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Enterprise and Regulatory Reform Bill: Committee Stage Report

Bill 61 of 2012-13

RESEARCH PAPER 12/56 3 October 2012

This is a report on the Public Bill Committee Stage of the *Enterprise and Regulatory Reform Bill*. It is designed to complement the Research Paper *Enterprise and Regulatory Reform Bill (RP 12/33)*, which covers in more detail the background to the Bill.

At Committee Stage, the Government made a number of amendments to the Bill including the introduction of new clauses to the provisions in Part 2 (employment) and Part 6 (copyright and executive pay). No Opposition amendments were agreed to.

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Research Paper 12/56

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Summary

Although the Opposition voted against a second reading of the Bill, in Committee they indicated their agreement, "in principle", with many aspects of it. They did, however, express concern on a number of occasions over potential 'unintended consequences' that could arise from how the Bill was drafted and with regard to Clause 11(2) (Composition of Employment Appeal Tribunal), Clause 12 (Power by order to increase or decrease limit of compensatory award) and Clause 51 (Commission for Equality and Human Rights), the Opposition voiced strong objections and stated that the latter two provisions should not form part of the Bill

In summary, the Government's amendments to the Bill included:

- Employment: **New Clause 2** would permit employers to enter negotiations and offer settlement agreements to employees with a view to terminating the employment relationship on the basis that the discussion/settlement offer would not, unless the employer acted improperly, be admissible in evidence in any subsequent claim for unfair dismissal.

- Copyright: **New Clauses 11, 13** and **Schedule 1** allow the creation of "orphan works" schemes to open access to potentially valuable material that currently cannot be licensed or used; put in place a voluntary regime for extending "collective licensing" to help reduce complexities in the licensing system; and reserve a power to introduce statutory codes of conduct for collecting societies if they fail to operate to minimum standards. **New Clause 12** is prompted by the introduction of European Directive 2011/77/EU and is designed to allow the Government to implement the Directive while retaining the harsher UK penalties.

- Executive Pay: Between the Bill's first publication and Committee there was a major change in the Government's approach. The original clause, Clause 57, was withdrawn by the Government and replaced with a package of new measures by way of four New Clauses:

    - **New Clause 5**, *Payments to directors: members' approval of directors' remuneration policy:* introduces a new requirement for a shareholder resolution on the policy part of the director' remuneration report.

    - **New Clause 6** would place restrictions on remuneration payments as well as payments for loss of office made to directors of quoted companies.

    - **New Clause 7**, *Payments to directors: minor and consequential amendments* would make amendments to the *Companies Act 2006* to ensure that the proposed new clauses are consistent with the Act. It also introduces a requirement that companies must publish details of payments for loss of office made to departing directors on their website.

    - **New Clause 8**, *Directors' remuneration reports and payments to directors: transitional provision*. The new clause sets out arrangements to assist companies in understanding how and when they will be required to comply with the new rules.

1 Second Reading

The Bill had its First Reading in the House of Commons on 23 May 2012.[1] Opening the Second Reading debate on 11 June 2012, Secretary of State for Business, Vince Cable, provided the following overview of the Bill's purpose:

> Specifically to support enterprise, we propose legislating for a green investment bank—that, I think, is the issue that is of concern to the hon. Lady. We propose improving the employment tribunal system and promoting resolution of disputes—that, I think, deals with the first intervention. We propose giving shareholders of UK quoted companies binding votes on directors' pay; promoting competition through a single competition and markets authority; strengthening powers to address anti-competitive behaviour; and encouraging innovation and investment in design by enabling copyright owners to prevent the importation of replica products.
>
> To simplify regulation and strip away unnecessary red tape, we propose extending the primary authority scheme to more businesses, for one-stop advice; repealing unnecessary regulatory requirements on business; and providing greater powers to time-limit new regulations—that is, to apply sunset clauses to new measures.[2]

Chuka Umunna, Shadow Business Secretary, summarised the Opposition's view of the Bill:

> That this House, whilst supporting the principles of the Green Investment Bank and affirming its belief that active government should work in partnership with business to encourage long-term sustainable economic growth, facilitate enterprise, protect the rights of all, particularly low-paid, workers and simplify regulation where necessary, declines to give a Second Reading to the Enterprise and Regulatory Reform Bill because it does not provide a strategy for economic growth; believes that the Bill contains inadequate measures to boost business confidence, enhance this country's international competitiveness, increase competition in consumer markets or protect consumers from powerful vested interests; further believes that the Bill fails to provide sufficient support to empower shareholders, investors and employees on executive remuneration to bring to an end excessive rewards for corporate failure; and is concerned that the Bill grants the Secretary of State additional powers to alter compensatory awards for unfair dismissal and contains provisions relating to the conciliation process that could dilute the rights of people at work.[3]

The Bill will return to the House for Report Stage on 16 October 2012.

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1 HC Deb 23 May 2012, c1171
2 HC Deb 11 June 2012, c64
3 HC DEB 11 June 2012, c77

2 Public Bill Committee Stage

The Members of the Committee were:

Mr David Anderson; Andrew Bingham; Andrew Bridgen; Lorely Burt; Neil Carmichael; John Cryer; Simon Danczuk; Geraint Davies; Fiona O'Donnell; Graham Evans; Joseph Johnson; Norman Lamb (Minister); Anne Marie Morris; David Mowat; Ian Murray (Opposition Spokesman); Eric Ollerenshaw; Chi Onwurah; Mr Mark Prisk (Minister); Chris Ruane; David Simpson; Julian Smith; Mr Iain Wright (Opposition Spokesman); and Jeremy Wright

The Committee debated the Bill in 17 sittings on nine days between 19 June and 17 July.

Proceedings of the Public Bill Committee can be found on the dedicated Enterprise and Regulatory Reform Bill page. The written evidence submitted to the Committee can found on the Parliament website.

All references to Clause numbers relate to the Bill as originally drafted (Bill 7 of 2012-2013).

3 Green Investment Bank (GIB)

The debate of this part of the Bill took place on 26 June 2012. There were several Opposition amendments tabled, none of which were successful. There were no Government amendments.

Iain Wright, speaking for the Opposition, aimed to amend the green purposes of the Bank set out in **Clause 1** to exclude investment in any high carbon infrastructure project. He was also concerned that the use of the phrase "the advancement of efficiency in the use of natural resources" was too broad and would allow investment in energy intensive projects, and proposed changing it to focus on "energy saving and energy efficiency".[4] The Minister of State for Business and Enterprise, Mark Prisk, rejected this on the grounds that he wanted to ensure that the legislation would not limit the range of projects that could be invested in now and in the future by being too narrow or too rigid.[5]

There was also an Opposition amendment put forward that would have required the GIB to take account of SMEs, improving supply chain issues and helping UK business reduce greenhouse gas emissions when making investments.[6] This was rejected by the Minister on the grounds that "to prescribe specifically either size or location [...] would create distortions in the right investment decisions" and that it was inconsistent with EU procurement law.[7]

During the debate Iain Wright expressed concern that the priority sectors for investment set for the GIB were too narrow.[8] The Minister stated this was 'not an exclusive list'[9] and:

> The bank is tasked not only with making investments but with facilitating and encouraging investments. That gives it a margin of discretion to invest in projects that it considers will help facilitate investments with green purposes.[10]

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4 PBC Deb 26 June 2012, c158
5 ibid., c164
6 ibid., c166
7 ibid., c184 For more information on procurement rules, see HC Library Note SN6029
8 ibid., c198
9 ibid., c208

No amendments were proposed for **Clause 2** setting out the process for the Secretary of State to designate the GIB. During the stand part debate the Minister summarised how the bank would be governed.[11] He also agreed to review whether a negative or affirmative resolution would be more appropriate when considering any order made under this clause.[12]

During the debate the Minister stated that the GIB in current form is likely to be designated a non-departmental public body by the Office of National Statistics (ONS). The Government is currently in discussion with the ONS as to whether it could be classified as a public financial corporation in the future, once it raises finance commercially.[13]

Clause 3 of the Bill sets how the objects of the GIB could be altered. No amendments were proposed. During the stand part debate the Minister set out the limitations on any future changes:

> Even if the Government dispose of some or all of their shareholding in the bank, a future majority shareholder cannot approve a change to the bank's statement of objects to allow it to invest in activities that are not green.
>
> We consider that it is vital that the UK Green investment bank always remains a green institution. Clearly it would be contrary to the coalition commitment and to the principle that we have established that the Green investment bank might one day deviate from that green mandate.[14]

Clause 4 of the Bill sets out the conditions under which the Government may provide financial assistance to the GIB. An Opposition amendment would have required the Government to allow the GIB to borrow from the capital markets by December 2013, subject to state aid rules.[15] During the debate Iain Wright expressed concern that the bank would only be provided with £3 billion of financing until 2015. In response the Minister stated a commitment to the future ability of the bank to borrow from the capital markets:

> For the bank to be an enduring green financial institution, its future borrowing is vital. I strongly believe that this deferred ability to borrow will not affect the success of the UK Green investment bank. The bank needs to focus first on consolidating its expertise, building up its credible track record and indeed building its balance sheet.[16]

And:

> The issue of timing is important. I note—as the hon. Gentleman mentioned—that European development banks are investing billions of pounds in green technologies. I think he referred to a figure of €25 billion for KfW[17], and the European Investment Bank is looking to make investments of around £18 billion. What was not mentioned, however, was that unlike the Green investment bank they are not new institutions?[18]

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[10] ibid., c209

[11] ibid., c215

[12] ibid., c217. These procedures are explained in the House of Commons Information Office Factsheet: Statutory Instruments

[13] ibid., c218. If the Bank is classified by the ONS as being within the public sector, then its borrowing will be included on the Government's balance sheet. This issue was discussed in detail in Section 6 the Environmental Audit Committee Report on the Green Investment Bank published in March 2011

[14] ibid., c219

[15] You can read more about State Aid rules on the European Commission website

[16] ibid., c232

[17] The KfW banking group is a German government-owned development bank formed in 1948. It invests in several areas including renewables.

[18] ibid., c232

Clause 5 would require the GIB to report as if it were a quoted company. The Opposition proposed amendments which would have put in place more detailed requirements for public reporting of the bank's activities. They would also have included the GIB as one of the institutions listed in the *Freedom of Information Act 2000*.[19] Iain Wright summarised the aim of these amendments as follows:

> The amendment would ensure that all working papers and studies undertaken in the preparation of the bank's business plan, as well as all written correspondence exchanged between the Government and the board, were made available on a website that was freely accessible by the public.[20]

In response the Minister stated that the GIB would qualify as a publicly owned company and therefore would be subject to the disclosure requirements in section 6 of the *FOI Act*. He also made reference to the enhanced reporting requirements included in clause 5. In his view the proposed amendments were unnecessary.[21]

During the debate the Minister also said that the Secretary of State would be responsible for appointing the chairman, senior independent director and the shareholder representative director.[22] The Secretary of State would, as major shareholder, also have final say on all aspects of pay.[23]

Clause 6 sets out the GIB documents that must be laid before Parliament. Proposed amendments would have required more detailed reporting and a five yearly review of the GIB's performance.[24] The Minister, who did not support the amendments, set out in his response how the GIB would be reporting to Parliament. This included the fact that while the Government was majority shareholder the Secretary of State would report to Parliament whenever new strategic priorities for the GIB were agreed.[25]

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19 ibid., c236
20 ibid., c237
21 ibid., c238
22 ibid., c243
23 ibid., c244
24 ibid., c245
25 ibid., c 248

4 Employment

4.1 Introduction

The Government undertook to review employment law in the Coalition Agreement. As part of the review process, the Government issued its *Resolving Workplace* Disputes consultation[26]. The proposals set out in the consultation included the introduction of: a mandatory early conciliation procedure; financial penalties for employers that have been found to have breached employment rights; and allowing straightforward, low value claims to be determined by legal officers rather than employment tribunal judges. In its response to the consultation, the Government confirmed its intention to implement those proposals and they have been brought forward in the *Enterprise and Regulatory Reform Bill.*

Although it did not form part of the Government's consultation, the Bill included a clause (**Clause 12)** that would grant power to the Secretary of State to increase or reduce the limit on the compensatory award for unfair dismissal.[27]

During Committee Stage the Government tabled New Clause 2, which provides that a discussion and/or offer made to an employee regarding the termination of their employment cannot be taken into account in unfair dismissal proceedings. New Clause 2 was agreed to on division, 12 votes to 8.[28] Further information on the new Clause is set out in section 4.5 below.

Other than the introduction of a New Clause 2, no other changes were made to the employment provisions of the Bill as originally drafted.

4.2 Early Conciliation (Clause 7)

Whilst the Opposition expressed its support for the principle of Early Conciliation via Acas,[29] it raised concerns over a number of issues including: the potential unintended consequences arising from the complexity of the procedure and its impact on the most vulnerable workers; and whether Acas would have the resources to fulfil its role in the mandatory Early Conciliation procedure.

Details of the Early Conciliation Procedure

The Shadow Minister for Business, Innovation and Skills, Ian Murray, stated that one of the Opposition's main concerns was the lack of detail contained in the Bill with regard to how the procedure would work in practice. He was of the view that:

> ...the method proposed in the Bill is unnecessarily complicated and there is a view that it may led to more satellite litigation, resulting in more costs, more uncertainty and more management time for employers.[30]

The then Minister for Employment Relations, Consumer and Postal Affairs, Norman Lamb,[31] responded that the Government and Acas were working together to consider the detail of the new Early Conciliation procedure. He also confirmed that the Government would consult on the detail of the new process before the end of 2012.

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[26] *Resolving Workplace* Disputes, January 2011. The consultation closed on 20 April 2011

[27] On 14 September 2012 the Department of Business, Innovation and Skills (BIS) issued a consultation, *Ending the Employment Relationship*, which includes proposals to limit unfair dismissal compensation at 12 months pay.

[28] PBC, 3 July 2012, c413

[29] Acas is the Advisory, Conciliation and Arbitration Service

[30] PBC 28 June 2012, c261

[31] Mr Lamb was replaced by Jo Swinson MP in the September 2012 reshuffle.

In addressing concerns over complexity and the impact upon vulnerable workers, the Minister stated:

> We will, as I have said, endeavour to make the system as simple and accessible as possible and will consult specifically on the issue of vulnerable claimants.
>
> [...]
>
> I absolutely give him the reassurance that the whole purpose of the measure is to ensure that the system is as light-touch as possible and that no unnecessary burden will be imposed on claimants, so that they provide the bare minimum of information to allow conciliation to proceed. Secondary legislation will specifically help vulnerable claimants put their case to ACAS.[32]

The Opposition amendment which proposed to give prospective claimants the right to seek advice from Acas in complying with the Early Conciliation procedure was negatived on division by 13 votes to 7.[33]

Acas

During oral evidence, Iain Wright asked Edward Sweeney (Chair of Acas) whether Acas would need extra funding to meet the task set out in the Bill. Mr Sweeney stated:

> I think we need some extra money—the big question is, how much? We do not know yet. It depends on the number of cases that we have and the economic circumstances. I know that this morning some figures were mentioned on what sort of money we have asked for. Publicly or privately, we have asked for no money yet. We have been looking at the situation and discussing what it might look like with our colleagues in BIS.[34]

In a subsequent question about increased workload, put by Labour MP Geraint Davies, Mr Sweeney stated:

> ...I do not think what we have now in our budget would cover any sizeable increase. I am quite clear that we would need some additional resource, but I am not sure yet what level of additional resource.[35]

Iain Wright referred Norman Lamb to the Government's response to the *Resolving Workplace Disputes* consultation and the Government's statement that there would be an increased burden on Acas which would require resourcing. He stated:

> "The Government recognises that there will be an increased burden on Acas that will require sufficient resourcing. This requirement will be met through the savings that will accrue to the Exchequer as a result of fewer cases requiring determination at ET."
>
> I do not want to jump the gun on future amendments and consideration, but the Government have recognised that ACAS requires more money than is proposed in the Bill to do its task. Is that not the case?[36]

The Minister responded by stating that the Government will ensure that Acas has the resources it needs to fulfil the task.[37]

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32 PBC 28 June 2012, cc 269+280
33 ibid., c 280
34 PBC 19 June 2012, c 58
35 PBC 19 June 2012, c68
36 PBC 19 June 2012, c271

4.3 Decisions by legal officers (Clause 10)

The Clause would give effect to the Government's aim to introduce a 'rapid resolution' scheme by permitting low value, straight forward employment tribunal claims to be determined by legal officers rather than employment tribunal judges.

Whilst the Opposition agreed with the principle of having a rapid resolution scheme, they voiced concern over the lack of detail regarding it. The Opposition had three main concerns with the procedure which they sought to address by means of an amendment that would require the Secretary of State and Lord Chancellor to jointly consult on the following three issues: the level of qualifications which legal officers would be required to attain; the type of proceedings which they could determine; and the mechanism for appealing the decisions of legal officers.[38]

Norman Lamb pointed out that Clause 10 is an enabling clause that gives effect to the Government's commitment to consider introducing a rapid resolution scheme. He confirmed that the Government would consult on the first two points raised in the amendment (i.e. the level of professional attainment required of legal officers and the type of claims they could determine). With regard to the issue of appeals he stated:

> There is simply no need to consult on the appeal, because—I say this on the record—the appeal will apply in exactly the same way as one for a claim that is taken to the full tribunal.[39]

Ian Murray restated his concern that having appeals from the decision of legal officers going to the Employment Appeal Tribunal would make the system overly complicated.[40]

The Opposition amendment was negatived on division by 12 votes to 5.[41]

4.4 Composition of Employment Appeal Tribunal (Clause 11)

The Clause contains a number of provisions including allowing Employment Appeal Judges to hear cases alone and, where the parties agree, allowing an appeal panel to consist of a judge plus one or three lay members (as opposed to two or four). Ian Murray, indicated that the Opposition was firmly opposed to Clause 11(2) which would reduce the role of lay members and change the nature of the system, which is currently comprised of a judge plus an equal number of employer and employee representatives.[42]

To deal with the first issue, the Opposition tabled an amendment that would permit an appeal judge to hear cases alone provided that both parties consented. In his response the Minister referred to the difference in proceedings as between the employment tribunal and Employment Appeal Tribunal:

> Proceedings in the EAT are of a completely different character. [...] It is solely points of law that require to be determined. Judges are clearly the most competent people to hear such matters. Indeed it is difficult to argue to the contrary, but we have built in appropriate flexibility and discretion in the clause as it stands. When judges feel that

37 ibid
38 ibid., c310
39 ibid., c316
40 ibid
41 ibid., c317
42 PBC 28 June 2012, c318

> there would be a benefit from having the input of lay members, they will be able to direct that a panel should sit.[43]

The proposed amendment was negatived on division by 11 votes to 5.[44]

The Opposition's second amendment sought to remove from the Bill those provisions that would allow an uneven number of lay members to sit on the appeal panel. The proposed amendment was negatived on division by 12 votes to 5.[45]

4.5 Confidentiality of negotiations (New Clause 2)

Business Secretary, Vince Cable, announced the Government's intention to introduce this New Clause during the Second Reading of the Bill on 11 June 2012:

> We want to do more to encourage parties to reach an agreed solution at an earlier stage. We will therefore introduce an additional clause in Committee to ensure that the offer of a settlement cannot be used against an employer in an unfair dismissal case.[46]

The accompanying BIS press release stated:

> Under these measures, employers will be able to offer settlement agreements before a formal dispute arises and will be legally protected from this offer being used as evidence in an unfair dismissal tribunal case. Employees will also continue to enjoy full protection of their employment rights, as they can choose to reject the offer of a settlement agreement and proceed to a tribunal. Evidence from the private sector shows that a sensible compromise can be reached in the majority of cases.
>
> [...]
>
> The agreements are currently available for employers in some circumstances. However, Government wants to encourage more businesses to use them, including before they have reached the stage of a formal dispute. By making settlement offers and discussions inadmissible in unfair dismissal claims, businesses can be more confident that they will not be used against them at a tribunal.
>
> The offer could be in the form of a letter to the employee and include detail on what kind of payment could be expected while employees can still choose whether to accept the offer. Settlement agreements should not replace proper performance management but there are occasions when both parties recognise that it makes sense to end the employment relationship. If an employee does not accept then the employer will still need to follow a fair process before finally deciding to dismiss the employee.
>
> The new clauses will be tabled in the forthcoming Committee stage. A consultation will be published in the summer on the principles of guidance for using settlement agreements, including draft letters and model templates for employers and employees to use. We want to make it as easy as possible for small employers to use fast settlement agreements without always having to resort to legal advice.[47]

The wording of the New Clause was tabled on 19 June 2012. It introduces new Section 111A into *Employment Rights Act 1996*, which sets out an employee's right to make a complaint of unfair dismissal to the employment tribunal. The New Clause provides that:

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43 ibid., c320
44 ibid., c321
45 ibid., c322
46 Deb, 11 June 2012, c70
47 BIS Press Notice, "*New plans for more efficient workplace resolution*", 11 June 2012

111A Confidentiality of negotiations before termination of employment

(1) In determining any matter arising on a complaint under section 111, an employment tribunal may not take account of any offer made or discussions held, before the termination of the employment in question, with a view to it being terminated on terms agreed between the employer and the employee.

This is subject to the following provisions of this section.

(2) Subsection (1) does not apply where, according to the complainant's case, the circumstances are such that a provision (whenever made) contained in, or made under, this or any other Act requires the complainant to be regarded for the purposes of this Part as unfairly dismissed.

(3) In relation to anything said or done which in the tribunal's opinion was improper, or was connected with improper behaviour, subsection (1) applies only to the extent that the tribunal considers just.

(4) The reference in subsection (1) to a matter arising on a complaint under section 111 includes any question as to costs, except in relation to an offer made on the basis that the right to refer to it on any such question is reserved.

(5) Subsection (1) does not prevent the tribunal from taking account of a determination made in any other proceedings between the employer and the employee in which account was taken of an offer or discussions of the kind mentioned in that subsection."

The Clause was debated on 3 July 2012 when the Government also tabled an amendment to the transitional provisions of the Bill (**Clause 17)** to state that the new clause would not apply to any offer made or discussions held before the commencement of the Clause.[48]

The Opposition proposed two amendments to the new clause.[49] The first would allow settlement agreements to be signed off by either the employee or the employee's chosen representative (i.e. a trade union official; workplace representative; or a legal representative). The second amendment sought to provide that the operation of the clause be reviewed after 12 months and that its continuation be subject to an affirmative resolution of both Houses of Parliament. Both proposals were negatived on division by 9 votes to 7.[50]

As currently drafted New Clause 2 only applies to claims of general unfair dismissal and would not apply to claims of automatic unfair dismissal or breach of contract. A potential concern for employers is that in the event that an employee brings a claim for unfair dismissal and a claim for unlawful discrimination, the employee may be able refer to the settlement negotiations/offer by virtue of the unlawful discrimination claim. Furthermore, should the Tribunal consider that something said or done during the negotiations was 'improper' or was related to 'improper behaviour' the content of the negotiations may be taken into consideration by the Employment Tribunal. What is meant by 'improper" has not been defined so there is an element of uncertainty in how the Clause would operate in practice.[51]

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48 PBC 3 July 2012, c391

49 ibid.

50 PBC 17 July 2012, c700 +701

51 On 14 September 2012 the Department of Business, Innovation and Skills (BIS) issued a consultation, *Ending the Employment Relationship*, which considers ways in which to ways in which to facilitate the use of settlement agreements.

The New Clause 2 was agreed to on division by 12 votes to 8.[52]

4.6 Power by order to amend limit of compensatory award (Clause 12)

The Opposition did not table any amendments to the Clause as they believed the Clause should be removed entirely.[53] Ian Murray further expressly opposed subclause (3) which would grant the Secretary of State a power to vary the limit of the amount of compensation payable depending on the type of employer concerned.

The Opposition's concern was that the power, if granted, would result in a reduction in the limit on compensation and that this would have a number of negative consequences:

> I am challenging the Minister to say whether the Secretary of State will use the power to increase or decrease the current compensatory awards. My guess is that they are only going one way.
>
> Let me set out our concerns. First, this proposal is bad for business and bad for employees. It is likely to disincentivise employers to comply with basic unfair dismissal rights and treat staff fairly. Secondly, it will increase the likelihood that employees will be minded to make a claim through a discrimination case—as we have discussed already—which is uncapped and will cost business more to defend.
>
> [...]
>
> There is also a question of whether justice would be denied. The essence of the Government's proposals in the clause was crystallised in the Bill's evidence sessions a couple of weeks ago. In the response to the question on the compensation cap from the hon. Member for Skipton and Ripon, John Morris from the Law Society said:
>
> "My logic starts"—
>
> again the Government's suggestion that there is a vested interest here flies in the face of what he says—
>
> "if I have lost £70,000 as a result of my employer's conduct, why should I be compensated to the tune of only £28,000?"—[*Official Report, Enterprise and Regulatory Reform Bill Public Bill Committee,* 21 June 2012; c. 101, Q227.]
>
> That seems to me to be natural justice. There is a gap there. We can illustrate this with a number of examples just to show how giving the Secretary of State this power to reduce the compensatory cap could either have unintended consequences or fly in the face of natural justice.[54]

Mr Murray also voiced the Opposition's specific concerns with regard to subclause (3):

> Let me go on to the exemption for small businesses in subsection (3) of clause 12, creating a two-tier work force. We are opposed to that proposal, which will give the Secretary of State the power to vary the level of compensation dependent on the description of the business, as prescribed in the clause. If the amount of compensation for unfair dismissal is reduced for small companies, it will encourage exploitative small companies to treat staff unfairly, as they will know that even if they get taken to a tribunal, the amount of compensation will be very low.

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52 PBC 3 July 2012, c414
53 PBC 3 July 2012, c 329
54 PBC 3 July 2012 c 338

> [...]
>
> The Opposition believe that there is a risk that the proposal could encourage employers artificially to reduce the size of their businesses or split them up and create a disaggregate of businesses in order to get them below a level at which they need to comply. Businesses might be fragmented into smaller units with holding companies. That, in turn, would have a knock-on effect on the enforcement of other legislation related to business size, and perhaps even collective redundancy, which is currently being consulted on by BIS.[55]

Norman Lamb replied that the power would be subject to the affirmative resolution procedure and other constraints so that it could not be used inappropriately. He also stated that any change in the limit to compensation limits would be subject to consultation.[56]

In response to the Opposition's concerns regarding subclause (3), the Minister acknowledged that:

> "there may be drawbacks to introducing a different limit for small firms, so we are not minded, I can reassure him, to introduce a lower cap for small businesses".[57]

The Opposition indicated that they would not vote against the Clause if the Minister would confirm that he would table the removal of subclause (3) on Report and commit to consultation. The Minister responded that he would reflect on the debate and then make a judgment.[58]

4.7 Financial penalties (Clause 13)

The Opposition stated their support for the principle of imposing financial penalties where there are aggravating circumstances. An amendment was tabled which provided that monies collected under the provision would be used to resource Acas. The Minister responded by giving an assurance that Acas would have the necessary resources to carry out all its functions including early conciliation. The Opposition withdrew the amendment.[59]

4.8 Public interest disclosures (Clause 14)

As drafted, **Clause 14** would introduce a 'public interest' test into all whistleblowing complaints.

Ian Murray moved to amend the Bill in order that the 'public interest test' be removed and new wording added that would expressly exclude whistleblowing complaints regarding contractual obligations owed specifically to the individual making the complaint. In support of the proposed amendment, he stated that the Clause needed to be more precise. He argued that:

> There is a significant danger in introducing a public interest test to whistleblowing claims. The important thing to remember is that any amendment to the legislation must be designed to deal with the Parkins issue and individual contract disputes. The amendment deals with the removal of the loophole by inserting that the PIDA legislation cannot be used for a private contractual issue, rather than a very subjective public interest test. The definition is so subjective that the implication will be that case law will again determine what is in the public interest and may mean that we are back

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55 ibid., c342 +343
56 ibid., c348
57 ibid., c349
58 ibid., c362
59 ibid., 374

> in a Parkins *v*. Sodexho situation to determine that. The other aspects of PIDA are very clear-cut in terms of potential wrongdoing and criminality; this particular aspect is not.
>
> The Bill is right to consider this issue, but the wording of the clause goes too far. The Government need to look at this very carefully and come back on Report with a solution to the problem, rather than a potential complication and an inadvertent weakening of the legislation.[60]

Mr Murray also queried whether dismissals connected with whistleblowing would be considered "aggravated" unfair dismissals and be subject to the provisions of Clause 13 and whether whistleblowing claims would be kept off the employment tribunal register for the purposes of protecting claimants from the risk of blacklisting.[61]

The Minister, Norman Lamb, replied that it was the original intent of the Public Interest Disclosure Act that those seeking protection under it should reasonably believe that raising a particular issue was in the public interest and that including a public interest test would remove the 'opportunistic use of the legislation for private purposes" i.e. it would deal with the issues arising from the *Parkins v Sodexho* case. With regard to the proposed amendment he commented that it was not necessary to disallow claims based on an individual's contract and pointed out that there may be cases where a breach of a worker's contract does raise wider public interest issues.[62] He further noted that as workers rights are derived from a number of sources including common law and statute, "to use wording related to personal work contracts would still leave much of the loophole open.[63]

In response to the specific questions raised by the Opposition, the Minister stated that:

> First, yes, this measure will be monitored to see how things play out as a result of the change to the legislation. Secondly, clause 13 will apply where the whistleblowing claim has aggravated features. If the tribunal is faced with a claim for unfair dismissal that relates to whistleblower legislation—in other words, a claim that the dismissal related to the whistleblowing—then, as with any other case of unfair dismissal, it will consider whether there are aggravated features beyond the ability to award what in this case could be unlimited compensation to make it appropriate for a penalty to be imposed. However, the test must be applied strictly to see whether there are aggravated features. Third was the question of keeping whistleblowing claims off the tribunal list in order to ensure that there are no blacklisting implications—I am getting inspiration as I speak and stretching it out as much as I can. We will look at whether it is appropriate to include whistleblowing on the register. The hon. Gentleman raises an entirely legitimate concern and we will look into it.[64]

The proposed amendment was negatived on division by 12 votes to 8.[65]

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60 ibid., c382
61 ibid., c384+385
62 ibid. c388
63 ibid.
64 ibid.
65 ibid., c390

5 The Competition & Markets Authority and its functions

5.1 Introduction

In March 2011 the Government launched a consultation on establishing a new single authority, the Competition & Markets Authority (CMA), from the merger of the Office of Fair Trading (OFT) and the Competition Commission (CC). The Government also proposed a series of changes to the legislative framework for enforcing competition law. In March 2012 the Government announced that it would proceed with the merger, while transferring the OFT's consumer protection functions to other bodies, and that the new authority should be operational by April 2014.[66] Part 3 of the Bill provides for the establishment of the CMA, and part 4 makes a number of changes to the process by which the CMA will assess mergers, investigate markets and prosecute both anti-competitive agreements and the abuse of market dominance.

The Secretary of State, Vince Cable, summarised the Government's case for these reforms during the Bill's Second Reading:

> Our competition regime has been well regarded, but it can be too slow, and recently there have been some worrying criticisms about how it has managed cartel offences.
>
> The reforms that I propose are designed to improve the effectiveness and efficiency of competition enforcement, operating through a new competition and markets authority, backed by streamlined and strengthened powers. The current division of responsibility for the two phases of the markets and mergers regimes, between the Competition Commission and the Office of Fair Trading, can lead to a duplication of activity and the inefficient use of resources. Further, the time it currently takes to complete mergers, markets and anti-trust cases is often far too long, and that in turn imposes additional costs on business, including on those that pose no threat to competition.
>
> Our reforms to the competition regime are designed to create a single, strong voice for competition and a one-stop shop for business; to create greater certainty for business, thanks to faster, clearer and, indeed, statutory time frames; to provide for more effective action to tackle anti-competitive mergers, including the discretion to suspend them; and to provide for robust action to tackle cartels, which can damage business and consumers alike, by removing, for example, the need to prove dishonesty. In addition, it will be easier for businesses to ask the new competition and markets authority to halt uncompetitive practices while investigations are ongoing. These measures go hand in hand with proposals, on which we are currently consulting, to allow businesses to take private actions to stop anti-competitive practices and to achieve redress.[67]

In his speech the Shadow Secretary of State, Chuka Umunna, stated that the Opposition supported this part of the Bill "in principle", though he raised concerns as to whether the merger would be cost-effective, and about the fact that the CMA would not have any responsibilities for consumer protection:

> There is definitely some sense in combining the OFT and the Competition Commission into one body, removing duplication and concentrating expertise in one place. However, the yardstick against which we will measure these reforms is whether they will improve on the existing regime or not. The OFT estimated that in ensuring a level

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66 HC Deb 15 March 2012, cc27-29WS; Department for Business, Innovation & Skills (BIS), *Growth, competition and the competition regime: response to consultation*, March 2012. This effectively abolishes the OFT and the CC.

67 HC Deb 11 June 2012, c73. Details on the consultation on private actions are collated on the Department's site. The consultation ended on 24 July 2012, but the Government have not set out how it intends to proceed.

> playing field, our competition regime benefited businesses and consumers to the tune of £700 million last year. As the Financial Times has pointed out, the expected savings of £1.3 million a year from the merger could be smaller than the cost to consumers and businesses if these reforms change our competition regime for the worse … We are also concerned about the withdrawal of consumer competences entirely from this new body.[68]

In general Members focused on other aspects of the Bill during the Second Reading debate, though several expressed their support for these changes to the competition regime.[69]

These provisions were debated in Committee over four sittings on 5 & 10 July. A number of technical, drafting amendments were tabled by the Government, and were agreed without a debate, with one exception, on clause 27. In both merger and market investigations Ministers may only intervene in cases which raise certain specified public interest concerns. In market investigations, the only public interest concern that sanctions this Ministerial involvement is national security. Although the Bill makes no changes to the independence of the competition authorities or the very limited role that Ministers have in the prosecution of competition law, **Clause 27** allows the Secretary of State, where they believe a market investigation meets this public interest test, to ask the CMA to advise on this issue, *alongside* its principal responsibilities to assess that market from the perspective of competition. The Opposition raised concerns that this might blur the CMA's duties, and put the clause, as amended, to the vote; however, the amended clause was approved by 12 votes to 7.

The Opposition tabled a series of amendments, mostly relating to the operation and functions of the CMA, on which the Committee divided on four occasions – though none of these amendments were accepted. In general, the debate focused on concerns that the new body might not focus sufficiently on securing the benefits of competition for consumers, or respond fully to the concerns of small businesses. The Opposition also raised the question of whether the competition test applied by the authorities in the decision to refer a merger for investigation might be amended. The Bill does not make any changes to this test, and the Government strongly opposed any amendments. Finally, one of the more controversial elements to these reforms to the competition regime is a change to the criminal offence for 'hard core' cartel activity, in removing the 'dishonesty' element of the offence. The Committee debated this at some length, as witnesses had raised concerns that this might penalise quite legitimate business activities; notably, the Minister agreed to reflect on these concerns before the Report stage of the Bill.

5.2 Creation of the CMA (Clauses 18-20, Schedules 4-6)

Clause 18 of the Bill establishes the Competition and Markets Authority (CMA), while **Schedule 4** provides for its governance and decision-making structure; both were debated at length.

Speaking for the Opposition Chi Onwurah raised concerns that the CMA's priorities might not recognise consumers' interests sufficiently, and moved an amendment to **Clause 18** so that the CMA's remit would be to "promote competition .. for the long-term benefit of consumers"; she argued "adding 'long-term' to the remit and duty of the CMA would encourage a more long-term approach without being prescriptive about the time frame."[70] In response the then

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[68] *op.cit.* cc86-7. In April 2012 the Government set out proposals to reform the structure of consumer protection, including those functions carried out by the OFT at present (BIS, *Empowering and protecting consumers: Government response to the consultation on institutional reform*, April 2012). These form no part of the Bill, and are not discussed here; for more background see, *Government proposals to change the consumer landscape*, Library standard note SN6021, 13 January 2012.

[69] For example, Adrian Bailey MP (c97), Brian Binley MP (c103), and David Evennett MP (cc107-8).

[70] PBC 5 July 2012, c 420

Minister for Employment Relations, Consumer and Postal Affairs, Norman Lamb, argued that this was an unnecessary change that could well be counter-productive:

> there could easily be a circumstance where consumers taking action through the new body to address an immediate detriment will bring about a short-term benefit. So just to define it as long-term benefits would seem inappropriate … even those cases [in the CMA's work] with an immediate impact, such as cartel enforcement action and merger control, deliver enduring benefits for consumers.[71]

The Minister noted that the responsibilities of the new body would be elaborated in more detail in its business plan: "The OFT, through its business plan, has a particular focus on the long-term approach to consumer benefit. Through administrative arrangements like that, one would anticipate that the new body would have a clear steer about its importance."[72] However, Ms Onwurah was not convinced and put the amendment to the vote; it was negatived by 12 votes to 9.

The Committee went on to discuss the establishment of the CMA in general terms. Ms Onwurah raised concerns that the merger of the two competition authorities posed certain risks to the UK regime, and questioned whether it should be a priority for the Government:

> Top-down organisational change risks much in order to gain—what? The impact assessment from the Department for Business, Innovation and Skills states that the Office of Fair Trading and the Competition Commission "are required to make significant savings to meet their 2010 Spending Review settlements and the merger savings are not expected to exceed those required by the SR." Basically, there will be no financial savings above what the spending review would in any case bring. Is the Minister certain that the risks associated with such a top-down organisational change do not outweigh the benefits?[73]

Fiona O'Donnell also raised concerns as to the funding of the CMA, asking if extra resources would not be required to "ensure that quick judgements will also be the right ones?"[74] John Cryer raised the separate issue of the operation of the public interest test – and earlier debates as to the case for extending the (very limited) scope of Ministerial involvement in the competition regime in the context of the takeover in 2010 of Cadburys by Kraft.[75] The Bill makes no changes to the public interest test.[76]

Mr Lamb also addressed the concerns raised about the funding of the CMA:

> The Government are committed to ensuring a smooth transition process and will work closely with the OFT and the CC to minimise disruption to the organisations while they continue to carry out their important roles and services. The new CMA will be sufficiently resourced to deliver its functions, but will not be immune from wider pressures to help deal with the UK's massive deficit ... Savings delivered by the creation of the CMA will be mainly from streamlining and eliminating overlaps between

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71 ibid., c424. Mr Lamb was appointed Minister of State at the Department of Health on 5 September.

72 ibid., c428

73 ibid., c435

74 ibid., c443

75 *op.cit.* c443-4. The background to this issue is discussed in the Library's first briefing paper on the Bill (Library Research Paper 12/33 pp 21-22).

76 For a statement of the Government's present position, see ibid., c447-8. At this time the Minister acknowledged that in 2008 the Labour Government had amended this list, as part of its response to the banking crisis, so as to allow Ministerial intervention in merger cases on the grounds of ensuring long-term financial stability.

> phases 1 and 2 of investigations. Those savings will help deliver the Government's existing spending review targets.[77]

The Minister also mentioned the large number of organisations that supported the creation of the CMA – in some cases, when giving oral evidence to the Committee such as the CBI, the Federation of Small Businesses, the Forum of Private Business and the City of London Law Society.[78]

Under **paras 1 & 9** of **Schedule 4** the Secretary of State would appoint both the chair and the chief executive of the CMA. **Para 12** of **Schedule 4** requires the CMA to prepare an annual plan and to have it laid before Parliament. Chi Onwurah raised concerns that Parliament would not have sufficient oversight of the CMA, and proposed amendments to have both of these appointments subject to the approval of the relevant Select Committee, and to ensure that the CMA's report was formally brought to the Select Committee's notice. The Minister argued that it would be wrong to give the Select Committee a veto power over appointments:

> A system is already in place, which was introduced by the previous Administration, for agreeing between Parliament and the Executive which of the Government's public appointments will be subject to a pre-appointment scrutiny hearing. Under the system, the Secretary of State discusses and agrees with the Chair of the relevant Select Committee which appointments will have such a hearing. The Cabinet Office publishes a list of the appointments—the most recent one is from August 2009. A document entitled, "Pre-appointment Hearings by Select Committees: Guidance for Departments" was published by the previous Government in August 2009, and this Government will follow those guidelines …
>
> Under the current system, a pre-appointment hearing process is already in place for the chairs of the Competition Commission and the OFT. We are currently recruiting a chair-designate to the CMA. I should like to make it clear that that appointment will also require a pre-appointment hearing by the BIS Committee. However … there should be proper scrutiny but not a veto …
>
> As with the appointment of the chair, the chief executive of the CMA will be appointed by the Secretary of State, but it will not be a public appointment. That is an executive post, not one where the post holder is regulating the Government or holding them to account, so there is a difference in terms of the appropriateness of scrutiny hearings before a Select Committee. The Government agree with the Liaison Committee that the key aim of the pre-appointment hearing is to establish the independence of the candidate from government. That would not be appropriate for a chief executive role, which is, by definition, a part of the executive and not a regulator of it.[79]

Mr Lamb went on to suggest it would also be inappropriate for the Committee to be under a statutory obligation to consider the CMA's annual plan each year though it would be, "absolutely at liberty to scrutinise either the plan or the report."[80]

A central component of the current system is the 'two phase' approach to merger and market investigations, with the OFT (and sector regulators) undertaking a first phase, before assigning cases to the Competition Commission. This division of responsibilities is to be retained in the new single competition authority, by assigning phase 1 decisions to the CMA

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77 ibid., c451

78 ibid., cc450-1

79 *op.cit.* cc454-5. On 17 July the Secretary of State announced that the Lord Currie would be appointed the chair-designate of the CMA (HC Deb 17 July 2012 c115WS).

80 *op.cit.* c457. Ms Onwurah did not press any of these amendments to a vote.

Board, while CMA panels are to consider phase 2 cases. In oral evidence to the Committee Sir John Vickers, once head of the OFT, raised concerns as to how this division of responsibilities would continue in a single body:

> What is unusual in the UK regime is a system where markets can be investigated and remedies applied, which can change market conditions very significantly, even though no one has broken any prohibition in the law. That has existed for decades in one form or another and many people regard it as a very valuable part of our system and, on balance, I agree with that view.
>
> When I was at the Office of Fair Trading and Sir Derek Morris was chairing the Competition Commission, he would sometimes be questioned in international forums about this because through American eyes, for example, it would look like an unusual part of the regime. His response, which I think was very strong, was that no case that comes to the Competition Commission as a market investigation reference has been initiated by the Competition Commission. It is issued by an entirely separate body: the OFT. That sharp and total separation between initiation and decision has enhanced the robustness of this aspect of our regime, which is unusual by international standards but positive.
>
> With mergers it is different, because a merger case is initiated not by the authorities but by the merging parties. In any regime, when merging parties want to do a significant merger, there will be scrutiny of that. My worry is that by combining these functions into one organisation, even though it may be entirely consistent with human rights legislation, it weakens that element of the system. When you have two organisations under one roof, you need an extra strong wall between the two parts. That will necessarily limit the efficiency gains that may come from the combination.[81]

Turning back to the debate on **Schedule 4**, Chi Onwurah proposed several amendments with a view to strengthening this 'wall' between the CMA Board and a CMA panel established for any phase 2 investigation: specifically, prohibiting more than 3 members of a panel from also serving on the Board, and requiring that any panel include consumer and financial experts. The Minister opposed these measures, on the grounds that limiting the composition of these bodies in this way could well be counter-productive:

> The Bill specifies that at least one panel member must be appointed to the board and preserves the separation of phases by requiring panellists who are likely to be part of a group that considers a phase 2 merger or market inquiry to be excluded from board discussions of a potential referral at the end of phase 1. I am pleased that the Opposition appear to accept the retention of the separation of phases and independent panellists, as well as the importance of ensuring that at least one member of the board has experience of phase 2 processes …
>
> [The Member's first proposed amendment] would limit to three the number of CMA panel members who could be appointed to the board … [It] is unnecessary, though, as the Secretary of State is unlikely in practice to want to appoint more than three panel members to the board. The Government said in our response to the competition consultation that we expect two or three panellists to be appointed to the board. That will ensure that the board has appropriate phase 2 expertise, which is important, without becoming too unwieldy.
>
> Particular circumstances might arise, however, in which the Secretary of State wants to appoint more than three panellists to the board, for example because of the evolution of competition or corporate governance practice. Alternatively, where there are already

[81] PBC 21 June 2012 c83 (Q186)

> three panellists on the board and none is available to participate in board discussions of a referral, perhaps because of a conflict of interest—they are likely to be on the phase 2 panel—the Secretary of State might want to appoint an additional panellist to the board. In those circumstances, it would be wrong to place an artificial constraint on the number of panellists on the board ..
>
> We expect a sufficient number and range of panellists will be appointed to the CMA for it to be able to cover consumer welfare and financial services-related functions. The specific appointments called for [in the Member's second amendment] … are therefore unnecessary. Including particular sectors in the Bill seems inappropriate. At any point in time there may be a particular focus on a sector, and there certainly is on financial services now, but in a few years' time the focus may be entirely elsewhere. We want to ensure that there is a range of expertise on the panel so that a group selected from the panel can undertake and discharge its responsibilities.[82]

The Minister also resisted amendments tabled by Ms Onwurah to require the CMA Board to have at least one member from Consumer Focus, and for the CMA's annual plan to provide estimates of the consumer benefits to its work. In his response the Minister said a little about the consumer functions that the CMA would have:

> It will have primary expertise on unfair contract terms legislation and additional consumer enforcement powers to address business practices that distort competition or impact on consumer choice in otherwise competitive markets, such as tricking consumers into tie-in contracts that might inhibit them from switching suppliers or subjecting them to excessive surcharges and using misleading reference pricing. The CMA will also act as the single liaison office for the EU regulation of consumer protection co-operation and have an international consumer role, for example, to represent the UK in the OECD's committee on consumer policy. The CMA will be centrally interested in the consumer, and the way in which competition works for the benefit of the consumer.[83]

Similarly, the Minister resisted a further amendment tabled by Ms Onwurah, to cap the remuneration of the highest-paid CMA members. Ms Onwurah had suggested this should be no more than 20 times greater than any other member of staff, though, as the Minister pointed out, this was unlikely to have any tangible impact:

> in the OFT, the banded remuneration of the highest-paid director in 2011-12 was £275,000 to £280,000, which is 6.8 times the median remuneration for the work force of £40,570. Imposing in legislation a ratio of 20:1 might create a return to the culture of public sector fat-cattery. Given that ratio and a median remuneration of about £40,000, the figure for the OFT—will someone do the maths: what is 20 times £40,570?. Anyway, it would be a hell of lot of money. This Government have no intention of allowing the sort of levels of pay that appear to be acceptable to the Opposition.
>
> The remuneration, allowances and expenses of the chair and the chief executive of the CMA and of members of the CMA board and the CMA panel will be determined by the Secretary of State. They will also be subject to the approval of the Chief Secretary to the Treasury if they are above £142,500 pro rata a year. We have complied with the process in seeking to recruit the chair-designate of the CMA, who will receive a salary of between £170,000 and £190,000 pro rata. The remuneration paid to members of the CMA board, including the chair and the chief executive, will be published annually in a remuneration report, which will form part of the CMA's resource accounts; that level of

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82 PBC 5 July 2012 cc461-2. Ms Onwurah did not press any of these amendments to a vote.

83 *op.cit.* c466

> transparency tended to be missing in the past. Therefore, we do not consider that a statutory requirement is needed specifically for the CMA to ensure fair pay.[84]

Ms Onwurah went on to raise concerns about the effectiveness of the competition regime for small businesses, and in particular, one aspect of market investigations that is to be unchanged under the Bill. At present certain organisations representing consumers are entitled to make a 'super-complaint' to the OFT about features of a market that appear to be significantly harming the interests of consumers.[85] The OFT is required to publish a response within 90 days stating what action, if any, it proposes to take in response to the complaint and giving the reasons behind its decision. In its initial consultation on reforming the competition regime the Government suggested that this complaint system might be extended to small businesses.[86] Few respondents supported such a change:

> Some respondents strongly felt that SMEs should not be given special status over their competitors, which could allow them to challenge business practices which might be pro-competitive and efficiency-enhancing. Of those respondents that supported the proposals, some were concerned about the scope for SME representative groups to gain super-complainant status and then raise issues that are more properly considered to be commercial concerns rather than competition issues.
>
> Given the lack of significant support for this proposal, and in the absence of evidence of the type of issues that may be brought to the CMA as a potential SME super-complaint, the Government has decided not to extend the super-complaint mechanism to SME bodies.[87]

Though the Bill makes no change to the super-complaint procedure, Ms Onwurah proposed a new clause to allow organisations representing SMEs to make super-complaints, along with an amendment to establish a unit within the CMA "dedicated to matters affecting competition issues amongst small and medium-sized enterprises":

> A dedicated SME unit would ensure that SMEs and representative bodies have a clear and obvious point of contact that can act as an advocate within the new organisation from the beginning … Small businesses, particularly micro-businesses, need equal protection and support on many issues. Micro-businesses consume products and services like domestic households, rather than in vast quantities like larger organisations. They should, therefore, be afforded the same level of protection as domestic households … The Government chose not to adopt the proposal to extend super-complainant status to SMEs, on which they had consulted … But we have heard that there was and is significant support for the extension.[88]

The Minister strongly opposed both changes, on the grounds that neither would be effective in delivering real benefits to SMEs:

> When dealing with competitive markets … we need to be careful about blurring the lines between consumers and competitors. As hon. Members will know, the Government consulted on whether to extend the super-complaints system to SMEs, and the majority of responses opposed the proposals. Respondents felt strongly that SMEs should not be given special status over their competitors, allowing them to challenge business practices that might be pro-competition and efficiency-enhancing. Furthermore, the Government did not receive any evidence of the type of issues that

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84 *op.cit.* c472

85 Under s11 of the *Enterprise Act 2002*. The OFT's site has more details on this procedure.

86 BIS, *A Competition Regime for Growth: a consultation on options for reform*, March 2011 paras 3.14-6

87 BIS, *Growth, competition and the competition regime: response to consultation*, March 2012 para 4.8-9

88 PBC 5 July 2012, cc478-9

> may be brought to the CMA as a super-complaint. It is therefore not clear that such proposals would provide the support to SMEs that hon. Members seek.
>
> Conversely, I believe that the Bill contains a number of measures that will deliver real benefits to SMEs on the ground every day. It will deliver faster decision-making and greater predictability of competition processes and decisions, decreasing the detriment to small businesses where they are customers. It will also reduce barriers to entry by making it easier for the CMA to tackle anticompetitive mergers, and it will reform antitrust to ramp up deterrents of anticompetitive and abusive behaviour. In addition, it will streamline processes on market studies and market investigations, reducing the burden on SMEs that may be involved in such processes …
>
> It is vital that the CMA can allocate its resources independently, so that it can effectively respond to priorities in the competition arena and deliver the greatest benefits for UK competition as a whole. I do not believe that restricting the CMA's flexibility in assigning its resources will benefit SMEs in the way that amendment 78 suggests, and it is not therefore necessary to legislate for the CMA to have a dedicated unit dealing with SME issues. To have a person on a board or a special unit smacks of tokenism; let us just get the system right to ensure that it delivers results for SMEs. I suspect they will see more benefits from that than they would from the proposed dedicated unit.[89]

Ms Onwurah's amendment to establish an SME unit was put to the vote, but defeated by 12 votes to 9.[90]

Under **para 14** of **Schedule 4** the CMA is required to published an annual performance report, which must include an assessment of how well it has met the objectives of its business plan. Ms Onwurah moved an amendment to require this report to include several other items: details of the consumer benefits 'realised' by the CMA over the year; an analysis of how phase 1 and phase 2 activities within the organisation were kept separate; and, an assessment of the performance of each of the sector regulators. In each case the Minister argued that these additional reporting requirements would be unnecessary:

> Transparency and accountability are essential for the CMA's success and for maintaining the confidence of business and consumers alike …By the same token, we must ensure that we do not place unnecessary statutory requirements on the CMA where those requirements can be delivered through non-legislative means. The obsession with legislating for everything is, I suspect, a mistake ...
>
> [On an assessment of consumer benefits] we believe that can be delivered without a legislative provision. The OFT, for example, does not have a statutory requirement to measure the benefit to consumers of its annual portfolio of work, but it is required to do so through non-legislative means …
>
> Preserving separation of decision making between phase 1 and phase 2 will be important to the CMA's success and fundamental to the organisational design … The institutional arrangements [for the separation of decision-making] will include, for example, that panel members are not permitted to sit on groups where they participated in a board decision to make a referral, which we discussed in relation to a previous amendment. And groups must take their decisions independently of the board. The board and panellists will be keen to uphold separation to ensure the CMA's

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89 ibid., c480, c483

90 ibid., c484. The Member tabled the new clause regarding super-complaints to be debated at the end of the Committee's deliberations but in the event it was not called (Public Bill Committee Proceedings, 17 July 2012 p48 – New Clause 9).

> decisions are regarded as fair and robust. A lack of separation could open the CMA to judicial review. The board will also be required to produce and consult on rules of procedure for phase 2 inquiries, and those will promote separation of decision making. The individual case decisions of the CMA will also be highly transparent and, of course, will be subject to judicial review. Having to report annually on organisational separation would therefore be a burdensome requirement—more paperwork—with little or no added benefit.
>
> Finally, with regard to the suggestion made by hon. Members to require the CMA to report on the performance of sector regulators in using their competition powers, the benefits of doing so are already achieved in the Bill … [Furthermore] we want to improve the culture of co-operation between the CMA and the regulators, so that they share more information and expertise and so that the regulators are more comfortable referring markets or passing antitrust cases to the CMA. That co-operation is likely to be undermined if the CMA is required to assess their performance.[91]

Nonetheless Ms Onwurah put the amendment to the vote; it was defeated by 12 votes to 9.[92]

The final issue which the Opposition raised during the debate on **Schedule 4** was the position of financial services. Ms Onwurah argued that while the Bill made explicit provision for the CMA to share concurrent powers with the sector regulators to enforce competition law, the responsibilities of the CMA to regulate the market for financial services, alongside the newly-established Financial Conduct Authority (FCA), were unclear.[93] The Member tabled a detailed amendment to establish an ongoing responsibility for the CMA to regularly assess the provision of financial services to consumers. In resisting the amendment, the Minister underlined that the FCA would have "lead responsibility for promoting competition and consumer interests in the financial sector":

> To fulfil its new competition objective, the FCA will need to keep markets for financial services under review, and it will, of course, be able to review financial markets. When it wishes to engage the CMA—the overall competition authority under the new regime—the Financial Conduct Authority will have a tailored power to refer matters to it. If the CMA receives an appropriate referral from the FCA, it may refer a matter for market investigation or bring Competition Act enforcement proceedings. That mechanism was widely supported by consumer groups, the industry and the Treasury Committee. The referral mechanism will not prevent the FCA taking the lead in addressing competition issues, but it will respect the expertise and powers of the CMA.[94]

The Minister went on to give some details as to how the two bodies would "co-ordinate on competition":

> The FCA and the CMA will need a memorandum of understanding, but we do not need to provide for that in the Bill to make that happen. The OFT has MOUs in place with the FSA and other similar sectoral regulators such as Ofcom without the need for legislation … The FCA needs a mechanism to engage the CMA if it is to make sure that the CMA's powers and expertise are effectively brought to bear in the financial services sector ... The FCA will therefore have a power of referral to the CMA—first to the OFT and in due course the CMA—under a corresponding duty to respond within 90

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91 PBC 5 July 2012, c488

92 *op.cit.* c490

93 The new regulator is to be established under provisions in the *Financial Services Bill 2012/13*; more background is given in Library Research Paper 12/08, 2 February 2012.

94 PBC 10 July 2012, c500

> days. The availability of the power will not prevent the FCA taking the lead in addressing competition issues where it is best placed to do so.
>
> On an appropriate referral from the FCA, the CMA may have the information and analysis it needs to take action—for example, to launch a market investigation reference—almost immediately. It will also be able to consider whether enforcement action under the Competition Act 1998 would be more appropriate. There are clear benefits to the referral mechanism in terms of enabling the CMA in its role as the principal competition authority to bring its expertise and experience to bear in taking action to address restrictions or distortions of competition. These are pragmatic arrangements that will reflect the fact that the FCA will have no track record of or experience in making market investigation references or capacity to enforce competition law itself. As such, it will be essential that it has a mechanism to draw on the expertise and powers of the CMA.[95]

Ms Onwurah put the amendment to the vote, though it was defeated by 12 votes to 9.[96]

Schedule 5 provides for the competition functions of the OFT and the CC as set out in the *Competition Act 1988* and the *Enterprise Act 2002* to be transferred to the CMA. In Committee the Minister moved two sets of technical, drafting amendments: in each case Mr Lamb gave a short précis of their purpose, and the amendments were agreed.[97] Amendments tabled by the Opposition, relating to the test for any anticipated or completed merger to be referred for investigation, were debated at considerable length. In moving these amendments, Ms Onwurah explained that, in the Opposition's view, the CMA should be enabled to take "a longer term view of the possible merits and demerits of mergers and takeovers in the UK." The general test for a reference at present is that the merger would result in a *substantial lessening of competition*.[98] Ms Onwurah proposed that in making such an assessment, the CMA should be required to take into account "the longer-term ability of the merged entity to compete effectively," citing the concerns that were raised over the long-term implications of the takeover of Cadbury in 2010:

> Kraft's takeover of Cadbury is perhaps the best—or worst—example of short-term interests taking precedence over the long-term interests of a great British company … The amendment would give the CMA the power to take a longer-term view on the impact of such deals when deciding whether to investigate further ... We believe the Government should be putting in place measures to ensure that short-termism is not rewarded in Britain.[99]

In response the Minister argued that the new test would put the international standing of the UK regime at risk "because it would introduce factors that would not be central and appropriate for its competition duty into the equation that the CMA would have to consider.":

> To the extent that the ability of the merging parties or the merged entity to compete impacts on the level of competition in the market, the CMA will already have to consider that as part of its assessment of any merger, just as the OFT and the Competition Commission do. Their task is to assess whether the merger will substantially lessen competition in the market, which would be bad for consumers and

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95 ibid., c507

96 ibid., c508

97 ibid., cc508-9, cc524-5

98 Under s33 of the *Enterprise Act 2002*. For some background on this test see, Library Research Paper 12/33 pp 19-20.

99 PBC 10 July 2012, cc512-3. As noted above, John Cryer had raised this issue at an earlier stage of the Committee's proceedings (PBC 5 July 2010 cc443-4), and also contributed at this point in the debate (PBR 10 July 2012 cc516-8).

> the economy more widely. It is very much a competition test, in line with tests used in other countries around the world. However, if the CMA was required to take a broader view of the ability of the merged entity to compete, it would take the UK's regime out of step with the international standard and blur the clear lines between the current competition test and other considerations …
>
> Currently the OFT and Competition Commission consider the impacts of any merger versus the counterfactual—what would have happened if it had not gone ahead—over the foreseeable future. There is no precise period for how long this is, and it will vary from market to market. For example, the appropriate period in, say, power generation markets and social media markets is likely to be quite different. The further one looks out from that particular point in time, the harder it becomes to predict what the competition environment will look like in the years ahead. Furthermore, there will be all sorts of other external factors that would have an effect on the ability of the merged entity to compete effectively, and which competition authorities are not best placed to try to predict. I therefore think that we need to be careful about extending the competition regime in the way that the amendments propose.[100]

The Minister also suggested that there was a risk to making the test incoherent, since "a merger creating a monopoly would almost certainly create an entity with an enchanced ability to operate effectively in the long run." Ms Onwurah argued that the amendment was "very reasonable and quite a small step." The Committee divided, and the amendment was defeated by 12 votes to 9.[101]

5.3 Mergers and markets (Clauses 21-30, Schedules 7-12)

The Committee debated a short selection of provisions from this part of the Bill, which were taken out of numerical order.

Clause 30 and **Schedule 12** provide for a series of statutory time limits to apply to market investigations (a similar schedule for merger investigations is provided for by **Clause 28** and **Schedule 11**).[102] In Committee Chi Onwurah tabled a number of probing amendments, to ascertain why the Government had settled on these particular limits (specifically, allowing the CMA an initial six months to complete most market studies, and eighteen months to complete a phase 2 investigation).[103]

In response the Minister noted that the new limits "are expected to reduce the end-to-end market process by up to a year in some cases", before giving more detail on why the new limits were being proposed:

> To date, most market studies that have been referred to the Competition Commission have taken between four and 10 months, so an initial decision point after six months will speed things up, while still allowing good time for a full and proper consideration of the market … Of the 35 market studies conducted by the OFT between 2004 and 2011 that were not referred on, 12 took more than 12 months to complete, and the average was 15 months. That is a long period of time and we would be shaving at least three months off these types of cases, which is a material benefit for all concerned. Based on the past experience of the OFT, and following the Department's consultations with

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100 PBC 10 July 2012, c520

101 *op.cit.* c523, c524. Ms Onwurah tabled a similar amendment at the end of the Committee's proceedings, but this was not called (Public Bill Committee Proceedings, 17 July 2012 p49 – New Clause 10). The Committee approved the remaining provisions relating to the creation of the CMA – **clauses 19-20** and **Schedule 6** – without any debate (*op.cit.* c509, c525).

102 The impact of the new schedule of time limits is graphically illustrated in the Explanatory Notes to the Bill (Bill 7-EN, May 2012 p56).

103 PBC 10 July 2012, c526

> the OFT—we have talked to the body that undertakes the work now—the Government believe that six months is an appropriate time period for the initial market study phase.[104]

The Minister went on to move three technical amendments to **Schedule 12** to ensure it was "internally consistent and works in the way it was intended"; these were agreed without a vote, after Mr Lamb gave a short summary of their purpose:

> Amendment 26 makes a minor and technical change to make clear that the undertakings referred to in paragraph 12 of schedule 12 are undertakings that have been accepted under section 154 of the Enterprise Act 2002, in lieu of a market investigation reference ....
>
> Amendment 27 makes a minor and technical change to the CMA's publication requirements ... Under current and new legislation the CMA is required to publish many of its decisions, so that interested parties have information about them. The amendment adds a provision to ensure that where the CMA has consulted on making a market investigation reference, and subsequently decides not to make that reference, it must publish that decision ...
>
> Amendment 28 makes a minor change to preserve the existing situation for appeals on decisions on whether to launch a market study. Currently, a decision by the OFT to launch a market study is expected to be subject to appeal to the High Court on grounds of judicial review. Changes in the Bill on time limits mean that under the current drafting, parties may have more reason to believe that such decisions would be now subject to judicial review by the Competition Appeal Tribunal, not the High Court. The amendment preserves the High Court as the appeal destination for those types of decisions, as it was not intended that the Bill change that.[105]

Clause 28 establishes the CMA's powers to gather information for market studies and investigations, and **Schedule 11** makes provision for the enforcement of those powers – such as fining companies that refuse to comply with its requests. In Committee Ms Onwurah tabled amendments to substantially increase the maximum size of these fines. In response the Minister summarised the fines regime, and argued that an increase as anticipated in the Opposition's amendments would be disproportionate:

> The Bill provides that the Secretary of State may, by order, set out the maximum penalties that the CMA can impose when an information request has not been complied with. They are as follows: in the case of a fixed amount, the amount cannot exceed £30,000; in the case of a daily rate, the daily amount cannot exceed £15,000; and in the case of a fixed amount and a daily rate, the fixed amount cannot exceed £30,000 and the daily rate cannot exceed £15,000 per day …
>
> [The amendment would amend this to a maximum fine set at 10% of turnover,] and Hon. Members might wish to note that breaches carrying a fine of [this size] … include breaches of antitrust—including the most serious infringements of competition law, such as price fixing … I do not think that the mischief we are seeking to avoid here, which is not complying with an information request in a market investigation, warrants this level of potential penalty ... Moreover, given that the Competition Commission has never used its existing enforcement powers, because the existing level of penalties operates as an effective deterrent, I do not believe that it is in any way necessary.[106]

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[104] ibid., cc527-8
[105] ibid., cc528-9
[106] ibid., cc535-6

The Minister went on to move two amendments to **Schedule 11**, as part of a wider group of amendments, to "close a loophole that has inadvertently arisen as a result of changes the Bill is making":

> Under existing legislation, the Secretary of State can intervene at certain points in market inquiries on limited public interest grounds set out in legislation … as a result of a number of changes the Bill is making, an unintentional gap has arisen, which means that in cases where the CMA has not published a market study notice, the Secretary of State would be unable to intervene on public interest grounds when he or she could do so in the current regime … Neither the amendments nor the Bill will widen the opportunity for Ministers to intervene in market investigations on public interest grounds. Currently, Ministers can intervene only where there are national security considerations—that is not changing. The Secretary of State can intervene only where the CMA is already looking at a potential competition issue in the market—that is not changing. The Secretary of State must accept the findings of the CMA on any competition issues—that is not changing. The amendments will merely preserve the existing power for Ministers to intervene in limited circumstances of significant national importance.[107]

The group of amendments moved by the Minister to close this 'loophole' included amendments to **Clause 27** and **Schedule 10**, which make provision for the CMA to advise Ministers on matters of public interest in market investigations, equivalent to an existing provision for the Competition Commission to advise Ministers on public interest issues in merger investigations. These amendments prompted a wider debate on this change to the markets regime. Speaking for the Opposition Ms Onwurah mentioned concerns raised by several organisations, including the CBI, that this could undermine the CMA's focus on competition:

> There is a reason why Labour left the public interest test with the Secretary of State when we designed the regime. As one consultation response put it, in a merger case, "as a matter of necessity, competition and public interest issues need to be considered at the same time and having regard to the same facts. In a market context, the justification for joint consideration of public interest issues and competition issues is much less and the risks greater." To put it another way, public interest issues are relatively simpler to spot and investigate in a merger investigation than in a market investigation. The public interest considerations in a market investigation are numerous and varied. The Government should not simply copy something that works well in one area of competition law and apply it somewhere else …
>
> If we are trying to speed up the market investigation process, we should ensure that the CMA's sole priority is competition, and let the Secretary of State worry about the public interest. That point was made forcefully by the CBI in our evidence sessions. Katja Hall said: "Our concern is about the risk of blurring the responsibility of the new Competition and Markets Authority. What is the benefit of giving the CMA the right to look at wider public interest issues rather than just leaving those with the Secretary of State? That would be our concern: why is that change necessary and is there a risk that it would blur the duties of the CMA?"—[*Official Report, Enterprise and Regulatory Reform Public Bill Committee,* 19 June 2012; c. 7, Q12.][108]

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[107] ibid., cc536-7

[108] ibid., cc539-40. These concerns were also raised in some responses to the Government's consultation (*Growth, competition and the competition regime*…, March 2012 para 4.10).

In his response the Minister argued that it was sensible to enable the Secretary of State to draw on the CMA's expertise in such cases, citing Malcolm Nicholson, a panel member of the Commission, when he gave evidence to the Committee:

> It is important to make the point that public interest cases are extremely rare. To date, there has never been a public interest markets case and, in themselves, the changes are unlikely to lead to any increase … Although such cases are extremely rare, they are, by their nature, of particular significance to the United Kingdom. It is therefore vital that the Secretary of State has access to the best possible expert advice when taking decisions on such cases. For example, as Malcolm Nicholson highlighted in his evidence to the Committee, "the skill set of an independent regulator of the sort that we have should mean that it is quite well placed to consider public interest issues alongside competition issues. I could certainly conceive of a competition inquiry looking at competition in wholesale and retail energy markets while having regard to security-of-supply considerations…I think there is scope here for doing something quite useful."—[*Official Report, Enterprise and Regulatory Reform Public Bill Committee,* 21 June 2012; c. 111, Q252.][109]

Mr Lamb went on to address some issues which, in his view, had caused confusion in this area:

> First, the powers will not make it any easier for Ministers to intervene on public interest grounds in the first place. The Secretary of State can make a public interest intervention only where the CMA has already begun a market study, or where it is consulting on making a reference, which is where the CMA already suspects that there may be a competition issue … Secondly, it will not be for the CMA to decide where the balance is between competition and public interest issues. That will remain, as it should be a decision for Ministers, who are accountable to Parliament …
>
> As I have said, the Secretary of State can make a public interest intervention only where the CMA already suspects that there may be a competition issue. The Secretary of State must accept the findings of the CMA on competition issues. Its independence is absolutely guaranteed. If the CMA finds no competition issue, the matter cannot be referred for further examination. Those principles are not changing either.[110]

However, Ms Onwurah was unconvinced, arguing that "although the decision-making power remains with the Secretary of State, if the responsibility for assessing the public interest case of markets, which as I have said are different from mergers, is to rest with the Competition and Markets Authority we should put the issue and principle of public interest to the Committee in a vote." The Committee divided, but approved of **Clause 27**, as amended, by 12 votes to 7.[111]

During a merger or market investigation the competition authorities may impose interim measures to counter any pre-emptive action taken by the affected parties. There have been concerns that the existing legislation is insufficiently clear,[112] though, as the Minister explained in Committee, "[both] the Competition Commission and the OFT interpret the existing legislation as already enabling them to reverse pre-emptive actions."[113] **Clause 29** makes it clear that the CMA's powers in this respect include the power to reverse any pre-

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[109] ibid., c542
[110] ibid., cc543
[111] ibid., c545
[112] Op.cit. *Growth, competition and the competition regime*…, March 2012 para 4.41
[113] PBC 10 July 2012 c548

emptive action taken by the parties or to reverse the effects of such action.[114] In Committee Ms Onwurah said that the Opposition supported these provisions but that the CMA should be required to published a "cost-benefit assessment for the interim measures applied to ensure that the measures are not disproportionate and are, at the very least, transparent."[115] The Minister resisted this amendment given that, "At the stage of the market investigation where this measure would be issued, the CMA is unlikely to know the precise detail of the problems that it is trying to solve. Therefore, it would be difficult to assess what harm might be caused to consumers by any problems, which the CMA would need to know to determine the benefits of reversing the pre-emptive action."[116]

The remaining clauses and schedules to this part of the Bill were agreed without any debate.[117]

5.4 Anti-trust, cartels, miscellaneous (Clauses 31-48, Schedules 13-15)

The Committee debated only one of the provisions in this section of the Bill: **Clause 39** amends the criminal cartel offence established under s188 of the *Enterprise Act 2002* – and in particular, removes the test that would require the competition authorities to prove that individuals had colluded *dishonestly*. This one part of the Government's proposals for reforming the competition regime drew a great deal of comment from respondents,[118] and it was the subject of quite a long debate in Committee. Ms Onwurah said that the Opposition "agree with the Government that the dishonesty bar is too high", but noted the concerns of some respondents that simply removing this test would result in quite innocent business transactions being prosecuted.[119] In its place Ms Onwurah suggested an alternative test, so that the authorities would need to show that individuals had concluded an agreement "with the intention of substantially reducing competition":

> That would have the effect of retaining a test, but not one requiring a judgment as subjective as dishonesty. It gets to the heart of the offence: although it is the objective of all competitive companies to reduce competition, hopefully by making the best products, reducing competition through agreement with competitors is and should be the target of legislation.[120]

In his response the Minister went into some detail as to the reasons for initially including the dishonesty test, before arguing that these objectives could now be achieved in other ways:

> It is also worth bearing it in mind that "dishonesty" was not chiefly incorporated in the offence to attach clear moral blame to the conduct, but it was recognised that dishonesty might be a marker to juries of the offence's serious nature and it might encourage judges to impose deterrent penalties. Reference was instead made to dishonesty not because it was seen to be intimately connected with hardcore cartel conduct, which is inherently damaging in itself, but as a mechanism to ensure certain effects.
>
> These were, first, to ensure that benign agreements that would benefit from exemption under the antitrust prohibitions were not criminalised; and secondly, to ensure that the offence could not be classified as "national competition law" for the purposes of EU

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114 **Clauses 22-23** of the Bill make provision with regard to the CMA's powers to impose interim measures in the context of a merger investigation.

115 PBC 10 July 2012 cc547-8

116 ibid., c548. In the event Ms Onwurah withdrew the amendment.

117 Specifically, **clauses 21-26** with **Schedules 6-9** (PBC 10 July 2012 c525).

118 For more details see, Library Research paper 12/44, pp32-36, pp58-60.

119 For example, Katja Hall, chief policy officer of the CBI (PBC 19 July 2012 c7 – Q13).

120 PBC 10 July 2012, c553

> law. If it were so classified, EU law would most likely operate to prevent individuals engaged in cartels investigated under the civil antitrust prohibition by the European Union from being prosecuted in the UK, which would be wholly counter-productive.
>
> The third reason was to try to make the offence easier to prosecute and reduce the likelihood that juries would have to consider economic evidence. It was felt that dishonesty provided a relatively straightforward test, commonly applied by juries in a host of other offences, for example, under the theft acts.
>
> We believe that those objectives have now been overtaken, or can better be achieved in other ways. Benign agreements can be taken out by the disclosure or publication mechanisms in the Bill. The Court of Appeal decided in the BA case that the cartel offence was not national competition law and their arguments did not depend on dishonesty, so unless the Court of Appeal's ruling were to be overturned by a higher court, the requirement is no longer needed to support that case. As for putting economic evidence before juries, ironically, the existence of the dishonesty requirement has actually opened the way for such evidence to go before juries. The judge trying the BA case decided such evidence was potentially relevant to the question of whether the behaviour had been dishonest.[121]

Mr Lamb went on to argue that adopting the test proposed by the Opposition "would make prosecutions more difficult and, in some cases, impossible":

> The amendment would require the prosecution to prove, in addition to other requirements, that the defendant intended that the arrangements would substantially reduce competition—that is what it says. That would introduce a significant impediment to prosecutions. Leaving aside the difficulties in assessing another's intentions, competition analysis is a complex area over which highly qualified experts can disagree, especially when it comes to such matters as how substantial an effect on competition an arrangement might be expected to have ... Putting in place a requirement to prove an intention substantially to impair competition would inevitably open the way to the jury being faced with evaluating complex, and no doubt conflicting, expert economic evidence, clearly significantly increasing the cost to both parties—to the prosecution and to the defence—of the whole exercise ...
>
> Worse, the amendment would substantially increase the chances that the cartel offence would be classified as "national competition law" under EU Regulation 1/2003. An offence that required proof that a substantial effect on competition was intended would look rather like competition law. If it were brought within the scope of EU law … the CMA would most likely be unable to prosecute any individuals where the European Commission was dealing with a case against the undertakings under the regulation. Of course, it tends to be the biggest cartel cases that are being investigated at European level.
>
> This is more than a theoretical concern. The only persons to have been successfully prosecuted under the current offence were involved in a cartel involving marine hose. The civil antitrust case against the undertakings concerned was dealt with by the European Commission … This was a case in which the defendants pleaded guilty and received substantial prison sentences. If accepted, the amendment would significantly increase the chances that the CMA would not be allowed to bring such a case.[122]

Ms Onwurah asked if the Minister could address the concerns of private sector witnesses, and consider "how the offence might be better worded", and Mr Lamb agreed to reflect on

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[121] ibid., cc554-5
[122] ibid., cc555-6

the Member's points "before Report, because we want to ensure that we get the provision absolutely right."[123]

Ms Onwurah also mentioned the provision made in **Clause 39** to exempt an arrangement from the scope of this offence, if it has been disclosed by the relevant parties to their potential customers. She was critical that the Government had not said exactly how these disclosure requirements would work in practice, and moved an amendment to require this type of disclosure to be made in electronic form:

> We leave it to the Government to come up with proposals that are more practical, but we have sought to help by suggesting that the company website could be a fitting location, in some cases, to publish competitive agreements. The sites are generally easily searchable, and if all such agreements were located under the heading, "Commercial Arrangements", they would be easy to find for all concerned. That should help ensure that cartel-like activities of undertakings can be easily identified by their customers.[124]

The Minister suggested that this was an unnecessary addition to the Bill – given that this provision allows the Secretary of State to specify these disclosure requirements by Order – and that there were potential problems in requiring disclosure of this form:

> The smallest companies may not have a website—of course, that is changing, but it will be the case for some businesses, although unusual. Even the smallest companies may agree to fix prices; for example, there have been cases of small shops in a particular locality agreeing to abide by common prices. There is also the question of which website is to make the relevant information available. Far from having no websites, big international businesses may have several. In the case of overseas companies, the main website may not be in the UK or even in English. I do not suggest that those are major problems or that it would be impossible to overcome them, but we do not need to face such difficulties in the Bill. [125]

The remaining provisions were agreed without debate.[126] **Schedule 15** covers minor and consequential amendments, and at this stage in the proceedings the Government moved a small drafting amendment to this schedule, which was agreed on the nod.

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[123] ibid., c557

[124] ibid., c554

[125] ibid., c557. Ms Onwurah withdrew both amendments without putting them to a vote.

[126] Specifically, **clauses 31-38** with **Schedule 13** (PBC 10 July c551), and, **clauses 40-48** with **Schedules 14-15** (PBC 10 July 2012 c558).

6 Reduction of Legislative Burdens

6.1 Sunset and review provision (Clause 49)

The Public Bill Committee debated provisions on sunset and review (**Clause 49)** on 12 July 2012. Iain Wright, the shadow minister, moved two amendments.

The first amendment would have ensured that:

> … prior to any sunset provisions being implemented, the review of the original legislation would include the views of businesses affected by that legislation and its possible repeal.[127]

The Minister, Mark Prisk, argued that the principle of engagement with stakeholders was a "vital part" of the process of reviewing regulations so a statutory requirement was unnecessary.[128]

The second amendment sought to ensure that sunset provisions would only take effect on the Common Commencement Dates (CCDs) of 6 April and 1 October, and that at least three months notice be given of new regulations and of regulations that would cease to have effect.[129]

The Minister told the Committee that the Government was "absolutely committed to the principle of CCDs … In that sense, there is no additional benefit from prescribing this requirement". The Minister also expected that regulations affected by sunsetting would be included in the statements of new regulation which would be published three months before CCDs.[130]

In his comments in the debate on clause stand part, the Minister noted that since the Government had adopted the principle of sunsetting, 88 pieces of new legislation had included a sunset or review clause. However, he noted that the ability to include them in secondary legislation was limited – depending on the legal powers under which the secondary legislation was made:

> The Government's policy on sunsetting regulations was set out in guidance in March 2011. Where regulation is no longer needed, or where it imposes a disproportionate burden, sunsetting can help remove that burden. In other cases, it will keep regulation up to date and support improvements where necessary. We are just over a year into the implementation of the new policy. In the period to April 2012, some 88 pieces of new legislation contained a sunset or review clause. A good example would be the change of the alcohol licensing provisions under the Police Reform and Social Responsibility Act 2011.
>
> At present, the ability to include a sunset or review clause for secondary legislation is dependent upon the legal powers or vires under which that legislation is made. In many cases, resolving questions around the legal powers absorbs significant legal resource and slows down the process. In a minority of cases, where the vires are found not to be sufficient, it can frustrate the implementation of the policy altogether. The clause will support the implementation of the Government's policy on sunsetting regulations by allowing sunset and review provisions to be included in any future

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127 PBC Deb 12 July 2012, c562; the amendment was withdrawn without a vote
128 ibid., cc563-564
129 PBC Deb 12 July 2012, cc566-568; the amendment was withdrawn without a vote.
130 ibid., c569

> secondary legislation where appropriate. Its effect will be to remove the issue of legal powers as a barrier to implementing that policy.
>
> The clause inserts a new section in the Interpretation Act 1978, which sets the legal framework for issues of statutory construction. The new section has the effect that, where there is a power or a duty in primary legislation to make subordinate legislation, a review or sunset provision may be included in that subordinate legislation.[131]

The Committee agreed that the clause should stand part without a division.[132]

6.2 Heritage protection (Clause 50 and Schedule 16)

Clause 50 and Schedule 16 of the Bill have a number of aims: to change the regime for demolition in conservation areas to bring it under the planning system; to change the way that buildings which fall within the curtilage of a listed building are listed; to make it easier to apply for a Certificate of Immunity from the listing of a building; and to establish Heritage Partnership Agreements (HPAs). HPAs would give the owner of a listed building, with approval of a group of interested parties in the building, permission to carry out certain types of work on the site without the need to apply for specific consent for each piece of work.

Opposition spokesman, Mr Wright, said the Bill's aim to merge conservation area consent and planning permission was "sensible" and "should not have an adverse effect on heritage protection."[133] He supported the clause and the schedule, but asked the Minister for clarification on a number of points. He was particularly concerned about funding and asked whether English Heritage and local planning authorities would be given more money to carry out their increased responsibilities.

Mark Prisk, Minister of State, Department for Business, Innovation and Skills, said that the aim of the Bill here was to maintain current levels of protection for heritage buildings while removing administrative duplication. In response to the question about whether there would be extra funding, he said that the measures in the Bill were about "streamlining the system and helping local authorities use their resources in a more focused fashion. Reducing the burden of having to deal with parallel processes will be beneficial in that sense."[134] Mr Wright later said that the Minister had "skirted over the issue"[135]

Mr Wright also asked about the new offence of failing to obtain planning permission for demolition of unlisted buildings in conservation areas (paragraph 5, Schedule 16). In particular, whether the fine of £20,000 was harsh enough to deter unscrupulous developers who could make millions of pounds for knocking down such a building and also whether there would be protection for people who knock down such a building out of genuine ignorance.[136] The Minister said the fines were "appropriate as they stand" but that he would "review them if we find that they are proving to be insufficient."[137]

The Minister also clarified to the Committee that the new regime for listed buildings would initially apply only in relation to new listings. He explained that English Heritage was undertaking a "prioritised programme" to update the list of entries of those categories of listed building that are subject to regular consent applications. He estimated that the changes in

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131 ibid., cc576-577
132 ibid., c578
133 ibid., c578
134 ibid., c583
135 ibid., c589
136 ibid., c580
137 ibid., c583

the Bill could result in a 10 per cent reduction in the number of listed building consent applications every year.[138]

Clause 50 and **Schedule 16** were agreed to without amendment.

6.3 Commission for Equality and Human Rights (Clause 51)

Clause 51 would amend the Equality Act 2006 (EA) by repealing the following provisions: the general duty (section 3, EA); the good relations duty (section 10 EA); the power to arrange the provision of conciliation for non-workplace disputes (section 27 EA). The Clause would also change the EHRC's duty to monitor its progress (Section 12 EA) and would change its reporting period from every three years to every five years. The Opposition was strongly opposed to this and stated that the Clause should be struck from the Bill. Iain Wright proposed a New Clause 14 and new Schedule 2 which would make the Commission accountable to parliament. Mr Wright stated:

> ...that the promotion and protection of equality and human rights is not, and should not be seen as, regulation. The Opposition therefore no longer have confidence that the Government will be a strong supporter of the commission charged with tackling inequality and human rights, and on that basis we tabled the new clause. The issue would be better served by having the commission independent of Government and accountable to us in Parliament.[139]

The New Clause and Schedule were not called to the vote.

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138 ibid., c584
139 ibid., c590

7 Miscellaneous and General Provisions

7.1 Copyright

Clauses in the original Bill

Clause 55 provides that industrially produced copies of an artistic work would enjoy the same copyright protection as unique art works, i.e. for the life of the original creator plus 70 years.[140] The clause was debated briefly and agreed to without division. The Minister, Norman Lamb, took the opportunity to emphasise that there would be an infringement only if the copy was a 'substantial part' of an original copyright work and that, as is the case at present, only items of "artistic craftsmanship" would be eligible for copyright protection.[141]

Clause 56 proved more contentious. The clause is a response to the difficulty that, where the *European Communities Act 1972* is used to amend exceptions to copyright and performance rights, this may currently restrict the maximum statutory penalties. An order-making power under this clause would allow amendment of any exceptions via secondary legislation, thus preserving the level of penalties in the substantive UK copyright legislation. Submissions to the Committee from professional bodies had argued that the wording of the clause was too loose to achieve such a specific aim.[142] The Committee considered two amendments moved by the Shadow Minister for Competitiveness and Enterprise, Iain Wright, to address this point. Their intention was to amend the clause, in the interests of clarity, "to provide that the powers it confers on the Secretary of State apply solely in the context of restricting the operation of copyright exception and regulatory penalties for copyright infringement".[143] The first amendment aimed to tighten the clause to ensure that any measure enacted under it was "appropriate". The second amendment specified that the clause could only be used to implement exceptions provided for specifically in the 1972 Act.[144] In general, Mr Wright was concerned that the procedures for scrutinising secondary legislation would not allow sufficient time if the Government decided, for example, to "bundle groups of exceptions together".[145]

In reply, Norman Lamb said that the first amendment would have the effect that the Government could only remove a copyright exception in its entirety, rather than being able to narrow, amend or broaden it. This would "straitjacket" the Government in the face of future technological change and judicial decisions. The other amendment, in the Minister's view, would be similarly restrictive: it would not, for example, allow the Government to change exceptions in response to domestic legal judgements in areas where the UK could still legislate independently of Brussels. Overall, he argued, the amendments would have the opposite effect of that intended by reducing the availability of maximum statutory penalties. In response to concerns about scrutiny of secondary legislation, he said that any use of the order-making power would be accompanied by an impact assessment and be subject to the affirmative resolution procedure.[146]

On division, both amendments were negatived by 11 votes to 6.

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140 "Industrially produced" in this context means that the article is one of more than 50 copies of an artistic work or it consists of non-handmade goods manufactured in lengths or pieces (such as carpets, wallpaper, etc). The Explanatory Notes to the Bill (para 418) give the example of a jeweller who makes a ring which qualifies for copyright protection as a work of artistic craftsmanship; the ring is then manufactured with more than 50 copies being made and marketed throughout the world.

141 ibid., c619

142 Quoted by Iain Wright at PBC Deb 12 July 2012 c626

143 PBC Deb 12 July 2012, c626

144 ibid., c628

145 ibid., c627

146 ibid., cc629-30

At the same sitting, the Committee discussed two new clauses in the name of Labour backbencher Fiona O'Donnell. The first (**NC 15**) provided that, where material is posted on the internet with the permission of the rights holder, it is not an infringement of copyright to circulate links to that material or to display it on a personal computer. The second (**NC 16**) aimed to create a new copyright exemption to enable wider distribution where material is released to the public under Freedom of Information.[147] Ms. O'Donnell suggested that NC 15 would bring UK copyright law more closely into line with the EU Information Society Directive.[148]

Norman Lamb responded that the Government found both proposed clauses problematic. Speaking to NC 15, he said that the dissemination of weblinks was the subject of a current court case and it would be inadvisable to legislate until the case has run its course. He confirmed that "there is already legal protection under copyright law for a person making a transient copy of a work if that is necessary for a lawful use, such as a display on a computer". Turning to NC 16, he argued that the clause posed a threat to the rights of third parties, who might find material in which they held copyright being widely distributed without their consent.[149]

New Government clauses

In November 2010 the Government commissioned the Hargreaves review of intellectual property. Professor Hargreaves published his report, which made wide-ranging recommendations, in May 2011.[150] There was a subsequent consultation exercise on implementing the proposals, to which the Government responded in part in July 2012.[151] In the Committee session on 12 July, the Opposition pressed the Minister on whether the copyright measures in the Bill were designed to implement Hargreaves' recommendations. The Minister replied that clauses 55 and 56 were "not part of the wider Hargreaves work". He continued: "The Government will make announcements about the outcome of that review and their response to it in due course."[152] At Committee stage the Government tabled three new clauses and an accompanying Schedule. These were debated on the final day of Committee stage and led to some lively exchanges, since, as the Minister was happy to confirm, two of the new clauses did, in fact, implement proposals in the Hargreaves report. He described these as the "first tranche of proposals", adding that "decisions on the rest of the consultation, including copyright exceptions, will be announced later in the year".[153]

The new clauses address areas of copyright law different from those touched on in clauses 55 and 56. A Library briefing note summarises the background to these measures and explores the issues further.[154] The Minister introduced the new clauses in considerable detail at the 17 July session. In brief, **New Clauses 11, 13** and **Schedule 1** allow the creation of "orphan works" schemes to open access to potentially valuable material that currently cannot be licensed or used; put in place a voluntary regime for extending "collective licensing" to help reduce complexities in the licensing system; and reserve a power to introduce statutory codes of conduct for collecting societies[155] if they fail to operate to minimum standards.

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147 ibid., cc620-1
148 ibid., c634; 2001/29/EC
149 Ibid., cc630-1
150 Intellectual Property Office, *Digital opportunity; a review of intellectual property and growth*, May 2011
151 HM Government, *Government policy statement: consultation on modernising copyright*, July 2012
152 PBC Deb 12 July 2012 c628
153 PBC Deb 17 July 2012 c710
154 *The Hargreaves Review of Intellectual Property* (HC Library briefing note)
155 The term refers to bodies such as the Performing Rights Society, the Copyright Licensing Agency and the Publishers' Licensing Society which collect copyright fees on behalf of their members

Existing copyright provisions for unpublished, anonymous and pseudonymous works mean that they remain in copyright until 2039 at the earliest. This has the consequence that potentially valuable assets cannot be used. The plan under **NC 11** and **NC 13** is that an independent body will authorise use of these so-called "orphan works"; there will be a registry of such works, and they will be licensed for an appropriate fee. If the original owner is subsequently found, that person will, of course, be able to reassert their rights over their intellectual property.[156]

The Minister summarised the new provision for "extended collective licensing" of copyright works in **NC 13**. The hope is that such measures will reduce the time and money spent on rights clearance:

> Extended collective licensing would allow qualifying collecting societies to apply to offer some non-exclusive licences on an "opt-out" basis. That means that, subject to rigorous safeguards, a collecting society that represents a significant number of rights holders could be authorised to license on behalf of all rights holders for a particular class of works. The absolute exception to that is where the rights holder says "no" to the collecting society by exercising his or her right to opt out of any ECL scheme.[157]

New Schedule 1 requires a collecting society to put in place a code of conduct which meets certain criteria. Where a collecting society fails to introduce an appropriate code, there would be a reserve power for the Secretary of State to put one in place. The Schedule is also drafted to ensure that the orphan works and extended collective licensing schemes also apply in respect of performers' rights.

These changes would be effected by way of amendments to the *Copyright, Designs and Patents Act 1988*. However, the clauses provide, in many cases, enabling powers only. In the Minister's words:

> Much of the operational detail about how orphan works, extended collective licensing, and the reserve power on codes of conduct will operate will be contained in regulations that we will develop. That will go through the full consultation process and ultimately be subject to approval by Parliament.[158]

Speaking for the Opposition, Iain Wright expressed concern at the "broad Henry VIII powers that the Secretary of State was giving himself".[159] He pressed the Minister for clarity on a number of points, including the constitution of the independent body for orphan works and the means by which the registry of orphan works would be compiled. Despite these reservations, he indicated that he found the Minister's presentation "quite reassuring" and he would not seek a division. He preferred to "reflect over the summer" on the issues raised by the new clauses and subject them to closer scrutiny at Report stage.[160]

New Clause 12 is prompted by the introduction of European Directive 2011/77/EU. The Directive extends the copyright term of protection for sound recordings and performers' rights from 50 to 70 years. Directives such as this are usually implemented using secondary legislation, under the *European Communities Act 1972*. However, the 1972 Act places a limit on the severity of penalties that can be associated with legislation introduced under it, and in the case of copyright the penalties already in place in the UK are greater than those provided

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156 PBC Deb 17 July 2012, cc711-12

157 ibid., c712

158 ibid., c714

159 A "Henry VIII clause" is a provision in a Bill which enables primary legislation to be amended or repealed by subordinate legislation, with or without further parliamentary scrutiny. The clauses were so named from the Statute of Proclamations 1539, which gave Henry VIII power to legislate by proclamation.

160 ibid., cc714-5

for by that Act. The clause is designed to allow the Government to implement the Directive while retaining the harsher UK penalties. The Minister said that, although this is a similar issue to that covered by clause 56, he was keen not to subsume one within the other because it "would have the unintended consequence of broadening the current narrow powers in clause 56".[161] The Opposition had tabled an amendment intended to broaden the scope of the exemption beyond sound recordings. The Minister responded that the amendment would create new order-making powers in new areas, something which "the creative industry sectors are anxious not to see happen". Again giving notice of his intention to return to this issue at Report stage, Iain Wright withdrew the amendment.[162]

Government New Clauses 11, 12, 13 and Schedule 1 were agreed and stand part of the Bill.

7.2 Directors' remuneration reports (Clause 57)

Clause 57 introduced the possibility of binding votes on directors' pay if a motion to that effect is moved on the company's AGM. During the course of 2011/12 there were a number of close votes on, and some defeats of, the normally routine directors' remuneration recommendations. This phenomenon had been dubbed the 'shareholder spring'. Government consultation on the rights of shareholders preceded the inclusion of this measure in the Bill. At the heart of both public and government concerns was the apparent disconnect between rewards given to the managers of large companies and the performance of those companies.

Between the Bill's first publication and Committee there was a major change in the Government's approach to this subject. The original Clause, Clause 57, was withdrawn by the Government and replaced with a package of new measures by way of four New Clauses:

- Government New Clause 5 – *Payments to directors : members' approval of directors' remuneration policy*
- Government New Clause 6 – *Payments to directors of quoted companies*
- Government New Clause 7 – *Payments to directors : minor and consequential amendments*
- Government New Clause 8 – *Directors' remuneration reports and payments to directors : transitional provision*

A full 'Notes On Clauses' note has been produced by the Department (BIS) on the New Clauses. It can be accessed here.

Outlining the new package the Minister, Norman Lamb, said:

> The Clauses that we have put forward would replace Clause 57 with a more comprehensive package of reform. The Clause would repeal section 439(5) of the Companies Act 2006, which currently prevents the statutory requirement for a resolution on the directors' remuneration report from having the effect of making a person's entitlement to remuneration contingent on the outcome of the resolution. It is that that makes the current vote on pay advisory in nature. Removing subsection (5) of the Act would make it easier for quoted companies to make payments to directors contingent on the resolution should they choose to do so, and should shareholders agree. However, we want to go further than that. In the light of the proposed New

[161] ibid., c719
[162] ibid., c720

> Clauses 5 to 8, which would introduce a binding shareholder resolution on directors' remuneration policy in all quoted companies, Clause 57 is no longer necessary. We will therefore oppose the motion that the Clause stands part of the Bill.[163]

Particularly in reference to New Clause 5 the Minister said:

> New Clause 5 introduces a new requirement for a shareholder resolution on the policy part of the director' remuneration report. In accordance with the proposed section 421(2A), the remuneration policy will be set out in a separate part of the remuneration report. That will contain information about performance measures and maximum possible pay-outs if targets are achieved as well as details of how the company would compensate a director in the event of loss of office. The contents of the report will be prescribed by regulation. The Committee will be aware that we have published a draft of the regulations to aid its consideration of the Bill, and consultations on those draft regulations are continuing through to 26 September. Companies will need to put to a shareholder meeting a resolution on the directors' remuneration policy in the first year these provisions come into force and at least every three years thereafter. That will require the support of a simple majority of those shareholders voting in order to be approved. If a company wants to make changes to its remuneration policy, it will need to put it back to shareholders for approval at a general meeting. That will promote a longer-term approach to pay policy and, far from watering down the original idea of an annual vote, when it was put to consultation the large majority of shareholders who responded—the hon. Gentleman mentioned one dissenting voice—believed that it was the right way forward. It is important, by the way, that if someone consults they listen to the responses.[164]

Outlining the practical implications of the Clause he said:

> Companies will continue each year to put to the AGM an advisory resolution on the remainder of the remuneration report, which is the backward-looking part on the actual payments I have just referred to, made to directors in the last financial year. If in any year they fail to get that vote, companies will have to bring forward a resolution on the remuneration policy at the next AGM. That triggers a vote at the next AGM.
>
> The advisory vote can achieve that trigger, calling companies to account if shareholders are unhappy with the way the remuneration policy is being implemented. That is a substantial strengthening of shareholder power.[165]

In response to questions the Minister confirmed that the new proposals would only apply to employment contracts agreed to after the New Clauses were tabled on 27 June 2012.[166]

On New Clause 6, payments to directors of quote companies, the Minister said :

> New Clause 6 would place new restrictions on remuneration payments and payments for loss of office that may be made to directors of quoted companies. So for the first time, there will be real, binding limits on what companies can pay. In future, all payments will need to be consistent with the approved policy in place at the time. That legislative provision is what makes the remuneration policy binding on a company; it will be binding once it has been approved by the shareholders at the AGM.

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163 ibid., c668
164 ibid., c668
165 ibid., c671
166 ibid., c670

> If the company wishes to pay beyond the levels approved in the policy, that will need to be approved in a separate, specific shareholder resolution. There will be sanctions if companies ignore the remuneration policy, so it has teeth. Any unauthorised payments made will need to be held on trust for the company, and the directors responsible will be liable for any costs incurred.
>
> The New Clause also makes it clear that any legal obligation that gives rise to a payment to a director that would be deemed unauthorised, is unenforceable. In other words, contracts cannot be used to trump the provisions in the legislation. That will ensure the remuneration policy cannot be undermined.[167]

On New Clause 7, payments to directors: minor and consequential amendments, the Minister said:

> New Clause 7 would make important, consequential amendments to various sections of the Companies Act 2006 to ensure that the proposed New Clauses are consistent with existing provisions in that Act. For example, it excludes quoted companies from the existing provisions in chapter 4 on payments for loss of office, because those companies will instead have to comply with the provisions set out in New Clauses 5 and 6.
>
> It also introduces a new requirement for companies to publish on their website, details of payments for loss of office made to departing directors. That will mean that shareholders no longer have to wait months to find out that information, again significantly increasing the power of shareholders. Shareholders can only exercise power if they have the information available on which to base judgments. It will cause companies to think more carefully about how exit payments will be perceived, which should help prevent the most egregious cases.[168]

Finally, about New Clause 8, Directors' remuneration reports and payments to directors: transitional provision, the Minister said:

> ...new Clause 8 deals with the transitional arrangements to help companies understand how and when these new rules will affect them and so that they can prepare. In particular, it makes clear how existing contractual provisions will be dealt with.[169]

For the Opposition, Iain Wright, proposed several amendments to these New Clauses but only two were pressed to a vote – both were defeated.[170]

One of the points of debate was on New Clause 5 where the Opposition questioned whether the proposed three year vote on directors' remuneration policy was sufficient and whether a yearly vote might not be better. The Minister replied that on the basis of the consultation, the three year period was more (but not universally) popular with both investors and with companies; it encouraged medium term thinking and, if at any stage investors were unhappy they could trigger an early review:

> We have, however, built in a safety net. If shareholders are not happy with how the pay policy is working out, they will be able to use the annual advisory vote on the report on pay to trigger a compulsory vote the next year. It is an important trigger, to which Sir David Walker referred —oh, look—as "ingenious" when he gave evidence to this Committee. It means that shareholders could force the annual binding vote on

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[167] Ibid., c671
[168] ibid., c672
[169] ibid
[170] ibid., c661

> remuneration policy should they wish to. Given the wide support for the Government's approach to the issue, we suggest gently that the amendment should be withdrawn.[171]

The Opposition put forward two New Clauses of their own:

- New Clause 17 – *Remuneration committees and non-executive directors*
- New Clause 18 – *High Pay Commission*

New Clause 17 would require: the inclusion of employee representatives on company remuneration committees; companies to demonstrate that board appointment are drawn from a 'diverse' background; and companies to demonstrate they are widening their search criteria for non-executive committees.

Supporting New Clause 17 the Opposition spokesman, Iain Wright, pointed to statistical evidence which suggested that there were sound business reasons for promoting more diverse boards. 'Companies with more women on their boards have a 42% higher return on equity'.[172] He supported the view that employees should be on boards by mentioning that 'the inclusion of employees on remuneration committees works elsewhere – most notably in Germany – and I see no reason why it should not work here.'[173]

The Minister rejected the New Clause as an inappropriate way of chairing these boards:

> The substance behind New Clause 17 has been debated in both Houses many times over the past few months. A successful company needs to have a board of the highest quality with the right mix of skills, knowledge and experience. The Government have been very clear about their commitment to board diversity as one critical way of promoting effective boards. The Secretary of State has spoken on numerous occasions about his desire to see directors recruited from a far more diverse range of backgrounds. This is not just about gender, but also about bringing in people with a wider range of professional experience as well.
>
> Companies should be looking outside the usual pool for recruitment. We have already taken steps to promote this. In October, a new provision of the UK corporate governance code comes into force requiring companies to report on their policy on boardroom diversity and what progress they have made. That is an important innovation that the Government have been keen to see. It is the first time that it has happened. This sits alongside a new ground-breaking code of conduct for executive head-hunters, which encourages them to recruit directors who are not currently on boards.
>
> [...]
>
> The appropriate way to deliver this objective is through the corporate governance code, by sharing best practice and through industry-led initiatives such as the excellent work led by Lord Davies. I pay tribute to him for the fantastic leadership that he has shown with regard to women on boards. That is the appropriate way to deal with this, not through company law.[174]

Mr Wright recommended New Clause 18, which would establish a statutory High Pay Commission, to mirror the existing Low Pay Commission. Its role would be as follows:

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171 Ibid., c675
172 ibid., c660
173 ibid., c661
174 ibid., c681 + 682

> We believe there is a need, given what is going on in boardrooms and elsewhere in corporate life, to have a body established by law to consider and make recommendations about high pay in society. We see this as the counterpoint to the Low Pay Commission, which was established by the National Minimum Wage Act 1998. The High Pay Commission should examine and monitor the level of directors' pay, both absolute and relative to the average pay of employees. It should also look at the nature of remuneration packages provided to directors—whether packages are becoming more complex and inherently risky—as well as the relationship between pay and performance, which we have discussed this morning.
>
> The shareholder spring has been activated to some extent by wider involvement in the issue. We therefore believe that the public should also provide their opinion on pay. We also believe that the High Pay Commission should report to the Secretary of State on such issues and make recommendations on high pay, so that we can have a wider debate in society about the level of pay of those who run our businesses. This point is not particular controversial, and I think that the Minister would be interested in the High Pay Commission's inclusion on the statute book.[175]

The Minister rejected the proposal on the grounds that it was not for Government to implement pay policies, but rather than allow shareholders the opportunity to exercise their views effectively. "After all it is their money at risk not that of bureaucrats in Whitehall."[176] He was sure that the newly formed, independent High Pay Centre, which would "carry forward the important research" begun by the High Pay Commission which ceased in December.[177]

Both Opposition new clauses were defeated on the vote.

7.3 Insolvency (Schedule 17)

Part 3 of **Schedule 17** of the Bill would repeal the 'early discharge from bankruptcy' provision contained in section 279(2) of the *Insolvency Act 1986 (*IA 1986).

The *Enterprise Act 2002* (EA 2002) introduced new section 279 into the IA 1986. Amongst its key provisions are:

- automatic discharge from bankruptcy after one year for most bankrupts, even if no payments have yet been made to creditors (section 279(1));
- reduction in duration of bankruptcy to less than 12 months, if certain conditions are met, known as early discharge (section 279(2))

For early discharge, the official receiver must file a notice at the court stating that an investigation of the conduct and affairs of the bankrupt under section 289 of the IA 1986 is unnecessary or concluded. Before filing this notice the official receiver is required by Rule 6.214A of the *Insolvency Rules 1986* to send a notice of his/her intention to begin the early discharge process to all the bankrupt's creditors and to any trustee (if one has been appointed).[178] Early discharge is intended to promote rehabilitation and reduce the stigma attached to bankruptcy.

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[175] PBC 17 July 2012, c662
[176] ibid., c692
[177] ibid. Information on the High Pay Centre can be found at: www.highpaycentre.org
[178] Under The Insolvency Rules (SI 1986/1925)

In 2007, an evaluation of the early discharge from bankruptcy provisions was carried out as part of a report on personal insolvency.[179] It concluded that discharge from bankruptcy earlier than the automatic one year did not have the desired impact of encouraging early rehabilitation.

Part 3 of Schedule 17 of the Bill was considered on 12 July 2012, during the fifteenth sitting of the Committee. No amendments to this part of the Bill were tabled and Part 3 of Schedule 17 was agreed to. However, the Opposition reserved the right to consider tabling amendments to this part of the Bill on Report.[180]

In considering Part 3 of Schedule 17 the Opposition spokesman, Iain Wright, confirmed that he was keen to work collectively and constructively with the Government to ensure that the bankruptcy regime was as conducive as possible to the economy's long-term growth and competitiveness.[181] However, he questioned whether Part 3 went far enough. He referred to the written submission of R3, a body representing insolvency practitioners, and their claim that the Bill represented a "missed opportunity to bolster the UK business rescue culture and to help protect the UK economy from the actions of unfit company directors".[182]

Mr Wright questioned whether all insolvency legislation should be revised to ensure that the country's long-term competitiveness was enhanced and that assets that were important to the economy were kept in this country.[183] He referred to the insolvency of the Coryton oil refinery as a relevant case study.[184]

In his response, the Minister, Norman Lamb, confined his remarks to individual bankruptcy. He explained that the Government was seeking to repeal the early discharge provision contained in section 279(2) because it had not had the positive impact expected.[185] Specifically, the provision had introduced considerable financial and administrative burdens into the bankruptcy case administration process. The average time at which early discharge was effective was eight months, so all that was achieved was four months, which was not a significant gain. The Minister claimed that repealing early discharge would save businesses £0.6 million a year, whilst having a single automatic discharge period would provide transparency and clarity in the bankruptcy regime. He said that the measure had the support of stakeholders, including bankrupts and creditors.[186] Only 15 per cent of bankrupts thought a discharge period of less than a year was appropriate.

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179 Insolvency Service, The Enterprise Act 2002 – the Personal Insolvency Provisions: Final Evaluation Report, November 2007

180 PCB 12 July 2012 c613

181 ibid

182 ibid

183 Ibid., cc613-614

184 The Coryton oil refinery closed in August 2012 after the site's owner Petroplus collapsed in January 2012. The site is to become an import terminal for petrol and diesel operated by Royal Vopak, Greenergy and Shell UK. It has been reported that the site's advanced refining capability is to be transferred to Shell's plant in Rotterdam

185 PBC 12 July 2012 c617

186 ibid., c617