the word to widen the scope of judicial review challenge, even when no convention right is engaged. For my part, that is a risk that I do not think should be taken. Your Lordships' House is well aware of the expensive and time-consuming nature of appeals, which of course favour larger organisations with a large legal spend. The noble Lord, Lord Vaizey, spoke at Second Reading of long and expensive battles and death by lever arch files—although he did not quite put it that way. Large companies have the resources.

A proportionality test is far closer to an appeal on the facts than one based on conventional judicial review principles. The issue as to whether an intervention is proportionate or not gives the court much greater scope for looking at those facts at greater length and greater expense and with a more uncertain outcome. I would therefore much prefer to revert to the word "appropriate", as was originally in the Bill, which does not carry the same legal charge and does not risk expanding the basis of appeal.

In the Media Bill, criticism has been made of the use of the word "appropriate", but, as many judges have said before, context is everything, and here it is the right word. I look forward to hearing the Minister's response and explanation behind the change in wording.

Baroness Stowell of Beeston (Con): Now that my friend the noble Lord, Lord Faulks, has spoken, I am happy to stand, because I hoped that he would cover all the technical aspects of his amendment, to which I have put my name.

Before I turn to the amendment, at the start of Report it is worth me reminding noble Lords and my noble friends the Ministers of something, because there are an awful lot of amendments in this group and they cover quite a bit of ground. The Communications and Digital Select Committee, which I have the privilege to chair, endorsed the Digital Markets, Competition and Consumers Bill as it was introduced in the Commons. We held quite a few hearings on the Bill last year, which came after a long period of campaigning for this legislation, and so it was one that we cared deeply about. Indeed, we applauded the Government for striking the right, careful balance on some difficult issues covered in Part 1 of the Bill, especially the appeals process, the countervailing benefits and the leveraging principle.

3.45 pm

However, we did give one word of caution, knowing that the Government would be subject to intense pressure from the big tech firms as the Bill progressed through Parliament. We said: do not dilute the Bill. It is the job of Parliament to scrutinise and improve legislation, and by doing that we refine it. It is not a job that should mean that nothing ever changes, but it is also our job to protect the Bill from being weakened in a way that might diminish its effectiveness or make it harder for those responsible for delivering it to meet the original objectives and purpose of the Bill. A lot of what I am going to be arguing for—or, sadly, voting for—will be because I think the Government got it right the first time, and I regret some of their decisions to amend parts of the Bill in those areas that I have just identified.

I start with the appeals process. The Government have held their ground in maintaining the judicial review process for appeals against substantive rulings by the CMA, and I welcome this. However, I am concerned about the Government's decision to swap the word "appropriate" for "proportionate" in Clauses 13 and 46, as my friend the noble Lord, Lord Faulks, has just described, as this could provide a loophole or opportunity for the SMS firms to argue against CMA remedies or conduct requirements, perhaps by proposing alternative solutions that serve their interests but might not necessarily increase competition. That is why I have added my name to the amendments of the noble Lord, Lord Faulks, and will join him if he decides to divide the House.

As to appeals against fines and penalties, where the Government have changed the procedure from the original judicial review process to full merits my concern is the opportunity for the SMS firms to use this

[Baroness Stowell of Beeston]
procedure to re-open the substantive rulings. I have retabled my own Amendment 45, which would put in the Bill that there must not be any read-across from appeals and fines, which are proposed to be by the merits procedure, to substantive rulings, which are restricted to the judicial review process.

In Committee, I said that I was trying to be constructive and avoid overturning what the Government have done in the Commons. I am disappointed that they did not consider my amendment as a suitable compromise, although I must say at this point that my noble friends on the Front Bench and their officials have been very generous with their time, meeting not just me but other noble Lords and talking to us about these issues. I am hugely grateful to them for that. I will, of course, wait to hear what my noble friend says when he comes to wind up.

The amendments in the name of the noble Baroness, Lady Jones, would revert the appeals process on fines back to the JR procedure away from merits. I will wait to hear what my noble friend says on that, but, because the Government have not moved on this in the way that I had hoped they might, at the moment I am minded to support the noble Baroness, Lady Jones.

I now move to what I might describe as private actions. This is quite technical. I am referring to Amendment 47, in the name of my noble friend Lady Harding, to which I have added my name. My noble friend apologises for not being able to be here to speak to her amendment today, but she is caught up in other responsibilities away from Parliament.

The problem this seeks to address is that, as things currently stand, there is an opportunity for legal action to be taken against an SMS firm via the courts, which could lead to the courts ruling on matters that the CMA is also looking at, the result therefore being two conflicting outcomes from two competing regulatory regimes at the same time. Our concern about this situation is that it could lead to some of the SMS firms not wanting to participate constructively with the CMA in this new ex-ante regime. The whole point of this new regime is for us to cultivate this participatory approach, so this could be quite counterproductive.

The amendment would place a requirement on the courts to avoid judgments that conflict with contemplated CMA decisions regarding a potential breach, and stay civil proceedings that overlap with the CMA's ongoing forthcoming investigations. It would ensure that the courts have appropriate regard to and avoid pre-empting the CMA processes and decisions, while not preventing private action after decisions have been made, therefore minimising this risk of conflict. The amendment certainly preserves the rights of redress. It does not prevent stand-alone private enforcement either, where the CMA has not opened its own investigation or does not anticipate doing so, or follow-on damages where the CMA has already established a breach.

Having said all that, my noble friend does not intend to move her amendment to a Division—and I certainly do not intend to do it in her absence. However, my noble friend the Minister and officials have indicated from the discussions we have had that there is a recognition within government of the problem, and I think there is a view that the Government would rather deal with it through court rules. Can my noble friend the Minister, when he comes to wind up, set out from the Dispatch Box how the Government intend to address this problem via whatever procedure or process is available to them which is not about legislation? Whether it is the regulator or the various firms that will be potentially designated SMS, people need to know that this matter will be resolved.

Finally, I turn to CMA guidance, the role of the Secretary of State in approving that guidance, and the question of a new Select Committee for Parliament. I certainly will not repeat all that I said in Committee. In simple terms, I agree with the Government that the CMA must be subject to strong oversight as it implements this new regime. However, my view is that this should be Parliament's job, not the job of the Secretary of State. On several occasions, I have made the case for a new Joint Committee of both Houses to oversee not just the CMA but Ofcom and the Information Commissioner's Office. We are giving them, by way of new legislation, significant new powers and responsibilities, whether it is by the Online Safety Bill, this Bill or the data Bill, but we are not giving ourselves in Parliament the same capacity to oversee what we are delegating to these regulators. There is widespread support in both Houses for a new Joint Committee, as it is obvious that our current Select Committee regime, however great it is—I say that as somebody who has the privilege of chairing one of the Select Committees—does not have the capacity or expertise in terms of the support that we receive to oversee the regulators in the way that they need to be overseen.

However, sadly, the Government have not given their support to that change. It is not vital for the Government to support the construction of a new committee, and it is certainly not something that we need to lay out in legislation. However, it is important that we all recognise the complementary and distinctive responsibilities between the Executive and Parliament in overseeing regulators, and for these new Select Committees to be successful, we need to act in a united way. In addition to that, at this point in the parliamentary cycle, the practicalities of getting a new Joint Committee established just will not be given the attention they need from colleagues in the other place.

Therefore, I will not be pressing my Amendments 55 and 57. Amendment 55 would have removed the power from the Secretary of State to approve the guidance from the CMA and introduce some role for the relevant Select Committees. However, we cannot keep leaving this matter unresolved, so I urge my noble friend the Leader of the House and the Senior Deputy Speaker to consider this matter as still ongoing and one for us to return to at a later date. If the Secretary of State is to retain the power to approve CMA guidance and any amendments to it, there has to be a deadline for her to work to. The moment that she receives the CMA's guidance, she will be subject to the most intense lobbying pressure. Not having a cut-off point for when the Secretary of State must decide opens the prospect of things changing in a way that I do not think would be consistent with what we are trying to achieve through this legislation.

Both Secretaries of State who are currently involved in this legislation, for DSIT and the Department for Business and Trade, are very strong individuals. I am not concerned about them being anything other than resolute in the face of great pressure. However, unfortunately we are legislating for a situation that goes way beyond the current personalities in these different posts. It is important, regardless of who is in the post, that there is a deadline. Therefore, if my noble friend Lord Lansley pushes his Amendment 56 to a Division, I will support him.

Lord Lansley (Con): My Lords, with that lead-in I will say a few words about Amendment 56 and Amendments 13 and 35 in the name of my noble friend Lord Faulks, which were discussed very intensively in Committee. We are all very grateful to my noble friend Lord Offord for the extent of his response to that debate as Minister, but I fear that it gave us information on which to work but not sufficient reassurance to hold back, as my noble friend Lord Faulks has continued to press the argument.

Let me make a point about that. In the course of that debate, as the noble Lord, Lord Faulks, said, the Government's intention seemed to be that either Article 1, Protocol 1, of the ECHR is engaged in relation to an appeal, using the arguments for the peaceful enjoyment of possessions and therefore, as the noble Lord, Lord Faulks, said, proportionality would be engaged as a consequence of that, or the ECHR is not engaged but it is the Government's intention, by introducing this provision in the Bill, that the same test would apply. However, I fear that we need to say, as the Minister quite reasonably said in response in Committee, that there are expectations that proportionality would form part of the decision-making process of the Competition and Markets Authority as a responsible regulator. It would be expected, as the Minister said, to apply that principle in the terms on which it was done in the Bank Mellat v Her Majesty's Treasury (No. 2) case.

The Minister referred to the "four limbs" of Lord Reed and Lord Sumption. I spent a bit of my life which I will not get back now reading some of these judgments, though it was quite interesting. It led me to go a little beyond the cases that were cited by my noble friend to the case of Pham v Secretary of State for the Home Department, where there was a really interesting discussion demonstrating that, although there was some development of the use of proportionality alongside reasonableness in determining administrative law cases, in the decisions that were being handed down there was a clear distinction between that proportionality which is linked to the reasonableness test—that is, that this was something so disproportionate that no reasonable regulator would have made this decision—and what they described as an intense review of the merits of the decision on proportionality.

4 pm

We can add that to another case, in which the Supreme Court said that it expects Parliament, when legislating, to be aware of the common-law principles that would be applied. If we know what common-law principles would be applied and that does not suffice, Parliament is, by definition, looking to go beyond that. That leads one to the situation outlined by the noble Lord, Lord Faulks, where we would be opening the door to an intense review, by the courts, of the merits of the proportionality of the decision made by the regulator. Although the Minister said that "due deference" would be given to the regulator, I am afraid that that does not mean that it will not be challenged and that the courts will not begin to push that door further open. They will do so because Parliament has legislated for proportionality to be an explicit part of these decisions. For that reason, I support the noble Lord, Lord Faulks, in his Amendments 13 and 35. They are very important for us to pursue.

As my noble friend Lady Stowell said, my Amendment 56 is, I am happy to say, a simpler proposition. The Competition and Markets Authority has to produce guidance. We should not forget that, in doing so, it is required to consult—so there will be draft guidance and a consultation. At the conclusion of that process, under Clause 114, the CMA is required to obtain the approval of the Secretary of State. Amendment 56 does not change any of that; the Secretary of State's approval is still required.

So, after the consultation has been completed, the guidance has been prepared and the CMA is ready for it to be published, it has to submit it to the Secretary of State. Under the legislation as it stands, if the Secretary of State declined to approve that guidance, it could not be published. The Minister might say that the Secretary of State will respond in some way. I hope that is true, as the idea that the Secretary of State would respond to the CMA by doing nothing for a long time is something we would want to avoid. But writing legislation is like writing contracts: you do not write them on the basis that everybody does what is reasonable; you write legislation that entertains the possibility that people, including Secretaries of State, will sometimes not do what they are supposed to do.

So let us at least be clear about what the Secretary of State should do under those circumstances; they should either approve the guidance or send it back within a reasonable time, and 40 days is the time in my amendment. Within 40 days, they should refer it back to the CMA with a statement of reasons for not approving it. By that stage, the department should be clear about that, because it would have had ample opportunity to look at the guidance during the consultation process. The Minister might say, "Ah, but 40 days doesn't seem very long for the process of decision-making to be constrained", but it follows a consultation. I think that 40 days is a perfectly ample and sufficient time for the department and the Secretary of State to respond to the CMA, either to approve or refer back.

The Minister, like others, has been very generous with his time and that of officials in discussing these matters. I hope that he none the less recognises that this Amendment 56 is a necessary safeguard that does absolutely no harm to the purposes of the Bill. When the time comes, I hope that he will accept it, but, if he does not, I fear that we will have to press it.

Lord Etherton (CB): My Lords, I speak to my Amendment 49. I am grateful to those across the House who have supported it. This amendment is

[LORD ETHERTON]
about the fundamental right of access to justice for consumers who have suffered from breaches of requirements and directions by the CMA, as the regulator, or commitments given to the CMA. The persons against whom the requirements and directions are imposed—those who have given the commitments—may be broadly described as the "big players" in digital markets. Their definition is a complicated one, but it indicates that these are the big players. We are talking here about those such as Amazon, Apple, Meta, Google, Samsung, Nokia and more.

In addition to remedies available to the CMA for breach of such requirements, directions and commitments, as has already been mentioned, such as imposing financial penalties, or the bringing of criminal proceedings and disqualification of directors, Clause 101 of the Bill grants those, whether businesses or individuals, who have suffered loss or damage, the right to bring their own civil proceedings for damages, or an injunction, or any other appropriate relief or remedy.

In the real world, one has to ask who has the financial ability or time to take on the large players in digital markets. The answer is, only billionaires and other wealthy businesses. This is true, critically, for the purposes of my amendment, which is directed to where large numbers of individuals or businesses have been harmed by the same improper or unlawful conduct. That situation of multiple complainants is the situation to which my amendment is directed. Under the current procedural rules of the courts in England and Wales, there are very limited circumstances where more than one person can join in the same proceedings, even though they may have suffered harm or loss from the same wrongful conduct of a big player. Multiple claimants could not, for example, bring one set of proceedings where the harm or loss has been suffered on different occasions, and in different circumstances.

Representative proceedings—or, as they are usually called, class actions—would overcome the procedural limitations. These class actions can be conducted, and usually are, on an opt-out basis, so that the proceedings would embrace everyone who has suffered from the same breach, whether or not they are aware of their right to damages or other relief, unless they take steps to opt out. Provision for collective proceedings, or class actions, already exists in the Competition Act 1998, as amended by the Consumer Rights Act 2015, for breaches of competition law. My Amendment 49 would extend that provision to the rights of civil action given to consumers under Clause 101 of the Bill.

In Committee, the Minister rejected that proposal. In *Hansard* of 24 January 2024, he is reported as saying that

"it is also important that the CMA can take a clear lead in imposing and enforcing requirements to bring effective change in digital markets ... We want the regime to be collaborative, but not litigious. This is why we have made provision for a public-led enforcement approach, which will ensure the CMA's central role in ensuring the consistent application and enforcement of the regime, while still making explicit provision for parties to seek redress".

He then said:

"Lengthy and complex litigation in the early years of the regime in particular would run the risk of creating uncertainty for all stakeholders and could undermine the delivery of the regime as a whole".—[*Official Report*, 24/1/24; col. GC 255.]

I am afraid that that response to a perfectly reasonable procedural improvement for the benefit of consumers is illogical and unconvincing.

The position is that, in addition to a market regulator scheme, the Bill expressly confers a civil right of action. To say that, although such a civil right exists, the Government do not want many or possibly anybody to enforce it is to grant a right without an effective remedy. That is a basic breach of the right of access to the courts.

The leading case on this is the 2017 Supreme Court decision in what is known as the UNISON case. In that case, the Lord Chancellor decided to impose fees for claims to employment tribunals. The number of claims dropped by around 66%. The Supreme Court, having found that the fees were unaffordable for most of those people to whom the courts were a proper means of recourse, quashed the fees order on the basis that it impeded access to justice.

As I said, civil claims against the big digital market players will be unaffordable, save for a very few people. The right to an opt-out class action in the most serious cases of damage or loss suffered by multiple businesses and individuals from the same wrongful conduct will provide a practical remedy, enabling such claims to be enforced.

The Government have recently announced that they will introduce in this parliamentary Session legislation that will make third-party litigation funding lawful in order to promote access to justice. Accordingly, my amendment, together with third-party litigation funding, will provide all the necessary practical ingredients for collective enforcement of the civil rights confirmed by Clause 101.

Further, the Minister's observation that lengthy and complex litigation is undesirable is contrary to the grant of the civil remedy in Clause 101, expressly given to those who have suffered loss or damage. Where multiple people have incurred loss or damage as a result of the same wrongful conduct specified in Clause 101, litigation would inevitably be lengthy and complex, even if brought by a single person who has the time and money to bring the proceedings.

The noble Baroness, Lady Stowell, in referring to Amendment 47, tabled by the noble Baroness, Lady Harding of Winscombe, says that it is undesirable that there should be any way in which the CMA undertakes investigations into breaches of undertakings, requirements or commitments at the same time as someone who has been harmed by the wrongful conduct brings civil proceedings. Amendment 47 specifies the circumstances in which, among other things, a court must stay proceedings.

The difficulty here, I am afraid, is twofold. In the first place, no example has been given as to where the overlap would occur. The regulatory provisions in Chapter 7 of Part 1 available to the CMA include

"Penalties for failure to comply with competition requirements",

the imposition of criminal offences, and provision for director disqualification, but there is no provision for payment of damages to small businesses that, or individuals who, have suffered loss or damage.

Furthermore, some of the provisions in Amendment 47 are extremely vague. Take, for example, one of the situations in which it is said that there should be a stay of civil proceedings: where

"the CMA gives notice to the appropriate court or Tribunal that it is investigating the conduct to which the civil proceedings relate under this Part, or is intending to open a breach investigation … into such conduct within a reasonable time".

What is a reasonable time? These investigations could go on for years, funded by very large, wealthy and determined players in the market. In the meantime, those who have suffered the loss will be out of pocket and will remain so. This is an opportunity to increase access to justice for those who have been given a right to recover damages or loss in a civil action against large, powerful players in the digital markets who would otherwise have no practical and efficient way of enforcing that right. We should embrace this opportunity.

4.15 pm

Finally, the amendment also requires the Secretary of State to conduct a review in order to ascertain whether there are any other types of claim that might be appropriate for collective proceedings. No response has been given to that proposal, which I suggest is also eminently reasonable.

Viscount Colville of Culross (CB): I have added my name to the Minister's Amendment 1 with great pleasure, because the Government agree that the power in Clause 6 is one the Secretary of State does not need. I have also added my name to Amendment 56 as it aims to curtail an even greater Secretary of State power. In Committee, I tabled a series of amendments to limit the Secretary of State's powers over various stages of the Part 1 conduct requirement process. At the time, we were told that these powers were needed to ensure that the regime could respond to the fast evolution and unpredictability of digital markets. I grateful to the Minister for changing his mind on one of these powers in Clause 6 and for tabling the amendment to leave out subsections (2) and (3), which, even with the affirmative procedure, were going to give the Secretary of State unnecessary powers. It is a sensible move, as the criteria for deciding whether a digital activity should be deemed of strategic significance are, as he said, broad and well set out in subsection (1).

My concern was that the powerful tech companies, whose market dominance will be investigated in the Part 1 process, might put pressure on Ministers to amend the four criteria in Clause 6 to dilute the range of company activities under consideration for SMS positions. I am satisfied that this amendment will stop that happening. I hope that the Minister will now listen favourably to other amendments, which will be debated today, to ensure that the conduct requirement process is as swift as possible and that the Secretary of State does not have overmighty powers to intervene in the process.

I am grateful to the noble Lord, Lord Lansley, for tabling Amendment 56, to which I have added my name, to Clause 114. Subsection (4)(a) as it stands gives too much power to the Secretary of State to approve these guidelines. As I said in Committee, it was pointed out that the guidelines are the most important part of the SMS process. They set out the framework for the conduct requirement process and allow implementation of the new powers the Bill gives to the CMA to examine market-dominant activities by big tech companies.

One of the reasons for my fear of the Minister's powers is that she might be subject to lobbying by tech companies, as the noble Baroness, Lady Stowell, pointed out, either to change the guidelines or to slow down implementation. At the moment, the Secretary of State has the power to delay approval indefinitely, and, looking to the future, when the guidelines need to be updated or revised, she or her successor could do the same thing. I am grateful to the Minister and his officials for meeting me twice to talk about this issue. I appreciate his time and attention, but I am disappointed that he and the Bill team felt unable to do anything to fetter the Secretary of State's powers with a time limit on delay for approval. The Minister feels that a time limit would make the process brittle, and fears that an election or some big political event could cause the process to time out. I ask noble Lords to bear in mind that the amendment deals with the Secretary of State's powers of approval of the guidelines only, not the entire procedure for setting up the guidelines. If there were an election, ministerial work would stop. However, once the new Government were in place, the time limit could kick in and start again. The Secretary of State could then approve the guidelines in 40 days or send them back to the CMA with reasons.

In my meeting with the Minister, he kindly offered to publish letters exchanged between the Secretary of State and the CMA as the guidelines were created. This seemed a wonderful offer that would go far towards ensuring transparency in the process and allay fears of backstage lobbying, and go some way towards assuaging Members' concerns about the process of creating guidelines. Unfortunately, the Minister rescinded that offer. I ask him in the name of the openness and transparency of the Part 1 process to reinstate it.

Such a move would complement the second part of Amendment 56, whereby if the Minister does not approve of the guidelines—which would surely be the only reason for delay—an open statement of reasons as to why the guidelines could not be approved would be published. Surely noble Lords agree that transparency in the guidelines process would go far in calming any fears of it being influenced by the big tech companies.

I want very much to see this Bill on the statue book, but the Secretary of State's powers in Clause 114 are detrimental to the Part 1 process and need to be looked at again. I hope the Minister will accept Amendment 56. If not, I will support the noble Lord, Lord Lansley, should he decide to test the opinion of the House.

Lord Black of Brentwood (Con): My Lords, I declare my interest as deputy chair of the Telegraph Media Group and my other interests as set out in the register. I will focus briefly on three crucial amendments in this group—on proportionality, the appeals standard, and the Secretary of State's powers—echoing points that have already been made strongly in this debate.

I fully support Amendments 13 and 35 in the name of the noble Lord, Lord Faulks. The amendment made to the Bill in the Commons replacing "appropriate"

[Lord Black of Brentwood]
with "proportionate" will significantly expand the scope for SMS firms to appeal the CMA's decision to create conduct requirements and initiate pro-competitive interventions.

As we have already heard, the Government have sought to argue that, even absent the "proportionality" wording, in most cases the SMS firms will be able to argue that their ECHR rights will be engaged, therefore allowing them to appeal on the basis of proportionality. The question arises: why then introduce the "proportionality" standard for intervention at all, particularly when the CMA has never had the scope to act disproportionately at law?

In this context, it is clear that the main potential impact of the Bill as it now stands is that a court may believe that Parliament was seeking to create a new, heightened standard of judicial review. As the Government have rightly chosen to retain judicial review as the standard of appeals for regulatory decisions in Part 1, they should ensure that this decision is not undermined by giving big tech the scope to launch expensive, lengthy legal cases. All experience suggests that that is exactly what would happen by it arguing that the Government have sought to create a new, expansive iteration of JR. I fear that, if the amendments from the noble Lord, Lord Faulks, are not adopted, we may find in a few years' time that we introduced full merits reviews by the back door, totally undermining the purpose of this Act.

Amendments 43, 44, 46, 51 and 52 in the name of the noble Baroness, Lady Jones, are also concerned with ensuring that we do not allow full merits appeals to undermine the CMA's ability to regulate fast-moving digital markets. Even though full merits are confined to penalty decisions, financial penalties are, after all, as we have heard, the ultimate incentive to comply with the CMA's requirements. We know that the Government want this to be a collaborative regime but, without there being a real prospect of meaningful financial penalties, an SMS firm will have little reason to engage with the CMA. Therefore, there seems little logic in making it easier for SMS firms to delay and frustrate the imposition of penalties.

There is also a danger that full merits appeals of penalty decisions will bleed back into regulatory decisions. The giant tech platforms will undoubtedly seek to argue that a finding of a breach of a conduct requirement, and the CMA's consideration that an undertaking has failed to comply with a conduct requirement when issuing a penalty, are both fundamentally concerned with the same decision: "the imposition" of a penalty, with the common factor being a finding that a conduct requirement has been breached. The cleanest way to deal with this is to reinstate the merits appeals for all digital markets decisions. That is why, if the noble Baroness, Lady Jones, presses her amendments, I will support them.

Finally, I strongly support Amendment 56 in the name of my noble friend Lord Lansley, which would ensure that the Secretary of State must approve CMA guidance within a 40-day deadline. This would allow the Government to retain oversight of the pro-competition regime's operations, while also ensuring that the operationalisation of the regime is not unduly delayed. It will also be important in ensuring that updates to the guidance are made promptly; such updates are bound to be necessary to iron out unforeseen snags or to react to rapidly developing digital markets. Absent a deadline for approval, there is a possibility that the regulation of big tech firms will grind to a halt mid-stream. That would be a disaster for a sector in which new technologies and business models are developed almost daily. I strongly support my noble friend and will back him if he presses his amendment to a vote.

With the deadline to comply with the Digital Markets Act in Europe passing only last week, big tech's machinations in the EU have provided us with a window into our future if we do not make this legislation watertight. As one noble Lord said in Committee—I think it was the noble Lord, Lord Tyrie—we do not need a crystal ball when we can read the book. We have the book, and we do not like what we see in it. We must ensure that firms with an incredibly valuable monopoly to defend and limitless legal budgets with which to do so are not able to evade compliance in our own pro-competition regime.

Baroness Kidron (CB): My Lords, I will speak to Amendments 43, 44, 46, 51 and 52, to which I have added my name, and Amendment 59. Before I do, I register my support for Amendments 13 and 35, which were brilliantly set out by my noble friend Lord Faulks and added to by others. I too shall support them if they choose to ask the opinion of the House.

I also support Amendment 56 in the name of the noble Lord, Lord Lansley. I have lived experience of waiting too long for the code to come back from the Secretary of State. Even without being a bad actor, it is in the nature of Secretaries of State to have a burgeoning in-tray, and it is in the nature of codes to be on a subject that politicians have moved on from by the time they arrive. I fully support him, and 40 days seems like a modest ask given the importance of the Bill overall.

I turn to the amendments in the name of the noble Baroness, Lady Jones. I look forward to her setting them out after I have supported them. They would reinstate judicial review as the appeal standard for penalty decisions. I thank the Minister for the generosity of his time; I know he spoke not only to me but to a number of noble Lords. However, the thing I have taken away from discussions with government and during Committee is the persistent drumbeat that asserts that we are giving huge new and untested powers to the CMA. Here, we can fill in as we like: full merits on penalty, countervailing benefits, proportionality, and Secretary of State powers have been introduced simply to give a little balance. I find that unacceptable given the power of the companies and the asymmetry we are trying to address.

The reality is that the powers given to the CMA, while much needed, are dwarfed by the power of the companies they seek to regulate. The resources available to the CMA, while welcome, are dwarfed by the resources available to a single brand of a single SMS. Most of all, the CMA's experience of regulating digital companies is dwarfed by the experience of digital companies in

dodging regulation. I am struggling to understand the imbalance of power that the Government are seeking to address.

I was in Brussels on Wednesday last week and there is a certain regret about the balancing that the EU allowed to the DMA in face of the tech lobby, only to see Apple, TikTok and Meta gleefully heading to the courts and snarling up the possibility of being regulated as intended for many years—or perhaps at all. This issue was raised by the noble Lord, Lord Black. Adding a full merits appeal on penalty will embolden the sector to use the threat of appeal to negotiate their position at earlier points in the process. It will undermine the regulator's strength in coming to a decision. Very possibly, as other noble Lords have said, it could bleed backwards into areas of compliance and conduct requirements. It is, as the noble Baroness, Lady Harding, said, creating a hole for water to get in. The companies lobbied furiously for full merits on penalties. This is not an administrative point; it goes to the heart of the regime. Full merits give the regulated leverage over the regulator.

The most straightforward way of ensuring that the regulator does not abuse its new, enhanced power, as the Government appear to fear, is to make it accountable to Parliament, as the noble Baroness, Lady Stowell, set out in full, repeatedly and with great eloquence. I am sorry that we will not have an opportunity to make our feelings on that issue felt today, but I strongly support her saying that we should not drop this issue just because it is inconvenient to deal with at this point in the electoral cycle.

4.30 pm

If I had been quicker off the mark, I would have added my name to Amendment 59, in the name of the noble Baroness, Lady Jones. This would give the CMA a duty to further the interest of citizens as well as consumers. I am deeply concerned that, across all Bills in this policy area, the Government are failing to raise their gaze to the future. We can take one certainty from the last decade or two: what may be okay for today's consumer may not be okay for tomorrow's citizen. We have seen this in the past when a decade and a half of untrammelled exploitation of children by social media companies was allowed. We will see it in the near future, as the battle for the water and energy needed for large computational models hots up. Neither the market nor the business model is yet a settled fact, and AI will certainly change the gatekeepers and the market hugely. Adding "citizen" would allow the CMA to take a more sophisticated approach to market analysis. It protects the UK public, many of whom are impacted by these markets even when not directly engaging.

Lord Wolfson of Tredegar (Con): My Lords, I added my name to Amendment 49, which was opened in detail by the noble and learned Lord, Lord Etherton. Therefore, and also because we are on Report, I can be extremely brief. I declare my interest as a barrister. I practise, among other places, in the Competition Appeal Tribunal, for both applicants and respondents. I will make two short points, although they are linked.

First, Clause 101, particularly subsection (1), provides individual rights to consumers. Having done so, we must find an effective method to enable those consumers to vindicate those legal rights. There is no point Parliament passing laws that provide people with individual rights if there is no effective real-world mechanism for those people to vindicate and enforce those rights. Not only is that a basic proposition of the rule of law, as the noble learned Lord, Lord Etherton, said, but this otherwise risks us engaging in a legislative form of Tantalus, where we place rights just in front of people: they can see the rights, but they cannot grasp and actually use them. I submit that that would be wrong in principle. If we are going to enable people to vindicate their rights, the obvious place—in fact, the only place in our current legal system—is the Competition Appeal Tribunal, where, as the House has heard, there is already experience in both opt-in and opt-out collective proceedings.

Secondly, in Committee, it was suggested that perhaps all these rights should be exercised through the regulator, and there is therefore no need for the collective proceedings. Sometimes the law does that: sometimes we pass laws that mean that people have to go through a regulator, or sometimes an officeholder, in order to vindicate their individual positions. But we have taken that decision of principle in Clause 101(1): we have given rights to individuals and consumers in the Bill. Given that, it seems to me that the only sensible course is to provide an effective mechanism for people to vindicate their rights.

Finally, while I am on my feet, I add my voice to Amendment 13, proposed by the noble Lord, Lord Faulks. I certainly agree with what he said about proportionality. I add only this, as the sort of person who might be making this argument in future. It would be all the more easy and attractive for counsel if "proportionate" was left in the legislation, having had this debate, and for them then to say, "Oh well, Parliament must have meant a merits review, because it went into it with its eyes open". The noble Lord, Lord Faulks, and my noble friend Lord Lansley eloquently set out the consequences of leaving the word in. Therefore, if we now leave the word in, it will be even easier for counsel—I declare again the obvious interest—to make the ingenious argument. Having had that amendment explained, it seems to me all the more important that we take the right decision in relation to it.

Lord Clement-Jones (LD): My Lords, it is a pleasure to follow that piece of logic. I do not need to speak for very long in support of the many important amendments that have been spoken to in this group. The Minister, in Committee and in his welcome letters and meetings, has attempted to rebut the need for them—but I am afraid that, in all cases, their proponents have been rather more persuasive in wishing to see the CMA unambiguously able to exercise its powers.

In a different context, the Communications and Digital Committee, chaired by the noble Baroness, Lady Stowell of Beeston, in its report on large language models, said that there was a considerable "risk of regulatory capture". Mindful of that, we need to make sure that the CMA has those powers.

[Lord Clement-Jones]

I turn to the amendment proposed by the noble Lord, Lord Faulks, and his argument about the dangers of introducing proportionality, also spoken to by the noble Lord, Lord Wolfson. On these Benches, we fully support having that provision in the Bill, as in the noble Lord's Amendment 13. Human rights for big tech is not really a slogan that I am prepared to campaign on.

The noble Baroness, Lady Jones, will no doubt introduce her Amendments 43, 46, 51 and 52 on appeal mechanisms for penalties, which differ from all the other decisions of the CMA. We very much support her in those amendments, and we have signed them. I also support the noble Baroness's Amendment 59. The Minister took the trouble to write, explaining why the Government did not consider including a duty to citizens, but sometimes such clarification, as in this case, makes us only more enthusiastic for change. I am afraid that citing overlap and the creation and operation of the DRCF is not enough; nor is citing the risk of regulatory overreach, given its inclusion 20 years ago in the Communications Act. We agree with the conclusions of the original task force.

We also support the noble Lord, Lord Lansley, on the importance of placing time limits on the Secretary of State in approving the CMA guidance under the digital markets provisions of the Bill, in Amendment 56. Although I believe that the noble Baroness, Lady Stowell of Beeston, will not be pressing it to a vote, we very much support her in her relentless campaign for improved parliamentary scrutiny. This has been identified by so many parliamentary committees, not least by the Industry and Regulators Committee on which I sit. It seems extraordinary that we are still waiting to implement the kind of solution that she is putting forward, and I hope very much that the House will take forward her suggestion.

We also very much support in principle the amendment proposed by the noble and learned Lord, Lord Etherton, on collective proceedings. He may not press the amendment to a Division today, but this is a vital change that we should make to ensure that rights in this area can be properly exercised and enforced. If the noble Lord, Lord Faulks, seeks the opinion of the House on his Amendment 13, the noble Baroness, Lady Jones, on her Amendment 43, and the noble Lord, Lord Lansley, on his Amendment 56, we will support them.

Baroness Jones of Whitchurch (Lab): My Lords, I thank all noble Lords who have contributed this afternoon to what is a very important group of amendments. I add my thanks to the Ministers and officials for their time in the run-up to this debate in trying to resolve the many issues that we have tabled today.

I thank the Minister for tabling Amendment 1 and for listening to our concerns about the Secretary of State's power to amend the conditions that would determine whether a tech company has a position of strategic significance. I am glad that the Minister has listened to our concerns, and we are happy to say that we accept the new proposals.

Our Amendments 43, 44, 46, 51, and 52 would reinstate judicial review principles as the means by which penalty decisions are heard, rather than being determined on the merits. I thank all noble Lords who have spoken this afternoon, and indeed those who have added their names to these amendments, for their support. As we debated in Committee and again today, these amendments are among the several we are debating in which the original balance between big tech companies and challenger firms was distorted by late government amendments on Report in the Commons. The Minister has already admitted that the changes came about as a result of lobbying by the big tech companies to No. 10. They clearly would not have done this unless they were expecting to benefit from those changes.

The debate around the appeals mechanism goes to the heart of those concerns. We know that penalties such as fines are the most significant deterrent in preventing SMS companies breaking the conduct requirements established by the CMA. There is a real concern that a merits appeals process would allow the SMS firms to deliberately delay implementation of the fines and open up the judgment of the CMA right back to square one. This is why the CMA has itself argued that it prefers the judicial review process, which is widely used elsewhere and avoids protracted litigation. We agree with the CMA and believe that appeals through judicial review will deliver swifter and more effective outcomes. We want to close down the opportunities for unnecessary litigation from huge corporate lawyers with time on their side and deep pockets to fund their activities.

As the noble Lord, Lord Black, and the noble Baroness, Lady Kidron, have said, the worrying news from Europe as to the responses so far from Apple and the other tech companies to their fines for anti-competitive behaviour underlines why it is so important to have robust and legally watertight regulation in place in the UK.

I do not think that the Minister, in Committee or in subsequent discussions, has been able to persuade us that a merits review process will not open the door to lengthy litigation designed to frustrate the whole process. If we remain unpersuaded by his arguments this afternoon, I give notice that I will wish to test the opinion of the House on Amendment 43.

These concerns also apply to Amendments 13 and 35 in the name of the noble Lord, Lord Faulks. In this case, replacing the word "appropriate" with "proportionate" has particular legal implications, which the noble Lord, Lord Faulks, has described extremely eloquently. We know that the CMA already has a duty to act proportionality, so repeating it in the Bill takes on a new legal emphasis that might lead a court to widen the scope of a judicial review challenge. In our view, "appropriate" has a much more common-sense meaning of rationality, whereas "proportionate" is a matter of judgment and is more easily disputed.

The Minister has argued that there is a need for extra clarity to reassure the tech companies on the intent of the clause. The amendment from the noble Lord, Lord Faulks, would require the CMA to act proportionately, as its current duty requires, and also appropriately. This is a win-win, which should provide the clarity that tech companies are seeking. I look forward to hearing the Minister's further clarification on these issues, but, unless there is any new, compelling

justification for the changes, we would support the noble Lord, Lord Faulks, if he chooses to test the opinion of the House.

Throughout our deliberations, the noble Baroness, Lady Stowell, has raised important questions about the need to strengthen parliamentary oversight of the CMA's activities. Her Amendments 55 and 57 provide an excellent route to addressing these concerns. Like other noble Lords, I am sorry that they have not yet found favour with the Government and I very much hope that she will continue to pursue them.

Meanwhile, Amendment 49 from the noble and learned Lord, Lord Etherton, raises the right of consumers to bring collective proceedings where they have suffered the same harm or loss from a breach of conduct requirements. As he has argued, this is a vital lifeline for individuals or small businesses that cannot afford to finance legal proceedings alone. His amendment would create a means of effective enforcement of existing rights once a breach has occurred. We agree that we ought to find a mechanism to allow these class actions to occur in specific circumstances.

However, we also agree with the amendment of the noble Baroness, Lady Harding, that the courts need to avoid proceedings which conflict with or overlap the CMA's ongoing investigations. We hope the Minister can provide some reassurance that the Government recognise the importance of these issues and will carry out a review. I hope this will provide sufficient reassurance to the noble Lord, Lord Etherton, that a vote on his amendment is not necessary.

4.45 pm

Finally, I reiterate that, despite our misgivings about the wording of the Bill, we support its central aim and would like to see it on the statute book as soon as practical. However, it can come into effect only once the CMA guidance is produced and signed off by the Secretary of State. We have been concerned throughout this process that there is no deadline for this sign-off to occur. This is why we very much support the amendment in the name of the noble Lord, Lord Lansley, that there should be a 40-day deadline for this approval. We will support him if he wishes to test the opinion of the House on this issue. I look forward to the Minister's response.

Viscount Camrose (Con): As ever, I start by thanking all noble Lords who spoke so compellingly during what has been a fascinating debate.

Amendments 13 and 35, tabled by the noble Lord, Lord Faulks, seek to remove the explicit statutory requirement for conduct requirements and PCIs to be proportionate. I appreciate that this is an issue about which many noble Lords have expressed themselves strongly, and I am grateful for the thoughtful discussions I have had with noble Lords about this, both in Committee and since. I thank my noble friends Lord Black, Lord Wolfson and Lady Stowell for their comments on this today.

We are, as has been observed, giving extensive new powers to the CMA. It is important therefore that we also include safeguards around those new powers. A proportionate approach to regulation supports a pro-innovation regulatory environment and investor confidence. That is why we have decided to make the requirement to act proportionately explicit in the Bill. This requirement reinforces the Government's expectations on the CMA to design conduct requirements and PCIs to place as little burden as possible on firms while still effectively addressing competition issues. The Government's view is that, for the vast majority of interventions, the DMU would have needed to ensure that they were proportionate even without this explicit provision, as Article 1 of Protocol 1 to the European Convention on Human Rights will apply to interventions that affect property rights of SMS firms, regardless of their size.

The proportionality provisions both make this explicit and ensure that it will apply in all cases, not just those where A1P1 applies, such as when future contracts are affected. The Government have considered case law about the standard of review when proportionality is under consideration by the CAT in competition cases. We do not share the view that the inclusion of these two requirements will raise the standard of review in a way that makes it materially easier for SMS firms to successfully challenge CMA decisions.

As my department has shared with the noble Lord, Lord Faulks, the CAT has held, in BAA v Competition Commission, that it must show particular restraint in second-guessing the CMA's judgment, and also give a wide margin of appreciation to the CMA. The Supreme Court has also stressed the caution that appellate courts must take before overturning the expert economic judgments of the CMA. We remain of the view that the courts will accord respect to expert judgments of the competition regulator in relation to economic matters and will not seek to overturn DMU judgments lightly.

I hope and believe that all of us, regardless of which Benches we sit on, agree that the UK being a place of proportionate regulation, where it is attractive to start and grow businesses, should be an aim of the Bill. I hope the noble Lord and my noble friend agree and will not press their amendments.

Amendments 43, 44, 46, 52 and 51 from the noble Baroness, Lady Jones, seek to revert the appeals standard of digital markets penalties back to judicial review principles. As I outlined in Committee, the Government believe it is important that the CAT can consider the value of a fine and change it if necessary, as the penalties that the CMA can impose are likely to be significant. Parties should be able to have penalty decisions reviewed to ensure that they are fair and properly applied. Additionally, only the requirement to pay a penalty is automatically suspended on an appeal. Any other remedies put in place by the CMA would remain in place, addressing the competition harm right away. An SMS firm would be expected to comply with them regardless of the outcome of the penalty appeal.

Amendment 45 from my noble friend Lady Stowell seeks to clarify that only penalties, not the decision to impose the competition requirement or the decision that a breach has been made, would be heard on their merits. I appreciate that the intent of this amendment is to improve clarity, but we feel that its drafting does not currently address what I understand my noble friend seeks to achieve. It would currently address

[Viscount Camrose]
only breaches of conduct requirements and not PCIs or enforcement orders. Amendment 55, also from my noble friend—

Baroness Stowell of Beeston (Con): I am grateful to my noble friend for giving way—I hope he will forgive me for interrupting him at a critical moment as he was about to say something about another of my amendments. He said that my Amendment 45 was inadequate because it did not cover sufficient bases. Would the Government consider it as a way forward if they were to expand it in a way that did cover all the bases?

Viscount Camrose (Con): Yes, we very much understand the spirit and intent of the amendment, so I would be very happy to consider that if we could expand it to cover the bases, as my noble friend sets out.

Amendment 55, also from my noble friend, would remove the role of the Secretary of State in approving the CMA's guidance on the regime and replace it with consultation with certain parliamentary committees. I agree with her that oversight of regulators by both government and Parliament is vital, but the Government have responsibility for the effectiveness of regulators and the policy framework that they operate in. As such, it is appropriate that the Secretary of State approves the guidance under which the CMA will deliver the regime. The CMA must already consult during the production of guidance and parliamentarians can respond to these consultations as they see fit. The Government therefore believe that this amendment is not necessary to permit parliamentary engagement with the drafting of guidance.

My noble friend Lady Stowell's Amendment 57, also discussed in Committee, requires additional reporting from a number of regulators, including the CMA, on the impact of the digital markets regime on their activities. As each of these regulators already provides annual reporting to Parliament detailing its operations and effectiveness, we feel that additional reporting would be duplicative and create unnecessary administrative burden for regulators. The named regulators also participate in the Digital Regulation Cooperation Forum, which also produces reporting on digital regulatory issues.

Amendment 56 from my noble friend Lord Lansley would add a statutory timeframe to the approval of guidance by the Secretary of State, requiring a response within 40 days. I thank the noble Viscount, Lord Colville, the noble Baroness, Lady Kidron, and my noble friend Lord Black for their remarks and our conversations on this issue. While the Government agree that it is important that the approval of guidance takes place in a timely manner and are committed to the prompt implementation of the regime, we do not think it is necessary to amend the Bill to achieve this outcome. The Government are committed to the prompt implementation of the regime. The introduction of a deadline for the approval of guidance, while supporting this objective, could cut short productive discussion and reduce its quality.

Amendment 59, tabled by the noble Baroness, Lady Jones, introduces a duty on the CMA to further the interests of citizens as well as consumers when carrying out digital markets functions. I thank the noble Baroness, Lady Kidron, for her remarks on this. As I outlined in Committee, the Government believe that the CMA's existing statutory duty provides the greatest clarity for the regime, people, businesses and the wider economy. The CMA already manages the interactions between competition in digital markets and wider policy on societal issues under its existing duty and through its work with the Digital Regulation Cooperation Forum.

For example, the CMA's market study into online platforms and digital advertising considered press sustainability and media plurality among the broader social harms to consumers. The CMA and Ofcom have also published joint advice on how the new regime could govern the relationship between online platforms and news publishers.

The Bill incentivises close co-operation with key digital regulators through the explicit regulatory co-ordination provisions. The CMA will have a duty to consult Ofcom on any proposed interventions that might affect Ofcom's competition functions for the sectors for which it has responsibility, such as broadcasting and telecoms. It would allow Ofcom to raise wider implications for media plurality.

The CMA has a clear mandate to act for the benefit of consumers in the broadest sense. The meaning of citizens in this context is unclear and risks reducing the clarity of the CMA's core competition remit and its role in the wider regulatory landscape.

Amendment 49, in the name of the noble and learned Lord, Lord Etherton, would enable private actions relating to breaches of the digital markets regime to be brought on a collective basis. It would also require the Secretary of State to produce a report on other types of claims which might be brought on a collective basis. We commit to reviewing the provision of collective claims in a post-implementation review. It is likely they will play an important role in protecting individuals and incentivising compliance in time.

I agree that, in time, collective actions would also help increase access to redress, recognising the significant legal resources SMS firms will have at their disposal and the costs involved in bringing private actions. However, our view is that making further procedural provision for claims will not bring the best outcomes for consumers and businesses while the regime is bedding in. Consumers and small businesses will benefit most from a public-led enforcement approach.

Under the digital markets regime, the CMA—

Lord Etherton (CB): Does the Minister accept what I said? In the Bill, currently there is no provision under the regulatory regime for the regulator to award damages for losses suffered by individual consumers.

Viscount Camrose (Con): Yes, I believe that is the case and I accept that. But, as I said, I will commit to carrying out a review in the future to understand how best to implement a collective action basis.

Under the digital markets regime, the CMA will be—

Lord Tyrie (Non-Afl): Can the Minister tell us when he intends that review to take place?

Viscount Camrose (Con): I intend for it to be part of the post-implementation review of the Bill.

Under the digital markets regime, the CMA will be devising novel requirements designed to address the particular circumstances of individual firms and market conditions. The DMU will need time to establish a broad set of precedents on the new rules and their enforcement. Introducing collective actions after the regime has bedded in would mirror the approach taken to the wider competition regime, which similarly had limited provision for redress when it was first established. Collective claims would also reduce incentives for firms to engage co-operatively if there is increased concern around litigation.

Amendment 47, in the name of my noble friend Lady Harding, and spoken to by my noble friend Lady Stowell, would prevent relevant courts or the CAT issuing any judgment or remedy that would conflict with a CMA decision. It would also require any private action to be stayed for CMA investigations into the same or similar breaches. The CMA is already permitted to provide evidence and opinions to the courts in competition cases through provisions in the Civil Procedure Rules and the CAT rules. I agree that the CMA may need a greater role in providing evidence and expertise to the courts in cases relating to the digital markets regime.

The Government intend to look at the issue in more detail, as we propose updates to the Civil Procedure Rules and the CAT rules. We will consider whether the courts' case management powers and other provisions are sufficient to ensure that the CMA can make representations to the courts.

Amendment 1 agreed.

5 pm

Clause 11: Procedure relating to SMS investigations

Amendment 2

Moved by ***Viscount Camrose***

2: Clause 11, page 6, line 34, leave out "a statement summarising the contents of"

Member's explanatory statement

This amendment would require the CMA to publish an SMS investigation notice rather than a summary of the notice.

Viscount Camrose (Con): My Lords, the Government fundamentally believe that public transparency is vital for the new digital markets regime. We noted the strength of feeling on this issue from noble Lords in Committee, which is why the Government have tabled amendments to enhance the transparency of the regime. The amendments will require the Digital Markets Unit to publish the full notices relating to SMS designation, conduct requirements and PCIs, so that all interested parties can access them. Amendment 54 makes it explicit that the DMU may make redactions for confidentiality purposes when publishing notices or other documents.

Finally, as a consequence of the other amendments in this group, Amendment 3 will require the DMU to send other regulators a full copy of an SMS investigation notice provided to the firm under investigation, rather than a summary. I hope that noble Lords will support these amendments, which address concerns raised in Committee on the transparency of DMU decisions. I beg to move.

Lord Bassam of Brighton (Lab): My Lords, as the Minister described, this group has government amendments, from Amendment 2 to Amendment 38, which add greater transparency to the process adopted by the CMA in disclosing information about cases involving SMS status firms where the challenger companies have an interest. We are pleased with the Minister's amendments and, broadly speaking, happy to give them our support, as they respond to points that a number of noble Lords made at earlier stages of the Bill about the need for greater transparency and openness.

The SMS companies are in a position of significant market strength vis-à-vis the challenger firms and have a clear interest in seeing the bigger picture when disclosure is made of information that is of material interest. By obliging the publication of the notices and orders, rather than summaries of the documents, we feel that challenger companies will have greater access to key information that may impact on their market performance. Our amendments, from Amendment 4 to Amendment 39, attempt to achieve a similar result; I suspect that Ministers will argue that their amendments have greater elegance and a similar effect.

I turn to government Amendment 54 and our own Amendment 5. We are clearly of a similar mind and share concerns about commercial confidentiality so that, where reasonable, the redaction of documents can take place. We differ in our approach simply by suggesting that there should be a system for registering the documents that are relevant; the Minister might like to think about that at a later date. In essence, this is an operational issue so, to satisfy our concerns, perhaps he can put on record that there will be an effective system for the registration of documents and a notification process that enables the challenger firms to understand better what information has been disclosed to the CMA in the course of its inquiries. On that basis, we will be content not to move our amendments, and we thank the Government for responding to the concerns behind them.

Lord Clement-Jones (LD): My Lords, this is a very straightforward group, and I congratulate the noble Baroness, Lady Jones, and the noble Lord, Lord Bassam, on having persuaded the Government to move further on the transparency agenda. I like the description given by the noble Lord, Lord Bassam, of the government amendment being more elegant. It is nice to think of amendments being elegant; it is not often that we think in those terms. We very much support the new amendments with some of the caveats that he made.

Viscount Camrose (Con): I thank both noble Lords for speaking so eloquently—indeed, so briefly and elegantly—and the noble Baroness, Lady Jones, for tabling her amendments, which would require the DMU to establish a process for non-SMS firms to register themselves with the DMU as an interested party. The DMU would then be required to send certain notices to these challenger firms.

[Viscount Camrose]

The Government agree that it is important that affected parties should have access to appropriate information related to DMU investigations. That is why the Government amendments go further, we feel. They will ensure that, subject to confidentiality, the DMU is required to publish all its SMS conduct requirements and PCI notices online, where they are accessible to everyone and not just specific firms that have registered their interest, or those who might not be considered challenger firms. The noble Lord, Lord Bassam, made a point about being informed of these things: while we would prefer not to put any such mechanism in the Bill, it is straightforward to imagine mechanisms that the DMU could employ to automate that.

The CMA has already been updating its approach to identifying and seeking input from third parties, including outside of formal consultations—making calls for evidence when launching investigations, web submission portals, and information requests for businesses, among others It will be able to use these approaches to inform decisions under the new regime.

I agree very much with the spirit of the noble Baroness's amendments, which is why these government amendments will go further, to promote transparency across the regime. I therefore welcome the statement of the noble Lord, Lord Bassam, that he feels sufficiently reassured to not press the opposition amendments at this time.

Amendment 2 agreed.

Amendment 3

Moved by ***Viscount Camrose***

3: Clause 11, page 6, line 35, leave out "statement" and insert "notice"

Member's explanatory statement

This amendment would require the CMA to give a copy of an SMS investigation notice, rather than a summary of the notice, to the FCA, OFCOM, the ICO, the Bank of England and the PRA.

Amendment 3 agreed.

Amendment 4 not moved.

Amendment 5 not moved.

Clause 12: Closing an initial SMS investigation without a decision

Amendment 6

Moved by ***Viscount Camrose***

6: Clause 12, page 7, line 9, leave out "a statement summarising the contents of"

Member's explanatory statement

This amendment would require the CMA to publish a notice under clause 12(2) rather than a summary of the notice.

Amendment 6 agreed.

Amendment 7 not moved.

Clause 14: Outcome of SMS investigations

Amendment 8

Moved by ***Viscount Camrose***

8: Clause 14, page 7, line 36, leave out "a statement summarising the contents of"

Member's explanatory statement

This amendment would require the CMA to publish an SMS decision notice rather than a summary of the notice.

Amendment 8 agreed.

Amendment 9 not moved.

Clause 15: Notice requirements: decisions about whether to designate

Amendment 10

Moved by ***Viscount Camrose***

10: Clause 15, page 9, line 5, leave out "a statement summarising the contents of"

Member's explanatory statement

This amendment would require the CMA to publish a revised SMS decision notice rather than a summary of the notice.

Amendment 10 agreed.

Amendment 11 not moved.

Clause 19: Power to impose conduct requirements

Amendment 12

Moved by ***Lord Clement-Jones***

12: Clause 19, page 10, line 36, after "activity" insert "or another digital activity under its control that is affected by the relevant digital activity"

Member's explanatory statement

This amendment would widen the conduct requirements for designated undertakings to include an undertaking's conduct with respect to any other digital activity that is impacted by its designated activity.

Lord Clement-Jones (LD): My Lords, I rise to speak to Amendment 12 and support Amendments 14, 23, 34 and 60, which will no doubt be spoken to in more detail by their proponents.

Last week, several things took place. First, the European Commission issued Apple with a fine of €1.8 billion. The fine was increased due to Apple providing the Commission with misinformation during the investigation. Secondly, as many noble Lords have noted, the Digital Markets Act came into force in the EU. Thirdly, Apple took the decision last week to terminate Epic Games's developer account, in retaliation for previous comments criticising Apple's approach to managing the App Store.

Fourthly, Apple introduced a new core technology fee, which it announced in January. It proposes to charge any developer who takes advantage of the DMA's benefits. In practice, it means that any developer wishing to list their app on an alternative store, or offer consumers an alternative payment method, is confronted with a new fee, despite not using any Apple service. This does not send a signal that Apple is ready

to comply with new competition regulations. Such anti-competitive behaviour and the efforts of big tech to avoid meaningful regulation is exactly why the UK needs a strong digital markets regime, and a very good illustration of the tactics that some big tech operators are using.

The amendments being put forward today as regards digital markets are crucial to ensuring that the UK's regulatory regime is fully equipped to meaningfully tackle big tech's anti-competitive practices and prevent its circumvention and delaying tactics, and that, wittingly or unwittingly, we have not given it the ability to drive several coaches and horses through the CMA's powers in the Bill. Equipping the CMA with a strong leveraging principle—which, thanks to the noble Lord, Lord Vaizey, we must now call the whack-a-mole principle—is therefore critical to ensure that it keeps up with such attempts to move illegal practices and fees around its ecosystems. I am not quite sure whether my Amendment 12 is belt or braces to the amendment being put forward by the noble Baroness, Lady Jones, but it is designed to ensure that what is called the leveraging principle has full play in the CMA's powers.

The noble Viscount, Lord Camrose, said in Committee:

"We agree with noble Lords that it is crucial that the CMA can deal with anti-competitive behaviour outside the designated activity where appropriate"—

note the "where appropriate". He went on:

"Our current drafting has sought to balance the need for proportionate intervention with clear regulatory perimeters. The regime is designed to address the issues that result from strategic market status and is therefore designed to address competition issues specifically in activities where competition concerns have already been identified. This recognises that SMS firms are likely to be active in a wide range of activities and will face healthy competition from other firms in many of them".—[*Official Report*, 22/1/24; col. GC 164.]

However, the Government's subsequent note on leveraging lays bare their limited approach to leveraging.

We need a much more comprehensive approach to the use of market power in non-designated activities, especially where activities are those such as operated by Google and Apple. For instance, Google runs Search, YouTube, its ad network, Ad Exchange and products such as Google Maps, Images, News and Shopping. All share operating systems and a browser, and fixed and common costs, and all operating system and browser costs are recovered from advertising. All search and browser and operating systems are integrated. All benefit from economies of scale, scope and network externalities. Apple, Amazon and Meta are all the same. They can account for everything as stand-alone businesses, but it is entirely their choice whether they do so; they can move costs around at will. Amendments are consequently needed to tighten up the provisions of Clauses 19 and 20—as particularly set out in Amendment 14 from the noble Baroness, Lady Jones—and ideally in Clause 29 as well.

I have signed amendments relating to countervailing benefits. Since the introduction of the Bill, we have been strongly of the view that Clause 29 could be a major loophole and that the long-term interests of the consumer could be ignored in favour of the short-term interests. On this basis, we strongly support returning to the form of the clauses as they were before Report in the Commons, as proposed by the noble Baroness, Lady Jones, in her amendments. I have sympathy with the amendment in the name of the noble Lord, Lord Lansley, too, and would support it if we felt there was sufficient support across the House.

Finally, I turn to Amendment 34 and the final offer mechanism, which is due to be spoken to by the noble Lord, Lord Black. The aim must surely be to ensure that the final offer mechanism is a credible incentive to negotiate, so that designated undertakings are not able to frustrate the enforcement process over many months or even years. The final offer mechanism would remain a last resort, used only when good faith negotiations had completely broken down but made a more credible incentive.

In closing, I should say that, if the noble Baroness, Lady Jones, wishes to test the opinion of the House on her Amendments 14 and 23, we will support her.

5.15 pm

Lord Lansley (Con): My Lords, I have four amendments in this group. Amendments 16 and 17 relate to the conduct requirements that the CMA can impose on designated undertakings, and Amendments 20 and 25 relate to countervailing benefits in relation to that conduct. I will come to that in a minute. Let me stick for a moment with Amendments 16 and 17.

Amendment 16 was helpfully introduced, to some extent, by what the noble Lord, Lord Clement-Jones, said about the activities in the run-up to the introduction of the Digital Markets Act in the European Union. There was a deadline of 7 March for that, and considerable attention has been paid to what Apple in particular has done in relation to that. The noble Lord made Apple's position clear. It is saying, essentially, that we can either stay with our existing system, and it will charge 30% by way of fees for apps on the App Store, or we can go to this alternative which enables us to comply with the DMA, and Apple will offer an alternative but with a 17% fee for apps plus a 3% core technology fee, and, if you go beyond a million downloads, you will get a 50 cents processing charge per download. Those who fear that their app may go viral, with millions of downloads, are potentially facing enormous costs for processing them through the App Store. As far as all the potential users of the Apple App Store are concerned, this potentially restricts their opportunity for competition rather than enabling it.

My first point is to further reinforce that we have come together to design legislation in support of the Government that is more flexible than the Digital Markets Act. The DMA, in effect, puts the obligations into the originating Act. To change them will be considerably more difficult than would be the case for the Competition and Markets Authority in our regime to change the structure and the content of conduct requirements. Potentially, we have really good flexibility.

Amendment 16 is linked to whether the powers to impose conduct requirements enable the CMA to act in relation to the leveraging of market power in digital activities into other activities—the wider system of its business. Amendment 16 is absolutely about whether the conduct requirements that can be imposed under Clause 20 are sufficiently wide to enable the Competition

[LORD LANSLEY]
and Markets Authority to structure them to limit activity which restricts competition in the way that these efforts are being pursued in relation to the Digital Markets Act. To that extent, Amendment 16 asks the Minister, if he would be kind enough to respond in this light, whether, if a designated undertaking were to behave in that sort of way, the CMA would have the power under the conduct requirements to respond and act, and to do so rapidly, to frustrate that kind of anti-competitive result.

Amendment 17 is slightly different, in that we discussed it in Committee. One of the European Union Digital Markets Act obligations is termed expressly to prevent others seeking to stop someone making a complaint to any public authority about non-compliance with the relevant obligations. I looked to see whether our conduct requirements, specified in Clause 20, cover a similar circumstance. In discussion in Committee, the Minister directed me to the "fair and reasonable terms" provision, which is very wide ranging but does not cover this, because these are not the terms of a contractual relationship between a designated undertaking and its users or potential users. It may not relate to that at all.

The Minister also directed me to the question of discrimination, but I do not think this is about discrimination between users; it is about preventing someone, who may be a user, a potential user or a potential competitor, from going to a public authority and saying, "This undertaking does not comply with its conduct requirements". We know—I will not repeat the evidence that I gave in Committee—that there have, unhappily, been circumstances of intimidation of those who would complain to regulators about the conduct of organisations with significant market power. I return to this simply to say to the Minister that I am not yet convinced. Can he convince us that this kind of activity is covered by the conduct requirements? If it is not, will he undertake to ensure that the necessary changes are made to Clause 20, which the legislation would permit?

I will also speak to the amendments about countervailing benefits exemptions. Amendments 23 and 24 revert the Bill to its original wording, which would be better than where we are now. I have looked at Clause 29 from my point of view and I cannot find a good reason for it, so I thought it better to leave it out. If there is a conduct investigation and there are countervailing benefits, they should be presented to the CMA when it makes representations to a conduct investigation. Why would they be left to any other time or specified separately in the legislation?

I thought it better to amend Clause 27 such that, when making representations, the designated undertaking may give details of the benefits associated with its conduct to form part of that investigation. At that point, it should come forward if it is prepared to make commitments that the CMA could accept, without necessarily making a finding, to close that investigation.

All this should take place in Clause 27 on representations, because that is where the sequence lies. I do not understand why Clause 29 has been added at what appears to be a later stage in the sequence of the legislation. As it is a separate clause, it appears as though the benefits can be presented at an entirely separate point.

As I have also discussed with the Minister, there is an analogy with the exempt anti-competitive agreements under the Competition Act 1998. I was on the standing committee when that Bill was in Committee and this is a very different kettle of fish. The 1998 Act set out broad descriptions of agreements that would be deemed anti-competitive and therefore void, except if undertakings came to the Competition and Markets Authority; then the burden is on it to demonstrate that they have, in effect, countervailing benefits, such as to innovation, the consumer and the like, without an adverse effect on competition.

That is ex post regulation. That is agreements and obligations that are broad-ranging and apply across industry. Here, we are talking about conduct requirements that are optimised and designed in relation to that undertaking in the first place. This is ex ante regulation. You cannot compare ex post provisions in the Competition Act with ex ante regulation under this legislation. They are not the same kind of thing.

Therefore, again, I come back to the argument: let us not have exemptions. The use of "exemption" seems wholly inappropriate. We have here a very straightforward process. Conduct requirements require, in themselves, under Clause 24, for there to be a consultation. The undertaking should tell the CMA what the benefits associated with its conduct are at that stage.

There is a forward-looking process; the conduct requirement is supposed to look forward five years, but none the less, circumstances change. The CMA can review a conduct requirement, and the designated undertaking should come to the CMA if circumstances change and there are countervailing benefits and ask for the conduct requirement to be reviewed. Even if, under all these circumstances, a conduct investigation notice is issued, the undertaking should come forward and express what the benefits are at that point. Under none of these circumstances is there a requirement for the use of "exemption" or for an additional clause that offers countervailing benefits as such.

I dare say I will not press this, because there is probably more to be said for Amendment 23 and going back to the original wording, but it afforded me the opportunity, I hope, to explain why I think the whole proposition in Clause 29 seems misplaced.

Baroness Kidron (CB): My Lords, I find myself in a slightly awkward position because my name is listed in support of Amendments 23 and 24, but I find the argument of the noble Lord, Lord Lansley, incontrovertible, and maybe he should press his amendment.

On the wording, I want to put on the record the view of Which?:

"This is a legal loophole for big tech to challenge conduct requirements through lengthy, tactical, legal challenges. It would tie up CMA (i.e., taxpayer) resources and frustrate the intent of the legislation. Whilst we agree with the intent of this provision, which is to encourage innovation that will benefit consumers, it is critical that these provisions do not inadvertently give designated firms a get out of jail free card from DMU decisions"

by presenting opaque consumer benefits.

I put that on the record because it is so measured in comparison with many of the emails and representations I have had, and still is absolutely categoric that this is a get out of jail card. Like the noble Lord, Lord Lansley, I do not understand why the regulator duty to be

"proportionate, accountable, consistent, transparent and targeted",

within the context of coming to the conduct requirements and taking up any countervailing benefits at that point, is not adequate. So I will support the noble Baroness, Lady Jones, and, indeed, the noble Lord, Lord Lansley, should he change his mind in the next few minutes.

I also add my support to Amendment 60, tabled by the noble Lord, Lord Fox. I am an enthusiastic supporter of international standards. They provide for soft law and, having worked with the IEEE on a number of standards over the last few years, I see how brilliantly they work to bring disparate people together and provide practical steps for those tasked with implementation. I declare an interest in relation to the IEEE, which gives some funding to 5Rights Foundation, of which I am chair.

The point I leave with the House is that, toward the end of 2022, I had two conversations with companies that will certainly be SMS about why they were now recruiting for employees to work on standards full-time. I believe the CMA should be in the standards-writing game.

5.30 pm

Lord Black of Brentwood (Con): My Lords, I refer to my entry in the register of interests. I will speak to my Amendment 34, the effect of which would be to allow the final offer mechanism to be initiated by the CMA after a conduct requirement of the type allowed under Clause 20(2)(a)—to

"trade on fair and reasonable terms"—

has first been breached and the other conditions in Clause 38 are met. This includes the condition that

"the CMA could not satisfactorily address the breach within a reasonable time frame by exercising any of its other digital markets functions".

I am very grateful to noble Lords who have added their names to my amendment.

As I explained in Committee, I am concerned that the final offer mechanism must be a credible incentive to negotiate rather than such a distant prospect that the big tech firms can delay and frustrate enforcement. The whole point of the Bill is to reduce the limitless ability of big tech to leverage its huge market power and financial and legal clout. Yet, if Google or Meta believes that the FOM will never be reached, they will happily offer publishers and content creators suboptimal deals and elongate the negotiation process, and publishers—I think particularly of the hard-pressed local press—may well be compelled to accept suboptimal deals out of commercial necessity.

It is important to note that the amendment would not rush a publisher or platform into the FOM unnecessarily. If the CMA judges that its other enforcement mechanisms would bring a swift resolution to any dispute on commercial terms, it could proceed with those remedies. Therefore, the amendment seeks merely to give the CMA a wider range of tools at an earlier stage, rather than mandating which tools it should select.

We need only to look to Australia, the first country to introduce final offer arbitration, to see just how determined some firms are to avoid fair commercial deals for the trusted content that is the antidote to a new wave of AI-generated disinformation. Less than two weeks ago, Meta, with weary inevitability, announced that it would close Facebook's news tab feature in Australia and would not renew any of the deals made with publishers after the news media bargaining code was put on to the statute book.

At a minimum, there must be assurances that the CMA will be able rapidly to move through the enforcement stages prior to the FOM, setting short deadlines for compliance and being ready to swiftly set new or more prescriptive conduct requirements of the type allowed in Clause 20(2)(a) if the initial requirements are inadequate.

We must also be sure that, under Clause 20(2)(a), the CMA will be able to require SMS firms to share information necessary for publishers to calculate the value of their content. Without this information, publishers will inevitably be at a severe disadvantage in initial negotiations, making it nigh on impossible for "fair and reasonable terms" to be agreed. In parts of the Bill dealing with the FOM itself, it is explicitly stated that the CMA can use an information notice to require an SMS firm to give information to the CMA, and for that information to be shared with a third party, such as a publisher. Although this precise mechanism may not be appropriate for negotiations outside the FOM, if the CMA's conduct requirements were not able to encompass a requirement for the necessary information to be shared, we would end up in a situation where the FOM was the only means to facilitate "fair and reasonable" commercial terms. Robust reassurances on this matter from my noble friend the Minister would be most welcome; I am waiting to see whether he writes "robust" down.

Finally on my amendment, I note that although this legislation ultimately cannot prevent global monopolies denying their users access to all trusted news content, the conduct requirement in Clause 20(3)(a) prevents SMS firms

"applying discriminatory terms, conditions or policies".

We must have clarity that the CMA would be able to use this requirement to prevent the withdrawal of a service by an SMS firm—including ending the hosting of news content—if it is done in a discriminatory manner. Such discriminatory behaviour could include the removal of news content from UK news publishers in an effort to avoid payment while promoting news content from English-language titles based in other jurisdictions. That must not happen. Again, I hope the Minister can provide reassurance.

I will say very briefly that I support Amendments 23 and 24, in the name of the noble Baroness, Lady Jones, which would reintroduce the indispensability standard to the countervailing benefits exemption. When the Bill was first published, the committee chaired by my noble friend Lady Stowell found that this exemption, as drafted, constituted a "proportionate

[Lord Black of Brentwood]
backstop", provided that the threshold for its use remained high, and stated explicitly that the Government should not lower the threshold.

We have been told by the Minister before that the changes made in the Commons do not lower the threshold but are an effort to add clarity. Yet, Cleary Gottlieb, a law firm which has represented Google in competition cases, has itself admitted that the new standard "is arguably lower". Unfortunately, if these amendments are not adopted, it seems highly likely that the courts will reach the conclusion that Parliament explicitly moved away from one set of words to another, the clear implication being that it wishes to create a new and novel standard, and one which would seriously undermine the whole purpose of the legislation.

On the issue of precision, it is hard to see how a move away from a well-established and understood legal concept can add clarity in this area. Since its adoption in the Competition Act 1998, as my noble friend Lord Lansley said, the indispensability standard has been tested extensively, meaning that designated firms, third parties and the CMA alike would have a huge amount of precedent to draw on if it was reintroduced into the legislation. Why on earth would we tamper with that?

As my noble friend Lord Lansley's amendments demonstrate, it is questionable whether the stand-alone exemption is necessary at all. Therefore, given that the changes made in the Commons may well have lowered the threshold required to access the exemption and the fact that they only reduced clarity—neither of which was the Government's stated intention—there seems no sound policy reasons not to return Clause 29 to its original form, and I will support the amendments from the noble Baroness, Lady Jones.

Baroness Stowell of Beeston (Con): My Lords, I assure noble Lords that, having spoken at length in the first group, I will be very brief in this group, not least because my noble friend Lord Black has made my argument for me on the countervailing benefits issue, which Amendment 23, in the name of the noble Baroness, Lady Jones, addresses. I support that amendment because, as my noble friend just said and as I referred to in my remarks on the first group, there were several issues in the Bill that your Lordships' Communications and Digital Select Committee was clear were important and should not be changed, one of which was countervailing benefits. I therefore support the amendment, which would reverse what has been changed in the Bill back to its original wording. As has been said, we know from the evidence of the last few weeks since the Digital Markets Act has been in force in Europe, and other cases have been brought against some of the respective large tech firms, that those firms will take any and every opportunity there is to exploit potential weaknesses or loopholes in legislation. That is why it is important that the language remains in its original wording.

I also support my noble friend Lord Black's remarks about his Amendment 34. I too look forward to my noble friend the Minister giving him some assurance in robust terms.

Lord Fox (LD): My Lords, Amendment 60 is in my name. I was expecting to be ploughing a rather lonely furrow on this amendment, so I welcome the enthusiasm of the noble Baroness, Lady Kidron, particularly as it is based on such relevant experience and came with such authority. I thank her for that.

The Minister has been very open in our discussions on these issues, which focus on two areas: interoperability and standards, which are, of course, inextricably linked. One critical area to be clarified is the importance of vertical and horizontal interoperability and the fact that each requires different responses. Clause 20 covers vertical interoperability; for example, the promotion of the use of platforms as neutral distribution channels to market for all kinds of apps. The Bill does not explicitly include interoperability between an app and a platform that operates as a distributor and, in a network sense, among websites that compete with each other and with the platforms. This is horizontal interoperability.

The department's view is that Clause 12 is wide enough to catch all of this. The Minister said in Committee that it is the department's contention that defining interoperability is unnecessary because it considers it to be a "commonly understood technical term". That is welcome, but it relies on a level of interpretation and inference by the DMU because the department's interpretation is not clear by the letter of the Bill. As such, it would be helpful if the Minister could confirm the explicit inclusion of horizontal interoperability between websites in promoting competition. Will he please confirm that Clause 20(3)(e) will not limit conduct requirements to promote interoperability with a platform only, and set out how the Bill permits the DMU to consider requirements relating to interoperability in a range of contexts, including web browsers, apps, operating systems and websites?

As far as standards are concerned, I think we agree that there is a need for open and non-discriminatory international standards to support interoperability and promote the competition at which the Bill is so firmly targeted. That this is important is illustrated by the fact that Apple recently publicly threatened to block access to the open web from its devices. For there to be competition, the open web needs to interoperate with Apple and Google browsers. This is quite a serious point. This activity is controlled via W3C standards.

The amendment I have tabled is designed to be helpful. It ensures simply that the DMU understands its role in seeking to ensure that international standards bodies are promoting interoperability, both vertically and horizontally, and hence promoting competition. Given the central importance of standards to competition, my aim is to emphasise that this is not an add-on for the DMU but a core activity. I thought the Minister might be able to accept this amendment, but if he feels unwilling to do so, I feel sure that if he could put on record this important role for the DMU, it will be an important step forward, and I look forward to his response.

Lord Leong (Lab): My Lords, it has been illuminating to listen to the varied and valuable contributions from all noble Lords who have spoken in this debate. I thank all those who have risen to speak. As may be expected,

a broad range of knowledge, differing views and important concerns has been shared and expressed. The noble Lord, Lord Clement-Jones, referred to Apple's dominance and it not being prepared to comply with any digital legislation. This should make us mindful of what big tech is getting up to. One thing is very clear: there is a strong consensus in the House that legislation is needed to catch up with, and indeed anticipate, the rapidly changing digital landscape which even the most technophobic among us can no longer afford to ignore.

I shall speak specifically to Amendments 14, 15, 23 and 24 in the name of my noble friend Lady Jones of Whitchurch. I thank the noble Baronesses, Lady Harding and Lady Kidron, and the noble Lord, Lord Clement-Jones, for adding their names. The principle behind Amendments 14 and 15 is to ensure that the Competition and Markets Authority can tackle anti-competitive conduct in a non-designated activity, provided that the anti-competitive conduct is related to a designated activity. These amendments do not seek to hamper digital innovation but rather to create a pro-competition market in which consumer interests are safeguarded.

5.45 pm

In Committee, the noble Lord, Lord Vaizey of Didcot, showed great innovation when he described the so-called leveraging principle as the "anti-whack-a-mole" principle, and I shall refer to it as the "whack a mole" principle from now on. Thanks to him, we all know what this means: companies can use their market power to retain an anti-competitive advantage until the regulator is about to catch them and then, just before the whack, they shift this unfair advantage somewhere else. This can happen again and again, perpetuating the inequity and creating unnecessary work for the CMA. Our amendment would prevent companies from circumventing regulation by shifting their anti-competitive behaviour from designated to non-designated activities.

I have no doubt that many noble Lords will have received briefings, representations and requests for meetings from big tech companies, which are pushing back strongly on these amendments. They cite concerns about regulatory overreach. They claim that these amendments will have lasting consequences, potentially delaying or deterring new and improved digital services being brought to market, but this is not the case. These amendments are pro-competition. They ensure that the playing field remains level. New innovators will not face an uneven pitch obstructed by too many whack-a-molehills with a maze of secret tunnels beneath it. I sincerely hope that the Minister is prepared to stand up for consumer interests in the face of increasingly powerful technology companies and, like a good groundskeeper, will roll the pitch to keep it even.

If the Minister genuinely supports a competitive marketplace, I hope he will support these amendments. If he does not feel that he can address our concerns, I give notice that we will test the opinion of the House on Amendment 14. I hope he will find my argument persuasive, and I will listen carefully to his response.

I will, in passing, mention three other amendments which support Amendments 14 and 15, to which I have just spoken. Amendment 12, tabled by the noble Lord, Lord Clement-Jones, simply widens the conduct requirements for designated undertakings to include an undertaking's conduct with respect to any other digital activity that is impacted by its designated activity. Together with Amendments 16 and 17, tabled by the noble Lord, Lord Lansley, this would enable the CMA to keep conduct requirements under review and take account of whether those requirements are having their intended pro-competition effects and, if not, to determine whether further intervention is required. Taken together, we believe that these amendments clarify and reinforce the powers available to the CMA.

I shall speak now to Amendments 23 and 24. Once again, I thank the noble Baronesses, Lady Harding and Lady Kidron, and the noble Lord, Lord Clement-Jones, for adding their names. These amendments would have the effect of reverting the wording on countervailing benefits exemptions to the Bill's original text, as referred to by the noble Baroness, Lady Stowell. We object to the Government's late amendments because they would narrow the application of the exemption through which big tech companies can argue that their conduct gives rise to benefits which outweigh the detrimental impact on competition that their conduct would otherwise breach. I hope the Minister will listen carefully to my argument and agree to accept Amendment 23 and revert to the original wording, as it is another issue about which we feel strongly enough to test the opinion of the House, if required.

Amendments 23 and 24 also reinsert the requirement for the conduct to be "indispensable" to the realisation of the benefits before an exemption can apply. As we discussed in Committee, the removal of the word "indispensable" may weaken the regulator's ability to rebuff countervailing benefit claims.

We believe that without the word "indispensable"—a word which has a recognised competition law standard—the threshold for claims will be reduced. It follows that a lower threshold would increase the likelihood of success for big tech firms' claims against the regulator. We fear that this could become a go-to tactic for litigation lawyers—a means by which they could delay a final conduct requirement outcome and thereby prolong a potentially anti-competitive advantage.

Without our far more precise definitions, the CMA may find itself inundated with numerous claims of countervailing benefits, used tactically by expensive lawyers to divert the regulator's limited resources from its central task of pursuing the conduct investigation.

In Committee, the Minister said that

"the current wording is that the benefits could not be realised without the conduct, and the previous wording was that the conduct is indispensable to the realisation of those benefits".—[*Official Report*, 24/1/24; col. GC 231.]

He went on to argue that this creates the same standard—neither higher nor lower—but with greater clarity.

In his subsequent letter, the Minister again argued that the current government-amended language has the same meaning as that originally proposed in the Bill. We do not accept that the different wording in fact means the same the thing. This is our key point of disagreement: if it does mean the same thing, why did the Government bother to change it?

[LORD LEONG]

The word "indispensable" is a recognised competition law standard. Reinserting this word strengthens the clarity of the law. This is a clarification which, it appears, we are all seeking. We assert that, in this Bill, the word "indispensable" is indispensable.

I now refer to the amendment from the noble Lord, Lord Black. We are sympathetic to the final offer. If there is a credible offer, it would offer challenger companies the option of coming to a settlement rather than playing into the hands of the dominant big tech companies with their vast financial resources.

In conclusion, I would like to mention Amendment 60 in the name of the noble Lord, Lord Fox. This amendment requires the DMU to take into account interoperability and international standards in discharging the duty to promote competition in the interests of consumers. Interoperability standards enable the operational processes underlying the exchange and sharing of information between systems. This ensures that all digital research outputs are findable, accessible, interoperable and reusable: the four pillars of the FAIR principles. Their widespread acceptance and adoption as standards for management of data, development of infrastructure and delivery of services in the sector warrants the amendment's inclusion in the Bill.

As we have argued throughout, our aim is to avoid unnecessary and expensive legislation. It is our contention that these amendments help to achieve that objective. I will listen keenly and with considerable interest to the Minister's response, in particular on Amendments 14 and 23.

Viscount Camrose (Con): As ever, I start by thanking all noble Lords who have spoken so well and clearly in this very interesting debate. I will start with Amendment 12 from the noble Lord, Lord Clement-Jones, and Amendments 14 and 15 from the noble Baroness, Lady Jones of Whitchurch, which would expand the ability of the CMA to intervene outside the designated digital activity.

As outlined in Committee, this regime is specifically designed to address competition concerns in digital activities in respect of which firms have been designated as SMS. I agree with noble Lords that the CMA must be able to deal with anti-competitive behaviour outside the designated activity where appropriate, to prevent firms leveraging power unfairly or seeking to circumvent and undermine regulation. Under current drafting, the CMA will already have broad powers to prevent and address issues of an SMS firm seeking to avoid or circumvent the regime or unfairly leverage its market power.

I hope I can reassure the noble Lord, Lord Leong, by listing these. First, there are three types of conduct requirement that can address different types of leveraging. In addition to the leveraging principle in Clause 20(3)(c), the CMA can prevent leveraging by imposing requirements to address self-preferencing under Clause 20(3)(b) and tying and bundling under Clause 20(3)(d). Additionally, PCIs can be imposed anywhere in an SMS firm's business to address an adverse effect on competition related to a designated activity, such as a firm seeking to circumvent regulation.

Finally, the CMA will have discretion to set the parameters of an SMS designation and to define a digital activity in a broad way. This will limit the risk of harmful activity falling outside the scope of a designation in the first place. This regime has been designed to give the CMA powerful tools to address competition issues. I hope noble Lords feel reassured that, where the CMA should be able to intervene, the powers already in the Bill allow it to do so.

Amendment 60, tabled by the noble Lord, Lord Fox, would require the DMU to consider interoperability and global web standards when carrying out its duty to promote competition under the digital markets regime and to liaise with international authorities when doing so.

The CMA engages already with global digital standards where it is appropriate to do so; for example, with the World Wide Web Consortium, or W3C, the web standards development organisation. We expect that the DMU will also pay due regard to global technical standards, along with other relevant considerations, when operating the digital markets regime. As outlined in Committee, a lack of interoperability in digital markets can reinforce entrenched market positions and harm competition.

SMS designation is the gateway into the regime. The Bill allows the DMU to define digital activity for designation purposes. In defining the digital activity, the DMU will be able to capture the various ways in which the firm provides digital content or internet services as part of that. The DMU would have discretion to impose obligations on that firm, including for interoperability in relation to that digital activity.

The Bill gives the DMU comprehensive and flexible powers relating to interoperability to promote competition in digital markets, including conduct requirements that can be tailored to a firm's specific business model and behaviour. So I would like to reassure the noble Lord that the regime's tools can apply to both interoperability between platforms and between and among apps and platforms and other digital services.

Depending on the scope of the designation, the DMU can set conduct requirements under Clause 20(3)(e) to promote interoperability, not only with a platform but in a range of contexts, including web browsers, apps, operating systems and websites.

Other types of conduct requirement can also be used to ensure interoperability, such as requirements for

"trade on fair and reasonable terms"

under Clause 20(2)(a) or requirements to prevent restrictions on the use of other products under Clause 20(3)(h). The Government agree that promoting interoperability and having regard to global standards can be important for promoting competition in digital markets.

Amendments 16 and 17 from my noble friend Lord Lansley would add two additional permitted types of conduct requirement to tackle specific types of behaviour by SMS firms. Amendment 16 seeks to prevent SMS firms charging fees which are unjustified or could restrict access to the relevant digital activity. Under the current framework, the CMA will be able to effectively tackle this issue. The CMA could likely use its powers under Clause 20(2)(a)—the requirement

to trade on fair and reasonable terms—and subsections (3)(a), (b), (c) and (d) prohibiting discriminatory treatment, self-preferencing, leveraging, and tying and bundling.

Amendment 17 would add a new permitted type of conduct requirement to deal with SMS firms attempting to stop third parties raising possible non-compliance with the CMA. Again, I can reassure my noble friend that Clause 20(3)(a) permits a conduct requirement that could prohibit an SMS firm imposing discriminatory terms. This could address retaliation by an SMS firm, including where an SMS firm has singled out a user for adverse treatment in retaliation.

I will now address the amendments relating to the countervailing benefits exemption. As set out in Committee,

"the exemption will not act as a loophole for firms to avoid conduct requirements".—[*Official Report*, 24/1/24; col. GC 231.]

It is an important safeguard that reflects similar practice in the competition landscape. Under Amendments 25 and 20, my noble friend Lord Lansley proposes to remove the clause and replace it with a discretionary power to consider consumer benefits under Clause 27.

My noble friend is right to say the CMA should be able to consider consumer benefits identified by representations. Regarding the sequencing of these clauses, I reassure him that any representations that the countervailing benefits exemption should apply to would be considered among the representations under Clause 27. Clause 29 does not therefore constitute an additional step; rather, it explains how the CMA must act in relation to a specific type of representation. It would not delay or extend the conduct requirement breach investigation process. Making it discretionary for the CMA to act on a demonstrable instance of consumer benefits outweighing the harm to competition, while removing the criteria in Clause 29, would create uncertainty for both SMS firms and for third parties as to how the CMA will conduct its processes.

6 pm

I turn next to Amendments 23 and 24 from the noble Baroness, Lady Jones of Whitchurch, which would revert the wording of the countervailing benefits exemption to the text as introduced in the Commons. I stress that the current wording maintains the same high threshold. However, I will not repeat the arguments, given the extensive debate we shared on this in Committee.

Lord Lansley (Con): I am very grateful to my noble friend. Could he say therefore whether a designated undertaking that feels it can demonstrate countervailing benefits must have presented those to the CMA before the CMA concludes its findings under Clause 30—or can it do so afterwards?

Viscount Camrose (Con): It can make a representation to the effect of countervailing benefits as part of a breach investigation, which can of course happen at any time during the life of a conduct requirement. We would expect it to make those representations at the start of or during the initial investigation. When these representations are made as part of a breach requirement, the Bill sets out the high standards required in order to accept that argument.

Lord Lansley (Con): Sorry, may I just press my noble friend? Can he therefore say that the presentation of a countervailing benefits exemption after the CMA has made findings under Clause 30 would be void?

Viscount Camrose (Con): A representation to the effect that there are countervailing benefits would take place as part of a breach investigation. Of course, once the investigation is complete, there is no further opportunity to do so. Have I answered the question?

Lord Lansley (Con): Yes.

Viscount Camrose (Con): To address the concerns of the noble Lord, Lord Leong, that the current wording deviates from legal precedent, I note that, since this is a new regime, existing exemptions in different competition regimes would not be directly applicable. It is highly likely that the application of the exemption will be tested, no matter the wording.

Finally, Amendment 34, tabled by my noble friend Lord Black of Brentwood, would allow the final offer mechanism to be used after the breach of a conduct requirement, rather than after a breach of an enforcement order. This novel tool has been designed as a backstop to normal enforcement processes. It is a last resort to incentivise sincere negotiations concerning fair and reasonable payment terms between the SMS firm and third parties. I wholeheartedly agree with my noble friend that these incentives must be both compelling and credible. It is clearly preferable for parties to reach a privately agreed settlement rather than one chosen by the regulator. That is why we must ensure due consideration of less interventionist options before turning to the final offer mechanism.

However, if SMS firms try to frustrate the process or drag it out to the detriment of third parties, I agree that the DMU should be able to accelerate stages before the final offer mechanism is invoked. That is why we have ensured that the DMU will be able to set urgent deadlines for compliance with enforcement orders, supported by significant penalties where appropriate, in cases of non-compliance.

I can robustly reassure my noble friend that the CMA can, via conduct requirements and enforcement orders as well as the final offer mechanism, gather and share key information with third parties.

Finally, to his comment on the forced withdrawal of content, the Bill is able where appropriate to tackle this issue. A conduct requirement could, for example, prevent an SMS firm withdrawing a service in a discriminatory way or treating users more favourably if they purchase the SMS firm's other products.

The Government have worked hard to strike a balanced approach to intervention. This includes ensuring that firms cannot undermine regulation, and prioritising benefits to consumers at the heart of the regime. I believe the tools, as drafted, achieve these goals, so I hope that noble Lords will not press their amendments.

Lord Clement-Jones (LD): My Lords, I thank the Minister for his response to the various amendments. I will be extremely brief; there will probably be quite a few votes now. I thank him for a full reassurance on Amendment 60, tabled by my noble friend, on standards

[Lord Clement-Jones]
and interoperability. I was looking closely at the noble Lord, Lord Black, when the Minister talked about Amendment 34, and I think there was a half-reassurance there—so that is one and a half so far.

It is clear to me, having discussed countervailing benefits further on Report, that this is, if anything, more dangerous than it appeared in Committee. I am sure that the noble Baroness, Lady Jones, will have noted the mood of the House as we discussed that.

On leveraging, the Minister made a valiant attempt to go through some points where the CMA might take more into account in terms of non-designated activities and so on. But the Minister sent through the technical note, and I am afraid that, if you look at it with care, it makes quite clear the circumscribed nature of the CMA's powers under the Bill as currently drafted. It will be very important that we take a view on that. I am sure the noble Baroness, Lady Jones, has been alert to that as well. I withdraw my Amendment 12.

Amendment 12 withdrawn.

Amendment 13

Moved by ***Lord Faulks***

13: Clause 19, page 11, line 7, leave out "proportionate" and insert "appropriate"

Member's explanatory statement

This amendment would restore the Bill's original wording in relation to Clause 19.

Lord Faulks (Non-Afl): My Lords, I invite the House to cast its mind back to the debates we had on the first group. Amendments 13 and 35 are both concerned with the use of "proportionality". The debates in Grand Committee and today on Report have been very much cross-party: there has been a shared endeavour to improve what is an excellent Bill, which strikes an important blow in regulating appropriately the digital market and, in particular, establishing a proper balance between big tech, with its immense power, and the smaller players.

The original Bill had "appropriate", and I wish to return to that wording. The change in the wording followed a heroic amount of lobbying by big tech, and there was a reason behind this lobbying: to make it easier to prolong, appeal and obfuscate—to use the legal might and finances that big tech has—and to possibly frustrate the whole purpose of the Digital Markets Unit.

The Minister, who has engaged with thoroughness and politeness throughout this process, did his best to reassure the House by saying that the use of "proportionate" was to reinforce the Government's expectation that the Digital Markets Unit would act proportionately. We do indeed expect it to act proportionately, but the use of "proportionate" in this context carries a heavy legal charge, as he tacitly accepted by saying that the use of "proportionality" meant that the analysis would spill over from cases involving the Human Rights Act or A1P1 into all cases, so that the scope for challenge of an intervention would significantly increase. That is not a happy situation, as a number of noble Lords have so eloquently said in supporting this amendment.

Amendments 13 and 35 are to the same effect, and I hope that Amendment 35 is regarded as consequential on Amendment 13. I wish to test the opinion of the House.

6.10 pm

Division on Amendment 13

Contents 217; Not-Contents 192.

Amendment 13 agreed.

Division No. 1

CONTENTS

Aberdare, L.
Addington, L.
Alderdice, L.
Allan of Hallam, L.
Alli, L.
Alton of Liverpool, L.
Anderson of Stoke-on-Trent, B.
Anderson of Swansea, L.
Andrews, B.
Ashton of Upholland, B.
Austin of Dudley, L.
Bach, L.
Bakewell of Hardington Mandeville, B.
Barker, B.
Bassam of Brighton, L.
Benjamin, B.
Bennett of Manor Castle, B.
Berkeley of Knighton, L.
Berkeley, L.
Best, L.
Black of Brentwood, L.
Blackstone, B.
Blower, B.
Boateng, L.
Bonham-Carter of Yarnbury, B.
Bowles of Berkhamsted, B.
Boycott, B.
Bradley, L.
Bradshaw, L.
Bragg, L.
Brinton, B.
Brooke of Alverthorpe, L.
Browne of Ladyton, L.
Bruce of Bennachie, L.
Bryan of Partick, B.
Bull, B.
Burt of Solihull, B.
Campbell-Savours, L.
Carter of Coles, L.
Casey of Blackstock, B.
Cashman, L.
Chakrabarti, B.
Chandos, V.
Chapman of Darlington, B.
Chartres, L.
Clancarty, E.
Clark of Windermere, L.
Clement-Jones, L.
Coaker, L.
Collins of Highbury, L.
Colville of Culross, V.
Craig of Radley, L.
Craigavon, V.
Crawley, B.
Cromwell, L.
Davies of Brixton, L.
Dholakia, L.
Donaghy, B.
Donoughue, L.
Doocey, B.
Drake, B.
Drayson, L.
D'Souza, B.
Dubs, L.
Eatwell, L.
Erroll, E.
Etherton, L.
Falconer of Thoroton, L.
Falkner of Margravine, B.
Faulkner of Worcester, L.
Faulks, L.
Featherstone, B.
Finlay of Llandaff, B.
Foster of Bath, L.
Foulkes of Cumnock, L.
Fox, L.
Freyberg, L.
Gale, B.
Garden of Frognal, B.
German, L.
Glasman, L.
Goddard of Stockport, L.
Goudie, B.
Grantchester, L.
Greenway, L.
Grender, B.
Griffiths of Burry Port, L.
Hacking, L.
Hamwee, B.
Hanworth, V.
Harding of Winscombe, B.
Harris of Haringey, L.
Harris of Richmond, B.
Hayman of Ullock, B.
Hayman, B.
Healy of Primrose Hill, B.
Hendy, L.
Hogan-Howe, L.
Hollick, L.
Howarth of Newport, L.
Hughes of Stretford, B.
Humphreys, B.
Hunt of Bethnal Green, B.
Hunt of Kings Heath, L.
Hussain, L.
Janke, B.
Jolly, B.
Jones of Moulsecoomb, B.
Jones of Whitchurch, B.
Jones, L.
Kakkar, L.
Kennedy of Cradley, B.
Kennedy of Southwark, L.
Kennedy of The Shaws, B.
Kerr of Kinlochard, L.
Khan of Burnley, L.
Kidron, B.

Kinnock, L.
Kinnoull, E.
Kramer, B.
Lansley, L.
Lawrence of Clarendon, B.
Lee of Trafford, L.
Lennie, L.
Leong, L.
Liddell of Coatdyke, B.
Lister of Burtersett, B.
Livermore, L.
Londesborough, L.
Ludford, B.
Mandelson, L.
Mann, L.
Marks of Henley-on-Thames, L.
Maxton, L.
McConnell of Glenscorrodale, L.
McIntosh of Hudnall, B.
McNally, L.
McNicol of West Kilbride, L.
Meacher, B.
Mendelsohn, L.
Merron, B. [Teller]
Morris of Yardley, B.
Murphy of Torfaen, L.
Newby, L.
Northover, B.
Oates, L.
O'Grady of Upper Holloway, B.
O'Loan, B.
Osamor, B.
Paddick, L.
Pannick, L.
Parminter, B.
Pinnock, B.
Pitkeathley, B.
Ponsonby of Shulbrede, L.
Prentis of Leeds, L.
Purvis of Tweed, L.
Quin, B.
Ramsay of Cartvale, B.
Randerson, B.
Razzall, L.
Redesdale, L.
Reid of Cardowan, L.
Rennard, L.
Ritchie of Downpatrick, B.
Roberts of Llandudno, L.
Rooker, L.
Russell, E.
Sahota, L.
Scott of Needham Market, B.
Scriven, L.
Sharkey, L.
Sheehan, B.
Sherlock, B.
Sikka, L.
Skidelsky, L.
Smith of Basildon, B.
Smith of Gilmorehill, B.
Snape, L.
Stansgate, V.
Stone of Blackheath, L.
Stoneham of Droxford, L.
Storey, L.
Stowell of Beeston, B.
Strasburger, L.
Stuart of Edgbaston, B.
Stunell, L.
Suttie, B.
Taylor of Bolton, B.
Taylor of Stevenage, B.
Teverson, L.
Thomas of Winchester, B.
Thornhill, B.
Thornton, B.
Thurso, V.
Tope, L.
Touhig, L.
Trevethin and Oaksey, L.
Tunnicliffe, L.
Turnberg, L.
Twycross, B.
Tyler of Enfield, B.
Vaux of Harrowden, L.
Wallace of Saltaire, L.
Warner, L.
Watson of Invergowrie, L.
Watts, L.
Wheeler, B. [Teller]
Whitaker, B.
Whitty, L.
Wilcox of Newport, B.
Winston, L.
Wolfson of Tredegar, L.
Wood of Anfield, L.
Woodley, L.
Young of Old Scone, B.
Young of Old Windsor, L.

NOT CONTENTS

Agnew of Oulton, L.
Altmann, B.
Altrincham, L.
Anelay of St Johns, B.
Arbuthnot of Edrom, L.
Ashcombe, L.
Ashton of Hyde, L.
Attlee, E.
Bailey of Paddington, L.
Balfe, L.
Barran, B.
Bellamy, L.
Bellingham, L.
Benyon, L.
Berridge, B.
Bethell, L.
Blackwood of North Oxford, B.
Blencathra, L.
Borwick, L.
Bottomley of Nettlestone, B.
Bourne of Aberystwyth, L.
Brady, B.
Bray of Coln, B.
Browne of Belmont, L.
Browning, B.
Brownlow of Shurlock Row, L.
Caine, L.
Caithness, E.
Callanan, L.
Cameron of Dillington, L.
Cameron of Lochiel, L.
Camoys, L.
Camrose, V.
Carrington of Fulham, L.
Cavendish of Little Venice, B.
Chadlington, L.
Colgrain, L.
Courtown, E. [Teller]
Crathorne, L.
Cruddas, L.
Cumberlege, B.
Davies of Gower, L.
De Mauley, L.
Deben, L.
Dobbs, L.
Douglas-Miller, L.
Duncan of Springbank, L.
Dunlop, L.
Eaton, B.
Eccles, V.
Effingham, E.
Empey, L.
Evans of Rainow, L.
Fairfax of Cameron, L.
Fall, B.
Fleet, B.
Fookes, B.
Foster of Oxton, B.
Fraser of Craigmaddie, B.
Frost, L.
Gadhia, L.
Garnier, L.
Gascoigne, L.
Geddes, L.
Glenarthur, L.
Godson, L.
Gold, L.
Goldie, B.
Griffiths of Fforestfach, L.
Grimstone of Boscobel, L.
Hamilton of Epsom, L.
Hannan of Kingsclere, L.
Harlech, L.
Harrington of Watford, L.
Haselhurst, L.
Hayward, L.
Henley, L.
Herbert of South Downs, L.
Hill of Oareford, L.
Hodgson of Astley Abbotts, L.
Hoey, B.
Holmes of Richmond, L.
Hooper, B.
Horam, L.
Howard of Lympne, L.
Howard of Rising, L.
Howe, E.
Howell of Guildford, L.
Hunt of Wirral, L.
James of Blackheath, L.
Jenkin of Kennington, B.
Johnson of Lainston, L.
Johnson of Marylebone, L.
Keen of Elie, L.
Kempsell, L.
Kirkham, L.
Kirkhope of Harrogate, L.
Lamont of Lerwick, L.
Lawlor, B.
Lea of Lymm, B.
Leigh of Hurley, L.
Lexden, L.
Lilley, L.
Lindsay, E.
Lingfield, L.
Liverpool, E.
Livingston of Parkhead, L.
Lucas, L.
Magan of Castletown, L.
Mancroft, L.
Manzoor, B.
Markham, L.
Marks of Hale, L.
Maude of Horsham, L.
McInnes of Kilwinning, L.
McIntosh of Pickering, B.
McLoughlin, L.
Mendoza, L.
Meyer, B.
Minto, E.
Mobarik, B.
Montrose, D.
Morgan of Cotes, B.
Morrow, L.
Mott, L.
Moylan, L.
Moynihan of Chelsea, L.
Moyo, B.
Murray of Blidworth, L.
Naseby, L.
Nash, L.
Neville-Jones, B.
Neville-Rolfe, B.
Nicholson of Winterbourne, B.
Noakes, B.
Norton of Louth, L.
Offord of Garvel, L.
O'Neill of Bexley, B.
Owen of Alderley Edge, B.
Parkinson of Whitley Bay, L.
Patel, L.
Patten, L.
Petitgas, L.
Pidding, B.
Polak, L.
Popat, L.
Porter of Spalding, L.
Ranger of Northwood, L.
Rawlings, B.
Reay, L.
Redfern, B.
Risby, L.
Robathan, L.
Roborough, L.
Sanderson of Welton, B.
Sandhurst, L.
Sarfraz, L.
Sassoon, L.
Scott of Bybrook, B.
Seccombe, B.
Shackleton of Belgravia, B.
Sharpe of Epsom, L.
Shephard of Northwold, B.
Sherbourne of Didsbury, L.
Shinkwin, L.
Shrewsbury, E.
Smith of Hindhead, L.
Soames of Fletching, L.
Sterling of Plaistow, L.
Stewart of Dirleton, L.
Strathclyde, L.
Swinburne, B.
Swire, L.
Taylor of Warwick, L.
Trenchard, V.
True, L.
Tugendhat, L.
Tyrie, L.
Udny-Lister, L.
Vere of Norbiton, B.
Verma, B.
Warsi, B.
Wasserman, L.
Waverley, V.
Wei, L.
Wharton of Yarm, L.
Willetts, L.
Williams of Trafford, B. [Teller]
Wrottesley, L.
Wyld, B.
Young of Cookham, L.
Younger of Leckie, V.

6.22 pm

Clause 20: Permitted types of conduct requirement

Amendment 14

Moved by ***Lord Leong***

14: Clause 20, page 12, line 30, leave out from "to" to "in" in line 31 and insert "harm competition in the relevant digital activity or the other activity"

Member's explanatory statement

This amendment, along with another to Clause 20(3)(c), seeks to ensure that the CMA can tackle anti-competitive conduct in a non-designated activity, provided that the anti-competitive conduct is related to a designated activity.

Lord Leong (Lab): My Lords, I have listened to the Minister, and I respectfully regret that I am not convinced. Our amendment is more comprehensive and would really provide a level playing field. As we have seen in the EU, big tech companies will go out of the way to circumvent any regulations. Therefore, I wish to test the will of the House.

6.23 pm

Division on Amendment 14

Contents 199; Not-Contents 199.

Division No. 2

CONTENTS

Aberdare, L.
Addington, L.
Alderdice, L.
Allan of Hallam, L.
Alli, L.
Alton of Liverpool, L.
Anderson of Stoke-on-Trent, B.
Anderson of Swansea, L.
Andrews, B.
Ashton of Upholland, B.
Bach, L.
Bakewell of Hardington Mandeville, B.
Barker, B.
Bassam of Brighton, L.
Benjamin, B.
Bennett of Manor Castle, B.
Berkeley of Knighton, L.
Berkeley, L.
Best, L.
Black of Brentwood, L.
Blackstone, B.
Blower, B.
Boateng, L.
Bonham-Carter of Yarnbury, B.
Bowles of Berkhamsted, B.
Boycott, B.
Bradley, L.
Bradshaw, L.
Bragg, L.
Brinton, B.
Brooke of Alverthorpe, L.
Browne of Ladyton, L.
Bruce of Bennachie, L.
Bryan of Partick, B.
Bull, B.
Burt of Solihull, B.
Campbell-Savours, L.
Carter of Coles, L.
Cashman, L.
Chakrabarti, B.
Chandos, V.
Chapman of Darlington, B.
Chartres, L.
Clancarty, E.
Clark of Windermere, L.
Clement-Jones, L.
Coaker, L.
Collins of Highbury, L.
Colville of Culross, V.
Crawley, B.
Cromwell, L.
Davies of Brixton, L.
Dholakia, L.
Donaghy, B.
Donoughue, L.
Doocey, B.
Drake, B.
Drayson, L.
D'Souza, B.
Dubs, L.
Eatwell, L.
Etherton, L.
Falconer of Thoroton, L.
Faulkner of Worcester, L.
Featherstone, B.
Finlay of Llandaff, B.
Foster of Bath, L.
Foulkes of Cumnock, L.
Fox, L.
Freyberg, L.
Gale, B.
Garden of Frognal, B.
German, L.
Glasman, L.
Goddard of Stockport, L.
Goudie, B.
Grantchester, L.
Grender, B.
Griffiths of Burry Port, L.
Hacking, L.
Hamwee, B.
Hanworth, V.
Harding of Winscombe, B.
Harris of Haringey, L.
Harris of Richmond, B.
Hayman, B.
Healy of Primrose Hill, B.
Hendy, L.
Hollick, L.
Howarth of Newport, L.
Hughes of Stretford, B.
Humphreys, B.
Hunt of Bethnal Green, B.
Hunt of Kings Heath, L.
Hussain, L.
Janke, B.
Jolly, B.
Jones of Moulsecoomb, B.
Jones of Whitchurch, B.
Jones, L.
Kennedy of Cradley, B.
Kennedy of Southwark, L.
Kennedy of The Shaws, B.
Kerr of Kinlochard, L.
Khan of Burnley, L.
Kidron, B.
Kinnock, L.
Kramer, B.
Lawrence of Clarendon, B.
Lee of Trafford, L.
Lennie, L.
Leong, L.
Liddell of Coatdyke, B.
Lister of Burtersett, B.
Livermore, L.
Londesborough, L.
Ludford, B.
Mandelson, L.
Mann, L.
Marks of Henley-on-Thames, L.
Maxton, L.
McConnell of Glenscorrodale, L.
McIntosh of Hudnall, B.
McNally, L.
McNicol of West Kilbride, L.
Meacher, B.
Mendelsohn, L.
Merron, B. [Teller]
Morris of Yardley, B.
Murphy of Torfaen, L.
Newby, L.
Northover, B.
Oates, L.
O'Grady of Upper Holloway, B.
O'Loan, B.
Osamor, B.
Paddick, L.
Pannick, L.
Parminter, B.
Pinnock, B.
Pitkeathley, B.
Ponsonby of Shulbrede, L.
Prentis of Leeds, L.
Purvis of Tweed, L.
Quin, B.
Ramsay of Cartvale, B.
Randerson, B.
Razzall, L.
Redesdale, L.
Reid of Cardowan, L.
Rennard, L.
Ritchie of Downpatrick, B.
Roberts of Llandudno, L.
Rooker, L.
Russell, E.
Sahota, L.
Scott of Needham Market, B.
Scriven, L.
Sharkey, L.
Sheehan, B.
Sherlock, B.
Sikka, L.
Skidelsky, L.
Smith of Basildon, B.
Smith of Gilmorehill, B.
Snape, L.
Stansgate, V.
Stone of Blackheath, L.
Stoneham of Droxford, L.
Storey, L.
Strasburger, L.
Stuart of Edgbaston, B.
Stunell, L.
Suttie, B.
Taylor of Bolton, B.
Taylor of Stevenage, B.
Teverson, L.
Thomas of Winchester, B.
Thornhill, B.
Thornton, B.
Thurso, V.
Tope, L.
Touhig, L.
Tunnicliffe, L.
Turnberg, L.
Twycross, B.
Tyler of Enfield, B.
Wallace of Saltaire, L.
Warner, L.
Watson of Invergowrie, L.
Watts, L.
Wheeler, B. [Teller]
Whitaker, B.
Whitty, L.
Wilcox of Newport, B.
Winston, L.
Wood of Anfield, L.
Woodley, L.
Young of Old Scone, B.

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Attlee, E.
Bailey of Paddington, L.
Balfe, L.
Barran, B.
Bellamy, L.
Bellingham, L.
Benyon, L.
Berridge, B.
Bethell, L.
Blackwood of North Oxford, B.
Blencathra, L.
Borwick, L.
Bottomley of Nettlestone, B.
Bourne of Aberystwyth, L.
Brady, B.
Bray of Coln, B.

Browne of Belmont, L.
Browning, B.
Brownlow of Shurlock Row, L.
Caine, L.
Caithness, E.
Callanan, L.
Cameron of Lochiel, L.
Camoys, L.
Camrose, V.
Carrington of Fulham, L.
Cavendish of Little Venice, B.
Chadlington, L.
Colgrain, L.
Courtown, E. [Teller]
Craig of Radley, L.
Craigavon, V.
Crathorne, L.
Cruddas, L.
Cumberlege, B.
Davies of Gower, L.
De Mauley, L.
Deben, L.
Dobbs, L.
Dodds of Duncairn, L.
Douglas-Miller, L.
Duncan of Springbank, L.
Dunlop, L.
Eaton, B.
Eccles, V.
Effingham, E.
Empey, L.
Evans of Rainow, L.
Fairfax of Cameron, L.
Fall, B.
Faulks, L.
Fleet, B.
Fookes, B.
Foster of Oxton, B.
Fraser of Craigmaddie, B.
Frost, L.
Gadhia, L.
Garnier, L.
Gascoigne, L.
Glenarthur, L.
Godson, L.
Gold, L.
Goldie, B.
Greenway, L.
Griffiths of Fforestfach, L.
Grimstone of Boscobel, L.
Hamilton of Epsom, L.
Hannan of Kingsclere, L.
Harlech, L.
Harrington of Watford, L.
Haselhurst, L.
Hayward, L.
Henley, L.
Herbert of South Downs, L.
Hill of Oareford, L.
Hodgson of Astley Abbotts, L.
Hoey, B.
Hogan-Howe, L.
Holmes of Richmond, L.
Hooper, B.
Horam, L.
Howard of Lympne, L.
Howard of Rising, L.
Howe, E.
Hunt of Wirral, L.
James of Blackheath, L.
Jenkin of Kennington, B.
Johnson of Lainston, L.
Johnson of Marylebone, L.
Kakkar, L.
Keen of Elie, L.
Kempsell, L.
Kinnoull, E.
Kirkham, L.
Kirkhope of Harrogate, L.
Lamont of Lerwick, L.
Lansley, L.
Lawlor, B.
Lea of Lymm, B.
Leigh of Hurley, L.
Lexden, L.
Lilley, L.
Lindsay, E.
Lingfield, L.
Liverpool, E.
Livingston of Parkhead, L.
Magan of Castletown, L.
Mancroft, L.
Manzoor, B.
Markham, L.
Marks of Hale, L.
Maude of Horsham, L.
McColl of Dulwich, L.
McInnes of Kilwinning, L.
McIntosh of Pickering, B.
McLoughlin, L.
Mendoza, L.
Meyer, B.
Minto, E.
Mobarik, B.
Montrose, D.
Morgan of Cotes, B.
Morrow, L.
Mott, L.
Moylan, L.
Moynihan of Chelsea, L.
Moyo, B.
Murray of Blidworth, L.
Naseby, L.
Nash, L.
Neville-Jones, B.
Neville-Rolfe, B.
Nicholson of Winterbourne, B.
Noakes, B.
Norton of Louth, L.
Offord of Garvel, L.
O'Neill of Bexley, B.
Owen of Alderley Edge, B.
Parkinson of Whitley Bay, L.
Patel, L.
Patten, L.
Petitgas, L.
Pidding, B.
Polak, L.
Popat, L.
Porter of Spalding, L.
Ranger of Northwood, L.
Reay, L.
Redfern, B.
Risby, L.
Robathan, L.
Roborough, L.
Sanderson of Welton, B.
Sandhurst, L.
Sarfraz, L.
Sassoon, L.
Scott of Bybrook, B.
Seccombe, B.
Shackleton of Belgravia, B.
Sharpe of Epsom, L.
Shephard of Northwold, B.
Sherbourne of Didsbury, L.
Shinkwin, L.
Shrewsbury, E.
Smith of Hindhead, L.
Soames of Fletching, L.
Sterling of Plaistow, L.
Stewart of Dirleton, L.
Strathclyde, L.
Swinburne, B.
Swire, L.
Taylor of Warwick, L.
Trenchard, V.
True, L.
Tugendhat, L.
Tyrie, L.
Udny-Lister, L.
Vaux of Harrowden, L.
Vere of Norbiton, B.
Verma, B.
Warsi, B.
Waverley, V.
Wei, L.
Wharton of Yarm, L.
Willetts, L.
Williams of Trafford, B. [Teller]
Wolfson of Tredegar, L.
Wrottesley, L.
Wyld, B.
Young of Cookham, L.
Young of Old Windsor, L.
Younger of Leckie, V.

The Deputy Speaker (Baroness Finlay of Llandaff) (CB): My Lords, there being an equality of votes, in accordance with Standing Order 55, which provides that no proposal to amend a Bill in the form which it is before the House shall be agreed to, unless there is a majority in favour of such an amendment, I declare the amendment disagreed to.

Amendment 14 disagreed.

6.34 pm

Amendments 15 to 17 not moved.

Clause 26: Power to begin a conduct investigation

Amendment 18

Moved by ***Lord Offord of Garvel***

18: Clause 26, page 15, line 24, leave out "a statement summarising the contents of"

Member's explanatory statement

This amendment would require the CMA to publish a conduct investigation notice in full rather than a summary of the notice.

Amendment 18 agreed.

Amendment 19 not moved.

Clause 27: Consideration of representations

Amendment 20 not moved.

Clause 28: Closing a conduct investigation without making a finding

Amendment 21

Moved by ***Lord Offord of Garvel***

21: Clause 28, page 16, line 2, leave out "a statement summarising the contents of"

Member's explanatory statement

This amendment would require the CMA to publish a statement under clause 28(2) in full rather than a summary of the notice.

Amendment 21 agreed.

Amendment 22 not moved.

Clause 29: Countervailing benefits exemption

Amendment 23

Moved by ***Lord Leong***

23: Clause 29, page 16, line 13, leave out paragraph (c)

Member's explanatory statement

This amendment, alongside another in my name to Clause 29, would revert the Clause back to the one first introduced in the House of Commons. This would narrow the ability of bigger platforms to claim their anti-competitive behaviour presents countervailing benefits.

Lord Leong (Lab): My Lords, I have listened to the Minister and I am afraid I am not persuaded. Our amendment would take the Bill back to the original version as in the other place and, on that basis, I wish to test the will of the House.

6.36 pm

Division on Amendment 23

Contents 209; Not-Contents 193.

Amendment 23 agreed.

Division No. 3

CONTENTS

Aberdare, L.
Addington, L.
Alderdice, L.
Allan of Hallam, L.
Alli, L.
Alton of Liverpool, L.
Anderson of Stoke-on-Trent, B.
Anderson of Swansea, L.
Andrews, B.
Ashton of Upholland, B.
Bach, L.
Bakewell of Hardington Mandeville, B.
Barker, B.
Bassam of Brighton, L.
Benjamin, B.
Bennett of Manor Castle, B.
Berkeley of Knighton, L.
Berkeley, L.
Best, L.
Black of Brentwood, L.
Blackstone, B.
Blower, B.
Boateng, L.
Bonham-Carter of Yarnbury, B.
Bowles of Berkhamsted, B.
Boycott, B.
Bradley, L.
Bradshaw, L.
Bragg, L.
Brinton, B.
Brooke of Alverthorpe, L.
Browne of Ladyton, L.
Bruce of Bennachie, L.
Bryan of Partick, B.
Bull, B.
Burt of Solihull, B.
Campbell of Surbiton, B.
Campbell-Savours, L.
Carter of Coles, L.
Cashman, L.
Chakrabarti, B.
Chandos, V.
Chapman of Darlington, B.
Chartres, L.
Clancarty, E.
Clark of Windermere, L.
Clement-Jones, L.
Coaker, L.
Collins of Highbury, L.
Colville of Culross, V.
Craigavon, V.
Crawley, B.
Cromwell, L.
Davies of Brixton, L.
Dholakia, L.
Donaghy, B.
Donoughue, L.
Doocey, B.
Drake, B.
Drayson, L.
D'Souza, B.
Dubs, L.
Eatwell, L.
Etherton, L.
Falconer of Thoroton, L.
Falkner of Margravine, B.
Faulkner of Worcester, L.
Faulks, L.
Featherstone, B.
Finlay of Llandaff, B.
Foster of Bath, L.
Foulkes of Cumnock, L.
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Harris of Haringey, L.
Harris of Richmond, B.
Hayman of Ullock, B.
Hayman, B.
Healy of Primrose Hill, B.
Hendy, L.
Hollick, L.
Hope of Craighead, L.
Howarth of Newport, L.
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Kennedy of The Shaws, B.
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Kidron, B.
Kinnock, L.
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Morris of Yardley, B.
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Oates, L.
O'Grady of Upper Holloway, B.
Osamor, B.
Paddick, L.
Pannick, L.
Parminter, B.
Patel, L.
Pinnock, B.
Pitkeathley, B.
Ponsonby of Shulbrede, L.
Prentis of Leeds, L.
Purvis of Tweed, L.
Quin, B.
Ramsay of Cartvale, B.
Randerson, B.
Razzall, L.
Redesdale, L.
Reid of Cardowan, L.
Rennard, L.
Ritchie of Downpatrick, B.
Roberts of Llandudno, L.
Rooker, L.
Russell of Liverpool, L.
Russell, E.
Sahota, L.
Scott of Needham Market, B.
Scriven, L.
Sharkey, L.
Sheehan, B.
Sherlock, B.
Sikka, L.
Smith of Basildon, B.
Smith of Gilmorehill, B.
Stansgate, V.
Stone of Blackheath, L.
Stoneham of Droxford, L.
Storey, L.
Stowell of Beeston, B.
Strasburger, L.
Stunell, L.
Suttie, B.
Taylor of Bolton, B.
Taylor of Stevenage, B.
Teverson, L.
Thomas of Winchester, B.
Thornhill, B.
Thornton, B.
Thurso, V.
Tope, L.
Touhig, L.
Tunnicliffe, L.
Turnberg, L.
Twycross, B.
Tyler of Enfield, B.
Vaux of Harrowden, L.
Wallace of Saltaire, L.
Warner, L.
Watson of Invergowrie, L.
Watts, L.
Wheeler, B. [Teller]
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Bottomley of Nettlestone, B.
Bourne of Aberystwyth, L.
Brady, B.
Bray of Coln, B.
Browne of Belmont, L.
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Duncan of Springbank, L.
Dunlop, L.
Eaton, B.
Eccles, V.
Effingham, E.
Empey, L.
Evans of Rainow, L.
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Fraser of Craigmaddie, B.
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Godson, L.
Gold, L.
Goldie, B.
Goschen, V.
Griffiths of Fforestfach, L.
Grimstone of Boscobel, L.
Hamilton of Epsom, L.
Hannan of Kingsclere, L.
Harlech, L.
Harrington of Watford, L.
Haselhurst, L.
Hayward, L.
Henley, L.
Herbert of South Downs, L.
Hill of Oareford, L.
Hodgson of Astley Abbotts, L.
Hoey, B.
Hogan-Howe, L.
Holmes of Richmond, L.
Hooper, B.
Horam, L.
Howard of Lympne, L.
Howard of Rising, L.
Howe, E.
Hunt of Wirral, L.
James of Blackheath, L.
Jenkin of Kennington, B.
Johnson of Lainston, L.
Johnson of Marylebone, L.
Keen of Elie, L.
Kempsell, L.
Kirkham, L.
Kirkhope of Harrogate, L.
Lamont of Lerwick, L.
Lawlor, B.
Lea of Lymm, B.
Leigh of Hurley, L.
Lexden, L.
Lilley, L.
Lindsay, E.
Lingfield, L.
Liverpool, E.
Livingston of Parkhead, L.
Lucas, L.
Magan of Castletown, L.
Mancroft, L.
Manzoor, B.
Markham, L.
Marks of Hale, L.
Maude of Horsham, L.
McColl of Dulwich, L.
McInnes of Kilwinning, L.
McIntosh of Pickering, B.
McLoughlin, L.
Mendoza, L.
Meyer, B.
Minto, E.
Mobarik, B.
Montrose, D.
Morgan of Cotes, B.
Morrow, L.
Mott, L.
Moylan, L.
Moynihan of Chelsea, L.
Moynihan, L.
Moyo, B.
Murray of Blidworth, L.
Naseby, L.
Nash, L.
Neville-Jones, B.
Neville-Rolfe, B.
Nicholson of Winterbourne, B.
Noakes, B.
Norton of Louth, L.
Offord of Garvel, L.
O'Neill of Bexley, B.
Owen of Alderley Edge, B.
Parkinson of Whitley Bay, L.
Patten, L.
Petitgas, L.
Pidding, B.
Polak, L.
Popat, L.
Porter of Spalding, L.
Ranger of Northwood, L.
Rawlings, B.
Reay, L.
Redfern, B.
Risby, L.
Robathan, L.
Roborough, L.
Sanderson of Welton, B.
Sandhurst, L.
Sarfraz, L.
Sassoon, L.
Scott of Bybrook, B.
Seccombe, B.
Shackleton of Belgravia, B.
Sharpe of Epsom, L.
Shephard of Northwold, B.
Sherbourne of Didsbury, L.
Shinkwin, L.
Shrewsbury, E.
Smith of Hindhead, L.
Soames of Fletching, L.
Sterling of Plaistow, L.
Stewart of Dirleton, L.
Strathclyde, L.
Swinburne, B.
Swire, L.
Taylor of Warwick, L.
Trenchard, V.
True, L.
Tugendhat, L.
Tyrie, L.
Udny-Lister, L.
Vere of Norbiton, B.
Verma, B.
Warsi, B.
Waverley, V.
Wei, L.
Wharton of Yarm, L.
Willetts, L.
Williams of Trafford, B. [Teller]
Wolfson of Tredegar, L.
Wrottesley, L.
Wyld, B.
Young of Cookham, L.
Young of Old Windsor, L.
Younger of Leckie, V.

6.46 pm

Amendment 24

Moved by ***Baroness Jones of Whitchurch***

24: Clause 29, page 16, line 14, after "is" insert "indispensable and"

Member's explanatory statement

This amendment, alongside another in my name to Clause 29, would revert the Clause back to the one first introduced in the House of Commons. This would narrow the ability of bigger platforms to claim their anti-competitive behaviour presents countervailing benefits.

Amendment 24 agreed.

Amendment 25 not moved.

Clause 30: Notice of findings

Amendment 26

Moved by ***Lord Offord of Garvel***

26: Clause 30, page 16, line 32, leave out "a statement summarising the contents of"

Member's explanatory statement

This amendment would require the CMA to publish a statement under clause 30(1) in full rather than a summary of the notice.

Amendment 26 agreed.

Amendment 27 not moved.

Clause 31: Enforcement orders

Amendment 28

Moved by ***Lord Offord of Garvel***

28: Clause 31, page 17, line 22, leave out "a statement summarising the contents of"

Member's explanatory statement

This amendment would require the CMA to publish an enforcement order in full rather than a summary of the order.

Amendment 28 agreed.

Amendment 29 not moved.

Clause 32: Interim enforcement orders

Amendment 30

Moved by ***Lord Offord of Garvel***

30: Clause 32, page 18, line 16, leave out "a statement summarising the contents of"

Member's explanatory statement

This amendment would require the CMA to publish a notice under clause 32(5) in full rather than a summary of the notice.

Amendment 30 agreed.

Amendment 31 not moved.

Clause 34: Revocation of enforcement orders

Amendment 32

Moved by ***Lord Offord of Garvel***

32: Clause 34, page 19, line 16, leave out "a statement summarising the contents of"

Member's explanatory statement

This amendment would require the CMA to publish a notice under clause 34(1) in full rather than a summary of the notice.

Amendment 32 agreed.

Amendment 33 not moved.

Clause 38: Power to adopt final offer mechanism

Amendment 34 not moved.

Clause 46: Power to make pro-competition interventions

Amendment 35

Moved by ***Lord Faulks***

35: Clause 46, page 26, line 27, leave out paragraph (b) and insert—

"(b) making the PCI would be likely to contribute to or otherwise be of use for the purpose of remedying or preventing the adverse effect on competition."

Member's explanatory statement

This amendment would remove "proportionality" as the determining factor in relation to a decision by the CMA to make a pro-competition intervention and would restore the Bill's original wording in relation to Clause 46.

Amendment 35 agreed.

Clause 48: Procedure relating to PCI investigations

Amendment 36

Moved by ***Lord Offord of Garvel***

36: Clause 48, page 27, line 39, leave out "a statement summarising the contents of"

Member's explanatory statement

This amendment would require the CMA to publish a PCI investigation notice or a revised version of the PCI investigation notice rather than a summary.

Amendment 36 agreed.

Amendment 37 not moved.

Clause 51: Pro-competition orders

Amendment 38

Moved by ***Lord Offord of Garvel***

38: Clause 51, page 29, line 26, leave out "a statement summarising the contents of"

Member's explanatory statement

This amendment would require the CMA to publish a pro-competition order rather than a summary of the order.

Amendment 38 agreed.

Amendment 39 not moved.

Clause 88: Amount of penalties under section 87

Amendments 40 to 42

Moved by ***Lord Offord of Garvel***

40: Clause 88, page 54, line 40, leave out "a person other than" and insert "an undertaking that is not"

Member's explanatory statement

This amendment would ensure that a penalty imposed on undertaking that is not an individual is calculated by reference to the undertaking's turnover.

41: Clause 88, page 55, line 10, leave out subsection (4) and insert—

"(4) Where a person is an undertaking that is part of a group, references in subsection (3) to the person's turnover are to the turnover of that group."

Member's explanatory statement

This is amendment is consequential on the first amendment to clause 88 in my name.

42: Clause 88, page 55, line 15, after "individual" insert "or a person that is not an undertaking"

Member's explanatory statement

This amendment would ensure that a penalty imposed on an individual or a person that is not an undertaking is calculated by reference to the amounts specified in subsection (5) (and not by reference to turnover).

Amendments 40 to 42 agreed.

Clause 89: Procedure and appeals etc

Amendment 43

Moved by ***Baroness Jones of Whitchurch***

43: Clause 89, page 55, line 32, leave out ", 114 (appeals)"

Member's explanatory statement

This amendment, alongside others in my name to Clauses 89 and 103, would revert the relevant Clauses back to the ones first introduced in the House of Commons. This would reinstate judicial review principles as the means by which appeals against penalty decisions are heard, rather than such decisions being determined on the merits.

Baroness Jones of Whitchurch (Lab): My Lords, I listened carefully to the Minister's response. This amendment to the way that appeals are processed goes to the heart of our concerns about the Bill. It would revert the wording to the much more sensible wording that the Government had initially in the Commons. We feel that, without our amendment, the corporate lawyers will run rings around the CMA and postpone any delays in the implementation of CMA decisions. This is an important amendment and I therefore wish to test the opinion of the House.

6.51 pm

Division on Amendment 43

Contents 204; Not-Contents 192.

Amendment 43 agreed.

Division No. 4

CONTENTS

Aberdare, L.
Addington, L.
Alderdice, L.
Allan of Hallam, L.
Alli, L.
Alton of Liverpool, L.
Anderson of Ipswich, L.
Anderson of Stoke-on-Trent, B.
Anderson of Swansea, L.

Andrews, B.
Ashton of Upholland, B.
Bach, L.
Bakewell of Hardington Mandeville, B.
Barker, B.
Bassam of Brighton, L.
Benjamin, B.
Bennett of Manor Castle, B.
Berkeley of Knighton, L.
Berkeley, L.
Best, L.
Black of Brentwood, L.
Blackstone, B.
Blower, B.
Boateng, L.
Bonham-Carter of Yarnbury, B.
Bowles of Berkhamsted, B.
Boycott, B.
Bradley, L.
Bradshaw, L.
Bragg, L.
Brinton, B.
Bristol, Bp.
Brooke of Alverthorpe, L.
Browne of Ladyton, L.
Bruce of Bennachie, L.
Bryan of Partick, B.
Bull, B.
Burt of Solihull, B.
Campbell-Savours, L.
Carter of Coles, L.
Cashman, L.
Chakrabarti, B.
Chandos, V.
Chapman of Darlington, B.
Chartres, L.
Clancarty, E.
Clark of Windermere, L.
Clement-Jones, L.
Coaker, L.
Colville of Culross, V.
Craigavon, V.
Crawley, B.
Cromwell, L.
Davies of Brixton, L.
Dholakia, L.
Donaghy, B.
Donoughue, L.
Doocey, B.
Drake, B.
Drayson, L.
Dubs, L.
Eatwell, L.
Etherton, L.
Falconer of Thoroton, L.
Faulkner of Worcester, L.
Faulks, L.
Featherstone, B.
Finlay of Llandaff, B.
Foster of Bath, L.
Foulkes of Cumnock, L.
Fox, L.
Freyberg, L.
Gale, B.
Garden of Frognal, B.
German, L.
Glasman, L.
Goddard of Stockport, L.
Goudie, B.
Grantchester, L.
Grender, B.
Griffiths of Burry Port, L.
Hacking, L.
Hamwee, B.
Hanworth, V.
Harding of Winscombe, B.
Harris of Haringey, L.
Harris of Richmond, B.
Hayman of Ullock, B.
Hayman, B.
Healy of Primrose Hill, B.
Hendy, L.
Hollick, L.
Hope of Craighead, L.
Howarth of Newport, L.
Hughes of Stretford, B.
Humphreys, B.
Hunt of Bethnal Green, B.
Hunt of Kings Heath, L.
Hussain, L.
Janke, B.
Jolly, B.
Jones of Moulsecoomb, B.
Jones of Whitchurch, B.
Jones, L.
Kennedy of Cradley, B.
Kennedy of Southwark, L.
Kennedy of The Shaws, B.
Kerr of Kinlochard, L.
Khan of Burnley, L.
Kidron, B.
Kinnock, L.
Kinnoull, E.
Kramer, B.
Lawrence of Clarendon, B.
Lee of Trafford, L.
Lennie, L.
Leong, L.
Liddell of Coatdyke, B.
Lister of Burtersett, B.
Livermore, L.
Londesborough, L.
Ludford, B.
Mandelson, L.
Mann, L.
Marks of Henley-on-Thames, L.
Maxton, L.
McConnell of Glenscorrodale, L.
McIntosh of Hudnall, B.
McNally, L.
McNicol of West Kilbride, L.
Meacher, B.
Mendelsohn, L.
Merron, B. [Teller]
Morris of Yardley, B.
Murphy of Torfaen, L.
Newby, L.
Northover, B.
Oates, L.
O'Grady of Upper Holloway, B.
O'Loan, B.
Osamor, B.
Paddick, L.
Pannick, L.
Parminter, B.
Pinnock, B.
Pitkeathley, B.
Ponsonby of Shulbrede, L.
Prentis of Leeds, L.
Purvis of Tweed, L.
Quin, B.
Ramsay of Cartvale, B.
Randerson, B.
Razzall, L.
Rebuck, B.
Redesdale, L.
Reid of Cardowan, L.
Rennard, L.
Ritchie of Downpatrick, B.
Roberts of Llandudno, L.
Rooker, L.
Russell of Liverpool, L.
Russell, E.
Sahota, L.
Scott of Needham Market, B.
Scriven, L.
Sharkey, L.
Sheehan, B.
Sherlock, B.
Sikka, L.
Smith of Basildon, B.
Stansgate, V.
Stone of Blackheath, L.
Stoneham of Droxford, L.
Storey, L.
Stowell of Beeston, B.
Strasburger, L.
Stunell, L.
Suttie, B.
Taylor of Bolton, B.
Taylor of Stevenage, B.
Teverson, L.
Thomas of Winchester, B.
Thornhill, B.
Thornton, B.
Thurso, V.
Tope, L.
Touhig, L.
Tunnicliffe, L.
Turnberg, L.
Twycross, B.
Tyler of Enfield, B.
Vaux of Harrowden, L.
Wallace of Saltaire, L.
Warner, L.
Watson of Invergowrie, L.
Watts, L.
Wheeler, B. [Teller]
Whitaker, B.
Whitty, L.
Wilcox of Newport, B.
Winston, L.
Wood of Anfield, L.
Woodley, L.
Young of Old Scone, B.

NOT CONTENTS

Agnew of Oulton, L.
Altmann, B.
Altrincham, L.
Anelay of St Johns, B.
Arbuthnot of Edrom, L.
Ashcombe, L.
Ashton of Hyde, L.
Attlee, E.
Bailey of Paddington, L.
Balfe, L.
Barran, B.
Bellamy, L.
Bellingham, L.
Benyon, L.
Berridge, B.
Bethell, L.
Blackwood of North Oxford, B.
Blencathra, L.
Borwick, L.
Bottomley of Nettlestone, B.
Bourne of Aberystwyth, L.
Brady, B.
Bray of Coln, B.
Browne of Belmont, L.
Browning, B.
Brownlow of Shurlock Row, L.
Caine, L.
Caithness, E.
Callanan, L.
Cameron of Lochiel, L.
Camoys, L.
Camrose, V.
Carrington of Fulham, L.
Chadlington, L.
Colgrain, L.
Courtown, E. [Teller]
Crathorne, L.
Cruddas, L.
Davies of Gower, L.
Deben, L.
Dobbs, L.
Dodds of Duncairn, L.
Douglas-Miller, L.
Duncan of Springbank, L.
Dunlop, L.
Eaton, B.
Eccles, V.
Effingham, E.
Empey, L.
Evans of Rainow, L.
Fairfax of Cameron, L.
Falkner of Margravine, B.
Fleet, B.
Fookes, B.
Foster of Oxton, B.
Fraser of Craigmaddie, B.
Frost, L.
Gadhia, L.
Garnier, L.
Gascoigne, L.
Glenarthur, L.
Godson, L.
Gold, L.
Goldie, B.
Goschen, V.
Greenway, L.
Griffiths of Fforestfach, L.
Grimstone of Boscobel, L.
Hamilton of Epsom, L.
Hannan of Kingsclere, L.
Harlech, L.
Harrington of Watford, L.
Haselhurst, L.
Hayward, L.
Henley, L.
Herbert of South Downs, L.
Hill of Oareford, L.
Hodgson of Astley Abbotts, L.
Hogan-Howe, L.
Holmes of Richmond, L.
Hooper, B.
Horam, L.
Howard of Lympne, L.
Howard of Rising, L.
Howe, E.
Hunt of Wirral, L.
James of Blackheath, L.
Jenkin of Kennington, B.
Johnson of Lainston, L.
Kakkar, L.
Kamall, L.
Keen of Elie, L.
Kempsell, L.
Kirkham, L.
Kirkhope of Harrogate, L.
Lamont of Lerwick, L.
Lansley, L.
Lawlor, B.
Lea of Lymm, B.
Leigh of Hurley, L.
Lexden, L.
Lilley, L.
Lindsay, E.

Lingfield, L.
Liverpool, E.
Livingston of Parkhead, L.
Lucas, L.
Magan of Castletown, L.
Mancroft, L.
Manzoor, B.
Markham, L.
Marks of Hale, L.
Maude of Horsham, L.
McColl of Dulwich, L.
McInnes of Kilwinning, L.
McIntosh of Pickering, B.
McLoughlin, L.
Mendoza, L.
Meyer, B.
Minto, E.
Mobarik, B.
Montrose, D.
Morrow, L.
Mott, L.
Moylan, L.
Moynihan of Chelsea, L.
Moynihan, L.
Moyo, B.
Murray of Blidworth, L.
Naseby, L.
Nash, L.
Neville-Jones, B.
Neville-Rolfe, B.
Nicholson of Winterbourne, B.
Noakes, B.
Norton of Louth, L.
Offord of Garvel, L.
O'Neill of Bexley, B.
Owen of Alderley Edge, B.
Parkinson of Whitley Bay, L.
Patten, L.
Petitgas, L.
Pidding, B.
Polak, L.
Popat, L.
Porter of Spalding, L.
Ranger of Northwood, L.
Rawlings, B.
Reay, L.
Redfern, B.
Risby, L.
Robathan, L.
Roborough, L.
Sanderson of Welton, B.
Sandhurst, L.
Sarfraz, L.
Sassoon, L.
Scott of Bybrook, B.
Seccombe, B.
Shackleton of Belgravia, B.
Sharpe of Epsom, L.
Shephard of Northwold, B.
Sherbourne of Didsbury, L.
Shinkwin, L.
Shrewsbury, E.
Smith of Hindhead, L.
Soames of Fletching, L.
Sterling of Plaistow, L.
Stewart of Dirleton, L.
Strathclyde, L.
Swinburne, B.
Swire, L.
Taylor of Warwick, L.
Trenchard, V.
True, L.
Tugendhat, L.
Tyrie, L.
Udny-Lister, L.
Vere of Norbiton, B.
Verma, B.
Warsi, B.
Waverley, V.
Wei, L.
Wharton of Yarm, L.
Willetts, L.
Williams of Trafford, B. [Teller]
Wolfson of Tredegar, L.
Wrottesley, L.
Wyld, B.
Young of Cookham, L.
Young of Old Windsor, L.
Younger of Leckie, V.

7.02 pm

Amendment 44

Moved by ***Lord Bassam of Brighton***

44: Clause 89, page 55, line 34, at end insert—

"(1A) Section 114 of EA 2002 (appeals) applies in relation to—

(a) a penalty imposed under section 85(4), and

(b) a penalty imposed under section 87 in connection with a function of the CMA under Chapter 5 (mergers), as it applies in relation to a penalty imposed under section 110(1) of that Act (and see section 103 of this Act for provision about applications for a review relating to other penalties imposed under section 85(1) or (3) or section 87)."

Member's explanatory statement

This amendment, alongside others in my name to Clauses 89 and 103, would revert the relevant Clauses back to the ones first introduced in the House of Commons. This would reinstate judicial review principles as the means by which appeals against penalty decisions are heard, rather than such decisions being determined on the merits.

Amendment 44 agreed.

Amendment 45 not moved.

Amendment 46

Moved by ***Lord Bassam of Brighton***

46: Clause 89, page 55, line 35, leave out subsection (2) and insert—

"(2) For the purposes of subsections (1) and (1A), sections 112 to 115 of EA 2002 are to be read as if references to "the appropriate authority" were references to "the CMA" only.

(3) For the purposes of subsection (1A), section 114(5A) of EA 2002 is to be read as if the words "In the case of a penalty imposed on a person by the CMA or OFCOM," were omitted.

(4) For the purposes of subsection (1A), section 114(12) of EA 2002 is to be read as if, for paragraph (b), there were substituted—

"(b) "the relevant guidance" means the statement of policy which was most recently published under section 90 of the Digital Markets, Competition and Consumers Act 2024 at the time of the act or omission giving rise to the penalty.""

Member's explanatory statement

This amendment, alongside others in my name to Clauses 89 and 103, would revert the relevant Clauses back to the ones first introduced in the House of Commons. This would reinstate judicial review principles as the means by which appeals against penalty decisions are heard, rather than such decisions being determined on the merits.

Amendment 46 agreed.

Clause 101: Rights to enforce requirements of this Part

Amendment 47 not moved.

Amendment 48

Moved by ***Lord Offord of Garvel***

48: Clause 101, page 61, line 12, at end insert—

"(4A) Rules of court and Tribunal rules may make provision about the transfer from the Tribunal to the appropriate court or from the appropriate court to the Tribunal of all or any part of a claim made in proceedings under subsection (2)."

Member's explanatory statement

This amendment would permit rules of court and Tribunal rules to make provision about the transfer of claims between the appropriate court and the Tribunal.

Amendment 48 agreed.

Amendment 49 not moved.

Clause 102: Treatment of CMA breach decisions etc

Amendment 50

Moved by ***Lord Offord of Garvel***

50: Clause 102, page 61, line 25, leave out subsection (2) and insert—

"(2) A CMA breach decision becomes final—

(a) when the time for applying for a review of that decision has passed without an application being made, or

(b) where an application has been made, when the application has been finally determined or has otherwise ended.

(2A) For the purposes of subsection (2)(b), an application is not finally determined until any appeal relating to it has been determined (ignoring any possibility of an appeal out of time with permission)."

Member's explanatory statement

This amendment confirms the circumstances in which a CMA breach decision becomes final.

Amendment 50 agreed.

Clause 103: Applications for review etc

Amendments 51 and 52

Moved by ***Lord Bassam of Brighton***

51: Clause 103, page 62, line 13, leave out paragraph (b) and insert—

"(b) a decision about the imposition of a penalty under section 85(1) or (3) or section 87 (but see subsection (3A) and section 89(1A));

(c) a decision about the imposition of a penalty under section 85(4) (but see section 89(1A))."

Member's explanatory statement

This amendment, alongside others in my name to Clauses 89 and 103, would revert the relevant Clauses back to the ones first introduced in the House of Commons. This would reinstate judicial review principles as the means by which appeals against penalty decisions are heard, rather than such decisions being determined on the merits.

52: Clause 103, page 62, line 17, at end insert—

"(3A) A person on whom the CMA imposes a penalty under section 85(1) or (3), or under section 87 in connection with a function of the CMA other than a function under Chapter 5 (mergers), may apply to the Tribunal in accordance with Tribunal rules for a review of the CMA's decision—

(a) to impose the penalty,

(b) about the amount of the penalty, or

(c) about the date by which the penalty is required to be paid or the different dates by which portions of the penalty are required to be paid.

(3B) Where an application is made under subsection (3A)—

(a) the penalty is not required to be paid until the application has been finally determined, withdrawn or otherwise dealt with, and

(b) the CMA may agree to reduce the amount of the penalty in settlement of the application."

Member's explanatory statement

This amendment, alongside others in my name to Clauses 89 and 103, would revert the relevant Clauses back to the ones first introduced in the House of Commons. This would reinstate judicial review principles as the means by which appeals against penalty decisions are heard, rather than such decisions being determined on the merits.

Amendments 51 and 52 agreed.

Clause 109: Information sharing

Amendment 53

Moved by ***Lord Offord of Garvel***

53: Clause 109, page 68, line 17, leave out subsection (3)

Member's explanatory statement

This amendment removes an amendment to section 393 of the Communications Act 2003 as this will now be addressed by the same amendment to that section contained in Schedule 29 to the Bill (see my amendment to that Schedule at page 407 at line 23).

Amendment 53 agreed.

Clause 113: Consultation and publication of statements

Amendment 54

Moved by ***Lord Offord of Garvel***

54: Clause 113, page 71, line 8, at end insert—

"(4) In order to give effect to any need to keep information confidential, the CMA may publish the notice or other document in a redacted form."

Member's explanatory statement

This amendment would ensure that the CMA may redact documents which it is required by this Part to publish in order to give effect to any need to keep information confidential.

Amendment 54 agreed.

Clause 114: Guidance

Amendment 55 not moved.

Amendment 56

Moved by ***Lord Lansley***

56: Clause 114, page 71, line 17, at end insert—

"(5) When the CMA seek the approval of the Secretary of State for guidance, the Secretary of State must within 40 days either—

(a) approve the guidance; or

(b) refer the proposed guidance back to the CMA with a statement of reasons why the guidance should not be published in that form."

Lord Lansley (Con): My Lords, in the debate on the first group, on Amendment 56 there was a strong view that when the Competition and Markets Authority presents guidance to the Secretary of State, the Secretary of State should either approve it or refer it back with a statement of reasons within a reasonable time, specified as 40 days, and not, as the Bill presently says, that the Secretary of State can choose not to approve it without any time limit. I am afraid, and I say it with regret to my noble friend, that we did not hear persuasive reasons to the contrary. I seek the opinion of the House on Amendment 56.

7.05 pm

Division on Amendment 56

Contents 202; Not-Contents 187.

Amendment 56 agreed.

Division No. 5

CONTENTS

Aberdare, L.	Anderson of Ipswich, L.
Addington, L.	Anderson of Stoke-on-Trent, B.
Alderdice, L.	Anderson of Swansea, L.
Allan of Hallam, L.	Andrews, B.
Alli, L.	Ashton of Upholland, B.
Alton of Liverpool, L.	

Bach, L.
Bakewell of Hardington Mandeville, B.
Barker, B.
Bassam of Brighton, L.
Beith, L.
Benjamin, B.
Bennett of Manor Castle, B.
Berkeley of Knighton, L.
Berkeley, L.
Best, L.
Black of Brentwood, L.
Blackstone, B.
Blower, B.
Boateng, L.
Bonham-Carter of Yarnbury, B.
Bowles of Berkhamsted, B.
Boycott, B.
Bradley, L.
Bradshaw, L.
Bragg, L.
Brinton, B.
Brooke of Alverthorpe, L.
Browne of Ladyton, L.
Bruce of Bennachie, L.
Bryan of Partick, B.
Bull, B.
Burt of Solihull, B.
Campbell-Savours, L.
Carter of Coles, L.
Cashman, L.
Chakrabarti, B.
Chandos, V.
Chapman of Darlington, B.
Chartres, L.
Clancarty, E.
Clark of Windermere, L.
Clement-Jones, L.
Coaker, L.
Collins of Highbury, L.
Colville of Culross, V.
Craigavon, V.
Crawley, B.
Cromwell, L.
Davies of Brixton, L.
Dholakia, L.
Donaghy, B.
Donoughue, L.
Doocey, B.
Drake, B.
Drayson, L.
Dubs, L.
Eatwell, L.
Falconer of Thoroton, L.
Falkner of Margravine, B.
Faulkner of Worcester, L.
Faulks, L.
Featherstone, B.
Finlay of Llandaff, B.
Foster of Bath, L.
Foulkes of Cumnock, L.
Fox, L.
Freyberg, L.
Gale, B.
Garden of Frognal, B.
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Glasman, L.
Goddard of Stockport, L.
Goudie, B.
Grantchester, L.
Greenway, L.
Grender, B.
Griffiths of Burry Port, L.
Hacking, L.
Hamwee, B.
Hanworth, V.
Harding of Winscombe, B.
Harris of Haringey, L.
Harris of Richmond, B.
Hayman of Ullock, B.
Hayman, B.
Healy of Primrose Hill, B.
Hendy, L.
Hollick, L.
Howarth of Newport, L.
Hughes of Stretford, B.
Humphreys, B.
Hunt of Bethnal Green, B.
Hunt of Kings Heath, L.
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Lee of Trafford, L.
Lennie, L.
Leong, L.
Liddell of Coatdyke, B.
Lister of Burtersett, B.
Livermore, L.
Londesborough, L.
Ludford, B.
Mandelson, L.
Mann, L.
Marks of Henley-on-Thames, L.
Maxton, L.
McConnell of Glenscorrodale, L.
McIntosh of Hudnall, B.
McNally, L.
McNicol of West Kilbride, L.
Meacher, B.
Mendelsohn, L.
Merron, B. [Teller]
Morris of Yardley, B.
Murphy of Torfaen, L.
Newby, L.
Northover, B.
Oates, L.
O'Grady of Upper Holloway, B.
O'Loan, B.
Osamor, B.
Paddick, L.
Parminter, B.
Pinnock, B.
Pitkeathley, B.
Ponsonby of Shulbrede, L.
Prentis of Leeds, L.
Purvis of Tweed, L.
Quin, B.
Ramsay of Cartvale, B.
Randerson, B.
Razzall, L.
Rebuck, B.
Redesdale, L.
Reid of Cardowan, L.
Rennard, L.
Ritchie of Downpatrick, B.
Roberts of Llandudno, L.
Rooker, L.
Russell of Liverpool, L.
Russell, E.
Sahota, L.
Scott of Needham Market, B.
Scriven, L.
Sharkey, L.
Sheehan, B.
Sherlock, B.
Sikka, L.
Smith of Basildon, B.
Stansgate, V.
Stone of Blackheath, L.
Stoneham of Droxford, L.
Storey, L.
Stowell of Beeston, B.
Strasburger, L.
Stunell, L.
Suttie, B.
Taylor of Bolton, B.
Taylor of Stevenage, B.
Teverson, L.
Thomas of Winchester, B.
Thornhill, B.
Thornton, B.
Thurso, V.
Tope, L.
Touhig, L.
Tunnicliffe, L.
Turnberg, L.
Twycross, B.
Tyler of Enfield, B.
Vaux of Harrowden, L.
Wallace of Saltaire, L.
Watson of Invergowrie, L.
Watts, L.
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Whitty, L.
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NOT CONTENTS

Agnew of Oulton, L.
Altmann, B.
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Bethell, L.
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Blencathra, L.
Borwick, L.
Bottomley of Nettlestone, B.
Bourne of Aberystwyth, L.
Brady, B.
Bray of Coln, B.
Browning, B.
Brownlow of Shurlock Row, L.
Caine, L.
Caithness, E.
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Carrington of Fulham, L.
Chadlington, L.
Colgrain, L.
Courtown, E. [Teller]
Crathorne, L.
Cruddas, L.
Davies of Gower, L.
Deben, L.
Dobbs, L.
Douglas-Miller, L.
Duncan of Springbank, L.
Dunlop, L.
Eaton, B.
Eccles, V.
Effingham, E.
Empey, L.
Evans of Rainow, L.
Fairfax of Cameron, L.
Fleet, B.
Fookes, B.
Foster of Oxton, B.
Fraser of Craigmaddie, B.
Frost, L.
Gadhia, L.
Garnier, L.
Gascoigne, L.
Glenarthur, L.
Godson, L.
Gold, L.
Goldie, B.
Goschen, V.
Griffiths of Fforestfach, L.
Grimstone of Boscobel, L.
Hamilton of Epsom, L.
Hannan of Kingsclere, L.
Harlech, L.
Harrington of Watford, L.
Haselhurst, L.
Hayward, L.
Henley, L.
Herbert of South Downs, L.
Hodgson of Astley Abbotts, L.
Hogan-Howe, L.
Holmes of Richmond, L.
Hooper, B.
Horam, L.
Howard of Lympne, L.
Howard of Rising, L.
Howe, E.
Hunt of Wirral, L.
James of Blackheath, L.
Jenkin of Kennington, B.
Johnson of Lainston, L.
Kakkar, L.
Kamall, L.
Keen of Elie, L.
Kempsell, L.
Kirkham, L.
Kirkhope of Harrogate, L.
Lamont of Lerwick, L.
Lawlor, B.
Lea of Lymm, B.
Leigh of Hurley, L.
Lexden, L.
Lilley, L.
Lindsay, E.
Lingfield, L.
Liverpool, E.
Livingston of Parkhead, L.
Lucas, L.
Magan of Castletown, L.
Mancroft, L.
Manzoor, B.
Markham, L.
Marks of Hale, L.
Maude of Horsham, L.

McColl of Dulwich, L.
McInnes of Kilwinning, L.
McIntosh of Pickering, B.
McLoughlin, L.
Mendoza, L.
Meyer, B.
Minto, E.
Mobarik, B.
Montrose, D.
Morgan of Cotes, B.
Mott, L.
Moylan, L.
Moynihan, L.
Moyo, B.
Murray of Blidworth, L.
Naseby, L.
Nash, L.
Neville-Jones, B.
Neville-Rolfe, B.
Nicholson of Winterbourne, B.
Noakes, B.
Norton of Louth, L.
Offord of Garvel, L.
O'Neill of Bexley, B.
Owen of Alderley Edge, B.
Pannick, L.
Parkinson of Whitley Bay, L.
Patel, L.
Patten, L.
Petitgas, L.
Pidding, B.
Polak, L.
Popat, L.
Porter of Spalding, L.
Ranger of Northwood, L.
Rawlings, B.
Reay, L.
Redfern, B.
Risby, L.
Robathan, L.
Roborough, L.
Rogan, L.
Sanderson of Welton, B.
Sandhurst, L.
Sarfraz, L.
Sassoon, L.
Scott of Bybrook, B.
Seccombe, B.
Shackleton of Belgravia, B.
Sharpe of Epsom, L.
Sherbourne of Didsbury, L.
Shinkwin, L.
Shrewsbury, E.
Smith of Hindhead, L.
Soames of Fletching, L.
Sterling of Plaistow, L.
Stewart of Dirleton, L.
Strathclyde, L.
Swinburne, B.
Swire, L.
Taylor of Warwick, L.
Trenchard, V.
True, L.
Tugendhat, L.
Tyrie, L.
Udny-Lister, L.
Vere of Norbiton, B.
Verma, B.
Warsi, B.
Waverley, V.
Wei, L.
Wharton of Yarm, L.
Willetts, L.
Williams of Trafford, B. [Teller]
Wolfson of Tredegar, L.
Wrottesley, L.
Wyld, B.
Young of Cookham, L.
Young of Old Windsor, L.
Younger of Leckie, V.

7.15 pm

Amendment 57 not moved.

Clause 116: Restriction on disclosure orders

Amendment 58

Moved by ***Lord Offord of Garvel***

58: Clause 116, page 71, line 31, leave out "the CMA to disclose or produce" and insert "the disclosure or production of"

Member's explanatory statement

This amendment would prevent a court or the Tribunal from making a disclosure order requiring the disclosure or production of digital markets investigation information while the investigation to which the information relates is ongoing, regardless of who holds the information.

Amendment 58 agreed.

Amendments 59 and 60 not moved.

Clause 126: Exemplary damages

Amendment 61

Moved by ***Lord Clement-Jones***

61: Clause 126, page 80, leave out lines 4 and 5 and insert—

""(1) The Tribunal may award exemplary damages in any collective proceedings.""

Member's explanatory statement

This amendment would allow exemplary damages in collective proceedings, which the bill as drafted seeks to prevent.

Lord Clement-Jones (LD): My Lords, the Minister gave a disappointing response in Committee to my amendment on exemplary damages in collective proceedings. In explaining the Government's decision, he said:

"The bar on the availability of exemplary damages in collective actions was one of the many safeguards put in place when the Consumer Rights Act 2015 was enacted, to ensure a balanced system of collective actions before the CAT which will not lead to a culture of undue litigation and US-style class actions".—[*Official Report*, 31/1/24; col. GC 371.]

That is not a particularly helpful way of describing a legitimate assertion of consumer rights in a collective fashion, given the imbalance of power that is there so often in these proceedings. We have heard about asymmetry, and this is precisely that kind of area. Why should they be denied exemplary damages when in an individual case they would have been awarded, for instance where the illegal action has been deliberate?

I thank the Minister for his letter of 27 February. In it, he says:

"These safeguards were put in place when the Consumer Rights Act 2015 was taken through the House to ensure a balanced system of collective actions before the CAT. These safeguards ensure that defendants are protected by avoiding vexatious and unmeritorious claims—or fishing expeditions—while allowing legitimate claims for redress to proceed"—

this is the point where I took a deep breath—

"without defendants feeling pressured to settle despite the likelihood of a strong defence".

Let us consider who we are thinking of as defendants: quite often in these circumstances, they will be extremely large companies. Is it not time that we reviewed the Consumer Rights Act 2015 in that respect? Surely, in these circumstances, we are talking about big tech, which has all the market power and the ability to finance litigation till kingdom come. Have the Government engaged in any recent consultation on that? As far as I can see, the last consultation they conducted was 10 years ago. I hope that the Minister has some slightly better answers this time around than both those in his letter and in Committee.

I look forward to hearing from the noble Lord, Lord Tyrie, and I encourage him to retable his Amendment 65 on whistleblowing. The government response in Committee and in their letter of 27 February—in contrast to what I have just said—demonstrated a real interest in expanding the regime set out in the Public Interest Disclosure Act 1998. The Government now say that they are currently reviewing the effectiveness of the whistleblowing framework in meeting its original objectives. I very much hope that the Minister can give us a foretaste of the conclusions of that review. I also look forward to hearing from my noble friend Lady Kramer, who has been a champion of whistleblowing rights.

Without anticipating what the noble and learned Lord, Lord Thomas, may say, I welcome government Amendment 62, but the timescale is crucial. We on these Benches will help to facilitate a Bill putting those rights on the statute book in any way that we can. We have received a letter from the Association of Litigation Funders. Without putting too fine a point on it, it says: "This vital role of litigation funding has been highlighted recently following the increased and long-overdue coverage of the Horizon scandal. Alan Bates,

[Lord Clement-Jones]
the lead claimant against the Post Office, has said that the backing of litigation funders helped him and his colleagues secure justice, expose the truth and clear their names and reputations". I cannot think of a better reason to make sure that we get the Bill on the statute book as soon as possible. I beg to move.

Lord Hodgson of Astley Abbotts (Con): My Lords, I have Amendment 63 in this group, which is an updated and slightly amended version of Amendment 89A that I tabled in Committee. As the title of the proposed new clause says, the amendment calls for the Government to undertake a review of the third-party litigation funding industry. We discussed my earlier amendment on 31 January, and a lot has happened since. I have been blowing the trumpet since March 2017, and suddenly it appears that the walls of Jericho have fallen down.

I thank the noble and learned Lord, Lord Thomas of Cwmgiedd, who has been kind enough to send me a copy of the draft report by the European Law Institute on the principles that should govern third-party funding. The draft report contained a great deal of intellectual heavy lifting, from which I have benefited greatly.

Most importantly and significantly, I thank my noble friend the Minister and, through him, the Lord Chancellor and the Ministry of Justice for the announcement on 4 March that a review of third-party litigation funding would be undertaken. I am also grateful to my noble friend and his officials for giving me the chance to see some early draft terms of reference and for the opportunity to discuss them with him. I have a handful of points about them that I would like to put on record tonight, and I hope he will be good enough to pass them on to the MoJ, so that they may be taken into consideration as the terms of reference are firmed up.

First, in Committee I explained that I was a very strong supporter of the concept of access to justice, but that we needed to know what sort of justice was being accessed. The noble Lord, Lord Fox—I am sad that he is not in his place, but I did say I was going to mention him this evening—got after me, not entirely unfairly, saying that all my remarks were, as he put it, of second-rate importance and that, without third-party litigation funding, there was no justice at all, to which I reply: up to a point, Lord Copper.

We—and I hope the review—must not forget that the funders are profit-making entities. This in itself is entirely understandable, but a profit-making entity marches to the beat of a different drum. All I am saying is that the plaintiffs—whose interests, after all, the funders are supposed to represent—are entitled to know about the beat of that drum, the waterfall of the distribution of the proceeds, who pays costs, and all those sorts of issues. If obfuscation takes place, there should be a body—the courts, perhaps—that can step in. Equality of arms demands no less.

My second point is that I hope the review will be prepared to get down into the real practical detail of what is happening in the industry today. High-flown legal principles are really important to provide the right structure but, to be effective and worth while, the review will need people with experience of the third-party litigation funding industry and those with a preparedness to get into the detail and turn over all the stones.

Thirdly, I hope the review will examine the consequences of grouping claims together, in the way that they are put together for funding via a single investment pot. In particular, the review will need to consider the position where firms of solicitors are undertaking the grouping. As I explained in Committee, where several cases are included in a single pot, there is a danger of too early a close-out, from a plaintiff's point of view, of the remaining case or so, when the funder would like to round up the pot and return the money to its investors. By contrast, when matters are not going so well, it may be in the funder's interest to prolong the proceedings—not in the interests of the plaintiffs—in the hope that a greater result will come from the last few cases, and the result will be a much more satisfactory outcome. The key differentiation is that the plaintiffs have an interest in the outcome of a single case, whereas the funders have an interest in the outcome of a group of cases.

Fourth is any unwitting exposure to costs. Under the opt-in regime, individuals took their chances when they signed in—not so under the opt-out regime. I think I am right in saying that there is nothing to stop my noble friend the Minister, me, or Members of your Lordships' House suddenly getting communications saying, "Please send us £100 for your share of unfunded costs of bringing this case". That seems to be not a likely but a possible situation, and not a very satisfactory one.

Fifthly, for those Members of your Lordships' House who sat through Committee and other stages of the National Security and Investment Act, when we were seeking to achieve a reasonable balance among interested parties, there is a read-across to this review. It is surely not in our national interest to have unknown funders—perhaps backed by foreign Governments—able to press for litigation claims against high-tech UK companies. Such actions can disrupt the management and development of the company or damage its reputation, and could in some cases give access to its technology. An ability for the Government and/or the courts to require disclosure of beneficial ownership could be of great advantage in the future.

Finally, we are promised a preliminary report this summer and a final report in summer 2025. This will presumably mean that the earliest we can accept draft legislation, if there is any, will be in the 2026-27 legislative programme, leading to stuff on the statute book in 2028. That is quite a long way away, and I hope we are not going to see any slippage in that timetable. I hope that I have been over-pessimistic about what might be achieved, and that my noble friend can reassure us on that.

I end as I began, by thanking my noble friend and the Government for this important development. I hope they will feel able to pass these remarks on to the MoJ and I ask whether those of us who have taken a long-standing interest in TPLF can be kept informed as matters develop, and that we shall have the opportunity to give evidence to the review in due course.

Lord Tyrie (Non-Afl): I have tabled Amendments 65 and 153. I declare my interests, as I did in Committee and as I have set out in the register. I also declare an interest in the Bill, since I had a hand in constructing it. I can never make up my mind whether I should be declaring victory and moving on, or flagging up further improvements. I have decided to take the latter course. Unfortunately, as on a previous occasion, it falls to me to come between a number of colleagues and their dinner, so I will do my best to be brief—although there are a number of things I need to say.

7.30 pm

I will take Amendment 153 first. It proposes a comprehensive review of the effectiveness of this legislation in five years' time and every five years thereafter—that is, a review of the whole competition, consumer protection and digital framework. We need that because this is not a minor Bill; it is greatly enhancing the powers of an already powerful body, and one which has a mixed track record of only partial implementation of its current statutory remit, mixed-quality corporate governance, a lack of accountability—which has been referred to many times in the course of scrutiny of the Bill—and a history of timidity at the top. Several of the new powers being granted, especially in the digital area, are completely uncharted territory, and nobody really knows what their effects will be. A review can find that out. Incidentally, we are also granting—although this has been much less scrutinised—enormous additional administrative powers in the field of consumer protection, and that would be occupying a great deal of our time were we not being distracted by the equally very important area of digital.

A second reason we need a review is that we need to know whether this legislation is delivering the goods for the final consumer. When a small group of us were working on the outlines of the legislation at the CMA, that crucial issue was extensively discussed among us. We conceived our proposal, which was published in 2019, as a three-legged stool, with three areas working together: a duty of expedition, a power to implement interim measures and a consumer duty on the regulator. This legislation has left out one of the legs. A review is needed to find out whether this two-legged stool can stand up.

A third reason we need a review is to consider whether, with respect to digital, we have this crucial issue of JR versus merits reviews in the right place. The Government have removed any form of substantive appeal compared to what they said they would do originally, which was a form of JR-plus on the Ofcom model. What also deeply concerns me is that we are likely to be reducing the deterrent effect of fines by providing a merits review of fines, when I think everyone is agreed that fines are too low and need to be higher if they are to be an effective deterrent.

One of the many points I did not make in Committee on this issue is that the UK is seen as a good jurisdiction to locate and transact, precisely because we have demonstrably balanced and reasonable review by the courts of substantive decisions. Those who argue for the pure form of JR—we have heard quite a bit of that today again—may end up prejudicing that very important benefit, and it could turn out to be a profound mistake. We will not get the Government to change their mind just now. I think they will reverse what has just been done here in the Commons shortly, but let us at least look at it again after a few years, and thoroughly. Incidentally, some might argue that we have created a form of review by the back door through the introduction of the word "proportionality". That may turn out to be the case, but, if so, it is a step into the unknown, whereas using the Ofcom route—the JR-plus route—was at least one on which there is case law.

I want to make one last point on Amendment 153. Perhaps in five years' time Parliament will already have put in place some meaningful parliamentary oversight anyway, and I strongly agree with what the noble Baroness, Lady Stowell—she is not in her place—had to say on that. I hope we get to better oversight. It is needed for a good number of regulators, not just the CMA, as substandard performance from a number of them is manifest now to all of us. I very much hope that Parliament will get help from the Government to put in place a powerful regulatory oversight body, with adequate, high-quality staffing. Were we to do so, the need for the five-year review I am proposing here in Amendment 153 would probably be less pressing.

The Government may in a moment tell us that there will be some post-legislative review and that that will be put in place in a few years' time anyway. All I would say to that, on the basis of more than a quarter of a century as a legislator—I do not know exactly how long—is, "Up to a point, Lord Copper". I have seen some of these reviews and how they can be gutted of any meaningful, genuine, scrutiny, and they are of very variable quality. This proposed new clause would make sure that the review is robust. In any case, of one thing I am absolutely certain: we must have better oversight of these bodies. Where the legislation concerning these regulators is concerned, but particularly in the competition field, "fire and forget" legislation will be of little use. That is why we need to have confidence that a review will take place, which we get with this amendment.

I turn now to whistleblowing and Amendment 65. The UK now needs to review and to reassess its whistleblowing provisions pretty thoroughly and as soon as possible. They are manifestly inadequate. Four points stand out. First, I think most people are agreed that they are defective in the anti-trust field. I have discussed that at considerable length in Committee, which I will not trouble the House with again.

Secondly, the problems with the UK's whistleblowing provisions are only going to get worse with the growth of digital detriment. It is extremely difficult for regulators to know even where to look to find that detriment and to find the abuse, given the power of algorithms and the asymmetry of arms with respect to them. Regulators are almost certain to need whistleblowers to find it.

A third reason we need more robust whistleblowing provisions is that there is moral hazard everywhere. I will give just two examples, one of which I have raised before. When someone blows the whistle, however ethical their position may be, it may also destroy that person's livelihood and that of his or her family. As the International Bar Association put it in a review of whistleblowing, whistleblowers must have full compensation, which they certainly do not get now:

"Otherwise, the whistleblower may 'lose by winning'".

[Lord Tyrie]
A second illustration of the moral hazard lies with the CMA itself. On the one hand, the CMA knows that it should do everything possible to encourage whistleblowing; on the other hand, any compensation it pays to them comes out of its own budget—scarcely the sort of encouragement that is appropriate.

Incidentally, I do not know why the Treasury is not more deeply into this. The fines go to the Consolidated Fund, and offering the CMA some proportion of what goes to the Consolidated Fund strikes me as a win-win for everybody—better deterrence, some more money in the Consolidated Fund and the CMA fully compensated for the cost of trying to assist or compensate a whistleblower. I hope that Ministers are looking at this, and I hope that is what I am going to hear in a minute.

Several of us have been pointing this out for years. Given the moral hazard, it is no wonder that the current situation is leading to a thin selection of anti-trust cases coming forward from the CMA. It is scarcely credible that there is so little detriment in the anti-trust field, given how few cases it is bringing. Of course, the truth is that it is very difficult to find out about them, and whistleblowing is probably the only practical way. The losers from all this are the millions of consumers who are left unprotected from collusion by firms, big and small, and particularly the smaller, challenger firms trying to break into markets.

A fourth reason that we need a review of whistleblowing is to seek out and try to emulate best practice in other countries. Several of them do it much better, particularly the United States, where whistleblowers are generously compensated.

Of course, if fines and compensation are both raised a lot, as they should be, a review will also need to look at some of the moral hazard that might come in the other direction—for example, the risk of deliberate provocation from those hoping to profit from the higher compensation, or vexatious claims from discontented employees. These are not easy issues to address. Perhaps we need to go further than we do now to deal with them.

The noble Baroness, Lady Kramer, has been arguing vigorously for years that we need to go much further, that we need an office for whistleblowers—a fully independent oversight regime with a remit well beyond the competition field. I have hesitated before supporting such a proposal but, given where we are now, perhaps she is right. At the very least, we need an immediate review to find out whether she is.

Baroness Kramer (LD): My Lords—

Lord Kamall (Con): My Lords—

Baroness Kramer (LD): Please.

Lord Kamall (Con): I thank the noble Baroness. I am afraid that was the opposite of chivalry.

I want to speak to Amendment 153, tabled by the noble Lord, Lord Tyrie. He and I have had a number of conversations about this. I refer noble Lords to my interests as set out in the register. Having written about competition law at EU level and taken part in debates on competition issues in the European Parliament during my many years there, I was very torn between the merits appeal and the judicial review. I was tempted by the idea from my friend in the other place, the right honourable Robert Buckland, of possibly a time-limited merits appeal.

Many of us fell down on the side of judicial review because the small firms, the challenger firms, were asking for it. They believed that it was quicker and more effective. We hope that it will be. That is why many of us have supported this. But we have to ask: what if we are wrong? We do not have perfect information. What if judicial review takes longer than envisaged? Some noble Lords have said to me that the Joint Committee of Parliament that the noble Baroness, Lady Stowell, proposed would be much more effective in holding the CMA to account and ensuring that there is not a repetition of cases being restarted because they lost at JR. That argument has some merit.

However, we must take a step back and realise that, given that none of us has perfect information, we should be aware of the notion of unintended consequences. I have written about this a number of times over the years for think tanks. Often a well-intentioned government intervention that is supposed to make things better, which many people support at the time and that makes sense and looks like it will work does not turn out how it is supposed to but makes things worse.

In that spirit, I have been thinking about how we make better laws. How do we ensure that there are safeguards in place for unintended negative consequences? How do we make some redress to ensure that we change course, having thought that we were on the right course but having made things worse by not recognising the unintended consequences? In Committee, I said that I had considered tabling an amendment for a review after three or five years, or whatever. However, I am concerned that this would be seen as a loophole by the big companies, which would then hold off in order to show that JR was not working so that they could go back to merits appeal.

The noble Lord, Lord Tyrie, has solved that problem in many ways with Amendment 153. It is right that we have a review of all legislation to ensure that it has worked out as was intended and so that where there are unintended, unforeseen consequences, when it did not work as we had envisaged, we have those safeguards. A good way of doing that would be to have reviews of legislation such as the one that the noble Lord proposes here, to ensure that we could change course if it did not turn out how we intended.

I hope it will do. I hope judicial review will work. I hope it will be much quicker and we will have a much more competitive market. I hope the challengers will grow stronger, we will have more competition and see creative disruption and new challengers at every stage and consumers benefiting. Amendment 153 says, "Let's make sure that we take stock to see whether legislation—particularly a Bill as important as this—works out as we want it to". That is why I support Amendment 153.

Lord Thomas of Cwmgiedd (CB): My Lords, I will speak very briefly in relation to the amendments to deal with the problem of litigation funding.

I thank the Lord Chancellor and the Ministers on this Bill for what they have done to facilitate bringing forward comprehensive legislation because it is plainly much better addressed in one simple Bill. I express also my gratitude to the Opposition, particularly the noble Baroness, Lady Jones of Whitchurch, and the noble Lords, Lord Bassam and Lord Stevenson of Balmacara, for their help. On the Liberal Democrat Benches I thank the noble Lords, Lord Clement-Jones and Lord Fox. I also thank my colleagues who are not here to support me. This is something where the Lord Chancellor has been right. He has taken the right decision. Our task now is to get it through before any events derail legislation. Any help that I can give, I am more than willing to.

7.45 pm

As I am on my feet, I will say one word about Amendment 63, tabled by the noble Lord, Lord Hodgson of Astley Abbotts. The Lord Chancellor has been correct in saying that we must have a review. I have supplied all the documents to which the noble Lord, Lord Hodgson of Astley Abbotts, has referred, to the Lord Chancellor and others, regarding the work that has been done by the European Law Institute and a committee which we have the benefit of being chaired by Mrs Justice Cockerill. It has a very strong perspective from England and Wales.

Litigation funding raises issues that are worldwide. They are very similar, whether in continental Europe, the United States, Singapore or Australia, by way of illustration. These are covered in the report. I very much hope that the Ministry of Justice will find it useful and think of a way to tap into all the knowledge that the group has. What the answer is, what the principles are, I will not take your Lordships' time up with, except to say that it may not be regulation. Regulation is not a universal success. There are other ways of doing things—maybe codes of conduct, maybe voluntary agreements. It is quite clear that this gives England and Wales, and the UK, an opportunity to show what we have always had: leadership in the law. We are known throughout the world for this. I very much welcome what the Lord Chancellor has done because it shows what a real leader he is.

Baroness Kramer (LD): My Lords, I very much support Amendment 61 moved by my noble friend and colleague Lord Clement-Jones. I am very much a believer in equality of arms. The issue of exemplary damages speaks exactly to that. I hope very much that the Government will take that on board, because it is a fundamental principle that makes a great deal of practical difference as well when wrong has happened and when people seek redress.

I support the two amendments tabled by the noble Lord, Lord Tyrie. Briefly, on Amendment 153, regarding the five-year review, I had the privilege of serving under the noble Lord's chairmanship on the Parliamentary Commission on Banking Standards. In many ways that was similar to this Bill, but our proposals were exceedingly radical. They required very substantial change by the financial services industry. We very much wanted them to be reviewed after a period of time. We did not manage to trap that into legislation; it did not happen. Instead, when issues became evident where we had made changes—for example, on presumptions of guilt and in areas where there was intense lobbying on ring-fencing and whatever else—changes happened but not in a coherent and sensible way that benefited from that overarching focus that we had had during the original review. That has been a real weakness. We finally have a new committee in this House, the Financial Services Regulation Committee, providing some accountability to regulators, but that is an issue that we would have picked up on much earlier had we been in the process of doing a comprehensive review. That underscores many of the points that have been made about this issue.

We live in changing times. The idea that things stand still and you can do everything piecemeal is really not appropriate. However, I will speak most on the issue of whistleblowing. I have not otherwise participated on the Bill but, when I see the word "whistleblowing", I am afraid that I suddenly find myself lured on to the Benches.

I very much ask the Government to take this issue on board, because I agree with the noble Lord, Lord Tyrie, and others: we will never get to grips with wrongdoing in any of the areas covered by the Bill, particularly with all the new complexities and the constant change within the digital and competitive arena, until we have an effective whistleblowing regime. We need a system that leads to the follow-up of valid tips from whistleblowers. Currently, looking at different regulators in many different fields is clearly completely haphazard. Some tips are followed up, some are dismissed and some are ignored. Secondly, and just as importantly, we need a proper arrangement to protect whistleblowers from retaliation, so they will not suffer detriment by coming forward.

Our current system depends on the Public Interest Disclosure Act 1998, which was a Private Member's Bill that was brought forward then as part of employment law. It was ground-breaking at the time but has long been shown to be utterly inadequate compared with more recent schemes, particularly in the United States. Those US schemes have had an astonishing success rate in disclosing wrongdoing, leading to prosecutions, convictions and financial penalties.

I will use an example not from the anti-trust field but from a field that I know best and with which many will be familiar—the Securities and Exchange Commission. Since it brought in its whistleblowing scheme in 2011 under the then new Dodd-Frank legislation, by the end of fiscal year 2022, it had received over 83,000 tips from whistleblowers and collected in excess of $6 billion in financial penalties. In fact, there has been so much activity in the following years that those numbers would be significantly higher if we brought them up to date.

It is also fair to assume that billions of dollars of wrongdoing have been deterred by the fear of disclosure under such an effective whistleblowing regime. Not just the SEC but a number of entities use whistle-blowing legislation within the financial field; the Commodity Futures Trading Commission—CFTC—is

[Baroness Kramer]
another example that has had the same kind of success as the SEC. I find it rather disturbing that the CFTC is now doing road trips in the UK to encourage whistleblowers who are aware of financial wrongdoing with any US connection to contact it directly. In fact, something close to a quarter of the cases it is currently pursuing have a UK-based whistleblower somewhere within them, because finance is so international. Now the people at the CFTC are very careful not to criticise any UK regulators, but it is not a compliment that they feel it is necessary to be here to get their independent message across to anyone who has come across wrongdoing, with a US connection, in the financial field.

The Public Interest Disclosure Act is inadequate for at least four reasons, some of which were mentioned by the noble Lord, Lord Tyrie. It does not require any follow-up on a tip, even if it is acknowledged to be valid. It covers only employees and not the many others, such as contractors or clients—all kinds of people come forward—who blow the whistle when they see wrongdoing. They are not covered at all and have zero protection at present. All it provides is anonymity for disclosures that are made to a prescribed group of people—basically, the regulators and MPs. Most whistleblowers are not anonymous; they will have raised issues with management, companies, employers, suppliers and clients. When they see something wrong, they do not instinctively think of themselves as whistleblowers in need of protection, and when they do, their identity is then known.

No regulator in the UK has ever acted to protect a whistleblower from retaliation. That retaliation is usually years spent in an employment tribunal or in the courts. For many whistleblowers, it is a loss of career. There is a wide scheme of informal blacklisting—we know of case after case. Many whistleblowers have to use their own resources because there is no legal aid to fight this process, so they run into financial ruin. You can imagine the mental health costs and the frequency with which families break down.

However, I have spoken to pretty much every UK regulator and typically—there are a few exceptions—they regard their own monitoring and supervision as entirely sufficient, with whistleblowing a mere marginal assistance. They also believe that whistleblowers should act out of duty and altruism, and not because there is protection from retaliation available or compensation for harm.

I have talked about the SEC and the CFTC and, prior to the Dodd-Frank legislation in the United States, which put in the strict whistleblowing rules and made them mandatory, US regulators had exactly the same attitude as the current UK regulators and the same failure to create a pattern of whistleblowing and to follow up cases. The change came with legislation.

In the sectors covered by the Bill, the rewards for wrongdoing are a huge temptation and require highly sophisticated expertise and knowledge. We can see why that is tough for a regulator to manage, unless it has a really effective whistleblowing programme. In its recent directive, the EU is now catching up with the United States in recognising whistleblowing as a key tool to expose wrongdoing early and to deter wrongful behaviour. It is time that we did the same.

I hope that the Minister takes back this message to those who are working on the reform of the whistleblowing framework, as it is really important. Sometimes one hears rumours that they are looking just to tweak existing legislation, but what is needed is a radical change that meets the needs and gives us the opportunity that an active whistleblowing community can deliver. I hope the Government will take on board that message.

Lord Bassam of Brighton (Lab): My Lords, I promise that I am not going to stand for too long between this session and people's desire to have supper. I have a few words to say, but I will try to keep them as brief as I can. This group of amendments deals with the interaction of the courts with regulation and redress, and we obviously support Amendment 61, in the name of the noble Lord, Lord Clement-Jones, on exemplary damages in class action cases. We will listen to the Minister's explanation carefully and try to understand why the Government are continuing to resist this approach.

We recognise that government Amendment 62 is part of a wider initiative to put right the fallout from the Supreme Court judgment in the PACCAR case, which acted as an inhibition to litigation fee agreements that enable collective actions such as those involving the postmasters and postmistresses. If we have learned anything from Committee, it is that Ministers should live in dread of the experience of the former Lord Chief Justice, at all times. The noble and learned Lord, Lord Thomas, offered us some wise words on that occasion and I am glad—delighted, actually—to see the Government finally acting with some speed to bring forward a Bill from the Ministry of Justice that covers a wider range of cases than the current Clause 127 achieves. If the noble Lord, Lord Clement-Jones, had not quoted Alan Bates, I would have done, because I thought it was a ringing endorsement of what was necessary.

Perhaps I could task the Minister and tire him a little to put a bit more on the record about the detail, nature and extent of the short Bill when he sums up. Can he give us a clue about its introduction date?

8 pm

The other amendments in this group, tabled by the noble Lord, Lord Hodgson of Astley Abbotts, and the noble Lord, Lord Tyrie, merit our support, not least because they call for a practical review of the operation of third-party funding for cases involving competition and consumer law, and the protection of whistleblowers. In the latter case this involves the need to protect those who are selflessly acting, or attempting to act, in the public interest.

Regarding Amendment 153 tabled by the noble Lord, Lord Tyrie, we want to hear from the Minister how the legislation will be kept under review. We have heard throughout the passage of the Bill of the need to keep abreast of the changes in the market affected by the actions of different platforms and the tech giants. We do not want to be caught short in the way in which we have been in the past, and some notion of a plan to review the legislation would go some way to reassure noble Lords—particularly those who have focused their time and attention on the Bill.

I have not referenced Amendment 66, simply because I do not really understand it. I assume that it is consequential. Perhaps the Minister can give the House that assurance and explain exactly what it means. With that, I am happy to listen to the wisdom of the Minister when he comes to sum up.

The Parliamentary Under-Secretary of State, Department for Business and Trade and Scotland Office (Lord Offord of Garvel) (Con): I thank all noble Lords who have contributed to the final group this evening, group 4.

Amendment 61 tabled by the noble Lord, Lord Clement-Jones, would enable the Competition Appeal Tribunal to award exemplary damages in collective proceedings. He is familiar with the Government's position on this matter. I have been pleased to have the opportunity to discuss it with him further since Committee, and have written.

The Government consulted before introducing the collective action regime in 2015. The great majority of respondents said that exemplary damages should not be available in collective actions to ensure that firms were not unduly pressured to settle claims due to just the risk of punitive damages. Introducing exemplary damages in collective actions could also act as a disincentive to leniency applications—these are critical to the detection and enforcement of infringements by public regulatory authorities. Without effective leniency programmes and public enforcement, it could be far more difficult for private parties to pursue redress.

This view was shared by both businesses and consumer groups, including the consumer group Which?, which did not consider extending exemplary damages to collective actions to be necessary. I am sure that this will be of particular interest to the noble Lord, Lord Clement-Jones, given his commendable focus on ensuring consumers are at the centre of our thinking. The Government believe the current provisions in the Bill reflect the right approach on this matter.

Government Amendments 62 and 157 relate to litigation funding. The Government have recognised the challenge posed by the PACCAR judgment and the impact on access to justice. Furthermore, it has always been the Government's intention to address the impact of the PACCAR judgment in full at the earliest opportunity. Since Committee, the Government have announced that it will quickly bring forward a separate Bill to enable this. I am sure that noble Lords across the House will welcome this news.

Clause 127 was introduced previously to mitigate the impact of PACCAR by enabling PACCAR-compliant funding agreements to be applied to opt-out collective actions. This clause will no longer be required, and these amendments effect its removal. I hope that noble Lords will support these amendments, along with government Amendment 66, which is a tidying-up amendment to remove a redundant cross-reference in Schedule 13.

Lord Clement-Jones (LD): My Lords, I am sorry to interrupt the Minister but the noble Lord, Lord Bassam, and I would be keen—despite the dinner hour approaching—to know a bit more about the Minister's plans as regards the short Bill. We want a bit more specific information about timing and what is happening. Is there a period of consultation, or can we go straight to legislation. What is the plan? With the best will in the world, we are delighted to hear what the Minister has to say, but can we have some specifics?

Lord Offord of Garvel (Con): Yes, this will be happening quickly.

Lord Clement-Jones (LD): My Lords, that is rather better than the ministerial "in due course". That is all I can say.

Lord Offord of Garvel (Con): I thought the noble Lord would appreciate that clarity.

Amendment 63 was tabled by my noble friend Lord Hodgson and I thank him and the noble and learned Lord, Lord Thomas, for their contributions to the debate. While the Government recognise the important role that litigation funding can play in facilitating access to justice, we are not blind to some of the challenges and opportunities to reform and improve the funding system. That is why, in recent days, the Lord Chancellor has written to the Civil Justice Council, inviting it to undertake a review of the sector. This work will ensure that claimants can get the best deal and it will expressly consider the need for further regulation or safeguards. Its terms of reference will be announced in the coming days.

Lord Clement-Jones (LD): I am sorry my Lords; I regret to keep interrogating the Minister, but there is a clear separation, I assume, between a review as to whether or not regulation is required, in the form that the noble Lord, Lord Hodgson, talked about, and re-establishing the basis for litigation funding following the PACCAR case. I assume there is a clear distinction between the two activities.

Lord Offord of Garvel (Con): That is correct.

Colleagues from the Ministry of Justice will be following this debate closely and will have heard the points made by my noble friend Lord Hodgson regarding the need for momentum for this review. Therefore, it would not be right to have a statutory review that would duplicate this work.

Amendment 65, tabled by the noble Lord, Lord Tyrie, is about whistleblowing. I thank the noble Lord and the noble Baroness, Lady Kramer, for their passionate contributions on this topic this evening. As I made clear in Committee, the Government recognise how important it is that whistleblowers are supported to shine a light on wrongdoing and believe that they should be able to do so without fear of recriminations. In 2023, the CMA increased the cap on rewards for illegal cartel whistleblowers from £100,000 to £250,000 to strengthen its enforcement work. Additionally, the Government are undertaking a wider review of the effectiveness of the whistleblowing framework in meeting its original objectives to facilitate whistleblowing, protect whistleblowers against detriment and dismissal, and to facilitate wider cultural change around whistleblowing.

My colleague the Minister for Enterprise, Markets and Small Business has recently mentioned in the other place that the research for the review is near completion. The Government intend to provide an update on this shortly.

Lord Tyrie (Non-Afl): Can the Minister say whether "shortly" is the same as "quickly", and whether it will be a comprehensive examination of the subjects or just picking off a small number of areas? What exactly is it looking at?

Lord Clement-Jones (LD): Before the Minister stands up, I will add to that. The Minister used the word "research", which I thought was extraordinary. "Research" is a flabby kind of expression in these circumstances. Do the Government intend to review the current state of whistleblowing with a view to ensuring there is a more comprehensive approach to it, or is this just some nice-to-have academic exercise?

Lord Offord of Garvel (Con): I thank both noble Lords for that. The update will be provided shortly. I agree with the noble Lord, Lord Clement-Jones, on the beauty of the wording that the "research" for the review is near completion. It does perhaps need some clarification, so let us get the timetable and I will provide that as soon as possible.

The noble Lord's continued engagement is greatly welcomed as we undertake this important work. However, we do not think it appropriate to place a new and binding obligation for a further review to be conducted within a specific timeframe. I will come back to him with exactly what the timeframe is.

Amendment 153 from the noble Lord, Lord Tyrie, would require the measures in the Bill to be reviewed at five-year intervals by an individual appointed with the consent of the relevant parliamentary Select Committee. I thank the noble Lords, Lord Tyrie and Lord Kamall, and the noble Baroness, Lady Kramer, for their contributions to the debate on this amendment. I commend its intent. However, the Government have already committed to carrying out an evidence-led post-implementation review to assess how the Bill is delivering on its aims. The CMA has also engaged constructively with parliamentary committees to support their scrutiny of its activities. This will continue in the future. Noble Lords will be aware that the CMA is also required to present and lay its annual report in Parliament, covering its operation and effectiveness.

I thank the noble Lords, Lord Clement-Jones and Lord Tyrie, and my noble friend Lord Hodgson for their amendments. I hope that they are sufficiently reassured by what I have said and do not feel the need to press them.

Lord Clement-Jones (LD): My Lords, I thank the Minister for that response. Even on an empty stomach, there are things to be taken away from what the Minister said. I score him two and a half out of four as far as this is concerned. What he said on exemplary damages was disappointing. I cannot see why the Government do not understand that using a review that took place in 2013 as a stick to beat us with by saying that we cannot have exemplary damages for collective proceedings seems a bit perverse. Time has moved on. The whistleblowing side is the half—so nul points for exemplary damages and half a point for whistleblowing, but if there had been more than just research it might have been full marks. As regards the other two points, the fact that there will be a post-implementation review is sensible. The Minister did not say much more about the post-PACCAR pledge, but we take a little bit on trust, particularly at this time of day. In the meantime, I beg leave to withdraw Amendment 61.

Amendment 61 withdrawn.

Clause 127: Use of damages-based agreements in opt-out collective proceedings

Amendment 62

Moved by ***Lord Offord of Garvel***

62: Leave out Clause 127

Member's explanatory statement

This clause would leave out Clause 127 of the Bill (use of damages-based agreements in opt-out collective proceedings), which addresses the Supreme Court judgment in R (PACCAR Inc) v Competition Appeal Tribunal [2023] UKSC 28 in respect of certain proceedings, because the Government intends to bring forward a separate Bill addressing that judgment in respect of all proceedings.

Amendment 62 agreed.

Amendment 63 not moved.

Consideration on Report adjourned.

House adjourned at 8.13 pm.