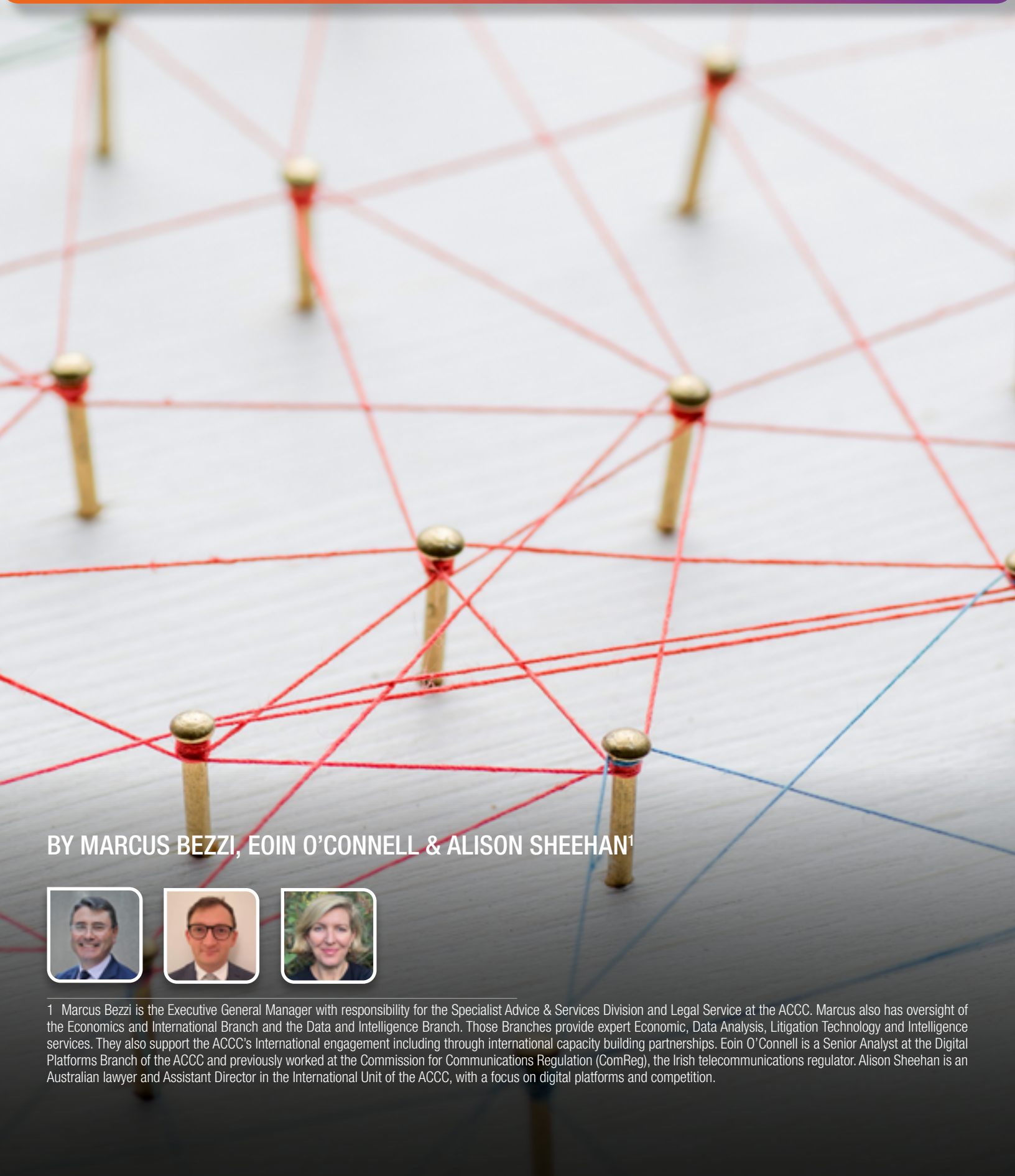
INTERNATIONAL CO-OPERATION FIXING PROBLEMS IN DIGITAL MARKETS



BY MARCUS BEZZI, EOIN O'CONNELL & ALISON SHEEHAN[1]

1 Marcus Bezzi is the Executive General Manager with responsibility for the Specialist Advice & Services Division and Legal Service at the ACCC. Marcus also has oversight of the Economics and International Branch and the Data and Intelligence Branch. Those Branches provide expert Economic, Data Analysis, Litigation Technology and Intelligence services. They also support the ACCC's International engagement including through international capacity building partnerships. Eoin O'Connell is a Senior Analyst at the Digital Platforms Branch of the ACCC and previously worked at the Commission for Communications Regulation (ComReg), the Irish telecommunications regulator. Alison Sheehan is an Australian lawyer and Assistant Director in the International Unit of the ACCC, with a focus on digital platforms and competition.

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INTERNATIONAL CO-OPERATION FIXING PROBLEMS IN DIGITAL MARKETS

By Marcus Bezzi, Eoin O'Connell & Alison Sheehan

A new sense of urgency and purpose has enlivened our international conversations about digital platforms, stimulating unprecedented levels of co-operation between competition and consumer authorities globally. In addition to conducting our own inquiries and reporting to Australian lawmakers, international co-operation has been crucial in informing the Australian Competition & Consumer Commission's current thinking on the challenges posed by digital platform markets. As a number of jurisdictions have recently agreed or are considering new competition regulations for large digital platforms, our continuing co-operation is helping us form a view on whether Australian competition and consumer law is sufficient to address these challenges so we can provide well developed advice to Australian lawmakers. As our experience in Australia evolves, we will continue to closely engage with international counterparts and we remain mindful of the benefits derived from international regulatory coherence and, above all, our shared sense of common purpose.

A new sense of urgency and purpose has enlivened our international conversations about digital platforms. Is there a version of the future where competition among digital platforms is promoted alongside other values, such as privacy, consumer protection, fair trading, and informed consent? How do we preserve the competitive process, and identify conduct that interferes with it, while supporting those values? What would the rules that do it look like?

These questions shape conversations at the domestic, bilateral, and multilateral level and brighten the eyes of competition and consumer agencies as we use our established networks of cooperation and collaboration: networks such as the OECD, the G7, the International Consumer Protection Enforcement Network ("ICPEN") and the International Competition Network ("ICN"). In other words, the forums that hold space for our individual and collective experiences as competition and consumer protection authorities. It is in these places that we have sought to share and define the challenges and characteristics of digital markets, made a case for, or explained the implementation of novel rules and laws.

Indeed, multilateral institutions such as the ICN and the OECD play a very important role in facilitating international cooperation on digital competition issues. Over recent years ICN agencies have produced a substantial body of research regarding competition harms in digital markets. The Australian Competition & Consumer Commission ("ACCC") has paid close attention to and gained many insights from market studies and inquiries in other countries. The ACCC has also taken inspiration from regulatory approaches progressed in other jurisdictions in formulating our advice for Australian legislators.

For the ACCC, collaboration with our international counterparts is strongly linked to both our effectiveness as a regulator and to maintaining economic sovereignty in relation to digital markets. The global nature of digital platforms requires a coherent and mutually supportive response between agencies if we are each going to be effective in our own jurisdictions in delivering for consumers and competition. But beneath it all, what is driving us and our colleagues around the world to understand digital markets and explore the case for new rules in the form of ex ante regulation?

From the Australian perspective, as we progress our mandate, it is a simple and genuine desire to understand.[2] One of the great early minds of competition law and economics in our country, Professor Maureen Brunt, urges us to consider, "what is going on here?"[3]

Professor Blunt stressed the important role of economic analysis to distinguish between conduct that is part of the competitive process, and conduct that interferes with that process. Some new markets, like digital platforms, are extremely challenging and complex. This is primarily because of the characteristics and business models of large digital platforms.

Professor Maureen Brunt commented that,

> *For antitrust law to be relevant and socially useful it must have mixed economic and legal content with due attention given to each term…most obviously antitrust law is a type of regulatory law directed to achieving economic and associated social and political objectives.*
>
> *So the terms of the statute are to be interpreted in light of the overall policy objectives of that statute.*

Our antitrust law, the Competition and Consumer Act 2010, sets out a broad policy framework and the object of our Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

It is this broad policy framework, together with our forensic interest in understanding "what is going on here," that drives our desire to understand digital platforms' conduct and business strategies and it is also how we ensure the regulatory framework is relevant and socially useful. At the ACCC we understand that this approach is broadly consistent with that of other agencies that have a competition and consumer protection mandate.

2 These comments were first made by ACCC Chair, Gina Cass-Gottlieb, during the keynote address at the 49th Annual Conference on International Antitrust Law and Policy conference. Chair Cass-Gottlieb's full speech is available here: https://www.accc.gov.au/speech/keynote-remarks-to-international-antitrust-law-and-policy-conference.

3 Brunt, Maureen, Antitrust in the Courts: The Role of Economics and Economists, (1999) in Maureen Brunt, Economic Essays on Australian and New Zealand Competition Law, p. 354.

I. EXAMPLES OF INTERNATIONAL CO-OPERATION

There are a variety of concrete ways in which we co-operate with other competition and consumer authorities on digital platform issues. First, we regularly and frequently engage with other competition authorities to provide updates on our inquiries and to learn about their work. Secondly, we work together through international networks such as the OECD, ICN and ICPEN.

For example, the OECD's Competition Committee has held best practice roundtables on a host of digital topics such as competition economics of digital ecosystems and abuse of dominance in digital markets. These discussions have enabled sharing of relevant perspectives from agencies and policy makers, businesses, consumers, and academic experts. They have been valuable in helping to promote a deeper understanding of the policy challenges presented by the digital economy and ways to address them.

Thirdly, we have closely monitored key developments overseas, including enforcement cases, expert reports (such as the Report of the Digital Competition Expert Panel in the UK and the Stigler Committee on Digital Platforms in the U.S.), market studies conducted by competition authorities (such as the CMA, the ACM, and the Bundeskartellamt) and legislative reforms, such as the EU's Digital Markets Act, the Amendments to the Telecommunications Business Act in South Korea and reforms in Japan that seek to address potential abuse by digital businesses with superior bargaining positions.

II. CHALLENGES POSED BY DIGITAL MARKETS

In addition to conducting our own inquiries and reporting to Australian lawmakers, our international co-operation has been crucial in informing our views on competition issues arising in digital platform markets. Indeed, global co-operation has unearthed a variety of common concerns and led to an emerging consensus that digital platform markets pose unique challenges that need to be addressed.

Through our inquiries and with the help of work from others globally, we have come to the view that:

- There are some differences in assessing market power in digital platform markets
- Many digital platform markets are prone to the accumulation of substantial and entrenched market power
- There are limitations on the capacity of enforcement action under Australian competition law to address any negative consequences associated with market power in digital platform services, and
- Harms arising from digital platforms with market power are likely to be significant and long-lasting
- Consumers and fair trading may not be adequately protected under existing regulatory regimes.

We briefly discuss each of these in turn, below.

A. Some Differences in Assessing Market Power in Digital Platform Markets

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.

First is identifying the competitive rivals to a digital platform. Most digital platforms are multi-sided. Identifying the competitive rivals involves assessing the alternatives available to users on multiple sides (e.g. consumers and advertisers), and the degree to which they are effective substitutes.

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.

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 and can be a source of considerable competitive advantage.[4] A key issue for assessing the market power of digital platforms is the

4 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.

likelihood of effective entry in the presence of these data advantages. The extent to which these data advantages are insurmountable is central to the degree and longevity of market power in digital platform markets.

B. Many Digital Platform Markets are Prone to the Accumulation of Substantial and Entrenched Market Power

Through our inquiries, we have found that many digital platform markets are prone to the accumulation of substantial market power, which, once attained, can readily become entrenched.

There are two reasons for this.

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:

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

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.

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

C. Limitations on Enforcement Action under Competition Law to Address Consequences of Market Power in Digital Platform Services

While we consider that existing economic and legal analytical tools under competition law remain broadly applicable for digital markets and do not need to be adapted, we have identified several reasons why ex post enforcement and merger control may not be sufficient alone to fully address concerns arising in relation to digital platform services.

One of our key concerns is the timeliness, scale, and efficiency of enforcement action under competition law in these dynamic markets.

Investigations and court proceedings are lengthy and necessarily retrospective. This is a common experience among international regulators, with some cases taking years to be resolved and their ultimate outcomes seeming more relevant to history than to the operation of current digital markets.

Due to the dynamic nature of digital platform services, there is also 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.

Moreover, as we are only able to litigate matters or conduct that fit within the specific provisions of competition law, 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. For example, behavioral remedies designed for individual breaches of competition law may not be sufficiently flexible to address persistent market-wide issues, they may have limitations in addressing structural problems (e.g. barriers to entry and expansion), or markets may have already "tipped" by the time the remedies are put in place.

Another challenge is the seeming inadequacy of court-imposed fines to address self-preferencing and other anti-competitive behavior of digital platforms. One-off penalties imposed by Courts in Australia may not reach the scale necessary to deter very large global digital platforms from engaging in similar conduct in the future.

D. Harms Arising from Digital Platforms with Market Power are likely to be Significant and Long-lasting

While consumers and businesses derive substantial benefits from the services provided by digital platforms, we are concerned that several markets already appear to have "tipped" in favor 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 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 reach Australian consumers). This position provides these platforms with immense influence on the terms of trade and competitive dynamics in these markets

Our inquiries have 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.

Exclusionary conduct by large digital platforms has lessened competition in a number of markets. And subsequently, harms arise as a direct and/or indirect consequence of this reduced competition (such as higher prices, reduced innovation, and lower quality services).

The nature of competition in these markets also underlines the particular importance of protecting potential competition in digital platform and related markets (including, for example, addressing the impact of acquisitions of nascent competitors).

Therefore, we are concerned that the existing competition law provisions 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.[5]

E. Consumers and Fair Trading may not be Adequately Protected under Existing Regulatory Regimes

In addition to the harms to consumers from reduced competition, 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. Some harms affect both consumers and business users (e.g. unfair terms of use or access, lock-in and ineffective dispute resolution), while others are particularly associated with consumers (e.g. excessive online tracking) or business users (e.g. unfair trading practices).[6]

Enforcement of consumer law also faces many similar challenges to those described above in relation to competition law. For example, investigations and proceedings are lengthy and necessarily retrospective, and we can only litigate matters or conduct that fit within the specific provisions of consumer law.

Moreover, the ACCC has identified specific types of conduct prevalent in the supply of digital platform services that are harmful to consumers but not expressly prohibited under Australian law (e.g. businesses making it extremely difficult or almost impossible for a consumer to cancel a service they no longer need or want).

Increasingly, there are concerns that consumers and fair trading may not be adequately protected under existing regulatory regimes. Indeed, in its 2019 Digital Platforms Inquiry, the ACCC has already made a number of recommendations to the Australian Government in this regard, in relation to unfair contract terms, unfair trading practices, internal dispute resolution and the establishment of an ombuds scheme to resolve complaints and disputes with digital platform providers.

III. EVOLVING THINKING ON NEED FOR UP-FRONT REGULATION FOR DESIGNATED FIRMS

A. International Developments and Co-operation

Thankfully, international co-operation has not only been beneficial in identifying the challenges posed by digital platform markets, but also in finding potential solutions. Both here in Australia and overseas, governments and competition agencies are reflecting on how best to address these challenges.

5 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.

6 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.

A number of jurisdictions have recently agreed or are considering new competition regulations for large digital platforms. In particular, Germany has amended its competition law to introduce specific prohibitions for platforms of "paramount significance for competition across markets." The EU's Digital Markets Act is expected to enter into force in October 2022. The first "gatekeepers" are expected to be designated in 2023, with obligations applicable in early 2024. In the UK, the Government has proposed a new pro-competition regime for digital markets which would be administered by the Digital Markets Unit at the CMA. A draft bill is expected to be developed during the parliamentary year concluding April 2023, and introduced in the following parliamentary year.[7] The U.S. has similarly seen the introduction of several legislative proposals seeking to impose ex ante rules on certain very large platforms.[8]

As a concrete example of this co-operation, we participated as a guest authority in producing the G7's compendium of approaches to improving competition in digital markets. This has been a valuable output of the collaborative work of competition authorities that has helped to improve understanding of the approaches taken to address these issues in different jurisdictions. Moreover, we have been closely following global developments and regularly engaging with other authorities to understand their approaches. All of this has helped to inform our thinking as we consider the appropriate response for Australia.

B. Australian Perspective

In February 2022, the ACCC released a Discussion Paper seeking feedback regarding the issues and harms so far identified during our inquiries, whether Australian competition and consumer law is sufficient to address these issues/harms and if not, what potential regulatory tools could be utilized to address these issues/harms.[9]

Over recent months, we have been engaging with these issues and formed views which are expressed in our fifth interim report of the Digital Platform Services Inquiry which considers the need for regulatory reform in digital markets in Australia which has not yet been made public. In due course, we expect the government will make the report publicly available.

While we cannot provide further detail on the views we have formed prior to publication, we focus our comments here on some key issues we have taken into account in preparing our report. We hope to have the opportunity to share more detailed views once the report has been made public.

Just as in other jurisdictions, our February 2022 discussion paper anticipated 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 Australia, and that these existing provisions would continue to apply in respect of digital platforms.

Moreover, we have carefully considered the targeted approaches taken in other jurisdictions when proposing reform, which typically focus on designated digital platforms and/or their services, characterized by certain criteria.

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 capitalization).
- 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.

7 The draft bill is the Digital Markets, Competition and Consumer Bill.

8 Reuters, "House antitrust subcommittee unveils five big tech antitrust bills," 15 June 2021.

9 ACCC, Digital Platform Services Inquiry Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services, February 2022.

Our February 2022 discussion paper noted a range of possible options for reform, should it be necessary. Some approaches to structuring a new framework include obligations and prohibitions contained in legislation, codes of conduct, rule-making powers, measures to promote competition, and third-party access regimes. In the DMA, the EU has opted to include obligations and prohibitions in legislation which has often been described as "self-enforcing," while the UK has pursued codes of conduct (or conduct requirements), which arguably provide greater flexibility.

As we have engaged with other competition authorities on these issues, we have improved our understanding of these approaches and the environment in which they have been designed.

While there are good reasons for reforms to differ across jurisdictions given local market conditions and existing national frameworks, we consider that regulatory coherence, compatible regimes, and enforcement cooperation will be highly desirable to the extent it is possible. We are mindful that this can increase the effectiveness of regulation and enforcement of digital platforms, and also reduce the burden of compliance on the platforms and the consumers and businesses that engage with them.

IV. CONCLUSION

In addressing digital platform issues, competition and consumer authorities are engaging in unprecedented levels of co-operation to facilitate our shared understanding and to address these challenges individually and collectively. We aspire to some degree of consensus on the goals we are seeking to achieve and how we achieve them. This should enable more effective policy formulation and law reform.

International co-operation has been crucial in informing the ACCC's current thinking on the challenges posed by digital platform markets and is helping us form a view on whether Australian competition and consumer law is sufficient to address these challenges so we can provide well developed advice to Australian lawmakers.

As our experience in Australia evolves, we will continue to closely engage with international counterparts and we remain mindful of the benefits derived from international regulatory coherence and, above all, our shared sense of common purpose.

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