

FINTECH AND COMPETITION LAW

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Legal Briefings - By **Mark Jephcott, Adelaide Luke and Alexandra Long**

As the surge of Fintech continues to gather speed, authorities around the world are watching with keen interest to see how Fintech can change the competitive landscape across various sectors and markets.

As the third installment of our Fintech e-bulletin series, we discuss in this briefing some of the recent competition law developments relating to the Fintech sector and explore some potential competition issues and concerns that may arise in the near future.

1. FINTECH AS A "DRIVER OF COMPETITION"

Fintech has been making headlines in 2016 and authorities around the world are taking note. In the European Commission's [recently announced plans](#) for accelerating the completion of the Capital Markets Union, the Commission expressed the view that Fintech "*benefits consumers by offering a wider choice of services which are more convenient to use or more easily accessible*". The Commission also stated that the innovative potential of Fintech "*should be harnessed*" and committed to "*continue to promote the development of the Fintech sector*".

Competition authorities around the world are also quickly recognising Fintech as a market disruptor with the ability to drive competition in the heavily entrenched banking and financial services market. For example, the Chairman of the Board of the Dutch Authority for Consumers & Markets (ACM) has been [quoted](#) as saying "*more competition is needed in the financial industry in order to realize more competitive prices, more innovative products and services, and better quality of service. FinTech can help realize all of those objectives*". The ACM launched a [consultation](#) in June on how they can support the Fintech sector "*at having a positive and lasting impact on competition*". Similar developments are occurring around the world – the Canadian Competition Bureau, for example, launched a [similar market study](#) earlier this year.

Other authorities are already taking substantive action. In July this year, the German competition authority (Bundeskartellamt) [ruled](#) against the German Banking Industry Committee's restrictions on internet payment services as being a breach of German and EU competition law. The restriction was found in the Committee's longstanding General Terms and Conditions, used by all the banks active in Germany, which imposed restrictions on online banking customers that did not allow them to make payments via third party systems. The German authority found that *"this rule has significantly impeded and continues to hinder the use of non-bank and innovative payment solutions"*.

2. FINTECH AND COMPETITION LAW

With the rise of Fintech driving the development of both existing and wholly new product markets, there are many issues that could arise from a competition law perspective for both Fintech players and existing financial institutions.

For example, one key feature of the Fintech movement is that much of it is being driven by small start-up players that are introducing new products or solutions into an existing market with one or more incumbent players. Some financial regulators have expressly stated their support for new and non-regulated businesses, such as the UK's Financial Conduct Authority in relation to their Innovation Hub. The Hong Kong Monetary Authority has taken a different approach, by allowing access to its Fintech Supervisory Sandbox only to authorized institutions already under its supervision (see our [ebulletin of 30 September 2016](#)).

From a competition law perspective, depending on the market shares of the incumbents, their reactions to such market disruption could involve conduct that, in another context, might be viewed as genuine commercial actions, such as aggressive pricing strategies or tying and bundling different products and services together. Players with high market shares must take care that their commercial actions cannot be deemed to be foreclosing the market, and should not engage in any such conduct in collusion with other market players.

Another key competition law risk arises from information sharing, whether as an integral part of the new technology itself (such as in blockchain technology) or in order to facilitate Fintech development. Where any data is shared amongst competitors, it is of course imperative to ensure that this cannot be construed as an exchange of competitively sensitive information. For example, information sharing concerns may arise if a future Fintech product operating on blockchain technology was used as a means to transmit detailed transactional information (such as customer, pricing and/or discounts, details about the transaction) to other participants within the blockchain network. Similarly, information sharing risks may arise in the context of large, shared databases maintained for the purposes of facilitating Fintech developers or users. The risk is particularly high if the information that can be obtained is current, granular and detailed, such that a competitor with access to the database could gain insights into current or future marketing strategies of independent market participants.

3. LOOKING AHEAD

There are many potentially novel ways in which competition law may be engaged as the Fintech movement develops. For example, the trend to develop interoperability between the systems and Fintech products used by different banks could give rise to competition law risks if this network of interconnected systems becomes sufficiently large. If such interoperability standards become sufficiently ubiquitous, it may then be problematic for the relevant companies to deny competitors access to the technical specifications required to develop interoperable products.

Looking forward, there have also been concerns raised in relation to the authentication process involved in blockchains, where participants on the blockchain could strategically turn off their blockchain servers in order to prevent an important transaction of one of their competitors from proceeding due to a lack of participants being available on the blockchain to authenticate the transaction. This could potentially be an infringement if several participants act in collusion, or may be an abuse of market power (in turn, raising interesting questions as to how market definition may be assessed in the context of a private and closed blockchain).

As the application of competition law is often dependent upon the precise nature of the relevant product markets, most competition law issues will not become apparent until more Fintech products begin to become operational. However, the interest shown to date by the competition regulators around the world suggests that they are keen to preemptively consider and assess the competition law risks arising from the changing Fintech landscape, and market players would be wise to follow suit.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



ADELAIDE LUKE
PARTNER, HEAD OF
COMPETITION, ASIA,
HONG KONG
+852 21014135
Adelaide.Luke@hsf.com

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