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## The Penrose Report: A roadmap for a future-proof competition regime?

In September 2020 Robert Penrose MP was commissioned by the UK Government to prepare an independent report, investigating how the UK could improve its approach to competition and consumer issues, in order to "build back better" in a post-Covid-19, post-Brexit world - helping to drive innovation and grow a dynamic and competitive economy.

On 16 February 2021, Mr Penrose MP's 70-page report entitled "*Power to the People*" ("**Report**") was published. It is broadly positive about the state of competition and consumer enforcement in the UK, but it does identify a number of issues, including the fact that the Competition and Markets Authority ("**CMA**") is lagging behind its international peers in terms of the number of enforcement cases it pursues and the levels of fines it imposes for competition law breaches. Processes are too slow and require businesses to employ expensive legal teams, thus favouring deep-pocketed incumbent firms over smaller, entrepreneurial companies. Competitive pressures have also got weaker in the last 20 years and consumers feel ripped off when buying some products and services (e.g. energy and car insurance).

The Report proposes a number of very far-reaching, ambitious and diverse proposals to reform the competition and consumer regimes in the UK which, if implemented, will result in a significant overhaul of the existing regime.

This briefing highlights the main proposals included in the Report to help develop a speedier, simpler and more efficient competition landscape across the UK, improving choice and outcomes for consumers. It also briefly notes the potential impact of these on companies doing business in the UK.

### Tackling digital markets

The most radical proposal is new legislation to update and modernise the UK institutions for the new digital economy.

While the Report is fully supportive of the Government's plans to tackle competition problems in digital markets and endorses the setting-up of a dedicated Digital Markets Unit ("**DMU**") within the CMA to oversee a pro-competitive regime for digital

platforms, it cautions against granting the DMU upfront powers that may introduce unnecessary red tape and regulatory burden. The Report suggests that the DMU be named the Network and Data Monopolies Unit ("**NDMU**"). In addition, in order to avoid "regulatory creep", it proposes that the NDMU's powers be ring-fenced from the CMA's existing competition and consumer powers, and that these only apply to individual firms that own and run new network and data monopolies rather than to the digital sector in general. In addition, it proposes that the powers should only be applied to problems which the CMA's existing powers cannot solve already, with parliamentary consent being required for any extension of the monopolies covered.



Also proposed is the imposition of a legal duty on the NDMU to extend and promote competition in the monopolies it regulates, by making pro-competition interventions to reinstate normal competitive conditions wherever possible and proportionate, including:

- designing and enforcing a pro-competitive code of conduct to give both smaller players and incumbent platforms more certainty on the acceptable rules of the game;
- overseeing data portability schemes so 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.

The Report notes that this duty should be extended to all other sector regulators.

### Increased CMA powers

The Report proposes updating the CMA's civil consumer enforcement powers to bring them into line with its competition powers so that the CMA can decide cases itself and impose fines in the same ways as it already does for competition law cases (i.e. without having to seek a court order).

The Report also proposes increased penalties for non-compliance by companies with investigations (e.g. through non-provision of evidence or provision of false or misleading information). Turnover based fines of between 1% and 5% are suggested (instead of fixed penalties of up to the maximum of £30,000).

The Report calls for increased flexibility in merger and market investigations, including the ability for the CMA to accept legally-binding undertakings at any stage in a market study, market investigation, or a Phase 1 or 2 merger review in order to reach solutions faster and avoid unnecessary expense.

The Report also considers whether the UK should introduce a merger regime which incorporates mandatory notifications and fixed waiting periods like the majority of other developed economies – especially in light of the mandatory filing regime set out in the National Security & Investment Bill.

### Reform of CMA processes and functions

The Report advocates changes to regulators' internal processes and governance. In particular, it recommends that the CMA assume responsibility for the overall progress of competition, consumer rights, supply-side reforms and productivity improvements in the UK, including publishing an annual '*State of Competition and Consumer Detriment*' report which measures and analyses progress and problems in both these areas across all sectors of the economy, and all parts of the country. The Report calls for the CMA to become a micro-economic sibling for the Bank of England's macro-economic role.

It also suggests that the CMA hold monthly intelligence-gathering meetings with consumer complaints organisations and publish the conclusions/findings of these meetings where appropriate.

### Focus for CMA's efforts

The Report has a number of targeted recommendations for where the CMA should focus its efforts (including in relation to the digital economy)

in order to help increase competition and protect consumers. In particular, it advocates:

- The potential extension of the CMA's online advertising market study into a full-scale market investigation to address transparency concerns relating to the price paid by consumers through their data for digital goods and services;
- The opening of a market investigation into digital "sludge" – i.e. digital nudging of consumers to make bad purchasing decisions – in order to assess how to recognise and measure sludge in future, and identify what consumer protection rules and analytical techniques might be needed to protect consumers from it as digital technologies evolve and develop;



- Consideration of 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);
- A closer look at loyalty penalties and price discrimination (where customers are said to be charged more over time for staying with the same supplier); and
- The consideration by the CMA of how to introduce more competition into local digital monopolies (e.g. public wifi networks).

### Interaction between sectoral regulators and the CMA

The Report proposes alterations to the web of Memoranda of Understanding between the various sectoral regulators and the CMA, advocating for the return of responsibility for competition in sectors with network monopolies of regulated assets (e.g. aviation, financial services, gas and electricity) from the sector regulators back to the CMA which would

have primary responsibility for the enforcement of competition and consumer law across all sectors in effect.

Sector regulators would be left with responsibility for injecting competition into their core network monopolies – for instance, by independently auctioning contracts to build/upgrade network monopoly infrastructure and eroding the strength of network monopolies through encouraging data sharing or reducing barriers to entry.

In particular, the Report advocates for increased scrutiny of sectoral regulators, including a requirement for each of these to publish multi-year project plans and proposes amending the sectoral regulators' legal duties so that their primary duty is "*competition for the benefit of consumers first; regulation only as a last resort*".

### Reform of judicial regime for competition law cases

The Report is critical of how competition complaints are currently handled by the regulators and the courts – especially the "complicated thicket" of different legal routes and rules that companies must navigate when they want to bring competition law actions or appeal decisions. The Report advocates for the simplification of the existing appeals system for competition cases so that any appeals be dealt with by the Competition Appeal Tribunal ("**CAT**") (currently, depending on the nature of an appeal, it may be heard by the High Court, the CMA or the CAT).



It also proposes that the Government establish a taskforce, led by a minister-appointed senior expert in managing legal processes efficiently, who is independent from both the CMA and the CAT, to conduct an end-to-end review and redesign of procedures and case management at the CMA and the CAT. The taskforce would include the CMA, the CAT, business leaders, investors, entrepreneurs and start-up representatives, sector regulators and

senior competition law practitioners and would consider issues including whether to switch to a 'prosecutorial model' for CMA cases, the scope for an updated 'fast track' route for some mergers, and a switch to an 'enhanced judicial review' standard for regulatory appeals.

In the Report's view, the redesigned process must:

- resolve all but the small number of most complicated cases (competition, consumer or mergers) within weeks or months rather than years;
- be as predictably simple and certain as possible, so that business leaders and investors can take decisions with minimal legal risk, and so that small entrepreneurial firms with limited legal budgets are not disadvantaged; and
- fulfil the 'fair trial' requirements of Article 6 of the European Convention on Human Rights.

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

In order to provide better access to justice for firms outside of London, the Report also proposes reforms at the local level. It suggests making Small Claim Courts and Alternative Dispute Resolution services fully 24/7 and easy, cheap and simple to use. The Report also advocates for the creation of new, cheap, efficient, fast-track County Competition Courts for local and regional cases (the tier below existing CAT fast-track cases) with very tight case management, a low cost cap for losing firms and a one- or two-day maximum hearing length.

### Government-led initiatives

In order to assist the CMA to work with other competition regulators on global cases and to decide cases more quickly and fairly, the Report advocates the pursuit by the Government of cooperation arrangements with other global jurisdictions to allow appropriate and safe information exchange.

The Report also generally favours avoiding subsidies to keep the UK economy competitive – especially now that the UK has left the EU and can decide for itself whether or not to subsidise particular industries. Although the UK's Department for Business, Energy & Industrial Strategy has recently announced the commencement of its consultation regarding a new UK subsidiary regime, the Report appears to reject the idea of creating any such subsidy regime in the UK.

The Report also proposes that ministers develop new ideas on how to prevent fast-growing UK-based firms in fast-growing sectors from being poached offshore for non-commercial reasons, without damaging the UK's attractiveness for foreign direct investment. Political intervention in foreign direct investment into the UK should be limited and controlled. The Report recognises the challenges contemplated by the National Security & Investment Bill in this regard - how to identify potentially problematic deals without damaging the UK's attractiveness for foreign investors.

## Other proposals

Other proposals include:

- Updated and streamlined public procurement rules to make it easier for smaller companies to bid for public sector work;
- Cutting regulation by requiring that no new rules can be introduced until old rules have been removed or modernised (a so-called "one-in-two-out" policy). This would apply to all forms of rule-making, with a view to reducing red-tape and costs for businesses;
- The creation of a new statutory duty for minimum standards in local authority trading standards teams, including powers to launch competition and consumer investigations; and
- The application of general consumer-protection regulation across the entire economy whereby firms are required to offer the same prices to new and existing customers.

## Implications

The Report proposes far-reaching and wide-ranging measures to reform the UK's competition regime. Although a number of the proposals, even if approved, would take some years to implement fully (for example, changes to legislation and to the judicial system) others, such as amendments to the relationship between the CMA and sectoral regulators, could be implemented relatively quickly with the requisite political will.

Overall, the proposals appear to pave the way for tougher competition regime, with a more powerful, aggressive CMA now prioritising consumers. The focus on reforms to policing the UK's digital economy is also highly topical, given the regulatory action being taken elsewhere in the world in respect of key players in this market. In short, the Report fires a warning shot to companies that a post-Brexit Britain will not be a soft touch from a competition perspective.

The Government will now consider the recommendations, which are not Government policy, but have already been welcomed by Chancellor Rishi Sunak and new Business Secretary Kwasi Kwarteng. It remains to be seen to what extent the UK competition law regime will change in the future.

## Contact us



**Marta Isabel Garcia**

Partner

T: +44 20 7809 2141

E: [marta.garcia@shlegal.com](mailto:marta.garcia@shlegal.com)



**Rhiannon Davies**

Senior associate

T: +44 20 7809 2033

E: [rhiannon.davies@shlegal.com](mailto:rhiannon.davies@shlegal.com)



**Anna Victoria Delahey**

Senior associate

T: +44 20 7809 2013

E: [anna.delahey@shlegal.com](mailto:anna.delahey@shlegal.com)



**Will Spens**

Associate

T: +44 20 7809 2365

E: [will.spens@shlegal.com](mailto:will.spens@shlegal.com)