PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT
GENERAL COMMITTEES

Public Bill Committee

DIGITAL MARKETS, COMPETITION AND CONSUMERS BILL

Eighth Sitting

Thursday 22 June 2023

(Afternoon)

CONTENTS

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not later than

Monday 26 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

Thursday 22 June 2023

(Afternoon)

[Dame Maria Miller *in the Chair*]

Digital Markets, Competition and Consumers Bill

Clause 81

Nominated officer

2 pm

The Parliamentary Under-Secretary of State for Science, Innovation and Technology (Paul Scully): I beg to move amendment 25, clause 81, page 49, line 15, at end insert—

"(d) a requirement in a direction under section 87 of EA 2002 (delegated power of directions) given by virtue of a pro-competition order (see section 49(1))."

This amendment makes a requirement in a direction under section 87 of the Enterprise Act 2002 given by virtue of a pro-competition order a related requirement for the purposes of this clause.

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

Clause stand part.

Clause 82 stand part.

Paul Scully: Government amendment 25 seeks to correct the list of "related requirements" in clause 81 to include pro-competition order directions. The Competition and Markets Authority has the power to impose directions on a firm with strategic market status to take specific action to come into regulatory compliance with a PCO, under section 87 of the Enterprise Act 2002.

As currently drafted, a nominated officer would not be responsible for a direction issued in relation to a PCO because this is not listed as a "related requirement". The amendment will clarify that nominated officers will be responsible for directions issued in relation to a PCO to which they are assigned by the SMS firm, and that compliance reports in clause 82 will have to cover these directions. The amendment will ensure that the digital markets unit is able to monitor whether an undertaking is complying with directions issued in relation to a PCO. I hope that the Committee will accept the amendment.

Clauses 81 places requirements on SMS firms to assign appropriate senior managers as "nominated officers" to monitor compliance with specific regulatory requirements. That will help to facilitate co-operation between SMS firms and the DMU and ensure that information included in compliance reports is accurate and complete, and that reports are submitted to the DMU in a timely manner. SMS firms will be required to assign nominated officers in respect of each conduct requirement, pro-competition order or commitment made in lieu of a pro-competition order. A nominated officer appointed in relation to a conduct requirement will be automatically responsible for overseeing compliance with any subsequent orders that are imposed by the DMU in relation to that conduct requirement.

Clause 82 place requirements on SMS firms to submit compliance reports to the DMU. A compliance reporting obligation can be imposed by the DMU in relation to conduct requirements and PCOs, and can be extended to cover additional requirements related to those requirements, such as an enforcement order in relation to a conduct requirement. Compliance reports can also be imposed when a firm has had a binding commitment accepted by the DMU, in lieu of the DMU imposing a pro-competition order. A compliance report will include details of how the firm has complied and will continue to comply with the regulatory requirement and any related requirements. Reports will also set out the extent to which the nominated officer assigned to the particular regulatory requirement considers that the firm has complied with that requirement. Information in compliance reports will be essential to the DMU's assessment of whether an SMS firm is complying with the regime, and will enable the DMU to take swift where it identifies risk of non-compliance.

Seema Malhotra (Feltham and Heston) (Lab/Co-op): It is a pleasure to speak to the amendment and clauses on behalf of my hon. Friend the Member for Pontypridd, and I will be brief. Government amendment makes a requirement in a direction under section 87 of the Enterprise Act, given by virtue of a pro-competition order a related requirement for the purposes of clause 82.

Labour supports clause 81, which requires a designated undertaking to assign an appropriate senior manager to the role of "nominated officer" when the CMA imposes a digital markets requirement, for the purpose of monitoring the undertaking's compliance with that requirement. We strongly believe this level of personal liability is required for big tech firms, which have dominated for too long, to listen and engage fully with this regime. We welcome clarity such as that in subsection (2), which sets out the tasks of the nominated officer and requires them to carry out those tasks in relation to

"digital markets requirements and all related requirements".

It makes sense that if a nominated officer is assigned to a conduct requirement, they are automatically assigned to any subsequent enforcement orders made in connection to it. We therefore support clause 81 and have not sought to amend it at this stage.

Government amendment 25 makes a change to the Enterprise Act to bring the provisions in line with the current Bill. We support its inclusion. It is vital that existing legislation is brought in line if this regime is going to work to its full effect.

Labour sees compliance reports and the formal duties outlined in clause 82, which ultimately require designated undertakings to provide the CMA with reports setting out how they are complying with requirements imposed upon them, as a natural step in the implementation of this regime. For transparency, accountability and fairness all round it is right that the CMA has a duty to notify a designated undertaking of any compliance reporting requirements and will specify in the notice when reports should be submitted, what information they should contain and what form they should take. Labour has long called for those powers, and we have also argued

that they should be flexible, so we are pleased to see provisions that allow the CMA to alter the reporting requirements on a designated undertaking by giving the undertaking a further notice.

Specifically interesting to see in the Bill are the provisions around subsection (5), which permit the CMA to require a designated undertaking to publish a compliance report or a summary of that report. Will the Minister confirm the form and the location that he feels would be suitable for such reports to be published?

We recognise that the provisions in clause 82 allow for the version the designated undertaking is required to publish to be different from the version provided in private to the CMA under subsection (1). For example, some information may be redacted for confidentiality purposes. It is still unclear, though, exactly where the report will be published, so it would be helpful to have the Minister's response on that point.

Paul Scully: The CMA could ask for a public version to be published on its website. It will be reported to the firm in full, but the majority of the publication in all such things will be online.

Amendment 25 agreed to.

Clause 81, as amended, ordered to stand part of the Bill.

Clause 82 ordered to stand part of the Bill.

Clause 83

Penalties for failure to comply with competition requirements

Paul Scully: I beg to move amendment 26, in clause 83, page 50, line 11, leave out "a designated" and insert "an".

This amendment, together with Amendments 27, 28, 29, 30, 31, 32 and 33 confirms that a penalty can be imposed on an undertaking that has ceased to be a designated undertaking in respect of things done (or not done) while the undertaking was a designated undertaking.

The Chair: With this it will be convenient to discuss Government amendments 27 to 33.

Paul Scully: Government amendment 26 seeks to clarify that the CMA can impose a penalty on a former SMS firm that no longer has strategic market status in relation to conduct that occurred before the designation ended or in relation to breaches of obligations that exist after the designation ends. With that aim, the amendment, together with its related amendments, replace the wording "a designated undertaking" with "an undertaking" in clauses 83 and 86. That ensures the change relates to penalties for failure to comply with competition requirements, as well as any penalties for failure to comply with investigative requirements. I hope the Committee will support the amendments.

Seema Malhotra: I thank the Minister for his remarks. We certainly support these Government amendments, and I will reserve the rest of my comments for the clause stand part debate.

Amendment 26 agreed to.

Amendments made: 27, in clause 83, page 50, line 23, leave out "a designated" and insert "an".

See the explanatory statement for Amendment 26.

Amendment 28, in clause 83, page 50, line 24, leave out "designated".

See the explanatory statement for Amendment 26.

Amendment 29, in clause 83, page 50, line 26, leave out "a designated" and insert "an".

See the explanatory statement for Amendment 26.

Amendment 30, in clause 83, page 50, line 28, leave out "designated". —*(Paul Scully.)*

See the explanatory statement for Amendment 26.

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

The Chair: With this it will be convenient to discuss clauses 84 to 90 stand part.

Paul Scully: Clause 83 allows the DMU to impose penalties on SMS firms where it is satisfied that the firm breached a regulatory requirement without reasonable excuse. Clause 84 sets the maximum penalties that the DMU can impose under clause 83. Substantial financial penalties are necessary to deter and tackle non-compliance, especially given the size of the firms in scope and the significant advantages that such firms could accrue from breaching the regime. Where an SMS firm has failed to comply with a conduct requirement or a merger reporting requirement, the DMU will be able to fine the firm by up to 10% of its worldwide turnover.

For other types of breaches, such as breaches of remedies, the DMU can impose a penalty of up to 5% of a firm's daily worldwide turnover for each day of continue non-compliance, in addition to fixed penalties of up to 10% of worldwide turnover. That is needed, because remedies represent specific actions that an SMS firm should carry out once an investigation has found an issue. Breaches should be addressed promptly, and punished accordingly if they are not. The DMU will have the discretion to choose whether to impose a fixed penalty, a daily rate or a combination of both, depending on the breach, and it will be expected to take a proportionate approach when imposing penalties. The penalty levels will help prevent SMS firms from absorbing financial penalties as a cost of doing business.

Clause 85 sets out that the DMU can impose penalties on firms or individuals where they have, without reasonable excuse, failed to comply with an investigatory power or a compliance reporting obligation, or provided false or misleading information to the DMU or another person while knowing that the information would be given to the DMU to be used in connection with any of its functions. In certain circumstances, the DMU will be able to impose financial penalties on senior managers assigned to an information request that has not been complied with, nominated officers assigned to a regulatory requirement for which a compliance reporting requirement has not been complied with, and individuals who have obstructed an officer of the DMU while entering premises under the powers set out in chapter 6 of the Bill. Having senior liability for the provision of information will help to ensure that a culture of compliance is embedded in SMS firms.

Clause 86 sets the maximum fixed and daily-rate penalties that the DMU can impose under clause 85. For firms, the DMU can impose a fixed penalty of up to 1% of a firm's worldwide turnover, a daily penalty of up to 5% of a firm's daily turnover for each day that non-compliance continues, or a combination of both. For individuals, the DMU can impose fixed penalties of up to £30,000, daily penalties of up to £15,000 each day,

[Paul Scully]

or a combination of both. The clause also grants the Secretary of State the power to amend the maximum penalties.

Clause 87 sets out the procedural requirements that the DMU must follow when issuing a penalty notice. It also sets out provisions relating to the payment and recovery of penalties. The clause applies sections 112, 113 and 115 of the Enterprise Act 2002 to penalties imposed by the DMU under clauses 83 and 85. Those sections cover procedural requirements when issuing a penalty, the payment of a penalty and interest by instalments, and the procedure for recovering a penalty that has not been paid. Clause 87 also states that challenges to merger-related penalty decisions made under clauses 83(4) and 85 should be brought under the existing merger review provisions set out in section 114 of the Enterprise Act.

Clause 88 sets out how the DMU will calculate the daily rates and turnover for the purpose of imposing a monetary penalty, so that there is clarity about the period of time that daily penalties will cover and when they will cease to accumulate. The ability to change how turnover is to be calculated is crucial to ensuring that the machine is flexible and can be updated in the future to reflect changes.

2.15 pm

Clause 89 requires the DMU to publish a statement of policy in relation to the exercise of its powers to impose penalties. That statement must set out the considerations that it will take into account when determining whether to impose a penalty, and the penalty amount. It also requires the DMU to consult the Secretary of State and other persons the DMU considers appropriate when preparing the statement. The Secretary of State must give their approval before the DMU may publish that statement.

The DMU may revise the statement of policy in line with changing circumstances following the same process. When issuing penalties, the DMU must take into account the most recently published statement of policy. That will provide transparency and clarity around its decision-making processes in relation to the issuing of penalties.

Clause 90 ensures that a person cannot be punished twice for the same breach where both criminal and civil punishments are available in the regime. The clause sets out that where a person has been found guilty of a criminal offence, the DMU cannot impose a civil penalty on them for the same act or omission. It also sets out the reverse: where a person has paid a civil penalty for an act of the kind referenced under clause 85—penalties for failure to comply with investigative requirements—they cannot be criminally convicted for that same offence. However, the clause does not prevent criminal or civil proceedings from being started where, respectively, a penalty has been imposed but not paid or someone has been charged but not convicted.

Seema Malhotra: It is a pleasure to speak to this group of amendments on behalf of my hon. Friend the Member for Pontypridd, who is still in the debate in the Chamber. As we know, the clause sets out that the CMA can impose monetary penalties on a designated undertaking where it is satisfied that the undertaking has breached a regulatory requirement, including for merger reporting and commitments, without reasonable excuse.

The clause's wording affords substantial flexibility. Indeed, the provisions are in place only when the designated undertaking has failed to comply "without reasonable excuse". None of us wants designated firms to be able to block action with excuses, so it would be helpful to hear how the Minister would quantify a reasonable excuse. That said, the Opposition welcome the clause, which is central to the regime. The ability to impose a penalty where appropriate is an important power that we hope will go some way towards encouraging companies to work with the regulator. For those reasons, we will not oppose it.

I turn to amendments 26 to 33, some of which we have already debated. It is helpful that we have made those amendments to ensure that a penalty can be imposed on an undertaking that was once designated and therefore captured by the regime but now no longer to subject to it. That will assist in capturing historical offences of failure to comply and goes to the heart of the importance of compliance.

Clause 84 outlines the maximum penalties that the CMA can impose. As we know, the CMA can impose penalties of up to 10% of worldwide turnover and, in the case of breaches of orders or commitments, of up to 5% of daily worldwide turnover for each day that a breach continues. Subsections (2) and (3) state that the CMA will, in most situations, have the discretion to choose whether to impose a fixed penalty, a daily-rate penalty or both. However, where an undertaking breaches a conduct requirement as opposed to an enforcement order or breaches any requirements under chapter 5 on mergers, the CMA will be able to impose only a fixed penalty.

The Opposition welcome these provisions. They afford the CMA flexibility and discretion, and we believe that financial penalties are an important power for any regulator to be able to impose. We therefore support the clause and do not seek to amend it. As with other formal liabilities, Labour believes that the CMA absolutely should be able to impose penalties on designated undertakings or individuals within them for failing to comply with certain investigative requirements. The powers are important to the regime and we welcome their inclusion.

In addition, clarity on exactly what will constitute, or be defined as failure to comply, is also helpful. We know that actions such as providing false or misleading information in the course of an investigation, or in relation to compliance reporting, will fall under this definition. That is a sensible approach, which we support.

Furthermore, clause 85(2) clearly sets out the circumstances in which the CMA can impose civil sanctions against either a named senior manager assigned to an information request or a nominated officer with relation to a compliance report. We feel that that personal duty is crucial to the success of the regime, as we hope that it will act as a deterrent, as companies will want to avoid personal duties, and that such a level of personal liability is crucial for SMS firms to take the CMA's powers and regulatory regime seriously. We therefore support clause 85 and its intentions and believe it should stand part of the Bill.

Clause 86 establishes the maximum fixed and daily rate penalties that the CMA can impose under clause 85 on undertakings and individuals. As outlined in clause 86(3), under the provisions, the CMA may impose a fixed penalty on an undertaking of up to 1% of the undertaking's worldwide turnover, or a daily penalty of up to 5% of the undertaking's daily worldwide turnover for each day of non-compliance, or both. Similarly, subsection (6) sets out that the CMA may impose a fixed penalty on an individual of up to £30,000, or a daily penalty of £15,000, or both. We welcome that clarity on the face of the Bill. Labour has been clear for some time now that financial penalties are vital for compliance, and that the CMA must have the statutory footing to be able to impose them in the most severe cases of non-compliance.

We further note clause 86(7) to (9), setting out that the Secretary of State has the power to amend the maximum amounts of penalty that can be imposed on an individual. Naturally, that is a point that I must press the Minister on: in what circumstances does he imagine that the Secretary of State would make such changes? It is an interesting power to ascribe to one individual, therefore we welcome subsection (8), which states that the Secretary of State must consult the CMA and such other persons as the Secretary of State considers appropriate before making the regulations. We therefore support clause 86 and believe it should stand part of the Bill unamended. Labour sees clause 86 as fairly procedural, setting out which sections of the Enterprise Act 2002 apply for penalties imposed under clause 83 or clause 85 of the Bill.

I will keep my comments on clause 87 brief as we see it as clarification rather than contentious, in particular given that we agree with the Government's approach more broadly on enforcement and appeals. My one plea to the Minister is that he and his colleagues in the Department do not bow down to likely pressure from big SMS firms.

We appreciate that in recent months we have faced headlines about some tech companies threatening to withdraw from the UK if provisions on online safety become—as they see it—too cumbersome. However, when it comes to regulating the online space more widely, whether in our digital markets or through safety provisions, we know that companies have remained unregulated for too long, and that that is having a massive impact on consumers. That applies to all of us in Committee and the hundreds of thousands of constituents across the country we represent. That said, we support clause 87 and have not sought to amend it.

Clause 88, too, we see as fairly standard, in that it sets out exactly how the CMA will calculate daily rates and turnover for the purpose of imposing a monetary penalty. This clause clarifies that daily penalties will accumulate until the person complies with the requirement—for example that the requested information is provided—or, where the penalty is incurred in relation to an overseas investigation, when the overseas regulator no longer requires assistance.

Labour further welcomes the fact that clause 88 will give the CMA the discretion to determine an earlier date for the amount payable in order to prevent that amount from accumulating. We of course hope that application of the provisions will rarely be required, but they are welcome additions to have on the face of the Bill.

Lastly, we note that clause 88(2) to (4) gives the Secretary of State the power to specify how turnover is calculated in secondary legislation. Again, I would welcome some clarity on this point. I wonder whether the Minister can further clarify in exactly what circumstances he envisions these powers will be required and, if he can confirm whether, when the Secretary of State has to draw upon those powers, what action will be taken to ensure the secondary legislation required is not subject to further delay? That point aside, we understand the need for clause 88 and welcome its inclusion in the Bill.

Clause 89 is important in that it places a statutory duty on the CMA to prepare and publish a statement of policy in relation to the exercise of powers to impose a penalty under clauses 83 and 85. In doing so, the statement must include considerations around whether a penalty should be imposed, as well as details of the nature and amount of any such penalty. We welcome the provisions in subsection (3) that confirm that the CMA may revise its statement of policy and, where it does so, must publish the revised statement.

We also feel that the requirement of the CMA to consult the Secretary of State before publishing a statement is an important step. However, Labour feels some clarity is needed here to establish exactly when and where that statement will be published. Will the Minister confirm the timelines for when the CMA will be required to publish the statements? It is important that there is no delay; any specific timelines will be gratefully received. Following those assurances from the Minister, I am sure we will be happy to support the clause standing part of the Bill.

Lastly, we see clause 90 as a standard clarification that ensures that where a person has been found guilty of a criminal offence committed under clauses 91, 92 or 93, which we will soon debate, they will not be required to pay a civil penalty for that same offence. It is also right that where a person has paid a civil penalty for an act of the kind referenced under clause 85, they cannot be criminally convicted for that same offence. We also welcome the clarity that the clause does not prevent criminal or civil proceedings from being started where, respectively, a penalty has been imposed but not paid or someone has been charged but not convicted.

Again, we hope that these clauses will never have to be enforced in reality, but they are important additions and Labour support them, given the importance of ensuring the CMA has the teeth to implement this regulatory regime in full.

Paul Scully: The hon. Lady mentioned "without reasonable excuse". The onus is on SMS firms to prove that they have an excuse for committing a breach. That approach reflects the bespoke targeted nature of the regime, which means that firms should be fully aware of whether they are compliant. That same threshold is used in the competition regime already for breaches of specific directions and commitments; other prohibitions in the competition regime are more high level than any other obligations within the digital markets regime, making it harder for firms to assess their own compliance and therefore requiring a different legal threshold.

[Paul Scully]

On updating penalty limits, and the Secretary of State's power to do so, it is important that the new regulatory regime is agile, flexible and can be adapted to changing circumstances. The power is the same as is already used under the Enterprise Act 2002, which ensures consistency across the legislation and will ensure that the power remains an effective enforcement mechanism in the future. The Secretary of State must consult the DMU and other persons before making changes to the penalty levels. Importantly, proposed changes will be subject to the affirmative procedure and will need to be approved in Parliament. Another hon. Member asked about where the policy will be published; again, that will be online and in full. Clearly, that will be as soon as is practicable, because we want to keep the pace of the policy as fast as possible, in order to keep up to date with any detriment to especially challenging tech, and obviously to consumers as a consequence.

The hon. Member for Feltham and Heston asked about the power to update turnover and how that might be calculated. It is really important that in this area the regulatory regime remains agile and flexible, and granting the Secretary of State the power to specify how turnover is calculated in secondary legislation will allow any future changes in accounting principles, for example, to be taken into account to ensure that these calculations remain relevant. Again, that power is the same as that already used under section 94A of the Enterprise Act 2002, ensuring consistency across the two pieces of legislation.

Question put and agreed to.

Clause 83, as amended, accordingly ordered to stand part of the Bill.

Clauses 84 and 85 ordered to stand part of the Bill.

Clause 86

AMOUNT OF PENALTIES UNDER SECTION 85

Amendments made: 31, in clause 86, page 52, line 29, leave out "a designated" and insert "an".

See the explanatory statement for Amendment 26.

Amendment 32, in clause 86, page 52, line 31, leave out "designated".

See the explanatory statement for Amendment 26.

Amendment 33, in clause 86, page 52, line 33, leave out "designated".—*(Paul Scully.)*

See the explanatory statement for Amendment 26.

Clause 86, as amended, ordered to stand part of the Bill.

Clauses 87 to 90 ordered to stand part of the Bill.

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

2.31 pm

Committee rose.

Written evidence reported to the House

DMCCB26 Cleary Gottlieb Steen & Hamilton LLP

DMCCB27 Online Travel UK

DMCCB28 Motion Picture Association

DMCCB29 Microsoft

DMCCB30 Google

DMCCB31 Taylor Wessing LLP

DMCCB32 Match Group (supplementary submission)

DMCCB33 Spotify

DMCCB34 People's Postcode Lottery

DMCCB35 Competition and Markets Authority (CMA)