

# Bird & Bird

## Digital Platforms and M&A



With the rapid development and uptake of digital technologies continuing to transform industries and operations, M&A transactions involving digital/tech companies are gaining momentum globally. In its Final Report on the Digital Platforms Inquiry, the Australian Competition & Consumer Commission's (ACCC) has, however, restated its concern that acquisitions in digital markets, or acquisitions in markets involving emerging technologies, may have the effect or likely effect of substantially lessening competition if the deal involves:

- a the acquisition of nascent competitors or start-up by dominant platforms or companies; or
- b the acquisition of any business with access to a large volume and scope of data, or which otherwise collects and monetises data.

This concern has prompted the ACCC to recommend amendments to section 50(3) of the *Competition & Consumer Act 2010* (Cth) to include the following as factors relevant to a merger analysis:

- a the likelihood that the acquisition would result in the removal from the market of a potential competitor; and
- b the nature and significance of assets, including data and technology, being acquired directly or through the body corporate.

While the ACCC is not currently prevented from considering these factors when determining whether an acquisition would have the effect or likely effect of substantially lessening competition in a market, the Final Report cites the need to “signal the significance of these factors” by articulating the factors in the legislation.

### Implications for your next acquisition

At this stage, companies seeking to undertake digital acquisitions to aid or accelerate their digital change, or to complement or bridge gaps in their existing digital offering, should be mindful of, but not discouraged by, this recommendation from the Final Report. Any legislative amendment would take some time to come into effect and, in any event, the ACCC already can (and does routinely) consider the proposed new factors in its merger analysis.

Nonetheless, it will be important for businesses looking to acquire (or to be acquired) in Australia to consider what this recommendation will mean for their merger strategy - particularly given the views of the ACCC and the broader international focus of regulators on how to assess and manage the early acquisition of a potential competitor and to prevent harm to innovation.

Digital M&A has always required a different approach and presented new challenges to traditional M&A. The proposed legislative amendments are simply another item to the blend of components that are integral to the success of a digital acquisition, being:

- c **Due Diligence:** The primary attraction of a digital M&A target is often its future potential and intangible assets, such as intellectual property, data, technology, employees or other talent, or even its very business model, all of which may require identification of the core assets and a forward-looking approach to due diligence.
- d **Valuation:** A nuanced approach must be taken to valuing digital assets. An appropriate valuation of digital businesses may take into account value drivers for the acquisition such as the estimated merger synergies, the scalability of the target's technology, plans to enhance and improve its technological offerings, strength in key markets, and even the strategic value of the proposed acquisition.
- e **Merger Analysis:** In parallel to the due diligence and valuation, consideration must be given to whether the acquisition may result in the removal of an important future competitor (even where it may be unclear at the time of the acquisition) and the competitive significance of certain assets of the target, particularly data resources.
- f **Post-merger Integration:** A deal isn't over when it closes. As with any acquisition, a digital acquisition can fail to meet expectations or deliver the intended value if the post-merger integration is overlooked or hurriedly executed without regard to the tailored approach required for digital acquisitions.

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