In addition, with the completion of the transaction, it was planned to establish a vertical relationship between Softline Group's Turkish subsidiary Axoft and the target Makronet in the software resale market, limited to the Turkish market. Axoft was the distributor of certain cyber security software distributed in Turkey in the software resale and distribution market. Makronet, on the other hand, operated in the fields of software resale and information technologies, as previously stated. In the response petition submitted by the undertaking, it was stated that after the completion of the acquisition, it was foreseen that the cyber security software distributed by Axoft, would be resold in Turkey through the purchase of this software by Makronet. Accordingly, the Board stated that there was a vertical overlap between Axoft's activities in the sale and distribution of software in Turkey and Makronet's activities in the resale of software in Turkey. Since Board found that the market shares of Axoft and Makronet were quite low, it was considered that the vertical relationship to be established would not adversely affect competition in these markets.

As a result of the foregoing examinations and evaluations, the Board concluded that the transaction would not significantly reduce effective competition in any market in the whole or in a part of the country, especially to create a dominant position or to strengthen an existing dominant position, and thus it granted unconditional approval to the transaction.

The Board's decision is of importance as it provides detailed insight into the Board's assessments on the technology undertaking exemption regarding turnover thresholds, as well as the Board's position when evaluating market overlap issues.

Gönenç Gürkaynak, Esq.
ELIG Gürkaynak Attorneys-at-Law

Eda Duru
ELIG Gürkaynak Attorneys-at-Law

Betül Baş Çömlekçi
ELIG Gürkaynak Attorneys-at-Law

United Kingdom

COMPETITION

Legislative Proposal—Digital Markets, Competition and Consumers Bill—strategic market status (SMS)—pro -competitive interventions—conduct of SMS firms—appeals—M&A activity—merger control reforms

Appeals; Competition policy; Consumer protection; Digital technology; Market power; Merger control; Online intermediaries

Digital Markets, Competition and Consumers Bill

In May 2023, the UK Government published the Digital Markets, Competition and Consumers Bill (the Bill). Through the Digital Markets Unit (DMU), the Competition and Markets Authority (CMA) will have new powers to regulate digital markets and the firms active within them. The Bill also proposed new powers to impose large fines for breaches of consumer protection laws, as well as certain changes to competition laws.

Strategic Market Status

Under the Bill, the DMU will be able to assign firms Strategic Market Status (SMS), meaning they will then need to abide by the Bill's Code of Conduct, and may be subject to Pro-Competitive Interventions (PCI).

To be designated as having SMS in respect of a digital activity, a firm will be required to have "substantial and entrenched" market power, a position of strategic significance, and either worldwide turnover of £25 billion or UK turnover of £1 billion. According to the Bill, "substantial and entrenched" market power will need to be established by carrying out a "forward-looking assessment of a period of at least 5 years".

The activity in question will also be required to have a link to the UK; this can be established not just through carrying on a business relating to digital activity in the UK, but also by operating a digital activity that is likely to have an immediate, substantial and foreseeable effect on trade in the UK, or even by simply having a significant number of UK users.

The CMA will be required, however, to carry out an investigation of up to nine months (extendable by three months) before assigning a firm SMS.

Conduct of SMS firms

The Bill establishes a mechanism by which the DMU can impose conduct requirements by giving an SMS firm notice. These conduct requirements can only be imposed where necessary to meet at least one of the following objectives:

1. The “fair dealing” objective, which requires treating users fairly and allowing them to deal with the SMS firm on reasonable terms;
2. The “open choices” objective, which requires allowing users to choose freely between the SMS firm and other firms; or
3. The “trust and transparency” objective, which requires giving users necessary information so that they can understand the services, content or terms on offer, and make properly informed decisions about whether and how to interact with the SMS firm in questions.

The conduct requirements imposed will either constitute requirements to: (i) have fair and reasonable terms, effective complaints processes and clear information for consumers; or (ii) will be requirements not to discriminate, self-preference, bundle, leverage, impose use restrictions, use data unfairly, restrict the use of third-party products, or restrict interoperability with third-party offerings.

In order to address breaches of conduct requirements, the DMU can issue “code orders” following an investigation. During the course of such investigations, SMS firms can offer commitments in an attempt to address the DMU’s concerns. SMS firms can also assert that a countervailing benefits exemption applies to their conduct, but will need to demonstrate that the benefits to consumers outweigh competitive harms, the conduct is indispensable and proportionate to the benefits, and the conduct does not eliminate effective competition.

PCIs

PCIs imposed by the DMU—again, following an investigation—can take the form of either an order imposing conduct requirements, even on a trial basis, or a recommendation to a public decision maker of steps they should take to address a competition concern. The DMU will be able to make a PCI on an SMS firm where it considers that a factor or combination of factors relevant to a digital activity is having an adverse effect on competition, and making the PCI is likely to be useful for remedying, mitigating or preventing the adverse effect on competition. Significantly, PCIs can be implemented anywhere within an SMS firm, including outside of the designated activity, provided that the DMU’s concerns relate to the designated SMS activity.

The DMU will have the power to enforce PCIs by issuing fines of up to 10% of global turnover, even without an enforcement order having been issued. Whilst there are some similarities between the PCI regime and the CMA’s current market investigation regime, the scheme under the Bill is likely to be more tailored to digital markets and key players within them.

Appeals

Appeals of decisions of the DMU will be based on the judicial review standard. Rather than inquiring into the merits of the decision, the Competition Appeal Tribunal (CAT) will therefore be largely limited to considering grounds such as whether the DMU acted lawfully and within its powers or followed due process. In some circumstances, consideration may be given to whether decisions are proportionate. Within the judicial review framework, the CAT will, however, be able to review the merits of decisions that impose financial penalties, in accordance with the Human Rights Act 1998.

SMS firms and M&A activity

SMS firms will be required to report all deals to the DMU where they increase their percentage of shares or voting rights in a "UK-connected body corporate" so that they cross any of 15%, 25% or 50%, and where the total consideration is £25 million or more. Whilst the parties need only wait five working days from when they report the deal to when they can complete, it is expected that there may be a lengthier process before a notification is accepted by the DMU as complete and the waiting period can begin. It should be noted though, that the CMA can opt within the waiting period to launch a formal merger investigation, adding greater delay to deal timelines.

Merger control reforms

Currently, under the Enterprise Act 2002, the CMA has jurisdiction to review mergers where the target company has either a 25% share of supply, or UK turnover of £70 million or more. The proposals within the Bill, however, while increasing the usual target turnover threshold to £100 million, would also see jurisdiction expanded so that deals must be notified where just one of the parties, whether the buyer or the target, has a 33% share of supply and a UK turnover of £100 million. A deal will only fall to be notified due to this new threshold, however, where the other party has some activities in the UK.

Separately, no deal will need to be notified to the CMA at all if the UK turnover of each party falls below the new safe harbour of £10 million.

Conclusion

The above is a non-exhaustive guide to the key proposals under the Bill; in addition to those discussed, there are planned changes to the merger review process itself, as well as, inter alia, the CMA's powers in market enquiries and the jurisdiction it has for antitrust investigations. There are also proposals to enhance the CMA's powers to enforce consumer protection law.

What is clear, however, is that when the Bill enters into force (which is not expected before mid-2024), the CMA will have a far larger number of tools at its disposal to deal with digital markets and, in the case of merger control reforms, acquisitions of nascent competitors. Companies in the digital sector may wish to consider in the coming months how this may affect contemplated deal timelines, as well as whether and how the SMS regime may affect their business.

Jordan Bernstein
Associate, *Clifford Chance LLP*