



# Penrose review of UK competition policy

Building on and adding to recommendations for change

17 February 2020

On 16 February, John Penrose MP published his UK Government-commissioned report on potential improvements to the UK antitrust regime in a post-Brexit, post-Covid-19 world. This alert summarises the report's "recipe-book" of recommendations.

## Background

The UK Government commissioned John Penrose MP to undertake an independent review of UK competition policy last September. The review follows a number of policy developments including the UK Digital Markets Taskforce's **recommendations** for regulation of digital markets and the Competition and Market (CMA)'s **suggested changes** to the competition and consumer protection regimes. However, Penrose was specifically tasked with looking at how the UK's competition regime can be updated in the context of Covid-19 and, with the end of the Brexit transition period, the emergence of the UK as an independent trading nation.

Published on 16 February 2021, his '**Power to the People**' report sets out wide-ranging proposals to boost competition to benefit business and consumers across the UK. A new Competition Act to update and modernise the UK's competition institutions for the digital age is among his key proposals. But Penrose also considers that some changes could be made more quickly, through Government policy directions to the CMA and sector regulators, changes to regulators' internal processes and governance and by altering the Memoranda of Understanding between them.

## Faster and more predictable competition decisions

To achieve the overall aim of quicker and better enforcement, Penrose recommends the following actions, many of which align with existing CMA recommendations.

- **Boosting the CMA's role as the competition and consumer champion:** Penrose calls for the CMA to improve its standing as a regulator by becoming “a micro-economic sibling for the Bank of England's well-established public macro-economic role, responsible for tracking progress of UK competition, consumer rights, supply-side reforms and productivity improvements”. Specifically, he considers that the CMA should publish:
  - An annual ‘State of Competition and Consumer Detriment’ report which measures and analyses progress and problems across all sectors of the UK-wide economy. The CMA and sector regulators should then use the findings, alongside other elements, such as the number of cases and the direct impact of investigations, to gauge their progress.
  - The conclusions and findings of its monthly meetings with consumer complaints organisations.

The intention is that these publications explain and direct the CMA's decisions as to which industries or markets it chooses to investigate and which firms it launches proceedings against.

- **Upgrading the CMA's consumer powers:** Penrose recommends that the CMA's civil consumer enforcement powers be updated so that the CMA can decide cases itself and impose fines in the same way as it already does for competition law cases.
- **Toughening penalties for procedural breaches:** Penrose suggests that penalties for non-compliance with investigations, such as failing to respond in a full, timely and accurate way to information requests, should be strengthened. Turnover-based fines of between 1% and 5% are suggested.
- **Earlier settlement in markets and mergers work:** To avoid unnecessary delays, work and expense and to reach a solution faster, Penrose recommends that the CMA should be able to accept legally-binding undertakings at any stage in a market study, market investigation, or phase 1 or 2 merger control review.
- **Co-operating internationally:** To help the CMA work with other antitrust regulators on global cases and decide cases more quickly and fairly, Penrose mandates the Government with pursuing international co-operation arrangements for appropriate and safe information exchange.
- **Single appeal tribunal:** Penrose supports a prompt implementation of the CMA's proposal to simplify the current “complicated thicket” of different appeal routes for sector regulators' decisions so that they are all dealt with by the Competition Appeal Tribunal (**CAT**).
- **Redesigning and future-proofing the process:** There is general consensus that current case duration – from the launch of a CMA probe to the completion of a potential CAT appeal – is too lengthy, but no agreement as to how to resolve the issue fairly. Penrose suggests that the Government establish a taskforce to complete an end-to-end review and redesign of procedures and case management in the CMA and CAT. The taskforce should be led by a legal management expert, appointed by Ministers, who is independent of both the CMA and CAT. But it should involve all of the CMA, CAT, business leaders, investors, entrepreneurs and start-up representatives, sector regulators and senior competition law practitioners. And no internal governance or statutory process requirements, including appeal standards, should be off the table. That includes consideration of the adoption of a ‘prosecutorial model’ for cases, the scope for an updated ‘fast track’ route for some mergers, and a switch to an ‘enhanced judicial review’ standard for

regulatory appeals. The reformed end-to-end process the taskforce creates would have to deliver three equally-important goals:

1. Resolve all but the very few most complicated cases (competition, consumer or mergers) within weeks or months rather than years;
2. Be as predictably simple and certain as possible, so that business leaders and investors can take decisions with minimal legal risk, and so small entrepreneurial firms with limited legal budgets aren't disadvantaged; and
3. Fulfil the 'fair trial' requirements of Article 6 of the European Convention on Human Rights.

To future-proof its work, Penrose considers that a reformed taskforce should review its work in five years, and recommend any further required changes.

## Digital-specific proposals

To counter the risk of 'regulatory creep' across every digital sector of the economy, Penrose strongly suggests that the CMA's **new digital unit** should be called the Network & Data Monopolies Unit (**NDMU**) and that its "extra-strong upfront powers" are: (i) ring-fenced from the CMA's existing competition and consumer powers so that the latter are used wherever possible; (ii) applied only to individual firms that own and run new network and data monopolies, rather than to the rest of the sector in which they operate; (iii) applied only to problems which the CMA's existing powers cannot solve already; and (iv) only extended with Parliament's consent. So, for example, to add a new monopoly, the CMA should be required to undertake a market study and then write a public letter to its Government Minister explaining that a new monopoly has emerged and asking Parliament to approve an extension to its powers through secondary legislation. In contrast, the CMA should be able to abolish powers over a former monopoly without Parliament approval.

At the same time, Penrose proposes that the NDMU (and indeed every sector regulator) has a legal duty to extend and promote competition in the monopolies it regulates, by making pro-competition interventions to reinstate normal competitive conditions wherever it is possible and proportionate. For the NDMU, this should include:

- designing and enforcing a pro-competitive code of conduct to give both smaller players and incumbent platforms greater certainty;
- overseeing data portability schemes so that users can seamlessly switch providers and interoperate services; and
- allowing access to key anonymised incumbent data sets where privacy and data protection are not an issue.

Other interventions envisaged include ensuring fair and equal access to monopoly networks for all suppliers and customers, requiring interoperability between networks and making switching cheaper and more convenient.

On data and privacy, Penrose questions whether the CMA should extend its initial **market study into online advertising** into a market investigation. He considers that the resultant increased transparency of the price consumers pay for digital goods and services through their data would facilitate comparison and switching between platforms.

## Reduction in red tape

Penrose advises the Government to cut regulation by reinstating the gateway condition (so new rules cannot be introduced until old ones have been removed or modernised), moving to a 'one-in-two-out' system and including all forms of Government and regulator rule-making in the new process, with no exceptions. He also encourages the Government to implement the broad changes outlined in its new public procurement green paper as quickly as possible.

## More competition in regulated sectors

Penrose would like to see each of the sector regulators publish and execute a multi-year project plan and thereby hand over responsibility for more and more of its sector to the CMA as a 'normal' competitive market, in time leaving the regulator with just the industry's core network monopoly. And he would like to see their legal duties audited and amended to have a strong, clear 'competition for the benefit of consumers first, regulation only as a last resort' primary legal duty. Penrose also suggests processes for the potential transfer of residual economic duties to the CMA/NDMU.

## Decentralised competition enforcement

To ensure access to justice for smaller firms away from London, Penrose pushes for the creation of "new, cheap, efficient, fast-track Competition Courts for local and regional cases" with tight case management, a low cost cap for losing firms and a one or two-day maximum hearing length.

Penrose also sees a greater role for local authority trading standards (**LATS**) teams, including powers to launch antitrust and consumer investigations in cases considered too small to warrant a full-scale CMA investigation and, for example, to join forces with neighbouring LATS to tackle regional cartels.

## Sticking up for consumers

Penrose makes recommendations to deal with: (i) loyalty penalties and price discrimination; (ii) 'information asymmetries' that allow unfavourable terms to be hidden in the small print of long and complicated contracts (including tracking the growth of digital comparison tools); and (iii) 'nudging' consumers to make poor decisions (including for the CMA to carry out a market investigation to assess how so-called 'sludge' should be recognised and measured, and to identify what consumer protection rules and analytical techniques will be needed to protect consumers from it as digital technologies evolve and develop over time).

## Minimal state intervention

Penrose generally favours avoiding subsidies to keep the UK economy competitive (see our **alert** on the Government's new subsidy control regime consultation). And, without significant reference to the **National Security & Investment Bill**, he suggests that Ministers develop new options on how to prevent successful UK-based firms in fast-growing sectors from being bought and moved abroad for non-commercial reasons, without damaging the country's attractiveness for foreign direct investment.

## So where next?

The Government **promises** to consider the recommendations set out in the report and respond in due course. However, with the CMA agreeing that Penrose's proposals would insert strength, speed and flexibility into the UK competition and consumer regime, it will face increasing pressure to prioritise more general reforms as well as those tackling digital markets

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