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Public Bill Committee

DIGITAL MARKETS, COMPETITION AND CONSUMERS BILL

Sixth Sitting

Tuesday 20 June 2023

(Afternoon)

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Saturday 24 June 2023

The Committee consisted of the following Members:

Chairs: Rushanara Ali, † Mr Philip Hollobone, Dame Maria Miller

† Carter, Andy *(Warrington South)* (Con)
† Coyle, Neil *(Bermondsey and Old Southwark)* (Lab)
† Davies-Jones, Alex *(Pontypridd)* (Lab)
Dowd, Peter *(Bootle)* (Lab)
† Firth, Anna *(Southend West)* (Con)
† Ford, Vicky *(Chelmsford)* (Con)
† Foy, Mary Kelly *(City of Durham)* (Lab)
† Hollinrake, Kevin *(Parliamentary Under-Secretary of State for Business and Trade)*
† Malhotra, Seema *(Feltham and Heston)* (Lab/Co-op)
† Mayhew, Jerome *(Broadland)* (Con)
† Mishra, Navendu *(Stockport)* (Lab)
Russell, Dean *(Watford)* (Con)
† Scully, Paul *(Parliamentary Under-Secretary of State for Science, Innovation and Technology)*
† Stevenson, Jane *(Wolverhampton North East)* (Con)
† Thomson, Richard *(Gordon)* (SNP)
† Watling, Giles *(Clacton)* (Con)
† Wood, Mike *(Dudley South)* (Con)

Kevin Maddison, John-Paul Flaherty, Bradley Albrow, *Committee Clerks*

† attended the Committee

Public Bill Committee

Tuesday 20 June 2023

(Afternoon)

[Mr Philip Hollobone *in the Chair*]

Digital Markets, Competition and Consumers Bill

2 pm

The Chair: Clauses 22 to 25 were debated this morning. With the leave of the Committee, I will put the Questions together on clauses 22 to 25 stand part.

Clauses 22 to 25 ordered to stand part of the Bill.

Clause 26

Power to begin a conduct investigation

Question proposed, That the clause stand part of the Bill.

The Chair: With this it will be convenient to discuss clauses 27 to 35 stand part.

The Parliamentary Under-Secretary of State for Science, Innovation and Technology (Paul Scully): It is a pleasure to serve under your chairmanship, Mr Hollobone. Clauses 26 to 35 are about the enforcement of conduct requirements. The participative approach within the pro-competition regime means that the digital markets unit will aim to resolve issues with firms with strategic market status without the need for formal enforcement action. Where that is not possible, clause 26 will empower the DMU to investigate suspected breaches of conduct requirements by SMS firms and, where it finds a breach, consider what action can be taken. That is necessary to ensure that SMS firms comply with requirements.

Opening an investigation allows the DMU to make use of the full range of information-gathering powers set out in chapter 6. Where the DMU begins an investigation, certain information must be given via a notice to the SMS firm, and a summary of that notice must be published. Clause 27 will require that before the DMU can make a finding of the breach, it must consider any representations that an SMS firm makes in relation to the conduct investigation.

Clause 28 will allow the DMU to close a conduct investigation at any time without making a finding as to whether a breach has occurred. The DMU will need to explain why it is closing the investigation and account for its decision. That power is needed as it allows the DMU to react to changes during the investigation process. That could be, for example, needing to divert resources to an emerging high-priority competition issue elsewhere.

Clause 29 sets out the countervailing benefits exemption. The DMU's objective is to promote competition for the benefit of consumers, and that will shape the design of its regulatory interventions, meaning that the DMU will take consumer benefits into account when designing conduct requirements in the first place. However, the inclusion of the countervailing benefits exemption provides a backstop to ensure that, if needed, consumer benefits can be explicitly considered at the enforcement stage, too.

During a conduct investigation, an SMS firm will be able to put forward evidence that its action brings about benefits for consumers that outweigh the potential harm to competition. That will reinforce that consumers are at the heart of the regime. The clause is not about pursuing textbook-perfect economic outcomes; it is about real-world outcomes for consumers.

Clause 30 will place the DMU under a duty to notify an SMS firm of the outcome of a conduct investigation within a six-month investigation period. That will ensure that investigations are executed within reasonable timeframes. That does not apply if the DMU has accepted a voluntary binding commitment from the firm relating to the conduct under investigation, or if the investigation is closed with no findings made. The duty to give a notice to an SMS firm and subsequently publish a summary online is vital to inform the firm under investigation of the outcome and keep relevant parties informed of DMU action.

Clause 31 will give power to the DMU to impose an enforcement order on an SMS firm where it has found a breach of a conduct requirement. Those orders will most often be cease-and-desist orders requiring bad behaviour to stop, but they can also require more complex behavioural changes where that is a more appropriate way to remedy a breach. When imposing or varying an enforcement order, the DMU has a power, rather than a duty, to consult those persons it considers appropriate. That will allow the DMU to consider relevant third-party and SMS representations on proposed enforcement action, while ensuring that enforcement orders requiring the SMS firm to simply stop bad behaviour are not delayed by a requirement to consult.

Clause 32 will grant a power to the DMU to introduce enforcement orders on an interim basis. The DMU needs to be able quickly to address immediate harms that may occur from suspected conduct breaches in order to prevent significant damage, prevent action that would make subsequent remedies ineffective, or protect the public interest. The clause will enable intervention before irreversible change occurs and will ensure that options to restore competition are maintained.

Clause 33 makes provision for the duration of enforcement orders and interim enforcement orders, and for the circumstances in which they cease to have effect. Clause 34 will establish the DMU's power to revoke an enforcement order, ensuring that the enforcement orders in place remain targeted and proportionate. The DMU needs the flexibility to remove enforcement orders where they are no longer appropriate, so that SMS firms are not subject to unnecessary or inappropriate rules.

Finally, to ensure that enforcement orders are effective, targeted and proportionate, it is important that the DMU considers how they function and whether changes are necessary. Clause 35 will require that the DMU monitors the effectiveness of the enforcement orders in place. That includes assessing whether SMS firms are complying with existing enforcement orders, whether variation of an order is required and whether further enforcement action is needed.

In conclusion, clauses 26 to 35 set out robust enforcement provisions to make sure that the impacts of conduct requirements are realised.

Alex Davies-Jones (Pontypridd) (Lab): It is an honour to serve under your chairship this afternoon, Mr Hollobone. With your permission, I will make some brief comments on the clauses, in response to the Minister.

Clause 26 is very welcome. It is an important clause that outlines the circumstances in which the CMA will be able to begin an investigation into a suspected breach of a conduct requirement, more formally referred to in the Bill as a conduct investigation. It is an important and positive addition. For too long, the CMA has not had the legislative teeth to make positive change in our digital markets. Ensuring that it has reasonable and sufficient powers such as those outlined in the clause is central.

Labour particularly welcomes the provisions and thresholds outlined in subsection (1), which make it clear that the decision to begin a conduct investigation will be grounded in empirical evidence, whether from complaints submitted by third parties or from the CMA's own market studies. None of us wants to see overregulation or businesses stifled, but it is important that when the CMA has reasonable grounds to carry out a breach of conduct requirement, it has the tools available to act swiftly.

We note that subsections (3) and (4) outline the requirement for the CMA to give a notice to the undertaking about the investigation and set out the content required for that notice. We welcome the provisions entirely, as we do the clarification on the period in which a statutory investigation can take place. We think six months is reasonable, and we are pleased to see clarity on when the timeframe can be extended—a matter we will come to later when we address clause 102.

The current wording of subsection (6) states:

"As soon as reasonably practicable after giving a conduct investigation notice, the CMA must publish a statement summarising the contents of the conduct investigation notice."

Could the Minister clarify exactly where, and to whom, that notice will be published? As I have previously stated in reference to other parts of the Bill, there are some grounds for making that information public, at least to those who request it. We appreciate the market sensitivities, but ultimately it is businesses that will be facing regulation over their digital practices, broadly for the first time, and they deserve access to that information. It will be a valuable tool for learning and best practice.

I will keep my comments on clause 27 brief because I think, or at least hope, that we all agree that it is an important clause that makes sure that the CMA is required to consider representations from the undertaking being investigated before making a decision on whether the undertaking has breached conduct requirements. I am keen to hear from the Minister exactly what sort of information he believes will be appropriate for the CMA to consider. A balanced approach to the regime is critical, but we do not want the CMA's investigatory powers delayed by big firms who may choose to delay or overwhelm the process in any way. That aside, we support the clause and have not sought to amend it at this stage. Sincere apologies to Committee members for my repetition, but this is a far more collegiate Committee than others I have sat on.

We support clause 28 and its intentions. As we know, the clause provides that the CMA can choose to close a conduct investigation without making a decision about a breach, and sets out the process and timing for giving a notice to the undertaking about the closure and publishing a summary of the notice. We welcome provisions and clarity over this process. The CMA could summarise the contents of the notice provided to the relevant designated undertaking, while allowing it to redact some information for confidentiality purposes. However, we feel that there is a strong argument, once again, for making that information public to anyone who wishes to request a copy.

Labour welcomes the intentions of clause 29, which outlines the procedure that the CMA must follow where a breach of a firm's conduct requirement results in net benefits for consumers. This is an important clause, and it is vital that we have such an exemption to ensure that the regime does not inadvertently harmfully impact consumers. However, the countervailing benefits exemption must not be drawn too broadly. If the exemption is too broad, SMS firms will be able regularly to avoid conduct requirement compliance by citing security and privacy claims, as well as spamming the CMA with numerous studies, thus diverting its resources, which, as we have discussed, are very precious. This would undermine the entire regime by severely limiting the efficacy and efficiency of the conduct requirements. I therefore wonder whether the Minister has considered including in the Bill an exhaustive or non-exhaustive list of acceptable grounds for exemption.

Broadly speaking, though, Labour welcomes the Government's approach, which has similarities with the approach taken in the Competition Act 1998. It would be remiss of me not to remind the Minister that that important Act came into being thanks to a Labour Government. The reality is that Labour has always been committed to getting this balance right. We want to support big businesses, while also protecting consumers and encouraging innovation. These principles do not have to be mutually exclusive. That is why we particularly welcome clause 29(2), which sets out the criteria for the exemption, including that the benefits need to be

"to users or potential users of the digital activity in respect of which the conduct requirement in question applies,"

and must

"outweigh any actual or likely detrimental impact on competition resulting from a breach of the conduct requirement".

As we know, some examples of benefits may include lower prices, higher-quality goods or services, or greater innovation in relation to goods or services.

Clause 29 also makes it clear that it must not be possible to realise the benefits without the conduct, which means that the CMA must be satisfied that there is no other reasonable or practical way for the designated undertaking to achieve the same benefits with less anti-competitive effect. That is an important clarification, which is once again a sensible approach that we feel is crucial to getting the balance of this regime right.

Although I know that colleagues will be aware of the example highlighted to us all in the Bill's explanatory notes about a default internet browser receiving security updates possibly being an exemption, I wonder whether the Minister can give us additional examples of situations in which he would see the clause coming into effect.

[Alex Davies-Jones]

That aside, we support the intentions of clause 29 and see it as a positive step in terms of putting consumers and common sense first.

We see clause 30 as being fairly procedural, in that it outlines the circumstances in which the CMA must give notice about the findings of a conduct investigation. We are pleased to see that a period of six months has been established; none of us wants to see this process going on unnecessarily. We note, however, that in subsection (1), and in the Bill generally, we truly believe that more transparency is required. As it stands, the Bill is missing an opportunity to afford civil society, academics, businesses and consumers alike the opportunity to learn from the regime and ultimately to improve best practice in our digital markets more widely.

We welcome clause 31. However, we note that subsection (4) specifies information that the enforcement must contain, while subsection (5) requires that the CMA

"may consult such persons as the CMA considers appropriate before making an enforcement order",

or varying one. Again, the wording is very subtle, but I am most interested to hear from the Minister exactly why the consultation process is a "may" rather than a "must".

Throughout the Bill in its current form, there appears to be a lack of points for stakeholders to engage with the CMA decisions through consultation. Although the CMA being able to design rules and interventions for each firm could result in more effective remedies, it also increases the risk of regulatory capture, whereby SMS firms write their own rules and get them rubber-stamped by the regulator. That makes proper consultation essential. I would appreciate clarification on that point from the Minister.

Clause 32, as its title suggests, gives the CMA the power to make enforcement orders on an interim basis. This is an important tool to allow the CMA to act rapidly where a potential breach is concerned. It is particularly welcome that subsection (1)(b) lists the circumstances under which interim enforcement orders can be made, and that these are broadly around preventing damage to a person or people, preventing conduct that could reduce the effectiveness of the CMA, or protecting the public interest. It is important for all of us with an interest in the Bill that that is clearly outlined in the Bill, so that is very welcome indeed.

Clause 33 makes provision for enforcement orders and interim enforcement orders to come into force, and outlines the circumstances in which they cease to have effect. We see this clause as, again, a fairly procedural one. We welcome the clarity of subsection (4), which will ultimately enable the CMA to take action against historic breaches. That is imperative, given the pace at which our digital markets and regulated firms can shift. We therefore support the clause and believe that it should stand part of the Bill.

On clause 34, as with previous clauses, there is no need for me to elaborate at great length. In essence, we agree with the clause.

As we know, clause 35 outlines that the CMA must keep the enforcement orders and interim enforcement orders that it has made under review, including whether to vary or revoke them, and also the extent to which undertakings are complying with them and whether further enforcement action needs to be taken. This is an incredibly important point. The CMA must review its own homework, as we expect all regulators to do. However, I wonder what assessment the Minister has made of making those reviews public. The CMA must have a degree of accountability, particularly to Parliament. We feel that that is somewhat lacking in the Bill as it stands.

More widely, that points to the lack of opportunities for stakeholders to engage with the CMA and its decisions through consultation, as I have previously said. This is a significant problem, given the nature of the regime. On the one hand, the flexibility and agency that the DMU has to tailor its regulatory approach depending on the nature of the firm should allow it to design more effective remedies. On the other, it increases the danger of regulatory capture by SMS firms. I would appreciate the Minister clarifying that point so that we get this right.

2.15 pm

Paul Scully: The publication of notices will be online. The reason that there will be two separate versions is that one might be redacted, for example for things like commercial sensitivity, but it is right that the SMS firm understands the full reasons. Beyond that redaction, there will be one separate online publication for people to see, including the challenger firms themselves.

The hon. Lady spoke about the length of time. The DMU will decide the length of the period during which an SMS firm can make representations, because it will vary from case to case. It is not for us to set an arbitrary timeline, because some will be comparatively simple and others will be incredibly complex and technical. That will ensure that the DMU can run investigations efficiently, without unnecessary delays due to late representations, but the DMU has to tell the SMS firm in the notice opening the investigation about the length of the period.

The implementation of any conduct requirements will be preceded by a public consultation, alongside ongoing engagement between the SMS firm and the DMU about compliance with those requirements as part of the regime's participative approach. However, there is no statutory requirement to consult on enforcement orders, because we are giving the DMU the discretion to consult where appropriate. Requiring consultation would not be proportionate for straightforward cease-and-desist orders, for example. Such orders, which we expect to be the majority of orders made, simply require firms to stop breaching the original conduct requirement that has already been consulted on, meaning that undertaking a consultation would be unnecessary.

That is where we are coming from on that—there is no deeper reason beyond ensuring that we can keep things proportionate for all sides. Third parties with a view or with evidence will be able to communicate those to the DMU during the conduct investigation itself, or once the enforcement order statement is published.

Question put and agreed to.

Clause 26 accordingly ordered to stand part of the Bill.

Clauses 27 to 35 ordered to stand part of the Bill.

Clause 36

COMMITMENTS

Question proposed, That the clause stand part of the Bill.

The Chair: With this it will be convenient to discuss the following:

That schedule 1 be the First schedule to the Bill.

Clause 37 stand part.

Paul Scully: I turn to the clauses on commitments related to conduct requirements. The ability of the DMU to accept commitments, which are voluntary and binding obligations, from SMS firms is important to support the participative approach to regulation that I have spoken about. That approach promotes greater efficiency and the swift resolution of investigations.

Clause 36 will allow the DMU to accept commitments from a firm during a conduct investigation. Firms will be able to offer commitments to the DMU to propose a solution to a suspected breach of conduct requirements. There will be robust safeguards in place to ensure that commitments are used appropriately. The DMU will need to publicly consult on any proposal to accept a commitment. Commitments can be varied to reflect changes in circumstances and will remain in force until either the DMU decides to release the SMS firm from the commitment or the conduct requirement to which the commitment relates comes to an end.

Clause 37 will ensure that the DMU is required to monitor the commitments that are accepted. That includes assessing the appropriateness of the commitments; whether SMS firms are complying with the commitments; and whether further enforcement actions are needed. To ensure that commitments are accepted, varied or revoked in a transparent way, schedule 1 sets out the procedures relating to commitments.

The procedures in schedule 1 also apply in relation to commitments for pro-competition interventions, but I will speak about those at a later stage. Schedule 1 ensures that the DMU publishes a notice detailing the commitment or proposed varying or revocation of the commitment and the reasons for its decision. The DMU must also consider any representations made in accordance with the notice before accepting, varying or revoking commitments. Without the ability to accept commitments, the DMU would have to use greater resources to further investigate breaches, and then develop and impose enforcement orders to fix them. The swift and effective resolution through binding commitments will be beneficial for the DMU, affected firms and ultimately consumers.

Alex Davies-Jones: Labour supports the intentions of clause 36, which ensures that the CMA can accept binding voluntary commitments from an undertaking during a conduct investigation to bring the investigation to an end. Once again, we feel that that is critical to a flexible and fair regulatory regime. It is only right that the CMA is empowered to continue an investigation into other behaviour and, when it can, investigate the same behaviour again. Therefore, we particularly welcome subsection (4).

That being said, there is no mention of consultation regarding the accepting of commitments from SMS firms, even though that will close a conduct requirement investigation and the commitments accepted will impact stakeholders. There is also no consultation when the CMA chooses to release an SMS firm from the commitments. Again, we feel that those points are worth clarifying. I would be grateful if the Minister could outline exactly why the Bill fails to place a duty on the CMA to consult appropriately on that important point.

Schedule 1 and its provisions relate to the commitments on firms, and it is very welcome. The schedule outlines the duty on the CMA to publish a notice, and consider any representations made in accordance with the notice that are not withdrawn. That is a logical and sensible approach. We also welcome the range of provisions in the schedule that provide extensive clarity on the CMA's responsibilities in relation to its decision making. We have repeatedly called for more clarity with a number of amendments, so I hope the Minister will carefully consider our reasonable requests. Overall, schedule 1 is an important part of the Bill that further clarifies the CMA's responsibilities, and we support its inclusion.

Without mirroring the comments that were made when we considered clause 25, Labour supports clause 37. It is vital for the regime to function now and into the future that the CMA has a duty to review those commitments. I am interested to know the Minister's thoughts on how frequent the reviews should be, but ultimately this is the right approach if we are to ensure and encourage total compliance. I hope that the Minister will assure us that the Government are open to improving the Bill when it comes to transparency, including parliamentary oversight. With that in mind, we do not have any specific amendments to clause 37 at this stage, but that could change.

Paul Scully: To answer the hon. Lady's point about consultation in clause 36, I will point her to schedule 1(2), which requires the DMU to consult on commitments before they are accepted or varied. Although that requirement is not in clause 36, it is in schedule 1.

Question put and agreed to.

Clause 36 accordingly ordered to stand part of the Bill.

Schedule 1 agreed to.

Clause 37 ordered to stand part of the Bill.

Clause 38

POWER TO ADOPT FINAL OFFER MECHANISM

Paul Scully: I beg to move amendment 1, in clause 38, page 20, line 32, leave out "proposed".

See the explanatory statement for Amendment 4.

The Chair: With this it will be convenient to discuss the following:

Government amendments 2 to 4.

Government amendment 45.

Government amendment 6.

Government amendments 8 and 9.

Government amendment 11.

Paul Scully: Government amendment 4 redefines what transactions can be dealt with under the final offer mechanism. It is accompanied by several consequential amendments to clauses 38 to 41. One of the conditions for the use of the final offer mechanism as currently drafted is that it can be used only in relation to a "proposed" transaction, where an SMS firm provides goods or services to the third party, or uses or acquires goods or services from the third party.

However, for the final offer mechanism to be most effective, it is crucial that the definition of "transaction" includes the future performance of an existing transaction, as well as new transactions that will happen in the future. That will ensure that parties who are already transacting with each other but on unfair and unreasonable payment terms are not excluded by the conditions for using the final offer mechanism. These are consequential, technical amendments that have been produced alongside feedback from the CMA.

Alex Davies-Jones: We welcome the first group of Government amendments, which we see as important clarifications to ensure that the final offer mechanism can be applied in relation to the future performance of an ongoing transaction. We support their inclusion, as those changes should stand part of the Bill.

Amendment 1 agreed to.

Amendments made: 2, in clause 38, page 21, line 1, leave out "proposed".

See the explanatory statement for Amendment 4.

Amendment 3, in clause 38, page 21, line 7, leave out "proposed".

See the explanatory statement for Amendment 4.

Amendment 4, in clause 38, page 21, line 13, at end insert—

"(4A) In subsection (1), 'transaction' means—

(a) a future transaction, or

(b) the future performance of an ongoing transaction,

whether in accordance with a contract or otherwise."

This amendment, together with Amendments 1, 2, 3, 6, 8, 9, 11 and 45 means that the final offer mechanism could be applied in relation to the future performance of an ongoing transaction.

Amendment 45, in clause 38, page 21, leave out line 20 and insert—

"'the transaction' means the transaction mentioned"—*(Paul Scully.)*

See the explanatory statement for Amendment 4.

Question proposed, That the clause, as amended, stand part of the Bill.

The Chair: With this it will be convenient to discuss the following:

Clause 39 stand part.

Government amendment 7.

Government amendment 10.

Clauses 40 to 43 stand part.

Government new clause 1—*Decision not to make final offer order—*

New clause 3—*CMA annual report on final offer mechanism—*

'(1) The CMA must, once a year, produce a report about the final offer mechanism.

(2) Each report must include information about—

(a) the number of final offer orders the CMA has made over the previous year;

(b) for each final offer order—

(i) the amount of time taken between final offer initiation notice being given and the final offer order being made.

(ii) whether bids were submitted by both the undertaking and the third party, and

(iii) the outcome of the process; and

(3) The CMA may provide the information in such a way as to withhold any details that the CMA considers to be commercially sensitive.

(4) The first report must be published and laid before both Houses of Parliament within one year of this Act being passed.'

This new clause requires the CMA to publish an annual report on the workings of the final offer mechanism. The report will be made publicly available and will be laid in both Houses of Parliament.

Paul Scully: Clauses 38 to 43 will allow the DMU to use the final offer mechanism as a backstop enforcement measure to other regulatory tools. The final offer mechanism will help the DMU to resolve breaches of conduct requirements requiring fair and reasonable payment terms when there has been sustained non-compliance by an SMS firm. The inclusion of these clauses in the Bill is essential to provide the DMU with a more effective alternative to setting prices directly, which could be complex and time-consuming in fast-moving digital markets.

The final offer mechanism is a backstop that can be used when normal enforcement processes have not brought about a timely resolution. The DMU must prevent SMS firms from imposing unfair and unreasonable terms in the first place and incentivise constructive negotiations. That will ultimately drive the best outcomes for consumers, which is why there is a high threshold set out in clause 38 for the use of the final offer mechanism.

On the occasions when the tool is used, the DMU will ask the SMS firm and relevant third party to each submit what they believe are fair payment terms—their final offers—and the DMU will then choose one. The regulator will not be able to amend or replace the offers. To ensure the timely resolution of the breach, clause 40 establishes that the upper time limit for the entire final offer process is six months, as well as providing for a power for the Secretary of State to amend that time limit in future. The clauses also establish clear requirements on the DMU to publish key notices and statements upon issuing any orders, ensuring public transparency and accountability about the tool's use.

It is important when discussing these clauses to mention the role of the DMU in facilitating the preparation of the final offers. Under clause 39, the DMU can both gather and share crucial information between the two parties, allowing both sides to prepare a well evidenced final offer. The outcome of the final offer mechanism will be confirmed through a final offer order, which will instruct the SMS firm to give effect to the terms decided through the tool.

Government amendment 7 makes provision for how final offer payment terms are to be given effect for the purposes of the transaction. The amendment makes explicit that the final offer order will not set out specific terms that must be incorporated word for word into the terms of the transaction; rather it will set out the outcome for the transaction for the SMS firm to achieve.

I therefore encourage Members to support its inclusion. The clauses also contain key provisions for ensuring that the use of this tool is proportionate, allowing the DMU to revoke a final offer order where there has been a material change in circumstances.

On that topic, I turn to Government amendment 10 and new clause 1. Taken together, they will ensure that the DMU can end the final offer mechanism without making a final offer order, at any time after giving a final offer initiation notice where there has been a material change in circumstances. Such a change in circumstances may include a privately negotiated agreement being reached between the disputing parties, or evidence of duress becoming known to the DMU. This amendment will therefore ensure the tool is not used where it is not appropriate to do so, and that the DMU has suitable flexibility to make that decision. I therefore invite the Committee to support these clauses and the relevant Government amendments.

2.30 pm

Finally, on new clause 3 I fully recognise the importance of transparency in a regime in general, and regarding the use of this novel tool in particular. However, the Bill as drafted already contains a robust process for ensuring transparency on the rare occasions that this tool will be needed through the clear public statements published by the DMU at significant points in the process, including about any final offer orders made. Those statements will provide information about the operation of the final offer mechanism in practice, ensuring clarity as to how and when the tool is being used for the sake of stakeholders, as well as interested parliamentarians. That is in addition to the annual report already prepared and delivered to Parliament by the CMA, which will also cover its activities under the regime. As such, an additional annual report would not offer Parliament any greater insight into the use of that tool, and therefore I do not believe that the new clause would provide any additional benefit. I hope that the hon. Lady feels able to withdraw it.

Alex Davies-Jones: As we know, there are several provisions contained in the Bill that could form the basis of new rules regulating agreements between UK news media and digital platforms, akin to the news media bargaining code in Australia. However, the formulation of those rules will be at the discretion of the DMU, and would apply on a case-by-case basis. As we have debated, the Bill currently enables the DMU to impose conduct requirements that are for the purposes of obliging undertakings to

"trade on fair and reasonable terms".

Those undertakings could also be obliged by the DMU to not carry on activities other than their digital activities in a way that could be anti-competitive. That could be the case where carrying out that non-digital activity is likely to increase an undertaking's market power materially or bolster the strategic significance of its position in relation to its digital activity.

The Bill also provides an arbitration process called a final offer mechanism. Under that mechanism, the DMU will invite the SMS firms and third parties to submit a payment terms offer that they regard as fair and reasonable. The DMU is then required to choose one party's offer only, without any ability to determine alternative offers. That process has been adopted in Australia for the purpose of arbitrating bargains between digital platforms and news media providers, although it has not yet been used. While there is no provision for a media bargaining code in the Bill, the mere existence of this mechanism will hopefully drive tech platforms to negotiate sincerely with media providers in that context to reach an agreement independently, rather than risk the CMA choosing the final offer. We entirely welcome this clause, and the additional relevant ones to follow.

In the digital media sector, Google and Meta's overwhelming market power means that publishers are not compensated fairly for the significant value that their content creates for platforms, which is estimated at about £1 billion per year here in the UK. Google Search and Meta's Facebook rely on news publishers to attract and engage users, as professional news content is reliable and regularly updated. It is absolutely right that the CMA will be empowered to make pro-competition interventions. While the conduct reviews will hopefully prevent the worst abuses of market power, PCIs will allow the DMU to implement remedies that address the root cause of that market power. For example, a CR could prevent an SMS firm from self-preferencing its own businesses in the digital advertising market, which has negative impacts including locking businesses into products and taking an unfairly large cut of revenues, whereas a PCI could require a functional separation to remove the incentive for self-preferencing. Labour sees that as a hugely important tool. We want to see and support an empowered DMU, so we are pleased to support the clause and believe it should stand part of the Bill.

Again, we see clause 39 as important: it sets out the process that the CMA must follow if it decides to use a final offer mechanism. In theory, the DMU should support publishers, who will now be able to negotiate fair and reasonable terms for the value that news content brings to platforms. If SMS firms refuse to comply, a final offer mechanism will be available, with each party submitting bids and the fairest offer being selected. The DMU will ensure that publishers receive a fair share of revenues for the advertising that is shown around their content. Publishers will also be able to receive user data when consumers interact with their content on platform services, in a manner compliant with data protection law. In theory, unfair commissions on app store sales will be prevented, ensuring that publishers can build sustainable digital subscription businesses.

These are all very welcome developments indeed. We particularly welcome subsection (3), under which the CMA must specify if it is considering taking any other action to address the underlying cause of the breach that led to the use of the FOM—for example, a pro-competition order instructing a designated undertaking to provide access for third parties to consumer data held by that undertaking, which could rebalance bargaining power within that digital activity. It will come as no surprise that I ask the Minister, once again, to clarify whether such statements will be published in the public domain. This important point is worth clarifying, so I look forward to hearing about the adequacy of the transparency provisions in this part of the Bill.

Government amendments 7 and 10 are linked to Government new clause 1. They clarify that parties can still settle outside formal processes once the FOM stage

[Alex Davies-Jones]

has begun. Given that the aim of the final offer mechanism is to incentivise parties to come to a deal without direct CMA intervention, it seems right that parties are still able to come to a deal outside this formal process. This may allow for more favourable terms to be reached, as the platforms will be under pressure in the FOM process, and it will mean that publishers can avoid the uncertainty of the CMA picking one of the two offers.

There will always be a concern that the asymmetry of resources might mean that publishers compromise too far when faced with the uncertainty of an FOM decision but, ultimately, Labour supported these provisions when they appeared in clause 40, and moving them to ensure that a deal can be reached outside the FOM at any time after a final offer intention notice has been issued seems to make good sense. We therefore support the Government amendments.

Unsurprisingly, Labour also welcomes clause 40, which establishes the process that the CMA must follow with regard to the outcome of the FOM process. We need not go into much detail on this clause, as we view it as a fairly standard and effective way of ensuring that proposed transactions are fairly processed by the CMA.

At this point, I must press home the wider importance of these final offer mechanisms because, if they are implemented correctly, they could have incredibly positive benefits. Indeed, we know that Google and Meta have attempted to ward off fair negotiations in Australia and Canada by restricting, or threatening to restrict, access to domestic trusted news, which is the antidote to online disinformation. Denying citizens access to reliable information to avoid payment serves only to emphasise the primacy that these firms place on profit, rather than citizens' interests. The Government should not give in to similar threats here in the UK, and I hope the Minister is listening.

As the EU and other jurisdictions have forged ahead with similar, but less agile and effective, digital competition regulations, there is a danger that the UK will become a rule taker, not a rule maker. Delayed or weakened legislation will leave UK businesses at a competitive disadvantage internationally, and will deny UK consumers lower prices and more innovative products. In contrast, a strong, forward-looking DMU regulation will ensure that digital markets live up to their potential, allowing consumers to enjoy the full benefits that technology can deliver. I hope that the Minister can reassure us that the Government will not bow to pressure and that the CMA will rightly be compelled to intervene where necessary.

Labour supports the intention of clause 41, which we also see as standard practice. Colleagues will note that subsection (1) provides that a final offer order must impose obligations on the designated undertaking that the CMA considers appropriate for giving effect to the final offer payment terms it has decided, and they must be included in the proposed transaction.

Again, subsection (2) sets out exactly what information the CMA must give to the parties, and we welcome the provision. I further note that subsection (3) requires the CMA to publish a statement summarising the final offer order, and this transparency is also welcome. It is unclear who will have access to these statements, so I am keen to hear the Minister's assessment of the value of making such documents public to anyone who wishes to seek them. This aside, we support clause 41 and believe it should stand part of the Bill.

Labour supports clause 42 and particularly welcomes subsection (3). This is an important clause as it empowers the CMA to take action on both historical and live breaches. Concerns reported to us by tech companies include requiring clarity on the terms of these final offer mechanisms. It is well known that many users sign up to digital platforms, via terms and conditions, to access a service with no monetary exchange as part of the agreement. Does the Minister see this counting as a contract that is challengeable via the final offer mechanism under the DMU regime? Although the regime appears clear, the final offer mechanism relates to pricing disputes and there are concerns that it could be drawn wider. Clarity on this point is vital and is worth establishing on the record, so I am keen for the Minister to address it.

I do not have any specific comments to make on clause 43. As we have previously said, Labour believes it is important that the CMA must be legally obliged to keep these final offer orders under constant review. This is the nature of a workable, agile regime, and we therefore support the clause standing part.

We tabled new clause 3 to require the CMA to publish an annual report on the workings of the final offer mechanism. This report should be made publicly available and should be laid in both Houses so that Parliament has its say.

We recognise that the final offer mechanism is fairly unique, and it is therefore only right that the CMA is required to update the House each year, with findings on the number of SMS firms that are subject to these investigations. The Minister mentioned that the CMA will be obliged to provide an annual report to Parliament; I want it to be clear that what we have set out in new clause 1 on the final offer mechanism would be part of that report so that Parliament could scrutinise how many were made, for example. This would add to and support the other transparency measures we have pursued, so I hope the Minister not dismiss the new clause, but will consider it carefully. We feel that that is an important matter to get on record in any annual review.

Paul Scully: I appreciate the spirit in which the hon. Lady has engaged in our debate on these clauses. I shall try to answer her questions in turn.

Publication will be online, so people will be able to see it. It will be public. The hon. Lady's second question was: will I listen? Absolutely yes, I will. On her third question—will I not bow? I will bow to her, but not to pressure, because I think we have largely got this right. I cannot remember her last question—

Alex Davies-Jones: It was about new clause 3.

Paul Scully: Oh yes. It is important that we examine the efficacy of the final offer mechanism, so it is appropriate that that will be covered in the CMA's review of all its work, and that we will get to see and assess that work as well. I can stand here and tell the Committee that I think we have got it right now, but things change. Yes, it is flexible, and yes, it is proportionate, but we want to make sure that it stays world beating.

Question put and agreed to.

Clause 38 accordingly ordered to stand part of the Bill.

Clause 39

FINAL OFFER MECHANISM

Amendment made: 6, in clause 39, page 21, line 32, leave out "proposed".*—(Paul Scully.)*

See the explanatory statement for Amendment 4.

Clause 39, as amended, ordered to stand part of the Bill.

Clause 40

FINAL OFFERS: OUTCOME

Amendments made: 7, in clause 40, page 22, line 25, leave out

"included as terms of"

and insert

"given effect for the purposes of".

This amendment means that terms as to payment are to be given effect for the purposes of the transaction, or of any substantially similar transaction, rather than having to be "included" as terms of the transaction.

Amendment 8, in clause 40, page 22, line 26, leave out "proposed".

See the explanatory statement for Amendment 4.

Amendment 9, in clause 40, page 22, line 28, leave out "proposed".

See the explanatory statement for Amendment 4.

Amendment 10, in clause 40, page 22, line 36, leave out subsections (6) to (10).*—(Paul Scully.)*

See the explanatory statement for NC1.

Clause 40, as amended, ordered to stand part of the Bill.

Clause 41

FINAL OFFER ORDERS: SUPPLEMENTARY

Amendment made: 11, in clause 41, page 23, line 19, leave out "proposed".*—(Paul Scully.)*

See the explanatory statement for Amendment 4.

Clause 41, as amended, ordered to stand part of the Bill.

Clauses 42 and 43 ordered to stand part of the Bill.

Ordered, That further consideration be now adjourned. *—(Mike Wood.)*

2.44 pm

Adjourned till Thursday 22 June at half-past Eleven o'clock.

Written evidence reported to the House

DMCCB18 Open Markets Institute (supplementary submission)

DMCCB19 Public Interest News Foundation and Impress

DMCCB20 Which? (supplementary submission)

DMCCB21 UK Interactive Entertainment Association (Ukie)

DMCCB22 Online Dating Association

DMCCB23 Financial Times

DMCCB24 Publishers Association

DMCCB25 Telegraph Media Group