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House of Lords
London
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Dear Lord Clement-Jones, Lord Bassam, Lord Fox and Lord Lucas,

Thank you for your constructive engagement during the fifth Grand Committee session of the Digital Markets, Competition and Consumers Bill (the Bill) on Monday, 5 February.

During the session, I said I would write to you on: powers of Trading Standards in relation to unlawful online content and their operation between England and Scotland; penalties for consumer law infringements; use of relevant evidence in criminal proceedings; unfair commercial practices and vulnerable groups; and pre-contract information. I have provided further details on these all below.

Powers of Trading Standards in relation to unlawful online content

In its response to the consultation on "*Improving consumer price transparency and product information for consumers*", the Government announced a commitment to extend the power to apply to court for online interface orders and interim online interface orders to additional consumer enforcers as specified in clause 150(1) of the DMCC Bill. This includes all local authority Trading Standards services and sector regulators like Ofcom, Ofgem, the FCA etc.

In doing so, it will be important to put in place appropriate procedures for the exercise of this power. For example, this may include requiring public designated enforcers to notify the CMA of their intention to apply to court for these orders and the CMA having the power to direct which enforcer may make such application to avoid duplication of enforcement activity. Such procedures already apply to other types of court orders that public designated enforcers can apply for under Part 3 of the Bill.

Penalties for consumer law infringements

In relation to how the penalty provisions in clause 157(5) and clause 181(6) will apply, I can confirm that while secondary legislation will allow for profits from infringing behaviour to be taken into account in the calculation of penalties, the penalties cannot exceed the statutory

maximums specified in the Bill, and I confirm these maximums can not be amended by secondary legislation. As I set out on the floor of the House, we believe it is right that the technical methodology used to calculate those penalties is a matter for secondary legislation.

Operations between Trading Standards in England and Scotland

The investigatory powers of local authority Trading Standards services are limited to the jurisdiction to which they belong. This reflects pre-existing differences in relation to which authorities can investigate breaches and take proceedings between the UK's nations.

We consider that the Bill provides for successful cross-border enforcement, whilst taking these differences into account. All court orders in respect of consumer protection breaches have effect in all parts of the UK. That allows, for example, an English enforcer to pursue a prosecution through the English courts if an infringer is based in Scotland, but the offence has caused harm in England. Similarly, the Crown Office and Procurator Fiscal Service could prosecute a case where a trader is based in England, but the infringement was committed in Scotland. If the court grants an order in either England or Scotland, it would be binding on the trader in respect of the practices they carry out anywhere in the UK.

In relation to the question of whether the provisions of this Bill have been considered vis-à-vis the UK Internal Market Act 2020, the latter is not directly relevant. A key purpose of the Internal Market Act is to ensure continued certainty for businesses that they can trade freely across the UK without being subject to regulatory divergence. In contrast, Part 3 of the Bill provides for UK-wide enforcement mechanisms and, to that extent, places no new regulatory burdens on traders. However, the Bill is compatible with the Internal Market Act in terms of applying a non-discriminatory approach to enforcement against traders wherever in the UK they are based or carry on business.

Use of relevant evidence in criminal proceedings

I also take the opportunity to clarify my remarks regarding the prohibition in paragraph 17 of Schedule 5 to the Consumer Rights Act 2015 on the use of information provided by a person in response to a written notice in criminal proceedings against that person.

This prohibition stems from a person's right to refuse to answer questions or provide information that could incriminate them. The right against self-incrimination is recognised and protected under English common law and under the Human Rights Act 1998. Similar restrictions are also found in other UK statutes, including those providing investigatory powers to the Serious Fraud Office and the CMA in relation to competition law enforcement.

We therefore consider that if paragraph 17 is removed, then a provision which plays an important role in ensuring that the Consumer Rights Act 2015 (as amended by the DMCC Bill) is compatible with human rights legislation will be lost.

I would be happy to discuss this with you in further detail, including what exemptions and workarounds exists and can be explored to support Trading Standards to successfully investigate and prosecute criminal breaches of consumer law.

Protection for vulnerable groups - unfair commercial practices

The intended effect of clauses 244 and 245 together are to ensure that vulnerable consumer groups have greater protection from unfair commercial practices.

Clause 244 identifies the average consumer, for the purposes of Part 4, Chapter 1, as reasonably well-informed, observant and circumspect. This definition is used to assess the effects of commercial practices on consumers. However, this is subject to clause 244(4)-

where a commercial practice is directed at a particular group, the average consumer is taken to be an average member of that group and the above characteristics are read accordingly.

Clause 244 is also subject to clause 245. Clause 245 provides that where a consumer group is particularly vulnerable to a commercial practice in a way traders can reasonably be expected to anticipate, 'average consumer' is to be read as referring to an average member of that vulnerable group (and their characteristics interpreted accordingly). Clause 245(4) provides that consumers may be vulnerable due to factors including but not limited to age, physical or mental health, their credulity and the circumstances they are in. For example, consumers who use wheelchairs may be a vulnerable group regarding advertising claims of ease of access to a holiday resort. In this way clauses 244 and 245 provide a higher level of protection for vulnerable people.

Pre-contract information

In developing the pre-contract information requirements in the Subscription Contracts chapter and schedule 21, the Government built on and adapted the existing Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 to suit the specific harms associated with subscription contracts. The Government also drew on evidence submitted to the 2021 'Reforming competition and consumer policy' consultation and worked with business and consumer stakeholders on the principles.

The Government will publish guidance to support businesses in implementing the requirements of the Chapter, including the pre-contract information requirements. In developing this guidance, we will work with businesses to understand and address operational concerns and will use best practice examples to illustrate the requirements.

Following implementation, the Government will also monitor the impact of the requirements on businesses and consumers. The Secretary of State will have the power to amend or remove information set out in Schedule 21 should it be deemed necessary.

I hope this letter addresses the points raised by the Noble Lords satisfactorily and I look forward to continued discussion with you all ahead of Report Stage.

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

Yours sincerely,

Lord Offord of Garvel CVO

Minister for Exports

Department for Business and Trade