



Outlook for 2019
Succeeding in uncertain times

Impact of technological change on Competition law

Technology is the great enabler, helping companies to grow, to be more inter-connected and to make lives easier. In this era of the ‘Internet of Things’, Artificial Intelligence (AI), Algorithms, Blockchain, and Big Data, are all dramatically changing the way in which we are able to communicate, live, learn and ultimately exchange goods, services and information.

To a greater or lesser extent, all companies today have a digital dimension to their business. For all of the benefits technology enables, it is also a force for uncertainty for businesses, governments and regulators. While enforcers are working to try to understand the links between technological advances and Competition law, the pace of change is running ahead of the authorities’ capacity and understanding of how to deal with it.

Amidst this storm of speculation around foreign investment control and issues of national security, in technology markets especially, as well as constantly shifting views on the role of regulators and governments, many agencies face the challenge of assessing whether the traditional antitrust framework is robust enough to regulate competitive behaviour or whether new forms of regulation or enforcement might be required.

Outlook 2019: Succeeding in uncertain times puts the impact of technology change in Competition law in context, deciphering what you need to know – and what you need to prepare for – to successfully navigate these topics in the years ahead.



“Dealing effectively with the challenge of rapid technological change, from a competition law perspective, requires companies to think deeply and plan ahead, to work closely and collaboratively with regulators to better understand the dynamic nature of their business and any impacts on competition and consumers, and to approach the issues in a creative, pragmatic and technology-savvy way”

Fay Zhou

Curb your anxiety: Antitrust issues that are not as bad as they seem

- ✓ **Scrutiny of foreign investment is nothing new** although globalisation and digitisation have expanded the focus beyond traditional industries such as defence and infrastructure, to cover more sectors. But with proper planning and a better understanding of the issues before undertaking an investment, the likelihood of successful clearance can be greatly increased
- ✓ **Authorities are still grappling with the implications of new technology within merger control** so there is huge potential (and pay-off) in working collaboratively through the deal process
- ✓ **Technology works both ways when it comes to cartels.** With greater frequency, sophisticated technologies can be used to enter into anti-competitive behaviours but also used by authorities to detect these
- ✓ **Compliance programmes work.** Cartel enforcement is at its lowest since the 1970s due in part to the (unintended) consequences of leniency programmes, but also because of the effectiveness of in-house compliance training and detection, and new technology that improves the delivery of these programmes
- ✓ **Digitisation and globalisation is on everyone’s agenda** so that increased connectedness and awareness of the rules of compliance in the technology arena acts as both a sword and a shield

Linklaters

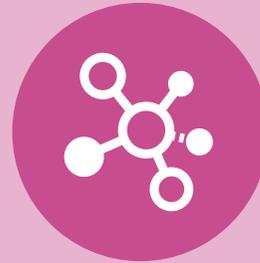
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Rather than getting caught up in the hype – and there is a lot of it out there – let's talk about what Foreign Investment Control means. National security and public interest tests and screens are nothing new and have existed in most countries' legislation for decades. What has therefore changed to explain the seeming explosion of transactions over the past five years being subjected to such scrutiny?

First, concern has increased – and so has government involvement and control – as a result of large foreign investment streams coming into Western countries from outside (mostly China), driven less by commercial rationale and more by national strategy.

Secondly, there is now a stronger focus on national self-interest and greater scepticism about the benefits of globalisation, fostering the return of the “national champion”.

These concerns have increasingly led governments to use their powers – originally granted as a tool to restrict foreign investment only where key areas of national security and public safety were concerned – in relation to a whole host of other areas such as the semi-conductor, IT and IP, AI, robotics and other new technologies as well as transport and communication technology sectors.

Governments are responding to perceived threats to national security through more rigorous enforcement of existing rules, introducing new restrictions and imposing more onerous conditions before allowing investments to proceed.

A recent example is provided by the latest legislative development at the European Union (EU) level. On 20 November 2018, representatives of EU governments and the European Parliament agreed on draft legislation to screen foreign direct investments (FDI). This new trend in FDI is well-depicted by the Austrian Economy Minister's words: “*we are determined to keep our technology sectors and key infrastructure safe*”. This new EU Regulation, likely to be adopted in the first quarter of 2019, gives greater scope to vet foreign investments into the EU for reasons of security, public order and threats to European technological advantages in key sectors. Member states and the European Commission (EC) are able to consider the potential effects on, among other concerns, critical technologies, including AI, robotics, semiconductors, and cyber security, when deciding whether foreign investments can go ahead.

In the U.S., the Committee on Foreign Investment (CFIUS) is widening the range of sectors in which it is taking an interest. The Foreign Investment Risk Review Modernization Act, passed in August 2018, significantly expanded CFIUS's authority in multiple ways, with increased scrutiny of transactions involving companies in critical infrastructure or critical technologies, non-controlling investments, and certain real estate transactions. The criminal indictments brought in January 2019 against the Chinese telecoms company, Huawei, by two separate grand juries in the U.S. – for the theft of confidential information from competitors and the evasion of international sanctions against Iran – will no doubt only heighten the tensions and uncertainty in this area.



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Germany has strengthened existing rules and introduced notification obligations for acquisitions in specified industry sectors related to public security, such as IT, telecoms and critical infrastructure, and it has announced a further reduction in the threshold for reviewing transactions, from 25% of voting rights to 10% for German target entities active in the operation of certain critical infrastructures and defence-related investigations. France has also progressively tightened its regime over the past few years, and the most recent reforms came into force on 1 January, extending the list of sectors covered to new strategic sectors including in relation to aero-spatial activities, information system security, cyber security, AI, robotics and activities relating to the storage of data whose disclosure is likely to harm strategic interests.

Meanwhile, the UK is considering very wide-ranging reforms, which would enable the government to review all types of investments, in virtually any sector. With the increased scrutiny of foreign investments and uncertainty over deal completion that such proposals bring, there is concern that investors may be deterred in the future from investing in the UK at all. In response to this, the government is currently considering how to give guidance to investors to avoid a “chilling effect” on investment.

What you need to know

*“Technology and its implications for national security have risen to the top of many countries’ anxieties when it comes to their willingness to allow inward investments. Some, such as the U.S., are more concerned than others, and whilst it is not possible to summarise a consistent attitude across countries, concerns mostly relate to investments by Chinese buyers including state-owned players. What is clear is that companies taking over any target with a hi-tech dimension can expect their investments to be closely scrutinised. Ultimately, investors will have to consider the **implications of new and strengthened regimes at the planning stage** and assess how best to manage timing and other implications as a result of increased uncertainty and complexity.”*

Christian Ahlborn



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The implications of new technology are also having a greater bearing on authorities' interest in and propensity to review proposed mergers. For example, agencies are looking at the extent to which control over data can potentially harm competition. When approving the recent merger between Apple and Shazam, EU Commissioner Margrethe Vestager noted: *"Data is key in the digital economy. We must therefore carefully review transactions which lead to the acquisition of important sets of data, including commercially sensitive ones, to ensure they do not restrict competition."* Meanwhile, the Japan Fair Trade Commission is reviewing its merger guidelines in order to clarify how it will assess data accumulation by online platforms – the potential first step in addressing online platform competition concerns.

What agencies are investigating is whether the application of new technology should fall within an existing theory of harm such as stifling innovation or conglomerate effects. However, there continues to be doubt as to how appropriate these theories are in the context of technology markets. This is all the more so because technology markets are fast-moving and dynamic and theories of harm which seem plausible today may be obsolete or become irrelevant as these markets develop. It is therefore important to challenge the regulators' starting position and creatively and productively to think beyond the immediate effects of any merger in the tech sector. For example, in Just Eat/ HungryHouse, the UK CMA was persuaded to assess the market as it would be in the future, as opposed to its traditional approach of focusing on a static snapshot of the market at the time the deal was entered into.

What you need to know

*"Merger control has resulted in more interventions by competition agencies and technology players especially need to be aware of the much more significant levels of regulatory scrutiny. When agencies look at whether mergers are likely to lead to reduced competition, technology is now a consideration of paramount importance. The problem is, **they are still struggling to define if and how innovation is impacted by the different dimensions of technology** and how to assess potential harm in fast-moving and dynamic markets. Our approach is to assist our clients in building a strong team to prepare well, be diligent in assembling the right information for the inevitable requests for information they will receive, present effectively and be ready for a long-haul process."*

Gerwin Van Gerwen



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As many businesses are finding across almost all industries and sectors, new technology in various manifestations can serve them very well. Put another way, those businesses that do not harness the potential for new technology are being left behind. Competition agencies are struggling to keep pace with changing markets, let alone the various applications to which technology is being put, when considering the impact on competition between companies and the protection of consumers.

Just to take a few examples: **Blockchain** technology, which enables direct peer-to-peer transactions to be securely recorded online, may give rise to shared price or cost information between participants who are also competitors or potential competitors. **Data analytics** is becoming an important source of competitive advantage for individual companies, but sharing **Big Data** is open to the charge of collusion. More broadly, the **Internet of Things**, involving links between multiple devices and therefore by definition aggregating data, is yet another area where competition authorities are struggling to keep pace with changing markets.

At issue is whether the existing regulatory frameworks are sufficient to identify and control cartels, and whether regulations need adapting. There is a difference in approach between the U.S., where broadly the authorities believe they have the right regulatory tools, and Europe, where the emerging consensus is that additional / revised rules are required – but these are topics that are being actively considered in most key jurisdictions. In addition to the intense focus on platforms (discussed in the next section of this Outlook piece), agencies in many countries are focussing on the role of Algorithms, examining whether and in which circumstances their use can make it easier for

firms to achieve and sustain collusion without any formal agreement or human interaction. In the UK, the Competition & Markets Authority recently conducted a **study** into pricing algorithms and it has now set up a data science unit to expand its expertise in the digital sector.

Not that all agencies are bewildered by the new technology. Some are themselves harnessing technology to search out potential cartels, including the use of “screens”, an automated detection method that uses large amounts of data to detect cartel behaviour, forensic IT and AI.

What you need to know

*“In general, we are seeing less enforcement by authorities in the cartel space. Whilst this may in part be due to companies being less inclined to apply for leniency – to avoid having to deal with burdensome inconsistent approaches between jurisdictions and the risk of follow-on damages claims – in our experience a key factor is that **more businesses have effective compliance policies** in place which mean they are catching any potential cartel behaviour at an earlier stage. These policies are important and clients are reminded of the importance of having – and properly implementing – a focussed antitrust compliance programme.”*

Doug Tween



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As the world becomes ever more connected, digital platforms – which enable those connections – are increasingly in the enforcers' sights.

In a very recent speech on new technology as a disruptive global force, EU Commissioner Vestager focussed on the key role played by platforms and the importance of ensuring that they deal openly and fairly with their business customers. This was one of the key concerns expressed at a [conference](#) on shaping competition policy in the era of digitisation organised by the EC in mid-January, and it explains the Commission's efforts to pursue cases in this space.

Those efforts have included the *Google* case (in which the company was fined €2.4bn for abusing the power of its search engine to make it hard for rivals to compete with its comparison shopping service) and the ongoing investigation into Amazon's Marketplace, a platform that links sellers and buyers. The Commission has set up a panel of three external advisers to report on the future challenges of digitisation for competition policy, and they will report by the end of March. But in advance of that report, Commissioner Vestager has already indicated a willingness to look at the existing competition rules, "or at least the way we enforce them."

And the Commission is not alone; many other regulators are also scrutinising these issues and pursuing ongoing cases in the areas of digital platforms, data and digitisation (including in France, Germany, the UK, Japan, Australia, India and South Korea). For instance, the Japanese Fair Trade Commission has recently launched a large-scale survey on the business practices of online platforms, and the Australian Competition and Consumer Commission is conducting an enquiry into

digital platforms, recently releasing a [preliminary report](#), with a number of significant preliminary recommendations.

Meanwhile, following increased enforcement against online restrictions, both by the agencies and in the courts, a key area to watch is the review of the EU Vertical Block Exemption Regulation. This exempts certain agreements and practices from the EU's general competition rules and includes specific provisions on online sales restrictions. The current regulation is due to expire in May 2022, and a consultation is expected in the first quarter of 2019, providing an important opportunity for businesses active in this space to influence the shape of the new rules.

What you need to know

*"To a greater or lesser extent all companies these days have a digital dimension to their business. More enforcement activity around online restrictions is to be expected. But companies also have opportunities to engage with regulators and **re-shape the framework of how antitrust law applies to the online world.**"*

Natura Gracia



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