

Putting Customers in Charge: Penrose Report on the State of UK Competition

15 March 2021

On 16 February 2021, John Penrose MP published an [independent report on improving competition and consumer protection in the UK](#) (the Report). It finds that the UK's competition and consumer regime *"has a good reputation, but not a great one"*; progress on *"cutting the costs of red tape"* has stalled; excessive regulation has left *"important industries more ponderous and less focused on their customers than they should be"*; and competition has weakened over the past 20 years, leaving consumers feeling *"ripped off."* To address these shortcomings, the Report makes a series of recommendations aimed at galvanising UK competition and consumer protection, promoting creative and light-touch regulation, and ensuring that regulation and competition are *"on the side of customers rather than of politicians, bureaucrats or company bosses."*

The Report's most significant recommendations include: (i) strengthening the CMA's powers to enforce consumer protection law; (ii) implementing measures to expedite, simplify, and introduce new forums for competition proceedings; (iii) cutting burdensome regulation and narrowing sectoral regulators' responsibilities; (iv) supporting the CMA's proposal to create a Digital Markets Unit; and (v) allowing greater scope to intervene in mergers that threaten to move operations offshore.

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Context

The Report is the latest in a series of publications in the past two years addressing the UK competition and consumer protection regimes, including:

- A [letter from Lord Tyrie](#), former Chairman of the Competition and Markets Authority (CMA) to the Department of Business, Energy & Industrial Strategy (BEIS) in February 2019, which called for the introduction of mandatory merger control filings, increased enforcement powers for the CMA, and greater focus on consumer interests.
- [The Furman Report](#) on ‘Unlocking Digital Competition’ in March 2019, which recommended a more flexible legal standard for intervening in acquisitions by digital platforms, and the creation of a Digital Markets Unit (DMU), with ex ante regulatory powers.
- [The CMA’s market study into digital advertising and online platforms \(completed in July 2020\)](#), which supported many of the recommendations in the Furman Report, and was followed in December 2020 by [advice to government from the CMA’s Digital Markets Taskforce](#) on implementing digital ‘codes of conduct’.
- [The CMA’s report on the state of competition in the UK](#), which found that competition across the UK economy has declined in the last 20 years, while market concentration is higher than it was in 1998.

Drawing on these prior studies, the Report makes recommendations for how the UK competition regime can:

- Meet the challenges of the post COVID-19 economic recovery;
- Contribute to the Government’s ‘levelling-up’ agenda;
- Increase consumer trust by tackling “*consumer rip offs and bad business practices*”;¹

¹ Foreword to the Report.

² Ibid.

- Ensure the competition regime is “*strong, swift, flexible and proportionate*”;²
- Support UK ‘disruptor’ businesses; and
- Make the best use of data, technology and digital skills in the wider economy.

The following sections discuss the Report’s main recommendations.

Recommendations

An expanded role for the CMA

The Report envisages a more active role for the CMA in shaping the conditions of competition in markets. The CMA’s new role would include responsibility for the overall progress of competition, consumer rights, supply side-reforms and productivity improvements, with a view to the CMA becoming “*a micro-economic sibling for the Bank of England’s well-established public macro-economic role*.”³

Under the proposals, the CMA would publish annually a wide-ranging ‘State of Competition and Consumer Detriment’ report addressing competition and consumer protection in all sectors of the economy and all parts of the country.

The CMA would also gain the power to determine that a business has violated consumer law – and impose fines directly – rather than having to apply to courts for cease and desist orders.

Faster and more predictable competition decisions

The Report argues that competition cases, from initial investigation by the CMA to appeals in the Competition Appeal Tribunal (CAT), are “*cumbersome and clunky*”⁴. It proposes a Government taskforce to redesign the CMA and CAT procedures and case management powers to achieve three core objectives:

- Expedite cases, ensuring that all but the most complicated cases are resolved within weeks or months, rather than years;

³ Section 2.1 of the Report.

⁴ Section 2.7 of the Report.

- Ensure that outcomes are “*as predictably simple and certain as possible*”;⁵ and
- Ensure that rights to a fair trial under Article 6 of the European Convention on Human Rights are properly observed.

The taskforce would include representatives from business, the legal profession, and regulators; would be led by a ministerial appointee that is independent from the CMA and the CAT; and would reconvene every five years to ensure that the three core objectives are being met (and propose further reforms if they are not).

The Report does not pre-empt the work of this taskforce, but makes four preliminary recommendations:

- The CMA should be able to accept legally-binding undertakings from parties at any stage of a merger investigation, market study, or market investigation;
- The CMA should continue to cooperate internationally with other national competition agencies;
- All appeals from decisions of sectoral regulators should be heard by the CAT (not the CMA or other Courts); and
- Firms that fail to respond properly to CMA information requests should face higher fines than the maximum currently allowed by law (£30,000 total or £15,000 per day).

Cutting red tape and promoting ‘better regulation’

Alongside a strengthened competition and consumer protection regime, the Report advocates reducing the regulatory burden on businesses. It argues for ‘better regulation’ as a middle path between deregulation (“*which might sweep away some of the important standards we need to protect ourselves or our environment*”)⁶ and red tape (which “*slows businesses down, focusing them on lobbying their regulators*

instead of delighting their customers, and making them less creative and efficient”).⁷

The Report views this middle path as essential to realising a ‘Brexid Dividend’, whereby current regulations are replaced with “*lower-cost competition and consumer rules*”.⁸ It supports the ‘better regulation’ principle: that existing regulations should be removed or modernised before new regulations are introduced. And it argues that the government should treat new regulation only as a “*last resort*”⁹ once lighter touch alternatives have been excluded, such as codes of conduct, self-regulation, and behavioural nudges.

More competition in the digital sector

The Report cites findings from other recent studies that some digital markets have become more concentrated: driven by network effects, some firms have large data pools to develop and personalise their services, high fixed costs, limited interoperability, and strategies that exploit consumer biases to restrict choice (so-called ‘nudge and sludge’ techniques).

The Report cautiously welcomes the CMA’s plans to establish the DMU, as well as contemplated codes of conduct for digital firms with ‘strategic market status’, and ‘pro-competitive interventions’ to address the sources of firms’ market power.

The Report warns that excessive use of the DMU’s new powers could, however, increase the regulatory burden on business. To avoid ‘regulatory creep’, the Report recommends that the DMU should be renamed the Network & Data Monopolies Unit (NDMU), should only apply to individual firms that own and run so-called ‘network and data monopolies,’ and should use its regulatory powers only when the CMA’s existing competition powers are inadequate. Any request to expand the NDMU’s remit would be subject to parliamentary approval.

Despite these safeguards, the Report’s ambitions for the NDMU are significant, envisaging that it would

⁵ Ibid.

⁶ Section 9.3 of the Report.

⁷ Section 3.1 of the Report.

⁸ Section 3.3 of the Report.

⁹ Section 3.2 of the Report.

play an important role in “*rebuilding normal competitive markets*”.¹⁰ Further, and despite the Report’s concerns about ‘regulatory creep’, it proposes that the NDMU should be able to make “*pro-competition interventions to reinstate normal competitive conditions wherever it’s possible and proportionate*”.¹¹ These interventions could include:

- Designing and enforcing a pro-competitive code of conduct;
- Overseeing data portability schemes so users can seamlessly switch providers;
- Allowing access to anonymised versions of important datasets, provided privacy and data protection can be ensured;
- Facilitating and encouraging new technologies that erode the power and strength of existing networks;
- Ensuring ‘fair and equal access’ to a monopoly network for all suppliers and customers;
- Requiring interoperability between networks; and
- Measures to make switching suppliers cheaper and more convenient. As examples, the Report identifies:
 - Open banking, which allows customer data from bank accounts to be shared with third party providers;
 - The Data Transfer Project, supported by Google, Apple, Microsoft, and Twitter, which allows customers to move their data, transaction history, and preferences seamlessly between competing products; and
 - Choice screens that prompt consumers easily to change default providers (such as online search engines) on their electronic devices.

The Report further recommends that the CMA build on its [Online Advertising Market Study](#) by considering future market investigations into the

‘price’ consumers pay through their data in return for accessing digital goods and services.

More competition in regulated sectors

The Report envisages a greater role for the CMA in regulated sectors, such as electricity, gas, and water, while reducing regulatory burdens.

First, existing sectoral regulators with concurrent competition powers should strive to increase competition in their respective sectors. Each sectoral regulator should be required to publish a project plan demonstrating how they intend to achieve this objective.

Second, as these sectors return to “*normal ‘pro-consumer’ ...markets*”¹², responsibility should be transferred to the CMA, leaving sectoral regulators with responsibility only for the core assets of ‘network monopolies’ such as gas pipes, electricity grids, railway tracks or water and sewage pipes. In time, the Report envisages the role of sectoral regulators being entirely subsumed by the CMA, with regulators’ residual oversight of core network monopolies being handed to the NDMU.

Third, sectoral regulators should be subjected to a strengthened ‘better regulation’ target and their legal duties should be audited and amended. They should be left with a primary duty to achieve “*competition for the benefit of consumers first*”,¹³ leaving “*regulation only as a last resort*”.¹⁴

Fourth, contracts for building and upgrading network monopoly infrastructure should be independently auctioned, thereby opening up regulated sectors to disruptors and greater competition.

Levelling-up through more competition

The Report identifies a need for more competition and consumer protection enforcement outside the South-East of England. It identifies three ways of

¹⁰ Section 4.3 of the Report.

¹¹ Section 4.3 of the Report.

¹² Section 5.3 of the Report.

¹³ Ibid.

¹⁴ Ibid.

broadening local access to competition and consumer law remedies.

First, Small Claims Courts and ADR services should be made simpler, less-expensive and more accessible, to encourage consumers to hold businesses to account.

Second, businesses should be able to litigate competition law disputes in the County Courts. This reform would enable dispute resolution in respect of antitrust matters that are too small to attract the CMA's attention. The Report states that competition cases pursued in the County Courts should be dealt with quickly and inexpensively by (i) making use of strict case management powers; (ii) limiting hearings to one to two days in length; and (iii) setting low cost caps for unsuccessful parties.

Third, the Report recommends that local authority trading standards teams should be given new powers and greater resources to investigate consumer abuses. The Report recommends that trading standards teams should be subject to new statutory duties to correct for under-enforcement. Under the proposals, trading standards teams would be given new powers to conduct competition and consumer investigations.

Addressing new forms of consumer exploitation

The Report identifies three ways to improve the UK's existing consumer protection regime.

First, the CMA should address the prevalence of price discrimination (*i.e.*, where certain discounts or offers are only made available to new customers). The Report recommends that the CMA update its guidelines to include a 'fairness test'. Transactional fairness requires that businesses: (i) do not use deceptive practices such as concealing important information in the small print; (ii) do not have practices that hinder customer switching, including ensuring that switching processes are simple and convenient;

and (iii) are able to explain the rationale for their pricing practices and how they benefit customers.

Second, information asymmetries between buyers and sellers prevent customers from making informed choices. The Report recommends that the CMA monitor and support the growth of digital price-comparison tools and considers measures to ensure that price comparison tools prosper.

Third, the CMA should combat the use of anti-consumer nudging (*i.e.*, where businesses use behavioural insights to disadvantage customers). The Report mentions the example of websites displaying a 'countdown' for offers or listing the number of customers currently viewing a product so as to create a sense of urgency.

Political intervention in international mergers

The Report discusses the benefits of foreign direct investment in the UK economy. It discourages political interventions in the competitive process, which should be "*as limited and controlled as possible*".¹⁵ It endorses the current UK merger control regime, noting the CMA's "*important and valuable politically-independent power to prevent deals*",¹⁶ as well as the narrow scope for ministerial intervention under the Enterprise Act 2002.

The Report states, however, that further political intervention in merger control may be necessary to prevent foreign companies from purchasing UK firms and taking their activities offshore. The Report recommends that ministers develop new options to block such deals, while acknowledging the difficulty in differentiating such deals from pro-competitive mergers.

Implications

The Report offers a robust defence of free markets, targeted regulation, and vibrant competition and consumer protection regimes. At the same time, it acknowledges a weakening of the consensus

¹⁵ Section 8 of the Report.

¹⁶ Ibid.

underlying the current system of competition and regulation, and suggests that consumer interests may have been inadequately protected.

Various considerations will determine whether the Report's recommendations are implemented. Some recommendations endorse proposals that have been made elsewhere and – tentatively – received government support. For example, the Report endorses the notion of pro-competitive regulation, as recommended by the Furman Report and the CMA.

Other recommendations will likely be more controversial, such as the proposal to reduce and ultimately eliminate the role of sectoral regulators and to allow County Courts to hear competition disputes. Likewise, the Report's proposals on 'better regulation' might depend on support from government departments.

The Report's most significant contribution, however, might come not from its specific proposals, but rather its support for competition – not burdensome regulation – as a way of enhancing the consumer interest. As the Report says, *"if competition works in favour of consumers rather than companies (or of business customers rather than their suppliers) then our post-covid, post-Brexit economy will grow faster and our society will be both happier, fairer and more just as well."*¹⁷ This message, from a prominent Member of Parliament in a report commissioned by BEIS and HM Treasury, could prove influential as the Government considers what shape the UK competition regime should take.¹⁸

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¹⁷ Section 1.2 of the Report.

¹⁸ The [Treasury's 'Build Back Better' Report](#), published 3 March 2021, makes a number of recommendations that are in line with the Report, including:

- Commissioning the CMA to produce regular 'State of Competition' reports on how competition is working across the economy;
- A commitment to consult on strengthening enforcement powers and penalties to deter anticompetitive behaviour;
- Hard-wiring competition principles into regulatory decision-making; and
- Easing the regulatory compliance and red tape burden on business.