

10 things to expect from UK competition law in 2022

Grow | Protect | Operate | Finance
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With the festive decorations away and the days (very slowly) starting to get longer, it can only mean that a new working year is underway. 2021 was an eventful year for UK competition law, as the UK's regime (and competition authority, the Competition and Markets Authority (**CMA**)) stood on its own following the end of the Brexit transitional period and grappled with the global pandemic, the climate crisis and the rapid pace of digitalisation.

This pace of change looks set to continue in 2022. Here is our list of what businesses – and in particular in-house lawyers – need to have on their radar screens in 2022.

A continued focus on sustainability



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2022 should bring more detailed guidance for businesses on the role of sustainability in competition law, noted as a “top priority” for the CMA in the recent consultation on its 2022-23 annual plan. Following its sustainability consultation, the CMA should soon be advising the government on changes to the competition regime that could help the UK meet its climate goals, providing businesses with comfort that they are not breaching competition law when they engage in “green” initiatives that involve, for example, competitor collaboration. The big question is whether this will lead to changes that make legitimate green activity significantly easier and less risky for businesses, or whether the changes will be confined to limited tinkering within the current competition framework. In enforcement, we can expect to see more action from the CMA in connection with claims about products’ environmental credentials (so-called “green washing”).

The detailed legislation underpinning the UK subsidy control regime will commence early this year. The Bill expands on the brief provisions contained in the UK/EU Trade and Cooperation Agreement and marks a shift in approach away from EU state aid law (which applied when the UK was an EU member state). Now, UK public authorities must self-assess any financial assistance provided to enterprises, with only a limited ex post role for the CMA and a short window for third parties to challenge awards. The detail contained in the Subsidy Control Act 2022 will be a welcome development, but further clarity from the courts on key concepts will also be required.

From state aid to subsidy control



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Reform of competition policy



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2022 could see a number of legislative changes in relation to competition law. In a five-point plan, BEIS has, among other things, proposed reforming the thresholds to determine when a merger falls under the CMA's jurisdiction (including introducing a mandatory threshold for larger mergers, which would be a significant change for a regime which is currently voluntary), stronger incentives for whistleblowing when there is anti-competitive conduct, stronger powers to investigate and enforce competition law, and a general speeding up of CMA investigations and work. If adopted, these changes could alter the way the CMA operates and increase risks for companies interacting with it.

In 2021, the first "opt-out" collective proceedings for competition law damages were approved to proceed to trial. Such "opt-out" claims are brought by a single claimant on behalf of a much larger group of consumers (or class) who have suffered harm as a result of anti-competitive behaviour, unless the individual consumer takes positive steps to stay out of the proceedings. These cases significantly increase the risk for businesses breaching competition law: for example, the case brought by Walter Merricks on behalf of UK consumers is claiming billions from MasterCard for excessive interchange fees on debit and credit cards between 1992 and 2008. Businesses that are victims of anti-competitive conduct can also claim for losses suffered because of inflated prices. With numerous damages cases pending before the UK competition courts, 2022 seems likely to see the most activity yet.

Collective damages actions



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New rules for distribution arrangements



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From 1 June 2022, there will be new UK rules applying to “vertical” agreements, such as distribution, agency and franchising. As there are differences between the UK and EU proposals, implementation could prove challenging for businesses operating across Europe. It will be difficult to take advantage of the more permissive provisions in the different rules in an agreement covering both jurisdictions. The proposed one-year transition period will mean that businesses have time to review and, if necessary, revise their existing vertical arrangements to comply with the new rules.

After reviewing vertical agreements, the CMA now turns its focus to guidelines and exemptions for horizontal agreements (those between companies operating at the same level of the supply chain). Businesses will be looking for the CMA to clarify its approach to issues that may act as barriers to legitimate collaboration among competitors. This will include, for example, updated guidance on how to assess whether the benefits of joint collaboration outweigh restrictions on competition in a range of areas such as environmental initiatives, joint bidding, purchasing, R&D and digital technology.

A fresh look at horizontal agreements



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Risks and challenges for M&A



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2022 can be expected to see the CMA continuing to take a tough stance on completed mergers, and imposing large fines where there are found to be procedural breaches. The CMA recently fined Facebook £50.5 million for breaching the provisions of an order requiring Facebook to provide information to the CMA. The CMA later ordered the completed merger in question to be unwound, highlighting the potential risks in not notifying a merger, even when the UK regime is “voluntary”. In addition to traditional merger control laws, the long-awaited National Security and Investment Act came into force on 4 January, requiring mandatory notification for transactions in certain sectors. This adds another execution risk when planning M&A, to be considered alongside merger control.

The establishment of the Digital Markets Unit, the CMA's response to the government's proposals for a new regime for digital markets in 2021, and the CMA's enforcement activity underline the importance the CMA attaches to digital markets. Recent investigations by the CMA against tech giants have focused on self-preferencing, anti-competitive terms and conditions, and the anti-competitive collection and use of data. With most businesses involved in e-commerce and interacting with platforms, competition law will continue to play an important role in the development of these markets and may provide scrutiny and challenge to practices which businesses consider to be unfair or damaging.

Digital markets



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Harmful pricing practices remain on the agenda



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Although busy with new issues such as sustainability and digital markets, the CMA has not lost sight of more traditional harmful practices, such as those involving pricing. 2021 saw a continuing trend of businesses being fined for harmful pricing practices. Currently, there are several pending cases concerning resale price maintenance, as well as allegedly excessive and unfair pricing by suppliers with a strong market position. Previous cases have focused on sectors such as pharma, construction and sport. Businesses must ensure their sales teams are aware of the limits imposed by competition law when it comes to discussing resale prices with their customers.

2022 will see a new leadership team take the helm at the CMA. The current CEO, Andrea Coscelli, is stepping down from the position in July of this year. With recruitment for a new, permanent Chair also ongoing following the departure in 2020 of Lord Tyrie, a new leadership team may lead to a re-appraisal of the authority's priorities and focus. Positioning the CMA as a key global competition authority following Brexit will no doubt be a key objective. When combined with the policy changes already proposed by government (see 3 above), businesses and their advisers will be watching with interest to see what impact this change at the top will bring.

All change at the CMA?



10