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House of Lords
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My Lords,

Thank you for your constructive engagement during the first Grand Committee session of the Digital Markets, Competition and Consumers Bill (the Bill) on Monday, 22 January.

During the session, I said I would write to you on: the forward-look for Strategic Market Status (SMS) designations; conduct requirements; and transparency and access to information under the regime.

Five year forward look for SMS designations

Lord Lansley and Lord Clement-Jones raised the important issue of the forward-looking assessment for SMS designation. As I underlined during the debate, it is vital that the Competition and Markets Authority (CMA), when undertaking a designation investigation, is able to consider existing evidence in the context of the forward-looking assessment.

The pursuit of market power can drive firms to invest and innovate. In the short term, the potential to acquire market power can drive firms to deliver the best possible outcomes for consumers. However, once market power becomes entrenched and there is little prospect of competition, consumers will lose out. It is therefore important that the Digital Markets regime carefully targets entrenched market power only and avoids undermining those market dynamics that deliver the best possible outcomes for consumers.

Given that designations will last for 5 years, it is appropriate that the CMA is obliged to give thought to the prospect of more competitive conditions arising organically within the 5-year period in the absence of regulatory intervention. That is what the forward-looking assessment is designed to do.

I would like to reassure Noble Lords that the current designation provisions are designed to allow the CMA the flexibility to use a range of available quantitative and qualitative evidence to make a holistic assessment to determine the degree of power enjoyed by the firm.
The CMA already makes forward looking assessments, for example within the mergers regime, where it uses available evidence to consider whether the merger would in the future result in a substantial lessening of competition. Under the Digital Markets Regime, we expect that the CMA will draw on evidence relating to current and past market conditions in order to inform their designation assessments. The CMA will only have to take account of developments that would be expected or foreseeable if it did not designate – not remote possibilities. The CMA will have to explain why certain developments are either expected or foreseeable, and it will need to draw on currently available evidence to support its reasoning.

However, crucially, clause 5 does not require the CMA to prove that a firm will definitely have substantial and entrenched market power for the next five years – which would be too high a threshold.

I hope this will reassure Noble Lords that the Bill already allows the CMA to take into account currently available evidence when undertaking the forward-looking assessment and determining what developments would be expected or foreseeable in the absence of designation.

Conduct requirements, interoperability and data

Lord Lansley and Lord Clement-Jones also raised the important question of whether an additional permitted type of conduct requirement is needed for the CMA to be able to require an SMS firm to promote interoperability. They suggested that the conduct requirement type under clause 20(3)(e) sets out that the CMA can only *prevent* an SMS firm from restricting interoperability.

I am pleased to confirm that, as I set out in the session, specific conduct requirements imposed by the CMA may be framed as either obligations or restrictions, irrespective of whether they fall within types of requirements under subsection 20(2) or 20(3). This means the CMA has the flexibility required to formulate effective conduct requirements in a way which is targeted and specific to each issue it intends to address. Chapter 3 of the Explanatory Notes relating to Clause 20 provide further details and examples of this.

Lord Lansley also noted the importance of ensuring that the list of permitted types of conduct requirement will allow the CMA to impose conduct requirements that prevent misuse of user data by SMS firms.

We agree that the large amount of data held by the most powerful tech firms, and the way in which it can be used, can help entrench their market position and harm consumers. That is why we have included the broad wording in 20(3)(g). Specifying in the Bill the various ways in which data could be misused would risk limiting, rather than broadening, the CMA's ability to intervene when data is being misused. Explanatory Notes relating to this clause set out some practical examples of how 20(3)(g) could be used, including similar ones to those raised by the Noble Lord in Grand Committee.

I hope Noble Lords will be reassured that the CMA will be able to set conduct requirements under clauses 20(3)(e) and 20(3)(g) (and indeed all other permitted types in the list) that could impose either positive obligations or restrictive requirements. I also hope Noble Lords will be reassured that taking a broad approach to the permitted types of conduct requirements is intended to give the CMA the flexibility it needs to set the most effective rules tailored to each scenario.

Transparency and consultation

During the debate on Group 3 amendments, I said I would write on third-party access to information on CMA investigations, as well as ensuring the CMA has access to the right amount of information to promote competition in digital markets for the benefit of consumers. Firstly, I would like to thank Baroness Jones of Whitchurch, Baroness Harding, Lord Vaizey of Didcot, Baroness Kidron and Lord Clement-Jones for their thoughtful and principled interventions during the Committee debate.

As I said during the debate, the Government agrees that appropriate transparency and access to information is vital. On this point of principle, I think Noble Lords and the Government are aligned. I will cover in turn specific points raised.

I agree that it is important that third parties can access relevant information related to the CMA's decisions. The CMA is bound by the principles of public law, which require it to set out the reasoning underpinning any findings, decisions, or proposals it publishes.

The amendments tabled by Baroness Jones of Whitchurch (amendments 8, 9, 10, 13, 35, 37, 42, 44, 45, 46, 57 and 58) would have the effect of requiring the CMA to identify and send a copy of certain notices to affected third parties. The Bill already requires the CMA to publish summaries of these notices, which will set out the key information that relevant stakeholders will need in order to understand the CMA's decisions under the regime. A requirement for the CMA to identify all affected third parties and send them the full notice is therefore not necessary. It would also introduce a significant administrative burden on the CMA. For example, there are hundreds of thousands of app developers who could potentially benefit from CMA intervention in this area. An investigation under the digital markets regime could therefore result in the CMA sending hundreds of thousands of notices and leave them open to legal challenge from any third parties who were missed.

Baroness Jones of Whitchurch, Baroness Harding and Lord Clement-Jones raised a related concern that engagement with third parties will take place too late, when the regulator has already taken a view on a competition concern, or decided on its course of action. I would like to assure Noble Lords that third parties will be able to engage with the CMA from the outset of a Digital Markets investigation or raise a competition concern or share relevant information with the CMA in confidence, as the CMA does under its existing processes. For example, at the outset, when launching a pro-competition intervention (PCI) investigation to establish whether there is a competition problem, the CMA will publish the purpose and scope of the investigation. The CMA will then engage with relevant stakeholders including third parties to establish its view, before formally consulting on its proposed PCI decision.

Finally, amendments 14 and 63 tabled by Lord Clement-Jones would create an obligation for SMS firms to pre-notify the CMA of activities it is undertaking that may result in a competition harm. I fear such an obligation could inadvertently stifle innovation, and therefore harm consumers. To ensure compliance SMS firms could be incentivised to take a maximalist approach, such that it would amount to a *de facto* requirement for SMS firms to notify the CMA of any and all new products or features with any possible connection to the designated activity. This could inundate the CMA with superfluous information and frustrate its efforts to prioritise investigations. There is a risk that this could result in red tape which is burdensome for both the CMA and SMS firms, who may choose to hold back the launch of new, innovative products to the UK market, to allow them to assess whether they give rise to a requirement to notify the CMA.

As currently drafted, the CMA's investigatory powers will allow it to capture any information it needs to fulfil its functions under the digital markets regime, whilst maintaining sufficient safeguards to ensure they are used proportionately. These are supported by robust enforcement measures, including penalties, for non-compliance.

I would like to reiterate my thanks to Noble Lords for your constructive engagement on the important issue of transparency and information access. We will continue to review the Bill and consider carefully the points raised during Committee. I hope these answers resolve the points raised in each of these areas. I look forward to continuing our debate on the Bill over the coming days.

I will place a copy of this letter in the libraries of both Houses.

Yours sincerely,

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Parliamentary Under Secretary of State
Department for Science, Innovation & Technology