

Linklaters

Tech Legal Outlook 2023

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Introduction

Disruptive forces are shaping the outlook for 2023: geopolitical tensions, climate change, high energy prices, and rapidly increasing interest rates are having a profound impact on the global economy. Tech companies are not immune to such forces, and we have already seen a significant revaluation of the sector. These macro headwinds come at a time of continuing intense regulatory scrutiny of the tech sector and the increasing cost and risk of litigation, particularly class actions.

Yet harnessing technology advances remains a key enabler for businesses to access new opportunities or evolve their operating model. Certain tech verticals will therefore continue to attract significant investment as companies and investors adapt to a new market dynamic and organisations pursue a digital and more sustainable future.

We explore the key global trends in the technology sector that we believe will shape the legal outlook for businesses in 2023 and beyond.

A new market dynamic

Many tech businesses are facing a severely constrained consumer market and fund-raising environment for the first time. Consumer behaviours that drove growth in the pandemic have, in many cases, fallen away as normal business has returned. This has challenged business models that were based on continued growth in consumer demand and cheap money being available to fund growth.

As a result, tech companies are facing real constraints on growth and, in some cases, the viability of their business model. AdTech revenues are under pressure, streamers have seen subscriber numbers fall, some online retailers

have collapsed and crypto has seen a significant fall. However, there will remain strong pockets of activity with consolidation by those with strong balance sheets.

Key areas of investment

We expect certain tech verticals will continue to attract significant investment in 2023, in particular net zero tech (tackling climate change), cyber (supporting operational resilience and addressing security threats), the Internet of Things (providing increased connectivity and the opportunity to drive efficiencies), and biotech (enabling remote monitoring and diagnostics, and AI driven research).

In addition, major tech players are making significant bets around the future of the digital economy and how the metaverse will evolve. An increasing number of corporates are considering a metaverse strategy and the role of digital assets in commerce. In 2023, we expect to see this drive further investment in this emerging part of the sector, and attract interest from regulators seeking to keep pace with tech developments, safeguard consumers, and promote competition.

In the first part of this publication we explore investment in game-changing tech: the role of NFTs in the digital economy; the financing of net zero technologies; the collaborations which are key to scaling innovative net zero tech; and the increasing regulatory scrutiny of tech investments.

Regulating the digital economy

In 2023, we expect to see governments and regulators across the globe continue to intervene to regulate the digital economy across issues ranging from privacy to online harms, and AI to antitrust.

Data is the lifeblood of the digital economy and there is an ever-expanding global framework of regulation for data with tech companies facing increasingly assertive enforcement and litigation. In 2023, we expect businesses with international operations to face increasing compliance requirements as growing concerns regarding privacy, data sovereignty and national security drive the development of national and potentially supranational frameworks seeking to regulate global data flows.

The EU's landmark Digital Markets Act will start to apply from May 2023 and it will bring a new era of regulation for the largest tech companies, part of a broader trend of regulatory initiatives across the globe. Regulators and competition authorities will use these new competition tools as well as traditional competition enforcement to regulate digital markets. Private litigation will also present an ever-greater risk for tech companies as claimant law firms pursue class actions against tech companies, particularly in the US and Europe.

In part 2 of this publication we explore the increasing regulation of the digital economy and highlight some of the most-far reaching developments that will shape the outlook in 2023: global data flows, new competition tools and competition litigation and the rise of class actions.



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1.1 Unlocking value in digital spaces: the role of NFTs

As the digital economy evolves, businesses continue to look to new ways of engaging with customers in a digitally native format, including using NFTs and tokenisation. As new applications and use cases for NFTs emerge, businesses will need to navigate the legal and risk issues to leverage the opportunities NFTs offer.

Value creation

Creating an NFT (non-fungible token) means linking an asset, often in a digital format (eg jpegs, music, or video files) to a unique digital token which can be transferred and traded on NFT marketplaces. The token is “minted” on a public blockchain (usually Ethereum) and represents a digital certificate of ownership for that asset which can be publicly inspected.

There are different structuring techniques deployed in “stapling” an NFT to an underlying asset; in some cases, this is by associating a unique token ID and a URL link to an asset that exists in digital form. The blockchain enables, and allows verification of, transfers of ownership or control of the NFT without a central authority.

NFTs can be linked to legal rights, such as IP rights, with respect to an underlying asset ([read more](#)). NFTs can also be powered by smart contracts, deployed on the same blockchain, to execute those rights automatically, for example, automatic payment of artist royalties in connection with the sale of the NFT.

NFT 2.0

“NFT 2.0” is a progression from the NFT 1.0 structures of simple pixelated images of digital art (e.g. Bored Ape Yacht Club) to high-fidelity 3D animations and complex play-to-earn game mechanics. NFT 2.0 is about ‘smart’ and realistic NFTs for in-game items, music, digital collectibles, tickets, and coupons.

The luxury goods, sports, and gaming industries are leading the way in the early adoption of NFTs. For example, Dolce & Gabbana sold a nine-piece collection of NFTs for \$5.6m which included physical items and their digital versions as NFTs.

NFTs in the metaverse

As more immersive digital spaces emerge, there will be more opportunity for consumers to use their NFTs: space for storing and appreciating NFT art, the catwalk for NFT digital wearables, and the opportunity to extend real-to-digital commerce to digital-to-digital (eg purchasing digital assets with digital currency) and digital-to-real commerce (eg receiving physical goods connected to a digital purchase).

NFTs could also be key to providing digital identity in digital environments. An NFT can link to a customer’s identity, providing a secure login into virtual or real-world experiences which can then be securely tracked with permissions controlled by the customer.

NFTs present opportunities for brands to leverage the evolving capabilities of these digital assets, for example as “next generation” loyalty and rewards cards. Together with digital wallets – which can store both NFTs and the crypto assets used to pay for them, NFTs could help meet the challenge of how to ensure the portability of digital assets across metaverse platforms.

Read more: [Payments in the metaverse](#)

Legal risks

NFTs do not fit neatly into traditional legal frameworks. The anonymous, decentralised, automated, and borderless nature of products, transactions and infrastructure based on public blockchains, raise key legal issues, including:

> **Applicable law and regulation:** What laws will apply to an NFT and where would you claim if things went wrong? When issuing an NFT how do you ensure that you are not subject to securities regulation?

> **Ownership:** When purchasing an NFT how do you ensure that you have bought an asset capable of being owned? How do you enforce your IP/ ownership rights? How do you keep your NFT secure, including when it is held by a third-party marketplace?

> **Rights of action:** Who can you sue if your NFT is stolen from a marketplace? Who is liable if a smart contract goes wrong? Can NFTs be seized or frozen by order or injunction? ([read more](#))

Paying attention to legal risk in NFT ventures should be a key priority in pursuing these new opportunities.

Read more: [IP in the metaverse](#)



We are starting to see the structure of a new digital economy emerge, with many looking to NFTs 2.0 to support the creation and assertion of ownership rights in digital environments such as the metaverse.”

Richard Hay, Capital Markets DSP Counsel, London

1.2 Financing net zero tech

Many different technologies will need to be rapidly developed and scaled if the world is going to achieve the transition to net zero by 2050. They will require significant public and private investment in 2023 and beyond.

Investment needed

Investment will be needed across all stages of technology evolution - from equity financing of deep-tech start-ups producing next generation solutions to high value project financing to develop large scale storage and generation facilities for more established technologies. The sources of finance are diverse with venture capital, private equity, sovereign wealth, and pension funds alongside corporates, banks, multilateral agencies, asset managers, and national governments.

To promote investment, governments around the world are setting policy goals with some committing significant capital. Key examples include the US Inflation Reduction Act, the European Union's €2.5bn investment with five venture capital, private equity and infrastructure funders via the European Investment fund, and the UK's Net Zero Hydrogen Fund. These and many other policies and initiatives are essential to give direction to the investor community and underpin the "bankability" of net zero projects in future.

Financial institutions and corporates are also subject to ever-expanding reporting requirements and stakeholder scrutiny of their disclosures (eg the European Corporate Sustainability Reporting Directive is estimated to catch circa 50,000 companies).

Investment remains resilient

Driven by these factors, investment in climate technology remains relatively resilient. Venture capital investment in early-stage hydrogen technologies exceeded \$2.5bn in 2022, up from circa \$400m in 2020. Investments in carbon capture technologies have more than doubled in value since 2021.

Overall, the level of net zero tech VC investment is down from 2021, reflecting the general market slow down. However, we expect continued strength in fund raising for these technologies into 2023 with pricing holding up well and larger equity cheques from institutional investors as certain technologies start to mature.

Larger scale investments

Europe has around 40 giga-factories at different stages of development. These have attracted and will need to continue to attract significant levels of institutional finance. Northvolt, for example, has raised more than \$3bn of debt and equity financing including a \$1.6bn project financing for the construction of its first giga-factory.

Investors had to find ways to balance a range of risks in this evolving area covering the facility's complex supply chain, construction of the facility and certainty of offtake, so they

could build a bankable business case. With the risks and challenges of such projects becoming better understood, we see continued interest from the banks, funds, and multilaterals for many other projects in the pipeline.

In the UK, HyNet is being developed by the Vertex Hydrogen joint venture. Vertex is a "blue" hydrogen facility where carbon neutrality is achieved through an integral carbon capture and storage capability. Hydrogen presents a particular challenge to financiers given the need to build both supply and demand for the energy source in parallel.

The UK Government has outlined a regime to secure appropriate levels of return for these critical initial projects, dealing with the volume and pricing risk inherent in such a nascent market. Given the commitments by more than 30 countries around hydrogen as a major energy source, the hydrogen-facility funding environment will remain a key focus for investors.

EV Charging infrastructure build out will also need to continue as the EV base increases across Europe. With the Allego-Carrefour financing in 2020 we saw the first-of-a-kind financing that sought to give comfort to the lenders around the commercial/traffic risk in a nascent industry. With the demand for charging points continuing to rise and increased levels of traffic data now available, we expect a broader universe of institutional investors involved in financing the roll-out of projects across Europe and the re-financing of the early projects.

Uncertainty in the interest rate environment will inevitably make financing more challenging for certain of the net zero projects/businesses through 2023 and we have

already seen some high-profile companies facing liquidity issues. Overall though, given the stated policy goals and the impact of the evolving reporting regimes, we expect net zero technology investment and M&A to remain strong source of deal flow through 2023 and beyond.

Read more: [Net Zero Tech](#)



Achieving net zero will require the widespread evolution of different technologies in parallel, across the world - a systems issue of immense scale and complexity costing tens of trillions of dollars."

Julian Cunningham-Day, TMT Partner, London

Investing in game changing tech

1.3 IP collaborations and scaling net zero tech

To achieve net zero by 2050, trillions of dollars of investment is needed in net zero technologies. Harnessing the intellectual property rights in these technologies is key to enabling the investment and collaborations needed to develop, scale, and deploy these technologies in 2023 and beyond.

The innovators

Ground-breaking innovations in the race to net zero are often the results of years of work by relatively small companies who have developed technologies in promising new areas such as fuel cell technology, methods for storing renewable energy, or processes for manufacturing more efficient batteries. Unlike “pure” tech online businesses, these smaller companies are not able to scale their technology within the walls of their own business but require external use-case validation.

For example:

- > a vehicle battery needs to be shown to be useful in a real-world car operating under driving conditions;
- > a fuel cell is only relevant if there is a use case that benefits from use of a fuel cell as opposed to another energy source;
- > storage solutions for renewable energy are only significant if they can be used at a large commercial scale, rather than in test or demo conditions.

The need for collaboration

This need to demonstrate the efficacy of net zero tech in large scale engineering and commercial environments drives a need for tech innovators to collaborate with large industrial engineering companies, global car manufacturers and other conglomerates who can provide the use case for which the net zero tech provides benefits; and it’s often critical to prove the use case quickly before an alternative technology becomes a more accepted solution for that particular market niche.

From an IP perspective, a collaboration of this type drives complex planning and decisions around how to license the relevant IP into the collaboration (typically a contractual or corporate joint venture entity), how to control access to the “crown jewel” IP of the smaller innovator entity and how to deal with ownership and licensing of new developments that arise from the collaboration.

Protecting IP

Innovators also need to think carefully about how they protect their IP. Patents offer strong protection so far as the legal framework is concerned. They grant monopoly rights and the ability to sue third parties using the protected technology without consent. However patents, by their nature, involve disclosing the invention to the wider world and it can be difficult to stop third parties gaining an advantage from that information even if they do not go so far as to infringe the patent. So in this space many innovators decide to keep some inventions secret and then rely on confidentiality and trade secrets laws as opposed to the patent regime.

These highly technical IP issues are important for the larger engineering and commercial side of the collaboration, but they are even more critical for the smaller R&D innovation side of the collaboration. If they get it wrong and lose control of their IP or end up disclosing their know-how to the wider world, their very reason for being comes under threat.

Perhaps for this reason, there is a strong trend in the market for the larger entity to also make a significant investment into the innovation entity when entering into collaborations, thereby aligning more closely the parties’ interests, demonstrating the commitment to the particular technology being provided, and at the same time providing generally more beneficial licensee rights for the investor.

Regulation

The two sides agreeing the terms of the technology and IP collaboration is not the end of the story. With the ever-increasing regulation of technology transfers between different jurisdictions, the parties need to be mindful of the powers of national or regional regulators to insist on certain licensing provisions, to approve certain types of transactions and to retain the power to alter or terminate certain collaboration and licensing agreements in the future.

Looking ahead

In 2023, we expect to see more collaborations across a broad range of net zero tech from the financing of start-ups developing cutting-edge technology to the roll out of more mature tech solutions.

Read more: [Net Zero Tech](#)



IP-heavy collaborations are not straightforward, but they are a critical element on the path to rapidly scaling net zero tech to respond to the urgent needs of the world’s governments, economies and climate.”

Paul Joseph, IP Partner, London

1.4 Regulators circling on investments in future tech

With rapid change forced by digitalisation, energy transition and deglobalisation, companies continue to invest in new technologies to future-proof their business and adjust to the new geopolitical realities. Yet they need to take account of increased governmental scrutiny and regulation and the need for potential filings in almost all transactions.

Overarching regulation

Multinationals are increasingly acquiring minority interests in companies developing and offering technologies and products complementary to their core business. Tech focused funds meanwhile continue to make a range of minority investments across new and often related technologies in sectors from health-tech to clean-tech.

Investors often desire to at least have access to certain information of the target, for example, by obtaining board representation of some sort (from observer seats and supervisory functions to actual management roles).

At the same time, regulators around the world are increasingly focusing on perceived concerns with minority investments ranging from foreign investment in home-grown tech firms through to the effects of minority stakes on competition.

Merger control and foreign direct investment

Transactions involving non-controlling minority stakes are already on the radar of many merger control regimes, such as Brazil, Austria, Germany, or Mexico to name a few. In Germany, for example, even shareholdings of below 25%

can trigger a mandatory filing if additional factors such as information or other governance rights below control level are obtained.

In addition, many countries have significantly expanded the review scope of their foreign investment regimes during the last couple of years. The geopolitical uncertainties are resulting in growing protectionism regarding domestically important industries including technology. Several regimes already have jurisdiction over non-controlling minority acquisitions with very low equity and governance rights.

Even a participation of 10% or less is commonly caught by foreign investment rules in many countries and most prominently in the US, Germany, the UK, Austria, Denmark, France, Italy, Spain, and Japan. Also passive participation, for example through investments by limited partners in fund structures, may trigger a notification, especially if the investor has observer rights.

Moreover, in the US, recent changes have come from the sharpened CFIUS focus on new technologies, including cybersecurity, sensitive personal data, and certain areas of technological leadership (such as microelectronics, AI, biotechnology, quantum computing, climate technologies). Technology investments in the US will therefore be subject to even further scrutiny.

Interlocking directorates

A long-forgotten instrument in US competition law has gained new-found prominence. The Department of Justice's antitrust division has recently enforced Section 8 of the Clayton Act in several cases, prohibiting interlocking directorates between competing companies. Investments often come with board representation. Furthermore, with traditional industrial companies investing heavily in future tech and Big Tech entering and digitalising the "old" industries, companies can become competitors unexpectedly quickly and may then need to constantly re-evaluate board memberships.

While there are further countries with regimes in relation to interlocking directorates in place, such as Canada, Mexico, South Korea, and Japan, in many other countries "traditional" antitrust laws might also require certain safeguards with a view to information exchange if board representation is sought in (potential) rivals.

Foreign subsidies

In addition to the regulatory regimes already applicable, further regulation is already in the pipeline. The EU's foreign subsidies rules are expected to enter into force in mid-2023 and technology companies will likely be on the radar. Under the new regime, companies that engage in public tenders or large transactions within the EU are required to report financial contributions from foreign governments. The powers of the European Commission include prohibition of the transaction, blocking a bidder from a tender or repayment of the subsidy.

Outlook

The world is clearly moving towards super-regulation making much needed investments in future tech increasingly difficult and burdensome for companies. Investors must assess the potential applicability of several sets of regulatory approval regimes in parallel, in many cases pre-closing and gun-jumping rules are in place.

Planning early and identifying often unexpected filing requirements is crucial. Further, companies might also consider alternative structures such as contractual cooperation or greenfield operations – however, even then it might not be possible to always avoid regulatory scrutiny.

Read more: [ForeignInvestmentLinks Blog](#)



With the foreign subsidies rules on the horizon in the EU, investments in future tech will be more complex, even in the case of non-controlling minority acquisitions.”

Kaan Gürer, AFIG Counsel, Düsseldorf

2.1 Global data flows

In a world where digital connectivity is critical to consumers, businesses and economies, there is a desire for more robust data and cyber protections, and a perceived need to safeguard national security interests. In 2023, we expect businesses to face increasing compliance requirements with the development of national and potentially supranational frameworks seeking to regulate increasingly global data flows.

Challenges and opportunities

Headwinds have emerged in 2022 for many firms, from macro-economics and geopolitics, to lingering pandemic controls in key markets. These challenges are not limited to one geography and nor are the commercial opportunities of the digital economy.

There is continued demand for domestic and international connectivity in commerce, as businesses and consumers enjoy the increased productivity and convenience of digital transactions and engagement, whether via desktops, mobile, or more recently, metaverse-driven interfaces. With this comes a desire from governments, businesses and individuals to better protect data and secure networks.

We therefore expect to see more national and potentially supranational frameworks in 2023 that seek to regulate increasingly global data flows.

GDPR-inspired Asia-Pacific reforms

The EU's General Data Protection Regulation has changed the privacy landscape in the EU and beyond by serving as a reference point for privacy and data protection laws in Asia and other regions.

By December 2022, most Asian markets had enacted or were in the process of passing legislation specifically regulating data flows and we expect these regimes to evolve in 2023. In 2022, the GDPR inspired the launch of new laws such as those introduced by China, Thailand and Indonesia, and amendments to existing legislation in Singapore, Japan, and Australia.

Read more:
[Indonesia passes its long-awaited data protection bill](#)

This trend of benchmarking data laws against the GDPR will allow international enterprises to leverage consistencies across regional and global data privacy programmes in 2023. For example, standardised processes and templates can help to ensure a base level of compliance in the markets through which data flows.

However, in regulated industries, authorities are expected to pursue further safeguards in the name of national security and public interest, as much as individuals' privacy. As digital convergence brings businesses with

international operations into contact with counterparties and sector obligations that may have been a remote touchpoint in the past, these businesses will need to invest in privacy compliance to deal with local nuances in data transfer regimes.

New realpolitik for dataflows between Europe and the US?

Following the European Court of Justice's 2020 Schrems II decision to invalidate the EU-US Privacy Shield as a data export mechanism under the GDPR, 2023 should see moves to implement the new Trans-Atlantic Data Privacy Framework as a long-term solution to data transfers that underpin US\$1trn of business between the EU and the US.

While we foresee pro-business developments relating to the EU-US data privacy and transfer framework, new challenges can be expected from noyb, the digital rights organisation co-founded by Max Schrems, which may slow the process.

Read more:
[EU & US - The new EU-US Data Privacy Framework is finally here, or is it?](#)

Post-Brexit, the UK can seek to deregulate its economy and strengthen ties to the US. It will therefore be an anathema for personal data transfers from the EU to the US to be easier than those from the UK. In 2023, we expect to see a transfer solution proposed between the UK and US that is a close copy of the EU model, but

possibly faster to implement to demonstrate the benefits of Brexit.

Read more:
[UK – Modest data protection reforms with a handful of big changes](#)

Much to be done

The cross-border flow of data is an integral part of international business. Nonetheless, restrictions on data exports seem inevitable in the face of growing national security, data sovereignty, and privacy concerns within key stakeholder groups.

Regulatory and societal trends will force businesses to reconsider cross-border data transfer strategies and take steps to better protect data generally. Meanwhile, we look forward to seeing enhanced bilateral and multilateral cooperation to unlock the value of data in the hyper-connected world.



“Until market regulators in key trade blocs harmonise rules in this area, businesses will need to contend with tougher compliance requirements and ultimately higher operational costs and risks.”

Alex Roberts, TMT Counsel, Shanghai

2.2 New competition tools

In 2022, governments, regulators, and competition authorities focused intently on the tech sector. With new competition tools, greater scrutiny of mergers and a desire to keep pace with tech developments such as the metaverse, competition law will continue to shape the digital economy in 2023 and beyond.

Increased focus on tech companies

The EU's Digital Market Act entered into force on 1 November 2022 and will take effect from 2 May 2023. Regulating key platform services (so-called "gatekeepers") including search engines, marketplaces, social networks, and advertising services, the DMA is intended to address perceived deficiencies in the regulation of digital markets and marks the largest shake up to European competition policy in decades.

The European Commission expects to designate the gatekeepers by 6 September 2023 and gatekeepers will have until 6 March 2024 to comply with the new rules. The EC is already gearing up for enforcement, hiring up to new 150 regulators to enforce the Act.

The DMA is part of a wave of similar regulatory efforts for policing digital markets: Germany's competition law reforms are in effect and the UK looks set to grant regulators similar powers. In the US, efforts to expedite self-preferencing and merger control reform legislation have been renewed in the wake of the US midterm elections but are likely to face challenges in building support even before control of the House changes in January 2023.

Read more: [Digital Markets Hub](#)

Increased merger control scrutiny

Competition authorities are also bedding in new powers for regulating M&A in the tech sector. These are likely to result in more reviews and deeper substantive scrutiny of how mergers in the sector may impact competition.

The European Commission's 2021 reform of its "Article 22" policy stance means that it has greater powers to review transactions falling outside the EU's merger control rules and Member States' national merger control regimes. The reform aims to close a perceived enforcement gap regarding acquisitions of innovative start-ups, so-called "killer acquisitions". It reflects the approach of the Commission in the Illumina/Grail case where it ordered Illumina to unwind its acquisition of Grail despite the transaction not triggering merger control filings anywhere in the EU.

The EU has therefore joined the US and China in having the power to review transactions that fall below its notifiable thresholds. The European Courts may also be on the cusp of further supplementing the Commission's powers by granting it greater leeway under the EU's antitrust rules to intervene where it believes past mergers may amount to an abuse of a dominant position.

The US has also been taking steps to try to reinforce its powers to challenge killer acquisitions, following a series of failed challenges to deals like *Illumina / Grail* that have diverged from outcomes in Europe. The Federal Trade Commission and Department of Justice are currently collaborating on revisions to "modernize" their joint merger control non-binding enforcement guidelines to better reflect enforcement in digital markets.

The FTC has also set out an ambitious policy statement for its enforcement of unfair competition that would give it broader power to challenge potential competition theories in dynamic markets.

Read more: [Competition regulation in digital markets: 5 Themes in 5 Minutes \(3rd Edition\)](#)

Regulators' eyes on the metaverse

With increasing commercial interest and investment in digital assets, the metaverse and the evolution of the digital economy, competition regulators are considering the potential competition issues that may arise and how they might address them.

The European Commission has acknowledged that the metaverse could deliver greater openness, mobility, and connectivity in the provision of services in different metaverse worlds. However, there is also potential for large metaverse platforms to operate closed ecosystems where consumers could be "locked in" and rivals

prevented from competing effectively to supply the users of such platforms.

The key message from the European Commission for tech firms active in the metaverse, is that antitrust enforcement and merger control rules are "technology-neutral" and "versatile".

The European Commission is just one of a number of authorities signalling that they will use their toolbox to target new tech and as well as the "old" tech that has dominated discussions over the last few years.

Read more: [Metaverse at Linklaters](#)



We expect increased focus on tech from antitrust authorities around the globe through new competition tools such as the EU's Digital Markets Act."

Will Leslie, AFIG Counsel, Brussels

2.3 Competition litigation and the rise of class actions

Until relatively recently, competition class actions were primarily a US phenomenon, but a flurry of recent claims in the UK and the EU mark a shift in the risk outlook for the tech sector. Claimants are pursuing class actions in multiple jurisdictions with firms willing to pursue novel claims, even without a prior infringement finding by a competition authority.

Class actions on the rise

Competition enforcement in the UK has traditionally been driven by competition authorities, and litigation has “followed-on” from infringement findings. Stand-alone claims for damages have been relatively rare. But we are now seeing private litigants, emboldened by the wave of enforcement against Big Tech and empowered by new class action regimes, bringing stand-alone claims.

The UK Supreme Court’s judgment in *Merricks v Mastercard* in December 2020 has provided a launchpad for “opt-out” class actions. Since May 2021, each of Apple, Google, Meta, and Amazon has been the target of at least one class action.

While many claims focus on conduct that is under investigation by competition authorities, this wave of claims shows that claimants are not waiting for an infringement finding to launch their claim. In addition, claimants are increasingly willing to pursue new theories of harm or deploy old theories in new directions.

For example, the case brought against Meta in the UK alleges it has abused its dominant position by taking excessive data from users without appropriate compensation. There is no UK or EU investigation into similar conduct (though the allegations bear similarities to a German Bundeskartellamt case, currently on appeal to the CJEU). Claimant firms also appear to be looking for opportunities to apply the same theories of harm in abuse of dominance claims across the tech sector, even where there is no regulatory investigation (eg UK claim brought in relation to Sony’s PlayStation Store).

A fight on multiple fronts

The trend is not limited to the UK. Google’s Play Store is the subject of class actions in the Netherlands and Portugal, and Apple’s App Store is also subject to a further class action in Portugal. With the EU’s Collective Redress Directive possibly leading to further “opt-out” class action regimes, tech companies will need to prepare for both a parallel fight with regulators and potential claimants, and “copycat” class actions across EU jurisdictions.

The EU’s Digital Markets Act will have a significant impact on the private enforcement landscape with the universe of potential claims against future “gatekeepers” likely to grow. On the other hand, read across of adverse findings under the DMA to non-EU jurisdictions will be potentially more challenging for claimants seeking to pursue equivalent actions in multiple jurisdictions than in cases where the European Commission has relied upon traditional competition tools to find an anticompetitive agreement.

In the US, claimant firms continue to pursue major class action litigation against Big Tech in parallel with government enforcement. Dominance cases on behalf of classes of consumers, developers, and advertisers have been brought against Google (advertising / Play Store), Apple (App Store / Apple Pay), Amazon (e-books), amongst others.

Tech companies are unsurprisingly deploying strategies to remove would-be claimants and to dissuade others. In a recent move to dismiss US antitrust claims in relation to advertising, Google sought to dismiss one claim it said “borrows liberally from a grab-bag of allegations” in other competition claims and others which it claimed had been dismissed previously.

Scope for future claims

Owing to significant market shares and sizeable customer bases, tech’s biggest players will remain at risk of competition claims in multiple jurisdictions. Responding to such claims requires a carefully considered strategy to minimise the inevitable costs, reputational harm, and business disruption.

The alleged quantum of damages sought in such claims often far exceeds the levels of regulatory fines. In the UK, for example, the damages sought have extended into the tens of billions. With the potential for lucrative claims to be brought against them, tech companies should be prepared for further action.

Read more: [Collective Redress blog](#)



The UK has been an active forum for class actions against major tech players in 2022. In 2023, we expect the trend to continue and to spread to other European jurisdictions and beyond.”

Verity Egerton-Doyle, AFIG Counsel, London

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