

New Regulatory Regime for Digital Platforms in the UK: The Digital Markets Unit

December 2020

Background

The digital market is rapidly changing and expanding, while also raising a number of competition concerns. For many competition authorities around the globe, competition policy regarding the digital sector is a key focus point right now. Abuse of market power by big platforms is especially a major concern. Stemming from the same concern, the UK Competition and Markets Authority (CMA) released its final report on online platforms and digital advertising, after a year-long market study, on 1 July 2020. The report stated that the existing powers of the CMA are not sufficient to address market concerns, and recommended a new code of conduct and regulatory regime. The UK government responded to these recommendations and established the Digital Markets Unit (DMU) within the CMA, which will start its operations in April 2021. Until then, the Digital Markets Taskforce (the **Taskforce**) has been mandated by the Government and the CMA in order to provide recommendations regarding the new code of conduct and its implementation. Accordingly, the Taskforce published its report in December 2020. The Taskforce's report follows some of the other previous reports and recommendations in this area, and advises the introduction of three new pillars for the new regulatory regime: (i) a new code of conduct, (ii) pro-competitive interventions, and (iii) specific merger control rules.

The work conducted so far

Before the CMA's report, an expert panel led by Jason Furman had published the "Unlocking Digital Competition" report in March 2019, which provided an analysis of the digital markets and proposed a competition system suitable for digital services (the **Furman Report**). These were the first comprehensive recommendations on competition in the digital markets in the UK, which included the formation of a DMU and designating digital firms with "strategic market status" (SMS). The CMA's Online Platforms and Digital Advertising Market Study Final Report (the **Final Report**), which was published on 1 July 2020, shows a lot of similarity with the Furman Report in terms of the proposed changes. The Final Report stated that big players in the display advertising and search advertising markets prevent rivals' entry and expansion, and that this situation might undermine competition and choice in the market and lessen consumers' control over the use of their data. In response, the CMA recommended an enforceable code of conduct which will govern the behaviour of digital platforms that are designated as having SMS. The CMA also addressed the need for new regulatory powers and advised the Government to establish a pro-competition regulatory regime for online platforms, including a DMU to implement interventions. The objective of the proposed regulatory regime is defined as overcoming uncompetitive market power and protecting consumers from exploitative practices.

In line with these developments, the UK government launched the Taskforce in March 2020 following the Furman Report, to provide specific recommendations on promoting competition in digital markets. The Taskforce shared its recommendations with the UK government on 8 December 2020. The Taskforce's report follows the previous recommendations made in the Furman Report and the CMA's Final Report. In a nutshell, the recommendations include a new code of conduct which will set out specific rules and principles for each SMS firm, pro-competitive interventions allowing the CMA to address market power issues, and specific merger control rules for SMS firms.

What will the new regime include?

➤ An enforceable code of conduct applying to platforms with an SMS

A new code will be introduced in order to set out clear rules on acceptable behaviour in digital markets for designated SMS firms, covering interactions with customers, users and competitors. The Taskforce's report recommended this code of conduct to be tailored to each SMS firm and each activity and conduct. The code will manage the market power held by each SMS, therefore preventing market abuses before they occur. According to the Taskforce, firms should be provided with clear objectives, principles and guidance on how they should behave in the market, and which behaviours are seen as exploiting consumers and businesses or excluding innovation. Under the new code of conduct, digital advertising platforms will need to be more transparent about their services and about how they are using consumer data. The DMU will monitor SMS firms, identify breaches and impose remedies when necessary as a result of its investigation.

➤ Pro-competitive interventions

The DMU will be able to use wide-ranging tools for intervention. The interventions will aim to address the root causes of market power and change the market power dynamics of SMS firms in the long-run, in order to increase competition and innovation. The CMA's Final Report recommended tools such as data-related remedies, greater interoperability, intervention to introduce consumer choice, addressing the power of defaults, and also structural separation. In its response to the Final Report, the UK government stated that more work was required to assess the benefits and risks of proposed intervention tools. The Taskforce's report also concluded that the DMU should not be limited in the types of remedies it can impose. However, the Taskforce argued that separation remedies should be limited to operational and functional separation.

➤ Specific merger control rules

The Taskforce recommends stricter merger control rules for firms designated with an SMS status. According to the Taskforce, the merger control regime should apply to all acquisitions by SMS firms. Some detailed recommendations by the Taskforce include: SMS firms being required to report all transactions to the CMA, a mandatory suspensory merger control process for transactions amounting to clear-cut acquisitions of control or exceeding a certain threshold, and a safety net allowing CMA to investigate acquisitions that did not trigger mandatory notification.

The UK government will rely on the Taskforce's recommendations when creating the legislation for the new regime. Although the Taskforce's recommendations will form the basis of the legislation, the final structure of the regime is not clear yet.

Global developments

Countries other than the UK are also focusing on competition in the digital markets. The German Ministry of Economics and Energy published the Act on Digitalisation of German Competition Law (**Draft Act**) in October 2019. The Draft Act proposes changes to German competition rules and introduces new powers for the German Federal Cartel Office in order to address challenges in digital markets and use of data, especially with regards to abuses of dominance. Other developments in Europe include the European Commission's recent draft Digital Markets Act (the **Draft DMA**), which was released on 15 December 2020. The Draft DMA introduces new competition rules regarding undertakings providing core services in the digital markets, who also have a

significant scale and position in the market. The DMA defines such undertakings as “gatekeepers,” and identifies new obligations, merger rules and investigation powers in order to protect consumers and competition in the digital markets.

In Turkey, the Turkish Competition Authority (TCA) announced earlier this year that it was working on the “Digitalization and Competition Policy Report” in order to monitor current developments in digital economy and contribute to future competition policies in this field. On 7 May 2020, the TCA also defined new duties and assigned the Strategy Development Department to conduct studies and contribute to competition issues regarding the digital economy. Lastly, on 11 June 2020, the TCA launched a sector inquiry on e-marketplace platforms.

Contacts



Hakkı Gedik

Turkey – Istanbul
Tel +90 212 371 29 53
Mobile +90 549 480 15 35
hakki.gedik@gedikeraksoy.com



Umut Gürgey

Turkey – Istanbul
Tel +90 212 371 29 66
Mobile +90 549 480 15 37
umut.gurgey@gedikeraksoy.com



Emre Önal

Turkey – Istanbul
Tel +90 212 371 29 65
Mobile +90 549 480 15 33
emre.onal@gedikeraksoy.com