Competition timeline
2023/2024

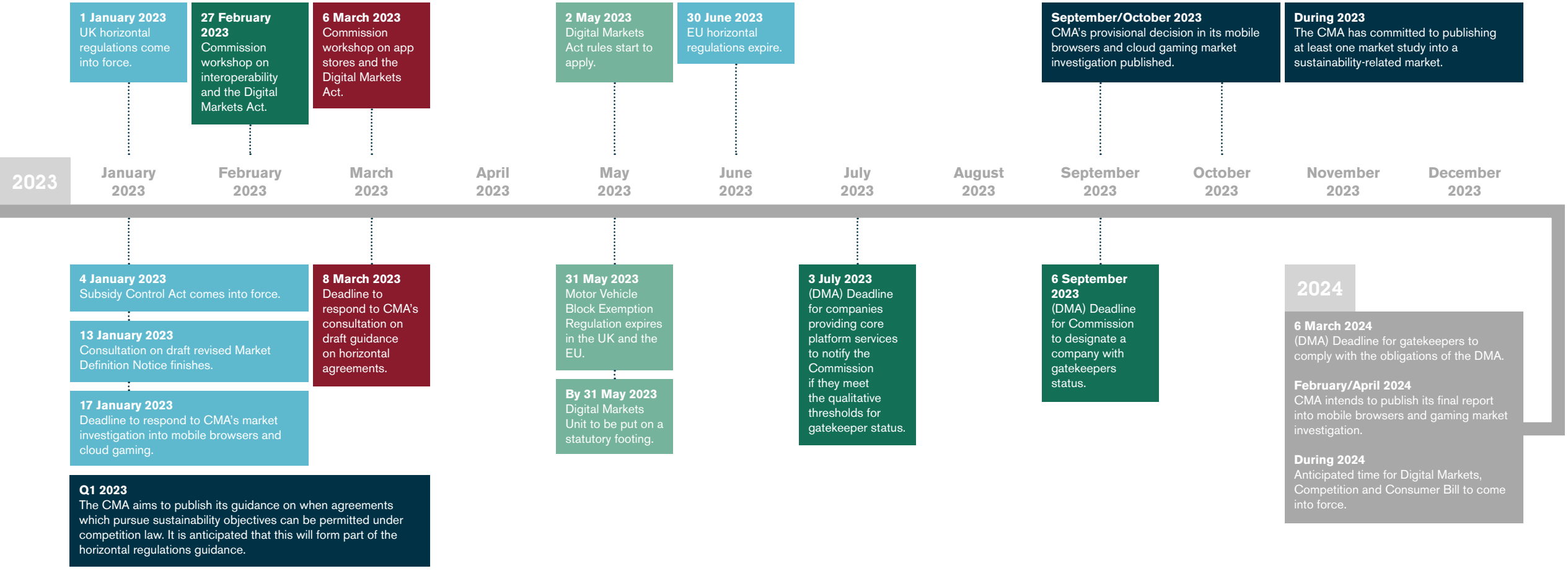
2023 promises a number of substantial changes to the competition law landscape in both the UK and EU. In this document we take a look at the issues facing businesses from a competition law perspective in the UK (including key EU developments likely to have an impact). Additionally we look ahead to some future changes due to take effect in 2024.

Key factors driving these changes are digitalisation and the ongoing consequences of Brexit, where the UK is having to put in place UK equivalents to take the place of expiring EU legislation. Being aware of the raft of upcoming regulatory changes is vital to ensure continued competition law compliance, which is crucial given the significant financial penalties and severe sanctions for breaches of competition law.

We are supporting our clients in safely navigating this rapidly changing competition law landscape, including by advising on commercial agreements, regulatory engagement, providing competition law compliance training and guiding companies through merger control and foreign investment regimes.

Key milestones | Horizontal agreements | Subsidy control | EU Market Definition Notice | CMA's market investigation into mobile browsers and cloud gaming | Digital Markets Act | Motor vehicle block exemption regulation | UK Digital Markets Unit | Contacts

Key milestones in 2023 and 2024



Horizontal agreements

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Horizontal agreements are agreements between competitors. The UK relied on retained EU legislation for two block exemptions which regulated these, the R&D Block Exemption and the Specialisation Block Exemption. Together these are referred to as the Horizontal Agreements Block Exemption Regulations (HBERs). The previous EU HBERs expired in the UK on 31 December 2022. They were replaced by the Specialisation Agreements Block Exemption Order (SABEO) and the R&D Block Exemption Order (R&D BEO). The CMA has published draft guidance and is consulting on this until 8 March 2023.

The CMA will consult separately on guidance on when sustainability agreements may be exempt from the requirements of UK competition law. This guidance on sustainability agreements will form part of the final horizontal agreements guidance when published.

The European Commission has extended the application of the HBERs in Europe until 30 June 2023 in order to give further consideration to concerns raised on the proposed introduction of a "competition in innovation" requirement in the R&D Block Exemption Regulation. In the meantime it has published draft HBERs and draft guidance on their application.

Businesses should be aware that the CMA has accepted that there are benefits to be found in consistency between the EU and UK block exemptions. With the exception of the EU's possible removal of the proposed "competition in innovation" requirement in its R&D Block Exemption, there is expected to be limited areas of material divergence between the EU and UK approach to horizontal agreements.

Specialisation

The Specialisation Agreements Block Exemption Order and draft Specialisation Agreements Block Exemption Regulation are largely similar in the changes they introduce when compared to the previous EU legislation. They both expand the scope of the block exemption to include unilateral specialisation agreements between more than two parties (previously, only unilateral specialisation between two competitors were capable of being block exempted). Unilateral specialisation agreements are those entered into between parties active on the same product market where one party agrees to stop production of certain products and instead purchase them from another party.

The change should allow more agreements to benefit from the exemption and these agreements may result in products being produced more efficiently and cheaply.

Additionally, both UK legislation and draft EU legislation propose administrative changes to their functioning and application.

Horizontal agreements

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Research and development

A key change in both the R&D BEO and the EU draft legislation is an alteration to the test for whether undertakings are "competing in innovation". Both the UK legislation and draft EU legislation require undertakings "competing in innovation" to identify three or more competing R&D efforts that are comparable with those carried out by the parties to the agreement.

This change is aimed at ensuring and promoting dynamic competition – the possibility of firms being able to enter or expand in a market, principally as a result of R&D. However, it has been criticised in EU market feedback on the grounds that innovation is mostly done away from the public gaze, so a company may have no way of knowing whether its competitors are involved in innovation in any given market. As a result of feedback, the Commission is considering whether to drop the condition altogether, although the CMA has retained this test and stated that it should continue to be retained in order to protect dynamic competition.

Sustainability

The CMA, Commission and a number of national competition authorities within Europe and worldwide are increasingly taking an interest in how competition law can promote sustainability.

The CMA has indicated that it expects sustainability objectives to fit within the existing competition framework as long as the benefits of sustainability are shared with consumers. As part of this it has committed to launching a Sustainability Task Force which will provide guidance on when sustainability agreements may be exempt from competition law. We anticipate this guidance to be provided in early 2023.

The Commission is proposing to introduce a chapter within its Horizontal Guidelines on how horizontal agreements which pursue sustainability objectives should be assessed for an exemption from competition law. The Dutch Authority for Consumers and Markets is leading the way on this front by encouraging consultation from businesses on agreements which pursue sustainability objectives. Taking this approach provides welcome clarity for businesses looking to collaborate on sustainability issues.

Information exchange

Both the new CMA guidance and the draft Commission guidance provide a detailed analysis of how algorithms can facilitate collusive information exchange and consequently breach competition law.

In addition both give specific examples of the potential for information exchange under a "hub and spoke" model. In a hub and spoke arrangement, multiple parties share information with a central body and subsequently the central body shares information about others strategy with them. Consequently the parties obtain information about each other's business strategy, thereby breaching competition law.

Please **contact** a member of the competition team for more details and questions about how the new UK horizontal agreements may affect your business.

Subsidy control

New rules governing all UK public sector funding and investment took full effect from 4 January 2023 in a major shift from the previous EU State aid regime.

On 11 November 2022, the Department for Business, Energy and Industrial Strategy issued **statutory guidance** on the Subsidy Control Act 2022 (SCA). The SCA entered into force on 4 January 2023. In addition, the Competition and Markets Authority (CMA) has published guidance on the **subsidy control functions of the Subsidy Advice Unit** (SAU). Although both documents are principally aimed at public authorities granting subsidies, they will nevertheless be relevant to businesses seeking to benefit from a subsidy as they may be required to pay back a subsidy that is received in breach of the rules.

The BEIS guidance on the SCA largely resembles the draft guidance published in July 2022, although it contains greater detail in a number of important areas, as well as containing more detailed examples. These examples include determining whether financial assistance is a subsidy and whether a subsidy achieves equity objectives. Many of the other changes are to simplify and streamline the guidance. A further point to note is the reorganisation of certain chapters within the guidance, for example the energy and environmental principles have been moved to earlier in the guidance.

The SAU will review certain subsidies referred to it by public authorities and provide independent advice on whether the subsidy can be given, although the CMA guidance makes clear that the SAU will not provide binding decisions on whether a subsidy can be given, or directly assess whether it complies with the subsidy control requirements listed in the SCA. The subsidies it will consider are primarily those requiring mandatory referral under the SCA – subsidies and schemes of particular interest and some subsidies and schemes of interest, as defined by the SCA.

The introduction of the SCA marks a significant change from the previous assessment of subsidies under EU state aid law. As such, businesses that receive subsidies of any kind from public authorities should ensure that future subsidies meet the requirements of the SCA.

Please contact Marc Shrimpling for more details and questions about the Subsidy Control Act and how it may affect your business.

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EU Market Definition Notice

The EU is consulting on its draft revised Market Definition Notice, first published in November 2022. The consultation finished on 13 January 2023. This is likely to be of interest to companies involved in M&A deals with an EU dimension and will also have a wider impact on the application of market definition in the context of competition law within the EU. This is likely to have an impact on UK businesses who have operations or suppliers within the EU.

The proposed changes in the draft Notice provide new or additional guidance on various key definition issues, including:

– Explanations on the principles of market definition and the way market definition is used for the application of competition rules.

– Greater emphasis on non-price elements of market definition such as innovation and quality of products and services.

– Clarifications regarding the forward-looking application of market definition, especially in markets that are expected to undergo structural transitions, such as technological or regulatory changes.

– New guidance in relation to market definition in digital markets, for example multi-sided markets and "digital eco-systems" (such as products built around a mobile operating system).

– New principles on innovation-intensive markets, clarifying how markets should be assessed where companies compete on innovation, including through pipeline products.

– More guidance on geographic market definition, including the conditions to define global markets, the approach to assessing imports as well as the Commission's approach to local markets defined by catchment areas (for example, in the retail sale of consumer goods).

– Clarifications as regards to quantitative techniques used to define markets, such as the small but significant and non-transitory increase in price (SSNIP) test, that the Commission may use when defining a market.

– Expanded guidance on possible sources of evidence and their probative value, based on the Commission's material experience and fact-based approach to market definition.

As such, the draft Notice is substantially longer and more detailed than the original 1997 Market Definition Notice. It also includes updated references to more recent Commission decisions and case law (with detailed footnotes). The European Commission has indicated that it intends to have a new Market Definition Notice in place in Q3 2023.

Please contact Simon Neill if you are affected by the changes to the EU Market Definition Notice or would like to discuss this development.

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CMA's market investigation into mobile browsers and cloud gaming

On 22 November 2022, the CMA launched a market investigation into cloud gaming and mobile browsers. The CMA notes that mobile phone and tablet providers control key gateways through which users can access content and services on their mobile devices. In particular, the CMA's investigation will focus on the restrictions imposed by Apple through the App Store.

The CMA comments that it will be able to tackle these issues most effectively through its new powers under the forthcoming Digital Markets, Competition and Consumer Bill. This bill is likely to include putting the Digital Markets Unit on a statutory footing.

In the meantime, the CMA is committed to using its existing powers to deliver one-off interventions in digital markets where these are found to be necessary to improve outcomes for UK consumers and businesses. In particular, should the market investigation find problems with cloud gaming and mobile browsers, the CMA may be able to tackle these via a one-off removal of restrictions.

Businesses which provide cloud gaming services, apps or mobile browsers should keep a close eye on developments as this investigation progresses, as the investigation will afford opportunities to lobby for substantial change in these markets. An **issues statement** was published on 13 December 2022 which invited affected parties to comment on the issues raised and possible remedies suggested in the statement. Responses to this issue statement were to have been submitted before midnight on 17 January 2023.

Information requests, site visits, consideration of responses to the issues statement and hearings will take place until June 2023. Additionally the CMA will publish working papers and/or disclose its thinking on certain issues to the relevant parties between March and July 2023. It is currently anticipated that a provisional decision will be published for consultation in September or October 2023 and, following response hearings, the CMA intends to publish the final report on the market investigation between February and April 2024. This is ahead of the statutory deadline of 21 May 2024.

Please contact Katherine Kirrage for more details about this market investigation.

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Digital Markets Act

The EU Digital Markets Act (DMA) entered into force on 1 November 2022. The rules contained within the DMA will begin to apply on 2 May 2023. Within 2 months, companies providing core platform services will have to notify the Commission and provide all relevant information, the deadline for this is 3 July 2023. The Commission will then have 45 days to designate companies with gatekeeper status, at the latest by 6 September 2023. Following this the designated gatekeepers will have a maximum of 6 months to ensure compliance with the obligations of the DMA. This will be by 6 March 2024 at the latest.

These rules are likely to have a significant impact on the functioning of competition in digital markets, as well as the effectiveness of public and private enforcement. This is hoped to be achieved by allowing perceived market power detriments to be tackled flexibly using both the ex-ante rules established by the DMA alongside the traditional competition tools. This is a significant piece of legislation that all players active or planning to become active in digital markets should be aware of, and not just those to whom the rules apply. The Commission intends to organise a number of technical workshops with interested stakeholders to receive their views on the implementation of the DMA. **The first of these workshops focused on selfpreferencing and took place on 5 December 2022**. Further workshops on interoperability (27 February) and app stores (6 March) are scheduled to be held.

The rules in the DMA are targeted at digital players with large scale and reach within the EU – such firms will be designated as "gatekeepers".

The Commission's Implementation Taskforce is already engaging with potential gatekeepers and other interested third parties and many companies in this space can expect contact over the coming weeks and months.

The DMA contains objective thresholds for assessing gatekeeper status – if firms meet the criteria below they will be presumed to be gatekeepers:

- the firm has an annual turnover in the EU of €7.5 billion or more in each of the last three financial years or its average market capitalisation/market value is at least €75 billion in the last financial year. In addition, it must provide the same core platform service in at least three Member States; and
- the firm provides a core platform service that had an average of at least 45 million monthly active end-users and at least 10,000 yearly active business users established or located in the EU in the last financial year; and
- each of these thresholds was satisfied in each of the previous three financial years.

The DMA provides that companies will need to notify the Commission if they meet these thresholds, within two months from when the thresholds are met.

Examples of the obligations which the gatekeeper must comply with include:

- Allowing third parties to interoperate with the gatekeeper's own service in certain specific situations (for example, allowing alternative messaging services to interoperate with the gatekeeper's messaging service, if requested).
- Allowing business users to access certain data that they generate in their use of the gatekeeper's platform.
- Giving end users and third parties the ability to effectively port their data from the gatekeeper's platform.
- Providing companies advertising on the gatekeeper's platform with the tools and information necessary for advertisers and publishers to carry out their own independent verification of their advertisements hosted by the gatekeeper.
- Allowing end users to easily uninstall software applications on the gatekeeper's operating system.

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Motor vehicle block exemption regulation

The Motor Vehicle Block Exemption Regulation (MVBER) is part of retained EU law in the UK following Brexit, but is due to expire on 31 May 2023. The CMA published its final recommendation on the future of the MVBER on 4 October 2022. This regulation sets out automatic exemptions for certain categories of agreements related to the purchase, sale, and resale of spare parts for motor vehicles, and the provision of repair and maintenance services for motor vehicles.

The CMA recommends replacing the MVBER with a motor vehicle block exemption order (MVBEO) that is tailored to the needs of businesses operating in the UK and serving UK consumers. The CMA's recommendation is broadly similar to the existing MVBER although there are some amendments to improve it and reflect market developments as a result of the increasing use of electric vehicles, the increasing amount of data generated by vehicles and the phase-out of internal combustion engines.

Key changes proposed by the CMA are:

- a shorter duration than the EU legislation, of six years, enabling an early review of the block exemption, anticipating significant changes to the market ahead of the phase-out of new petrol and diesel cars/vans in 2030; and
- a number of changes to reflect the increasing crossover between technology and vehicles. This includes changes to take account of the increasing amount of data generated by vehicles and that spare parts are increasingly technological in nature.

Please contact Simon Neill for more details and questions about how the new UK MVBEO may affect your business.

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UK Digital Markets Unit

The Chancellor, Jeremy Hunt, confirmed in his Autumn Statement that the government will introduce new legislation to protect consumers from fake reviews and subscription protection and give the CMA substantial new powers to deal with anti-competitive practices in digital markets. This is likely to include putting the Digital Markets Unit (DMU), which was launched in shadow form in April 2021, on a statutory footing. The government is intending to introduce a Digital Markets, Competition and Consumer Bill to do this in the current parliamentary session, which will end in May 2023. If legislation is introduced following this timeline it seems unlikely that the reforms would come into force much before 2024.

The new digital markets legislation will allow the DMU to designate powerful digital firms with "strategic market status". This power is likely to be targeted at a small number of major digital platforms who enjoy "substantial and entrenched market power" in one or more designated activities. The DMU will impose precise conduct requirements on firms deemed to have strategic market status, these will be tailored to the particular harms associated with their specific activities.

Firms designated with strategic market status (under the UK DMU regime) or as gatekeepers (under the EU Digital Markets Act regime) will be required to undertake significant work to ensure compliance with the new rules. It will also be necessary for those firms that interact with powerful digital firms to understand the rules and what changes are coming.

Given the ever-increasing digitalisation of the economy, this legislation will be relevant to a number of businesses – and particularly those with substantial digital activities.

Please contact Katherine Kirrage for more details and questions about how the DMU or digitalisation more widely may affect your business.

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