

DIGITAL PLATFORM REGULATION AND MANDATORY MERGER CONTROL ON THE HORIZON

The last quarter of 2023 has been busy for digital platform operators and investors as the Australian Treasury, Senate's Economics References Committee (**Committee**) and the Australian Competition and Consumer Commission (**ACCC**) released three papers on Australia's future merger control regime and obligations on digital platform services. Here is what you need to know:

EMERGING CONCERNS ABOUT MERGERS...

Productivity growth has slowed in Australia and a range of competition indicators – including industry concentration, incumbency and firm mark ups – suggest there has been an overall deterioration in competition in Australia since the early 2000s. The OECD noted that *"a growing body of evidence links excessive concentration and market power with a range of poor economic outcomes"*. Concerns have been raised that the anti-competitive effects of certain types of acquisitions by large firms are not adequately captured by current competition laws. Against this background, on 20 November 2023, Australian Treasury released a consultation paper seeking feedback and views from interested parties on options for modernising Australia's merger regulation.

... AND DIGITAL PLATFORMS

But concerns extend beyond mergers to business practices of large digital platforms, in particular the practices of the five largest platforms: Alphabet (Google), Amazon, Apple, Meta and Microsoft. On 27 November 2023, the ACCC's Chair Gina Cass-Gottlieb [noted](#) that the continued expansion of these platforms heightens the risk of detrimental practices, including invasive data collection methods and strategies leading to consumer lock-in where users, compelled by limited alternatives or inconvenience, might unwittingly agree to unfavourable terms and data collection practices. These practices are examined in the ACCC's 7th Interim Report in its ongoing Digital Platform Services Inquiry ([ACCC Interim Report](#)) which seeks to set out the potential ramifications of these practices on competition. Following the Interim Report, Assistant Treasurer Stephen Jones and Communications Minister Michelle Rowland [expressed](#) the view that the ACCC has *"presented a strong case for the development of a new ex ante digital competition regime to address anti-competitive behaviours of certain digital platforms."* Meanwhile, the Commissioner of the Productivity Commission, Stephen King, criticised the ACCC's ongoing review of digital platforms as unfairly targeting online retail platforms, saying there is nothing online marketplaces were doing that was not already being done by Australia's major supermarkets.

Key issues

- ACCC supports a mandatory suspensory merger control regime and changes to the substantive competition test. This proposal is being tested in the Treasury's merger control consultation paper.
- Interested parties may submit responses to the merger control consultation up until 19 January 2024.
- Business conduct of digital platforms is under scrutiny for potentially causing anti-competitive concerns and consumer harms. Digital platforms are expected to be subject to dedicated legislation which will align with corresponding regulations in other jurisdictions.
- Interested parties should be prepared to make a submission on the ACCC's last interim digital platform services inquiry report mid next year.

Only three days after the release of the ACCC Interim Report, the Committee published its report in the Senate Inquiry into the Influence of International Digital Platforms ([Senate Report](#)). The Senate Report collects together concerns of interested parties on a broad range of digital business practices ranging from self-preferencing, tying, bargaining imbalances, data collection, use of algorithms, and online safety, to the development of Artificial Intelligence. The Senate Report has significant parallels to the findings and recommendations of the ACCC's inquiries, as well as the Review of the Privacy Act already being implemented by the government.

MERGER CONTROL REGIME

Ms Cass-Gottlieb noted the rapid expansion of digital platforms and [emphasised](#) the vast number of acquisitions by major digital platforms over the past decade, with the five major platforms collectively making approximately four acquisitions per month between 2010 and 2020. In the eyes of the ACCC, such acquisitions enable a platform that already has access to a large volume and scope of data to extend its power to other markets.

This issue is highlighted in the Treasury consultation paper on merger reform released on 20 November 2023 ([Treasury Consultation Paper](#)). Relevantly, the Treasury Consultation Paper notes that certain types of acquisitions by large firms would not be adequately captured by current competition laws including:

- creeping or serial acquisitions (i.e., a series of small acquisitions by large firms) which have been concerning in Australia in sectors such as supermarkets, liquor and hardware;
- acquisitions by large incumbents of nascent competitors as they could constitute a competitive constraint in the future if not acquired; and
- expansions into related markets, including by digital platforms, for example, Google's acquisitions of YouTube, DoubleClick, Waze, and Fitbit, and Meta's acquisitions of Instagram and WhatsApp.

Three policy options to address these issues amongst other things have been laid out in the Treasury Consultation Paper. Each will vary the existing voluntary notification scheme. However, the ACCC proposes and supports only one of the options, being the implementation of a mandatory formal suspensory merger control regime in which transactions above a threshold must be notified to the ACCC. The mandatory notification would be supplemented by a "call-in" power for transactions below the threshold where there are competition concerns (for further reading on the possible thresholds and "call-in" powers see our briefings dated [22 August 2023](#) and [4 July 2023](#)). Transactions would be suspended for a period of time while the ACCC conducts its assessment and upfront information requirements would be introduced. The ACCC would only grant clearance if it was satisfied the merger was not likely to substantially lessen competition. The merger control test in the *Competition and Consumer Act 2010 (Cth)* would also be revised to require consideration of:

- transactions that entrench, materially increase or materially extend a position of substantial market power;
- additional merger factors (like market barriers or entrenchment of market power) or, instead, reverting to a simple substantive test without explicit merger factors (i.e., "substantial lessening of competition" test), similar to the US and the UK; and/or

- related or ancillary agreements between merger parties (such as non-compete agreements or agreements concerning supply of goods or services post-merger) as part of the merger review process.

DATA CONCERNS IN A DIGITAL LANDSCAPE

The ACCC and the Committee have identified the exponential increase in the collection and aggregation of user data by digital platform service providers as a significant risk to competition. The concern is that digital platform service providers, expanding their array of services, would opportunistically gather and merge non-public user data across platforms. In particular there are concerns about:

- a perceived lack of consumer awareness regarding the extent, purpose, and sharing of their data. To the extent that business terms of service and privacy policies contain vague statements about data sharing with "trusted third parties", users may be unaware of the parties involved in any data sharing, and the opacity in data collection processes may amount to misrepresentation.
- the unrestricted collection of consumer data, compounded by strong network effects and economies of scale, which could present barriers to market entry and expansion, i.e., large platforms, acting as gatekeepers between consumers and businesses, could strategically use non-public data to develop in-house apps or hinder user migration to rival platforms, thus stifling competition and innovation.
- excessive data accumulation which could infringe upon consumer privacy and security, leading to increased profiling and potential manipulation. The broad scope of data collection practices could heighten the barriers to switching platforms, limiting consumer choice and exacerbating potential consumer harms.

To address these concerns, the ACCC and the Committee recommend implementing stringent measures to enhance transparency in data collection practices across digital platforms. This includes creating more accessible and concise terms of service and privacy policies that clearly outline data usage and sharing practices. Additionally, they advocate for mechanisms to ensure consumer awareness and understanding of how their data is utilised, with a focus on minimising the risk of potential misuse.

INTERCONNECTIONS: IMPACT ON CONSUMER CHOICES

A further "consumer choice" concern articulated by the ACCC relates to the interconnection of products and services to retain consumer loyalty and entrench or expand market power. The ACCC's view is that default settings, pre-installations, and bundled offerings that streamline user experiences can limit consumer choice. Products of this nature include, for example, Apple's pre-installed apps, such as Apple Maps or the Health app.

This concern is consistent with competition concerns that typically arise around bundling and tying practices. These strategies can increase costs or reduce revenues for competitors, hampering their competitiveness. In August 2023, Microsoft unbundled Teams from Office 365 in response to the European Commission's concerns about bundling practices.

Digital platforms may exert self-preferencing by favouring their products over third-party offerings; gatekeeper positions may enhance the ability to direct user attention

to higher-profit services. These practices might potentially limit competition and consumer choice.

In response to these particular concerns, the ACCC has recommended new service-specific codes of conduct for "designated digital platforms", which would allow for dynamic and flexible measures tailored to relevant digital platform services which have the ability and incentive to harm competition by engaging in anti-competitive conduct. Ms Cass-Gottlieb [provided](#) an example of a marketplace application code which would prevent designated digital platforms using non-public data collected from the app review process to develop their own apps.

CONSUMER HARM RISKS FROM EXPANDING ECOSYSTEMS

The ACCC notes that consumers of digital platform services frequently pay with their data and attention, often unaware of the full extent of these transactions and the potential for the provision of data to increase the risk of scams. [Reportedly](#), Australians lost over AUD 80 million to scams on social media in 2022, a rise of 43% from 2021. In view of mounting concerns among consumers, the ACCC proposes two key consumer-oriented reforms:

- Mandatory requirements for all digital platforms to tackle issues such as scams, malicious apps, counterfeit reviews, and the implementation of more robust verification processes for business users; and
- Mandatory standards for internal dispute resolution and the establishment of an external ombudsman scheme to handle disagreements between platforms and users.

NEXT STEPS

The inquiries, reports and recommendations from the ACCC, Treasury and the Committee aim to articulate and address the multifaceted challenges posed by digital platform services. Emphasis is put on further coordination between key regulators of the digital platforms on a national level through the Digital Platform Regulators Forum while simultaneously aligning with international developments. The Australian government has [welcomed](#) ACCC's recommendations in principle. It can, therefore, be expected that future legislation on digital platforms in Australia will take note of corresponding legislation in other jurisdictions, such as the Digital Markets Act and Digital Services Act in the European Union.

The current Treasury consultation on the proposed merger control regime is the next step to what will likely be the most significant change to Australian merger control laws in recent years. Notably, the former Chair of the ACCC, Rod Sims, has been appointed to sit on the newly established Competition Taskforce's panel to oversee the consultation process and advise Treasury on possible changes to the current merger control process. As the original proponent of merger reform in Australia in August 2021, Mr Sims may be inclined to advise the government to implement those reforms expeditiously.

Interested parties, including market participants with larger market shares (particularly those in concentrated industries) and, of course, digital platform service providers, should use these consultation processes to make submissions, in particular to the Treasury's Competition Taskforce by **19 January 2024**.

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