

5 Global Digital Markets Regulatory Issues To Watch In 2022

By **Francesco Liberatore** (January 18, 2022)

Developments in digital markets regulation show no signs of slowing down in 2022. The sector has experienced accelerated growth and acquired reinvigorated strategic importance throughout the ongoing historic global pandemic.

With more vigorous enforcement, a number of significant policy reviews and broader political movements, such as political elections across Europe and the midterm elections in the U.S., there are plenty of regulatory developments affecting the industry in the year ahead.



Francesco Liberatore

International businesses will want to keep a close eye on the following developments in 2022, given their impact on operations globally.

1. Digital Markets Regulation Heats Up in the EU and the U.K.

2022 will continue to see key developments in connection with proposals for new digital markets regulation around the globe and, in particular, with new legislation being adopted in the U.K. and the European Union.

In the U.K., the Digital Regulation Cooperation Forum launched a technology horizon-scanning program to provide a coherent view of new and emerging digital markets and technologies, and how they should be regulated.

The DRCF groups together the Competition and Markets Authority; the U.K.'s Office of Communications; its data protection agency, known as the Information Commissioner's Office; and the Financial Conduct Authority.

The DRCF is more than an information exchange between the regulatory bodies: It has a CEO and a secretariat to push forward a common regulatory agenda in defined areas, drawing on the collective expertise of the four regulators.

In addition, the CMA published a compendium of approaches to improving competition in digital markets, including more enforcement and new ex ante regulation for platforms with significant market status.

This is part of a clear trend to make large platforms more accountable for potentially anti-competitive conduct, but also for illegal and harmful content — see also the U.K. Online Safety Bill, currently being legislated through the U.K. Parliament — though questions about who determines what is harmful, but not illegal, persist.

In the EU, the European Parliament approved an amendment to the proposed Digital Markets Act, which would allow "any providers of equivalent core platform services to interconnect with [a gatekeeper's] number independent interpersonal communication services," such as messaging apps, "or social network services upon their request and free of charge."

This amendment echoes an interoperability requirement already contemplated in the recent EU Electronic Communications Code for number-independent communication services, so it

remains to be seen whether the two provisions — if the amendment is retained in the final text of the DMA — would complement each other or collide.

These proposals are not alone on the global stage. Similar proposals have been tabled in Australia, Japan and the U.S., among other countries.

2. Transatlantic Cooperation

Given the cross-border nature of digital markets, the Organization for Economic Cooperation and Development noted in its 2018 report, "Going Digital in a Multilateral World,"

Governments may need to enhance co-operation across national competent agencies to address competition issues that are increasingly transnational in scope or involve global firms.

Against this backdrop, the U.S., EU and U.K. competition agencies have recently issued joint statements to reaffirm their commitment to cooperating in this area, including through participation in high-level meetings as well as regular staff discussions.

The fact that U.S., EU and U.K. antitrust officials will now have an official place to meet regularly to talk policy and exchange views may be expected to bleed into how they approach enforcement in digital markets in 2022.

For example, both the European Commission and the Federal Trade Commission are doubling down on how a digital market gatekeeper may use its own platform to favor some of its own services over those of rivals. However, the approaches to tackling these issues may not necessarily be the same.

For example, Europe is still aiming to adopt a new digital rulebook — the new DMA and the Digital Services Act — by mid-2022 to promote fairness and contestability through an ad hoc ex ante regime separate from competition law, requiring designated gatekeepers not to engage in certain conduct, such as self-preferencing, and to engage in others, such as data mobility and interoperability.

This is something that the U.S. is unlikely to do, at least within the same time frame. At the same time, the U.S. agencies have been more vocal than their EU counterparts in advocating for the breakup of large Big Tech platforms.

The U.K. approach to tackling common issues in digital markets is even more different — somewhat quintessentially British. It is largely based on a report prepared by a group of experts, the so-called Furman Report, and founded on the new Digital Markets Unit within the CMA.

The Digital Markets Unit is empowered to develop codes of conduct for digital players with strategic market status to pursue personal data mobility and systems with open standards, where these will deliver greater competition and innovation.

The CEO of the CMA, Andrea Coscelli, noted in an October speech:

Whilst the UK regime proscribes similar conduct to the proposals in Brussels and Washington, the approaches taken to applying regulation do differ. The DMA, and some of the [U.S.] Congressional proposals, are more prescriptive and, in the case of the DMA, self-executing. The US proposals rely on an enforcement model to prohibit

a wide range of conduct, and provides for an affirmative defense. In contrast, many of the EU's DMA will always apply to all designated gatekeepers, with a narrowly drafted exception.

Instead, the U.K. regime's obligations for firms with significant market status would be based on those firms' market behaviors, and only be adopted following an investigation to determine, on the facts of each individual case, that the pro-competitive intervention — e.g., requiring data mobility or interoperability — is "an effective and proportionate remedy to an adverse effect on competition."

3. Enforcement of the New EU Electronic Communications Code

2022 will also finally see active enforcement of the new EU Electronic Communications Code across the European Economic Area and the U.K.

The EU Electronic Communications Code is an ambitious recast of the existing regulatory framework for the regulation of electronic communications services and networks, aimed at promoting competition and consumer protection while expanding the scope of telecom-style economic regulation to internet-based communications services.

The code attaches different regulatory treatment to different categories of regulated networks and services.

For example, private networks are subject to lighter regulation than public networks, and number-independent services are subject to lighter regulation than number-dependent services, i.e., services allowing a dial-in or dial-out functionality with national or international numbers.

The extent to which the regulation will apply to new forms of digital communication, as well as the actual obligations applicable to each network and service, will therefore depend on its legal characterization under the code.

Despite the U.K.'s exit from the EU, the U.K. government has pledged to apply the code in the U.K. too, but has so far delayed the extension of the rules to number-independent services. This might well change in 2022.

Elsewhere, several other jurisdictions outside the EU are looking to review their current regulatory approach to bring it in line with the new definitions contained in the code, which makes it an international gold standard for the regulation of new communications services and networks.

Therefore, ensuring compliance with the code and other international communications law changes will be a key theme for 2022.

4. New Rules on Distribution

2022 will also likely continue to shine a light on certain online sale practices that raised concerns for competition and consumer protection authorities concerning geoblocking, resale price maintenance, price gouging and the use of pricing algorithms, among other issues.

Some commentators questioned whether existing competition and consumer protection rules were well-equipped to deal with such concerns. These questions spurred a rethink of

the existing approach to enforcement on e-commerce.

For example, later this year, the European Commission and the CMA will publish new rules on vertical distribution agreements with a view to ensuring that the rules are fit for purpose in digital markets. Although the two sets of rules are expected to continue to be broadly aligned, there will likely be important areas of divergence.

For example, prior iterations of the distribution rules permitted any type of most-favored nation, or MFN, clauses, provided that the parties' market shares were less than 30%. A series of enforcement cases in online retailing — e.g., e-books, hotel reservations and insurance price-comparison sites — has prompted the EU and U.K. to contemplate tighter rules on MFNs.

While the new draft EU rules propose maintaining the MFN exemption except for online platformwide retail MFNs, the U.K. is planning to take a stricter approach, whereby all "wide" parity clauses, whether online or not, would be prohibited.

Another example of divergence is dual distribution, i.e., a supplier retails its own products while also supplying distributors that sell the products on to other retailers.

Under the new EU rules, the European Commission is planning to apply a safe harbor for nonreciprocal agreements between competitors, e.g., where the supplier manufactures and distributes, and the buyer distributes only.

However, competitively sensitive information sharing between supplier and reseller within dual distribution would not be allowed above a 10% retail market share threshold.

However, this safe harbor would not be available for e-commerce platforms — providers of online intermediation services — that are themselves retailers competing with marketplace sellers using the platform, regardless of their market shares.

In contrast, the U.K. is planning to retain the approach of the current rules, extending the exemption to include dual distribution by wholesalers and importers, and plans to provide further guidance about the horizontal exchange of information in dual distribution situations.

Finally, the EU proposes to allow noncompete clauses — i.e., clauses that require the buyer to source from the supplier more than 80% of its total purchases of the contract goods or services — for a period of 5 years, which may be tacitly renewed.

In contrast, in the U.K., noncompete clauses that are tacitly renewable beyond 5 years would not qualify for exemption from competition law.

5. Connected Cars at the Crossroads

Last but not least, the demand for connected cars in 2022 will inevitably surpass that for traditional vehicles, just like happened between smart and dumb phones.

This convergence between the car manufacturing and communications industries is not without friction though.

A wave of patent licensing fights in the area of connected cars landed in court dockets in both the U.S. and Europe in 2021. The lawsuits will ripen over the coming months, and are likely to set the tone and develop a pattern for future licensing talks in the automotive and

Internet of Things sectors.

The lawsuits over communications technology against top carmakers underline licensors' lack of patience for what they perceive as patent holdout, where a patent user holds out on paying a licensor the royalties due.

The litigation also underscores the urgency with which car companies should obtain patents they may not be familiar with to survive a fast-changing automobile industry.

Finally, the issue is further aggravated by a technology dilemma, at least in the EU. There, an EU regulation requires motor vehicles to be fitted with 112-based eCall. This obligation is technology-neutral. The options available on the market include 2G, 3G or 4G technology.

However, current EU standards for eCall devices are limited to 2G and 3G technologies that use circuit-switched connections.

Industry-led initiatives toward a new standard for 4G interoperable eCall devices are only at the early stages — 4G does not use circuit-switched technology, but is based on IP Multimedia System, or IMS, technology.

The technology dilemma arises as member states begin to plan their eventual switching off of 2G and 3G networks in favor of 4G networks.

While most of the eCall functionality exists in IMS emergency call and IMS multimedia emergency service specifications, original equipment manufacturers must upgrade or refit current eCall devices in their vehicles with 4G interoperable functionality in order to guarantee that an eCall is transmitted to emergency services in case of a car accident.

While some European operators seem to be looking to switch off 3G before 2G, other operators are looking to switch off 2G and keep a 3G coverage layer.

Providing coverage for eCall could be influential in operator choices, particularly if original equipment manufacturers were willing to contribute toward the cost of maintaining 2G narrowband coverage in order to avoid the cost of swapping out eCall modules in existing vehicles.

It is in the interest of all original equipment manufacturers to understand the regulatory and commercial implications of a 2G/3G network switchoff on their obligation to provide passengers with eCall access in vehicles across the EU.

Industry-led standardization initiatives will provide an opportunity to engage in a public policy debate aimed at facilitating a smooth pan-EU transition strategy to solve this technology dilemma.

Francesco Liberatore is a partner at Squire Patton Boggs.

Squire Patton international affairs advisor Matthew Kirk contributed to this article.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients or Portfolio Media Inc., or any of its or their respective affiliates. This

article is for general information purposes and is not intended to be and should not be taken as legal advice.