

PENROSE REPORT PROPOSALS TO UPDATE THE UK'S COMPETITION AND CONSUMER PROTECTION REGIMES

On 16 February 2021, John Penrose MP published proposals to update and modernise the UK competition and consumer rules for an increasingly digitised economy. The proposals include increased powers for the Competition and Markets Authority (**CMA**) and, in the long-term, a substantial redesign of the competition regime.

HOW WILL THIS AFFECT COMPETITION POLICY?

In September 2020, John Penrose MP was asked by the Chancellor to prepare an independent report on how the UK's approach to competition and consumer issues could be improved in future, amid concerns regarding the effects on the UK economy of the coronavirus pandemic and the end of the Brexit transition period. The Penrose report is intended to inform the UK Government's policy-making going forward.

While some of the proposals would require an overhaul of the existing competition legislation, many of the changes can take effect faster through amendments to the competition regulators' processes and procedures.

PROPOSALS TO INCREASE THE CMA'S POWERS AND OBLIGATIONS

The Penrose report includes a series of proposals aimed at increasing the CMA's competition and consumer law enforcement powers. In particular:

- the CMA should be able to accept undertakings at any stage during a market study, market investigation, and merger review;
- the penalties for non-compliance with competition investigations, including failure to supply information, should be increased from fixed amounts (of £30,000 and £15,000 per day) to turnover-based fines used in other jurisdictions; and
- the CMA's civil consumer enforcement powers should be enhanced to match its competition powers, including powers to issue decisions and impose fines for infringements, without having to seek a court order.

In addition, the report also points to a number of additional actions for the CMA to take with the aim of increasing competition and protecting consumers. Specifically, the CMA should consider extending its digital advertising market study into a full-scale market investigation to address transparency concerns

Key issues

- The Penrose report includes a series of proposals aimed at increasing the CMA's competition and consumer law enforcement powers.
- A Network & Data Monopolies Unit should oversee firms that own and run new network and data monopolies.
- The scope of the NDMU's powers would be less extensive than those of the Digital Markets Unit planned by the Government.
- A taskforce should be established to undertake a substantial redesign of the CMA and CAT procedures to simplify and speed up cases.

related to the price paid by consumers through their data for digital goods and services. Penrose also recommends a series of measures to address consumer harm arising from:

- loyalty penalties and price discrimination, where the report highlights "*important and helpful new thinking*" on transactional fairness from the University of East Anglia's Centre for Competition Policy which could be incorporated into CMA guidance;
- "rip-offs" hidden in the small print of long and complicated contracts, where the report sees digital comparison tools as a potential antidote and recommends that their growth is monitored and, if necessary, encouraged; and
- "sludging" (*i.e.*, "nudging for evil"), for which the report recommends a CMA market study to identify consumer protection rules and techniques.

Other proposals for prompt change include simplifying the appeals system so that all appeals against sectoral regulators' decisions could be dealt with by the Competition Appeal Tribunal (**CAT**) (instead of the current mix of appeals to the High Court, the CAT and other tribunals, and the CMA). Penrose also recommends that cheap, efficient, fast-track competition courts are created for local and regional cases with very tight case management, short hearings and a low cost cap for losing firms.

A NEW NETWORK & DATA MONOPOLIES UNIT

The report proposes establishing a more focused Network & Data Monopolies Unit (**NDMU**) instead of the Digital Markets Unit (**DMU**) currently envisaged by the Government. It implicitly calls into question the notion of "digital markets" by raising concerns that a new regulator's powers could ultimately extend, through "*regulatory creep*," to the entire economy, given that "*everything is digitising*." As a result, the report considers it vital to ring-fence the NDMU's powers, and to ensure that the CMA's existing competition and consumer powers are used wherever possible.

In addition, the report proposes that the NDMU's powers should only apply to individual firms that own and run new network and data monopolies following a rigorous process for designation – a CMA market study followed by Parliamentary approval – but an easier process for removing such firms from the scope of the NDMU's powers.

The NDMU would be responsible for extending and promoting competition within its remit, where possible and proportionate. In line with the recommendations of the Furman Review in 2019, specific proposals in the Penrose report include:

- designing and enforcing a code of conduct;
- overseeing data portability schemes to enable switching and interoperability;
- providing access to key anonymised datasets, insofar as permitted by privacy and data protection rules; and
- using potential pro-competitive interventions to encourage new technologies, ensure fair and equal access to monopoly networks, require interoperability between networks, and make switching cheaper and more convenient.

Penrose also recommends that the NDMU's mandate to encourage competition through pro-competitive interventions should be extended to every sectoral regulator.

REVIEW AND REDESIGN OF THE CMA AND CAT

On the contentious issue of how best to simplify and speed up competition law investigations and appeals, the report confines itself to setting out some of the differing views of the CMA, CAT and competition lawyers. Other than a tentative conclusion that speed and efficiency may not be best served by a move to a US-style prosecutorial model for competition investigations, the report does not offer recommendations for reform. Instead, it proposes the establishment of a taskforce to undertake a complete review of CMA and CAT procedures and case management, from launch of an investigation through to appeal. The taskforce would be led by an independent senior expert and be comprised of representatives from business, the competition authorities and the CAT, as well as senior competition lawyers.

More generally, the Penrose report sees the CMA becoming a "*micro-economic sibling for the Bank of England's well-established public macroeconomic role*" and taking on responsibility for the overall progress of competition, consumer rights, supply-side reforms and productivity improvements. In particular, the report says that the CMA should publish an annual "State of Competition and Consumer Detriment" report which could be used to measure and analyse progress and problems across all sectors of the economy, together with metrics such as the number of CMA cases, and the direct impact of its market studies and investigations.

BETTER REGULATION, NOT DEREGULATION

The Penrose report advocates cutting regulatory burdens, and considers that Brexit provides an opportunity to replace "*all the much-criticised box-ticking, bureaucratic EU rules [...] with modern, digital equivalents which deliver the same standards at a fraction of the cost and time.*" It recommends reinstating the "*one-in two-out*" process and the gateway condition, which requires old rules to be removed or modernised before new rules can be introduced. This would apply to all forms of rule-making, with a view to reducing red-tape and costs for businesses.

IMPLICATIONS FOR THE LAUNCH OF THE DMU

The Penrose report was published just two months before the Government's proposed date for the launch of a new Digital Markets Unit within the CMA in April 2021. The DMU is intended to be responsible for enforcing a mandatory code of conduct against firms with strategic market status.

By contrast, the NDMU envisaged by the Penrose report would be significantly narrower in scope, and would only apply to network and data monopolies. The NDMU's proposed powers also appear to be less far-reaching, consistent with John Penrose's warning against mission creep.

The report was welcomed by the CMA's chief executive Andrea Coscelli, Business Secretary Kwasi Kwarteng and Chancellor Rishi Sunak. It remains to be seen to what extent the Government will implement the Penrose proposals.

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