Digital transformation

2018
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Digital transformation, built on IT cornerstones of cloud, mobile, social and big data, is affecting all industries.

Going digital is not just about making sales via mobile devices, or using Twitter to communicate with customers. Digital adopters are making transformational shifts in the way they: use data all across their businesses; carry out back-office functions; manufacture, store and transport their goods (including money); and approach and communicate with their stakeholders (from suppliers, to customers, shareholders, employees and even regulators).

Some industries are seeing their businesses profoundly disrupted by new digital entrants (think what Uber has done to transport, or Amazon to retail), while for others, the imperative is to incorporate digital opportunities into their businesses to become more competitive within their existing markets.

No industry is being left untouched by digital, although some (eg financial services, healthcare, hospitality, retail, automotive) are moving forward faster than others. Agility and flexibility characterise successful digital businesses and many companies are struggling to keep pace with innovation and to engage the right teams within their organisations. However, the C-suite increasingly recognises the strategic necessity of embracing digitalisation, and digital strategy is a boardroom issue.

Setting and implementing a digital strategy requires a host of interdisciplinary skills. Equally importantly, going digital requires a significant cultural shift in many organisations, particularly in the way they engage with third parties to deliver elements of that strategy.

Allen & Overy is an engaged and active player in the digital ecosystem. We work with companies at all stages of growth and development from established players with scale and pedigree, to emerging companies making a name for themselves through their energy and ideas. One of our particular strengths is navigating the cultural issues that can arise when large institutional organisations work with smaller digital players.

Our lawyers are experts in working with our clients to produce consistent and risk-conscious results while preserving and encouraging the innovation, creativity and agility that these alliances promise.

We have the ability to field integrated multidisciplinary teams to help clients smooth the path for digital projects. From anticipating regulatory hurdles, to protecting intellectual property, to motivating and retaining key staff and negotiating transactions with partners and suppliers, our team has experience of all aspects of the digital journey. We are able to draw on insights from across a range of industries to identify best practice and mitigate risks – we know the issues that matter, and those that don’t.
The ability to manipulate large sets of structured and unstructured data ("big data") is one of the key characteristics of the digital revolution. For many businesses, there are two types of big data opportunities. One relates to how they can take advantage of the data available to them to improve the way in which they run their business, the second relates to whether they can monetise the data they collect through business-as-normal activities. There are however a number of legal and regulatory considerations that need to be considered before working with big data.

The first is a clear understanding of relevant privacy and data protection frameworks. Where data includes personal information (of customers or staff, for example), many data protection laws impose data minimisation requirements, purpose limitation requirements and cross-border data transfer restrictions. Data security will also be an important concern. How should you protect data against a possible breach? It is important to understand what technical and organisational measures may be required under relevant legislation in order to protect the data that is held. There will also be intellectual property considerations associated with the use of big data. For example, who owns the input data that companies are using to conduct data analytics? Who owns the output data?

Emerging issues

Bringing new technology into a business frequently involves finding new partners. Established market participants may work with new-generation companies to short cut the R&D cycle for new technologies; they may buy or collaborate to bring new skills into the business; or they may use their partners to provide access to new markets or distribution channels. A fundamental question is what form that collaboration might take. Digital transformation is certainly driving M&A as companies buy in technology and skills or combine with peers to build scale, but commercial collaborations are also a popular route to achieving these goals. Equally, corporate venturing may offer a way to connect with early-stage companies to assess potential technologies, exert a degree of influence on the future direction of the emerging company and be in a good position to acquire or license technology if it looks to be shaping up well. It is important to understand the pros and cons of M&A over other forms of involvement such as investment or collaboration.

Culture clash can be a particularly corrosive dynamic when emerging and established companies come together in investments, M&A or commercial partnerships. It is often lamented that while established players may look to start-ups precisely because they are agile and nimble, trying to scale that culture into a large organisation is hard to do. Meanwhile, the bureaucracy of the big company may frustrate the start-up. This culture clash doesn’t start after the deal is signed, it can be a barrier while the deal is being negotiated. To work through this, both sides need to understand the goals of the transaction and how they might differ for each party. They also need to understand what contributions each partner might make. These contributions are not only financial, for an emerging company “softer” areas like the introduction the established player can make to other market participants, or the mentoring that might be available to team members, could all be valuable considerations. Due diligence is also likely to be different, emerging companies simply don’t have the track record of established players. Diligence will need to focus more on the strength of the team, the company’s references from partners, investors and customers, and a solid understanding of the market in which the start-up operates.

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The more we put online, the more we expose ourselves to the risks of cyberattack. Cyberattackers are quick to spot the potential vulnerabilities of new technologies and exploit them to commit civil and criminal offences (and to frustrate detection of those activities). Risks to business are significant and include damage to reputation, business interruption, financial loss, litigation, loss of IP and confidential information, and regulatory sanctions. Cybersecurity is about prevention of (and/or preparation for) cyberattacks, but also about reaction once the risk has been realised. It requires an integrated approach across traditional security disciplines proactively to understand, detect and respond to advanced and evolving threats.

Intellectual property frameworks have a clear role to play in protecting and promoting innovation. However, digital technologies also make it increasingly technically possible to easily share ideas and content, whether or not this material has IP rights attached. Equally, in today’s “smart economy”, a new IP paradigm of open innovation has emerged where companies may bring in innovation from a wide range of external sources, including for example crowdsourcing ideas using open digital platforms or working with open source software. The current IP protection framework can be difficult to apply effectively to the digital world and there can be challenges for IP rights management when ideas or technology born in an open source environment are commercialised at a later date.

New business models and working processes also run the risk of creating grey areas around liability. For example, who assumes liability if a driverless car has a crash? Current regulations mean that car owners are generally liable for accidents caused by their vehicles (and are consequently required to hold insurance against this risk). In the connected car world, what interplay will there be with product liability regimes? Will manufacturers be held liable? Or imagine the case of a healthcare app which provides monitoring of symptoms or a reminder to take medication – could the producer of the app be held liable for healthcare issues that arise as a consequence of an issue with the app? What if the issue with the app was in fact triggered by a communications network outage? In some countries, product liability legislation is strictly limited to “products” and not “services” – in a digital environment such a distinction may be very difficult to make, as may questions of relevant jurisdiction. Clearly identifying such risks and planning for them will be essential, as will expertise in dispute resolution in the event of such a problem.
Our experience

**Deutsche Borse Group**
on its investment in Digital Asset Holdings, a venture-stage financial technology company developing blockchain technology to support recording and settling financial transactions.

**Khazanah Nasional Berhad**
the strategic investment fund of the Government of Malaysia, as lead investor in a USD54 million Series D funding round into Blippar, a company focusing on augmented reality and the creator of an app that uses smartphone camera to overlay digital images on to real world pictures.

**Euvision Technologies**
a specialist in image recognition applications powered by artificial intelligence, on its acquisition by Qualcomm from its shareholders.

**A leading PRC internet company**
in respect of its prospective investment into one of global leading taxi-app transportation companies.

**AVG Technologies**
a computer security software provider, on the USD60m acquisition of Privax, a leading global provider of desktop and mobile privacy services for consumers and parent company of innovative VPN provider HideMyAss!

**Homa**
in contract negotiations with a big utilities and energy grid provider concerning a complex software and infrastructure project in the field of smart grid and decentralised energy sources for implementing the energy transition.

**DeepMind Technologies**
the UK artificial intelligence start-up, on its acquisition by Google for USD500m.

**A technology group**
on the launch of an application relating to a natural disaster alert system in more than 50 jurisdictions. We advised on compliance with environmental, public, data privacy, IT and telecommunication laws and regulations in 50 jurisdictions.

**Draper Fisher Jurvetson (DFJ)**
on its investment in Bright Computing, a company specialising in management software for clusters and clouds used in high-performance computing, storage, databases, Hadoop and OpenStack.

**Forum Group**
a developer of mobile applications, in drafting the terms and conditions for its applications (and related advice on data protection and e-commerce aspects).

**Huawei**
on the acquisition of the UK based Internet of Things firm Neul Limited.

**GSK**
on a crowd-sourcing social media project.

**A large international supplier of electronic products and devices**
on the potential classification of specific mobile health apps as medical devices, and the regulatory implications thereof.

**BNP Paribas Fortis**
on the development and roll-out of an innovative mobile payments platform in Belgium. The platform was developed with Belgacom and Accenture, and integrates mobile payments, virtual ticketing, e-couponing and loyalty programmes into a mobile wallet.

**Toyota**
on a project for the integration of telematics technology (technology that records a vehicle’s trajectory, acceleration, manoeuvres, breaking, etc.) and the commercialisation of the data collected with such technology.

**Telenor, Telenor Financial Services and Telenor Myanmar**
on the establishment of a mobile financial services provider in Myanmar by way of a joint venture with a local Myanmar bank.

**One of the largest providers of HR solutions in the world**
on the data protection aspects of a global big data project whereby data will be centralised to one single shared platform for data mining and business analytics (big data) purposes.

**Renault**
on the on-board digital system for its vehicles called R-Link.

**CWT**
on the development of new applications for travellers.

**BNP Paribas Personal Finance**
on digital loyalty programmes with its partners.

**Unibail Rodamco**
on its digital loyalty cards.

**Elster Group**
the NYSE-listed provider of “smart” gas, electricity and water meters, on the USD2.3 billion tender offer for all its shares by Melrose.

**SAP**
on the acquisition of the French company Multiposting, a European leader in e-recruitment solutions.
A Medical Devices Manufacturer
on the data protection aspects of the launch of medical devices and software for the treatment and management of respiratory health issues across the EU.

SAP
on its USD3.4bn acquisition of NYSE-listed cloud computing leader SuccessFactors.

Blackhawk Network
a leading prepaid and payments global company, which supports the program management and distribution of gift cards, prepaid telecom products and financial service products in a number of different retail, digital and incentive channels, on data privacy issues.

Novartis
on its first ever “telehealth” project, involving Qualcomm Life, aimed at the development and commercialisation of a new internet-enabled inhaler for the treatment of lung patients.

A Shopping Platform
on the establishment of guidelines for the processing of geolocation data and the launch of geolocation-based advertising activities in the European Union.

A leading global technology provider
on the development of standard terms and conditions for their software-as-a-service and platform-as-a-service offerings.

A provider of actuarial and related products and services
on privacy issues associated with using healthcare data in its software.

Accel Partners
on its investment in Catawiki, the online auction house for exceptional products and collectables.

Doccle
the joint venture company incorporated by Acerta and Telenet, on the drafting and negotiation of a technology licensing agreement with Atos Origin for the development of a 3D digital document distribution and storage platform.

Pamplona Capital Management
on the acquisition of a minority stake in the equity capital of Octo Telematics, the global brand leader in providing car insurance telematics services, from Renova Group.

A leading automotive manufacturer
on its innovation & digital issues, including on an outsourcing contract and on the use of encryption technology.

The Bank of Cyprus
in negotiating an agreement with IBM for a digital transformation program aimed to improve their online offering. The agreement consisted of several separate components, including an outsourcing component, software development and a digital factory.
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