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**The Evolving Concept of Market Power in the Digital Economy – Note by Australia**

22 June 2022

This document reproduces a written contribution from Australia submitted for Item 5 of the 138th OECD Competition Committee meeting on 22-24 June 2022.

More documents related to this discussion can be found at

<https://www.oecd.org/daf/competition/market-power-in-the-digital-economy-and-competition-policy.htm>

Antonio CAPOBIANCO  
Antonio.Capobianco@oecd.org, +(33-1) 45 24 98 08

**JT03496762**

## *Australia*

1. This submission primarily draws on the Australian Competition and Consumer Commission's (ACCC) experience in conducting several sector inquiries into the competitiveness of digital platform services markets.

### 1. Role of the ACCC

2. The ACCC is Australia's national consumer protection and competition regulator and is responsible for enforcing compliance with the competition, consumer protection, fair trading and product safety provisions of the *Competition and Consumer Act 2010* (CCA).

3. The purpose of the CCA is to enhance the welfare of Australians by:

- promoting competition among businesses
- promoting fair trading by businesses, and
- protecting consumers in their dealings with business.

4. For the purposes of this submission, there are several key provisions of the CCA which are relevant:

- Firstly, the ACCC is responsible for investigating and enforcing section 46 of the CCA which deals with conduct engaged in by a firm with a substantial degree of market power that has the purpose, effect or likely effect of substantially lessening competition in a market.
- The ACCC is also responsible for administering section 50 of the CCA which prohibits acquisitions that would have the effect, or be likely to have the effect, of substantially lessening competition in any market.
- In addition, the ACCC can be directed under subsection 95H(1) of the CCA to undertake in-depth inquiries. These inquiries involve extensive investigation and analysis, including public consultation. We publish our findings in formal reports to help inform consumers, encourage public debate and inform policy consideration. Under these powers, the ACCC has been examining competition and consumer issues associated with digital platforms since late 2017.<sup>1</sup>

#### Box 1. ACCC inquiries into digital platform services

##### **Digital Platforms Inquiry 2017-2019**

In December 2017, the ACCC was directed by the Australian Government to consider the impact of online search engines, social media and digital content aggregators (digital platforms) on competition in the media and advertising services markets. The ACCC published its final report and concluded the inquiry in July 2019.

<sup>1</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019; ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021; ACCC, [Digital platform services inquiry 2020-2025](#)

**Ad Tech Inquiry 2020-2021**

On 10 February 2020, the Government directed the ACCC to hold an inquiry into the markets for the supply of digital advertising technology (ad tech) services and digital advertising agency services. The final report was published in August 2021.

**Digital Platform Services Inquiry 2020-2025**

On 10 February 2020, the Government directed the ACCC to conduct a 5-year inquiry into markets for the supply of digital platform services, with reports to be provided to the Treasurer every 6 months. The ACCC has published regular interim reports with an in-depth focus on particular services or topics (specifically, online private messaging services, app stores, the use of web browsers and search services and the effectiveness of choice screens, and general online retail marketplaces). The ACCC's next report, to be provided to the Australian Treasurer in September 2022, will consider whether there is a need for a new regulatory framework to address the competition and consumer concerns identified in digital platform services markets to date, and if so, the form of any such framework (referred to as the 'Interim report on regulatory reform' for the purposes of this submission).

## 2. The concept of market power under Australian law

5. Market power under Australian law broadly concerns a firm's ability to act with a degree of freedom from the competitive constraints of rivals, potential rivals and customers. In practice, this involves identifying the relevant market and a subsequent assessment of the degree of competitive constraints faced by a firm. This assessment typically involves considering factors such as the degree of concentration in the market, barriers to entry and expansion, the extent of vertical integration, the degree of product differentiation, and whether there are any formal arrangements between firms which restrict their ability to function as independent entities. As set out below, additional factors may be relevant in assessing market power in digital platform markets.

6. Australian law does not prohibit a firm from possessing a substantial degree of market power. Nor does it prohibit a firm with a substantial degree of market power from 'out-competing' its rivals by using superior skills and efficiency to win customers at the expense of firms that are less skilful or less efficient. This conduct is part of the competitive process, which drives firms to develop and offer products that are more attractive to customers; it should not be deterred. However, it is illegal for a firm with substantial market power to substantially lessen competition by engaging in conduct that prevents or deters rivals, or potential rivals, from competing on their merits. Some types of conduct that have the potential to substantially lessen competition include refusals to deal, restricting access to an essential input, or predatory pricing.

## 3. Some differences in assessing market power in digital platform markets

7. While assessing market power in digital platform markets involves many of the same issues and inquiries as assessing market power in other markets, there are a few key differences.

8. First is identifying the competitive rivals to a digital platform. Most digital platforms are multi-sided. That is, they provide services to more than one distinct user group. For example, Meta provides services to both consumers who wish to use social

media services, and advertisers who wish to advertise to these consumers while they are doing so. Identifying the competitive rivals to Meta involves assessing the alternatives available to both consumers and advertisers, and the degree to which they are effective substitutes.

9. Second is the importance of potential competition. As discussed below, a number of the characteristics of digital platform markets make them prone to ‘tipping’ where one or a very small number of large platforms supply the vast majority of the market. Once this occurs, the most significant competitive rivalry is likely to come from disruptive entry. That is, entry on a scale sufficient to displace the incumbent(s). As a result, a significant focus of the assessment of market power in many digital platform markets concerns the barriers to, and the likelihood of, disruptive entry.

10. Third is the importance and role of data. Access to, and use of, individual-level data is central to the business models of many digital platforms. For example, the success of advertising-funded digital platforms depends on their access to, and ability to use, information about individual users to improve the effectiveness of advertisements. Access to individual-level data can be a source of considerable competitive advantage.<sup>2</sup> A key issue for assessing the market power of digital platforms is the likelihood of effective entry in the presence of these data advantages. In this regard, it is important to assess the variety of the sources of individual-level data available to digital platforms across the breadth of their activities in digital markets. The extent to which these data advantages are insurmountable is central to the degree and longevity of market power in digital platform markets.

#### 4. Sources of market power in digital platform markets

11. The ACCC has found in its inquiries that many digital platform markets are prone to the accumulation of substantial market power, which, once attained, can readily become entrenched.

12. There are two reasons for this.

13. First, digital platform markets have a number of characteristics that make them prone to high degrees of market concentration and significant barriers to entry. These characteristics include:

- extreme economies of scale and sunk costs,
- network effects (direct and indirect),
- expansive ecosystems and advantages of scope,
- consumer inertia, switching costs and defaults; and
- access to, and use of, vast amounts of individual-level and other high quality data.

14. While these characteristics are not unique to digital platform markets, their strength and their presence in combination gives them greater significance in the assessment of market power.

15. Second is the strategic conduct of large digital platforms. Once a firm gains a position of substantial power in a digital platform market, it has a strong commercial incentive and ability to entrench and extend that market power. We have observed a range

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<sup>2</sup> ACCC, [Digital Platform Services Inquiry Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services](#), 28 February 2022, pp 33-36.

of conduct that has likely achieved these outcomes including systematic acquisitions of potential rivals and the use of strong market positions to favour their own operations in related markets (leveraging and self-preferencing).

#### 4.1. Extreme economies of scale and sunk costs

16. The ACCC has found that once a digital platform reaches a certain size it can be very difficult for smaller platforms or new entrants to effectively challenge them, due in part to sunk costs and extreme economies of scale.<sup>3</sup>

17. Digital platforms generally incur high upfront or fixed costs in the development and operation of their platforms, but low (and possibly declining) marginal costs in servicing additional users. For example, there are substantial fixed costs in operating Google's general search services (in particular, the crawling and indexing of webpages, and developing search algorithms) but low marginal costs associated with providing search services to additional users.<sup>4</sup>

18. These large economies of scale insulate large digital platforms from competition in two ways. First, it places smaller platforms at a significant cost disadvantage, limiting their ability to compete. Second, it makes new entry less likely. That is, to the extent that the high fixed costs are 'sunk' (i.e. cannot be recouped if the entrant is unsuccessful), they can make entry extremely risky. Conduct of incumbent platforms (as discussed below) might further contribute as a disincentive to entry given this risk.

#### 4.2. Network effects

19. Digital platforms can exhibit two types of network effects.

##### 4.2.1. Same-side network effects

20. Same-side (direct) network effects occur when the value of the platform to a user increases with the number of the same type of users on the platform. For example, the value of Meta's social media platform to a user increases the more their family and friends also use the platform. As a result, digital platforms with a large number of users can easily attract more users, making the platform even more valuable.<sup>5</sup> Similar effects occur for private messaging apps.<sup>6</sup>

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<sup>3</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 73, 76, 79; ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, pp B2-B3. ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 88; ACCC, [Digital Platform Services Inquiry Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services](#), 28 February 2022, p 27.

<sup>4</sup> ACCC, [Digital Platform Services Inquiry Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services](#), 28 February 2022, p 27. Similarly, these extreme economies of scale are enjoyed by Meta's social media business in relation to its R&D expenditure and by Apple and Google in relation to the establishment and operation of mobile operating systems and app marketplaces.

<sup>5</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 79.

<sup>6</sup> ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, pp 25, 32. Network effects on online private messaging services can also be described as 'identity-based' since the users' identity, rather than just the number of users, is relevant to determining the utility of the service to users.

21. Same-side network effects can also arise from data accumulation. For example, an additional user of a search service increases the data the search engine has about search behaviour, which allows it to improve the relevance of its algorithms, and, in turn, the quality of search outcomes for all users.<sup>7</sup> Often these effects are such that a platform needs to reach sufficient scale before it can offer a service capable of competing with the incumbent platform.

#### *4.2.2. Cross-side network effects*

22. Cross-side (indirect) network effects occur when the value of the platform to a user increases with the number of the users on the other side of platform. For example, the value of an app store to a consumer depends on the number of app developers who make their apps available on the store (and vice versa). Cross-side network effects in platform markets can be uni-directional or bi-directional. For example, platform markets involving advertising are often uni-directional as advertisers are more attracted to platforms with more users, though more advertisers will not necessarily make a platform more attractive to consumers.

23. If (positive) cross-side effects operate in both directions, there can be strong feedback effects. For example, the more app developers who make their apps available on an app store, the more consumers are likely to use the app store, which is likely to attract more app developers, and so on.

#### *4.2.3. Network effects and tipping*

24. The presence of same-side and/or positive bi-directional cross-side network effects can make digital platform markets prone to “tipping”. In markets where such network effects are sufficiently strong, users will be drawn towards the platform with the highest number of users. This further enhances the attractiveness of the platform which has the potential to lead to the market to “tip” in favour of this platform, leaving it as the only platform in the market, or the largest platform by a substantial margin. Once this occurs, the most effective form of competition may be competition “for the market” rather than competition “in the market”.

25. The presence of strong network effects, especially when coupled with single-homing and barriers to switching (including high co-ordination costs; see below for further discussion of these effects), limits the competitive constraint from smaller platforms and new entrants. If there are only a few users on a platform, that platform will be of relatively low value to any given user and will have difficulty attracting new users. Consequently, a small-scale entrant is likely to have difficulty in attracting new users relative to a large incumbent; making entry less likely and, if it does occur, of limited competitive significance.

#### *4.2.4. Cross-side network effects and zero-pricing*

26. Some digital platforms provide consumers with services for a zero monetary price. Cross-side network effects explain why platforms have an incentive to set prices in this fashion. By charging a zero monetary price, digital platforms like Google Search and Meta’s social networking platforms encourage consumers to use their platforms, which increases their attractiveness both to other users (to take advantage of same-side network effects), as well as to advertisers. While consumers do not pay a monetary price, this does not mean the services are free. Consumers pay by allowing Google and Meta to collect and

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<sup>7</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 66-67.

use their data (e.g. for targeted advertising), and through the sale of their attention to advertisers. This enables Google and Meta to earn revenue from advertisers.<sup>8</sup>

27. The ACCC notes that certain behavioural biases resulting from the ‘free’ nature of online services means that many consumers are likely to focus more on the zero monetary cost of using a digital platform service and less on the potential costs of providing digital platforms with their data and viewing advertising.<sup>9</sup>

28. Zero pricing can also make new entry difficult. To gain scale, it is necessary for a new entrant to attract users to both sides of the platform. The presence of zero prices eliminates one of the key ways in which an entrant can attract users – price discounting.<sup>10</sup> For example, Google Search does not charge users for using its search engine. As a result, attempts by smaller search engines to differentiate their offers to attract users focus on non-price attributes, such as the use of personal data and privacy or by promoting social objectives (for example, planting trees with profits).<sup>11</sup> While non-price attributes are a basis for competition, it can be more difficult to convey the value of these attributes to consumers compared to the value of a lower price.

#### ***4.2.5. Single-homing and multi-homing***

29. A key factor that affects the importance of network effects for the structure of digital platform markets and barriers to entry is whether or not users single-home or multi-home. A user is said to multi-home if they regularly use more than one platform to access the same service. For example, the ACCC has found that many consumers use more than one online marketplace to search for and buy goods online. Similarly, many consumers regularly use more than one online private messaging service.<sup>12</sup> Network effects as a source of market power may be mitigated if one or both types of users (on each side of the platform) multi-home.

30. Consider Google Search. In Australia, Google provides around 95% of general search services, and has done so for over a decade. It is also the default search engine on the largest Internet browsers. It seems that most users of general search almost always use Google, and effectively single-home. If an advertiser wishes to reach these consumers when they are searching for information on the internet, they must advertise on Google Search. Google effectively has a ‘monopoly’ over access to the attention of these customers, while they are engaged in general online search.<sup>13</sup>

### **4.3. Extensive ecosystems and advantages of scope**

31. Many large digital platforms have developed extensive ecosystems, which they continue to expand by acquiring firms and developing new products and services. Ecosystems can benefit consumers by increasing convenience or reducing friction when moving between different services and devices within the system. However, when coupled

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<sup>8</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 63.

<sup>9</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 395-396.

<sup>10</sup> Assuming it is not commercially feasible to charge a negative monetary price.

<sup>11</sup> ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, pp 93-94.

<sup>12</sup> ACCC, Report on Online general retail marketplaces, 28 April 2022, p 13; ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, pp 23-24.

<sup>13</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 95.

with a lack of interoperability between ecosystems and default biases (which mean that consumers tend to stick with the default options), they may result in reduced switching or increased switching costs for consumers, which can lead to limited competition in related services and limited competition between the ecosystems themselves.<sup>14</sup> Ecosystems can also entrench an incumbent's control over access to consumers (and consumer data), thereby consolidating any market power.

32. Ecosystems also give rise to advantages of scope, particularly in relation to the accumulation and control of user data. For example, Google benefits from advantages of scope in its supply of search engine services, including from the data it obtains from its various businesses (including Google Search, its ownership of Android and its presence across the mobile device ecosystem).<sup>15</sup> These advantages of scope can enable digital platforms to expand and extend their dominance into adjacent markets.

33. Relatedly, large digital platforms have developed substantial advantages through their global reach. Low distribution costs mean that once established, large digital platforms have been able to readily expand into new geographic markets.

#### 4.4. Consumer inertia, switching costs and defaults

34. The barriers to entry and expansion resulting from the presence of network effects and economies of scale can be exacerbated by consumer inertia and switching costs. New entrants and smaller platforms may be able to encourage consumers to switch to their platform if it is easy to do so and involves little cost. However, this is often not the case. Switching between platforms can require consumers to buy new devices or move between ecosystems. The costs of buying a new device or learning how to operate in a different ecosystem can be significant. In the case of social networking services, changing platforms is likely to involve family and friends moving on mass. The coordination issues in doing so are likely to be substantial. The difficulties faced by new entrants and smaller platforms in attracting users are also affected by pre-installation and default arrangements<sup>16</sup> and the lack of interoperability and data portability between services. These factors can essentially 'lock-in' consumers, making it difficult for new entrants to build sufficient scale and can ultimately enable digital platforms to further entrench their dominant position.

#### 4.5. Importance of data

35. The ACCC has found that access to vast amounts of individual-level data can provide a considerable competitive advantage to established digital platforms relative to smaller rivals.<sup>17</sup>

36. Access to and control of vast amounts of rich and high quality data (including real time data) – including through large ecosystems and mergers or acquisitions – provides the following benefits:

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<sup>14</sup> ACCC, [Digital Platform Services Inquiry Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services](#), 28 February 2022, p 31.

<sup>15</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 73-74; ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 92.

<sup>16</sup> ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, pp 12-13.

<sup>17</sup> ACCC, [Digital Platform Services Inquiry Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services](#), 28 February 2022, p 33.



- ability to train algorithms to improve products and services, assist in the development of new products and services, and ultimately increase the platform's attractiveness to users,
- ability to increase advertising revenue by improving performance of (targeted) advertising, and
- ability to increase profitability by allowing a firm to improve its ability to forecast product demand and market trends.

37. The ACCC notes that the data held by large digital platforms such as Google and Meta is particularly valuable not just because of the scale and scope of the user data collected, but also because of the high volume of reliable first-party data (i.e. data collected via their own services that may not necessarily be available to potential rivals).

38. The lack of access to comparable data makes entry, or expansion by smaller rivals difficult, and unlikely; ultimately weakening present and future competitive constraints on large platforms.

#### 4.6. Acquisitions of potential rivals

39. A number of large digital platforms including Google and Meta have spent substantial sums acquiring hundreds of other businesses.<sup>18</sup> While many of these acquisitions are likely to have been efficiency-enhancing or pro-competitive, there is scope for acquisitions to entrench or extend a position of significant market power in digital platform markets.

40. One way this can be achieved is through the acquisition of nascent rivals. As noted above, the prospect of disruptive entry can be an important, and in many cases, the most significant constraint on large digital platforms. Disruptive entry can come from new business models or from businesses with a service that is substantially superior to the services offered by the incumbent. This constraint can however be undermined by a strategy of acquiring nascent rivals before they become a material threat. Moreover, digital platforms with substantial market power can have strong commercial incentives to engage in such a strategy. Acquiring nascent competitors is a form of insurance. While the likelihood that a nascent competitor will become a disruptive force is low, the potential loss to the incumbent if it does is likely to be substantial.

41. Advantages of scope can also be obtained through acquisitions. The ACCC has found that Meta (then Facebook) obtained advantages of scope from the purchase of WhatsApp. For instance, through the ownership of WhatsApp, Meta is able to access consumer data, which can be used to improve the quality of ad targeting on the Facebook platform, Instagram, Messenger and Facebook Audience Network.<sup>19</sup>

42. Strategic acquisitions by a digital platform, benefiting from substantial data or other advantages in one or more markets, can also enable it to further entrench any existing market power and extend its position to other markets (including emerging and new markets), due to the significant economies of scope associated with data agglomeration.<sup>20</sup>

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<sup>18</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 74-75, 80-81.

<sup>19</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 81.

<sup>20</sup> ACCC, [Digital Platform Services Inquiry Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services](#), 28 February 2022, p 68-69.

#### 4.7. Vertical integration and self-preferencing behaviour

43. Many digital platforms are vertically integrated in some or all of the services they supply. This integration can give rise to efficiencies and provide benefits to businesses and consumers. However, vertical integration can also lead to significant competition and consumer harms where vertically integrated firms have the ability and incentive to engage in anti-competitive conduct. For example, the ACCC has concerns that Google’s vertical integration and dominance across the ad tech supply chain, and in related services, has allowed it to engage in leveraging and self-preferencing conduct that has interfered with the competitive process and reduced the strength of actual and future constraints from rivals over time.<sup>21</sup> The ACCC has identified similar concerns in the context of Google and Apple’s app marketplaces, and Google Search.<sup>22</sup>

#### 4.8. Importance of gatekeeper status of the largest digital platforms

44. In addition, there appears to be a growing recognition internationally of the important role many digital platforms play in the operation of other markets in the economy. Many digital platforms provide businesses with access points to consumers. A small number of large digital platforms provide unique access to so many consumers that many businesses have little choice but to participate on the platforms – whether to gain sufficient reach in advertising, or to make their goods available to significant customer segments. These platforms hold a ‘gatekeeper’ position between consumers on one side and business users on the other. These characteristics set the largest digital platforms apart from many other businesses in the economy. The use or abuse of market power by platforms exhibiting these characteristics can have serious implications for competition in other markets, as well as for consumers broadly. This issue is something that the ACCC will consider more in its Interim report on regulatory reform.

### 5. Limitations on enforcement action under CCA to address consequences of market power in digital platform services

45. The ACCC considers that the existing economic and legal analytical tools under competition law – including those for assessing market power – remain broadly applicable for digital markets and do not need to be adapted. As noted above, the ACCC approach to assessing the market power of digital platforms, and the tools it uses to do so, are similar to those used to assess market power in other markets (despite some of the specific sources of market power being different).

46. The ACCC has identified several platforms as having significant market power in the supply of digital platform services in the course of its market studies. Specifically, the ACCC has found that Google has significant market power in relation to general search, search advertising, and is dominant in the ad tech supply chain. Similarly, the ACCC has found that Meta has significant market power in relation to social media and display

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<sup>21</sup> ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, pp 7-8.

<sup>22</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, pp. 6-8, 45-48, 130. ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, pp 12-13.

advertising, and both Apple and Google have significant market power in relation to mobile operating systems and likely have significant market power in mobile app distribution.<sup>23</sup>

47. The ACCC has, however, identified several reasons why ex post enforcement and merger control under the CCA may not be sufficient alone to fully address concerns arising in relation to digital platform services.

48. In this context, the ACCC is currently considering, as part of its fifth report under the digital platforms services inquiry, whether Australia's current competition and consumer protection laws, including merger laws, are sufficient to fully address the competition and consumer harms that have been identified in relation to digital platform services, and the role they play in the operation of markets in the economy.<sup>24</sup> As noted previously, the Interim report on regulatory reform will be provided to the Treasurer in September 2022.

### 5.1. Timeliness, scale and efficiency of enforcement action

49. One of the ACCC's key concerns is the timeliness, scale and efficiency of enforcement action under the CCA in these dynamic markets.

50. Investigations and court proceedings are lengthy and necessarily retrospective in effect, seeking to address particular competition and consumer harms after they have occurred. Due to the dynamic nature of digital platform services, there is a risk that market power can be relatively quickly extended and/or entrenched while a case is being investigated and litigated and further harm may occur, with potentially irreversible consequences. This is particularly the case where digital platform providers are vertically integrated, operate extended ecosystems or participate across various levels of a supply chain. The dynamic nature of these markets also means that many of the competition harms may be more novel and prospective, which makes them more difficult to assess given the limited precedents upon which to draw from.

51. As the ACCC is only able to litigate matters or conduct that fit within the specific provisions of the CCA, cases typically focus on a very specific breach. This means enforcement action is unable to effectively address systematic harms and the breadth of problematic conduct that a digital platform with substantial market power can engage in, in an efficient and timely way.

52. By way of background, the Australia's competition and consumer law enforcement proceedings are judicial, rather than administrative, in nature. Accordingly, parties such as the ACCC (and other state and territory consumer protection agencies for example) take legal action under the CCA and it is the role of the Court to determine whether there has been a breach and, if so, the appropriate penalties or other remedies. The ACCC cannot itself come to a finding that a company has breached the CCA. However, where the court finds contraventions, the ACCC can seek to address any harm caused by the conduct or arrangements through court ordered remedial action (in addition to penalties). The ACCC can also accept court enforceable undertakings in settlement of investigations and court proceedings.

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<sup>23</sup> ACCC, [Digital Platform Services Inquiry Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services](#), 28 February 2022, p 16.

<sup>24</sup> ACCC, [Digital Platform Services Inquiry Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services](#), 28 February 2022.

53. The complex services and relationships involved in digital platform services also mean that the ACCC is often dependent on conduct being brought to the ACCC's attention by receiving complaints. However, it is likely that some forms of discrimination or self-preferencing that may be anti-competitive go undetected by market participants, particularly in circumstances where digital platforms more or less operate as "black boxes". We note that this has been somewhat mitigated by the ACCC's ability to examine these markets in detail as part of our inquiries into digital platforms markets.

### Box 2. Parallels with sector-specific regulation

There has been debate about whether certain services offered by a few large digital platforms such as Google, Meta and Apple, should be classified as 'essential facilities' similar to national infrastructure and 'natural monopolies' like rail, telecommunications and electricity, and be subject to obligations akin to an access regime.

These industries similarly give rise to concerns regarding systematic anti-competitive conduct given the incentives for vertically integrated monopoly infrastructure providers to discriminate – or self-preference – in the supply of wholesale services in favour of their own downstream operations. Obligations placed on these providers often seek to address similar issues to those identified above, such as addressing self-preferencing (e.g. through setting access prices and non-discrimination provisions) and information asymmetry between the regulator and regulated entity (e.g. through record keeping rules).

While the CCA does not directly provide for the ACCC to perform similar functions in relation to other services, such as digital platforms services, the ACCC is considering whether a similar approach could be used to address some of the conduct and harms arising in digital platforms markets.

## 5.2. Court imposed remedies unable to address underlying cause of the harm

54. Another challenge is the seeming inadequacy of court-imposed fines and remedies to address self-preferencing and other anti-competitive behaviour of digital platforms.

55. One-off penalties imposed by Courts in Australia may not reach the scale necessary to deter very large global digital platforms – with access to significant financial resources – from engaging in similar conduct in the future and to encourage a change in behaviour.

56. It can also be difficult to use enforcement action to obtain remedies that address the underlying cause of the problems in relation to digital platform services. It may not be possible for specific behavioural remedies, designed in response to individual alleged breaches of the CCA, to be sufficiently flexible to address persistent market-wide issues. Further, the behavioural remedies most likely to be available through enforcement of individual breaches of the CCA also have limitations in addressing structural problems, such as barriers to entry and expansion.<sup>25</sup> Targeted remedies may also be less effective in fast-moving markets, such as digital platform markets, where markets may have already tipped due to the underlying conduct by the time the remedies are put in place.

<sup>25</sup> ACCC, [Digital Platform Services Inquiry Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services](#), 28 February 2022, p 64.

57. Private actions by Australian businesses to enforce relevant competition and fair trading protections against a large digital platform also face considerable challenges. This is due in part to prohibitive dispute resolution clauses in some digital platforms' standard terms of service as well as the imbalance in access to financial resources. The latter is particularly likely to constrain the ability of smaller businesses to reach a settlement on an issue that impacts their viability without recourse to initiating legal action.

### 5.3. Limitations in merger control

58. The specific characteristics of many digital platforms mean that digital platform markets are often highly concentrated. In such markets, the major constraints can come from potential competition which threatens to displace the incumbent's market position. As noted above, firms with strong positions in these markets can undermine this process by acquiring nascent competitors before they can become a genuine threat. For example, between 2008 and 2018, Amazon, Facebook (Meta) and Google made approximately 300 acquisitions, 60% of which involved firms that were less than 4 years old.<sup>26</sup>

59. Acquisitions that protect or extend the market power of large digital platforms, particularly those involving the acquisition of a nascent competitors, have the potential to cause substantial harm to competition and innovation over the medium to long term. The ACCC is therefore currently considering whether regulatory reform is needed to address anti-competitive acquisitions by digital platforms as part of its upcoming Interim report on regulatory reform.<sup>27</sup> In its Discussion Paper to inform the Interim report on regulatory reform, the ACCC proposed that there should be a new tailored merger regime for digital platforms that meet pre-defined criteria linked to their market power and/or strategic position in one or more digital markets (including, potentially, their role as gatekeepers). The ACCC also outlined other potential options for stakeholder feedback, such as notification requirements and applying a lower probability of competitive harm threshold to acquisitions by digital platforms that meet that meet the relevant criteria.

## 6. Harms arising from digital platforms with market power are likely to be significant and long-lasting

60. Consumers and businesses derive substantial benefits from the services provided by digital platforms and are a substantial source of innovation. These benefits and the capacity for digital markets to continue to drive economic growth through innovation and creative disruption should not be interfered with in any new regulatory settings.

61. The ACCC is concerned however that several markets already appear to have "tipped" in favour of one or two dominant firms and that the market power of certain large digital platforms is both becoming increasingly entrenched and expanding into related markets. This has significant consequences for actual and potential rivals, business users and consumers. In fact, in several key markets, the position of certain large digital platforms is such that they hold very powerful positions and increasingly act as 'gatekeepers' between businesses and end-users (i.e. effectively regulating the terms on which businesses can

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<sup>26</sup> Elena Argentesi, Paulo Buccirossi, Emilio Calvano, Tomaso Duso, Alessi Marrazzo and Salvatore Nava, "[Merger Policy in Digital Markets: An Ex-Post Assessment](#)", CESifo Working Paper No. 7985, December 2019.

<sup>27</sup> ACCC, [Digital Platform Services Inquiry Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services](#), 28 February 2022.

reach Australian consumers). This position provides these platforms with an immense influence on the terms of trade and competitive dynamics in these markets, as well as on society and the economy more broadly.

62. In its inquiries, the ACCC has identified numerous harms to competition and consumers – many of which are likely to be significant and long-lasting – as a direct result of this increasingly entrenched and expanding market power.

63. Firstly, exclusionary conduct by large digital platforms has lessened competition in a number of markets. As mentioned above, the ACCC has previously raised concerns that Google’s position across the ad tech supply chain has allowed it to engage in leveraging and self-preferencing conduct to the detriment of both future and present rivalry.<sup>28</sup> And subsequently, harms arising as a direct and/or indirect consequence of reduced competition in the market (such as higher prices, reduced innovation and lower quality services). The ACCC has also found that the 15-30% commission charged by Apple and Google for in-app purchases is likely inflated by their market power.<sup>29</sup>

64. The tendency for digital platform markets to “tip”, and the expansion of existing market power into related markets, has also increased the importance of protecting potential competition in digital platform and related markets (including, for example, addressing the impact of acquisitions of nascent competitors).

65. Finally, the ACCC is also increasingly concerned about harms associated with bargaining imbalances between ‘gatekeepers’, consumers and business users, and the lack of sufficient consumer and business user protections. For consumers, this includes excessive online tracking, use of ‘dark patterns’, exposure to online scams, harmful apps and fake reviews, and consumer lock-in and reduced choice.<sup>30</sup> For business users, this takes the form of unfair trading practices, such as unfair terms of use or access, lack of transparency about pricing, quality and the operations of digital platforms, and ineffective dispute resolution.<sup>31</sup>

66. In this context, the ACCC is concerned that the existing provisions under the CCA alone may be insufficient to address the potentially significant and long-lasting harms to consumers and competition, particularly where effective competition is no longer possible.<sup>32</sup>

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<sup>28</sup> ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, pp 7-8.

<sup>29</sup> ACCC, [Digital Platform Services Inquiry Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services](#), February 2022, pp 42.

<sup>30</sup> ACCC, [Digital Platform Services Inquiry Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services](#), February 2022, pp 43-53.

<sup>31</sup> ACCC, [Digital Platform Services Inquiry Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services](#), 28 February 2022, p 53-57.

<sup>32</sup> . ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 19. ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 5, ACCC, [Digital Platform Services Inquiry Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services](#), February 2022, p 62.

### Box 3. Intersection of consumer and competition issues

As noted above, the ACCC has identified a range of consumer harms that arise as a direct or indirect consequence of reduced competition, from power imbalances between ‘gatekeepers’ and consumers, and a lack of consumer protections.

As a combined competition and consumer protection agency, the ACCC administers the Australian Consumer Law, including provisions regarding unfair contract terms and misleading and deceptive conduct (along with state and territory consumer protection agencies). In recent years, the ACCC has taken enforcement action against digital platforms regarding a number of alleged contraventions of consumer law. However, online consumer harms are increasing across a range of areas and need to be more directly addressed.

The ACCC is therefore considering the need for additional consumer protection measures in its upcoming Interim report on regulatory reform.

## 7. Evolving thinking on need for up-front regulation for designated firms

67. The ACCC released a Discussion Paper in February 2022 seeking feedback regarding the issues and harms so far identified during its inquiries, whether Australian competition and consumer law is sufficient to address these issues/harms and if not, what potential regulatory tools could be utilised to address these issues/harms.<sup>33</sup>

68. The ACCC is yet to form views on these questions, which will be the subject of the Interim report on regulatory reform. The ACCC expects that, should any new tools be recommended to the Australian Government, these would be designed to complement the existing competition and consumer law protection provisions in the CCA, and that these existing provisions would continue to apply in respect of digital platforms.

69. To the extent that the ACCC considers that reform is needed, it is likely the ACCC would recommend that this would only apply to designated digital platforms and/or their services, characterised by certain criteria. Internationally, the ACCC notes that a number of jurisdictions have recently agreed or are considering new competition regulations for large digital platforms. In particular, the EU has recently reached political agreement on the Digital Markets Act which seeks to impose certain obligations on firms holding ‘gatekeeper’ status (based on quantitative criteria).<sup>34</sup> The US has similarly seen the introduction of several legislative proposals seeking to impose ex ante rules on certain very large platforms that meet quantitative criteria.<sup>35</sup> On the other hand, the UK has recently established a Digital Market Taskforce tasked with designing enforceable codes of conduct to govern the behaviour of platforms funded by digital advertising and designated as having ‘strategic market status’ based on qualitative criteria.<sup>36</sup> And Germany has introduced

<sup>33</sup> ACCC, [Digital Platform Services Inquiry Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services](#), February 2022.

<sup>34</sup> European Commission, Press Release ‘[Digital Markets Act: Commission welcomes political agreement on rules to ensure fair and open digital markets](#)’, 25 March 2022.

<sup>35</sup> Reuters, ‘[House antitrust subcommittee unveils five big tech antitrust bills](#)’, 15 June 2021.

<sup>36</sup> UK Government, [A new pro-competition regime for digital markets](#), 20 July 2021.

specific prohibitions for platforms of ‘paramount significance’ also based on a qualitative assessment.<sup>37</sup>

70. While the thresholds or criteria for the application of these regimes are likely to vary between jurisdictions, some of the key factors include:

- Platforms’ size and the importance of their services for consumers, business users and the broader economy (e.g. number of (business) users or revenue, market capitalisation).
- Whether platforms function as a critical intermediary or unavoidable trading partner; specifically whether one set of users (e.g. businesses, advertisers) are heavily reliant on the platform to reach another set of users (e.g. customers, consumers). That is, whether platforms act as ‘gatekeepers’ between two types of users.
- Whether there is a significant power imbalance between these platforms and their users which enables them to not only unilaterally set, amend, interpret and enforce the terms and conditions of access to their services, but also more generally set the rules of the game regarding the functioning of products and services in which they are dominant.
- Whether platforms hold an entrenched or durable position, whereby they are unlikely to be challenged by any present or future rivals in the medium term through dynamic competition, due to high barriers to entry and expansion (arising as a result of high costs of entry, economies of scale, advantages of scope, network effects combined with zero-pricing, high levels of vertical integration and conglomerate effects). It is likely that these factors may have already reduced dynamic competition and innovation, and as a result these platforms may already have demonstrated persistent market power.

71. This suggests that the concept of market power, while still highly relevant, is not the only consideration when trying to develop new regulatory regimes to address competition issues associated with digital platforms. As noted above, the ACCC is still in the process of developing recommendations for the Australian Government on the potential need for regulatory change to address these issues, and if so, what new regime might be required. In doing so, the ACCC will consider, among other things, the regimes being proposed and implemented in other jurisdictions and the need for alignment.

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<sup>37</sup> Bundeskartellamt, ‘[Alphabet / Google subject to new abuse control applicable to large digital companies – Bundeskartellamt determines ‘paramount significance across markets’](#)’, 5 January 2022.