CLIFFORD CHANCE

FINTECH AND COMPETITION LAW

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FINTECH AND COMPETITION LAW

Competition authorities around the world have increased their focus on fintech as part of a broader rise in intervention in financial services and tech markets. Fintech markets have been analysed, deals have been blocked and new responsibilities placed on the largest tech firms. In this extract from a recent Clifford Chance webinar, we assess the risks and opportunities for financial services and fintech firms from new legislation on digital competition and how antitrust authorities have treated mergers.

The connection between competition law and fintech

All major economies have a form of competition law. This typically prohibits cartels and anti-competitive agreements, unless they have a redeeming feature, and prohibits abusing a dominant position. There are also restrictions on mergers. "If you're looking to acquire another company, if you're looking to work together with another company, if you want to access a network, or a platform, or data – competition law will determine the boundaries of what you can or can't do," says Daniel Schwarz, a London-based Senior Associate at Clifford Chance and a Legal Fellow in the Cambridge Centre for Finance Technology and Regulation.

"The rise of the digital economy has changed the dynamic. This is the most interesting time to be in fintech and competition law," says Schwarz. "You have competition in whole new ecosystems such as crypto, competition affecting new technologies such as blockchain, competition between the state and the private sector on the issuing of currency and payment infrastructure, and traditional financial institutions, banks and insurers competing with big tech companies, blurring the regulatory boundaries." In addition, central bank digital currencies will mean that central banks will compete with retail banks for customer deposits.

"When I was at the IMF, I saw that those involved in fintech and financial regulations, are in a different community to those involved in competition law. But you can see parallels. Financial regulations place additional obligations on the biggest firms, on systemically important financial institutions, and competition laws also place additional obligations on the biggest firms, those with dominant positions. You have open banking, to support sharing data held by banks, and now competition authorities are trying to find ways to share data held by tech firms," he says.

Competition law will determine which companies you can buy, how you treat your customers, how you treat your competitors, how you determine access to networks and access to data. It applies to crypto exchanges, to blockchains, to new platforms. This is important for those working in fintech and financial services more broadly.

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> Senior Associate, London

How will the Digital Markets Act affect fintech?

The Digital Markets Act (DMA) is a tool that complements EU and national competition law. With the DMA, the European Commission wants to reign in Big Tech much quicker and more effectively and aims to create a real change in the marketplace. So far, competition law agencies in the EU have mainly imposed fines and prohibited a specific type of abuse or anti-competitive conduct only after the fact on a case-by-case basis, sometimes after lengthy proceedings which often go all the way up to the European Court of Justice.

The DMA, which came into force on 1 November 2022 and will start to apply from 2 May 2023, is widely perceived as a new type of competition regulation and a game changer in establishing contestable markets and fair competition in the digital sector. With the new law, the European Commission will seek to close the perceived enforcement gap under traditional competition law by automatically subjecting gatekeepers to far-reaching ex ante prohibitions and obligations. The mantra under the new DMA is speed and effectiveness.

How will that affect fintechs and the financial sector more generally? The answer is probably two-fold. "In terms of gatekeeper designation, it's hard to see that any fintech or financial institution, even those who are too big to fail, will be part of the first wave of gatekeeper designation decisions due in September 2023," says Michael Dietrich, a Partner in Clifford Chance's Düsseldorf office advising on EU and German competition law with a focus on Tech antitrust. "For now, big banks plus fintechs (at least in the EU) do not yet make Big Tech. But popular apps and networks such as PayPal, WePay, Plaid or Acorns may be next in line. With the increasing convergence between the financial and digital sectors, it will only be a matter of time before platforms, apps and other consumer-facing intermediation services will emerge that are big enough to hit the relevant gatekeeper thresholds," he says. Investment, insurance and banking services, operations relating to pension funds and dealings in futures and options are expressly recognised as financial intermediation services and, hence, constitute core platform services under the DMA.

The second point is that non-gatekeepers are the beneficiaries of the DMA. The obligations and prohibitions applying to gatekeepers can be enforced by third parties, for example, banks and fintechs. "So, if you believe that access to data, networks, platforms or technology would help your business or if you are suffering from tying, self-preferencing, disproportionate T&Cs or adverse default setting, you should take a closer look at the provisions of the DMA," says Dietrich.

US legislation and the impact on fintech

The biggest legislative changes are those affecting transactions. The result of these changes is that transactions are taking longer to process and are more costly to effectuate.

"While not a legislative change per se, as a policy matter, the Federal Trade Commission has temporarily suspended the early termination of the merger control waiting period, meaning that innocuous transactions nonetheless must wait out the 30-day suspensory period," says Tim Cornell, Head of Clifford Chance's US Antitrust practice and a Partner in the Washington, D.C. office.

On 29 December 2022, President Biden signed the Consolidated Appropriations Act of 2023, which makes substantial changes for parties filing notifications required by the Hart-Scott-Rodino Act, especially in terms of fees and disclosures. While some transactions will see a drop in US filing fees, larger deals will see nearly a ten-fold increase to US$2.25 million.

In addition to the fee changes, for parties receiving subsidies from "foreign entities of concern" (including entities controlled by China, Iran, North Korea and Russia, and entities included on the Specially Designated Nationals (SDNs) list), the parties will need to disclose those subsidies. More details on how that requirement will be implemented are forthcoming.

"While our President continues to urge Democrats and Republicans to come together to pass strong bipartisan legislation to hold Big Tech accountable, the likelihood of such legislation seems remote," says Cornell. Congressman David Cicilline, who is a proponent of anti-Big Tech legislation and a founder of the bipartisan Congressional Antitrust Caucus, announced his resignation effective June 2023 and Congressman Thomas Massie was selected to lead the US House of Representatives antitrust subcommittee. Massie is a staunch anti-antitrust enforcement advocate and is likely to create hurdles for any new antitrust legislation and increase scrutiny of the agencies. "At best, we may see the American Innovation and Choice Online Act get passed, which prevents certain online technology companies ("covered platforms") from preferencing their own products," adds Cornell.

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What is the UK doing?

The CMA has already set up a Digital Markets Unit (DMU), looking at competition in digital markets. The government is due to publish new legislation giving the DMU new powers. This will involve designating firms such as Apple and Google as having "Strategic Market Status." These firms will then have to comply with "conduct requirements" on access to data, access to platforms, networks, supporting interoperability, not tying or bundling products together, and not self-preferencing. For example, the CMA has said that, under the new regime, Apple could be required to give access to the NFC chip in iPhones, so that mobile wallet apps or banks can use it to make contactless payments.

"It's different to the EU approach – it's more flexible, more tailored," says Schwarz. "When you combine the CMA's recent experience of investigating tech companies and its new powers for digital markets, in the context of the FCA looking at Big Tech in financial services, it's clear that competition rules are going to have an even bigger impact on fintech and financial services. If you're in a financial services business, whether it's payments, lending, insurance, and you want access to more data, access to networks, want to create apps that can do more, the new competition regime could be a way to achieve that."

It is also important to remember that even without these new powers, competition authorities and financial regulators have already affected competition in fintech. For example:

- When Facebook tried to lead a consortium setting up Libra, a global stablecoin and payments infrastructure. The European Commission sent questionnaires to participants on competition law, but it was financial regulators, concerned about monetary sovereignty and financial stability, that blocked it.
- When Facebook tried to launch WhatsApp Pay in Brazil, it was not just the competition authority that blocked it, it was also the central bank

How have the US authorities approached tech and fintech mergers?

"US antitrust agencies have touted an increased enforcement effort aimed at addressing what they deem as decades of less-than-adequate enforcement. Technology and financial institutions are particular focal points for the US antitrust agencies, and not surprisingly the intersection of the two – fintech – is also on the radar," says Cornell.

Visa / Plaid is a good example.

- Visa and Plaid eventually abandoned their planned US$5.3 billion transaction after facing US Department of Justice (DOJ) scrutiny, when the DOJ filed a lawsuit to block the deal.
- The essence of the claim was that Plaid, a successful fintech firm, was poised to challenge Visa's payment platform monopoly in online debit business, and the transaction was Visa's attempt to take out Plaid before it had a chance to succeed.
- The FTC's recent (failed) challenge to Meta's acquisition of Within, in the VR fitness space, shows the agencies' continued interest in challenging acquisitions by incumbents that they perceive to threaten nascent competition.

The FTC's review of the Black Knight / Intercontinental Exchange is another fintech deal to watch. It is likely that the FTC will seek to block the deal.

"Recent agency hires, regulator statements, merger review trends, and anticipated changes in merger review policy all foreshadow that fintech mergers and acquisitions are likely to face even greater examination from antitrust enforcers in 2023," Cornell adds.

For example, the Antitrust Division of the DOJ recently hired Jeremy Kress, a vocal critic of consolidation in the financial sector. Kress was a law professor at the University of Michigan and a former attorney at the Federal Reserve. He has been vocal about increased review of transactions in the financial sector. Indeed, Antitrust Division chief Jonathan Kanter cited a paper by Kress in a

January 2023 speech, stating that: "Underenforcement of antitrust laws has led to competition challenges across our economy" and naming "financial services" as a "massively important" sector where "concentration has grown." The increased scrutiny of bank mergers being advocated by many in the Biden administration is likely to bleed into the fintech space.

What is the UK's approach to mergers?

In the UK, the CMA did not block the Visa / Plaid merger as the market characteristics and regulatory environment were different to the US, but the CMA has been very interventionist and has been closely scrutinising fintech deals.

At one stage, 20% of the CMA's phase 2 investigations were into fintech deals. For example, a merger between crowdfunding platforms, Crowdcube and Seedrs, was abandoned when it was clear it was going to be blocked. "I don't want to be too negative, lots of fintech M&A deals go ahead without any competition issues, but it needs to be thought about and thought about early on," says Schwarz. "One of the things the CMA looked at in recent fintech investigations was the internal documents of the parties to get a sense of how they see the markets and therefore whether the merger could harm competition.

In recent fintech deals, the CMA also looked at the way that the valuation was calculated, to make sure that the value to the acquirer is not attributable to the removal of a future competitor.

The EU's and Germany's approach to mergers

In the EU and in Germany, mergers involving data and technology tend to be closely scrutinised by the European Commission and national regulators. Not surprisingly, this is also the case in transactions involving fintech and Big Tech. One example is the recent acquisition of Vipps and Mobile Pay by a consortium of Danish and Norwegian banks. Though the parties finally obtained clearance after the first phase in October last year, they first had to withdraw the notification. Only after Finnish OP Financial Group, provider of the mobile payment app Pivo, decided to drop out, was the case renotified and cleared, since Pivo will continue to compete with the apps of the consolidated entity.

In the EU, we have also seen an important policy change concerning the application of Art. 22 EUMR. This was created to allow Member States with no merger control rules to request the European Commission to examine a case, provided that the concentration affects trade between Member States and threatens to significantly affect competition within the territory of the Member State making the request. The European Commission has always strongly discouraged requests for referrals where a national authority did not have jurisdiction because the merger was not caught under its own national merger control rules.

In March 2021, the European Commission adopted a new approach to Art. 22 requests. It clarified that it would accept, and in fact actively encourage, Member State referrals even though they fall below national merger control thresholds. "What sounds very technical is a considerable expansion of the EC's merger control jurisdiction. The European Commission justifies the policy shift by saying that it also wants to catch mergers that threaten nascent competition, so-called "killer acquisitions," without getting swamped with a huge number of additional notifications," says Dietrich.

The most prominent example is the Illumina / Grail case. The merger between the two US biotech companies, which manufacture systems for genetic analysis and cancer screening tests, did not have an EU dimension nor did it reach the relevant national thresholds anywhere in the EU. However, the European Commission took the position that the requirements of Art. 22 were fulfilled and invited Member States to submit a referral request. France decided to refer the case and, in turn, the European Commission informed the parties that it would review the case. Illumina, supported by Grail, appealed, but in July 2022 the EU's General Court upheld the new referral policy.

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"The new approach under Art. 22 obviously makes the merger control process and strategies for implementation much less predictable and more complex," Dietrich says. "And that's not the end of the story. Under the DMA, gatekeepers must inform the EU Commission or relevant national authorities about a proposed merger in the digital sector, for example a combination with a fintech, prior to implementation. This transparency regardless of any notification obligations provides the European Commission with the opportunity to inform national competition authorities and ask them to make a referral request like in the Ilumina / Grail case. The combination of heightened transparency under the DMA with the policy shift under Art. 22 will further tighten the net to catch "killer acquisitions" in the digital sector. But this comes at the cost of legal certainty and predictability for parties involved in cross-border transactions."

Considerations for banks and fintechs when setting up new platforms

- Firstly, you need to make sure that you do not share competitively sensitive information, both in your discussions and the new platform itself. If you're setting up a blockchain, what information is being shared on the blockchain? Sometimes you can use cryptography to ensure that participants cannot view competitively sensitive information.
- Secondly, you should make sure that those who are not part of the platform are not unfairly excluded if it gains a significant market position. If it's a network or a platform – what are the membership criteria and access terms? If you're setting up a blockchain, is it permissioned or permissionless?
- Thirdly, make sure the platform does not operate in an anti-competitive way. For payment schemes competition authorities often look at the fee structure or usage requirements. If you're setting something up, you often want to incentivise membership and to incentivise its use, but concerns can be raised by competition authorities if it has a significant market position and the terms make it harder for others to compete.

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