

Insights

THE PENROSE REPORT – ARE WE HEADING FOR A “NEW NORMAL” IN UK COMPETITION POLICY?

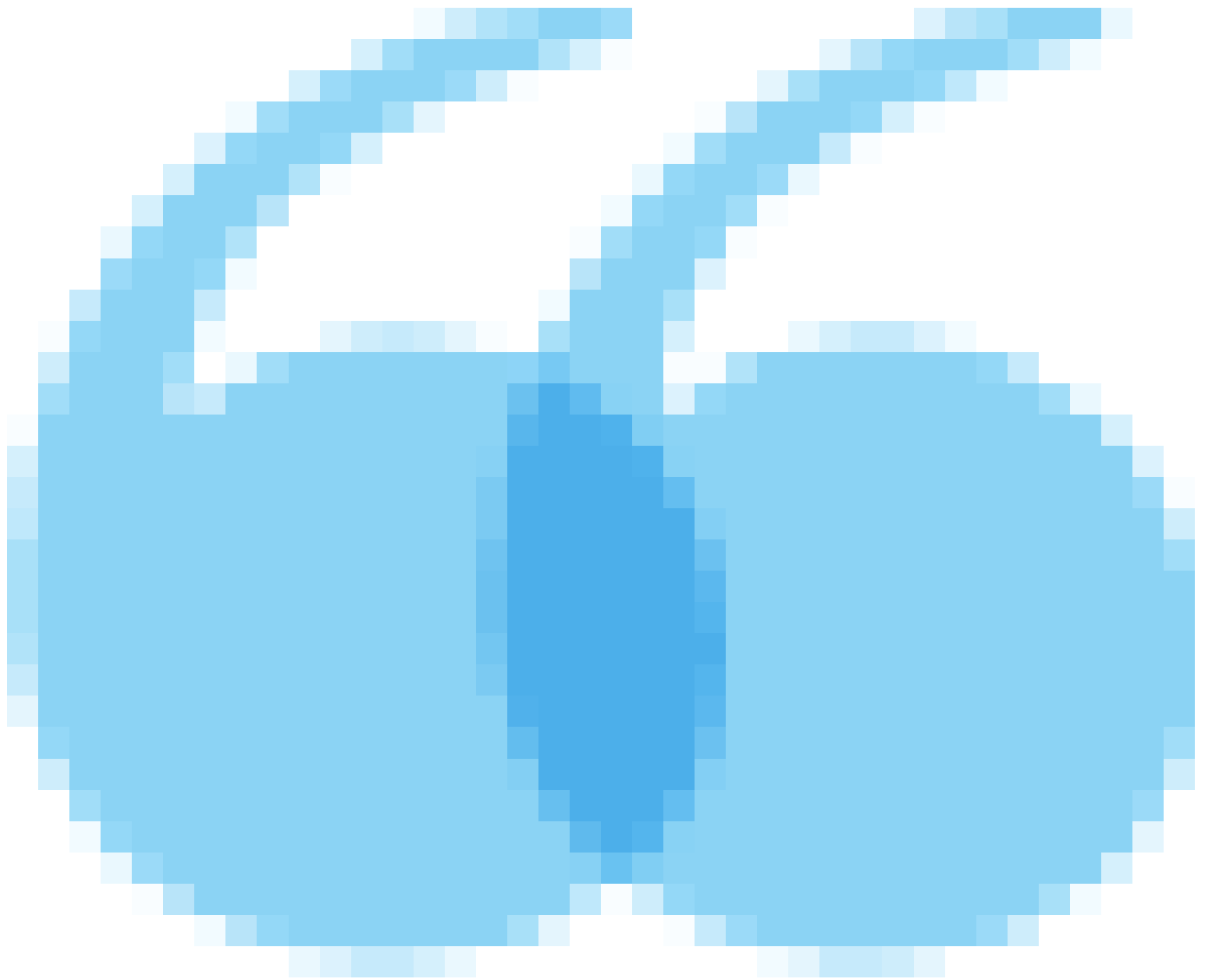
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SUMMARY

The Penrose Report to the UK Government recommending wholesale reform to the UK’s competition regime is a paean to the power of deregulation and increased competition to drive economic growth and beneficial consumer outcomes.

In the autumn of 2020, the UK Government commissioned John Penrose MP to carry out an independent review of the UK’s competition policy. Penrose was asked to review how the UK’s competition regime should evolve post-Brexit to drive economic recovery from COVID-19, level up the regions, increase consumer trust, support UK disruptors, and best leverage data, technology and digital skills.

The 70-page Report, titled Power to the People, was published on 16 February 2021. Matching the questions asked, the Report is broad in scope and ambition, calling for an entirely new legislative framework, and containing many striking recommendations, which merit serious engagement from public and private sector stakeholders alike. Penrose puts forward a diverse range of proposals to reform competition and consumer protection regimes in the UK, with the overarching goal of making “markets work for people, not the other way around”.



We will be restoring normality just as soon as we are sure what is normal anyway - Douglas Adams



Common to all of Penrose's suggestions is a desire for greater simplicity and efficiency in process, narrowing the "burden" of regulatory intervention, and looking to foster "normal competition" outside of a narrowing scope of "monopoly regulation" – aims which both business and the regulators can surely get behind. However, what "normal" looks like may be up for debate, and some of Penrose's ideas as to how it should be achieved may prove more divisive as they are developed.

The CMA emerges as a big winner in the Report; its ongoing independence critical in becoming a "micro-economic sibling" to the Bank of England. Penrose proposes increased powers for the CMA in parallel to competition law to drive consumer rights, supply side reforms and productivity improvements. Increased speed, volume and predictability of CMA enforcement cases are all assumed to be valid aims in themselves, but Penrose proposes deferring to an expert taskforce to undertake an "end to end redesign" of the institutional framework for delivery.

We consider below what the Report may mean for the evolution of competition policy in the UK under the following heads:

- M&A activity
- The Digital Markets Agenda
- Complaints, judicial review and disputes
- Sector regulation
- Subsidy and foreign investment control

M&A activity: Penrose wants all of the CMA's merger cases to be resolved within weeks or months and to be as simple and certain as possible. Penrose pulls no punches in his assessment of the CMA's current approach to mergers, the inflexibility of which he considers frequently generates "unnecessary delays, expense and pointlessly unproductive work". Nevertheless, Penrose would enhance significantly the CMA's powers to issue financial sanctions in the event of non-compliance with information requests made to merging parties. Penrose proposes a welcome 'fast-track' route for the review of certain transactions and suggests that the CMA should be allowed to accept legally-binding undertakings at any stage of a Phase One or Phase Two merger review to enable faster completion of transactions. The Report lauds the mandatory filing regime of the UK's National Security & Investment Bill, and challenges the proposed expert taskforce to consider whether the UK should introduce a merger control regime which incorporates mandatory notifications and fixed waiting periods like the majority of major economies.

The Digital Markets Agenda: Penrose's report comes hot on the heels of the Government's announcement that it would be setting up a dedicated Digital Markets Unit (the "**DMU**") within the CMA to oversee a pro-competitive regime for digital platforms. While fully supportive of the Government's plans to tackle competition problems in digital markets, Penrose cautions that granting the DMU upfront powers with broad application may cause unnecessary red tape and regulatory burden. Penrose suggests that the DMU should be renamed the NDMU – the Network & Data Monopolies Unit – and that its powers should:

- be ring-fenced from the CMA's existing powers;
- only apply to individual firms that own and run new network and data monopolies;
- only apply to problems which the CMA's existing powers cannot solve already;
- only be extended with Parliament's consent.

At first blush, Penrose's NDMU may catch fewer digital platforms within its ambit than the CMA's proposed Strategic Market Status designations by the DMU. The Government response to these

two separate contributions to the high profile question of ex ante regulation of the major digital platforms will be closely watched. It would though be overstatement to say that Penrose pulls in the opposite direction to the Digital Markets Agenda, Penrose proposing that the NDMU should have a legal duty to extend and promote competition in the monopolies it regulates, by making pro-competition interventions to reinstate “normal” competitive conditions wherever possible and proportionate.

Complaints, judicial review and disputes: Penrose’s calls for process efficiency continue in his assessment of how competition complaints are currently dealt with by the regulators and the courts. Penrose is critical of the “complicated thicket” of different legal routes and rules that firms must navigate when they want to bring competition law actions or appeal regulatory decisions.

Penrose acknowledges and supports the CMA’s request that all appeals should be dealt with by the Competition Appeal Tribunal – but the precise appeal standards to be applied should be a matter for the taskforce (raising a question of overlap with the work of the Independent Review of Administrative Law, which has just provided its conclusions to Government).

At the local level too, Penrose proposes reforms. In order to boost competition outside of the South-East and strengthen consumer rights, he suggests making Small Claims Courts and ADR services fully 24/7 and easy, cheap and simple to use. He also suggests that new, more efficient fast-track County Competition Courts should be created which would deal with local and regional cases quickly and cheaply – although query what a multiplicity of local competition courts and regulators may do for “predictability”. There is scant consideration of competition damages actions in the Penrose Report, but the proposal for increased transparency, including publication of the details of monthly intelligence-gathering meetings between the CMA and the Citizens Advice Bureau, Trading Standards and sector Ombudsmen may prove a fertile hunting ground for consumer class claims.

Sector regulation: Particularly striking are Penrose’s proposed reforms to sector regulation, recommending that it be focused in due course only on “the core network monopolies with Regulated Asset Bases” plus “a few remaining hard-to-solve consumer protection problems”. In what would be a significant overhaul of the current regulatory system, Penrose proposes that the NDMU’s legal duty to reinstate “normal” competitive conditions wherever possible – a positive mandate to “erode the power and strength” of monopoly incumbents - should be extended to every sector regulator. Where possible, contracts for infrastructure investment and upgrading should be delivered by external bidders through an independent auction process. The sector regulators would be required to demonstrate the narrowing of their activities to the Government. Upon notice from a material proportion of regulated firms in a given sector or from certain consumer groups, sector regulators may become subject to a statutory motion for their functions to be transferred to the CMA. Penrose calls for sector regulators to have a “strong, clear ‘competition for the benefit of consumers first, regulation only as a last resort’ primary legal duty”.

Subsidy and foreign investment control: Penrose comments “Now we have left the EU, we can decide for ourselves if we want to subsidise particular industries, or not. In general, to keep our economy competitive and successful, we should choose ‘not’”. Penrose argues that the UK’s approach to state aid and subsidy control should focus on reducing regulatory and political risk so that businesses and their investors can focus on their customers instead of the regulators. Political intervention in foreign direct investment into the UK, he remarks, should be limited and controlled, and ministers should develop new options to prevent fast-growing UK-based firms in the industries of the future from being poached offshore - in an apparent proposed extension, beyond national security, to the grounds on which the Government may wish to limit foreign investment.

Conclusion

On publication, HM Treasury and the CMA have welcomed the thrust of Penrose’s report to grow competition through a new and streamlined legislative framework for UK competition/consumer policy. Which of the proposals will be taken forward remains uncertain, not least given the common ground between Penrose and the Government’s overall economic and social agenda. Industry has an important part to play in influencing the outcome. Throughout the report, Penrose sets out recommendations for a regime which will promote “normal competitive conditions”, rebuild “normal competitive markets” and “normalise” the regulated and monopolised sectors to the advantage of the UK. One thing which is certain is that if Penrose’s suggestions are acted on, the new “normal” will look very different to the status quo.

BCLP’s Antitrust & Competition group is monitoring developments in this area. If you have any questions or would like to discuss any aspect of the Penrose Report in more detail, do not hesitate to get in contact with any member of the team.

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