Competition timeline
2023-25

The second half of 2023 – and beyond – heralds profound changes to the competition law landscape in both the UK and EU. In this document we take a look at the impact of these changes for businesses, as well as what's on the horizon in 2024 and 2025.

Two key factors driving the current upheaval of competition law are digitalisation and the ongoing consequences of Brexit, which is already leading to divergent rules and enforcement in the UK and EU. Given the serious penalties for breaches of competition law, staying on top of this shifting legal landscape is fundamental to risk management and compliance.

We are supporting our clients in safely navigating this rapidly changing competition law landscape by:

- ensuring contractual arrangements are competition law compliant;
- providing bespoke compliance training for executives and customer-facing teams;
- guiding companies through the complexities of UK and international merger control, subsidy regulation and foreign investment regimes; and
- defending clients facing competition or regulatory investigations.

Key milestones

12 July 2023
Implementation of the EU Foreign Subsidies Regulation (FSR).

12 October 2023
Mandatory notification obligation commences under the FSR.

During 2023
CMA intends to publish at least one market study into a sustainability-related market.

31 March 2024
Deadline for "gatekeepers" to comply with the obligations of the DMA.

Autumn 2024
Expected date for the UK Digital Markets, Competition and Consumers (DMCC) Bill to be enacted.

2023

July 2023 | August 2023 | September 2023 | October 2023 | November 2023 | December 2023 | January 2024 | February 2024 | March 2024 | April 2024 | October 2024 | November 2024

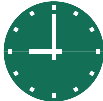
2024

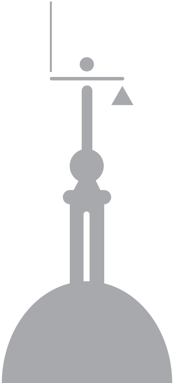
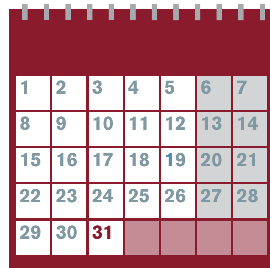
31 July 2023
Deadline for companies providing "core platform services" as defined in the Digital Markets Act (DMA) to notify the Commission and provide relevant information.

Q3 2023
Commission aims to finalise its revised market definition notice.

2025

During 2025
DMCC Act expected to take effect.



Digital Markets, Competition and Consumers Bill

The UK government has published the Digital Markets, Competition and Consumers Bill (DMCC Bill) and this is expected to enter into force in Autumn 2024. The DMCC Bill provides the Digital Markets Unit (DMU), which was launched in shadow form in April 2021, with a statutory footing.

The DMCC Bill allows the DMU to designate powerful digital firms with “strategic market status” (SMS) where the company has “substantial and entrenched market power”; holds a position of strategic significance in respect of a digital activity; has a global turnover of over £25bn or a UK turnover of over £1bn; and where their relevant digital activity has a UK nexus. 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 bespoke and precise conduct requirements on firms deemed to have SMS and these will be tailored to the particular harms associated with their specific activities.

Firms designated with SMS (under the DMCC Bill) 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.

Additionally the DMCC Bill targets “killer acquisitions” by creating an additional merger control test applicable where an acquirer has:

– an existing share of supply of goods or services of 33% in the UK or a substantial part of the UK; and

– a UK turnover of £350 million.

Although this test is of general application, it is clear that this new law is targeted at “killer acquisitions” in the digital sector, a situation whereby a large firm acquires a smaller innovative company in markets adjacent to their main activity to eliminate future rivals or threatening innovations.

A further point to note is the increased administrative penalties and personal liability the Bill creates. Fixed penalties of up to 1% of a business’ annual turnover will be available for failure to comply with investigative measures, as well as additional daily penalties of up to 5% of daily turnover while non-compliance continues. For the first time, individuals (e.g. company directors) will be able to be fined for failure to comply with the CMA’s investigative measures: fixed penalties of up to £30,000 are available, as well as additional daily penalties of up to £15,000.

Given the ever-increasing digitalisation of the economy, this legislation will be relevant to a number of businesses – particularly those with substantial digital activities. More broadly, the strengthening of the CMA’s broader competition powers and the changes to merger control will affect all businesses and are developments to watch.

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

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Digital Markets Act

The EU's Digital Markets Act (DMA) entered into force on 1 November 2022, with the rules applying as from 2 May 2023. The DMA is targeted at digital players with large scale and reach within the EU – the so-called "gatekeepers" of the digital world.

The DMA introduces a mandatory notification requirement on companies that exceed the DMA's thresholds (see below). Specifically, within two months of first meeting those thresholds, companies providing "core platform services" must notify the Commission and provide all relevant information that is required. The Commission will then have 45 working days to adopt a decision designating the company as a "gatekeeper". Following this, the newly-designated gatekeeper will have a maximum of 6 months to ensure compliance with the regulatory obligations of the DMA.

These rules are expected to have a significant impact on both the functioning of competition in digital markets and the effectiveness of public and private enforcement. The Commission hopes that this will 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 *ex-post* competition tools.

The DMA is a significant piece of legislation that all businesses involved in digital markets should be aware of, and not just those to whom the rules apply. The Commission has organised a number of technical workshops with interested parties to enable all stakeholders to share their views on the implementation of the DMA. **The first of these workshops focused on self-preferencing and took place on 5 December 2022**. The Commission has also held workshops focusing on interoperability between messaging services (27 February 2023); app store related provisions (6 March 2023); and data-regulated obligations (5 May 2023).

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

Gatekeeper thresholds

The DMA contains objective thresholds for assessing gatekeeper status – if an undertaking meets the criteria below, they will be presumed to be a gatekeeper:

- in each of its last three financial years, the undertaking had EU turnover of €7.5 billion or more or its average market capitalisation/market value was at least €75 billion;
- 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
- those same core platform services were provided in at least three Member States.

Digital Markets Act

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 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 system.

Commission officials have noted that the integrated services of many potential gatekeepers have meant that the process of designation is less "automatic" than previously thought. This is despite the intentions behind the DMA being to make the process of and requirements for designation very clear.

Please contact Katherine Kirrage for more details and questions about how the DMA may affect your business.

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Horizontal agreements

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 is currently analysing feedback from a consultation on draft guidance to accompany these Orders.

The European Commission 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 (which has been dropped). It has now published updated versions of the HBERs and horizontal guidelines, which will take effect from 1 July 2023.

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 Commission's last-minute decision to drop the requirement for "competition in innovation" in the EU R&D Block Exemption, there are limited areas of material divergence between the EU and UK approaches to horizontal agreements.

Specialisation

The UK's Specialisation Agreements Block Exemption Order (Specialisation Order) and the EU's Specialisation Agreements Block Exemption Regulation (Specialisation 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 agreements between two competitors benefitted from the block exemption). 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 purchases 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 EU legislation propose administrative changes to their functioning and application. A notable discrepancy is that the EU guidance extends the scope of the Specialisation Regulation to include subcontracting agreements – meaning that these agreements can also benefit from the block exemption in the EU, but not in the UK. The CMA has said its approach will be explained in its guidance. It will be interesting to see whether the guidance is similar in both the EU and UK when published.

Horizontal agreements

Research and development

A key change in both the R&D BEO and the EU legislation is an alteration to the test for whether undertakings are "competing in innovation". The UK legislation requires parties to an R&D agreement to identify three or more competing R&D efforts that are comparable with those carried out by the parties in order to benefit the block exemption. The Commission has dropped the condition altogether, whereas the CMA has indicated that this test should be retained in order to protect dynamic competition (i.e. the possibility of firms being able to enter or expand in a market, principally as a result of R&D). However, this requirement has been criticised in market feedback on the grounds that innovation is mostly done away from the public gaze, so the parties to an R&D agreement may have no way of knowing whether its competitors are involved in innovation in a relevant market.

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 published draft guidance on environmental sustainability agreements between businesses operating at the same level of the supply chain. A consultation on this draft guidance finished on 11 April 2023 and the CMA is currently analysing the responses to this consultation. It has not indicated a date for the publication of the final guidance. The draft guidance indicates that the CMA will take a novel and substantially more permissive approach when considering "sustainability agreements". This will be achieved by expanding the class of consumer benefits which can be considered in an assessment of whether the benefits of an agreement outweigh its anti-competitive effects – under the draft guidance, there are certain situations when benefits to indirect consumers and wider society can also be included in a competition law assessment.

The Commission has separately published guidance on the assessment of horizontal agreements that pursue sustainability objectives. However, the Commission's approach is more in line with traditional principles of a competition law assessment i.e. that the anti-competitive effects of an agreement can only be outweighed by the benefits to consumers in the market affected by the agreement. This is because it does not expand on the definition of consumers in the same way as the CMA guidance. However, the guidance does permit a competition assessment of an agreement to take account of benefits to consumers in substantially overlapping markets as long as there is significant crossover between consumers in the primary market concerned by the agreement and these related markets.

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

EU Foreign Subsidies Regulation

The EU Foreign Subsidies Regulation (FSR) aims to tackle subsidies by non-EU countries which distort competition within the EU internal market. The FSR will be implemented from 12 July 2023 and the notification obligation contained within will apply from 12 October 2023.

Foreign subsidies are distortive where they improve the competitive position of the recipient(s), negatively affecting competition on the EU internal market. The FSR defines foreign subsidies very broadly. Foreign subsidies include both direct and indirect financial contributions by a non-EU country which confer a benefit on an undertaking active in the internal market. The definition of subsidy is widely drawn, and includes the following forms of financial assistance, amongst others:

- interest-free loans;
- unlimited guarantees;
- capital injections;
- preferential tax treatment;
- tax credits; and
- grants.

Under the FSR, the Commission will have the power to investigate financial contributions granted by non-EU governments to companies active in the EU. If the Commission finds that such financial contributions constitute distortive subsidies, it can impose measures to redress their distortive effects.

The FSR will introduce three tools:

- A notification-based tool enabling the Commission to investigate concentrations involving a financial contribution by a non-EU government, where the acquired company, one of the merging parties or the joint venture generates an EU turnover of at least €500 million and the transaction involves a foreign financial contribution of more than €50 million;
- A notification-based tool to investigate bids in public procurements involving a financial contribution by a non-EU government, where the estimated contract value is at least €250 million and the bid involves a foreign financial contribution of at least €4 million per third country; and
- A general tool to investigate all other market situations, where the Commission can start a review on its own initiative (ex-officio) or request an ad-hoc notification for smaller concentrations and public procurement procedures.

With respect to the two notification-based tools, the parties will have to notify the financial contributions received from non-EU public authorities prior to concluding a concentration or a public procurement procedure above the relevant thresholds. The Commission also has the power to request ad-hoc notifications for smaller concentrations and public procurement procedures if it suspects the existence of distortive subsidies. Pending the Commission's review, the concentration in question cannot be completed and the investigated bidder cannot be awarded the contract.

The general investigation tool would allow the Commission to start investigations on its own initiative. This would cover other types of market situations, such as greenfield investments or concentrations and public procurements below the thresholds.

If the Commission establishes that a foreign subsidy exists and that it is distortive, it will balance the distortive effects of the subsidy with its positive effects. This balancing test will be used to determine the appropriate redressive measures or how commitments should be structured. Any interested parties are able to give information to the Commission to inform this balancing test. This presents an opportunity for companies to present their own side of the story and explain any potential benefits the subsidy may have.

With respect to the redressive measures and commitments, the FSR includes a range of structural and behavioural remedies, such as requiring the divestment of certain assets or providing access to infrastructure, amongst others.

EU Foreign Subsidies Regulation

Strong sanctions

A failure to notify a notifiable M&A transaction or public tender can result in fines of up to 10% of aggregate worldwide turnover of the parties concerned. Additionally, the provision of incorrect or misleading information can result in a fine of 1% of aggregate worldwide turnover. Lastly, the Commission may impose fines of up to 10% of aggregate worldwide turnover for breaches of commitments or redressive measures. Alternatively, it may impose periodic penalty payments not exceeding 5% of the average daily turnover of the undertaking concerned.

In case of notified transactions, the Commission can also prohibit the subsidised concentration or the award of the public procurement contract to the subsidised bidder.

The Commission's time limits for reviewing a notification are similar to those under the EU merger regime, although this does not mean that the review periods will run concurrently. Further complications in relation to deal planning will arise when the merger and FDI notifications are also reviewed by various EU national authorities, while the FSR notification is reviewed separately by the Commission.

Given the serious consequences for breaches of the FSR, businesses must begin taking steps to ensure compliance with the rules. This includes:

- identifying financial contributions provided by non-EU countries from 12 July 2018 (including monetary transfer and other trades e.g. granting of special/exclusive rights);
- determining whether these financial contributions constitute "foreign subsidies" (i.e. do they confer a benefit to a company active in the internal market);
- conducting a preliminary assessment of whether any foreign subsidies could be considered "distortive" (Commission will make the final decision; however, companies should consider the purpose of the contribution(s), the relevant product/market, the nature and amount of the subsidy and the overall market position and evolution of the company); and
- reviewing the possible effects of these subsidies (e.g. high level of environmental protection and social standards, the promotion of research and development).

Please contact Simon Neill to discuss the Foreign Subsidies regime in greater detail and explore its application to your business.

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UK subsidy control

New rules governing all UK public sector funding and investment came into 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), which entered into force on 4 January 2023. 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: for example, on 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 it 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.

During February and April 2023, the SAU published its first two reports into referral requests received under the SCA. These and subsequent reports provide useful insights into the approach that the SAU will take to the assessments conducted by public authorities. However, as the reports are only advisory and cannot directly assess whether the schemes in question comply with the subsidy control requirements, it remains to be seen whether the SAU's criticisms of these assessments will translate into improvements as more assessments are carried out.

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.

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EU Market Definition Notice

Earlier this year the EU finished a consultation on its draft revised Market Definition Notice, first published in November 2022. The consultation finished on 13 January 2023 and the Commission intends to have a new Market Definition Notice in place in Q3 2023. The Notice will be of particular interest to companies facing merger notifications or having to self-assess their commercial arrangements for competition law compliance.

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 has traditionally used when considering substitutability of products.
- 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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Motor vehicle block exemption regulation

The Motor Vehicle Block Exemption Regulation (MVBER) was part of retained EU law in the UK following Brexit, but expired on 31 May 2023. The Motor Vehicle Agreements Block Exemption Order (MVBEO) replaced this in the UK and came into force on 1 June 2023. The CMA published guidance on the MVBEO on 5 June 2023.

The MVBEO is intended to be tailored to the needs of businesses operating in the UK and serving UK consumers. The MVBEO is broadly similar to the previous MVBER although there are some amendments intended to improve its relevance to the UK market 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 within the MVBEO are:

- a 6 year duration, 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. This means the MVBEO will expire on 31 May 2029. In contrast to this the European Commission has extended the duration of the MVBER until 31 May 2028 (although some amendments have been made to the Supplementary Guidance for this regulation, these amendments mirror the changes made by the MVBEO); 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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Publication number Q_2306151536CAT