

LAUNCH OF THE UK DIGITAL MARKETS UNIT – PREDICTIONS FOR THE NEW REGIME

On 7 April 2021, the UK government launched the Digital Markets Unit (**DMU**) within the Competition and Markets Authority (**CMA**) to oversee a new pro-competition regulatory regime in respect of digital activities. While its long-term impact will no doubt be significant, substantial questions remain regarding the powers and processes of the new unit, which launched in 'shadow form'.

WHAT IS THE DMU?

The DMU was first mentioned in the Furman Report in March 2019 and, since then, has been the subject of considerable advice, recommendations and discussion. In particular:

- the CMA recommended the creation of a DMU within the CMA following its market study into online platforms and digital advertising which concluded in July 2020 and subsequently as part of its refreshed Digital Markets Strategy in February 2021;
- at the end of last year, the Digital Markets Taskforce (**DMT**) advised the government to set up a DMU to seek to further the interests of consumers and citizens in digital markets, by promoting competition and innovation; and
- despite its launch in 'shadow form' this week, the DMU is not expected to be given powers until 2022, given the government's busy legislative programme for 2021.

The DMU, which will be led by Will Hayter as interim head, will adopt a "*sector neutral approach*" in assessing the role of platforms across a variety of digital sectors, with the aim of promoting competition and innovation. The CMA's ambition is to establish the DMU as "*a centre of expertise for digital markets, with the capability to understand the business models of digital firms, including the role of data and the incentives driving how these firms operate.*"

The DMU will be tasked with implementing and enforcing a code of conduct for businesses, or parts of businesses, that will be designated as having Strategic Market Status (**SMS**). It is also expected to have the power to impose so-called pro-competitive interventions on SMS businesses to tackle the underlying sources of market power and promote competition.

Key issues

- The UK government launched the DMU to oversee a new pro-competition regulatory regime in respect of digital activities.
- The DMU will be tasked with implementing and enforcing a code of conduct for businesses that have Strategic Market Status.
- As a first step, the DMU is being asked to consider how codes of conduct could work in practice in the context of advertising and news publishing.
- The DMU is also expected to undertake a range of other pro-competitive interventions to tackle the underlying sources of market power and promote competition.
- The details of the DMU's powers and processes will be subject to consultation prior to being enacted as legislation.
- International cooperation will be key to regulate digital activities which are inherently cross-border.

However, the exact powers and processes of the DMU remain unclear, as the DMU launched in 'shadow' non-statutory form and its full powers will be subject to consultation and legislation.

HOW WILL STRATEGIC MARKET STATUS DESIGNATION WORK?

At this stage, there is no clarity on the exact criteria for SMS designation; however, the existence of substantial and entrenched or enduring market power with respect to at least one digital activity will likely play a determinative role. The DMT also recommended that SMS designation should depend on whether the firm's market power provides it with a strategic position.

An important aspect of the new regime is that the process of designating SMS envisages a detailed, evidence-based assessment of firms and the markets in which they operate, prior to deciding *which parts of their businesses* may be designated as having SMS.

Any such work by the DMU would be subject to the government having taken key decisions on the regulatory framework for designation and the SMS test. In particular, it remains to be seen whether the DMU will be solely responsible for SMS designation or whether its decision will be subject to Parliamentary approval as recommended by the Penrose Report.

Given the focus of the government's announcement on "*tech giants such as Facebook and Google*," the designation assessments for Google and Facebook will likely be prioritised, in relation to their activities in digital advertising and their relationships with content publishers.

In addition to online search engines and social networks, the DMT recommended that the DMU initially prioritises online marketplaces, app stores, web browsers, operating systems and cloud computing services.

CODE OF CONDUCT FOR BUSINESSES DESIGNATED AS SMS

The DMU will be responsible for introducing, maintaining and enforcing a new code of conduct applicable to companies designated as having SMS. It will also be expected to provide supporting guidance to enable firms to understand what represents acceptable behaviour when interacting with their customers, users and competitors, and therefore comply with the code of conduct.

As a first step, the DMU is required to consider how codes of conduct could work in practice to govern the relationship between digital platforms and advertisers or businesses that use them to reach customers. In addition, the DMU must also work with Ofcom on a code of conduct to cover the relationship between digital platforms and content providers, such as news publishers.

Although the exact contents remain to be seen, the code of conduct will likely include requirements for greater transparency (for example about the use of customers' data), more choice for consumers (particularly in relation to the use of their data), and limits on restrictions on customers using rival services.

"PRO-COMPETITIVE INTERVENTIONS"

In addition, the UK government is considering empowering the DMU to undertake a range of other pro-competitive interventions to promote competition and address the root causes of SMS businesses' market power.

Pro-competitive interventions could include mandating data access, enforcing greater interoperability, changing choices and defaults for consumers, and imposing separation remedies. Given that at least some of the envisaged pro-competitive interventions would have very far-reaching implications, the government will need to carefully consider and scrutinise these proposals.

At this stage, it is unclear if and when these will become reality and whether there will be scope to influence to the government's considerations. One key question to consider is the extent to which the regime would provide for an effective system of appeals against decisions by the DMU.

WILL THE DMU IMPACT ON MERGERS?

Following the DMT's recommendation for a new SMS merger regime and the CMA's focus on mergers in the digital space, the statutory framework for merger review is likely to change for businesses designated as having SMS.

This may include a reporting obligation to make the CMA aware of all transactions within a short (unspecified as yet) period after signing. There may also be a new mandatory and suspensory merger notification regime for SMS businesses which meet certain thresholds. The DMT recommended that competition concerns should be assessed using the existing substantive test, but the more cautious "realistic prospect" test in prohibiting mergers at Phase 2.

If the government follows the DMT's proposals, completion of transactions subject to the mandatory regime would be prohibited prior to clearance by the CMA, and failure to notify would be subject to a fine.

THE DMU'S ROLE IN THE INTERNATIONAL CONTEXT

Given that digital activities are inherently cross-border, international cooperation will be important to regulate issues which cannot be fully addressed in isolation. The DMU will need to coordinate with regulators globally, also with a view to sharing information with international partners and seeking reciprocal arrangements.

The UK, having initially occupied a thought leadership role in relation to digital regulation by initiating the Furman review in 2018, is gradually being overtaken by other jurisdictions that are in the process of enacting legislation introducing new digital regulation or have already done so. Germany, for instance, has recently adopted distinct antitrust rules for companies in the digital sector that are deemed to be of "*paramount importance for competition across markets.*"

Delays to the UK's legislation being enacted raise the concern that the UK's approach to digital regulation, widely regarded as more pragmatic and proportionate, is less likely to influence legislative or policy developments in the EU or across the Atlantic:

- The European Commission published its proposed Digital Markets Act (**DMA**) in December 2020 which includes *ex ante* rules covering large online platforms acting as gatekeepers. In order to be effective, the UK regime cannot depart significantly from the rest of Europe. Whilst several questions regarding the implementation in practice remain, the UK approach might well end up being more flexible, and hence more effective in addressing key issues arising in the digital context, than the approach embodied in the DMA.

- The US has also seen a recent increase in antitrust enforcement activity and a range of recommendations relating to competition in digital markets. Although the US has yet to pass any legislation, some legislators have proposed introducing a series of bills to address all recommendations in the Investigation of Competition in Digital Markets Majority Staff Report. While it is very unlikely that all proposals will become codified, there is growing consensus on some points, such as data portability and interoperability. Additionally, there is a possibility of new antitrust legislation by states that could affect digital markets and other companies.

WHEN CAN A FULLY FUNCTIONING NEW REGIME BE EXPECTED?

Although the DMU has launched, there will be some time before it is equipped with the necessary powers. Any new powers will be subject to legislation by the UK government.

Consultation on the proposals for the new regime was initially set for early 2021, but it is understood that the timetable for legislation is being delayed given the UK government's busy legislative agenda. The government has committed to introducing legislation as soon as parliamentary time allows, which is now not expected before 2022.

In the meantime, the non-statutory DMU is expected to:

- work on the operational aspects of setting up the new regime, including building teams with the relevant capabilities and preparing draft guidance;
- support and advise the government on shaping the statutory regime, including the work on scoping the codes of conduct;
- examine relevant markets and players, using the CMA's existing powers; and
- engage with stakeholders across industry, academia, other regulators and government to ensure that it can begin operations as quickly as possible once the new pro-competition regulatory regime is in place.

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