Tech Legal Outlook 2020 – Mid-Year Update
Catalyst for change
The rapid outbreak of Covid-19 and the accompanying lockdown measures have dramatically changed life as we know it and transformed the business outlook for 2020 and beyond. The crisis has provided a catalyst for change, with technology and data more critical than ever.

The role of technology
A striking feature of lockdown has been the need for a sudden shift to living and working online, and our continuing dependency on digital services for everything from healthcare to groceries, education to entertainment. The crisis has forced a change in behaviour and in some cases, required a change in law to facilitate new arrangements, protect national interests at a time of crisis, or to support those suffering financially.

The new normal
The “new normal” presents an evolving landscape with opportunities and challenges for the tech sector. Countries are emerging from lockdown measures, employees are returning to work and there continues to be the prospect of future outbreaks. By 8 June 2020 U.S. stocks, led by tech companies, had recouped losses from the lows of March. In the following week, global stocks began to fall after a rise in new Covid-19 cases in the U.S. and China. Big U.S. and Chinese tech companies have out-performed the market. However, growth across the wider tech sector has faltered and many organisations have experienced disruption and difficulties. Economic recovery is unequal and unpredictable.

Challenges ahead
Organisations will continue to grapple with the new normal for an extended period of time: overcoming new challenges where they seek to raise funds or make investments; protecting their innovation and intellectual property; adapting to a changing legal and regulatory environment; navigating an employment minefield; responding to significant changes to supply and demand; and addressing increased risks such as cyber threats. This presents a number of risks and legal issues for organisations to navigate.

Seven key trends
In this publication, we explore seven of the key trends likely to shape the technology sector in 2020 and beyond. Many of the trends originated before the pandemic: digital technologies have been transforming sectors, cyber-risk has been increasing, governments have been increasingly protectionist in their approach to foreign investment and increasingly seeking to regulate the digital economy. What is different is the pace of change.

Commentators suggest we have achieved in months what would otherwise have taken 5-10 years. Further, there is likely to be a change in political, regulatory and social attitudes as people come to terms with the pandemic, the gathering momentum of the #blacklivesmatter movement and the evolving landscape of the new normal.
Developments in Venture Capital

Q1 20 global VC investments were significantly down against Q1 2019 (total number of deals down 20% and total deal value down 9%) and that trend has continued into Q2 against Q2 2019 (total number of deals down 23% and total deal value down 10%). VCs have understandably been focused on ensuring the health of portfolio companies, with further rounds being required to fund certain businesses through the expected crisis duration (with down-rounds starting to appear where business models of portfolio companies have been affected by the crisis, e.g. Monzo).

Deals are still getting done though and we have seen fund raises by the likes of Lilium and Cazoo in Europe (although both of those deals were in the pipeline prior to the lockdown) and Lendingkart (a virtual lender based in India) and Halobloc (an Indonesian virtual consultation app) in Asia. Those sectors benefiting from Covid-19 effects (e.g. certain bio-techs, telemedicine, remote working aids) have also been able to attract new money and VC funds have plenty of dry powder to service these opportunities.

2020 will though likely provide something of a reality check for some of the early-stage companies that are reliant on VCs to meet cash needs. Some may find it difficult to secure the necessary funds and failure rates are expected to increase (even for some with otherwise sound business models). For others, funding terms (including valuations) are generally becoming more investor-friendly (as happened after the Global Financial Crisis) and processes less company-driven as fear of missing out recedes.

Tech acquisitions

It is a varied story across different parts of the sector but, overall, M&A activity has continued in the sector and we expect to see increasing activity as the year progresses.

While some of U.S. Big Tech were initially impacted by reduced advertising revenues, all of FAMGA continue to generate substantial amounts of cash and are now trading above pre-crisis levels. With more than $560bn of cash on their balance sheets, we have already seen the major U.S. players starting to make acquisitions as prices moderate and liquidity issues start to bite (e.g. Amazon's play for self-driving vehicle start-up Zoox).

There remain also certain strategic imperatives for U.S. Big Tech and tech investors, for example, the ongoing battle for dominance of digital infrastructure and payment systems in Asia. The major Chinese tech companies such as Alibaba and Tencent are already embedded in the Asian payments infrastructure, and together with Huawei are seeking to rollout cloud and data centre capacity to serve populous markets demanding digital transformation services. In response we have seen Facebook's recent investments in GoPay and Jio Platforms and Google and Microsoft's data centre activity in Asia.

Major Chinese tech companies have similarly performed strongly despite the crisis and China was obviously one of the first countries to emerge from lockdown. We are likely to see these companies and other Chinese players target Europe, other parts of Asia and Latin America in the continued hunt for new markets and product areas, as was seen with Tencent's investment into Afterpay. However, governments have already tightened foreign investment controls relating to technology (see Section 2) and we expect the regulatory response will show an increased level of protectionism in many parts of the sector (particularly for data-heavy businesses or those perceived to be developing critical technologies). At the same time, merger control authorities will continue to increase their guard against killer acquisitions.

Some start-ups (if cash rich) may see an opportunity for consolidation if competitors or companies in adjacent business areas are facing distress (Revolut, for example, has indicated it will look for acquisition targets during the crisis).

Major corporates are also starting to look at opportunities to acquire technology and tech talent to assist with response to disruption in their markets (e.g. Walmart’s acquisition of CareZone and Verizon’s acquisition of Blue Jeans Network). These acquisitions may include technology-related suppliers that are facing general liquidity issues.

While on average listed technology stocks have effectively regained any losses since Covid-19 started to impact the market, prices of a number of key verticals within the sector remain dampened. Private equity funds and corporates will therefore look for value in the listed company space where pricing remains depressed due to uncertainties around post-Covid-19 trading.

A key area of activity for acquisitions is in the digital infrastructure sub-sector. Strong revenue businesses such as telecom tower companies, data centres and fibre businesses continue to attract attention from major corporates and pension funds (e.g. Vantage Data Centres’ acquisition (backed by Digital Colony and PSP) of Next Generation Data, the largest data centre in Europe).

With the crisis emphasising the importance of this critical technology infrastructure, we see activity remaining strong throughout the year.

Government funding measures

Governments all over the world have been responding to the Covid-19 crisis with a wide range of support measures designed to keep corporates and businesses afloat during the immediate impact of the crisis. For most developed economies, technology businesses are now a key employer and revenue generator making support for start-ups high on the list of focus areas.

These funding measures are unique to each jurisdiction and governments have taken many different approaches with varying eligibility criteria and exclusions. As we emerge from lockdown, the effect of increased debt levels on tech companies could start to create a further wave of M&A and fund-raising activity.

The lockdown has produced some real winners and, as with every down-turn, there is a flight to quality.

Stuart Bedford
- Tech Sector Corporate Partner, London

U.S. – China tech rivalry has intensified, with U.S. and Chinese companies competing for influence in South East Asia through strategic investments.

Niranjan Arasaratnam
- Tech Sector Corporate Partner, Singapore
Foreign direct investment control and deglobalisation

The rapidly changing regulatory environment creates risks and uncertainty for investors considering cross-border investments. Going forward, we expect investments in the technology space to be subject to close scrutiny.

A paradigm shift

There has been a paradigm shift in the scope and intensity of regulatory scrutiny of transactions involving FDI in recent years. This global trend has accelerated due to the impact of Covid-19, which has heightened concerns over opportunistic acquisitions of strategic assets and “home grown” local champions.

The impact of expanding foreign investment scrutiny has been particularly pronounced in the tech sector. Technology, data, and communication infrastructure are all increasingly now perceived as central to the national interest and industrial policy, against the backdrop of a new global “technology race”.

The Foreign Investment Risk Review Modernization Act (FIRRMA) recently introduced a mandatory pre-closing notification requirement with the Committee on Foreign Investment in the U.S. (CFIUS) for certain investments in companies involved with critical technology, critical infrastructure or sensitive personal data.

Several governments have also adopted measures outside of formal legal frameworks to scrutinise FDI.

Individual EU Member States: the UK, France, Germany, Spain and Italy have strengthened their rules as a result of their new screening regulations and/or Covid-19 to include additional technology sectors.

Lowering of procedural thresholds of screening regimes

Procedural thresholds have been lowered to capture a wider range of investments, exemplified by recent reforms in France, Germany, Italy and the UK in Europe. For example, in Germany a new lower FDI screening threshold for transactions involving 'critical infrastructure', came into effect in June (10% of a company’s voting rights as opposed to the general 25% threshold); while in the UK the Government is intending to lower the jurisdictional thresholds for public interest interventions for technology sectors.

Similarly, Australia and New Zealand have suspended asset value thresholds during the pandemic to capture all covered transactions regardless of dollar value. These reforms may have a disproportionate impact on the tech sector by capturing investments in smaller start-ups.

Increasing intervention levels under screening regimes

Regulatory authorities have also taken an increasingly interventionist approach to transactions involving tech platforms, which has the potential to impact on a broad range of tech companies. In addition to traditionally sensitive technologies such as semiconductors, concerns increasingly arise in consumer technology areas where the national security nexus is less obvious. For instance, concerns relating to the use of customer data are an increasing focus in both the EU and U.S. (as evidenced by recent CFIUS cases involving platforms such as PatientsLikeMe, Grindr and StayNTouch).

Use of more overt political measures to scrutinise FDI

Several governments have also adopted measures outside of formal legal frameworks governments to scrutinise FDI.

EU Commissioner Margrethe Vestager, responsible for competition and the digital sector, recently urged EU Member States to acquire stakes in European companies to prevent foreign takeovers if necessary. This approach has already been adopted in Germany, with the German Government investing in a strategic stake in 50Hertz (the German high-voltage energy network) to fend off investment from China’s State Grid in 2019.

Similarly, the UK Government has previously sought to obtain commitments from overseas acquirers of sensitive UK companies under the Takeover Code rules, to mitigate public interest and/or political concerns where a transaction does not qualify for formal review under the UK’s public interest regime (see, for example, SoftBank / ARM).

Response to Covid-19

Finally, we have seen far-reaching proposals to limit FDI in the light of Covid-19. In the U.S., the chair of the House Judiciary’s antitrust subcommittee recently proposed a temporary merger ban, while senior European politicians have mooted a similar ban on acquisitions of European firms by Chinese investors. Indeed, the European Commission has just published a White Paper proposing a new bloc-level review of acquisitions of EU companies by foreign acquirers backed by subsidies; a move widely perceived as a response to concerns that Chinese and other foreign investors are acquiring European champions with cutting edge technologies.

Read more: The European Commission canvasses new broad powers to neutralise market distortions from foreign subsidies (June 2020)

 Expansion of screening regimes to include new tech sectors

The scrutiny of FDI in the tech sector arises in the context of a global expansion of foreign investment controls, with the introduction of new regimes and extension of existing ones:

United States: The Foreign Investment Risk Review Modernization Act (FIRRMA) recently introduced a mandatory pre-closing notification requirement with the Committee on Foreign Investment in the U.S. (CFIUS) for certain investments in companies involved with critical technology, critical infrastructure or sensitive personal data.

European Union: The EU will introduce a screening framework from October 2020 which targets inter alia critical and strategic technologies, data and access to sensitive information. This was bolstered by guidelines issued in March 2020, which urged greater vigilance in light of Covid-19.

Read more on Foreign Investment Control at Linklaters and access our Thresholds for Key Jurisdictions guide (May 2020)

Global tensions and Covid-19 have proven to be a powerful catalyst for ever stronger foreign investment control in the tech sector.

Christian Ahlborn
Tech Sector Leader, Competition Partner, London
The Covid-19 pandemic has presented unforeseen and unprecedented challenges for organisations from an employment perspective. While the most tech-savvy and experienced in remote working have been some of the best able to adapt to new working practices, challenges have emerged in other areas.

Returning to the workplace
As countries around the globe have emerged from lockdown at different rates and in different ways, employers across all sectors are having to contemplate how to return their workforces back to the workplace safely, and what a “new normal” might look like for their workplaces in the future. The relationship of trust and confidence between an employer and an employee has become more critical for employers navigating their way through this uniquely complicated landscape.

It is arguably more important now, than ever before, for employers to have meaningful engagement with their workforce and good industrial relations, and to remain flexible and open to review and change plans at short notice. More fundamentally though, employers, with Big Tech names like Twitter and Facebook leading the way, are already reconsidering their existing working arrangements to cater for permanent remote working models, provide more flexibility for their workforce, and attract and retain a more diversified talent pool.

Workforce restructuring
Like other sectors, some tech businesses are having to consider restructuring their workforces in light of lessons learned or the longer-term uncertainties arising from the pandemic and changes to their business models, with some already implementing and planning for redundancies and lay-offs in the short to medium term once the various government support measures come to an end.

The diversity challenge
Diversity remains one of the biggest challenges across the sector. The lack of diversity in tech affects not only workplace cultures, employment models and future talent pools, but also the goods and services the industry creates.

Inequalities and the lack of diversity have been brought to the fore by the pandemic and the global anti-racism protests following the death of George Floyd in the U.S. Both have highlighted that certain groups of workers are more susceptible and at risk than others. Legislators and the judiciary across the globe are actively working to tackle these inequalities too, from the U.S. Supreme Court’s landmark ruling barring discrimination against LGBT workers to Japan’s new law aimed at preventing harassment in the workplace.

For employees with disabilities or associated disabilities, from the BAME community, or those of specific ages, as well as women and pregnant women – employers must consider the impact on these groups and whether adjustments are required as workforces re-open and organisations plan for their future of work.

Whistleblowing
As workforces slowly return to the workplace, we anticipate whistleblowing and speak up/listen up arrangements to come under closer scrutiny. We are already seeing increasing reports of workers being subjected to a detriment for raising concerns relating to health and safety. It is vital that employers maintain their reporting channels for speaking up, not only in compliance with local laws and obligations, but also as good governance to assist businesses with identifying areas of risk. Employers will want their people on the ground to be their eyes and ears so they can learn from experiences and make changes swiftly.

Leadership and executive pay
Employers across all sectors are already having to take difficult decisions relating to the future of their workforces and their salaries – and tech sector organisations are no exception. Whilst the impact is being felt across the wider workforce, attention is being focused at executive pay and how individuals leading organisations are being impacted financially by the crisis.

Impact on the gig economy
The status of employees, workers and independent contractors in the gig economy remains an ongoing issue across many jurisdictions, as courts and tribunals continue to grapple with the application of their existing legal frameworks. The crisis has intensified the call for gig economy workers to be provided with the same or equivalent safeguards and protections afforded to employees and other workers, including those relating to health and safety, as well as basic employment rights such as sick leave.

Throughout 2020 and beyond, we continue to expect further developments, consultations and potential legislative reform – potentially posing some of the most significant changes to employment laws for some jurisdictions in recent times.

Impact for the tech sector
For many businesses, the pandemic has accelerated the adjustment to new ways of working and forced many companies to stress test their agile and remote working arrangements. Broadly, the tech sector has responded well to these changes, but those that were previously sceptical of such ways of working may have a harder time explaining why employees have to be present in the workplace when they can work remotely or flexibly.

New opportunities have also arisen for food delivery platforms, e-commerce sites, and those developing apps and new tech to assist jurisdictions with managing the pandemic. Crises also provide employers with an opportunity in terms of workplace culture, and how employers have reacted to the evolving pandemic and supported their workforces will impact their workplace culture in the long-term.

In this new and complex world of work, maintaining effective communication, driving resilience and adaptability, as well as sustaining employee engagement and trust, has become the ultimate test, and differentiator, of today’s leadership.

Laure de Panafieu
Asia Head of Employment and Incentives, Partner, Singapore
As reliance on technology and data has increased dramatically through the crisis, some tension has emerged between the increased use of data and the restrictions on data analysis and disclosure that may be imposed by privacy laws, posing a key question: “Have we reached peak privacy?”

**Tech in the spotlight – have we reached “peak privacy”?**

**Strong spotlight on Tech**
As countries across the globe locked down, there was an acceleration in the implementation of new technology and digital solutions to predict and manage the virus, enable remote working, and deliver a broad range of services touching on almost every aspect of our lives.

This increasing use of tech and data-enabled services has brought a strong spotlight on tech which is a comparatively lightly regulated industry. In particular, there is scrutiny of major technology companies which are considered as part of nations’ critical infrastructure due to their huge communication networks and strength in data management and logistics (read more in Section 6).

**Data collection**
Another aspect of our increasing reliance on data is the way governments and private companies are collecting data as part of measures, such as contact tracing, to monitor and contain the outbreak of pandemics. Varying approaches are being taken across Europe, highlighting the difficulty in reaching consensus on the best approach.

The cultural divide between East and West is also a complexity – the apparent success of China and South Korea in containing the virus through rigorous contact tracing may advocate a more nuanced approach to privacy restrictions, whilst at the same time, the implications of increasing surveillance of citizens could be perceived as dangerous.

In the West, there are some concerns based on the past experience of terrorism legislation that increasing surveillance with tracking to contain the virus may be an irreversible change in the balance between surveillance and privacy.

**Reconciling human rights with economic realities**
It will be for countries and corporates to determine how to reconcile pre-existing rules regarding human rights (such as privacy and freedom of movement) with the decisions made in “digital crisis mode” and the resulting focus on the need to protect health and welfare, and the harsh economic realities of doing business in the new world.

We are seeing different approaches by regulators to the crisis. In financial services, we have seen a relaxation of some compliance requirements as regulators grant forbearance measures to financial firms in crisis. We have also seen data privacy regulators taking a more pragmatic approach in their guidance around data protection rules that could affect the ability of governments and businesses to deal with the crisis. Privacy regulators are concerned not to be seen to be standing in the way of necessary public health measures.

**The need to adapt to changing attitudes**
Firms and regulators may need to pivot to ensure they are sufficiently aligned with popular sentiment as peoples’ priorities shift from physical to economic survival. While greater surveillance may be tolerated during a health crisis, attitudes may change once the immediate crisis has passed.

Trust will continue to be a key factor as attitudes to corporates are likely to change depending on how they approached the crisis (including the treatment of workers and the delivery of services).

Those companies who can adapt successfully as attitudes change may benefit from the opportunities offered by the expediting of digital strategies, while those regulators who are sufficiently nimble to adapt their strategies to these rapidly changing times are more likely to remain effective and influential in the years to come.


Subscribe to our DigiLinks blog for data-related legal updates.

Organisations will need to navigate changing political, regulatory and social attitudes to privacy across the globe.

Julian Cunningham-Day
Tech Sector Leader and TMT Partner, London
Curated data, analytics and artificial intelligence (AI) have been driving innovation across many sectors. The Covid-19 outbreak has triggered an acceleration in its use in the development of digital health, from modelling the outbreak and predicting patient demand, to drug development and diagnosis. Intellectual property law will need to adapt to protect investment in developments and enable innovation.

**Protection of data as an asset**

Data has been and remains a key driver for growth. It is the fundamental basis that empowers AI. With more and more data being gathered and AI allowing more sophisticated analysis of large data volumes, the options for data-based business models and commercialising data are increasing. Digital services are often provided in exchange for data rather than a service fee. It is therefore no surprise that, as the importance of data as the “new currency” increases, so do the associated legal issues.

**Rights in data**

Legal protection for “data currency” has not yet followed this development. The law offers little protection to data as an asset unless steps are taken to protect it as confidential information. In the European Union, the latest addition to the legal toolbox for data dates back to the mid-1990s when EU Directive 96/9/EC introduced a sui generis right for databases. This right protects the investment required to collate existing data in a database. It does not, however, protect the creation of data and the data itself.

At the end of the last century, when the investment protection for databases was introduced, the internet was only about to surface. The compilation of data was cumbersome and associated with significant cost. With automation improving and reducing the costs of data compilation, this is less relevant in today’s world. Awarding protection for the investment in collating data no longer reflects the commercial realities. The current focus on digitalisation and AI may therefore revive the discussion on affording protection to data as such, which has been less prevalent recently.

**Data powering AI and the patentability issue**

From a development perspective, the current lack of protection of data is positive and has enabled data to be widely used to make inventions with the help of AI. The speed at which AI can analyse data enables research and development that drives increasing numbers of scientific breakthroughs. Machine learning, robotics, expert systems and symbolic learning generate output that a person of “normal skill in the art” would not have been able to make.

From a legal perspective, this challenges the long-established principles on which patents are granted. If AI makes inventions that a human skilled in the relevant field would not have made, the thresholds for awarding monopoly rights to incentivise research and development need to be rethought.

**AI-assisted research in healthcare**

AI-assisted research is of increasing importance in the healthcare sector to repurpose known drugs to treat other indications. Five to seven years can be saved when repurposing a known drug compared to the development of a blockbuster drug. The risk of failure is much lower, too. It is therefore no surprise that 25% of the pharmaceutical industry’s revenue is generated with repurposed drugs. They are also expected to play a significant role in treating Covid-19. Such low barriers to market entry have triggered extensive AI-assisted research for new uses of known substances.

Data is mapped to find connections between drugs and diseases. Algorithms are implemented to identify unknown relationships and interactions. Repurposing companies use AI to monitor drug pipelines for drugs that have disappeared, drugs that were approved but are no longer manufactured and drugs that were abandoned in the process of their development. More often it is not the pharma that identifies a second use but a third-party expert in AI-assisted research.

**Protecting AI inventions**

This use of AI opens a Pandora’s box of legal issues that depend on the specifics of the technology used: Was the specific AI better than the usual AI? Does the AI merely implement a specific search task or is deep learning part of it? Today, human inventors behind the AI are still easy to identify. It is, however, merely a matter of time until the machine will by-pass its creators and develop its own process for more efficient research and development. This will lead to complex questions of attributing inventorship or even awarding patent protection at all.

Legislators, patent offices, and courts will need to strike a careful and innovation-friendly balance between recognising the use of AI in inventive processes and awarding protection for it while at the same time not raising the bar too high, in particular for inventions that are not or only minimally based on AI.

**The increasing role of AI in scientific breakthroughs is challenging the principles on which patents are granted.**

Julia Schönbohm
IP Partner, Germany
Regulation of Big Tech

The pandemic has accelerated the use of technology and data, and increased dependency on major tech companies. These tech companies have out-performed the market during the crisis and they are again in the regulatory spotlight. As a result, we expect to see further moves to regulate the digital economy in coming months.

Increasing regulatory scrutiny

While Covid-19 has temporarily halted the UK Information Commissioner’s investigation into privacy and AdTech, it seems to have done little to slow down the antitrust authorities, who are continuing to pro-actively pursue new and existing cases.

The European Commission has launched two new investigations into Apple in relation to: the terms and conditions of its app store; and its rules on how Apple Pay should be used in merchants’ apps and websites. Its investigation into Amazon – Marketplace is expected to escalate in the coming months and a number of preliminary probes into Facebook and Google remain open.

In the U.S., there is also increasing scrutiny; the federal and state antitrust enforcers have opened probes into the major U.S. tech companies in the last year, while a Congressional antitrust sub-committee has been holding high-profile public hearings on conduct in the sector.

Regulating the digital economy

However, the most significant developments over the next year may stem from increased legislative efforts to regulate the digital economy. The GDPR marked a watershed in efforts to regulate data not just in the EU but globally; the so-called “Brussels Effect” resulting in (perhaps begrudging) widespread adoption of a higher standard of general privacy compliance, with jurisdictions as far afield as Thailand and India among those taking or expected to take the European rules as a model for their own markets in 2020.

Its impact has not been lost on policymakers, with the next year expected to see the initiation of even more sweeping regulatory reform that will directly impact tech companies:

- **At the EU level**, at the start of June the EU Commission launched a public consultation on the Digital Services Act and a ‘new competition tool’ that would allow it to initiate market investigations into perceived structural competition problems, with the ability to impose market-wide remedies on companies. Also, the long-awaited ePrivacy Regulation remains on the horizon. The former is already tagged as a legislative “bulldozer”, covering topics such as online platforms’ responsibility for content as well as new antitrust powers for the European Commission.

- **In the UK**, the CMA’s final report from its market study into online platforms and digital advertising was published in July, recommending that the UK government establish a new regulatory regime for online platforms. The report includes a wide range of politically controversial proposals, including the potential breakup of Google and Facebook, to address a slew of competition concerns in relation to the AdTech industry. The autumn should also bring news of the UK government’s plan for its new online harms regime, with legislation said to follow soon afterwards.

- **Finally, U.S.** regulatory developments are likely to turn heavily on the outcome of the elections in November, but may ultimately be the most momentous given Big Tech’s centre of gravity on the U.S. West Coast.

Opening new regulatory fronts

These legislative efforts are seeking in part to embed the lessons of the last few years, as well as opening new regulatory fronts. For example, the EU’s recent Platform – to – Business Regulation addresses how online platforms treat businesses operating on their platforms – a concern which has run through the European Commission’s antitrust investigations over the last decade.

The EU is also consulting on proposals to impose wide-ranging new rules on online platforms deemed to hold significant market power. Germany will enact similar rules in the Autumn and the UK is actively doing likewise. This would mark a significant escalation of the intensity of regulation and draws parallels with the European Commission’s “access” regime imposed on telecommunications markets in the early 2000s.

Indeed, Europe is not alone with the Japanese Diet having passed the Digital Platform Transparency Act at the end of May, although aiming to compel platform operators to deal with business users and consumers with greater fairness and transparency, this new legislation has drawn criticism from industry leaders (including the CEO of e-commerce giant Rakuten) who complain that it will have an adverse effect on technology innovation in Japan.

Harmonising competing policy objectives

To regulate Big Tech effectively, legislation will need to harmonise competing policy objectives, notably privacy and anti-trust law, encouraging competition while also offering individuals sufficient protection in their interactions with digital markets. The next decade may well be spent examining, shaping, and implementing the legislative efforts of the next year.

Read more: The EU’s Digital Services Act: Difficult choices ahead (June 2020)

Read more: UK’s CMA seeks new regulatory regime to take on Google and Facebook (July 2020)

Christian Ahlborn
Tech Sector Leader, Competition Partner, London
The lockdown measures implemented during the Covid-19 crisis have provided an extended proof of concept for a remote living and working model. This has accelerated digitalisation, with some commentators predicting that, in the next 18 months, we may see digital transformation that would otherwise have taken five to seven years.

Rethinking the business model
To keep businesses going during lockdown, organisations have had to consider and adopt remote working rapidly and at huge scale. Some of these challenges will be ongoing post lockdown. Organisations with business models that have previously involved lots of people working in close proximity have been forced to move to a digital model.

Many believe that this rapid switch to digital processes has “sparked a new mindset,” giving business the enthusiasm and energy to overcome cultural resistance to change. Many organisations have realised, when forced to change, they can very quickly and successfully adapt to technology supported remote working.

We expect continued adoption of digital technologies including, for example, business processes automation, albeit with careful management and remote human oversight. As we spend more time online, the lines between home and work life are blurring. The impacts of this on both employees and employers may be positive and/or negative and remain to be seen.

Impact on financial services
This digital acceleration is being felt keenly in the financial services sector. During lockdown, as banks have closed branches and moved their face-to-face personnel to overloaded telephone support services, reliance on digital banking and digital payments has become fundamental in day to day life. Hygiene issues associated with handling of cash, cards and contact pads has also encouraged a move to contactless payments where available.

Traditional banks are under customer pressure to implement digital solutions for the full range of financial services and are competing with each other and Fintechs in doing so. Artificial intelligence will continue to be a key technology and a pre-requisite for digital services such as call centre bots, account opening procedures and loan automation. Digital identity technologies will also be important as KYC processes increasingly move online.

Rapid digital transformation is also relevant not just for the retail side but also from an institutional perspective. Operating in a highly regulated sector, pre-lockdown, banks would normally only allow trading from a monitored desk or trading floor. To allow traders to work from home, a whole new model has had to be adopted, with significant relaxation of systems and controls. Securities exchanges have also been overcoming the challenges of going paperless and digital workarounds have been achieved to deal with mass virtual signings.

For digital asset native payments companies, the ‘new normal’ arguably is just the norm for them. These kinds of start-ups have an ingrained level of comfort and familiarity with remote working and teaming. Rather than stifle innovation, the pandemic’s increased demand for digital solutions has invigorated these companies and stimulated investors’ interest in them.

The risk is real
New digital models can lead to a weakening of usual systems and controls, creating heightened compliance, operational and cyber risks – a problem both for financial firms and their regulators. Examples include increased opportunity for fraud and cyber attacks (especially phishing), as criminals and state actors exploit the vulnerabilities of large numbers of people working remotely and anxious for information about Covid-19.

In financial services, we have seen a relaxation of some compliance requirements as regulators grant forbearance measures to financial firms in crisis. It’s a mixed bag in terms of how long these measures will apply – some of these have a deadline (which could still be extended), while others are more open-ended.

The role of fintech
With the acceleration of the trend towards digital payments, the pandemic could also help spur the development of Central Bank digital currencies (with particular interest being shown by the UK, France and China). Regulators are acknowledging that Covid-19 “highlights the value of having access to diverse means of payments, and the need for any means of payments to be resilient against a broad range of threats” (Bank of International Settlement).

Fintechs are emerging as the natural solution to the demand for rapid digitalisation. The fintech revolution emerged from the previous global financial crisis, with fintech companies built on a model of agility, flexibility and innovation in the face of uncertainty. Some Fintechs will be facing their own challenges – those without funding or dealing in FX markets, for example. However, for those that can survive the short term and continue to innovate, there will be longer-term opportunities, as digital-only financial services becomes the new norm and a bigger pool of digital customers come online.

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Fintech solutions, from digital payments and AI enabled services to potential new forms of digital currency, are key components of the ‘new normal’ in finance.

Joshua Ashley Klayman
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Read more about the international regulatory response to stablecoins: The FSB outlines recommendations for regulating global stablecoins as Libra issues revised whitepaper.
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