2022 OUTLOOK

Three themes for the competition year ahead

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Three themes for the competition year ahead

Once again competition law will give rise to high profile developments in the coming year. We have picked out three themes to be aware of this year: the rapid rise in class actions; the ongoing revolution in digital antitrust; and the regulatory challenge faced by businesses looking to achieve COP26 sustainability goals.

1. LIGHTS, CAMERA, (CLASS) ACTION!

BURST OF CLASS ACTION CASES RAISES CONSIDERATIONS FOR ASSESSING DAMAGES

The class action pipeline in the UK is bulging. Four cases were certified this year, five are awaiting a certification judgment, and a further four are pending a certification hearing, with rumours of more to come. These cases involve millions of class members and could result in damages awards that run into the billions of pounds. The characteristics of the cases span a broad spectrum. Some have been brought on behalf of direct purchasers and others on behalf of indirect purchasers. Some have been filed on behalf of end-consumers and others on behalf of businesses. Some are follow-on cartel damages cases, while others relate to alleged standalone abuses of dominance.

The general consensus that the Supreme Court set a low bar at the certification stage in its Merricks judgment appears to have been borne out this year: no cases have fallen at this hurdle. Interest in the criteria and approach to certification is likely to continue into 2022, given that judgments are awaited in relatively complex cases with different characteristics from those that have been certified this year. For example, the Trucks and Forex judgments will be the first to involve large-scale claims by businesses rather than end-consumers, and the first to involve competing class action claims.

Nevertheless, attention in 2022 is likely to begin to turn away from certification and towards consideration of how the scale and diversity of class action cases will be dealt with in practice as they progress to trial. A relevant consideration in this regard is whether the economic analysis for the purpose of assessing damages may be different for class actions as compared to individual

proceedings. Below we discuss this issue in relation to three key aspects of a damages assessment: precision, pass-on and disclosure.

PRECISION

In those instances where it is appropriate to estimate certain elements of loss on a "market-wide" basis, the economic analysis in class action cases is likely to mirror closely the equivalent analysis undertaken in individual proceedings. This is because in both situations the economic analysis would make use of data on all sales made by the defendant(s) over a certain time period. This may be the case where the effects of an infringement are expected to be similar across all sales and/or where large samples of data are required to produce robust damages estimates.

However, it is yet to be seen whether there could be greater emphasis on achieving precision in class action cases than would be the case in individual proceedings. Whilst the "broad axe" principle is a relevant consideration for both types of proceeding, the scale of class action claims means that any uncertainty around damages calculations could potentially lead to wild swings in overall estimates. For example, if a class action has 20m class members who each spent £100 per year over an alleged 10-year infringement period on the relevant product or service, then every additional percentage point of overcharge would – all else equal – be worth £200m across all of the class members. The materiality of such "swings" may lead to a greater degree of scrutiny regarding the level of precision underlying damages estimates in class actions. The challenge for economists faced with such an increased emphasis on precision is that any damages assessment can only ever produce estimates within a corridor of uncertainty.

PASS-ON

Assessing pass-on issues could be particularly complex in class action cases. Any such assessment would traditionally be claimant-specific and would involve: (i) exploring the nature of any link between the input cost(s) affected by the allegedly infringing conduct and price-setting by the relevant entity; and (ii) quantifying the strength of this link (to the extent possible). However, as Merricks illustrated it may not be practicable to apply this framework at the same level of granularity for class actions as for individual claims, given the sheer number of class members involved. However, it remains to be seen whether a more general alternative approach could be adopted for class actions, and what it would look like in practice.

The difficulty of the pass-on challenge in class actions may also depend on the characteristics of the case. Matters may be more complex in cases involving indirect purchasers, where pass-on issues are likely to occupy a central role in any damages assessment given that pass-on by the direct purchaser will be a necessary step in determining any prima facie loss suffered by the class members. Similarly, the challenge may be tougher if the case involves a large number of potentially affected markets, as a separate pass-on analysis would probably be required for each one.

DISCLOSURE

The assessment of certain issues typically relies on claimant-specific disclosure (such as pass-on, as set out above, or compound interest and tax). It may be difficult to obtain this type of disclosure on a systematic basis, or at all, in class actions. Parties to these cases may therefore need to explore creative approaches, such as representative sampling of class members (where it may be difficult to determine what is representative without first going through some or all of the disclosure process) and/or using publicly

available information (where the challenge may be in establishing the extent of read-across from such sources to the case at hand).

There could also be significant variation in the level and types of difficulty associated with claimant disclosure depending on the characteristics of the class action in question. For example:

- for opt-out cases, the potential for engaging with class members on disclosure is currently unclear;
- for indirect purchaser cases, information held by intermediaries may be relevant for assessing pass-on to the class members, but it may be difficult to collect if these intermediaries are not involved in the case; and
- for claims by commercial enterprises, these challenges are likely to arise in relation to several issues (e.g. downstream pass-on tax), whereas fewer of these issues may apply to claims by end-consumers.

CONCLUSION

The discussion above suggests that in the coming year class action cases may start to present plenty of novel challenges to keep the competition litigation community busy. Importantly, there is unlikely to be a one-size-fits-all approach to case management or the assessment of damages.

Frontier Economics is advising class representatives and defendants involved in a number of class action cases in the UK, including Mastercard in relation to the Merricks case, Mr. Justin Le Patourel in relation to the BT case, and parties to other proceedings currently at the certification stage.

2. A NEW ERA FOR DIGITAL MARKETS REGULATION

MEETING EXPECTATIONS RAISED BY NEW OVERSIGHT LAWS WILL BE A TALL ORDER

The year 2021 saw progress in the development of proposed legislation to regulate digital markets in the EU and the UK (e.g. the DMA, DSA and DMU), albeit at a slower pace than some may have anticipated. Nevertheless, it is likely that legislators will be converging on the final details of the regulation in the first half of 2022 in the EU, although the UK is expected to take longer. New legislation will add a range of instruments and powers to those that regulators are currently using to address potential concerns in these markets, giving rise to a new landscape for digital firms and their advisors to navigate.

In Germany, the legislation has progressed more quickly, with the BKartA introducing Section 19a of the German Competition Act in January 2021. The BKartA has now taken the first step in implementing these powers with the announcement in January 2022 of its determination that Google has Paramount Importance for Competition Across Markets (PICAM), whilst investigations into Meta, Amazon and Apple are also underway.

IMPLEMENTATION CHALLENGES

It seems likely that the main debates on digital regulation during 2022 will quickly move from the wording of the legislation to prioritisation and implementation – a challenge for regulators which is likely to be even greater than the efforts it took to get this legislation off the ground in the first place. When the new

powers are finally in place, there will probably be a process of triaging for the EC, the CMA, the BKartA and other NRAs. Regulators will need to decide on priorities; who takes forward what and what is the most appropriate tool for each issue given the choice of instruments now available.

QUESTION 1: WHICH ISSUES TO PRIORITISE?

The DMA establishes a long list of obligations that will apply to a broad range of core platform services. Given the hype surrounding this legislation in recent years, by the time it comes into force many interested parties may be lining up to flag their concerns and add to the long list of tasks for the EC (and the CMA in respect of the UK legislation). Complainants will have had ample time prior to the passing of the legislation to lobby for their cases. This build up of potential actions will present a daunting challenge for regulators. The sheer volume of work for regulators, given the number of digital markets involved and their complexity, is likely to be testing, at least in early stages. It is an open question whether the EC and the CMA will have adequate resources for implementation – if not, it remains to be seen how they will identify the most pressing areas to tackle first.

In Germany, the BKartA already has ongoing investigations into the Google News Showcase service and Google's data processing terms, so these may be the first cases to be assessed under the new legislation. However, the caseload may increase significantly as and when additional complaints against Google are lodged and if Meta, Amazon and/or Apple are also found to have PICAM over the next few months.

QUESTION 2: WHO IS RESPONSIBLE?

Regulation of digital markets has seen considerable overlap across European and global jurisdictions. A new set of tools and responsibilities may make the multi-jurisdictional headache even worse. With effective triage, the array of regulators armed with appropriate powers could overcome some of the resource constraints, but approaches are likely to differ significantly, with some regulators more used to antitrust than ex-ante enforcement[1]. Although the BKartA will have a head start in taking action against Google (and potentially others), other regulators are still likely to want to flex their newfound powers once these come into force. Inconsistencies between jurisdictions could quickly bring any progress with deals and remedies to a standstill. It will likely be in the interests of both digital firms and regulators to coordinate across all jurisdictions to avoid the whole sector being snarled up in multiple ongoing and overlapping investigations for many years.

QUESTION 3: WHICH INSTRUMENT TO USE?

Faced with a range of different concerns, regulators will need to decide which tools to use for what purpose: should they launch a 101/102 case or a market investigation, turn to ex-ante regulation or combinations of those options?[2] The multiplicity of instruments will add complexity to the jurisdictional

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[1] Enforcement of the DMA, for example, will involve less forensic analysis and more enforcement and forward-looking monitoring compliance, at least with respect to conduct captured by Article 5. The monitoring role is something that the EC and other competition authorities generally try to avoid, as evidenced for example by their strong preference for structural rather than behavioural remedies.

[2] In the case of the DMA in the EU, this is particularly relevant under Article 6. This involves a case-by-case assessment with less discretion for conducts listed in Article 5. The DMU may allow the CMA ample discretion both in terms of which markets to address and which mechanism to use.

overlap, as different authorities or units, each with their particular responsibilities, will juggle their own goals, rules and resourcing constraints.

Historically, regulators with both regulatory and competition powers have typically chosen to use regulatory routes, as these are seen by regulators to be simpler and quicker to implement and with more limited legal routes of appeal. However, in turn this places greater responsibility and accountability on regulators, and any unintended consequences will be placed at their door.

QUESTION FOUR: WILL IT WORK?

A key stage of implementation will be the imposition of remedies where issues of fairness, proportionality and unintended consequences are likely to be contentious. Platforms themselves will likely be tooling up to litigate every aspect of the implementation. Regulators may also find themselves under pressure to put in place mechanisms for determining whether particular interventions are having the desired effect. However, given that the DMA will not enter into force until immediately after legislation is passed, remedy implementation is likely to be an issue for future years.

HIGH EXPECTATIONS

The prolonged debate on the new digital markets regulation tools by many sectors of society has created high expectations. Regulators such as DG Comp, the BKartA and the CMA will have to live up to these expectations once the legislation is implemented.

Proponents of the DMA and DMU have portrayed them as being faster, easier and more effective than the existing competition law-based mechanisms in dealing with issues raised by digital platforms[3]. However, in the enthusiasm for new powers the fundamental challenge of relying on ex-ante regulation (which is not typically a very flexible instrument) in a fast-moving market appears to get brushed under the carpet. The competition concerns that exist in today's dynamic markets may differ from those in the future, which may render ex-ante tools such as the prohibition of certain behaviours dated or inadequate or unable to live up to expectations.

Further, regulators will continue to rely to a large extent on existing ex-post competition instruments. The common wisdom to date has been that anticompetitive behaviour may have gone unpunished because the current toolkit is not fit for purpose. But the past few years have shown that these tools can be effective once regulators/authorities build the cases to address sectoral concerns[4]. Regulators may end up relying on them to an unexpected extent as market conditions change, since the potential harms may be a consequence of anticompetitive conduct not codified in the legislation. At the least, one would expect the intellectual framework for identifying potential competition concerns to remain strongly rooted in that of existing competition law.

[3] For example, by focusing on ex-ante regulation that explicitly identifies prohibited behaviours, and through a removal of the need to find dominance before imposing remedies.

[4] e.g. Google shopping fine upheld by the EC General Court, EC and/or CMA crackdown on seemingly innocuous acquisitions such as Facebook/GIPHY, market studies and Art 101/102 probes.

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RISKS

Given the substantial risk of getting high profile regulatory interventions wrong, authorities will presumably want to continue to take a thoughtful, evidence-based approach – although this may be offset by the pressure they are likely to feel to "make a difference" in short order. The chief potential risks regulators face are:

- **Political.** Political pressure and high expectations from multiple stakeholders may give authorities an incentive to move too fast, particularly under proposed UK legislation that gives the CMA more discretion on timing.
- **Legal.** At the same time, authorities will be conscious that pressing ahead initially with cases where the evidence base is not particularly strong, or where remedies may appear disproportionate, may expose them to possible court challenges that could set an unwelcome precedent for the future use of these tools.
- **Economic.** And, as always with regulation of dynamic markets, there is the risk of unintended consequences, such as stifling innovation or distorting competition. That could arise (for instance) if two fairly similar firms are subject to very different obligations because one of them is just below the threshold for being a gatekeeper.

CONCLUSION

Authorities will need to find a sweet spot for the new legislation to be effective. First, they will need to move sufficiently fast to be able to react to new challenges. Second, they need to be mindful of the risk of unintended consequences, particularly when imposing remedies. And third, they need to be able to insulate themselves from political pressure and manage expectations.

Even launching the initial ground rules of the legislation has been a drawn-out process. This is just working within the parameters of competition in the market as it is now, and benefits from the spadework of the ongoing Art 101/102 cases. The legislation will have to adapt to new challenges as the market changes. The idea that regulatory intervention is going to be ever faster and more effective in the context of dynamic markets may have set a high bar that will be difficult to clear.

The second half of 2022 may therefore be the time when European competition authorities have to deal with the reality, not just the potential, of their new powers. While legislators will have got a new toolkit to play with, the real challenge of successful implementation – with accountability for the outcomes – will then begin. So our message to regulators for 2022 is: with great power comes great accountability.

3. COP26 GOALS PUT SUSTAINABILITY PACTS IN THE SPOTLIGHT

BUSINESSES NEED LEGAL CLARITY TO HELP FIGHT CLIMATE CHANGE

While 2021 was a year of bold pledges on tackling climate change, 2022 will challenge the world to turn these words into action. With the warnings of COP26 ringing in their ears, policymakers and regulators will be looking for innovative ways to accelerate decarbonisation – and competition authorities will be no exception.

At first blush, competition policy and climate change initiatives may seem to have little in common. However, as we explored in a recent article, market forces can either help or hinder decarbonisation in different circumstances. Where consumers have a strong preference for environmentally friendly products, competition can act as a powerful incentive for companies to clean up their act. But greener products are often more expensive and – where consumers are not willing to pay this premium – competitive pressure may present even well-intentioned suppliers from going green. This has led some to question whether competition law – which bans agreements between firms that harm their customers – should be adapted to permit such agreements if they can be shown to deliver environmental benefits that would otherwise be unachievable.

At the start of 2021, only two European competition authorities – in the Netherlands and Greece – had set out concrete proposals on how they would evaluate such agreements. As we explored in our previous article, these proposals were bold in principle but left a number of practical questions unanswered.

Over the last 12 months, a number of other regulators have weighed into the debate – most notably the European Commission (EC), which plans to revise its guidelines on horizontal agreements by the end of 2022. The EC has struck a noticeably cautious note, with greater emphasis on policy continuity than change. In a September 2021 policy brief, the EC acknowledged that there were calls for "clarification" on how the pursuit of green goals affects antitrust assessment, but stressed that there were already "various ways for companies to engage in sustainability initiatives without restricting competition" in the meaning of the EU's existing legal and regulatory framework. It pointedly noted that "stakeholders appear to have difficulties providing real-life examples of sustainability initiatives that are hampered by the potential risk of the application of competition rules". The EC also stressed that, in many circumstances, cooperation agreements would not be needed to achieve environmental objectives at all, either because consumers value sustainable products (meaning firms "are expected to offer such products independently rather than by cooperating") or because "existing (environmental) regulation already incentivises companies to produce in a sustainable manner".

Like the EC, the UK Competition and Markets Authority has sounded a similarly conservative note on sustainability, with a focus on clarifying – rather than overhauling – its existing framework. These messages from Brussels and London contrast markedly with bolder proposals from some other European capitals. For example, draft guidelines on sustainability agreements issued by the Netherlands Authority for Consumers and Markets (ACM) stress that sustainability is one of its "key priorities" and that "agreements between undertakings can contribute in an effective manner to the realisation of public sustainability objectives".

Perhaps most strikingly, the ACM plans to take account of the wider benefits that such agreements might create for society as a whole. By contrast, the EC has indicated that it will only consider the benefits of an agreement where the beneficiaries and the groups of consumers affected by the restriction are "substantially the same". This is a fundamental difference since the economic conundrum at the heart of tackling climate change is a free-rider problem: the costs of mitigation measures are often borne locally by people living and working today, while the benefits will be enjoyed globally by future generations. The economic theory of externalities shows that in such circumstances, the provision of measures to alleviate climate change will be insufficient. The ACM recognises this quandary and – at least in principle – permits agreements that could help address the problem by taking account of the wider benefits they could generate. By contrast, by focusing narrowly on the impact of an agreement on direct consumers of the

goods or services in question, the EC's proposed approach ignores the free-rider conundrum which is at the heart of the climate crisis.

The EC's underlying message would seem to be that the free-rider challenge is not something for businesses to take into their own hands; instead, where coordination is required, governments and/or regulators must take the lead with targeted interventions in the market. On this view, companies would essentially be expected to respond to the rules and incentives set by policymakers. Their role would not be proactive.

It will be interesting to see how Europe's national competition authorities react to these proposals over the coming year. The EC's perspective is coherent, but also conservative. And it piles pressure on policymakers to lead the fight against climate change – easier said than done at the best of times, let alone when governments have their hands full with a protracted global pandemic. Moreover, as the painful negotiations at COP26 illustrated, governments suffer from their own free-rider problem when it comes to signing agreements that impose costs on their own electorates today to achieve global good tomorrow.

However the debate unfolds, European businesses must push regulators for greater clarity than exists today by the end of 2022. There is widespread recognition among Europe's antitrust authorities that the EU needs a harmonised approach to the treatment of sustainability agreements, but as things stand the conflicting messages from different quarters may well confuse and mislead companies. Some authorities have tried to reduce the resulting risks for businesses by introducing interim safeguards. The ACM, for example, has pledged not to impose any fines for collective agreements in which it is clear that the businesses involved followed its draft guidelines "in good faith". However, the EC has made no such commitments. This means that firms entering into a sustainability agreement could find a warm welcome in some member states, only to face prosecution by Brussels. Whatever the merits or otherwise of greater coordination between businesses to achieve environmental goals, better coordination between Europe's competition watchdogs would surely be welcome.

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