'Power to the People': Long-Awaited UK Report Calls for Streamlining and Enhanced Legal Predictability in UK Antitrust Regime

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Commissioned by the U.K. government to review its antitrust regime, Conservative Member of Parliament John Penrose's "Power to the People" report proposes streamlined, modest changes rather than wholesale reform to the current regime. The report's recommendations are outlined below:

- Merger reviews and antitrust investigations should be done "faster, better," with all but the most complicated cases resolved "within weeks or months rather than years." Companies should be able to resolve cases at any time with remedies, and investigations should take place within a transparent and predictable legal framework;
- The powers of the recently announced Digital Markets Unit (DMU) of the U.K. Competition and Markets Authority (CMA) should be ring-fenced to avoid regulatory creep, and its *ex ante* ability to intervene should 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";
- Subsidies and government intervention in the case of foreign direct investment (FDI) should be used cautiously;
- Sector regulators should refocus on core network monopolies in the sectors they supervise, and the CMA should be given a greater role to promote and enforce competition in these sectors; and
- The CMA's consumer law enforcement powers should be updated to bring them in line with its competition law tool kit.

The report, which was published on February 16, 2021, rules out broader and more controversial reforms, such as replacing administrative antitrust investigations by a prosecutorial model. Additionally, it finds no easy way of reconciling the CMA's wish for a less interventionist appellate Competition Appeal Tribunal (CAT), with the need for rigorous judicial accountability to maintain the quality of decision-making. The report therefore recommends an independent review of how to best address these concerns.

Mr. Penrose's conclusions were cautiously welcomed by the CMA, though the report is likely to cut across the regulator's desire for broad intervention powers in digital markets and a less intrusive level of CAT review. It comes at a time when the regulator has been criticised by its former chairman, Lord Andrew Tyrie, who followed the publication with his own opinion piece in the *Financial Times*, in which he said the CMA is not fit for its purpose.[1] Concerns with the regime, particularly regarding speed and legal predictability, also have been expressed in business media, specifically in reference to the CMA's increased post-Brexit case load. As such, the report's recommendation calling for greater speed and flexibility in U.K. merger inquiries are likely to be welcomed. In relation to the inherently more complex antitrust inquiries, it will remain difficult to address the slow pace of investigations while still ensuring due process is observed.

'Faster, Better' Decision-Making in Mergers and Investigations

The report states that the CMA and the CAT "need to be able to decide all but the most complicated and difficult cases much faster." Current procedures are "cumbersome and clunky," and the report proposes a government-appointed task force to complete an

[1] See Lord Tyrie's February 24, 2021, opinion piece in the *Financial Times*, "The UK Competition Regulator Is Not Fit for Purpose."

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end-to-end review and redesign of procedures and case management in both agencies. Businesses familiar with the sometimes drawn-out review processes will welcome a key end goal of the report, which is to “resolve all but the small number of most complicated cases (competition, consumer or mergers) within weeks or months rather than years.”

These pleas were most recently echoed in the government-commissioned independent report on the U.K. fintech sector by Network International Board of Directors Chairman Ron Kalifa, which noted clear feedback from stakeholders that the CMA must adapt its approach in the complex fintech sector and indicated that “there is a case for more flexibility in the assessment of mergers and investments for nascent and fast-growing markets such as fintech.”[2]

To further streamline proceedings, Mr. Penrose’s report suggests that the 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.” However, at present, the CMA cannot agree to “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.”

The report also recommends strengthening incentives for notifying parties in mergers, as well as incentives for those that are subject to a CMA investigation to respond promptly to information requests. It perceives the CMA as lacking power, relative to its international peers, to punish parties for noncompliance with information requests or other demands. In particular, the CMA cannot issue administrative penalties for deliberately giving false or misleading information, as this currently requires the CMA to seek the prosecution of a company before a criminal court. The report therefore recommends that penalties for noncompliance with investigations be broadened and strengthened, for instance through the use of turnover-based fines.

Relatedly, the findings showed mixed evidence as to whether use of a prosecutorial model, under which the CMA would stop making its own decisions and switch to bringing prosecutions to the CAT instead, would be faster. Accordingly, any benefits are therefore unproven, and there is no recommendation included in the report for introducing such a model, though it leaves open the possibility for the change to be considered later on.

[2] See “The Kalifa Review of UK Fintech.”

Avoiding ‘Regulatory Creep’ in Light of New Digital Markets Regulation

The U.K. recently announced the creation of the DMU to introduce and enforce a new code to govern the behaviour of online platforms. Additional competition rules will therefore apply to large tech firms and platforms, including a new *ex ante* framework for firms deemed to have “strategic market status.”[3]

The report welcomed this development but cautioned against the risk of “regulatory creep” while also recommending that the DMU be renamed the Network and Data Monopolies Unit (NDMU) to articulate a limited remit. The report proposes that its powers 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, and that, in line with previous proposals on the role of the DMU, the NDMU promote competition through use of policy tools, including:

- a pro-competitive code of conduct;
- data portability schemes;
- fair and equal access to monopoly networks for all suppliers and customers;
- interoperability between networks; and
- improved switching capabilities.

The government expects to create the DMU sometime in April 2021 and currently is consulting on its form and function. The publication of the report, coming only two months before the envisaged creation of the DMU, is likely to play into the consultation process.

Restraint on State Aid, Subsidies and Political Intervention

In the context of the post-Brexit environment under which the U.K. is developing its own subsidy control regime, the report urges the U.K. government to take a restrained approach to subsidies or other intervention, lest excessive intervention create investment uncertainty and deter foreign direct investment. The U.K. currently ranks as the second-largest recipient globally of FDI, behind the U.S.

[3] See our December 23, 2020, client alert, “CMA Proposes New UK Competition Regime for Large Tech Firms.”

At the same time, the report suggests that some intervention may be merited to avoid the risk of U.K. businesses being bought and then largely relocated overseas, rather than further expanded within the U.K. This aligns with recent government policy proposals in the National Security and Investment Bill,[4] which states that "ministers should develop new options on how to prevent fast-growing U.K.-based firms in fast-growing sectors ... from being poached offshore for non-commercial reasons." The bill is currently working its way through Parliament and could be approved before the end of March 2021.

Changing the Role of Sector Regulators

The report suggests readjusting the reach of nine specialist sector regulators in the U.K.[5] in order to focus their efforts on core network monopolies in the sectors they supervise. Taking the example of the U.K.'s Civil Aviation Authority, which "treats most of its sector like a normal industry apart from network effects at Heathrow and Air Traffic Control in the U.K.," the goal would be to shift the emphasis away from economic regulation of each sector, where possible, and instead give the CMA a greater role to promote competition in these sectors.

An audit of each sector regulator's legal duties would support this change of emphasis, with the goal being to embed as their primary legal duty "competition for the benefit of consumers first, regulation only as a last resort."

To further promote competition, the report states that sector regulators should be given a mandate "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." The report concludes that contracts to build and upgrade network monopoly infrastructures should be independently auctioned rather than handed to the incumbent organisation.

Consumer Rights and Competition Throughout the UK

The report calls for greater emphasis on competition and consumer rights at a national and local level in the U.K. The report recommends that the CMA publish the conclusions of its regular monthly intelligence-gathering meetings with consumer complaints organisations, and that its civil consumer enforcement powers be enhanced and brought in line with its competition law powers. The CMA would then be able to decide consumer law cases and impose fines in the same way that it does for competition law cases.

The recommendations also call for the government to create new, cheap, efficient and speedy county competition courts for local and regional cases, which could help smaller-scale retailers, among others.

Key Takeaways

The conclusions and recommendations found in the independent report are not binding on the U.K. government, which is expected to respond to its findings in due course, but are likely to, at least to some extent, influence the direction of U.K. antitrust law post-Brexit.

The CMA has cautiously welcomed the report and indicated that it shares the ambition for an enhanced competition and consumer regime. The findings echo, in parts, those of other reviews, including the letter and summary published in February 2019 outlining proposals for reform of the competition and consumer protection regimes from Lord Tyrie when he was still chairman of the CMA.[6]

Most important for global companies whose acquisition plans may fall under the CMA's microscope are the report's recommendations on process and delivery. The delays involved in merger and antitrust investigations are well observed, particularly in mergers, which see an already generous two-month (40 working day) first-phase review commonly dwarfed by up to three to six months of "pre-notification," when the "real" inquiry is undertaken. Typically, 15 days into the formal notification period, the CMA communicates its provisional conclusions. Phase 1 merger decisions, often two to three pages a decade ago, are now commonly over 100 pages, even in clearance cases, signifying the particularly burdensome process companies go through given the broad scope of the restrictive provisions applicable for the duration of the inquiry where the CMA has imposed a hold-separate obligation.

The CMA's process also is a rigid one, as the agency is unable to accept remedies until it finds fault with a deal. Then, it must spend another two months (subject to additional extensions)

[4] See our November 11, 2020, client alert, "UK Government Introduces New Regime for Screening Foreign Direct Investment."

[5] The Civil Aviation Authority, the Financial Conduct Authority, the Gas and Electricity Markets Authority, the Northern Ireland Authority for Utility Regulation, the Office of Communications, the Office of Rail and Road, the Payment Systems Regulator, the Water Services Regulation Authority and NHS Improvement.

[6] See Lord Tyrie's February 24, 2019, letter to the Secretary of State for Business Energy and Industrial Strategy.

assessing the suitability of the remedies before it clears the deal. This process seems unnecessarily bureaucratic if parties can spot issues early and come armed with adequate upfront remedies. It also risks misaligning the U.K. with other antitrust authorities that have greater flexibility to accept earlier stage remedies. Similarly, the binary approach to remedies — either offered at Phase 1 after two months or Phase 2 after another six to eight months — produces unsatisfactory results, including in such situations where a Phase 1 remedy’s minor fault results in an eight-month inquiry that could have been forestalled by an incremental improvement a few weeks into Phase 2. Companies will therefore welcome the report’s recommendation that remedies be taken at any time.

For antitrust investigations, which tend to involve complex evidential and legal procedures, as well as the need to afford due process to defendants in a quasi-criminal inquiry, resolving all but the most complicated of cases “within weeks or months rather than years” would require wholesale reform of existing CMA and CAT procedures.

The proposal to revise the ambit of the sector regulators and give the CMA a greater role in promoting competition in the relevant sectors also would require a set of institutional changes that would take time to implement. As such, the recommendations in this area are unlikely to lead to immediate change.

Whether the recommendations regarding ring-fencing the role of the DMU become policy should become apparent much sooner, as the U.K. government is currently consulting on the form and function of the DMU and expects to create the unit in or around April 2021. Additionally, as the DMU is a yet-to-be-created unit, not having to reset existing regulatory architecture will make it much easier to implement the report’s recommendations.

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