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The UK competition regime

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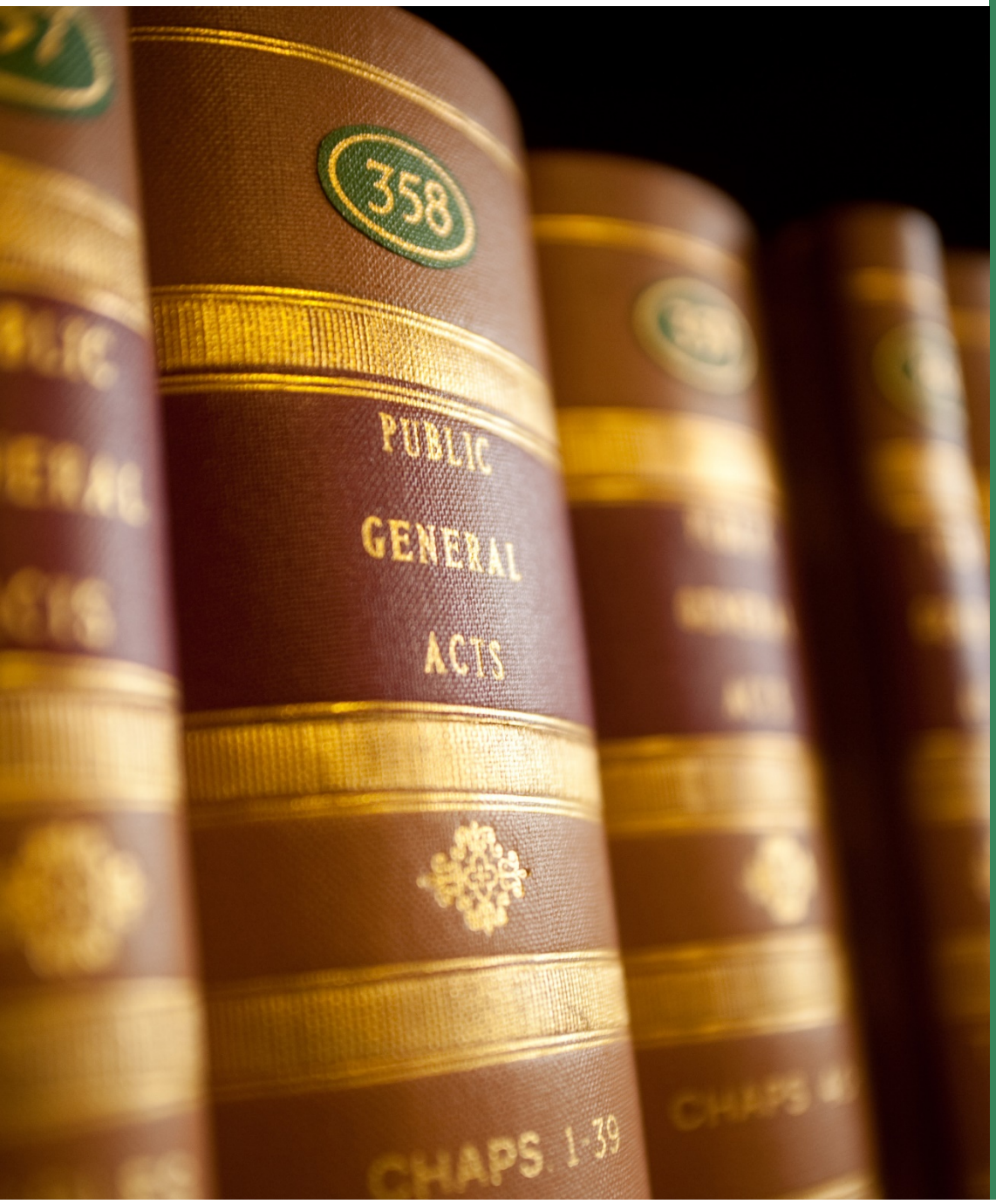

Inside:

Contents

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Summary

Competition law seeks to curb practices that undermine or restrict competition to the detriment of consumers. This includes the abuse of a dominant market position by a firm, anti-competitive agreements between firms, and mergers or takeovers which, if allowed, would result in a substantial lessening of competition.

In the UK, primary responsibility for enforcing competition law lies with the independent competition authority, the Competition & Markets Authority (CMA). The legislative framework for the UK regime is established by the Competition Act 1998 and the Enterprise Act 2002, as amended by the Enterprise and Regulatory Reform Act 2013, which created the CMA. The Government has limited powers to intervene in either the assessment of mergers or the investigation of markets.

Individual sector regulators – such as Ofcom (communications), Ofgem (gas and electricity) and the Financial Conduct Authority (financial services) – have similar powers to investigate competition in their own fields.

The prohibitions in UK law on abusing dominant market positions and anti-competitive agreements were based on and underpinned by equivalent provisions in EU law. Since Brexit, under the terms of the UK-EU trade agreements, EU competition law is no longer enforced in the UK, and the UK and EU now operate completely separate competition regimes. See section 2 of our briefing The UK-EU Trade and Cooperation Agreement: Level Playing Field for information on the competition provisions of the UK-EU trade agreement.

The CMA is now responsible for all anti-competitive practices that affect UK markets and consumers.

In August 2018, the Secretary of State for Business, Energy and Industrial Strategy asked the CMA to come forward with proposals to better protect consumers in the digital economy and improve public trust in markets. In February 2019, CMA Chairman Lord Tyrie outlined his proposals to the Secretary of State in a letter. In summary, the CMA wanted to be able to act more quickly and decisively on competition issues, and it wanted its powers to protect consumers upgraded to the same level as its competition powers.

In February 2021, Conservative MP and UK Anti-Corruption Champion John Penrose published a report on reform of UK competition law. The Penrose report's recommendations include strengthening CMA powers and streamlining current processes. Most of the proposals suggested by Lord Tyrie in his 2019 letter were not carried over.

A global debate is taking place about the dominance of tech giants in digital markets and their ability to stifle competition. Following the recommendations of an expert panel and a Digital Markets Task Force, a Digital Markets Unit (DMU) was set up within the CMA in April 2021. This monitors and regulates the behaviour of platforms with significant market power. The Government intends to consult on the design of the DMU and legislate to put it on a statutory footing in due course.

1. Purpose and scope of competition law

Competition law restricts practices that harm free and fair competition, in the hope that this will lead to new, better and cheaper products.

Most countries regulate competition in some way – there are over 130 competition law systems in the world. In the UK, competition regulation dates back to the Monopolies and Restrictive Practices (Inquiry and Control) Act of 1948.[1]

Professors Whish and Bailey's influential textbook lists four main things competition law addresses:

- **anti-competitive agreements**: these are agreements that restrict competition, such as by fixing prices or restricting output. They are generally unlawful unless they can be justified, such as by making the market more efficient. They can be 'horizontal' agreements (between competitors) or 'vertical' (such as between a supplier and a retailer).

- **abuse of substantial market power**: abusive behaviour by a firm with substantial market power is unlawful. An example would be where a dominant firm reduces its prices to less than cost in order to drive a competitor out of the market or to deter a competitor from entering the market, known as predatory pricing.

- **mergers**: if a firm buys out a rival the market may become less competitive and consumers may have to pay more as a result. Systems of merger control usually provide that certain mergers require the approval of the relevant competition authority.

- **public restrictions of competition**: the State is often responsible for restrictions and distortions of competition, for example by providing subsidies to firms. Some systems allow competition authorities to scrutinise 'public' restrictions of competition by commenting on, or making recommending regarding, such restrictions.[2]

But while different systems might target similar practices, this doesn't mean that the systems are always motivated by the same concerns. Different competition regimes' goals might be one or more of the following:

- consumer protection – by delivering benefits to customers in the forms of (for example) lower prices and more choice;
- redistribution – promoting "economic equity" by ensuring resources and wealth does not accumulate inappropriately in the hands of corporations at the expense of individuals;
- protecting small firms against more powerful rivals;
- promoting market "fairness" in the general sense;

1 Richard Whish & David Bailey, Competition Law (9th edition), 2018 pp 1 and 2
2 Ibid, pp 4 and 5

- promoting wider policy concerns, like reducing unemployment; and
- protecting domestic firms against international competition (for the EU, for example, the maintenance and integration of the Single European Market).[3]

The legislative framework for the UK's competition regime is provided by the *Competition Act 1998* and the *Enterprise Act 2002*, as amended. Until recently, the UK's national competition regime operated within the context of the EU-wide regime: articles 101 and 102 of the Treaty on the Functioning of the European Union which outlaw anti-competitive agreements and abuses of a dominant position when they may affect trade between member states.[4]

1.1 Financial benefits of competition

In the past, competition authorities have produced estimates of the financial benefits of the UK's regime to consumers – though, as noted in the Competition Commission's 2011 annual report, these are not precise numbers:

> Although some of the benefits flowing from our work are hard to quantify and attribute accurately, the CC aims to quantify where possible the direct financial benefits to consumers that we achieve. The CC and the OFT have estimated direct financial benefits to consumers of £465 million for the market investigation regime and £127 million for mergers in 2010/11 (these are annual estimates averaged over the three-year period 2008/09 to 2010/11 and include the work done by both the OFT and the CC). In making these estimates, we recognize that our approach is partial in its scope and subject to considerable uncertainties in its application. At present we have no agreed methodology for estimating the benefits of our regulatory work.[5]

In June 2013 the Office of Fair Trading published estimates of consumers' savings from its own work.[6] These were in turn collated by the BIS Department, which put the direct savings made by consumers from the regime at £598m in 2012/13.[7] The BIS Department published similar estimates in March 2015:

> The OFT and Competition Commission estimate that the competition regime produced direct benefits to consumers of around £575 million in 2013/14. This figure includes only direct financial savings to consumers and does not account for wider effects, such as any impact on productivity or the deterrence effect of the OFT and CC's work or the wider competition and consumer regime.
>
> The overall impact estimate is roughly the same as the £598 million in 2012/13. The indicator has fallen from £810m in 2011/12. This fall is the result of the high impact 2009/10 Groceries investigation dropping out of the three year rolling average. The estimated

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3 Ibid pp20-25
4 A Competition Regime for Growth …, March 2011 pp17-18
5 Competition Commission Annual Report and Accounts 2010/11, HC 1098 7 July 2011 pp10-11
6 Positive Impact 12/13, OFT1493, June 2013
7 The value of the consumer benefits of the competition regime, December 2013 p3

> benefits of competition enforcement have risen slightly. Estimated merger benefits have stay roughly the same.[8]

During the proceedings of the *Enterprise and Regulatory Reform Bill*, several witnesses expressed considerable scepticism about these figures, though there was consensus that, even if the value of the competition regime could not be quantified, competition brought considerable benefits for the economy. As Professor of Regulation at the University of East Anglia Catherine Waddams said, "[the impact of competition on productivity] is something almost immeasurable, in terms of the whole nature of the productivity of the economy … [but] I think that there is no doubt that the historical evidence shows that vigorous competition policy does have those benefits."[9]

Subsequently in July 2015 the Competition and Markets Authority published estimates that put annual direct benefits of £745m over the period 2012-15, putting ratio of benefits to cost at 12:1. The department suggested that although the estimates relied, in part, on assumptions, in their view the numbers were on the conservative side:

> In general relatively cautious assumptions are applied to the estimates and they exclude estimates of benefits from a number of cases where the impact was difficult to quantity in a sufficiently robust manner. In addition the focus on direct financial benefits excludes many important wider impacts of the competition regime including, for example, the deterrence of anti-competitive mergers and other types of anti-competitive behaviour and the CMA's wider impact on productivity and growth.[10]

In its survey of the competition regime published in early 2016, the National Audit Office noted that there remains "no measure of the competition regime's impact on growth or productivity".[11]

The CMA's latest annual impact assessment for financial year 2019/20 – published in July 2020 – estimated that it delivered total financial benefits to consumers of £1.3 billion, against costs (money spent) of £93 million. The biggest benefit to consumers during the year came from the CMA's decision to block the Sainsbury's/ASDA merger due to concerns about price rises and a worsening of quality, range and service for customers.[12]

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8 The value of the consumer benefits of the competition regime, March 2015 p4

9 PBC, 3rd sitting, 21 June 2012 cc106-7 Q243

10 CMA impact assessment 2014 to 2015, July 2015 para 1.5-6

11 The UK competition regime, HC737, February 2016 p7, p44

12 CMA impact assessment 2019/20, 14 July 2020, paras 1.6 and 3.17, and CMA Press release, CMA blocks merger between Sainsbury's and Asda, 25 April 2019

2. Overview of UK competition law

2.1 Legislation

By the 1990s, there was widespread recognition of the need for reform of UK competition law. European competition law was directly effective in the UK, meaning businesses in some circumstances had to navigate two entirely separate competition regimes.[13]

The Labour Government argued that UK regulation of anti-competitive practices was weak, with anecdotal evidence suggesting that this made the UK a difficult market to enter. The Restrictive Trade Practices Act 1976 placed undue emphasis on the form of an agreement rather than its economic effect. Powers to deal with abuses by companies of significant market power were inadequate and investigations often took a long time, with little to show for them.[14]

As a result, the Labour Government elected in May 1997 reformed the area by passing the Competition Act 1998 (CA) as one of its first pieces of legislation.

The CA is one of three key pieces of legislation underpinning the current UK competition regime:

1 **Competition Act 1998**

The CA's main provisions entered into force on 1 March 2000.

It contains two prohibitions. The first ("Chapter 1") is modelled on Article 101(1) of the Treaty on the Functioning of the EU (TFEU), forbidding agreements and practices which have as their object or effect the restriction of competition. The second ("Chapter 2") is modelled on Article 102 TFEU and forbids the abuse of a dominant position.

The CA grants the regulator (currently the CMA) wide powers to obtain information, conduct investigations, and impose penalties for breaches of the prohibitions.[15]

2 **Enterprise Act 2002** (EA)

The EA's competition provisions entered into force on 20 June 2003.

The EA sought to modernise UK merger control (which the CA had not reformed) by restricting ministerial involvement in merger decisions.

This was a major change in the way enforcement decisions are made: it gave primary responsibility to the OFT and the CC, removing the decision-making powers of Ministers, save in certain exceptional cases which give rise to a matter of public interest:

> The *Enterprise Act 2002* brought about a significant change in the way that decisions on merger and market cases were made. Under the previous *Fair Trading Act* merger and monopoly regimes, the

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13 Jeremy Lever, The development of British competition law: a complete overhaul and harmonization, WZB Discussion Paper, No. FS IV 99-4, March 1999, p24

14 Practical Law Competition Team, Overview: UK competition law

15 Ibid

> DGFT [Director General of Fair Trading] would advise the Secretary of State whether the conditions for a reference for in-depth investigation appeared to be satisfied. It was for the Secretary of State to decide, having regard to that advice, whether such a reference should be made.
>
> The function of the Monopolies and Mergers Commission/CC was to investigate the merger or market that had been referred to it and to report its findings to the Secretary of State, along with its recommendations for remedial measures. The final decision on what action should be taken was for the Secretary of State. The *Enterprise Act 2002* largely removed Ministers from the decision making process. The decision to refer mergers or markets is taken by the OFT. The CC then investigates and decides whether there is a competition problem. If it finds that there is, it decides on the appropriate remedial measures for any competition issues identified.[16]

While Ministers retained no direct involvement in the competition regime, they retained a residual role in the application of a public interest test in relation to market investigations, and, more substantively, the merger regime.[17] In the latter case, Chapter 2 of the 2002 Act allows the Secretary of State to intervene on grounds of national security and health, financial stability, and media quality, plurality and standards.

Vince Cable and BSkyB

A notable example of ministerial involvement in a merger investigation took place during the Coalition Government years. In 2010 News Corporation – founded by Rupert Murdoch - made a £12 billion bid for full ownership of broadcaster BSkyB. Some of News Corporation's competitors, including the BBC and the publishers of *The Guardian*, *The Telegraph* and *The Daily Mail*, wrote to Business Secretary Vince Cable urging him to intervene on media plurality grounds.[18]

Dr Cable intervened and used powers under the Enterprise Act[19] to order the media regulator – Ofcom – to examine the bid. Once the report was received, he would be able to block the bid if he decided that it was against the public interest.

However, the decision whether to block the bid needed to be based on a consideration of the public interest at stake – in this case, media plurality – rather than personal considerations. So when a recording emerged in December 2010 of Dr Cable telling undercover reporters that he had "declared war" on Rupert Murdoch, News Corporation questioned Dr Cable's ability to deal with the matter fairly.[20]

Dr Cable was subsequently stripped on any role in overseeing the bid. Responsibility was transferred to Jeremy Hunt at the Department for Culture, Media and Sport.

News Corporation ultimately pulled out of the bid in July 2011 following revelations of phone hacking at its publication *The News of the World*.[21]

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16 A Competition Regime for Growth …, March 2011 p125
17 See Appendix 1 to A Competition Regime for Growth …, March 2011; in particular, pp132-135
18 The Guardian, Vince Cable refers News Corp's BSkyB bid to regulator, 4 November 2010
19 The relevant powers were actually in the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003, secondary legislation made under the Enterprise Act
20 The Guardian, Vince Cable: I have declared war on Rupert Murdoch, 21 December 2010
21 The Guardian, News Corp pulls out of BSkyB bid, 13 July 2011

In addition, the EA established that in the performance of their functions the OFT and the CC would be required to apply a competition test – so that, in deciding whether a proposed merger should be allowed to proceed, the authorities' assessment is based on whether the merger can be expected to lead to "a substantial lessening of competition":

> The substantive test applied…under the Fair Trading Act regime was whether the merger operated against the "public interest". A public interest test also applied in monopoly cases. In practice, successive Secretaries of State had applied the public interest test as a competition based test. The *Enterprise Act 2002* formalised this by making the substantive test a competition test. As a result the substantive test in merger cases became whether the merger gives rise to a substantial lessening of competition within any market or markets in the UK for goods or services. The substantive test in market investigations became whether there are features of the relevant market that prevent, restrict or distort competition in any market for goods or services in the UK or a part of the UK.[22]

The requirement placed on the competition authorities to assess matters from this perspective – without regard to other matters of public concern – can be controversial. For example, in 2006 the Competition Commission began a major review of the UK groceries market in the wake of serious public concerns about the market power of the four leading supermarkets. At the outset of its inquiry, the CC felt it necessary to remind those making submissions of the statutory limits set to its assessment:

> The [Commission] is required to determine whether any feature, or combination of features, of the market prevents, restricts or distorts competition (under s134 of the 2002 Act). If this is so, there will be an 'adverse effect on competition', and we will seek to identify the detriment to consumers resulting from the adverse effect on competition (which might take the form of higher prices, less choice, lower quality of available products or lower innovation than if competition was working effectively). [...]
>
> But we must distinguish competition issues from other issues of public concern associated with grocery retailing which we have no power to investigate or resolve. Unless they affect competition, issues such as the environmental impact of the grocery supply chain, the composition of the high street and its impact on communities, rural land usage or employment conditions in overseas suppliers are not things we can decide on. These issues and public concern about them may interact with competition issues and provide background and context for our investigation, but our focus must be on the competition issues.[23]

The thresholds determining whether a merger qualifies for investigation were changed, introducing a new turnover test (based on a UK turnover of £70 million of the target company).

The EA also introduced criminal sanctions for individuals who engage in cartels, and a new power for the OFT to apply to the court to disqualify directors involved in breaches of competition law.[24]

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22 op.cit. pp125-6

23 CC, Groceries market investigation: Statement of issues, June 2006 paras 4-5

24 Practical Law Competition Team,

3 **Enterprise and Regulatory Reform Act 2013** (ERRA)

ERRA's main competition provisions entered into force on 1 April 2014.

ERRA created a new body, the Competition and Markets Authority (CMA), which took over the functions of the Competition Commission and the competition functions of the Office of Fair Trading. The CMA became responsible for merger regulation, market investigations, cartels, and several functions in the regulated utilities sector.

It also sought to streamline and strengthen provisions on mergers and markets, in particular by formalising the system of market studies, introducing new timescales for investigations and enhancing powers to obtain information.

2.2 Institutions

CMA

The Competition and Markets Authority set up by ERRA has a duty to promote competition for the benefit of consumers. Its functions include:

- investigating markets and mergers between organisations;
- taking action against businesses and individuals involved in cartels or anti-competitive behaviour; and
- protecting consumers from unfair trading practices.[25]

When investigating a merger, the CMA has a statutory deadline of 40 working days to complete the initial stage of its review (known as Phase 1).

If at the end of Phase 1 the CMA determines that the merger results in a realistic prospect of a substantial reduction of competition, it has a duty to launch an in-depth assessment (Phase 2). At Phase 2, a CMA panel of independent members assesses whether the merger is expected to result in a substantial lessening of competition. If so, the CMA decides upon the remedy, which could include prohibiting the merger or requiring the sale of parts of the business.[26]

The Business Secretary appoints the chair and the chief executive, as well as members of the CMA board (which exercises the functions of the CMA and is responsible for Phase 1 merger decisions) and a CMA panel (which contains independent experts and makes Phase 2 merger decisions).[27]

In 2018 Lord Tyrie, a former Conservative MP and Chair of the Treasury Select Committee, was appointed Chair of the CMA for a five-year term, but resigned in September 2020 after reportedly having "fallen out" with CMA chief executive Andrea Coscelli.[28] Jonathan Scott was appointed his interim replacement.

The Government stated before the CMA was set up that it expects it to deliver direct financial benefits to consumers of at least ten times its cost to

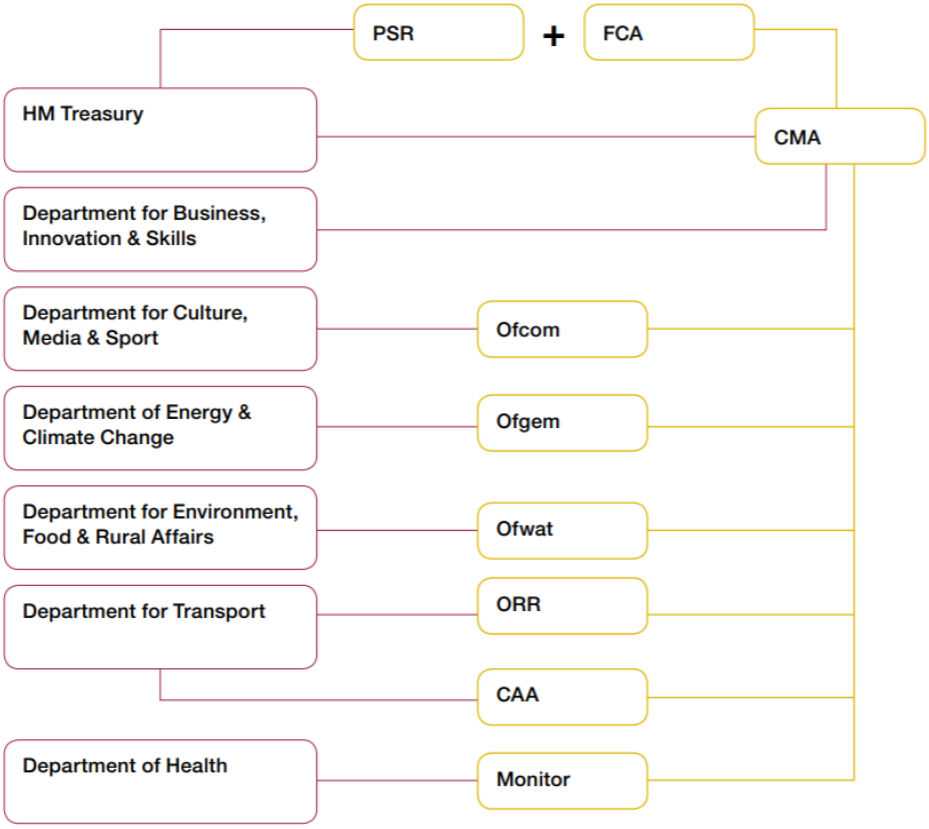
25 CMA, About Us
26 CMA, A Quick Guide to UK Merger Assessment, 18 March 2021
27 See Schedule 4 of ERRA
28 City A.M., CMA chair Tyrie was 'forced to step down' after row with directors, 28 June 2020

the taxpayer[29]. The CMA's latest annual impact assessment for financial year 2019/20 – published in July 2020 – estimated that it delivered total financial benefits to consumers of £1.3 billion, against costs (money spent) of £93 million.[30]

Sector Regulators

Sector regulators in energy (Ofgem), water (Ofwat), communications (Ofcom), financial services (FCA), payment systems (PSR), health services (NHS Improvement, previously Monitor), rail (ORR) and aviation (CAA) have similar powers and responsibilities to the CMA in their own areas. The United Kingdom Competition Network (UKCN) provides a forum for co-operation between the CMA and sector regulators to encourage stronger competition across the economy.

The diagram below shows the regulators together with their sponsor Department:[31]



Competition Appeal Tribunal

The Competition Appeals Tribunal (CAT) was established by the Enterprise Act 2002. It consists of a President, a panel of Chairs and a panel of ordinary members. In financial year 2019/20, the CAT had 18 staff and passed down judgments in 30 cases.[32]

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29 BEIS, CMA Performance Management Framework, January 2014, p2

30 CMA impact assessment 2019/20, 14 July 2020, paras 1.6 and 3.17

31 NAO, *The UK competition regime*, HC737, February 2016, p21. Appendix Three (pp50-51) has more details on the eight sector regulators and their responsibilities.

32 CAT, Annual Report and Accounts 2019/2020, pp5 and 64

It is an independent judicial body that hears appeals on decisions of the CMA and the sectoral regulators, as well as claims for damages resulting from breaches of competition law.

2.3 Brexit

EU competition law was developed – and applied – with promoting Single Market integration in mind. Practices which could divide the territory of one Member State from another could therefore be severely punished.

It mainly consists of the following provisions from the Treaty on the Functioning of the European Union:

- Article 101(1) which prohibits agreements, or practices that have as their object or effect the restriction of competition; and
- Article 102 which prohibits the abuse of a dominant position.

The EU Merger Regulation also gives the European Commission exclusive jurisdiction within the European Single Market to review mergers with an EU dimension.

For example, in 2016 the European Commission blocked a proposed merger between the owners of the O2 and Three mobile networks on the grounds that it would lead to higher prices and less consumer choice by reducing the number of networks in the UK from four to three. In 2020, the EU's second highest court annulled the Commission's decision to block the deal, finding several errors of law including a failure to prove that prices would rise or that competition would be harmed as a result of the merger.[33]

UK competition law (the Competition Act 1998) was modelled on Articles 101 and 102; as a result, many cases would have the same outcome whether they are dealt with under EU or domestic law. In cases where there would be different outcomes, however, EU law would take precedence over national law.

On 31 December 2020, the UK left the European Single Market. EU competition law is no longer enforced in the UK; the UK and EU now operate completely separate competition regimes. See section 2 of our briefing The UK-EU Trade and Cooperation Agreement: Level Playing Field for information on the competition provisions of the UK-EU trade agreement.

The CMA is now responsible for all anti-competitive practices that affect UK markets and consumers, including the ones previously within the jurisdiction of the European Commission.[34]

In oral evidence in 2019, the CMA Chairman, Lord Tyrie, sought to reassure the Business Select Committee that the CMA's budget increase of £20 million should cover the regulator's additional role after Brexit:

> **Mark Pawsey:** My question was going to be to what extent you will need additional resources to deal with these items in isolation, rather than as a member of the EU.

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33 See FT, European Commission's decision to block Three-O2 deal annulled, 28 May 2020

34 See Competition and Markets Authority, Speech by Dr Michael Grenfell, A view from the CMA: Brexit and beyond, 16 May 2018

> **Lord Tyrie:** We have been given some extra money.
>
> **Mark Pawsey:** Could you give us an indication?
>
> **Lord Tyrie:** It is £20 million, and the £20 million has already been cut back from £22 million, but £20 million is fine. Thank you very much for asking about our resources. It is always a vexed issue with regulators. I want to tell you, though, that we are not asking for more money.
>
> **Mark Pawsey:** I was going to ask whether that additional resource met the additional demand for your work.
>
> **Lord Tyrie:** In a steady state post Brexit, with or without a deal, that will probably enable us to function to a level that would be acceptable to this Committee, Parliament and the public. If it is not, we will come back and say. This is uncharted territory; we cannot be absolutely sure. I want to convey, though, that the scale of the adjustment will be very large.[35]

Divergence

UK courts are no longer required to follow EU competition case law. Divergences are likely to emerge over time. Some have argued the Brexit trade-off is one of flexibility versus clout. Dr Steve Unger, then a board member of Ofcom, made that point in oral evidence to the Lords Select Committee on the European Union in 2017:

> There is a trade-off here, which is not ultimately for me to determine. I do a lot of work internationally, talking to countries outside Europe. They are very interested in what the UK has to say; we have a lot of influence. In talking to those countries, having greater flexibility as to our position can help, in some cases, reach agreement. On the other hand, when you talk to those same countries as part of a European delegation—I have had experience representing the 28 to other countries—you clearly have more clout.[36]

On the question of whether the UK should cease to be constrained by EU Court judgments in the future, the CMA's Dr Grenfell took a nuanced view in 2018:

> On the one hand, it is argued that yes, we should conform with EU jurisprudence – continue to conform with EU jurisprudence – because that will provide business with the consistency, predictability and stability they crave. It's what we've always done (for the past 18 years). EU countries are our nearest, and largest, trading partners, and so it is helpful to have the same competition laws that they have, applied and interpreted in pretty much the same way.
>
> But there are also powerful arguments against 'privileging' EU Court of Justice jurisprudence over all other international precedent and best practice, and over our own independent thinking. Again, we are talking not about the bulk of competition law (on which there is consensus across the globe – price collusion and bid-rigging are unlawful everywhere). As I've said we are talking only about those issues at the margins over which there is genuine and legitimate debate – fidelity rebates or price discrimination, for example. Once

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35 Business, Energy and Industrial Strategy Committee, Oral evidence: Work of the Competition and Markets Authority, HC 2246, Wednesday 5 June 2019, QQ30-32

36 House of Lords European Union Committee, Internal Market Sub-Committee, Brexit: competition, Thursday 14 September 2017, Q15

> we are outside the EU, if the view of the UK competition authorities or courts is that the better view on one of these issues is X, why should they be constrained from applying X just because one particular foreign court, the EU Court of Justice, has case law which says Y, case law which might be outdated?[37]

[37] Competition and Markets Authority, Speech by Dr Michael Grenfell, A view from the CMA: Brexit and beyond, 16 May 2018

3. Reform of the competition regime

3.1 The NAO's 2016 review

In February 2016, the National Audit Office published a review of the UK competition regime, to consider early evidence on the CMA's performance. While it concluded that the regime as a whole was "more coherent" it raised concerns that there were "still too few successful enforcement cases, and business awareness of competition law could be improved," adding, "the regime has further to go to ensure that value for money is achieved."[38]

The report found that:

- business awareness of the competition authorities and of competition law itself is low, and in the NAO's view, this may potentially harm compliance[39];
- stakeholders "considered the low number of decisions a key failing of the UK competition regime so far". One reason they identified is that the CMA faces more difficult legal battles than many of its foreign counterparts;[40]
- the approach taken by the CMA on mergers was innovative and effective;[41]
- on markets, the CMA had placed a significant emphasis on investigations, with much of its reputation staked on the impact of high-profile inquiries. [42]

The report went on to make a number of recommendations for the CMA, arguing that if case flow failed to increase significantly, it should "assess the fundamental reasons for low enforcement caseflow, and consider the case for removing any legislative or institutional barriers." More widely than this, the authors recommended that the CMA should increase its existing efforts to improve awareness. Finally, the CMA and the regulators should "develop further their understanding of consumer behaviour to inform proposed remedies."[43]

3.2 Government consultation on Modernising Consumer Markets

In April 2018, the Government published a consultation paper on Modernising Consumer Markets. The paper announced a number of consultations and reviews, with three overarching principles:

1 competition should be central to the Government's approach and the Government should always look to remove barriers to competition where they arise;

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38 NAO press notice, *The UK competition regime*, 5 February 2016
39 *The UK competition regime*, HC737 of 2015-16, February 2016
40 HC 737, February 2016 para 2.11-15
41 HC737, February 2016 p9
42 Ibid
43 HC737, February 2016 pp11-12

2 consumers should benefit from new technology and new business models, with competition and regulation working together in the consumer interest; and

3 consumers should be able to get redress when things go wrong and consumer rights are effectively enforced.

The paper also announced a statutory review of the competition powers (as required by the *Enterprise and Regulatory Reform Act 2013*), looking at:

- whether the 2014 reforms to the competition regime have helped to deliver competition in the UK economy for the benefit of consumers;
- whether the competition regime provides the CMA and regulators with the tools they currently need to tackle anti-competitive behaviour and promote competition;
- whether the competition regime is sufficiently equipped to manage emerging challenges.[44]

3.3 CMA proposals

In its response to the Government (July 2018), the CMA argued that the competition regime should be reformed in order to better protect consumers:

> [We] believe that:
>
> - the Government's reforms to the competition framework in 2014, combined with the CMA's ongoing work to make our processes more efficient and effective have helped to strengthen and streamline the regime; but that
> - further reforms could help to make the end-to-end regime – from initial evidence gathering to the outcome of any appeals – better able to tackle consumer detriment, in particular against a backdrop of digitalisation and the UK's Exit from the EU.[45]

In August 2018, the Secretary of State for Business, Energy and Industrial Strategy asked the CMA to come forward with proposals to better protect consumers in the digital economy and improve public trust in markets.

In February 2019, CMA Chairman Lord Tyrie outlined his proposals to the Secretary of State in a letter. He argued for the CMA to act faster and more decisively on competition issues, and for its powers to protect consumers upgraded to the same level as its competition powers. The proposed reforms are summarised as follows:

> The proposals create new duties and responsibilities on the CMA to enable it better to respond to [the challenges of the digital economy and declining confidence in market competition]. This includes an overriding statutory duty to treat the interests of consumers as paramount. The new duties would be backed by strengthened tools and powers to facilitate earlier and more robust intervention to address consumer detriment, and to deter wrongdoing.

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44 BEIS, Modernising consumer markets: Consumer Green Paper, April 2018, p60
45 CMA, CMA response to Modernising consumer markets green paper, July 2018, p6

> It is also proposed that the CMA relinquish certain powers and functions, or its lead responsibility for them, including the review of certain decisions by economic regulators, and the prosecution of criminal cartels, enabling it to focus more effectively on its core responsibilities.
>
> Changes are recommended to merger control to help the CMA work effectively with international counterparts after Brexit.
>
> Consequential and supporting changes are proposed to the process of review of CMA decisions by the courts.[46]

There are eight strands to the proposed reforms suggest by CMA Chair Lord Tyrie:

1 An **overriding "consumer interest" duty**, binding on both the CMA and the courts.

2 A more effective regime for **market studies and investigations**: proposals include extending the scope of market investigations to cover consumer detriment issues and the ability to impose legally enforceable remedies on an interim basis.

3 **Enforcement of consumer protection law**: in contrast to its powers to enforce competition law, the CMA cannot itself enforce consumer protection law and fine businesses. It is proposed that the CMA should be given powers to do that, in line with its competition powers.

4 **Individual responsibility**: proposals include new fines and sanctions for individuals involved in serious competition law infringements.

5 **Whistleblowers and auditors**: proposals include better compensation for whistleblowers and a duty on auditors to report competition breaches to the CMA.

6 **Investigatory and information-gathering powers**: turnover-based fines are proposed for firms that do not comply with the CMA's requests or that provide false or misleading information, along with a general power to require information.

7 **Court review of CMA decisions**: changes are proposed to limit the scope of appeals and speed up the process.

8 **Merger control**: the CMA proposes to make the notification of mergers above a certain threshold mandatory, accompanied by a "standstill obligation" to stop parties going ahead before receiving the CMA's approval.

Government Minister Lord Callanan told the House of Lords on 25 June 2020 that the proposals in the letter "have helped shaped public debate as well as informing government action.[47]

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46 CMA, Summary of proposals from Andrew Tyrie, CMA Chair, to the Secretary of State for Business, Energy and Industrial Strategy, 25 February 2019

47 HL Deb 25 June 2020, Vol804

3.4 CMA state of competition report

In February 2020, Chancellor Sajid Javid and Business Secretary Andrea Leadsom asked the CMA to report on the state of competition in the UK.[48] The results of the report would inform debate on competition and highlight issues warranting further analysis, as well as to assist the CMA, regulators and government to better target efforts towards improving competition. Published in late November 2020, the report found that:

- levels of competition had deteriorated during the 2008/09 recession and have still not fully recovered, which was "worrying". There are concerns that competition will reduce further owing to the severe economic impact of the COVID-19 pandemic;
- in some industries, partial ownership links (companies in an industry which have shares in each other or have common shareholders, and therefore can reduce competition) were significant;
- a small number of large, highly profitable firms have developed more powerful positions in markets since 2008, with potentially adverse consequences for consumers;
- reported consumer experiences of markets puts the UK only slightly above the European average; and
- rates of switching and shopping around were considerably lower among low income and financially insecure consumers. This may have been exacerbated during the pandemic.[49]

3.5 Penrose report

In September 2020, the Treasury and BEIS asked Conservative MP and UK Anti-Corruption Champion to produce a report considering "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."[50]

Published in February 2021, the Penrose report concluded that swift change to the UK competition regime was needed:

> … 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. … Sector regulators intervene heavily, creating regulatory burdens … 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.[51]

Most of the proposals suggested by Lord Tyrie in his 2019 letter were not carried over – in particular, proposals to impose greater liability on

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48 See letter to CMA chief executive Andrea Coscelli from Sajid Javid and Andrea Leadsom, dated 5 February 2020

49 CMA, The State of UK Competition, November 2020, pp 2-5

50 John Penrose, Power To The People, February 2021, p4

51 Ibid, p8

individuals and boards of public companies for competition law breaches were not mentioned. Some of the main proposals in the Penrose Report were:

- the strengthening CMA powers, including the power to impose greater penalties for non-compliance with investigations and allowing the CMA to settle at any stage of an investigation;
- the Government should pursue competition cooperation agreements with other countries, as it no longer benefits from the EU's cooperation agreements;
- streamlining the current process under which different appeals processes apply to different sector regulators, so that all appeals are dealt with by the CAT;
- establishing a taskforce to conduct a review of the "end-to-end" process, from CMA investigation to CAT appeal. This would aim to: reduce the length of cases from years to weeks; simplify the system so that it is both reliable and easily understood by non-experts; and fulfil the "fair trial" requirements of Article 6 of the European Convention on Human Rights;
- reviving the Government's "Better Regulation" efforts, including cutting regulatory burdens and costs by requiring Government Ministers to remove or modernise old rules before introducing new ones. In particular, the report notes that Brexit creates opportunities to cut EU rules deemed unnecessary (such as in public procurement). According to law firm Eversheds, while this may reduce costs for firms operating in the UK, it would require greater divergence between the UK and EU competition regimes, making it arguably more burdensome for firms seeking approvals in both the UK and EU in future;
- returning responsibility for competition in sectors with network monopolies of regulated assets – such as aviation, financial services, gas and electricity, and communications – from the sector regulators back to the CMA. Penrose argues there is "no inherent reason why […] 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";
- "levelling-up" the UK economy by introducing local and regional County Competition Courts to hear complaints more quickly, cheaply and efficiently; and expanding resources available to and duties of Local Authority Trading Standard teams, which investigate and enforce local scams and consumer problems; and
- restricting the provision of Government subsidies to where it is "unavoidable" in a limited number of pre-defined legal grounds, such as national security, public health or financial stability.[52]

Business Secretary Kwasi Kwarteng said the Government will "consider John's recommendations and respond in due course."[53]

3.6 Lord Tyrie *Financial Times* article

On 24 February 2021 (shortly after publication of the Penrose report, but without reference to it) Lord Tyrie wrote an article in the *Financial Times* in which he argued for reform of the CMA, stating that it should:

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52 Eversheds Sutherland, Penrose report: UK competition law set to change to give power back to the people, 5 March 2021

53 Gov.uk, Independent report: John Penrose MP publishes proposals to strengthen UK's competition regime, 16 February 2021

- put more effort into investigating markets where consumers are harmed, focusing on cases with the greatest and most visible returns for consumers;
- engage more directly with small businesses and the public, as two-thirds of businesses still do not know the CMA enforces UK competition law;
- become more transparent, with the CMA board rather than executives deciding which major cases to take on, then explaining its choices to Parliament and the public; and
- have new statutory duties both to promote the consumer interest, and to act swiftly.[54]

[54] Financial Times (Lord Tyrie), The UK competition regulator is not fit for purpose, 24 February 2021

4. Case study: digital markets

A global debate is taking place about whether the dominance of a few tech giants stifles competition. For example, in 2019 Google received over 90% of UK search advertising revenue, and Facebook received over 50% of display advertising revenue.[55]

Other online giants include Amazon, Apple, Microsoft and eBay. All of these are based in the United States, so any solution requires co-operation with competition authorities around the world, and in particular with two major US agencies – the Federal Trade Commission and the Department of Justice Antitrust Division.

Some options for reform are introduced below.[56]

Break-up

A break-up means a company separates or sells part of its operations or products. For example, Facebook could sell Instagram or WhatsApp; Google could spin off YouTube; or Amazon could split off its marketplace platform from its retail divisions that compete with other sellers. However, to do this, a proper investigation must be carried out, and evidence must show that divestment is a proportionate remedy to the harm identified. The company can appeal against the decision in the courts.

Utility regulation

This is an argument for regulating digital platforms for the same reasons that we regulate utilities: they are natural monopolies and virtually everyone depends on them one way or another. A key tool of utility regulation would be to cap profits.

Prevent new acquisitions

This would restrict companies from making yet more acquisitions, such as by lowering the thresholds for interventions into proposed mergers and takeovers, or taking greater account of considerations beyond market share and the potential impact on consumer prices.

Promoting data portability and interoperability

Data portability lets customers move their data elsewhere. It is similar to how mobile phone users can switch networks without losing their phone number.

Interoperability seeks to force companies to share their data with others, making it easier for competitors to enter a market. For example, people joining Instagram were initially able to discover and more easily connect with all the people they followed on Twitter, thanks to a Twitter application that made such data available.

New dispute resolution bodies

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55 CMA, Online platforms and digital advertising, Market study final report, 1 July 2020, p5

56 Adapted from: *The Economist*, The techlash against Amazon, Facebook and Google—and what they can do, 20 January 2018

New bodies could be created to handle complaints quickly and fairly. For example, a seller who feels they have been unfairly demoted in Amazon's search results, or a newspaper that believes its ranking in Facebook's feeds is too low, could seek redress from these bodies. The bodies could be hosted by the company, but made up of external experts, or they could be entirely independent.

4.1 UK policy

The UK Government commissioned Professor Jason Furman to look at this issue. The Digital Competition Expert Panel that he chaired reported in March 2019 (the report was called "Unlocking digital competition" or more informally as the Furman Review). The introduction alludes to a range of views about the state of digital competition:

> Some people argue that digital platforms are natural monopolies where only a small number of firms can succeed, making competition impossible. The logical conclusion of that view is utility-like regulation of the type used for electricity distributors. Others believe there is already adequate competition and no policy changes are needed to maintain it. We disagree with both views, seeing greater competition among digital platforms as not only necessary but also possible – provided the right policies are in place.[57]

The Panel argued in favour of new rules that promote competition:

> […] the UK should take a forward-looking approach that creates and enforces a clear set of rules to limit anti-competitive actions by the most significant digital platforms while also reducing structural barriers that currently hinder effective competition. These rules should be based on generally agreed principles and developed into more specific codes of conduct with the participation of a wide range of stakeholders.[58]

To develop and enforce these rules, the Panel recommended setting up a new "digital markets unit" with three main functions:

1 To develop a code of competitive conduct, with the participation of stakeholders;

2 To enable greater personal data mobility and systems with open standards in order to increase competition and consumer choice;

3 To advance data openness where access to non-personal or anonymised data will tackle the key barrier to entry in a digital market, while protecting privacy.[59]

The Panel also had two strategic recommendations for the competition regime:

1 Updating merger policy so that the CMA can take more frequent and firmer action to challenge mergers that could reduce future levels of innovation and competition, taking better account of technological developments.

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57 Digital Competition Expert Panel, Unlocking digital competition, March 2019, p2
58 Digital Competition Expert Panel, Unlocking digital competition, March 2019, p2
59 Digital Competition Expert Panel, Unlocking digital competition, March 2019, pp5-6

2 Faster and more targeted antitrust enforcement, by enabling more use of interim measures while a case continues and by limiting the grounds for companies to appeal against the CMA's decision in the courts.[60]

CMA response

The CMA has made the case for new and enhanced powers in their "far-reaching proposals" (February 2019) submitted to the Business Secretary (see CMA's proposals in this briefing). One of their aims is precisely to be able to act much faster, so that "within six or nine months, still within all the procedural guarantees for Amazon and everyone else, [we would like to be able] to take at least a preliminary decision on that matter".[61]

The CMA also commissioned work to look at their past merger decisions in the UK digital sector, Ex-post Assessment of Merger Control Decisions in Digital Markets (9 May 2019). Among other things, this concluded that competition authorities ought to intervene more to stop big tech buying out their smaller rivals:

> There is a concern that merger policy has put too much weight on the risk of incorrect intervention (type I error) compared to the risk of incorrect clearance (type II error) when assessing mergers in the digital sector, leading to increased concentration in digital markets. The nature of competition in many digital markets may change the terms of the usual trade-off between type I and type II errors. Network effects often make the structure of digital markets quite concentrated and barriers to entry rather high. Big data may contribute to such outcomes, to the extent that the data endowments enjoyed by incumbents provide a competitive advantage that makes it even more difficult to challenge them. The main mechanism left to discipline incumbents is that of competition for the market, i.e. that potential and actual entry mitigate the ability of incumbents to exert market power. This makes potential competitors even more valuable than they usually are in traditional markets. As a result, type II errors may be particularly costly. In other words, certain features of digital markets may justify some changes in the way mergers in the sector are typically assessed.[62]

Deals that the report looks at include Facebook's takeover of Instagram and Google's takeover of Waze, where the competition authority's decision "may have represented missed opportunities for the emergence of challengers to the market incumbents but have also likely resulted in efficiencies".[63]

On 3 July 2019, the CMA launched its Digital Markets Strategy, which sets out the authority's approach to protecting consumers in the digital economy while ensuring that digital markets remain competitive. The Strategy identified seven priorities for the CMA:

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60 Digital Competition Expert Panel, Unlocking digital competition, March 2019, p6

61 Andrea Coscelli (CMA CEO) in: Business, Energy and Industrial Strategy Committee, Oral evidence: Work of the Competition and Markets Authority, HC 2246, Wednesday 5 June 2019, Q18

62 Lear, Ex-post Assessment of Merger Control Decisions in Digital Markets, 9 May 2019, p iii

63 Lear, Ex-post Assessment of Merger Control Decisions in Digital Markets, 9 May 2019, p xiii

> Priority 1: Consumer and antitrust enforcement and merger assessment
>
> Priority 2: The work of our Data, Technology and Analytics (DaTA) unit
>
> Priority 3: Market study on online platforms and digital advertising
>
> Priority 4: Review our mergers approach to digital markets as necessary
>
> Priority 5: Policy work to consider a possible 'digital markets unit'
>
> Priority 6: Proposals to reform our enforcement tools
>
> Priority 7: International cooperation[64]

Under priority 3, the CMA also launched the Online platforms and digital advertising market study. This assesses three potential sources of harm to consumers in connection with digital advertising:

- to what extent online platforms have market power in user-facing markets, and what impact this has on consumers
- whether consumers are able and willing to control how data about them is used and collected by online platforms
- whether competition in the digital advertising market may be distorted by any market power held by platforms.[65]

Reporting in July 2020, the market study found that online platforms like Google and Facebook "are now protected by such strong incumbency advantages…that potential rivals can no longer compete on equal terms". The CMA therefore recommended that the Government should establish a new Digital Markets Unit (DMU) which:

> would be empowered to enforce a code of conduct to govern the behaviour of platforms with market power, ensuring concerns can be dealt with swiftly, before irrevocable harm to competition can occur. The DMU should also have powers to tackle sources of market power and increase competition, including powers to increase interoperability and provide access to data, to increase consumer choice and to order the breakup of platforms where necessary.
>
> We have identified a wide range of specific interventions that the DMU could introduce under this regime to tackle the market power of Google and Facebook, from ordering Google to open up data to rival search engines and separate aspects of its open display advertising business, to requiring Facebook to increase its interoperability with competing social media platforms and give consumers a choice over whether to receive personalised advertising.[66]

In legislating for this new regulatory regime, the report made four high-level recommendations:

> Recommendation 1: Establish an enforceable code of conduct to govern the behaviour of platforms funded by digital advertising that are designated as having strategic market status (SMS). The purpose

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64 CMA, Digital Markets Strategy, July 2019, p3
65 CMA, Online platforms and digital advertising market study, 3 July 2019
66 CMA, Online platforms and digital advertising; Market study final report, 1 July 2020, p5

of the code would be to meet three high-level objectives of fair trading, open choices and trust and transparency.

Recommendation 2: Establish the requirement for a DMU to undertake SMS designation, introduce and maintain the code based on objectives set out in the legislation, and produce detailed supporting guidance.

Recommendation 3: Give the DMU the necessary powers to enforce the principles of the code on a timely basis, and amend its principles in line with evolving market conditions.

Recommendation 4: Give the DMU the necessary powers to introduce a range of pro-competitive interventions, which should include:

a. Data-related interventions (including consumer control over data, interoperability, data access and data separation powers)

b. Consumer choice and default interventions

c. Separation interventions[67]

The Government's November 2020 response to the report broadly agreed with the recommendations. It committed the Government to: set up the DMU within the CMA from April 2021, consult on proposals for a for the form and function of the DMU in early 2021, and to legislate to put the DMU on a statutory footing "as soon as parliamentary time allows".[68]

In the March 2020 Budget the Government announced that it accepted the strategic recommendations of the Furman Review and would form a Digital Markets Taskforce to "provide advice to the government on the design and implementation of a pro-competition regime for digital markets". Reporting in December 2020, the Task Force "welcome[d] the government's response [in November 2020] to the CMA's online platforms and digital advertising market study, and its commitment to establishing a DMU from April 2021 within the CMA". The Task Force's 15 recommendations centred around the creation of the DMU and the role it would play.[69]

On 7 April the CMA announced that the DMU had been established, on an initial non-statutory basis awaiting further consultation and legislation.[70] Consultations on the design of the DMU have reportedly been delayed, and legislation is now not expected until 2022.[71]

4.2 International action

Several other national authorities have also expressed concerns about digital markets in their respective jurisdictions, The Digital Markets Task Force summarised international work in this area in its December 2020 advice report:

- In the US, the congressional House Judiciary Antitrust Subcommittee said (in a 2020 report) that tougher action is needed to address

67 Ibid, p34

68 BEIS and DCMS, Response to the CMA's market study into online platforms and digital advertising, November 2020, pp8-11

69 CMA, A new pro-competition regime for digital markets, December 2020, p2, 8, 84-87

70 CMA, Digital Markets Unit, 7 April 2021

71 See commentary of Osborne Clark, Digital Markets Unit: what we know and what to expect, 23 April 2021

competition concerns. Recommendations made by the Subcommittee include interventions to restore competition from structural separations to data remedies such as interoperability and data portability. Investigations into Facebook and Google's advertising dominance are reportedly taking place at state and federal levels;[72]

- In the EU, the European Commission has consulted on proposals for the introduction of a new Digital Markets Act, which includes rules covering large online platforms acting as gatekeepers, as well as plans which could increase the responsibility of platforms;
- In Germany, the Federal Government has endorsed draft legislation introducing the concept of 'undertakings with paramount significance for competition across markets' and giving the national regulator (the Bundeskartellamt) powers to prohibit such undertakings engaging in certain conduct;
- In Australia the government established a special unit within the Australian Competition and Consumer Commission (ACCC) to proactively enforce, monitor and investigate competition and consumer protection in digital platform markets. The government has asked the ACCC to create a mandatory code of conduct to govern the commercial relationship between digital platforms and media companies.

  The Australian Government also rowed back on plans in February 2021 to require Facebook and Google to pay news publishers for displaying publishers' content on their platform, after Facebook temporarily blocked all news on its platform in Australia. The Australian Government instead agreed that a media bargaining code it was introducing would not apply if platforms can demonstrate they have "signed enough deals with media outlets to pay them for content". Australia's treasurer (finance minister) Josh Frydenberg said Australia was a "proxy battle" for the world on the regulation of Google and Facebook; and[73]
- In Japan, the government established a 'Headquarters for Digital Market Competition' in September 2019 with an aim to facilitate discussion on the transparency of dealings with digital platform businesses and the protection of privacy. In June 2020, it released an interim report proposing that preventative rules be applied to digital platforms.[74]

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72 The Guardian, What Facebook's Australia news ban could mean for its future in the US, 27 February 2021

73 The Guardian, Facebook reverses Australia news ban after government makes media code amendments, 23 February 2021

74 CMA, A new pro-competition regime for digital markets, December 2020, pp11-12

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