Collaboration and corporate venturing

IN THE FINANCIAL SERVICES INDUSTRY

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Retail banking in a perfect storm?

In the past ten years, the financial services industry has experienced significant change. Customer behaviours have developed significantly. Historically, retail banks attracted customers largely through the breadth of their branch network. However, many customers are now no longer focussed on which bank operates their nearest branch. Instead, they are comfortable with remote banking and assess banks on the quality of their digital offering.
The customer experience is a key differentiator for retail banks and technology has become critically important in shaping this customer experience. To compete in this evolving market, traditional retail banks have had to embrace digitalisation and reinvent their business models to meet customer expectations.

Competitors

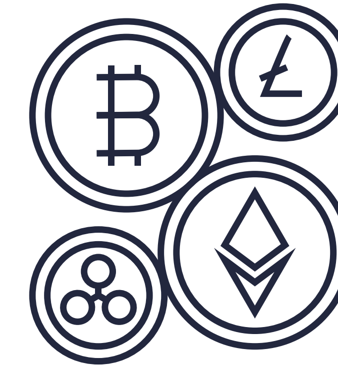
Traditional retail banks have to start competing with new types of competitors such as internet banks, large tech companies and fintech innovators/disruptors who have all entered or are looking to enter the sector. These new competitors often do not have the costly overheads associated with maintaining large branch networks. Instead, they are fully focused on technology in ways that are difficult or even impossible to replicate for traditional retail banks.

Regulators

Regulators across the globe have looked at ways to improve retail banking competition, including through open banking regulations, providing access to data (eg through regulations such as PSD II in the EU) and by reducing the regulatory burden on certain activities within the retail banking sector. A number of regulators have implemented sand-box processes that impose more limited regulatory restrictions on fintechs in the early stages of their lifecycle so as not to stifle their growth and innovation. Certain regulations now make a distinction between small and large credit institutions and investments to enable regulation to apply in proportion to the size of the firm (eg the European Market Infrastructure Regulation (EMIR)).

COVID-19 pandemic

The financial services sector is not immune to the long-lasting implications that the COVID-19 pandemic has had and will continue to have on how we interact, socialise, work and live. Changes that were already occurring in the sector are likely to be further accelerated. Fears over infections have already significantly reduced the number of cash transactions that are taking place, and the move to a cashless society is likely to occur much sooner than it would have done without the pandemic. The digitalisation of the retail banking sector is likely to be further accelerated, given customers have been unable to visit bank branches and even those who have previously been reluctant to accept remote banking have been forced to do so. Technology will drive change in the sector and banks will be competing to offer the best technology.



“Fears over infections have already significantly reduced the number of cash transactions that are taking place, and the move to a cashless society is likely to occur much sooner than it would have done without the pandemic.”

The upside: opportunities for traditional retail banks

Notwithstanding the changing environment, traditional retail banks still have an important role to play:
In many cases they still have strong, local brand recognition and are fully embedded in the local economic environment. Financial institutions, including banks, have had a very important role to play during the pandemic in supporting businesses, including through the provision of government-backed funding. The role played by financial institutions may improve their public image (which was tarnished by the global financial crisis and has never fully recovered) and enable them to build on this goodwill and extend their product offering to other services.
This brand recognition can be used as an asset to venture into new markets such as mobility and telecoms.

Traditional retail banks are starting to recognise the value of the immense amounts of personal data they have in relation to their markets and customers and are looking for ways to leverage the value of this data when entering new areas.

“Fintechs and non-financial players face difficulties and significant expense in successfully navigating this complex regulatory environment.”

Regulators

Step by step, the jurisdiction of European regulators has been extended. Fintechs (from MiFID II algorithmic trading firms (through MiFID II) to payment services aggregators (through PSD II) under the open banking concept, e-money issuers (through the second Electronic Money Directive (EMD2)) and, to a certain extent, third-party service providers (notably under the European Banking Authority (EBA) Outsourcing Guidelines) now fall within the scope of regulatory supervision. Fintechs and non-financial players face difficulties and significant expense in successfully navigating this complex regulatory environment. The fact that regulations are not uniform across each of the European jurisdictions leads to difficulties in creating pan-European banks, strengthening the relevance of local retail banks at country level. This issue has become even more relevant given the impact of Brexit (ie EU regulations will shortly no longer apply to the British market). As such, regulation acts as a barrier to entry that protects traditional retail banks and, in particular, large retail banks that have sizable, well-developed legal and risk departments.

Fintechs

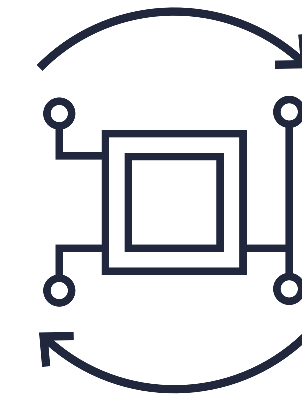
Although the changing market environment will lead to huge opportunities for fintechs, funding may be harder to come by. As a result of the pandemic, fintechs may suffer from delays in executing their business plans. This in turn may affect their ability to raise funding. Due to the pace of innovation, the fintech sector is fragmented and, as a consequence, there will be a large number of fintechs competing for capital. IPOs are also likely to be few and far between for fintech companies in the short to medium term, given the general difficulty in the current equity markets. Even strong fintechs with talented management teams but that do not have and cannot raise sufficient capital will face challenging times. This may create M&A opportunities for traditional retail banks that are sufficiently capitalised and looking to acquire fintechs with a view to insourcing tech teams, developing new technology or conquering new markets.

Some new initiatives at the horizon

Forthcoming regulatory changes proposed by the European Union include:

- the proposed crowdfunding platforms regulation
- the markets in crypto assets (“MiCA”) regulation proposals, which are expected to entitle relevant operators to provide services in the EU / EEA on a cross-border / passport basis eliminating national barriers and regulatory regimes
- the upcoming update of the Payment Services Directive 2 (PSD3)
- the upcoming update of the Markets in Financial Instruments Directive 2 (MiFID3)
- the EC’s action plan for a comprehensive Union Policy on preventing money laundering and terrorist financing
- the EC’s proposal for a EU regulatory framework on digital operational resilience and its retail payments strategy, aiming to enhance consumer confidence in digital financial services and remove barriers across Member States, and
- the entering to the market of the first Pan-European Personal Pension Products (PEPPs).

These initiatives will further enhance the FinTech sector across Europe on banking, payment, investment services, insurance and crypto-assets.



Digitisation requires banks to adapt their regulatory compliance models. For example, digitalisation may impact:

- know-your-customer (KYC) processes
- continuous risk mapping / CRR regulatory capital calculations, and
- fast-track / online reporting processes. Outsourcing and cloud outsourcing also create other types of challenges and have led to recent EBA Outsourcing guidelines which bring third party / IT providers within the remit of banking regulation.

Spotlight on data sharing

Access to data plays an important part in cooperation and collaboration in the financial services sector. Financial institutions have a huge amount of data and are looking at new ways to leverage the value of this data. Where personal data is shared (eg of a financial institution's customers and/or prospects), and therefore processed, parties will need to comply with data protection law and regulation (eg the General Data Protection Regulation (the GDPR).

PARTIES WILL NEED TO CONSIDER:

- **What role are the parties undertaking** – Under the GDPR, parties may be classified as a controller, processor or joint controller. Depending on this classification, they will be subject to different obligations.

  The qualification also has an effect on what the relevant party can do with the data.

  Controllers and joint controllers can use personal data for their own purposes. Processors (ie persons acting on behalf of controllers or joint controllers) can typically only process personal data upon instruction from the (joint) controller.

  Depending on the role of the parties, specific contractual arrangements may need to be put in place such as data processing agreements or joint controllership arrangements.

- **Legal basis for data sharing** – When sharing personal data with other parties for subsequent use by them, an appropriate legal ground is required for both the sharing of data and its subsequent use.

  The GDPR identifies six potential legal grounds for data sharing. Four of those are relevant to commercial arrangements and can be considered as a basis for the sharing and processing of data. These are:
  - consent of the data subject;
  - the processing necessary for the performance of an agreement (or to take pre-contractual steps);
  - the processing necessary to comply with a legal obligation; and
  - the legitimate interest of the controller (or a third party).

    In the types of collaboration that we are considering, the only permitted ground for sharing and processing personal data is likely to be where the consent of the data subject has been obtained.

- **Use of new or existing data sets** – Parties to the collaboration must consider whether they will work with new data sets, existing data sets or a combination of both.

From a GDPR perspective, working with new data sets (ie data collected specifically in the context and for the purpose of the collaboration) is often easier as appropriate approvals and safeguards can be put in place before any data is collected. Therefore, it is important to take data sharing into account in the initial stages of any collaboration so all data developed through the collaboration can be shared in a clean and compliant manner from the start.

However, from a business or practical perspective it may be easier or more appealing to work with existing data sets. When working with existing data sets, any use for a new purpose will qualify as a further processing of data. Unless this new purpose is compatible with the initial purpose, new consent may be required from data subjects.

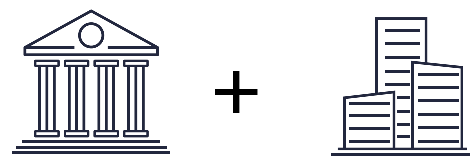
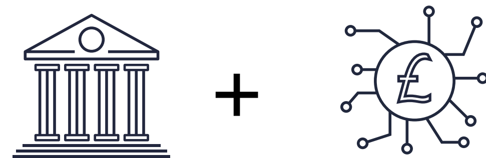
- **Transfer of personal data outside of the EEA** – When transferring personal data outside the EEA, parties must ensure that the transfer is covered by an appropriate transfer mechanism.

  For a number of countries (eg Japan and Israel), the European Commission has issued an adequacy finding confirming that those countries provide an adequate level of protection to personal data. Consequently, personal data can be freely transferred to such countries.

  Where there is no such adequacy finding, an alternative mechanism must be put in place. A commonly used transfer mechanism is a data transfer agreement based on Standard Contractual Clauses set by the European Commission. Recently, the Court of Justice of the EU (in the Schrems II case, which also invalidated the EU-US privacy shield) clarified that these Standard Contractual Clauses remain a valid mechanism to transfer personal data, although there must still be an appropriate assessment of the risk. In particular, companies transferring personal data outside the EEA must assess the risk posed by the legal regime in the destination country and ensure that, where required, additional safeguards are put in place.

The collaboration strategy

Redefining a business model is a massive undertaking for any organisation and does not come easily or cheaply. It is difficult for businesses to reinvent themselves without outside influences. Client data, customer access, deep pockets and regulatory expertise are prized assets of large financial institutions that can convince other market participants to venture into collaborations with them, which can help traditional retail banks in redefining their business models. We have seen a trend of increased collaboration in developing new markets, accessing new customers, offering new services and products, developing new technology and leveraging data. We expect this trend to continue.

Collaboration between	Key drivers for collaboration
Traditional financial institutions	• technology development • creation of cross-jurisdictional (e.g. pan-European) platform • cross-border access to clients • first step in euro-consolidation
 Traditional financial institutions and Non-financial institutions	• access to data • new product offering (both for financial institution and non-financial institution) • access to customers
 Traditional financial institutions and Fintechs	• financial resources • access to clients (for fintech) • market recognition (for fintech) • access to data (for fintech and for financial institution) • technology development (for financial institution) • regulatory support (for fintech)

Commercial collaboration

In a purely commercial collaboration the parties work together on the basis of a commercial contract but do not set up a corporate joint venture through which they will undertake the new activity. Each party remains independent and provides a product or service to the other party. Although terminating a commercial collaboration may also come with challenges, it is still easier to unwind than a full corporate joint venture.

KEY AREAS THAT NEED TO BE CONSIDERED AND AGREED BY THE PARTIES IN THE FRAMEWORK OF COMMERCIAL COLLABORATION:

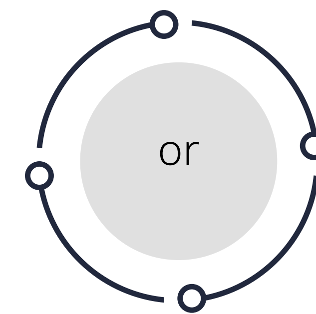
- Are there any mandatory legal provisions that govern the contractual relationship that need to be taken into account (eg agency relationship, broker relationship)? This requires a jurisdiction-specific analysis in the jurisdictions in which the parties choose to become active.
- Who does what? Is one party delivering a service to the other party? Are both parties delivering services to each other?
- Will the parties commit to exclusivity in relation to the venture, such as exclusive technology development, exclusive offering of certain products in relevant markets? Exclusivity arrangements may trigger anti-trust considerations.
- How are revenues, profits and costs shared between the commercial partners?
- Will the commercial partners develop certain intellectual property through their collaboration? How are the ownership and usage rights of these intellectual property rights divided between the partners? What happens with the intellectual property rights if the commercial partnership ends?
- Is there an agreed exit strategy? Will certain intellectual property be insourced? Is there continued technical support following the end of the collaboration? What continuity of service guarantees are agreed?
- Sharing of information:
  - anti-trust aspects of sharing of commercially sensitive information between competitors in the framework of the commercial cooperation; and
  - data protection aspects of sharing personal data between the partners.
- Will each party maintain its independence towards the outside world or will the partners develop a joint branding for the initiative?
- If the commercial agreement is combined with an equity investment, how is the equity investment affected by the termination of the commercial agreement?

Collaboration through M&A: Investing in fintechs

As established financial institutions have looked to redefine their business models and embrace digitalisation, we have seen increased investment by established financial institutions in fintechs.

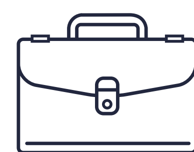
What may collaboration through M&A look like?

The acquisition by the established financial institution of 100% of the fintech – it may be easier, quicker and cheaper for an established financial institution to acquire a fintech than to develop technology in-house.



Minority or majority investments in the fintech by the established financial institution together with entry into a strategic collaboration agreement or commercial agreement for the provision of services/products by the fintech to the established financial institution.

AS WITH ANY M&A DEAL, DUE DILIGENCE IS A KEY ASPECT OF THE TRANSACTION. WHEN PERFORMING DUE DILIGENCE ON FINTECHS, THE FOLLOWING AREAS DESERVE SPECIFIC ATTENTION:



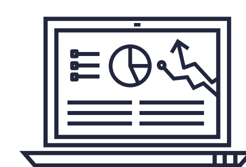
Corporate

As with any early stage investment, fintechs' corporate structures are often more complex than more mature companies. Investors should focus on equity plans, subscription rights, or option schemes that could dilute the investors.

HR

Employment terms and equity-linked employee incentive plans.

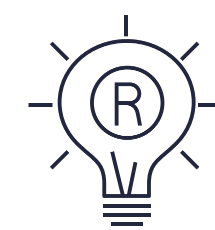
Dependency on key employees/ management.



Business

Customer concentration risk and understanding the strength and certainty of the fintech's key customer relationships.

How will the fintech's key commercial relationships react to the equity investment by the financial institution?



IPT/Data

Ownership of IP (given the actual value of a fintech is generally in its IP).

Disaster recovery and resilience.

Data security and compliance.

Data recovery.

Data ownership.

Data compliance.

(Regulatory) Compliance and AML

Is the fintech regulated in all the jurisdictions that it needs to be?

- It is not always clear-cut whether a fintech needs to be regulated and the fintech may have taken a risked-based approach on whether it is required to be regulated.
- An established financial institution may take a more conservative view than the fintech has historically taken given its wider regulatory position.

If it is not currently regulated, will the fintech need to be regulated in the future as it grows?

Are there are any jurisdictions that the fintech intends to expand into where it will need to be regulated? This issue is particularly complex given the lack of a fully harmonised regulatory framework in the fintech sphere and the different approaches taken by national regulators (eg the availability in each relevant jurisdiction of a fast-track or sandbox authorization process).

Anti-money laundering and general compliance.

Will the fintech still be able to operate in the way it used to operate if it needs to be regulated or will regulation affect its business model?

What is the impact on the prudential supervision if the fintech is being integrated in a larger group structure with other regulated entities?

"This issue is particularly complex given the lack of a fully harmonised regulatory framework."

The maturity of the fintech, its funding needs, the aspirations of the founders/owners of the fintech and the competitive dynamic will be a key driver in structuring any investment in or acquisition of the fintech. There needs to be upfront clarity and alignment between the investor and the founders/management team of the fintech on the future activities of the fintech and integration with the financial institution. If the parties have different expectations this will ultimately cause serious issues for the relationship. We have seen the following sources of conflict that are best addressed from the outset:

FOUNDERS' VIEW	FINANCIAL INSTITUTION INVESTOR'S VIEW
Further develop the Fintech to maximise exit proceeds	Align the Fintech to the financial institution's overall strategy: • focus on the Financial institution's key markets; • develop new products that support the overall business of the financial institution; • gain access to data to support the financial institutions' overall business • gain a competitive advantage vis-à-vis its competitors; • integrate the FinTech to maximise synergies Buy future competitors (keep them small) Block competitors from entering the equity of the Fintech in which the financial institution has invested Not focused on exit
Access to funding	Control over funding
Have as much freedom as possible to further develop the Fintech	Ensure that there is appropriate oversight on (i) budget, (ii) strategy, (iii) product development
Remuneration of employees in line with the start-up market (option schemes, share schemes)	Align employment conditions of the Fintech's employees with the financial institutions' employees (e.g. bonuses / share options etc...)
Bankruptcy is an acceptable risk in a start-up environment	Bankruptcy can cause reputational damage and also negatively impact a regulator's "fit and proper" assessment of the directors appointed by the financial institution

How to overcome the differences?

BE CLEAR ABOUT EACH PARTY'S INTENTIONS. ON THIS BASIS, POSSIBLE STRUCTURES INCLUDE:

- Full buy-out at fair price and integration of the FinTech in the financial institution;
- Majority investment; and
- Minority investment with limited set of equity rights (information rights).

WHERE STRUCTURED AS AN INVESTMENT:

- Have a clear agreement on how the funds invested by the financial institution are to be used by the FinTech;
- Have a clear agreement on how the FinTech should engage with competitors of the financial institution;
- Agree on exit mechanics (e.g. IPO rights, tag-along rights, drag-along rights);
- Where the financial institution acquires a majority stake in the FinTech: agree on a clear roadmap on how the financial institution will acquire 100% of the equity over time (if that is the intention of the parties)/agree on good leaver/bad leaver mechanics for the founders retained stake;
- Agree on an appropriate set of veto rights at board and/or shareholder level; and
- Focus sufficiently on the commercial relationship between the FinTech and the financial institution.

USE OF EARN-OUTS (FOR MAJORITY / 100% ACQUISITION DEALS). HOWEVER, DOWNSIDES INCLUDE:

- earn-outs are complex to negotiate and the founders/ management team will want some control over the operations of the FinTech so that they can drive hitting the earn-out metrics, which can lead to delays on integration and achieving synergies; and
- the founders/management team will be focussed on achieving the earn-out metrics and, as a result, may not focus on the longer-term interests of the FinTech.

ENSURE THAT REPRESENTATIVE DIRECTORS UNDERSTAND THEIR DUTIES, RESPONSIBILITIES AND LIABILITIES AS A DIRECTOR

Consortium structures / cooperation between established participants

The financial services sector has seen increasing collaboration between established financial institutions.

These collaborations are often structured through a corporate joint venture or a consortium setup.

When establishing a corporate joint venture, a number of issues need to be considered and agreed between the parties. It is important that a joint venture has a framework that enables it to operate and that incentivises all joint venture partners to maximise its chances of success.

The issues that need to be considered include:

THE JURISDICTION OF INCORPORATION AND NATURE OF THE JOINT VENTURE VEHICLE AND REQUIRED APPROVALS:

- The jurisdiction of incorporation and nature of the joint venture vehicle will be heavily influenced by tax considerations.
- Will the joint venture need to be regulated?
- Will any competition law approvals be required before the joint venture can be established? This will typically include both a self-assessment by the parties that the proposed consortium will not fall foul of applicable antitrust rules and an analysis of potential merger control filing obligations.

WHAT THE PARTNERS ARE INVESTING IN THE JOINT VENTURE:

- Will partners invest cash, people, access to clients, client data, pre-developed IP, other assets or a mixture?
- How will the equity in the joint venture be allocated? How are non-cash contributions valued?
- Where businesses are being contributed to a joint venture, the parties will need to consider: (i) whether any regulatory approvals are required; (ii) whether any change of control consents / novations are required from contractual counterparties; (iii) the TUPE implications (ie will employees be transferred to the joint venture by operation of law who the parties do not want to transfer or vice versa); and (iv) the tax implications for the contributing partner and the joint venture.

THE PURPOSE, BUSINESS PLAN AND DIVIDEND POLICY:

- What is the purpose of the joint venture (eg: development of a specific piece of technology, development of a separate business, information sharing, best practice development).
- What is the business plan of the joint venture? What is the revenue model (standalone and viable revenue streams or will the JV require long-term support from the consortium partners)?
- Who will be allowed in as part of the consortium (as broad a consortium as possible including all industry players, one financial institution per jurisdiction, non-financial institutions).
- What is the scope of the JV and how is it expected to develop? Are the joint venture partners free to compete with the joint venture through their other operations?
- Will the joint venture partners trade with the joint venture and, if so, on what terms? If the partners enter into commercial contracts with the JV, conflicts of interest needs particular attention. Tiered memberships with varying rights and obligations should also be considered and these rights and obligations should be laid out clearly.
- How will profits of the joint venture be distributed between the parties? Will they be distributed pro-rata to equity ownership or in some other manner? Is the purpose of the JV to maximise revenue of the JV partners (eg no actual revenue generation at the level of the JV)?

GOVERNANCE RIGHTS:

- How is the board composed? Who gets to appoint board members? Powers of management? Is management independent from the board members? What rights do the consortium members have in relation to the operation of the JV?
- Who controls the day-to-day operations of the joint venture?
- What veto rights / reserved matters do each of the parties benefit from?

EXIT MECHANISMS:

- How can a joint venture partner exit the JV / force an exit?
- Are the joint venture partners able to transfer some or all of their equity ownership in the joint venture to third parties (either throughout the life of the joint venture or after expiry of an initial lock-up period)? If so, does the other party benefit from pre-emption rights and drag and tag rights (as is common)?
- However, if both joint venture partners are critical to the successful operation of the joint venture, these traditional exit mechanisms will not be appropriate and thought needs to be given to other exit mechanisms (eg either partner can force the liquidation of the joint venture after a specified, initial period).
- What are the applicable regulatory requirements (eg are regulatory notifications or change of control consents required) and other impacts (eg on outsourcing providers) if the exit mechanisms are implemented?

DEADLOCK:

- What happens if the joint venture partners cannot agree on how to operate the joint venture (eg one joint venture partner continues to exercise a veto over an important matter)?
- Does this trigger an exit event or is some other mechanism agreed upfront to resolve the deadlock? Will the joint venture agreement be silent on how deadlocks will be resolved so the parties can determine the best way to resolve a deadlock at the time that it arises?

Spotlight on anti-trust

The financial services industry's move from physical proximity to digital proximity dovetails with an accelerating trend of enhanced enforcement by authorities of competition law in the digital space. There are significant efforts by many competition authorities worldwide to come to grips with an ever-changing and fast-evolving digital and technological landscape.

There are concerns among competition authorities that the rapid pace of technological developments may leave their enforcement attempts stranded. For example, in May 2015, the European Commission launched a sector inquiry into e-commerce. This formed part of the European Commission's overarching Digital Single Market strategy which, more recently (in July 2020), also gave rise to a sector inquiry into the Internet of Things for consumer-related products and services (such as smart home devices).

To date, the focus of competition authorities has primarily been on issues such as big data troves and the dynamics of online commerce. However, it is clear that the areas of scrutiny are ever-widening.

It is, therefore, not surprising that the European Commission and various other competition authorities have investigated conduct in connection with e-payment systems. **Focus-points** included the terms and conditions; access requirements regarding the systems themselves and the data they generate; and measures relating to their integration into merchant apps and websites. Competition authorities will closely monitor any governance arrangements that could, for example, result in the exclusion of new members or rivals, or the imposition of unfair or unreasonable terms. The European Commission can be expected to take a very cautious approach where such activities could lead to the creation of dominant players, resulting in behaviour that can amount to abuse. This is evidenced, for example, by the European Commission's scrutiny into the crypto-asset market in the EU.

Effective fintech projects will often require a form of competitor cooperation. Again, over-zealous antitrust enforcement is a potential concern with respect to such ventures. There are concerns that these enforcement trends, and the fear of competition authorities to be a step or two behind the market, could result in over-enforcement and overly formalistic approaches by competition authorities.

Companies need to be aware of these trends and ensure that they conduct proper **up-front legal analysis** to gauge any antitrust issues that their projects may encounter. Equally, this means that, when conducting due diligence with respect to a potential cooperation project, special attention will need to be paid to ensure that these risks are sufficiently scoped and, eventually, dealt with in the transaction documents. Given the sensitivities that such a due diligence exercise will often give rise to, measures ensuring that competition law compliance is safeguarded tend to be very important. This will often involve setting up a so-called clean team by means of which competitively sensitive information can be safely made available and evaluated by the parties.

To the extent a transaction will trigger **merger control notification** obligations, parties will need to plan for the relevant competition authority(ies) requiring time to fully understand the implications of what the parties are planning, and to reflect on the potential competitive dynamics that may result. Delays may occur as authorities grapple to understand the full implications of not only the venture at stake, but also the potential impact on issues such as pipeline developments and innovation. These issues may not be apparent from a traditional analysis of the competitive overlaps to which a transaction may give rise. This should be reflected in the transaction timetable and parties should ensure that they are not caught off-guard by unexpected lines of enquiry.

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