

# Power To The People

**Stronger Consumer Choice And Competition**

**So Markets Work For People, Not The Other Way Around**

*An Independent Report Presented To Her Majesty's Government*

*By John Penrose MP*

*February 2021*

### Acknowledgements & Thanks

I'd like to thank everyone who has so kindly lent me their time, expertise and – above all – patience as I've asked annoying questions during the preparation and drafting of this report. But most of all I'd like to thank my long-suffering secretariat of officials from the Treasury and Department of Business, Energy and Industrial Strategy who have helped to compile and write it with me.



## About The Author

John Penrose has been MP for Weston-super-Mare since 2005. His campaigns to reboot British capitalism so our economy works for the many, not the few, include the Energy Price Cap; making housing cheaper to own or rent by allowing urban owners and developers to Build Up Not Out; making Britain's economy more generationally-and-socially-just through a UK Sovereign Wealth Fund; and reforming formerly-nationalised utilities (e.g. energy, telecoms, water, rail) to put customers in charge, rather than politicians, bureaucrats or regulators instead.

A successful businessman before he entered politics, John has held a variety of posts since he was elected including PPS to Oliver Letwin, Shadow Business Minister, Tourism & Heritage Minister, Government Whip, Constitution Minister and Northern Ireland Minister. He is currently the Prime Minister's Anti-Corruption Champion, Chair of the Conservative Policy Forum and sits on the Party's Policy Board. This is an independent report represented to the Government; it is not a statement of Government or Conservative Party policy.

## Foreword

In September 2020 I was asked to write an independent report on how the UK's approach to competition and consumer issues could be improved in future. The coronavirus pandemic was scarring our economy and the Brexit transition period was about to end, so Britain would need a springboard of renewed energy and dynamism to grasp the opportunities and overcome the challenges of its newly-independent, sovereign status at the end of the year.

The official terms of reference for my report were:

### Context

The government has stated that competition is essential to drive innovation, produce better outcomes for consumers and allow new entrants to the market to grow. Promoting competition will be particularly key in the context of the recovery from COVID-19. The pandemic is the biggest threat the UK has faced in decades and overcoming it will require all the dynamism and creativity that exists across all sectors and in all regions and nations of the UK.

In recent years, a number of international academic and policy studies have suggested that competitive pressure across advanced economies, including the UK, may have weakened. Against this backdrop, getting competition policy right takes on even greater importance. The UK's competition regime is generally well-regarded, and authorities have taken on work in a number of high-profile areas in recent years, such as pharmaceuticals, digital advertising and statutory audit. Nonetheless, there is always room for improvement, particularly in terms of adapting to current market conditions and challenges.

Work is already underway in relation to digital competition issues. The March 2019 Furman Review – a major independent review for HMG on competition in digital markets – made six strategic recommendations for changes to the UK's competition framework, which the government accepted at Budget 2020. Work is in train to take Furman's strategic recommendations forwards and a new cross-regulator taskforce, based in the Competition and Markets Authority (CMA), will provide detailed advice on the potential design and implementation of measures for unlocking competition in digital markets, reporting at the end of the year.

However, further challenges remain. The Conservative Party's 2019 Manifesto committed to level up the economy, to tackle consumer rip-offs and bad business practices and to support disruptors taking risks on new ideas and challenging incumbents.

An earlier set of reform proposals, outlined by the outgoing CMA Chairman Lord Tyrie in February 2019, considered potential changes to the competition and consumer protection regimes. In June 2019, the BEIS Smart Data Review examined how to accelerate the development and use of new data-driven technologies and services to improve the consumer experience in regulated markets. In February 2020, HM Treasury and the Department for Business Energy and Industrial Strategy commissioned the CMA to produce a report on the 'State of Competition' in the UK.

## Scope

A short independent report building on and adding to the recent competition policy developments set out above. In particular, to look at how the UK's competition regime can evolve to meet the government's policy aims of promoting a dynamic, innovation-driven economy which delivers for consumers and businesses across all regions and nations of the UK, within the context of recovery from COVID-19 and the end of the transition period.

## Timing

The report should be delivered by the end of the year.

## Key questions

Building on the government's existing competition policy direction, as the UK looks to forge new relationships with the EU and other international partners, how can the UK's competition regime best:

1. Play a central role in meeting the challenges of the post COVID-19 economy and in driving the recovery?
2. Contribute to the government's aim of levelling up across all nations and regions of the UK?
3. Increase consumer trust, including by meeting the 2019 Manifesto commitment to tackle consumer rip offs and bad business practices, and by ensuring the competition regime operates in a way which is strong, swift, flexible and proportionate?
4. Support UK disruptors taking risks on new ideas and challenging incumbents?
5. Make best use of data, technology and digital skills which are vital to the modern economy

I hope this report provides at least some of the answers to these questions.

*John Penrose MP*

**Christmas 2020**

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# Chapter One:

## Making Markets Work For People, Not The Other Way Around



# 1. Making Markets Work For People, Not The Other Way Around

## 1.1 A World Class Competition & Consumer Regime



Britain has traditionally been one of the best places in the world to invest and do business. Our independent legal system, open economy, flexible labour markets and predictable and (relatively) unbureaucratic regulators have all meant that we have always scored highly in international rankings on the ease of doing business or opportunities for wealth-creation.

Our competition and consumer regime has been a core part of this environment, providing a leading example of how strong and independent economic regulators can reduce regulatory risks and political interventions, so business leaders can focus on delighting their customers rather than lobbying and worrying about their legislators instead. More certainty and less risk makes Britain a more attractive destination for investment, and also means investors need lower returns which cuts costs and makes our firms more productive too.

Without independent regulators, the risks of damaging short-term political interventions which distort competition are much higher. Distortions push investment towards less-productive parts of the economy rather than where it would be most useful. And they cost citizen-consumers a great deal, through the extra taxes they pay to fund the interventions; the higher prices they face because of the protections which allow inefficient firms to flourish; and the unfairness of money and resources being diverted to tilt the playing field in favour of deep-pocketed incumbent firms with the most successful lobbyists, rather than the system being on the side of delivering good value for the man or woman in the street.

This report explains that our independent competition and consumer regulation regime currently has a good reputation, but not a great one. International rankings put our major competition institutions behind USA, France, Germany, EU and Australia. We have stopped making progress on cutting the costs of red tape and, in recent years, have gone backwards. Sector regulators intervene heavily, creating regulatory burdens which make large and important parts of our economy more ponderous and less focused on their customers than they should be. Investors and business leaders say that officialdom moves too slowly in an increasingly fast-paced digital world. Citizen-consumers feel ripped off when they buy things like energy or car insurance, and increasingly feel that markets aren't set up to work for them. In other words, the system needs to be updated, improved and refreshed.

The rest of this chapter will explain the detail behind these points, to provide a foundation for the recommendations and changes in the rest of this report.

## 1.2 Why Competition Works For Everyone



In principle, stronger competition ought to be automatically on the side of citizen-consumers (and of business customers too), because firms that have to compete harder to attract and retain customers are more innovative, move faster and more nimbly, and are more productive and efficient than ones which can take them for granted. That should mean economies with strong competition and customer choice, where the ‘customer is king’ (or queen), will naturally have more firms that are constantly jostling to offer something better, or cheaper,

or more organic, or greener than their rivals. This doesn’t just give British citizen-consumers and business customers a wider range of high-quality goods and services at more competitive prices;<sup>1</sup> it creates a range of other, equally-important and broader benefits for our society and our economy too:

- More competitive, successful firms are the best – and probably only – long term guarantee of secure and well-paid jobs for British workers. Anything else will, ultimately, be at risk from being hollowed out and undercut by stronger foreign firms that offer better goods for the same price, or the same ones for less, in a repeat of what happened to British manufacturing in the 1970s and 1980s. And since public-sector jobs ultimately depend on a successful, competitive economy to pay the taxes which fund them too, their security and prosperity depends on our international competitive success as well.
- Societies which have set up their economies so firms have to compete to delight their customers every day are fairer, with less injustice, because rip-offs can’t become as serious, or last as long, as in the ones that haven’t. At its most basic, this means citizen-consumers get more for their money and have a higher standard of living, if the system is on their side.
- The benefits of a system where rip-offs can’t last stretch well beyond economics; they strengthen our society and our politics as well. If citizen-consumers know they can vote with their feet (or their wallets) by switching to another firm that does what they want faster, or cheaper, or with less carbon, or in a different colour; and that the law will protect them if it comes down to it in the end; then they will have confidence that the system is on their side. And that increases their happiness and trust in what they buy, as well as in the organisations that provide it for them too.

But this theory only works if the system is set up the right way in the first place, so it is on the side of customers rather than of politicians, bureaucrats or company bosses. This means three, practical things:

- First, customers need to have trust and confidence in the legal and complaints system, so they know it is on their side and they can put things right if there’s a problem. High-trust economies perform better than low-trust ones, because consumers know they don’t have to look over their shoulders or check the fine print every time they buy a loaf of bread or a pot of jam. Trust and confidence oil the wheels of commerce, allowing most

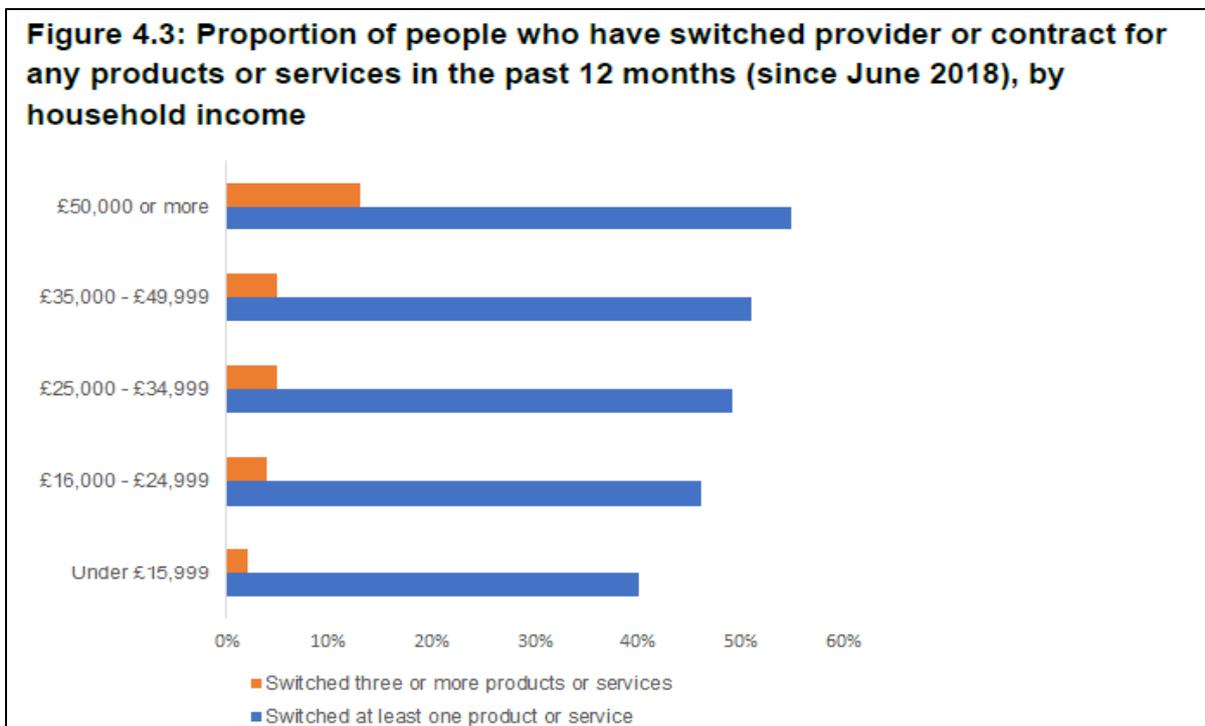
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<sup>1</sup> Competition and Markets Authority, *Productivity and competition: a summary of the evidence* (2015) <https://www.gov.uk/government/publications/productivity-and-competition-a-summary-of-the-evidence>.

transactions to happen faster, with much lower costs than in places where it doesn't exist. And faster, cheaper deals make entire economies more productive and competitive too.

But trust and confidence aren't the same as faith. They have to be earned; backed up by daily experience that the system works to deliver consumer and business customer rights effectively, otherwise trust will quickly erode and curdle into suspicion. That's why contract and consumer laws have to work in favour of customers, so they can enforce their rights if it comes down to it, but also to make rip-offs rarer in the first place.

- Next, customers need enough honest and reliable information to make informed choices about what they are getting for their money, to compare offers from different firms.
- Finally, customers need to be able to switch easily and freely from one product to another. But this isn't as simple as it sounds because lots of us are creatures of habit, or short of time, so we often stick to the same brands of coffee or shop in the same shops unless something jolts us out of it, as the graph below<sup>2</sup> shows.



This matters because it means most of us don't switch that often but, to make sure firms can't take us for granted, we need to get the same prices and choices as the consumers and business customers who do. This 'coat-tailing' means everyone gets better deals, so our economy is more productive and competitive (because it maximises what economists call 'consumer surplus') and fairer too, because it stops firms charging me more than you for the same pot of jam, or lightbulb, or shirt.

In other words, 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

<sup>2</sup> CMA analysis of BEIS Public Attitudes Tracker, Competition and Markets Authority, *The State of UK Competition report (2020)*, <https://www.gov.uk/government/news/cma-reports-on-the-state-of-competition-in-the-uk>

### 1.3 So How Are We Doing?



The problem is, it looks as though UK competition and consumer choice has weakened in the last two decades<sup>3</sup>. In many sectors, the largest firms have a more powerful market position today than in 2008 and it is harder for smaller firms to displace them. Citizen-consumers are starting to feel the effects: the UK only ranks 11<sup>th</sup> out of 30 European states for being on the side of customers, with big gaps in how some sectors treat us compared to others as this table shows<sup>4</sup>.

The same study shows that almost one in eight of us had an experience worthy of a complaint, **Best and worst performing UK markets for consumers**

MPI = Market Performance Indicator, including trust, comparability, choice, expectations & problems, detriment

Difference as compared to the EU-28

	MPI	Comparability (Avg)	Trust (Avg)	Problems (%)	Detriment (Avg)	Problems & detriment (Avg)	Complaints (%)	Expectations (Avg)	Choice (Avg)	
<b>Top 5 markets (compared to EU-28 average)</b>										
51	Mortgages	+5.5*	+0.2	+0.9*	-2.7*	-1.2*	+0.2*	-16.2	+0.7*	+0.5*
29	Home insurance	+4.6*	+0.4*	+0.5*	-1.5	+1.3	+0.1	+16.5*	+0.6*	+0.8*
55	Dairy products	+3.5*	+0.0	+0.5*	+1.7	+0.6	-0.1	+13.5	+0.6*	+0.5*
8	House and garden maintenance products	+3.3*	+0.3*	+0.5*	+1.8	-1.6*	+0.0	-4.3	+0.5*	+0.2*
48	Non-prescription medicines	+3.0*	+0.1	+0.5*	+0.7	-0.1	-0.0	+19.7	+0.2*	+0.6*
<b>Bottom 5 markets (compared to EU-28 average)</b>										
36	Train services	-6.8*	-0.9*	-0.6*	+15.3*	+0.6*	-1.0*	+8.9*	-0.3*	-0.8*
34	Internet provision	-4.1*	-0.5*	-0.2	+15.8*	+0.1	-0.9*	+1.2	-0.2	-0.2
35	Tram, local bus, metro, and underground services	-3.0*	-0.8*	+0.1	+14.6*	-0.1	-0.8*	+2.6	+0.0	-0.4*
20	Real Estate Services	-2.2*	-0.4*	-0.4*	+10.7*	-0.5	-0.5*	+4.2	-0.1	+0.3*
33	Mobile telephone services	-2.2*	-0.5*	-0.4*	+10.1*	-0.3	-0.5*	-5.9	+0.0	+0.2*

compared to an EU average of one in twelve, and the gap between the UK and EU has got wider in recent years as well.<sup>5</sup> So even though the state of competition in the UK is reasonably strong, the trends are headed the wrong way. We need to improve.

<sup>3</sup> Competition and Markets Authority, *The State of UK Competition Report* (2020)

<sup>4</sup> European Commission, *Consumer Markets Scoreboard: Making markets work for consumers* (2018) [https://ec.europa.eu/info/publications/consumer-markets-scoreboard\\_en](https://ec.europa.eu/info/publications/consumer-markets-scoreboard_en)

<sup>5</sup> Competition and Markets Authority, *The State of UK Competition Report* (2020).

## 1.4 Evolution, Not Revolution



Making customer choice and competition work properly for everyone doesn't happen by accident: it needs a world-class legislative and regulatory regime to underpin and maintain it. Strongly independent regulators are essential for keeping politics at arms' length from commercial decisions, so there is always a predictable environment where investors and business leaders can take decisions without worrying if the rules of the game might change unexpectedly.

The UK's competition and consumer regulators have always been pretty good, but currently they're lagging behind their equivalents in other countries. For example the Competition and Markets Authority (CMA) opens fewer enforcement cases than its opposite numbers in France and Germany<sup>6</sup>, issues lower aggregate fines for breaches of competition laws<sup>7</sup>, and ranks below them, the European Commission, Australia and the US Federal Trade Commission in international league tables too<sup>8</sup>.

There's a further problem, because the ever-growing complexity of competition laws and regulatory processes is making decisions too slow, expensive, and difficult for business leaders to navigate without an expensive priesthood of experts to advise them at every step. Price control decisions by sector regulators have grown over decades from scores of pages of submissions in a process which lasted a few months when the system first began, to thousands of pages of expensively-lawyered expert testimonies in a process which takes years now. A recent review of competition enforcement legislation<sup>9</sup> said "long cases are undesirable" and "stakeholders raised concerns about case timescales following EU exit, as [...] more complex cases could [...] expose the more time-consuming aspects of current procedure, such as access to file." As far back as 2003 the Competition Appeal Tribunal (which hears appeals from the CMA) was warning of the danger of 'hypertrophic growth of documentation and evidence, and inordinate duration of proceedings'.<sup>10</sup>

This puts smaller, disruptive and entrepreneurial firms at a disadvantage, because they find it harder to afford the expert advice without which it is increasingly impossible to take part in the processes successfully. It also gives large, deep-pocketed and well-lawyered incumbent firms the advantage of using legal process delays to 'walk backwards slowly', bogging things down when they're faced with otherwise-legitimate challenges so entrepreneurs are prevented from bringing new technologies to market for years, until the commercial window of opportunity has closed and it's too late. If we allow our competition laws and processes to become more complex, expensive and slow at the same time as digitisation is pushing businesses to become cheaper, faster and more convenient, we will weaken competition and hamstring British firms severely.

<sup>6</sup> BEIS, Competition law review: post implementation review of statutory changes in the Enterprise and Regulatory Reform Act 2013, 2019,

[https://www.legislation.gov.uk/ukpga/2013/24/pdfs/ukpgaod\\_20130024\\_en.pdf](https://www.legislation.gov.uk/ukpga/2013/24/pdfs/ukpgaod_20130024_en.pdf) p.26

<sup>7</sup> Lord Tyrie's letter to the BEIS Secretary of State, February 2019 & National Audit Office report, The UK competition regime, February 2016, Figure 14. <https://www.gov.uk/government/publications/letter-from-andrew-tyrie-to-the-secretary-of-state-for-business-energy-and-industrial-strategy>

<sup>8</sup> See for example: Global Competition Review: Rating Enforcement 2019 and 2020

<sup>9</sup> BEIS, Competition law review: post implementation review of statutory changes in the Enterprise and Regulatory Reform Act 2013, 2019,

<sup>10</sup> <https://publications.parliament.uk/pa/ld200304/ldselect/ldconst/68/3111202.htm>

## 1.5 The Size Of The Prize



To be fair, many of our independent regulators have already noticed there's a problem and are trying to fix it. The CMA has produced a long list<sup>11</sup> of proposed changes and improvements, and several of the sector regulators are already moving to cut the cost and complexity of their rules and processes too.

We need to build on these initial foundations, to give a free-trading, global post-Brexit Britain one of the best competition and consumer regimes in the world, pushing us back into the top international rank once more so our businesses, exporters and investors can become more competitive, and thus more creative, successful, digital and agile too.

To achieve this, we will need a new Competition Act to update and modernise our institutions for the new digital economy. But many of the proposals in this report don't need legislation and can be done faster, either through the existing system of once-a-Parliament Government policy directions to CMA and some of the sector regulators; or by changes to those regulators' internal processes and governance; or by altering the web of Memorandums Of Understanding between them too. So we can, and should, begin to make changes and improve our international ranking immediately.

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<sup>11</sup> Lord Tyrie's letter, *ibid*

# Chapter Two:

## Faster & More Predictable Competition Decisions



## 2. Faster & More Predictable Competition Decisions

The changes have to begin with Britain's central and most important competition institutions; the Competition and Markets Authority (CMA) and the Competition Appeal Tribunal (CAT). They stop rip-offs by taking action against firms that are colluding or abusing dominant market shares; blocking or demanding changes to mergers that would disadvantage customers; or updating industries where the underlying rules aren't working properly so they do.

### 2.1 A New Competition & Consumer Champion

To start with, there's a broader, strategic purpose which isn't getting the attention it needs and deserves, and which CMA should fulfil. At the moment there is no strong, independent institution responsible for the overall progress of competition, consumer rights, supply-side reforms and productivity improvements and, given their importance for post-Brexit Britain's economic growth and jobs, it's an important gap in our current regime. ***So the CMA should fulfil this role in future, becoming a micro-economic sibling for the Bank of England's well-established public macro-economic role.***



***Specifically, CMA should publish 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. CMA should use the findings as part of the measures of its own success, as should the sector regulators too, alongside other measures such as (for example) the number of cases or successful prosecutions it completes, or the direct impact of its cases and market studies and investigations.***

CMA also holds regular monthly intelligence-gathering meetings with consumer complaints organisations such as Citizens Advice Bureau, Trading Standards and Ombudsmen; ***the conclusions and findings of these meetings should be published transparently whenever possible*** (there may need to be exceptions where live investigations are discussed, for example), to show details of which parts of the country and sectors of the economy are making progress or causing concern.

Taken together, these two publications should also explain and frame CMA's strategic choices of which industries or markets it chooses to investigate, and which firms to launch proceedings against too.

## 2.2 Upgraded Consumer Powers



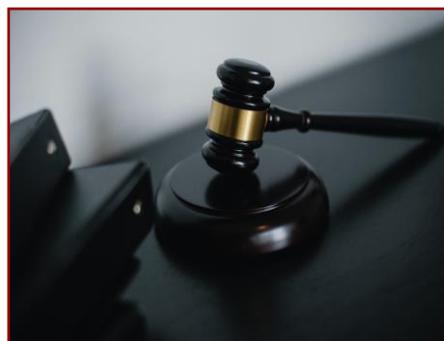
When the CMA is enforcing competition law (for example cartels, abusing a dominant market position or price fixing) it can make decisions and impose fines without having to go through a court. But when it is dealing with consumer problems (like unfair contract terms and conditions) they have to take their case to a non-specialist court rather than making their own decisions. And even if CMA wins its case, the non-specialist court has no power to impose a fine; it can order the offending firm to change what it does in future, or to put right any damage, but

there's no direct financial punishment. And if the firm ignores the court's judgement, nothing happens unless the CMA takes them back to court for contempt. This makes the entire process slower, more bureaucratic and much weaker, because there's no need or incentive for any firm to co-operate or settle out of court to get a lower penalty. And it allows rogue firms to carry on ripping off consumers for years while their lawyers slow everything down to a crawl in the courts.

***The CMA's civil consumer enforcement powers should be updated to bring them into line with, and have the same importance as, the competition toolkit.*** The CMA should be able to decide cases itself and impose fines in the same way as it already does for competition law cases. This would force firms to take consumer law much more seriously and, particularly important for the CMA's internal priorities and culture, it will put both parts of the CMA's current legal duty to 'promote competition [...] for the benefit of consumers' on an equal legal footing.

## 2.3 Tougher Penalties For Firms That Slow Down Cases

Effective investigations depend on the parties involved co-operating with the CMA and responding in a full, timely and honest way to requests for information. Current penalties for failure to supply information are limited to a relatively low maximum of £30,000 and/or £15,000 per day. A failure to provide evidence may also have implications for appeals as the CAT will be less likely to admit new evidence that could and should have been provided to the CMA during its investigation. And if firms deliberately give false or misleading information, the only option in the UK is criminal prosecution, which is too onerous to be useful or proportionate.



By contrast, other countries can impose turnover-based fines (between 1% and 5%) which are far more effective getting firms to comply with investigations, and fairer too because larger companies have to take enforcement action just as seriously as smaller ones. ***So penalties for non-compliance with investigations should be strengthened and brought into line with international norms.***

## 2.4 Settling Earlier In Markets & Mergers Work



Market studies and investigations are a powerful and flexible tool for tackling embedded problems in particular sectors: CMA estimates it used them to save consumers £839.5m a year between 2017 and 2020<sup>12</sup>. And merger reviews are essential to preventing tie-ups which could reduce competitive pressure and result in worse outcomes for consumers.

Some of these cases are complicated and difficult, with lots of detailed and careful analysis and discussions. But others are much more straightforward, where the answers and solutions are clear early on. For these simpler cases, both CMA and the firms in the industry itself may all agree what needs to change, but they aren't legally allowed to reach agreement before the end of a phase one or two merger investigation, or the end of a market study or investigation either.

In those cases, this creates unnecessary delays, expense and pointlessly unproductive work, and stops consumer rip-offs from being dealt with faster. So ***CMA should be allowed to accept legally-binding undertakings at any stage in a market study, market investigation, or Phase One or Two merger review.***

## 2.5 International Co-operation

Globalisation means plenty of competition investigations where CMA needs to work in partnership with its equivalents in other countries, wherever international firms or supply chains span national boundaries. This means they need the right tools to co-operate with their overseas counterparts, including bilateral co-operation agreements and 'information gateways' in legislation, to allow critical information to be shared safely so cases can be decided quickly and well.



The UK's information sharing laws, which are set out in part 9 of the Enterprise Act 2002, are already better than many countries which either prohibit or place more restrictive conditions on the sharing of confidential information. However, our regime could still be improved upon and work is already underway; for example on 2 September 2020 the CMA signed a new framework with competition authorities in the USA, Australia, Canada and New Zealand to improve co-operation on investigations. ***The Government should continue to pursue co-operation arrangements so our laws allow appropriate and safe information exchange, and so cases can be decided faster as well as fairly.***

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<sup>12</sup> CMA, *CMA Impact assessment 2019-20*, <https://www.gov.uk/government/publications/cma-impact-assessment-2019-to-2020>

## 2.6 Appealing Sector Regulators' Decisions



Under the current system, firms that need to appeal against sector regulators' decisions face a complicated thicket of different legal routes and rules. Some decisions are appealed to the High Court, some to the CAT or other tribunals, and still others to the CMA. The result is a complex system which is much harder for non-experts to navigate, and which gives an advantage to big incumbent firms with long experience of the system and big legal teams, compared to smaller entrepreneurial challengers. CMA has proposed ***the system should be simplified so that any appeals which they currently consider should instead be dealt with by CAT. This is a pragmatic step and should go ahead promptly.***

## 2.7 Process Redesign

There's a wide range of further potential changes to CMA's powers and processes, in addition to the ones I've recommended here, which have been suggested by both CMA and others. They are more contested, either by the CAT, business representatives or senior practicing lawyers, usually due to fears that they will reduce the rights for firms or individuals to appeal against decisions or processes which they think are wrong or unfair.



But even though there's no consensus about the suggested solutions, there is plenty of agreement that the end-to-end process – from beginning a CMA investigation to completing a potential CAT appeal – is cumbersome and clunky. The criticisms vary depending on who is being asked and, in summary, they include:

- CMA says it is forced to produce far too much detail on peripheral or unnecessary issues, making tight and efficient case management impossible as they 'boil the ocean' to reduce the risk of being overturned on appeal to CAT.
- In reply, CAT says that CMA's overall record is very good so they shouldn't worry so much about being overturned on appeal, and that occasional reversals are an inherent and inevitable part of the process anyway.
- Senior trial lawyers say the CMA's 'phase 2' process has too much confirmation bias; that some panel members bring preconceptions to cases rather than open minds; that 'provisional findings' aren't provisional but are really a draft decision in all but name; and that access to panel members is unequal and rationed.
- Senior jurists say that fears of follow-on civil damages claims make firms unwilling to settle cases early, because CMA's need for admissions of fault ('heads on spikes') makes 'without prejudice' settlements less likely.
- CMA says CAT's oral hearings take too long, are contrary to the original intention of a mainly paper-based appeal process, and are often closer to a complete retrial than a full-merits review.
- CAT retorts that their hearings aren't full retrials at all, are pretty quick given the complexity of their cases, that oral hearings with cross-examination are essential to test evidence effectively, and that they were always supposed to be part of the process too.

- CAT argues that CMA's administrative processes can't satisfy the Article 6 Human Rights fair trial requirements for quasi-criminal cases (ie competition enforcement cases), so their full-merits hearings are vital to ensure justice and high quality decisions.

In other words, everyone agrees the end-to-end process needs fixing, but there is no consensus on how to put it right. The answer is for ***the Government to establish a taskforce to complete an end-to-end review and redesign of procedures and case management in CMA and CAT. It should include CMA, CAT, business leaders, investors, entrepreneurs and start-up representatives, sector regulators and senior competition law practitioners. Its scope must include changes to any and all existing internal governance or statutory process requirements, including appeal standards, from investigation and case launch to appeal. It should be led by a senior expert in managing legal processes efficiently, appointed by Ministers, who is independent from both CMA and CAT.*** The reformed end-to-end process it creates ***must deliver three equally-important goals:***

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

There are several other factors which the taskforce will need to consider as it works to deliver these goals:

- Ofcom's appeals to CAT under the Communications Act 2003 were switched from a 'full merits' to 'enhanced judicial review' standard in 2017<sup>13</sup>. This appears to have worked well in the eyes of most people, creating a faster and more predictably certain process without losing quality. It is a potential template for civil law appeals from other regulators as well.
- A potential solution to CAT's view that CMA's administrative structure makes full merits appeals essential for any quasi-criminal cases would be for CMA to stop making its own decisions and switch to bringing prosecutions to CAT for decision instead. This 'prosecutorial model' has been strongly recommended by a small number of highly-experienced competition lawyers during this review, as the way to deliver a faster, tighter, cheaper and more efficient end-to-end case process. But the evidence available to me doesn't support this; if anything, comparisons between prosecutorial and administrative approaches show weak support for the opposite conclusion.<sup>14</sup> Given the unproven benefits of changing to a prosecutorial approach and the certainty of significant risks and disruption during any switch from the existing administrative model, I have decided against recommending it here. But because the benefits are strongly argued by senior legal practitioners with experience of both systems, the taskforce may wish to consider it further if incremental improvements to the existing administrative regime can't deliver the scale of changes in speed, simplicity and efficiency which are needed.
- The taskforce's scope will include making merger cases quicker. There is already work underway for an amended digital mergers process in CMA, and the new National Security and Investment regime moves some cases closer to the kind of 'mandatory notification

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<sup>13</sup> Communication Act 2003 as amended in 2017, and Article 4 of the 2002 EU Framework Directive.

<sup>14</sup> Armoogum, K. and B. Lyons. *What Determines the Reputation of a Competition Agency.* (2014)

and suspension' regime which is already common in other jurisdictions. The taskforce should also consider whether there is scope for an updated 'fast track' route for some mergers, going beyond the current arrangements.

## 2.8 Future Proofing



No institutions or regulatory regime can remain unchanged while the world modernises and digitises around them, otherwise they will be left behind. Stasis does not create stability. So, to keep regulatory risks and uncertainty low, the taskforce's three goals must remain firmly in place over the long term, but their work will need to be checked periodically in future to make sure that it is still delivering them successfully. ***The taskforce should be reformed in 5 years to review their work, and to recommend any further changes that may be needed***

***to deliver their three unchanged goals.***

As part of future-proofing, it has been suggested that policy responsibility for CAT could be moved from the Department for Business, Energy and Industrial Strategy (BEIS) into the Ministry for Justice (MOJ). The argument is that managing and modernising courts and tribunals is a core part of MOJ's work and internal expertise, but peripheral to BEIS, and that CAT would benefit from being part of continuous improvement and fresh thinking alongside other appeals bodies and tribunals, perhaps under the President of Tribunals. The counter-argument is that questions of efficient legal process and procedure are more the responsibility of judges themselves, rather than of officials in either MOJ or BEIS, and that CAT gets plenty of exposure to the latest techniques and thinking through its system of ex-officio Presidents where senior judges from other courts and tribunals sit in CAT cases whenever their particular expertise is needed. Given the taskforce will be proposing a whole series of other significant incremental improvements to the existing systems and processes, moving CAT to MOJ could cut across their work so I have concluded it would not be appropriate change to make at this time.

# Chapter Three:

## More Competition in Industries Burdened By Red Tape



## 3 More Competition in Industries Burdened By Red Tape

### 3.1 Better Regulation, Not Deregulation



Laws and regulations aren't automatically the enemy of competition, because markets aren't the 'law of the jungle' as some people like to suggest. Their rules aren't laws of nature or of physics which are inherently uncaring and impossible to change; they are political decisions, made by humans, and we can alter them if they aren't working properly. The right kinds of pro-competition rules set standards so contracts can be enforced, staff aren't exploited, our environment is preserved and products are safe to use, and they frame free markets to stop monopolies and cartels, so customers are in charge,

rather than politicians, bureaucrats or company bosses.

But beyond these fundamental pro-competition rules to set up markets in favour of citizen-consumers, too much red tape slows businesses down, focusing them on lobbying their regulators instead of delighting their customers, and making them less creative and efficient as a result. Cutting the size and weight of these regulatory millstones around the neck of our economy, by replacing rules with pro-consumer competition wherever possible, is economically valuable<sup>15</sup>. It's the difference between potentially-dangerous 'deregulation' which might sweep away some of the important standards we need to protect ourselves or our environment; and highly-desirable 'better regulation' which maintains the standards but applies them in the least-costly, unbureaucratic way possible.

### 3.2 Ease Of Doing Business

Better Regulation is something we have done well in the past. We come top of international rankings<sup>16</sup> on regulatory policy, and 8<sup>th</sup> in the world for ease of doing business<sup>17</sup>. But Better Regulation isn't easy, because every system in Whitehall and Westminster is set up to produce new rules; it's how politicians, civil servants and regulators forge their careers, which is why reducing red tape never comes naturally. Better regulation systems have to be extremely tough and effective to overcome these deeply-embedded cultural and organisational instincts. The key ingredients are:



- Rules and regulations should be a last resort, not the first tool out of the box. There are many effective, lighter-touch alternatives including self-regulation, codes of conduct, behavioural nudges, and earned recognition which should be considered first.

<sup>15</sup> CMA Regulation and Competition report, Jan 2020

<sup>16</sup> OECD Regulatory Policy Outlook Report 2018

<sup>17</sup> World Bank Ease of Doing Business index.

- Rules and regulations should specify the outcomes that have to be achieved, not the process for achieving them. This allows creative firms to work out the cheapest and most efficient way to comply, which keeps costs low without compromising standards, allows flexible solutions depending on each firm's specific situation, and therefore increases the economy's overall productivity too. It also future-proofs the regulations, because firms can change how they comply whenever new customers or new technologies come along, rather than being stuck with (for example) analogue processes in a digital world. The only exception to this 'outcome' approach is a few sectors like nuclear safety, where the risks of catastrophic failure are so serious that process-oriented prevention can't be avoided.
- Better regulation has to focus on cutting 'regulatory burdens' – the net costs of complying with a particular new rule or regulation – rather than the broader question of whether overall economic effects are positive or negative. No matter how advantageous or positive the overall economic effects of a new rule may (or may not) be, they aren't a justification for ignoring the costs of achieving them, or for failing to improve productivity by minimising them wherever possible. This means that strong better regulation systems don't exclude anything from their scope, no matter how politically important and high priority they may be.
- The regulatory burden of new rules that are being introduced, and of any old ones that are being removed, needs to be independently audited otherwise Ministers and officials will mark their own homework. The Regulatory Policy Committee and Better Regulation Executive do this in UK and are widely praised for their work<sup>18</sup>.
- They create 'gateways' to prevent new rules from being introduced until the costs and burdens of old ones have been removed. This is the strongest and most effective way to overcome the deeply-engrained pro-regulation instincts of Westminster and Whitehall. It turns burden reduction into an automatic process, because any Minister or regulator who wants to introduce a new rule must find old ones to remove (or, often, to replace with a lower-cost modern or digital alternative) first. If removing the old regulations is left until after the new rules are in place, it invariably won't happen at all.

The coalition Government managed to reduce the red tape burden between 2010 and 2015 with a 'one-in-two-out' system that worked effectively. It satisfied four of the five conditions for a good Better Regulation system (above) but left major loopholes by excluding all EU rules and all the sector regulators from its scope. But it worked reasonably well: 62% of businesses said the overall level of regulation was an obstacle to them in 2009, and this fell to 40% by 2018<sup>19</sup>.

But then the system changed, and things went into reverse: in 2018 the Government set a target of cutting the cost of red tape by £9bn, but ended up increasing it by £8bn instead because they had abandoned the 'gateway' condition (above) and the results were predictable. The most recent announcements<sup>20</sup> leave the 'gateway' problem unfixed; there are now 13 different exemptions from the scheme's scope; and the level of ambition has been cut back to 'one-in-one-out' – which, because of all the exemptions, effectively accepts that red tape costs will keep growing in future.

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<sup>18</sup> For example in reports by OECD (2018) & NAO (2016)

<sup>19</sup> UK government Business Perceptions Survey 2018

<sup>20</sup> Business Impact Target, House of Commons written statement, 15 December 2020 <https://questions-statements.parliament.uk/written-statements/detail/2020-12-15/hcws653>

### 3.3 The ‘Brexit Dividend Target’



Given this recent history, the opportunities for post-Brexit Britain to cut red tape costs ought to be immense. We have a template for an effective Better Regulation system which we know worked very well until recently, and where the missing elements could be reinstated easily. And Brexit means we can now begin replacing all the much-criticised box-ticking, bureaucratic EU rules which were outside the scope of previous better-regulation efforts with modern, digital equivalents which deliver the same standards at a fraction of the cost and time. The same goes for the rules created by the independent sector regulators too, which were excluded from Better Regulation before but can now be asked to replace as many of their current regulations as possible with lower-cost competition and consumer rules as well.

For example, we can rebuild our natural ecosystems faster and more effectively by redesigning the environmental assessment framework so it is easier to use<sup>21</sup>. Or by repealing EU rules which mandate water companies to solve water quality problems by building expensive, high-carbon water treatment plants, when striking deals with local farmers to reduce pollution risks or slow water runoff upstream could be both a greener and far more economically efficient and productive solution instead.

***The Government should make cutting red tape costs into an automatic burden-reduction process, with a revived and stronger Better Regulation regime.*** Specifically, this means:

- ***Reinstating the gateway condition, so Ministers and regulators must first remove or modernise old rules before they can introduce new ones.***
- ***Increasing the ambition of the regime’s target from ‘one-in-one-out’ to ‘one-in-two-out’, so we are moving forward rather than (at best) marking time.***
- ***Including all forms of Government and regulator rule-making in the new process, with no exceptions.*** This includes all the previously-excluded EU rules which have become UK laws as part of the Brexit transition process; the independent sector regulators which were exempt in the past; Government Department and, through them, all the other regulators (such as the Environment Agency) as well. The sector regulators may need their own equivalent of the Regulatory Policy Committee, so they remain genuinely independent and at arm’s length from Government as well<sup>22</sup>.

<sup>21</sup>National Infrastructure Strategy: Fairer, faster, greener. HM Treasury. 25 November 2020. p84 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/938539/NIS\\_Report\\_Web\\_Accessible.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/938539/NIS_Report_Web_Accessible.pdf)

<sup>22</sup> This role could potentially be delivered through the UK Regulatory Network (UKRN)

### 3.4 Government Contracts



One of the biggest and most economically-valuable areas that is currently held back by red tape is public contracting and procurement, of everything from waste collection services bought by local Councils, to big capital projects like building new roads commissioned by central Government, and everyday office supplies purchased by arms-length Government agencies. It is a third of all public spending at almost £300 billion<sup>23</sup> (including academies) in a normal, non-pandemic year, so doing it well is essential to make sure taxpayers get good value

for money. But its importance is much broader and more fundamental than that; its scale affects the competitive pressures and productivity (for better or worse) of a significant proportion of the entire UK economy. And its transparency drives levels of trust and confidence in whether public sector contracts are genuinely fair and open to smaller 'challenger' companies or charities which want to compete on a level playing field against big and long-established incumbents or not.

At the moment the Official Journal of the European Union (OJEU) rules create important standards for open auctions of government contracts, which aim to achieve precisely these outcomes. They are successful up to a point, but are widely criticised for being too slow and time-consuming, as well as too difficult for small firms to navigate: the 25 largest firms increased their share of contract value from 13% to 18% between 2013 and 2017<sup>24</sup>. In other words the bureaucratic and red tape costs which they create are too big, and the result is weaker competition and worse value for taxpayers because small and medium-sized challengers are being frozen out.

The Government's new procurement green paper<sup>25</sup> shows how post-Brexit Britain could achieve better value for taxpayers by reforming, updating and improving these EU rules with a new, more digital, faster, automatically-transparent process that is both easier for entrepreneurial firms to compete through, and also more resilient against corruption and fraud as well. Given the scope and scale of Government contracting, this would be a huge increase in competition across large parts of our economy. So ***the Government should implement the broad changes outlined in the Green Paper as fast as possible.***

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<sup>23</sup> Government Procurement: the scale and nature of contracting in the UK. Institute for Government, Dec 2018 [IfG procurement WEB 4.pdf \(instituteforgovernment.org.uk\)](#)

<sup>24</sup> Government Procurement: IfG, Dec 2018 [IfG procurement WEB 4.pdf \(instituteforgovernment.org.uk\)](#)

<sup>25</sup> [Green Paper: Transforming public procurement - GOV.UK \(www.gov.uk\)](#)

# Chapter Four:

## More Competition in Digital Industries



## 4. More Competition In Digital Industries

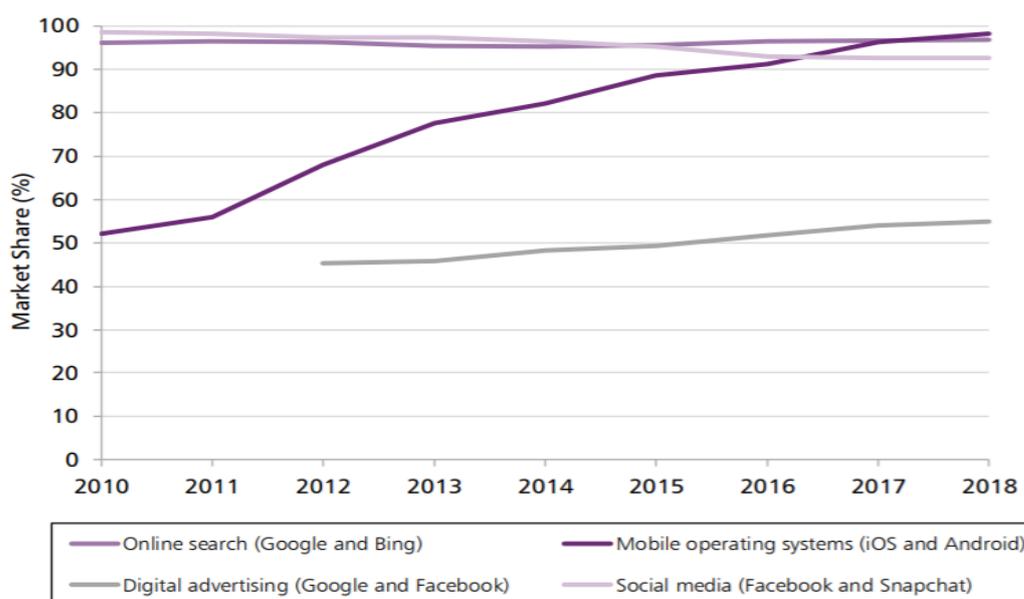
### 4.1 Digitisation: Wonderful But Not Perfect



Digitisation is transforming almost everything for the better, by making things cheaper, faster, more convenient and bringing previously-rare or hard to find information and cultural experiences within reach in moments, often without parting with any cash in exchange. New digital industries are an important and fast-growing part of our economy, contributing nearly £150bn to GDP in 2018.

But there are downsides to these otherwise-wonderful changes, and some of them are caused by new types of business which create enormous new network monopolies, or which charge nothing upfront but harvest and use customer data to make money instead. The chart below from the UK's Furman Review of competition in the digital economy<sup>26</sup> shows some examples

**Chart 1.B: Combined indicative market shares of current leading two companies in selected UK digital markets**



Sources: StatCounter,<sup>21</sup> Comscore,<sup>22</sup> and eMarketer and company reports<sup>23</sup>

These conclusions have been confirmed by a host of other<sup>27</sup> heavyweight<sup>28</sup> reports<sup>29</sup>. More broadly, they show the same highly-familiar problems of network monopolies which our existing sector regulators were originally created to address in the non-digital economy are reappearing in new forms in the digital world as well. One reason for this is the presence of

<sup>26</sup> [Unlocking digital competition, Report of the Digital Competition Expert Panel](#), 13 March 2019

<sup>27</sup> [Stigler Committee on Digital Platforms: Final Report](#), 16 September 2019

<sup>28</sup> [CMA Online platforms and digital advertising](#), 1 July 2020

<sup>29</sup> [CMA Digital Markets Taskforce Advice](#), 16 December 2020

'network effects', where there are more benefits to users from a platform with a larger number of other users and so users gravitate to one platform. For example, in social media it makes sense to be on the same platform as your friends and family, and advertisers or market sellers want to operate on pages where there are the most users.

Some digital network monopolies are also using data to build dominant positions as well. Bigger and deeper pools of customer data mean the largest digital firms can tailor their products and services better, which in turn draw in more users and data. For example an internet search engine which has been trained on a large database including a wide range of rare 'tail' search terms is likely to be more useful than one which has not. And firms with big pools of data can enter new markets by launching products at the same time as they cut off or reduce access for firms which were previously their customers, but have now become their rivals.

Digital services also frequently have high fixed costs and low marginal costs, giving them huge economies of scale so they become far more profitable than their smaller rivals, and can invest faster in new developments to extend their leads even further.

These structural and strategic problems are often buttressed by other tactics which erode competition and consumer power too:

- Using the power of defaults to nudge consumers towards a particular product, or away from a rival. Google paid Apple around £1.2bn in 2019 to be the default search engine in Safari in the UK alone, as holding this default buys it significant market share.<sup>30</sup>
- Limiting interoperability between market-leading incumbent firms or products and their rivals (for example Android and Apple) makes it harder or more expensive for customers to switch easily between rivals, or for challenger firms to make their products and services easily-accessible for many customers either.

These restrictions on competition hurt customers in several practical ways.

- Notionally 'free' products always come with a price of some form, usually paid by exchanging our data (which companies then use to target advertising, or sell to other companies which use it in similar ways) for the product or service itself. This industry is worth £14bn each year<sup>31</sup> in the UK alone, but it's impossible for anyone to know the price we're paying for a specific product or service if we don't know the value of the data we're signing away. And if we don't know the price we're paying, it's impossible to tell if we're being ripped off or getting a great bargain, or to compare it to a rival offer which might be better.
- Making services less interoperable makes switching harder. Once a firm knows we are locked in, they are more likely to take us for granted, because they know it will be hard or impossible to move our profiles and data to a new or rival service if we want to.
- The monopolies and barriers to entry mean innovative new companies can't get a look in. While the early years of the internet saw dynamic competition with new and better products and services launching all the time, things are now much slower. The major players have remained largely the same for the last decade, and their products have changed at a much lower pace. Potentially-exciting new challenger products and services are being blocked or throttled, so consumers have less choice than in the past.

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<sup>30</sup> [CMA Online platforms and digital advertising](#), 1 July 2020

<sup>31</sup> [CMA Online platforms and digital advertising](#), 1 July 2020

All these reductions in consumer power and choice feed through into the prices customers pay. CMA estimates every household in the UK is paying £500 more each year than if there was proper competition in digital advertising markets.<sup>32</sup>

## 4.2 Fixing One Problem While Avoiding Another



All this work means Britain has become a world-leader in understanding the costs in lost competition which come alongside the benefits of digitising our economy, and has just announced that a new digital markets unit will be created in CMA<sup>33</sup> with powers to create extra-strong upfront ('ex-ante') regulations to deal with them properly.

This is exactly the right thing to do, because the entire economy is digitising, and therefore any sector could potentially see entrepreneurial firms emerging to create new digital network monopolies at any time. Siting the new unit inside CMA will not only ensure it can spot and deal with new threats to strong competition no matter where they emerge, but will also make sure the unit doesn't hollow out CMA itself as every sector of our economy becomes a digital one.

But the new unit creates a further danger, which needs to be avoided too. It will have modern versions of the same extra-strong upfront powers as long-established sector regulators like Ofwat, Ofcom and Ofgem. Because these upfront powers are so strong, and usually quicker and easier to use than normal competition and consumer laws as well, the temptation for any regulator is to use them more and more, and the workaday competition and consumer ones less and less. So upfront powers are a headily-addictive drug for regulators to use, but they come with a high cost because they add far more red tape costs and regulatory burdens than traditional competition and consumer powers too. As a result, upfront powers create a high risk of 'regulatory creep' which adds red tape costs steadily over time; the huge growth in cost, time and complexity of price control decisions in the long-established sector regulators over the last 30 years shows what can happen.

***So the new digital unit's extra-strong upfront powers must be ring-fenced tightly, to prevent regulatory creep***, otherwise they will steadily spread to cover every digital sector of the economy. And since everything is digitising, that would put the entire economy at risk of replacing competition with enormous increases in red tape and bureaucracy instead.

***To reinforce this vital, central point, the new unit should be called the Network & Data Monopolies Unit (NDMU)*** and its extra-strong upfront powers must:

- ***Be a ring-fenced addition to the rest of CMA's existing competition and consumer powers, so it can use the normal ones wherever possible.***
- ***Only apply to individual firms that own and run new network and data monopolies, rather than to the rest of the sector in which they work.***

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<sup>32</sup> [CMA Online platforms and digital advertising](#), 1 July 2020

<sup>33</sup> [Government response to the CMA digital advertising market study](#), 27 November 2020

- **Only apply to problems which CMA's existing competition and consumer powers can't solve already.**
- **Only be extended with Parliament's consent.** The unit will need a process to bring new network or data monopolies that haven't been invented yet under its legal powers as they emerge, and to remove old ones as they decline. **To add a new monopoly, CMA should 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. To remove a former monopoly the process should be quicker, and CMA should be able to abolish the power without approval from Parliament.**

### 4.3 Rebuilding Normal Competitive Markets



The NDMU will be a vital tool to minimise and manage the costs of any new digital network and data monopolies, both now and in future. But its upfront powers will only treat the disease rather than curing it; the safest and best long term answer is to turn the affected industries back into normally-competitive, pro-customer markets, so the consumer costs of a monopoly are permanently removed along with the burdens of all the upfront rules and regulations which were needed to protect its suppliers and customers.

Permanently removing these costs to make these industries more dynamic, productive and creative isn't the only advantage of rebuilding normal competitive markets wherever and whenever possible. It also makes sectors more stable by cutting regulatory and political risks to create industries where bosses and shareholders fix commercial problems when things go wrong, rather than Ministers and regulators intervening unpredictably (and often expensively) with all their attendant lawyers, lobbyists, political activists and subsidy requests as well. Put another way, it lets business leaders focus on delighting their customers, rather than lobbying their regulators or their legislators instead.

So **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 it's possible and proportionate.** As the Furman Review also recommended, this should include:

- **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.**

There are other potential pro-competitive interventions which could be used as well. They include:

- **Allowing and encouraging new technologies which erode the power and strength of existing networks.**

- **Ensuring fair and equal access to a monopoly network for all suppliers and customers, so they can't be blocked or disadvantaged and competitive choices are as good as possible** (for example generators selling into electricity grids).
- **Requiring interoperability between networks**, as Ofcom does for telecommunications.
- **Making switching cheaper and more convenient** existing examples of this include the Current Account Switching Service and Open Banking, but we will need to go further too. For example services like the Data Transfer Project (DTP) sponsored by Google, Apple, Microsoft, Twitter and others will be needed so customers can move their personal data, transaction history and preferences safely, securely and simply from one company's product to another. Plus services such as 'choice screens' will reduce the power of default settings, so customers can switch (for example) to a different internet browser from the preset one on their laptop, tablet or phone simply and easily, rather than in a complicated and difficult process which can only be navigated by a confident expert.

The potential of pro-competition interventions is already being demonstrated in practice by the successful example of Open Banking, a UK innovation which is now being copied around the world.

#### **Open Banking and the potential of pro-competitive interventions**

Open Banking is a scheme which sees the secure and consented sharing of customer data from current accounts and credit card accounts as well as some savings accounts with authorised third party providers (TPPs). These providers then use this data to provide innovative services for the consumer or business, such as automatic switching and account management. It unlocks competition by reducing a key barrier to entry for challenger firms: safe access to customers' data and transaction history held by incumbents.

Open Banking was the result of the Payment Services Regulations (PSRs) and the CMA's Retail Banking Order which mandated participation for the nine largest UK banks.

There are now over 2 million individual and SME users, involving over 250 authorised third parties and account providers.<sup>34</sup> The Open Banking Implementation Entity estimates the potential annual benefit from Open Banking at £12bn for consumers, and £6bn for SMEs users.<sup>35</sup>

The success of Open Banking can be broadened to improve competition and consumer power in other industries by extending the pro-competition recommendations which are outlined above so they apply throughout the rest of the economy as it becomes steadily more digital in future, and by including Government-owned datasets as well. For example public data releases such as Transport for London's (TfL) provision of free, real-time open data to developers in 2009, saw a number of new business and products created, including some competing directly with TfL's complementary products, such as Citymapper. Research by Deloitte found that the release of open data by TfL is generating annual economic benefits and savings of up to £130m a year.<sup>36</sup>

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<sup>34</sup> [Real demand for open banking as user numbers grow to more than two million](#), 28 September 2020

<sup>35</sup> [Next steps for Smart Data](#), September 2020

<sup>36</sup> Deloitte, [Assessing the value of TfL's open data and digital partnerships](#), July 2017

The Government's 'Smart Data' project aims to extend these types of pro-competition and open-data interventions much more widely, to cover other sectors wherever possible. Plus the (relatively) newly-established Regulatory Horizons Council<sup>37</sup> is intended to challenge existing regulators' thinking and processes, to make sure they aren't unintentionally blocking or obstructing insurgent companies and investment in important, newly-emerging technologies which could be economically transformational too. This is precisely the right thing to do, and has the potential to improve the competitiveness and productivity of our entire economy dramatically. **So NDMU's legal duty to reinstate normal competitive conditions wherever possible should be extended to every sector regulator too, for the same reasons.**

#### 4.4 Data & Privacy



The NDMU's mandate to deal with the competition and consumer effects of data monopolies will inevitably intersect with the Information Commissioners Office (ICO) whenever privacy issues are involved. CMA is already working alongside the ICO in the Digital Taskforce, and there will need to be a strong and close working relationship on these issues in future too.

The CMA's Online Advertising Market Study<sup>38</sup> examined consumers' attitudes to data and found that people are less able to control how their data is used than they would like. They also examined the profits platforms such as Facebook and Google are earning from data, concluding that consumers are not getting as good a deal as they should under competitive conditions. **CMA should continue this work, potentially by extending its initial market study into a full-scale market investigation in future, to improve transparency of the price consumers are paying through their data for digital goods and services, so they can make informed choices about whether each one represents good value or not, and whether they wish to switch to others which might be better.**

<sup>37</sup> [Regulatory Horizons Council \(RHC\) - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

<sup>38</sup> [CMA Online platforms and digital advertising](#), 1 July 2020

# Chapter Five:

## More Competition in Sectors with Economic Regulators



## 5. More Competition In Sectors with Economic Regulators

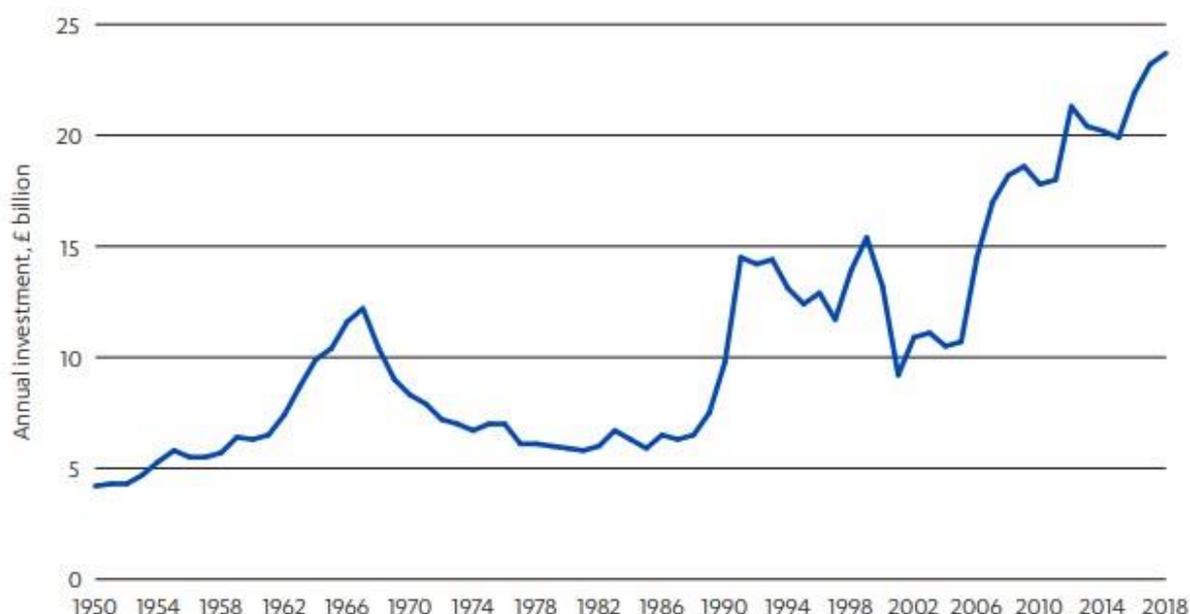
### 5.1 Who Are The Sector Regulators?

While CMA and CAT deal with competition and consumer issues for most of the economy, there are seven industries where nine specialist sector regulators handle the same problems. The regulators are:

- Civil Aviation Authority (CAA)
- Financial Conduct Authority (FCA)
- Gas and Electricity Markets Authority (Ofgem)
- Northern Ireland Authority for Utility Regulation (NIAUR)
- Office of Communications (Ofcom)
- Office of Rail and Road (ORR)
- Payment Systems Regulator (PSR)
- Water Services Regulation Authority (Ofwat)
- NHS Improvement (NHSI)<sup>39</sup>

These are important industries covering a quarter of our Gross Domestic Product (GDP),<sup>40</sup> with investment in energy, telecoms and water reaching almost £25bn in 2018 as the chart below shows<sup>41</sup>, making up over 13% of private sector investment. So their economic performance, and whether our competition and consumer regime works well or badly for their customers, staff, investors and suppliers, matter hugely for post-Brexit Britain's success.

**Figure 2: Investment (Gross Fixed Capital Formation) in energy, water, sewerage and waste<sup>22</sup>**



<sup>39</sup> The author's wife is Chair of NHSI. Ministers have already announced plans to remove CMA and NHSI competition powers to intervene in NHS provider mergers, pricing and licence condition decisions, so NHSI is included here for completeness, but the recommendations in this report will not otherwise apply to it.

<sup>40</sup> [CMA Annual Concurrency Report](#), 15 April 2020

<sup>41</sup> [NIC Strategic Investment and Public Confidence](#) October 2019



At the heart of each economically-regulated sector is a network monopoly, from gas pipes, electricity grids, railway tracks or water and sewage pipes, which reduces the overall levels of competition in the sector by giving its owner market power to exploit suppliers or customers. For example generators need the grid to get electricity to their customers, and train firms need access to the tracks to run their services. And if customers aren't connected to the network then it's either impossible or a lot more expensive to buy things like electricity, gas or water than if they are. So monopoly owners can charge customers rip-off prices, or demand exorbitant terms from their suppliers, or under-invest in their network so it doesn't work particularly well or reliably, because they know their suppliers and customers can't take their business elsewhere.

As a result, sector regulators have traditionally needed very similar kinds of extra-strong upfront regulation powers to protect the customers and suppliers of their network monopolies as the new NDMU (see previous chapter) will be getting to cope with modern versions of the same problems in new digital network monopolies too. Plus some of the sector regulators also have to cope with extra economic problems (mainly consumer rip-offs, particularly in parts of the financial services industry<sup>42</sup>) on top of the problems caused by network monopolies too.

Most of the sector regulators don't just handle economic regulation; they have non-economic regulatory duties as well. For example Ofcom does spectrum auctions, broadcast content regulation and is about to take on 'online harms' too; ORR & CAA cover rail safety and air security as well. These responsibilities aren't particularly relevant for this report, although they will be affected by the new Better Regulation targets (in chapter 3 above), but they mean that, for most sector regulators, competition isn't their only or, in some cases, even their main focus.

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<sup>42</sup> The financial services industry has split responsibilities; the Payment Systems Regulator handles payment system network effects while the Financial Conduct Authority deals with consumer protection (with an operational objective to promote competition too)

### 5.3 Outside The Networks: Normality Everywhere



Outside the network monopolies with their Regulated Asset Bases (RAB<sup>43</sup>), there is no inherent reason why most of the rest of each of these sectors shouldn't become a normally-competitive industry, with the same high standards, strong competition and consumer powers as other parts of our economy. The benefits will be same as the ones described for digital industries in s4.3: Rebuilding Normal Competitive Markets (above); companies will become more dynamic, productive and creative if they are focussed on delighting their

customers, rather than on lobbying their regulators or their legislators instead. And they should be safer and more stable for investors too, because lower regulatory and political risks mean business leaders only have to manage normal commercial uncertainties instead.

To be fair, some regulators have already moved a long way in this direction; the Civil Aviation Authority treats most of its sector like a normal industry apart from network effects at Heathrow and Air Traffic Control, and Ofcom does the same apart from BT Openreach and mobile network interconnection fees. But others have only recently begun.

So the challenge is to normalise as much of these industries as possible, with a steady, low-risk and predictable process which business leaders can see in advance and build into their plans. This will have to be approached carefully, because each sector is different; each regulator has slightly different legal powers, so they can't all use the same techniques, and the proportion of each industry that is outside the network monopoly varies hugely. As a result we will need to take several steps:

- **Require each economic regulator to publish and execute a multi-year project plan, to turn as much of their sector into a 'normal' pro-consumer, high-standards competitive market as possible.** As the plan progresses, the sector regulator should formally hand over responsibility for more and more of its sector to CMA (initially by simple changes to the Memoranda Of Understanding which each of them has with CMA, but some statutory transfers may be needed later too) so they are progressively left with a smaller and smaller piece of less-competitive activity centred on the industry's core network monopoly. This planned, long-term schedule of CMA-handovers will create a risk-reduction ratchet of milestone moments for business leaders and investors, when political and regulatory uncertainties are permanently reduced as the changes are locked in forever.
- **Each sector regulator will be subject to the newly-strengthened Brexit Dividend better regulation target** (see chapter 3 above). This will apply to everything they do, whether it is economic or other types of regulation, and whether it is aimed at areas of the industry which are currently inside or outside the network monopoly.
- Each sector regulator already has a set of legal duties, and most of them include promoting competition for the benefit of consumers (or a close equivalent) somewhere. But they vary enormously in strength and importance, so we will need a strong, long term, legal ratchet to maintain the initial one-off gains that are outlined here, and to prevent regulatory regrowth and creep in future. **We must audit and amend all the sector regulators' legal duties so they all have a strong, clear 'competition for the benefit of consumers first, regulation only as a last resort' primary legal duty.** The audit should include the NDMU, since it has the same dangerously-strong upfront powers as the sector regulators too.

<sup>43</sup> Or Regulated Capital Values (RCVs) in some industries too

## 5.4 Tough Regulation & Stronger Competition For What's Left



Once these changes have all taken effect, we will eventually be left with economic regulators that are focused solely on the core network monopolies with Regulated Asset Bases in their sectors, plus a few remaining hard-to-solve consumer protection problems (particularly in industries like financial services).

The time it will take to whittle each industry down to this remaining 'hard core', and the size of what's left in the end, will be different in each case. That's partly because of the different starting points and regulators' legal powers in each sector which are described in section 5.3: Outside The Networks: Normality Everywhere (above)<sup>44</sup>; partly because the residual network monopolies make up a much bigger and more important slice of the total economic activity in some industries (like water) than in others (like media and telecoms); and partly because the remaining consumer protection problems are more complex and dangerous in some sectors (like financial services) than in others (like mobile telecoms).

The opportunities to inject more competition into the remaining core of network monopolies are, inevitably, more limited than for the rest of these industries. But there are still significant areas where post-Brexit Britain can and should improve. They are:

- As the National Infrastructure Commission has also recommended<sup>45</sup> ***we should independently-auction the contracts to build and upgrade the network monopoly infrastructure in each regulated industry***, rather than handing them to the incumbent monopoly-owners instead<sup>46</sup>. Given the enormous size and scope of infrastructure upgrades that will be required over the next few decades (for example to achieve net-zero carbon), this is a huge extension to competition. It will deliver far better value for money for businesses and consumers, not least because it allows external bidders to propose innovative new ways to achieve whatever the desired outcomes are (for example by building more small-scale local power generation capacity if it produces better returns and resilience than the traditional architecture of fewer, large plants connected by a high-capacity national grid).

And, by replacing regulatory modelling, lawyers and lobbyists with an independently-auctioned competitive market price, it will cut red tape burdens and also produce better, more consistently-accurate answers that will make investments far more efficient and productive too.

Finally, by keeping the pricing, timescales and project risks of major new investments separate from the lower steady-state risks of day-to-day maintenance and running the existing installed network, it makes price regulation decisions less complex too.

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<sup>44</sup> For example the financial services industry's split regulators (FCA and PSA) will require a different and tailored approach compared to other sectors.

<sup>45</sup> [NIC Strategic Investment and Public Confidence](#), October 2019

<sup>46</sup> This has already been used successfully for Ofgem's Offshore Wind Transmission programme and Ofwat's Direct Procurement for Customers mechanism for the Thames Tideway Tunnel.

- The market power of any network monopoly isn't necessarily permanent: it can ebb or flow as technology changes. For example, while landline telephone services provided by BT were once the only way of speaking in real time over distances, there is now competition from mobiles and voice calls through apps and computers. **So the sector regulators should share the same mandate as NDMU to erode the power and strength of their network monopolies by making pro-competitive interventions, for example by encouraging more data sharing, or reducing barriers to new entrants, wherever it's possible and proportionate to do so.** This is explained in more detail in section 4.3: 'Rebuilding Normal Competitive Markets' (above). It should also provide the sector regulators with a long-term way to reduce the scale, scope and bureaucratic burden of their price control regulatory processes in future too.

Dealing with the remaining 'hard core' of hard-to-solve customer rip-offs in these sectors will either need tight long-term grip from sector regulators like FCA or, where the problems affect more than one industry, stronger general consumer-protection regulations for the entire economy. These are described in Chapter 7: Sticking Up For Consumers (below).

## 5.5 Long Term Regulator Quality & Stability



At the end of both these processes, the economic regulation teams in each of the sector regulators ought to be a great deal smaller than they are today. But they will still embody an important remaining risk that has to be managed: in some cases, regulators can become less-skilled than, or even captured by, the long-established and deep-pocketed incumbent firms they are supposed to regulate, particularly after the end of a price-control process when a single-sector economic regulator's workload declines significantly, and many staff (understandably) leave to further their careers elsewhere.

This isn't a new problem of course; it has existed ever since economic regulators were first created. Nor is it a particularly big risk for most of the time; Britain's reputation for strong and independent economic regulation means these types of problems don't happen often. But it still matters, because it increases the risk of consumer rip-offs going unsolved, and of political interventions (like the energy price cap legislation) if regulators aren't strong enough to pre-empt problems in advance. It increases political and regulatory risks, raising the costs of capital which investors will demand, and so the costs that are ultimately passed on to consumers and business customers alike. If we can reduce it, we should.

In the past, there were limited options for solving this problem. The UK Regulatory Network<sup>47</sup> (UKRN) was set up to reduce this risk by creating a forum for economic regulators to learn and compare best practice and, while their work is valuable and has certainly helped to reduce this risk, they wouldn't claim to provide a complete solution either. But the creation of the NDMU in CMA will produce an expert, cross-sector network regulator for the first time, with

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<sup>47</sup> UKRN members are the nine economic sector regulators, plus the Financial Reporting Council, Single Source Regulations Office, the Information Commissioners Office, The Pensions Regulator, and the Regulator of Social Housing

the most up to date, digital-era set of legal powers and duties of all our network monopoly regulators. These qualities make it not only inherently less vulnerable to being captured or deskilled than a single-sector regulator, but also a safe harbour for any that might find themselves in trouble at any point in future. So, as a residual safeguard 'insurance policy' to maintain the quality, integrity and independence of our economic regulators in future:

- ***Each sector regulator should publish its workload figures annually and, in each year that economic regulation forms less than half of its activity, the regulator's Chair should write a public letter to the CMA's Minister explaining whether their residual economic regulation duties should be transferred to the NDMU or not.*** This residual safeguard shouldn't start for between three to five years, to allow time for the multi-year project plans to 'normalise' each sector regulator's industry (described in section 5.3: 'Outside The Networks: Normality Everywhere' above) to take effect.
- There is an existing (and unused) statutory power to transfer some of the economic regulators' powers to CMA, but it doesn't cover all of the regulators or all of their economic regulatory powers, ***so it should be updated to do so, and to allow incremental, partial transfers of powers as each step of the 'sector normalisation' project plans (described in section 5.3: Outside The Networks, Normality Everywhere' above) unfold over time.*** This is particularly important for any powers which can't simply be transferred by changes to the Memoranda of Understanding between CMA and sector regulators.
- ***If any of the existing consumer groups that hold legal 'supercomplaint' powers believe a sector regulator is becoming deskilled or captured, they should also have the power to trigger a formal, public request to Ministers to table the statutory motion to transfer the economic regulatory responsibilities to CMA. For fairness, this power should also be triggered if more than ½ of the regulated firms in a sector (by revenue) write a joint open letter to the same effect.*** However it was triggered, it would only transfer the legal powers and responsibility for future regulatory decisions; it should not allow retrospective unpicking of any decisions (particularly pricing decisions) that were already in place, since that would increase uncertainty rather than reducing it.

With any luck this process will never be needed in future. But if it is, defining and creating the legal path carefully and in advance will reduce political risks by forging a safe, predictable and institutionalised transition process for a change which could otherwise only be achieved through an unplanned and inherently uncertain political intervention instead.

# Chapter Six:

## Levelling Up: More Competition Outside The South-East





## 6.2 Boosting Local Competition: Stronger Consumer Rights.....



But these aren't the only things that matter: raising the local competitive temperature for all firms in every part of the country, particularly the ones that aren't exposed to world-class rivals in global export markets, will level up productivity and growth too. There's plenty of evidence showing that stronger competition goes hand in hand with higher productivity<sup>52</sup> as less-competitive firms have to step up or shut down. At its most basic, this means giving small firms and consumers quicker, easier, cheaper and more digital ways to enforce their rights when goods or services aren't good enough, so poor-performing firms face more pressure, and so consumers know they can trust the system to be on their side if they need it.

At the moment, around 7 out of 10 consumer disputes are settled directly with businesses<sup>53</sup>. For example, if a customer purchases a product that turns out to be faulty, they ought to be able to return it for refund, repair, or replacement. If that doesn't work they can either go to the Small Claims Court<sup>54</sup> or an Alternative Dispute Resolution (ADR) service (usually an ombudsman, but sometimes mediation or arbitration).

These options are currently being upgraded and modernised. For example, recent changes to the Small Claims Court include:

- Claims can now be filed online or on paper, with lower fees and 24/7 availability for digital applications<sup>55</sup>. The same is true for settling out of court.
- Pre-court hearing mediation is encouraged for cases up to £10,000 value, with an 'opt out' model for lower value disputes (under £500) to use the Small Claims Court mediation service.
- The Online Civil Money Claims service helps consumers through the process, so they can use the court effectively.<sup>56</sup>

These upgrades are still too new to measure their impact, but they are clearly steps in the right direction. Some ADR services are modernising too: the Furniture and Home Improvement Ombudsman, the Dispute Resolution Ombudsman, and the energy and telecoms ombudsmen have online case management systems so consumers and businesses can track case progress, and new services are emerging like Resolver which is a free and independent digital platform that does something similar.

These improvements are right, but they need to go further and apply to every industry too. ***Small Claims Courts and ADR services should all become fully 24/7, to match the modern digital economy, and be as easy, cheap and simple as using an app on your phone.***

<sup>52</sup> CMA, "productivity and competition: a summary of the evidence", July 2015

<https://www.gov.uk/government/publications/productivity-and-competition-a-summary-of-the-evidence>

<sup>53</sup> BEIS Public Attitudes Tracker Wave 30 (June 2019), p.38

<sup>54</sup> Provided the dispute is under £10,000 (or under £5,000 in Scotland and £3,000 in Northern Ireland) in value.

<sup>55</sup> But Ministers are consulting on proposals to raise digital fees to the same levels as analogue applications.

<sup>56</sup> <https://www.gov.uk/guidance/hmcts-reform-update-civil>

## 6.3 .....County Competition Courts.....



Most competition problems are only ever enforced by CMA or the sector regulators but, for the last few years, companies that feel they are being unfairly treated by other businesses can bring their own cases to the CAT (or the High Court). This has been a sensible, welcome extension of justice for cases which would not necessarily have warranted investigations by public authorities, to increase competitive pressures throughout our economy.

But even though the CAT has a Fast Track Procedure for some of these cases, it will still look dauntingly slow and expensive for many small or local firms. A further, lower tier of regional 'County Competition Courts' would extend access to justice even further, particularly for smaller firms further away from London. ***We should create new, cheap, efficient, fast-track 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 1 or 2-day maximum hearing length too.***

### **Case Example**

A small independent retailer finds one of its suppliers wants to impose a contract that stops them from applying discounts below a certain level, which would stop them from running promotions to stand out from competitors or attract new customers. They think the new contract could be resale price maintenance, which is a breach of competition law, but it isn't worth the money or time of going to CAT. So they take the case to the local competition court instead, using their correspondence with the supplier as evidence, to get the contract changed.

## 6.4 .....Stronger Trading Standards



Local authority trading standards (LATS) teams have an essential role in investigating and enforcing local scams and other consumer problems which are too small to warrant a full-scale investigation by CMA or a sector regulator.

The problem is, LATS teams have been hollowed out in some – but by no means all – parts of the country by Councils facing budget pressures. The number of trading standards officers has fallen steadily<sup>57</sup> and almost half of

all LATS do not believe that their team has sufficient skills to cover the full range of trading standards responsibilities. Extra skills and expertise are provided by National Trading Standards and Trading Standards Scotland, which have specialist teams to help with things like e-crime and scams. But the legal duty which underpins LATS only requires local Councils to establish a trading standards service; some have taken this to mean as little as a single qualified officer, when estimates suggest the sustainable minimum is eight<sup>58</sup>.

The predictable result is an enforcement gap, with lots of cases unresolved. A medium sized LATS would expect the Citizens Advice Consumer Helpline to refer well over 700 consumer issues to them a year, but the average number of criminal prosecutions per LATS team is only 9.1<sup>59</sup>. Even though some cases won't meet the bar for prosecution, spotty and uneven local investigations and enforcement will sap consumer trust and confidence in whether the system is working properly to protect them, and stop local economies from becoming efficient, competitive and productive too.

***We should create a new statutory duty for minimum standards in LATS teams, including powers to mount antitrust and consumer investigations, and provide ring-fenced resources so they can deliver them well.*** The new statutory duty should define the outcomes which have to be achieved (in line with the Better Regulation principles described in Chapter 3 above) but leave local Councils to decide how best to deliver them, to allow more local control and creativity. This will also allow LATS to decide whether and how to join forces with their neighbours to tackle regional scams and cartels, in the same way as police forces pool resources in Regional Organised Crime Units at the moment.

<sup>57</sup> Chartered Trading Standards Institute Workforce Survey 2018/19.

<sup>58</sup> Audit Scotland "Protecting Consumers", prepared for the Accounts Commission, January 2013

<sup>59</sup> Chartered Trading Standards Institute Workforce Survey 2018/19.

# Chapter Seven:

## Sticking Up for Consumers



## 7. Sticking Up for Consumers

### 7.1 Stronger Consumer Protection



The central theme of this report is how to give citizen-consumers more power and choice, so firms have to work harder to attract and keep their business, which makes our economy more productive and competitive overall.

Consumer protection laws play an essential, central role in achieving this. They create the basic legal framework that makes the customer king (or queen), providing the foundations for our rights to (for example) return online purchases without charge up to 28 days after ordering; to make sure products that are advertised as ‘on sale’ have been offered at a higher price for a reasonable period before; and that the ingredients in our food are listed accurately on the packet so we know what we’re buying in advance.

Most of our existing consumer-protection rules already work well enough and don’t need to be changed. But there are three important gaps where post-Brexit Britain’s legal framework still allows consumers to be ripped off, and where our protections need to be stronger:

- Loyalty penalties and price discrimination, where people are charged different prices for the same things.
- Rip-offs hidden in the small print of long and complicated contracts that no-one has time to read.
- ‘Nudging’ people the wrong way (called ‘sludge’)

Each of these rip-offs is an analogue-era problem which is mutating and growing as the economy digitises, so our current rules need to be updated to stay future-proof. They also overlap with parts of the ‘hard core’ of deeply-embedded customer rip-offs which the economic sector regulators will still have to battle once they have normalised as much of the rest of their individual industries as possible (see Chapter 5 above). But because each of these problems affects more than one industry, the stronger consumer protection rules which will be needed to solve them will have to cover the entire economy rather than individual sectors instead. The rest of this chapter will take each of these three weaknesses in our consumer protections in order, and recommend answers to make each one stronger in turn.

## 7.2 Price Discrimination: Loyalty Penalties & ‘Fairness’



Price discrimination happens whenever customers are charged different prices for the same products. It's a growing problem because ever-bigger and deeper pools of online data mean more firms (or charities, or public bureaucracies) are now able to tell when some of us are less likely to notice or care about a higher price than others. Most of them won't misuse this newly-available ability, but some already are: the biggest recent example is the £3.4bn a year consumer detriment created across multiple industries by the 'loyalty penalty'<sup>60</sup>, where loyal

(or time-poor) customers who renew an existing contract in industries like energy or insurance are systematically charged more than people who switch.

The best and simplest way to stop loyalty penalty price discrimination is already being introduced, for parts of the insurance market at least: the Financial Conduct Authority is consulting on a sector-specific rule which requires firms to offer the same prices to new and existing customers for home and motor insurance. It ensures that loyal, time-poor or vulnerable customers can 'coat-tail' on the competitive pressures and keen prices achieved by the active consumers who switch, as already happens in most other well-adjusted and consumer-friendly industries, as described in section 1.2: 'Why Competition Works For Everyone'. ***We should apply it (or a close cousin of it) as a general consumer-protection regulation across the entire economy, so it provides a complete solution that covers energy and any other affected sectors of this £3.4bn rip-off too.***

But future-proofing this to prevent new types of yet-to-be-invented price discrimination from appearing in a fast-changing digital world is difficult, because society's view of what counts as fair or unfair changes over time. For example when airlines first started charging different fares for the same class of seats on the same flights several decades ago, there was initially a fuss. But now discounts for early or last-minute bookings are entirely normal and widely accepted; in fact they form the basis of some firms' business models, and of quite a few families' holiday plans too.

The same goes for introductory discounts too. A lower interest rate for a few months to persuade you or me to switch our mortgages may be entirely fair, but perhaps not if we then can't switch again for the next five or ten years, and particularly if they weren't clear about it when we signed up. But when and how does a fair and reasonable introductory discount (which we'd be happy to be offered) become an unfair, rip-off loyalty penalty (which we wouldn't)?

This isn't just an academic or philosophically-interesting ethical question; it creates potentially-serious problems for businesses that need clarity so they and their carefully-nurtured, valuable brands don't suddenly get pilloried in a tabloid newspaper or on social media for something they thought was OK until yesterday, particularly if everybody else in their industry was doing it too. And it affects citizen-consumers as well because, as explained in section 1.2: 'Why Competition Works For Everyone', it's vital customers know they can trust the system not to allow them to be exploited by new or emerging rip-offs in future either.

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<sup>60</sup> [CMA loyalty penalty update 2020](#)

Fortunately, our consumer laws already set a legal requirement for contract terms and notices to be fair, and the CMA issues guidelines for a ‘fairness test’ on how firms should apply them in practice<sup>61</sup> (for example this ensured people got refunded on holidays cancelled because of the coronavirus pandemic<sup>62</sup>). This is extremely sensible, but it can still be hard to use in the real world: for example Ofgem felt they didn’t have the necessary legal powers to deal with loyalty penalties in the Energy sector, and asked Parliament to pass an entirely new Energy Price Cap law to fix it instead. In other words, it’s still too hard for business people, consumer groups or regulators to work out in advance what ‘fairness’ means in practice, so they can understand whether a proposed new business model, online technique or pricing structure will pass muster or not, and make changes to avoid damaging their brand reputations if it won’t.

Fortunately, there is important and helpful new thinking underway which may provide what’s missing. The University of East Anglia’s Centre for Competition Policy has suggested the idea of “transactional fairness”<sup>63</sup> which would define fairness as satisfying three criteria:

- ‘No deception’ – including passive forms of deception like hiding rip-offs in the contract small print, so people aren’t aware of key details when they sign up.
- ‘No hindrance’, so consumers can easily compare alternatives before they sign up, and so switching processes are simple and convenient too.
- ‘Public explanation’ – the firm must expect to be challenged to explain the rationale of its pricing practices, and be able to justify why they are good for their customers too.

This ‘transactional fairness’ approach probably isn’t a complete or final answer to future-proofing our laws so they will stay fair for consumers, as well as predictable for businesspeople and regulators too. But it is a valuable step towards something that is vital to make sure our digital economy remains trusted and useful for everyone. ***CMA should update its guidelines on what treating customers fairly means in practice, including ‘transactional fairness’ in its work, so it is as easy as possible for businesses, charities and public bodies to identify and avoid problems in advance, and so the guidelines keep up with changing attitudes of what society views as ‘fair’ in future too.***

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<sup>61</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/450440/Unfair\\_Terms\\_Main\\_Guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/450440/Unfair_Terms_Main_Guidance.pdf)

<sup>62</sup> [CMA secondary ticketing investigation; CMA Covid-19 cancellation policy investigation.](#)

<sup>63</sup> Lyons, Sugden, 2020: “Transactional fairness and unfair price discrimination in consumer markets”: <http://competitionpolicy.ac.uk/documents/8158338/33995216/6+Lyons+Sugden+Transactional+fairness+and+unfair+price+discrimination+in+consumer+markets.pdf/dfaf9bc0-4af9-634c-4ae3-60ed1881f64a>

## 7.3 When Sellers Know More Than Buyers



Contract legalese and small print has always created opportunities for rip-offs because it produces ‘information asymmetries’, where sellers know far more than buyers and can bury rip-offs where customers won’t find them until it’s too late. This means consumers can’t make properly-informed choices, and is particularly dangerous when people are making big, important one-off commitments like pensions, mortgages or insurance. But the digital world means this problem is spreading to include terms and conditions for basic everyday items like public wifi signups, privacy and data usage policies too. It takes several different forms:

- No visible or comparable price. As explained in Chapter 4: ‘More Competition In Digital Industries’, where online services have no monetary cost it’s impossible to know what price we are paying with the data we are signing away. That means we can’t tell if it’s a great deal or a complete rip-off, and nor can we compare its price to a rival firm’s offer that might be better. A vital piece of information is being concealed from us, which means we aren’t giving fully-informed consent when we agree to the sign-up terms.
- Nobody reads the small print. We are being asked to agree to many pages of detailed and complicated legal small print, often several times a day, and nobody has the time to give properly-informed consent. A recent experiment created a fake social networking site with terms and conditions that included giving up your first-born child as payment. 98% of people agreed to this.<sup>64</sup>
- ‘Take it or leave it’. There are rarely options to change or modify terms and conditions and, in a digital world where there are lots of monopolies (whether it’s the only local public wifi network wherever you happen to be, or where rival social networks are too small to work half as well as the market leaders) there often isn’t an acceptable or practical alternative service if we don’t like what we’re being offered either. That said, there are small-but-welcome steps in the right direction in some areas; for example most websites now offer choices of whether to accept cookies or not.

There are several possible approaches which CMA and the sector regulators are already using to address these ‘information asymmetries’ where buyers know much less than sellers. The main ones are:

- Expert advisors. If buyers need to be experts to spot rip-offs but haven’t got the time (or, if they’re vulnerable, the capacity) to become well-enough briefed to spot problems, then an independent expert advisor can level the playing field and guide them to the right decision. Lawyers, insurance brokers and Independent Financial Advisors (IFAs) are analogue-era examples of this, and digitisation has created new ones – ‘Digital Comparison Tools’ (DCTs) – from price comparison websites to digital concierge or switching services which apply the same approach to a wide range of new areas like energy prices or car insurance too.

As technology improves in areas like artificial intelligence, DCTs might well evolve far enough to become a permanent, practical antidote to the rip-offs caused by information asymmetries, levelling the playing field so sellers can’t hide things from buyers and customers don’t need extra protection anymore. They haven’t reached that stage yet but, in 2017, CMA concluded that they are developing fast<sup>65</sup> and both their range and capability is expected to keep improving in future.

<sup>64</sup> Obar, 2018: “The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services”: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2757465](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2757465)

<sup>65</sup> [Digital comparison tools market study: final report \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/614441/digital-comparison-tools-market-study-final-report.pdf)

- Key Terms & Conditions. Most complicated and hard-to-understand products have a few key areas where the value is created or lost; usually the price, but it can also include things like how long you're locked into a contract before you can switch too. Creating standardised and easy-to-compare measures of these key features (like the APR% rate for consumer loans) allows consumers to make better-informed choices quickly and easily.
- Minimum contract terms and standards. Because nobody reads the small print, the law sets minimum standards for most detailed contract terms. This has already been described in section 7.2: 'Price Discrimination, Loyalty Penalties & Digital Fairness' above.

CMA and the sector regulators will need to continue using all three of these techniques in future, as they have until now. And, in addition, CMA must:

- ***Track whether DCTs are continuing to grow in power and reach, to level the playing field so buyers can make reliable and well-informed choices regardless of how vulnerable or short of time they are, or how complicated a particular contract may be. If they aren't growing fast enough to close this knowledge and information gap in the sectors where it causes the most consumer detriment soon, CMA must reopen their 2017 market study and introduce measures to make sure they can.***
- As outlined in Chapter 4: More Competition In Digital Industries ***CMA must consider how to improve transparency of the price consumers are paying through their data for digital goods and services, so they can make informed choices about whether each one represents good value or not, and whether they wish to switch to others which might be better.***
- ***For the local digital monopolies (like the example of a single available public wifi network mentioned above), CMA must consider how to introduce more competition as described in section 4.3: 'Rebuilding Normal Competitive Markets'. Or, if that isn't possible in these particular cases, evaluate whether these monopoly-owners should be held to a higher standard of minimum contract terms and standards so that customers with less choice have stronger legal rights to protect them from being ripped off.***

## 7.4 Sludge



‘Sludge’ is where the consumer behaviour insights of ‘nudge theory’ are used to rip customers off, rather than to help them do the right thing. Described as ‘nudging for evil’<sup>66</sup>, sludge exploits consumers (including vulnerable people) and saps citizen-consumer trust and confidence about whether the system is really on their side and will protect them from being ripped off. Studies show that more than 1-in-10 websites use these techniques at the moment <sup>67</sup>, and that vulnerable or less-educated consumers are more likely to be persuaded by sludge

too<sup>68</sup>. Examples include:

- “Subscription traps”, where companies offer consumers free trials and snare them into long, expensive deals (often by making it difficult for consumers to cancel the trial)
- Hiding or obfuscating opt out routes for added cost services (e.g. making the opt out icon smaller, less visible and/or located away from the ‘opt in’)
- Creating a sense of urgency around price or availability (e.g. number of customers looking at the same product, time clock for offers)
- Using defaults to influence consumer behaviour (e.g. pre-ticked checkboxes for add-ons; displaying paid options more prominently.)

Regulators are already taking action in some areas, for example by banning pre-ticked boxes on shopping websites<sup>69</sup> and making travel booking websites change their behaviour on things like misleading discount claims, ordering hotels based on commission rates rather than customer criteria, and hidden charges.<sup>70</sup> The CMA has also (rightly) endorsed<sup>71</sup> the principle of ‘symmetry’ (or ‘equivalence’), which says it should be just as easy to get out of a contract or an introductory trial as it was to sign up in the first place.

But this is a fast-developing area where companies, charities or public bureaucracies can run real-time experiments every day to quantify precisely how effective a particular page layout, wording change or design alteration is at achieving the outcome they want. This means that the net effects of as-yet-unknown positive nudges and negative sludges can be measured, which may provide powerful new tools for regulators to make sure that consumers aren’t being encouraged too strongly to do the wrong things. But it also means regulators will have to future-proof consumer protections against new examples of digital ‘sludge’ that will certainly be invented in future. ***CMA should undertake a market investigation to assess how we should recognise and measure sludge in future, and identify what consumer protection rules and analytical techniques will be needed to protect consumers from it as digital technologies evolve and develop over time.***

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<sup>66</sup> <https://science.sciencemag.org/content/361/6401/431.full>

<sup>67</sup> Mather et al., 2019: “Dark Patterns at Scale: Findings from a Crawl of 11k Shopping Websites”: <https://webtransparency.cs.princeton.edu/dark-patterns/>

<sup>68</sup> Luguri, Jamie and Strahilevitz, Lior, Shining a Light on Dark Patterns (August 1, 2019). U of Chicago, Public Law Working Paper No. 719, University of Chicago Coase-Sandor Institute for Law & Economics Research Paper No. 879, Available at SSRN: <https://ssrn.com/abstract=3431205> or <http://dx.doi.org/10.2139/ssrn.3431205>

<sup>69</sup> <https://www.bbc.co.uk/news/world-europe-15260748>

<sup>70</sup> <https://www.gov.uk/government/news/hotel-booking-sites-to-make-major-changes-after-cma-probe>

<sup>71</sup> CMA Report ‘Tackling The Loyalty Penalty Dec 2018’ [Tackling the loyalty penalty \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/711111/tackling-the-loyalty-penalty.pdf)

# Chapter Eight:

## Self-Denial: State Aid, Subsidies & Political Intervention



## 8. Self-Denial: State Aid, Subsidies & Political Intervention

Reducing regulatory and political risks is an essential part of making the customer king (or queen), because stronger competition and consumer choice cuts the reach, costs, economic distortions and uncertainty of bureaucratic and political interventions, so businesses and investors can focus on delighting their customers rather than lobbying their legislators or regulators instead. The benefits for post-Brexit Britain's jobs, growth, business investment and living standards of this approach are huge, particularly for an open and global trading nation like ours.

Our approach to state aid and subsidies control should follow the same principles. Now we have completed the process of leaving the EU, we have regained full sovereign control of the power to 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'.***

Subsidies distort competition, leading to investment being directed towards less-productive parts of the economy rather than where it would be most useful, making prices higher for hard-pressed families because more competitive and productive firms aren't able to elbow their less-successful rivals aside<sup>72</sup>.

They put all the benefits of politically-independent regulation into reverse, making Britain less attractive for investment in growth and jobs, and meaning investors need higher returns which raise costs and make our firms less productive as a result. Even worse, they create huge opportunities for deep-pocketed incumbent firms with good lawyers and lobbyists, or for political movements keen to flex their muscles, to get special deals for themselves at the expense of everyone else. And because the political pressures to intervene and prevent easily-identifiable and imminently-looming job losses are so much bigger than the ones created by people who fail to get as-yet-uncreated new jobs when investment goes abroad, it creates a 'losers paradox'<sup>73</sup>: that politicians are terrible at picking winners, but losers are brilliant at picking politicians.



The principle of political self-denial and minimising distortions doesn't just apply to subsidy control; it extends to include any future industrial strategy<sup>74</sup>, and every Free Trade Agreement which we sign as a fully-independent sovereign nation in future too. All of them should have competition at their heart, and as many safeguards as possible to limit the temptations for politicians to intervene, or for well-funded vested interests and incumbents to create political pressure for Ministers to do the wrong things.

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<sup>72</sup> [Caballero, R.J. and Hammour, M.L., 1994. On the Time and Efficiency of Creative Destruction. National Bureau of Economic Research. And Jovanovic, B., 1982. Selection and the Evolution of Industry. Econometrica: Journal of the Econometric Society, pp.649-670.](#)

<sup>73</sup> Baldwin, R.E. and Robert-Nicoud, F., 2007. Entry and asymmetric lobbying: why governments pick losers. *Journal of the European Economic Association*, 5(5), pp.1064-1093.

<sup>74</sup> Creating, not picking, winners: How to develop an industrial strategy which works for everyone. Chris White and Benedict Wilkinson, Kings College London. November 2017 <https://www.kcl.ac.uk/ifis/assets/creating-not-picking-winners.pdf>

Even where political intervention is unavoidable, it should be as limited and controlled as possible to minimise the potential for damage. In merger control CMA has an important and valuable politically-independent power to prevent deals which would be anti-competitive, but there are also four carefully-predefined legal criteria for Ministers to intervene and prevent British firms from being bought as well: national security, public health, media plurality and financial stability. In these cases, Ministers can only intervene on specific grounds, which carefully limit the legal scope of their powers. For anything else they can ask acquiring firms to make legally-binding commitments about how they will manage a British firm once it has been bought (for example to maintain or increase the number of UK-based jobs, or research and investment) but they have no legal powers to demand or insist at all.



Some (but certainly not all) investors and buyers agree to make these legally-binding commitments when they're asked. For example when Connect Bidco bought UK satellite communications company Inmarsat, they gave a series of binding Undertakings under the Takeover Code (for example to maintain Inmarsat's headquarters in the UK). As long as Britain remains an internationally-attractive place to create wealth and to start, build or buy a business, then they are likely to be happy to keep doing so in future too. But whether buyers will give promises or not, the benefits of foreign direct investment (FDI) to our

economy are huge: in 2019/20 it created 56,000 new jobs and retained 9,000<sup>75</sup> We are the second-largest recipient of FDI on the planet, behind only the USA<sup>76</sup>.

There is a single (but important) exception to this reassuring picture: the minority of cases where companies buy a business and then move everything that makes it competitively successful abroad. If they're doing it because Britain isn't an internationally-attractive place to do business anymore, then the right answer isn't to create new legal powers to block or prevent the merger, but to ask why the UK isn't competitive (whether it is shortcomings in skills or infrastructure, or high costs, or anything else) and fix the underlying and fundamental problem instead. But in some other cases the problem may be different; for example if a foreign firm has its Government's backing and support to acquire and move know-how, jobs and supply chains in promising new industries as part of a national industrial strategy to establish commanding positions in key sectors. Buying jobs in this way probably destroys wealth or prosperity for the country in question, but in the process it hollows out Britain's economy, prevents supply chains and industry clusters from becoming established here instead of in rival locations abroad, and means British inventions never blossom or prosper at home, but only bear fruit abroad.

The problem is that it is extremely hard to pick out these types of deal from all the others, so trying to enshrine legal powers to block or modify these transactions creates a dangerously slippery slope towards unpredictable and damaging political interference, frightening off too much sensible and legitimate investment in British jobs and growth, and allowing the 'losers paradox' to run riot. As a result, previous Governments have concluded that the risks and

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/899385/Department for International Trade inward investment results 2019 to 2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/899385/Department_for_International_Trade_inward_investment_results_2019_to_2020.pdf)

<sup>76</sup> [https://unctad.org/en/PublicationsLibrary/wir2020\\_en.pdf](https://unctad.org/en/PublicationsLibrary/wir2020_en.pdf)

costs of trying to block these types of deals are too big to be worthwhile compared to the huge overall benefits of FDI on the rest of our economy.

This is broadly correct, but the problem still remains unsolved. So ***Ministers should develop new options on how to prevent fast-growing UK-based firms in fast-growing sectors (in other words, successful firms in the industries of the future) from being poached offshore for non-commercial reasons, without damaging our attractiveness for FDI by creating disproportionate political risks at the same time.***

# Chapter Nine:

## Summary



## 9. Summary

### 9.1 A World Class Competition & Consumer Regime



firms more productive too.

Britain has traditionally been one of the best places in the world to invest and do business. We do well in international rankings on the ease of doing business or wealth-creation, and our strong and independent economic regulators reduce regulatory risks and political interventions, so business leaders can focus on delighting their customers rather than lobbying their legislators. More certainty and less risk makes Britain a more attractive destination for investment, and also means investors need lower returns which cuts costs and makes our

Without independent regulators, the risks of damaging short-term political interventions which distort competition are much higher. Distortions push investment towards less productive parts of the economy, cost citizen-consumers more through extra taxes and higher prices, and tilt the playing field away from creative entrepreneurs in favour of deep-pocketed incumbent firms with good lobbyists.

Our competition and consumer regime currently has a good reputation, but not a great one. International rankings put us behind USA, France, Germany, EU and Australia; we have stopped making progress on cutting the costs of red tape; sector regulators intervene heavily, making big and important industries more ponderous and less focused on their customers than they should be; competitive pressures have got weaker in the last 20 years; and citizen-consumers feel ripped off when they buy things like energy or car insurance. Our system needs to be updated, improved and refreshed.

Stronger competition and consumer choices mean more jobs, make exporting firms more likely to win contracts, and give British consumers and business customers a wider range of high-quality goods and services at more competitive prices. Societies where firms have to compete hard to attract and retain customers are fairer, with less injustice, because rip-offs can't become as serious, or last as long, and because people are confident that the system is on their side.

A free-trading, global post-Brexit Britain should give customers more power and choice, so more of our firms become world-leading competitors and exporters once more. To get into the top international rank of competition and consumer regimes, we will need a new Competition Act to update and modernise our institutions for the new digital economy. But many of the other proposals in this report don't need legislation and can be done faster. So we can, and should, begin the changes to improve our international ranking immediately.

## 9.2 Faster, Better Competition Decisions



Our central competition institution, ***the CMA should become 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, CMA should publish an annual 'State of Competition and Consumer Detriment' report which measures and analyses progress and problems across all sectors of the economy, and all parts of the country. CMA should use the findings as part of the measures of its own success, as should the sector regulators too.***

CMA also holds regular monthly intelligence-gathering meetings with consumer complaints organisations such as Citizens Advice Bureau, Trading Standards and Ombudsmen; ***the conclusions and findings of these meetings should be published transparently whenever possible*** to show details of which parts of the country and sectors of the economy are making progress or causing concern.

CMA's consumer powers are a great deal weaker and less effective than the ones it holds to deal with competition problems, which means that sticking up for consumers is more difficult and less central to their work at the moment. That isn't right, so ***the CMA's civil consumer enforcement powers should be updated to bring them into line with, and have the same importance as, the competition toolkit.***

CMA's powers to punish firms that deliberately slow down cases are much weaker than many other countries' competition regulators, giving big incumbent firms more scope to 'walk backwards slowly'. ***So penalties for non-compliance with investigations should be strengthened and brought into line with international norms.*** Nor can CMA agree legally-binding changes with firms part-way through a merger case or a market study, even if everybody agrees what's needed. This is slow, expensive and pointlessly unproductive, so ***they should be allowed to accept legally-binding undertakings at any stage in a market study, market investigation, or Phase One or Two merger review.***

CMA often needs to work with other competition regulators on big global cases. ***Ministers should pursue co-operation arrangements for safe information exchange so cases can be decided faster.***

Firms that appeal against regulators' decisions face a complicated thicket of different legal routes and rules. ***The system should be simplified so all appeals should instead be dealt with by the Competition Appeals Tribunal (CAT).***

To keep pace with a modern, digitising economy CMA and CAT need to be able to decide all but the most complicated and difficult cases much faster. But the end-to-end process is cumbersome and clunky and, while businesses, investors, consumer groups, senior lawyers as well as CMA and CAT all agree it needs updating, there is no consensus on how to put it right. So ***the Government must establish a taskforce to complete an end-to-end review and redesign of procedures and case management in CMA and CAT. It should include CMA, CAT, business leaders, investors, entrepreneurs and start-up representatives, sector regulators and senior competition law practitioners. Its scope must include changes to any and all existing internal governance or statutory process requirements,***

***including appeal standards, from investigation and case launch to appeal. It should be led by a senior expert in managing legal processes efficiently, appointed by Ministers, who is independent from both CMA and CAT. The reformed end-to-end process it creates must deliver three equally-important goals:***

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

***The taskforce should be reformed in 5 years to review their work, and to recommend any further changes that may be needed to deliver their three unchanged goals.***

### 9.3 More Competition In Industries Burdened By Red Tape



Laws and regulations aren't automatically the enemy of competition, because markets aren't the 'law of the jungle' as some people like to suggest. They are political decisions, made by humans, and we can alter them if they aren't working properly. The right kinds of pro-competition rules set standards so contracts can be enforced, staff aren't exploited, our environment is preserved and products are safe to use, and they frame free markets to put customers in charge, rather than politicians, bureaucrats or company bosses.

But beyond these fundamental pro-competition rules, too much red tape slows businesses down, focuses them on lobbying their regulators instead of delighting their customers, and makes them less efficient. Cutting the size of these regulatory millstones is the difference between potentially-dangerous 'deregulation' which might sweep away important standards we need to protect ourselves or our environment; and highly-desirable 'better regulation' which maintains the standards but applies them in the least-costly, unbureaucratic way possible.

Better Regulation isn't easy, because every system in Whitehall and Westminster is set up to produce new rules; it's how politicians, civil servants and regulators forge their careers, so better regulation systems have to be extremely tough and effective. The key ingredients are:

- Rules and regulations should be a last resort, not the first tool out of the box.
- Rules and regulations should specify the outcomes that have to be achieved, not the process for achieving them.
- Better regulation cuts 'regulatory burdens' – the net costs of complying with a particular new rule or regulation. No matter how positive the economic effects of a new rule are, they don't justify ignoring the costs of achieving them. Strong better regulation systems don't exclude anything from their scope, no matter how politically important and high priority they may be.

- The regulatory burdens need to be independently audited otherwise Ministers and officials will mark their own homework.
- Better regulation creates 'gateways' to prevent new rules from being introduced until the costs and burdens of old ones have been removed. If removing the old regulations is left until after the new rules are in place, it won't happen at all.

The opportunities for post-Brexit Britain to cut red tape costs are immense. We can create a 'Brexit Dividend' by replacing bureaucratic EU rules with modern, digital equivalents which deliver the same standards at a fraction of the cost and time. The same goes for the rules created by the independent sector regulators too, which were excluded from our Better Regulation regimes in the past. **So the Government should make cutting red tape costs into an automatic burden-reduction process, with a revived, stronger Better Regulation regime.** Specifically, this means:

- **Reinstating the gateway condition, so Ministers and regulators must first remove or modernise old rules before they can introduce new ones.**
- **Increasing the ambition of the regime's current 'one-in-one-out' target to 'one-in-two-out', so we are moving forward rather than (at best) marking time.**
- **Including all forms of Government and regulator rule-making in the new process, with no exceptions.**

One of the biggest and most economically-valuable areas that is being held back by red tape is public contracting and procurement. It is a third of all public spending, so ensuring contracts are genuinely fair and open to smaller 'challenger' companies or charities which want to compete on a level playing field against big and long-established incumbents would be a huge increase in competition across large parts of our economy.

At the moment the Official Journal of the European Union (OJEU) rules create important standards for open auctions of government contracts, but are widely criticised for being too slow and time-consuming, as well as too difficult for small firms to navigate: the result is lots of red tape and worse value for taxpayers because small and medium-sized challengers are being frozen out.

The Government's new procurement green paper shows how post-Brexit Britain could achieve better value for taxpayers by reforming, updating and improving these EU rules with a new, more digital, faster, automatically-transparent process that is both easier for entrepreneurial firms to compete through, and also more resilient against corruption and fraud as well. So **the Government should implement the broad changes outlined in the Green Paper as fast as possible.**

## 9.4 More Competition In Digital Industries



Digitisation is transforming almost everything for the better, by making things cheaper, faster and more convenient. But there are downsides to these otherwise-wonderful changes, caused by firms with enormous new network and digital data monopolies, which hurt customers in several ways.

- Notionally ‘free’ products always come with a price of some form, usually paid by exchanging our data. But we don’t know the value of the data we’re signing away, so we don’t know the price we’re paying, making it impossible to tell if we’re being ripped off or getting a great bargain, or to compare it to a rival offer which might be better.
- Making services less interoperable makes switching harder. Once a firm knows we are locked in, they are more likely to take us for granted, because they know it will be hard or impossible to move our profiles and data to a new or rival service if we want to.
- Innovative new companies can’t get a look in. The early years of the internet saw dynamic competition, but the major players have remained largely the same for the last decade. New challengers are being blocked or throttled, and consumers have less choice.

All these problems feed through into higher prices: CMA estimates every household in the UK is paying £500 more each year than if there was proper competition.

To fix these problems, Britain has just announced a new digital markets unit will be created in CMA with powers to create extra-strong upfront (‘ex-ante’) regulations to deal with them. This is exactly the right thing to do, because the entire economy is digitising and any sector could potentially see new digital network monopolies at any time. But the new unit’s upfront powers create a high risk of ‘regulatory creep’ which adds red tape costs steadily over time, because regulators always find upfront rules easier and more convenient to use than traditional competition and consumer laws. The huge growth in cost, time and complexity of price control decisions in the sector regulators over the last 30 years shows what can happen.

***So the new digital unit’s extra-strong upfront powers must be ring-fenced tightly, to prevent regulatory creep, otherwise they will steadily spread to cover every digital sector of the economy, with enormous increases in red tape and bureaucracy. To reinforce this central point, the new unit should be called the Network & Data Monopolies Unit (NDMU) and it’s extra-strong upfront powers must:***

- ***Be a ring-fenced addition to the rest of CMA’s existing competition and consumer powers, so it can use the normal ones wherever possible.***
- ***Only apply to individual firms that own and run new network and data monopolies, rather than to the rest of the sector in which they work.***
- ***Only apply to problems which CMA’s existing competition and consumer powers can’t solve already.***
- ***Only be extended with Parliament’s consent.***

The NDMU’s upfront powers only treat the disease of weak competition rather than curing it; the safest and best long term answer is to turn the affected industries back into normally-competitive, pro-customer markets to make them more dynamic, productive and creative,

cutting regulatory and political risks to create industries where bosses and shareholders fix commercial problems when things go wrong, rather than Ministers and regulators with all their attendant lawyers, lobbyists, political activists and subsidy requests as well.

So **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 it's possible and proportionate.** Through measures like:

- **Data portability schemes**
- **Fair and equal access to a monopoly network for all suppliers and customers**
- **Interoperability between networks.**
- **Making switching cheaper and more convenient**

## 9.5 More Competition In Economically-Regulated Industries



While CMA and CAT deal with competition and consumer issues for most of the economy, there are several big and important industries where specialist sector regulators (like Ofwat or Ofcom) handle the same problems. Investment in energy, telecoms and water reached almost £25bn in 2018 so their economic performance matters hugely.

At the heart of each economically-regulated sector is a network monopoly with a Regulated Asset Base, so sector regulators have the same kinds of extra-strong upfront regulation powers as the new NDMU to handle this, as well as dealing with consumer rip-offs (particularly in financial services).

Most of the sector regulators don't just handle economic regulation; they have non-economic regulatory duties as well. For most sector regulators, competition isn't their only or, in some cases, even their main focus.

Outside the network monopolies with their Regulated Assets, there is no inherent reason why the rest of each of these sectors shouldn't become a normally-competitive industry, with high standards, strong competition and consumer powers, and low regulatory and political risks. This will require a long term, low-risk and steadily-predictable process which business leaders can see in advance and build into their plans.

Some regulators have already moved a long way in this direction; but others have only recently begun. Each one has slightly different legal powers and the proportion of each industry that is outside the network monopoly varies hugely. As a result we will need to:

- **Require each economic regulator to publish and execute a multi-year project plan, to turn as much of their sector into a 'normal' pro-consumer, high-standards competitive market as possible.** As the plan progresses, the sector regulator should formally hand over responsibility for more and more of its sector to CMA (initially by simple changes to the Memoranda Of Understanding which each of them has with CMA, but some statutory transfers may be needed later too) so they are progressively left with a

smaller and smaller piece of less-competitive activity centred on the industry's core network monopoly. This planned, long-term schedule of CMA-handovers will create a risk-reduction ratchet of milestone moments for business leaders and investors, when political and regulatory uncertainties are permanently reduced as the changes are locked in forever

- ***Each sector regulator will be subject to the newly-strengthened Brexit Dividend better regulation target*** (see chapter 3 above). This will apply to everything they do, whether it is economic or other types of regulation, and whether it is aimed at areas of the industry which are currently inside or outside the network monopoly.
- ***We must audit and amend all the sector regulators' legal duties so they all have a strong, clear 'competition for the benefit of consumers first, regulation only as a last resort' primary legal duty.***

Once these changes have all taken effect (which, for sector regulators like Ofwat or FCA with furthest to travel, could take several years) we will eventually be left with economic regulators that are focused purely on the hard core network monopolies with Regulated Assets in their sectors, plus a few remaining deeply-embedded long-term consumer protection problems (particularly in industries like Financial Services) which will still need a tight grip. The opportunities to inject more competition here are more limited, but not zero. They are:

- As the National Infrastructure Commission has also recommended ***we should independently-auction the contracts to build and upgrade the network monopoly infrastructure in each regulated industry***, rather than handing them to the incumbent monopoly-owners instead. This is a huge extension to competition.
- Because the market power of any network monopoly isn't necessarily permanent, ***the sector regulators should share the same mandate as NDMU to erode the power and strength of their network monopolies by making pro-competitive interventions, for example by encouraging more data sharing, or reducing barriers to new entrants, wherever it's possible and proportionate to do so.***

At the end of both these processes, the economic regulation teams in each of the sector regulators ought to be a great deal smaller than they are today. But they will still embody an important remaining risk: that they may become less-skilled than, or even captured by, the deep-pocketed incumbent firms they are supposed to regulate, particularly after the end of a price-control process when a single-sector economic regulator's workload declines significantly, and many staff (understandably) leave to further their careers elsewhere.

This isn't a new problem (it has existed for as long as economic regulators), but it increases the risk of consumer rip-offs going unsolved, and of political interventions (like the energy price cap legislation) if regulators aren't strong enough to pre-empt problems in advance. This raises political and regulatory risks, increasing the costs of capital which investors will demand, and so the costs that are ultimately passed on to consumers and business customers alike. If we can reduce it, we should.

The UK Regulatory Network (UKRN) forum for economic regulators to compare best practice reduces this risk, but wouldn't claim to have removed it completely. But the new NDMU in CMA will be our first expert, multi-sector network regulator, with up to date, digital-era legal powers, making it less vulnerable to capture or skill loss, and a safe harbour for any single-sector regulator in trouble in future. So, as a residual safeguard 'insurance policy' to maintain the ongoing quality, integrity and independence of our economic regulators:

- **Each sector regulator should publish its workload figures annually and, in each year that economic regulation forms less than half of its activity, the regulator's Chair should write a public letter to the CMA's Minister explaining whether their residual economic regulation duties should be transferred to the NDMU or not.** This residual safeguard shouldn't begin for at least three to five years, to allow time for the multi-year project plans to 'normalise' each sector regulator's industry to take effect.
- There is an existing (and unused) statutory power to transfer some of the economic regulators' powers to CMA, but it doesn't cover all of the regulators or all of their economic regulation powers, **so it should be updated to do so, and to allow incremental, partial transfers of powers as each step of their 'market normalisation' project plans unfold over time.**
- **If any of the existing consumer groups that hold legal 'supercomplaint' powers believe a sector regulator is becoming deskilled or captured, they should also have the power to trigger a formal, public request to Ministers to table the statutory motion to transfer the economic regulatory responsibilities to CMA. For fairness, this power should also be triggered if more than ½ of the regulated firms in a sector (by revenue) write a joint open letter to the same effect.** However it was triggered, it would only transfer the legal powers and responsibility for future regulatory decisions; it should not allow retrospective unpicking of any decisions (particularly pricing decisions) that were already in place, since that would increase uncertainty rather than reducing it.

With any luck this process will never be needed or used. But if it is, defining and creating the legal path carefully in advance will reduce political risks by forging a safe, predictable and institutionalised transition process for a change which could otherwise only be achieved through an unplanned and inherently uncertain political intervention instead.

## 9.6 More Competition Outside The South East



The UK has a well-known and much-studied productivity problem. There's a 'long tail' of less-productive firms and our labour productivity has grown at just 0.3% a year since the 2008 crisis, the longest and deepest period of weakness since the 1980s. The picture has a geographical skew too; productivity in London and the southeast is world class, but much lower elsewhere. Levelling up our economy outside the southeast depends partly on whether each area has good local skills, transport links (whether for freight or commuting) and affordable real estate.

But raising the local competitive temperature for all firms, particularly the ones that aren't exposed to world-class rivals in global export markets, boosts productivity and growth too. This means giving small firms and consumers quicker, easier, cheaper and more digital ways to enforce their rights when goods or services aren't good enough, so poor-performing firms face more pressure.

Most consumer disputes are settled directly with businesses. If that doesn't work they can go to the Small Claims Court or an Alternative Dispute Resolution (ADR) service (usually an ombudsman, but sometimes mediation or arbitration). Recent changes to the Small Claims Court include:

- Claims can now be filed online or on paper, with lower fees and 24/7 availability for digital applications. The same is true for settling out of court.
- Pre-court hearing mediation is encouraged for cases up to £10,000 value, with an 'opt out' model for lower value disputes (under £500) to use the Small Claims Court mediation service.
- The Online Civil Money Claims service helps consumers through the process, so they can use the court effectively.

Some ADR services are modernising too, with online case management systems so consumers and businesses can track case progress, and emerging new digital platforms like Resolver too. These improvements are right, but they need to go further and apply to every industry too. ***Small Claims Courts and ADR services should all become fully 24/7, to match the modern digital economy, and be as easy, cheap and simple as using an app on your phone.***

Companies that feel they are being unfairly treated by other businesses can bring their own cases to the CAT (or the High Court). But even though the CAT has a Fast Track Procedure it will still look dauntingly slow and expensive for many small or local firms away from London. ***We should create 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 1 or 2-day maximum hearing length too.***

Local authority trading standards (LATS) teams have an essential role in investigating and enforcing local scams and other consumer problems which are too small to warrant a full-scale investigation by CMA or a sector regulator. But they have been hollowed out in some parts of the country, creating spotty and uneven local enforcement which saps consumer trust and confidence in the system and makes local economies less competitive and productive. ***We should create a new statutory duty for minimum standards in LATS teams, including powers to mount antitrust and consumer investigations, and provide ring-fenced resources so they can deliver them well.*** The new statutory duty should define the outcomes which have to be achieved (in line with the Better Regulation principles described in Chapter 3 above) but leave local Councils to decide how best to deliver them, to allow more local control and creativity. This will also allow LATS to decide whether and how to join forces with their neighbours to tackle regional scams and cartels, in the same way as police forces pool resources in Regional Organised Crime Units already.

## 9.7 Sticking Up For Consumers



Cutting rip-offs isn't just good for citizen-consumers; it also increases the economic 'consumer surplus' which makes our economy more productive and competitive. Consumer protection laws are an essential part of the system for making this happen, to ensure the economy works in favour of citizen-consumers rather than politicians, bureaucrats or company bosses.

Most of these rules are already good and needn't be changed, but there are three important gaps where post-Brexit Britain's legal framework still allows customers to be ripped off, so our consumer protection rules need to be stronger. These three gaps overlap with parts of the 'hard core' of deeply-embedded customer rip-offs which the economic sector regulators will still have to battle once they have normalised as much of the rest of their individual industries as possible. But because each of them affects more than one industry, they will have to be solved by CMA and Ministers creating stronger general consumer-protection regulations for the entire economy, rather than by single-sector remedies instead. They are:

- a) Price discrimination happens whenever customers are charged different prices for the same products. It's a growing problem because ever-bigger pools of online data mean more firms know which of us won't notice a higher price. Most won't misuse this new ability, but some already are; like the £3.4bn a year 'loyalty penalty' rip-off, where loyal customers who auto-renew mobile, broadband or insurance contracts are charged more than people who switch.

A simple way to stop loyalty penalty price discrimination is underway; in home and motor insurance, the Financial Conduct Authority is consulting on a rule requiring firms to offer the same prices to new and existing customers, so loyal customers can 'coat-tail' on the keen prices offered to the active consumers who switch, as already happens in most other well-adjusted industries. ***We should apply it (or a close cousin of it) as a general consumer-protection regulation across the entire economy, so it provides a complete solution that covers energy and any other affected sectors of this £3.4bn rip-off too.***

But future-proofing this to cope with new types of yet-to-be-invented price discrimination in a fast-changing digital world is difficult, because society's view of what counts as fair or unfair changes over time. Consumer laws already set a minimum 'fairness test' for most detailed contract terms and notices, but it can be hard to use in practice, so we need a clearer framework to help business people, consumer groups or regulators work out whether a proposed new approach will count as fair in advance, so they can avoid damaging their brands. ***CMA should update its guidelines on what treating customers fairly means in practice, including 'transactional fairness' in its work, so it is as easy as possible for businesses, charities and public bodies to identify and avoid problems in advance, and so the guidelines keep up with changing attitudes of what society views as 'fair' in future too.***

- b) Contract legalese and small print has always created opportunities for rip-offs because it produces 'information asymmetries', where sellers know far more than buyers and can bury rip-offs where customers won't find them until it's too late. This means consumers can't make properly-informed choices, and is particularly dangerous when people are making big, important one-off commitments like pensions, mortgages or insurance. But the digital world means this problem is spreading to include terms and conditions for basic everyday items like public wifi signups, privacy and data usage policies too. It takes several different forms:
- No visible or comparable price. Where online services have no monetary cost it's impossible to know what price we are paying with the data we are signing away, so we can't tell if it's a great deal or a complete rip-off, and nor can we compare its price to a rival firm's offer that might be better. A vital piece of information is being concealed from us, which means we aren't giving fully-informed consent when we sign up to the terms.
  - Nobody reads the small print. With many pages of detailed and complicated legal small print, nobody has time to give properly-informed consent. A recent experiment created

a fake social networking site with terms and conditions that included giving up your first-born child as payment. 98% of people agreed to this.

- 'Take it or leave it'. There are rarely options to change or modify terms and conditions and, in a digital world where there are lots of monopolies (whether it's the only local public wifi network wherever you happen to be, or rival social networks that are too small to work half as well as the market leaders) there often isn't an alternative service to choose either.

There are several possible answers including expert advisors (including Digital Comparison Tools or DCTs like price comparison sites or switching services); key standardised terms (like the APR% rate for consumer loans); and legal minimum contract terms and standards too. CMA and the sector regulators will need to keep applying them as the economy digitises, plus CMA must:

- ***Track whether DCTs are continuing to grow in power and reach, to level the playing field so buyers can make reliable and well-informed choices regardless of how vulnerable or short of time they are, or how complicated a particular contract may be. If they aren't growing fast enough to close this knowledge and information gap in the sectors where it causes the most consumer detriment soon, CMA must reopen their 2017 market study and introduce measures to make sure they can.***
  - As outlined in Chapter 4: More Competition In Digital Industries ***CMA must consider how to improve transparency of the price consumers are paying through their data for digital goods and services, so they can make informed choices about whether each one represents good value or not, and whether they wish to switch to others which might be better.***
  - ***For the local digital monopolies (like the example of a single available public wifi network mentioned above), CMA must consider how to introduce more competition as described in section 4.3: 'Rebuilding Normal Competitive Markets' above. Or, if that isn't possible in these particular cases, evaluate whether these monopoly-owners should be held to a higher standard of minimum contract terms and standards so that customers with less choice have stronger legal rights to protect them from being ripped off.***
- c) 'Sludge' is where the consumer behaviour insights of 'nudge theory' are used to rip customers off: 'nudging for evil'. It exploits customers (including vulnerable people) and saps citizen-consumer trust and confidence about whether the system is really on their side and will protect them from being ripped off. This is a fast-developing area where companies, charities or public bureaucracies run real-time experiments to quantify precisely how effective each feature is at achieving the outcome they want. This means that the net effects of positive nudges and negative sludges can be measured, which may provide powerful new tools for regulators to make sure that consumers aren't being encouraged to strongly to do the wrong things. But it also means regulators will have to future-proof consumer protections against new examples of digital 'sludge' that will certainly be invented in future. ***CMA should undertake a market investigation to assess how we should recognise and measure sludge in future, and identify what consumer protection rules and analytical techniques will be needed to protect consumers from it as digital technologies evolve and develop over time.***

## 9.8 Self-denial: State Aid, Subsidies & Political Intervention



Most of this report aims to reduce regulatory and political risks, by using stronger competition and consumer powers to cut the reach, costs, economic distortions and uncertainty of bureaucratic and political interventions so businesses and investors only have to deal with commercial problems instead.

Our approach to state aid and subsidies control should follow the same principles. 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'.*** Politicians are terrible at picking winners, but losers are brilliant at picking politicians.

The principle of political self-denial and minimising distortions doesn't just apply to subsidy control; it extends to include any future industrial strategy, and every Free Trade Agreement which we sign as a fully-independent sovereign nation in future too. All of them should have competition at their heart, and as many safeguards as possible to limit the temptations for politicians to intervene, or for well-funded vested interests and incumbents to create political pressure for Ministers to do the wrong things.

Even where political intervention is unavoidable, it should be as limited as possible. In merger control CMA has an important and politically-independent power to prevent deals which would be anti-competitive, but there are also four legal criteria for Ministers to intervene and prevent British firms from being bought as well: national security, public health, media plurality and financial stability. Ministers can only intervene on very specific, legally-defined grounds and, for anything else, they can ask acquiring firms to make legally-binding commitments (for example to maintain or increase the number of UK-based jobs, or research and investment) but they have no legal powers to demand or insist at all.

Broadly, this works and the benefits of foreign direct investment (FDI) to our economy are huge: in 2019/20 it created 56,000 new jobs, retained 9,000, and we are the second-largest recipient of FDI on the planet, behind only the USA. The only problem is the minority of cases where a foreign firm has its Government's backing and support to acquire and then offshore know-how, jobs and supply chains in promising new industries as part of a national industrial strategy to establish commanding positions in key sectors. This probably destroys wealth or prosperity for the country in question, but it hollows out our economy in the process so British inventions never blossom or prosper at home, but only bear fruit abroad.

It is extremely hard to enshrine legal powers for Government Ministers to block these transactions without a slippery slope towards broader political interference, frightening off sensible investment in British jobs and growth, and allowing the 'losers paradox' to run riot. The risks and costs of trying to spot and block the bad deals are too big, unless we can define a simple, hard-to-misuse rule for Ministers to intervene without opening Pandora's box. So ***Ministers should develop new options on how to prevent fast-growing UK-based firms in fast-growing sectors (in other words, successful firms in the industries of the future) from being poached offshore for non-commercial reasons, without damaging our attractiveness for FDI by creating disproportionate political risks at the same time.***

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