Competition timeline
2024-25

Osborne Clarke

The competition law landscape in the UK and EU is undergoing profound change. Below, we identify 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 (on the latter, we are already seeing 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 and collaborations are competition law compliant;

– providing bespoke compliance training for executives and customer-facing teams;

– supporting clients engaging with regulators and government on legislative proposals and market interventions;

– 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 | Digital Markets, Competition and Consumers Bill | Digital Markets Act | Horizontal agreements and sustainability | EU Foreign Subsidies Regulation | National Security and Investment Act | EU Market Definition Notice | Contacts

Key milestones

Q1 2024
European Commission is expected to adopt its revised market definition notice.

H1 2024
Expected date for the UK Digital Markets, Competition and Consumers Bill to be enacted.

H1 2024
Likely date for any changes to the National Security and Investment Act to be confirmed.

During 2024
We can expect further informal assessment publications from the CMA under its ‘open door policy’ on Green Agreements.

During 2024
First decisions under the EU Foreign Subsidies Regulation are likely.

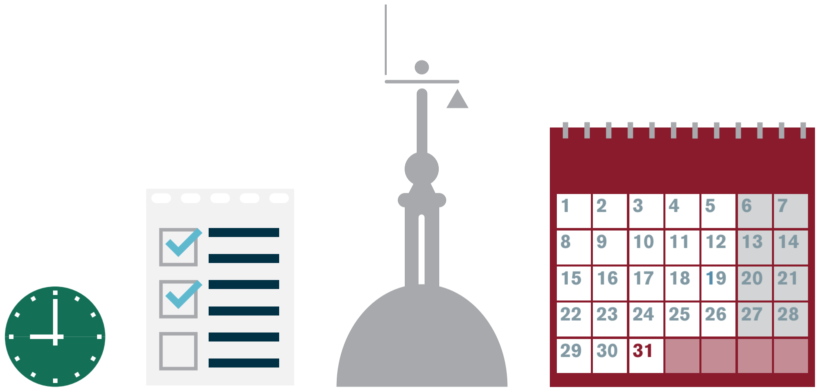
2025

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

31 March 2024
Deadline for companies that have already been designated as “gatekeepers” to comply with the obligations of the Digital Markets Act.

2025

During 2025
The full impacts of the DMCCB are expected to be felt, particularly following the anticipated publication of codes of conduct for firms designated with strategic market status.



Digital Markets, Competition and Consumers Bill

Continues on next page

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

Additionally, the CMA has published an initial review into Foundation Models, which it intends to update in March 2024. The CMA also expects to publish a joint statement with the Information Commissioner's Office (ICO) that will consider areas of cross-over between competition, consumer and data protection objectives. It is likely that these reports will feed into the enforcement priorities under this new legislation.

Regulation of large tech companies

The DMCCB 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 DMCCB) 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.

A currently hotly debated topic is whether the appeals standard under the DMCCB should remain as judicial review or be amended to allow a full merits review of a decision. A judicial review appeal standard focuses on the reasonableness and procedural correctness of a decision rather than assessing the the decision on its own merits. A principal advantage of judicial over a merits based review is that it is generally a much faster process.

Digital Markets, Competition and Consumers Bill

"Killer Acquisitions"

Importantly, the DMCCB does not just regulate the largest tech companies, but introduces wider changes to the central competition regime. For example, the DMCCB 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.

Enhanced penalties and personal liabilities

A further point to note is the increased administrative penalties and personal liability the DMCCB 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 (e.g. compulsory requests for information): 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 DMCCB, DMU or digitalisation more widely may affect your business.

Katherine Kirrage
Partner
T +44 207 105 7514
katherine.kirrage@osborneclarke.com

Digital Markets Act

Continues on next page

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). The 1st set of gatekeepers have been designated under the DMA but the Commission is able to designate additional gatekeepers should market conditions change. 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". Gatekeepers will have 6 months after designation to comply with the obligations of the DMA, i.e. by or before 6 March 2024 for those already designated.

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'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.

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.

Digital Markets Act

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. It is notable that the emergence of AI chat bots has raised a number of questions on how to designate the various services offered by large tech players. This indicates how new technologies can create difficulties in applying the DMA to fast developing and nascent technological markets.

Six big tech companies have been designated in relation to social networks, online intermediation services, advertising, number independent communication services, video sharing, search, browsers and operating systems. Challenges have been lodged in relation to some of these designations. Notably there have been no designations or investigations launched into businesses offering cloud computing or virtual assistants. With the increased capability of virtual assistants based on artificial intelligence, they may play a bigger role in the future. The highly concentrated cloud computing market is arguably the most striking absence, given its critical role across both the private and public sectors – including its instrumentality in hosting generative AI models and apps. The DMA allows the Commission to conduct market investigations to determine whether a service that does not meet the quantitative criteria should still be covered. It has launched such an investigation into iPadOS and we can expect more such investigations in other markets to come.

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

Katherine Kirrage
Partner
T +44 207 105 7514
katherine.kirrage@osborneclarke.com

Horizontal agreements and 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 Green Agreements Guidance on agreements between businesses operating at the same level of the supply chain. The guidance outlines the approach the CMA will take when considering “environmental sustainability agreements” and describes a novel and substantially more permissive approach when considering “climate change agreements”. In relation to climate change 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. It will enable the assessment to consider benefits to all UK consumers rather than just those in the relevant market. On 14 December 2023, the CMA published the first informal guidance under its open door policy. Please see our **Insight** for more details.

The European 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 sustainability considerations in horizontal agreements may affect your business.

EU Foreign Subsidies Regulation

Continues on next page

The EU Foreign Subsidies Regulation (FSR) aims to tackle subsidies by non-EU countries which distort competition within the EU internal market. The FSR was implemented on 12 July 2023 and the notification obligation contained within applied from 12 October 2023. By the end of 2023, the Commission had entered into 38 pre-notification discussions, received eight notifications and approved four deals – substantially exceeding the Commission's expectations.

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 has 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 introduces 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.
- 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 allows 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.

EU Foreign Subsidies Regulation

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.

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, the Commission 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 take 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.

Simon Neill
Partner
T +44 20 7105 7028
simon.neill@osborneclarke.com

National Security and Investment Act

On 13 November 2023, the Cabinet Office issued a call for evidence in relation to the National Security and Investment Act 2021 (NSIA) to collect views on how the national security and investment regime can be more business friendly while maintaining and refining the protections needed to protect national security.

This call for evidence closed on 15 January 2024. The government was looking for views from cross economy stakeholders in the UK and overseas. Oliver Dowden, the Deputy Prime Minister, has indicated that the powers are to be pared back to make them “more business friendly” with the aim of “narrowing and refining” the scope of the regime. In particular, this evidence will help the Government:

– Hone the scope of the system’s mandatory notification requirements;

– Improve the notification and assessment processes under the NSIA; and

– Develop the Government’s public guidance and communications on how the NSIA works and where the Government tends to see risk arising.

Depending on the responses received, more detailed consultation on specific measures or legislative changes may be necessary. However, changes that require primary legislation are not currently being considered.

Notably, Dowden proposes removing internal restructures from the regime as the ultimate beneficial owner of the company remains the same in these scenarios. Additionally, junior business minister, Nus Ghani, has highlighted the need for the law to account for emerging threats, including the risk of hostile state actors accessing or buying companies with access to UK citizens’ data..

Please contact Marc Shrimpling to discuss the NSIA in greater detail and explore its application to your business.

Marc Shrimpling
Partner
T +44 117 917 3490
marc.shrimpling@osborneclarke.com

EU Market Definition Notice

The Commission is expected to adopt a Revised Notice on Market Definition (the Notice) early in 2024. This was originally expected to be adopted by the end of 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 in the EU.

The proposed changes in the 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 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).

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

Simon Neill
Partner
T +44 20 7105 7028
simon.neill@osborneclarke.com

Contacts

Key contacts

Click photo for full biography:

Marc Shrimpling
Partner
T +44 117 917 3490
marc.shrimpling@osborneclarke.com

Simon Neill
Partner
T +44 20 7105 7028
simon.neill@osborneclarke.com

Katherine Kirrage
Partner
T +44 207 105 7514
katherine.kirrage@osborneclarke.com

Osborne Clarke in numbers

1300+
talented lawyers

working with

330+
expert Partners

in

26
international locations*

advising across

8
core sectors

with insight into

3
Transformational trends

driven by

1
client-centred approach

Our locations around the world

Europe
Belgium: Brussels
France: Paris
Germany: Berlin, Cologne, Hamburg, Munich
Italy: Busto Arsizio, Milan, Rome
The Netherlands: Amsterdam
Poland: Warsaw
Spain: Barcelona, Madrid, Zaragoza
Sweden: Stockholm
UK: Bristol, London, Reading

USA
Miami, New York, San Francisco

Asia
China: Shanghai
India*: Bengaluru, Mumbai, New Delhi
Singapore

Osborne Clarke is the business name for an international legal practice and its associated businesses. Full details here: osborneclarke.com/verein/

*Services in India are provided by a relationship firm

osborneclarke.com

Publication number Q_2401221746CAT