The Treasury Competition Review
Competition Policy for the Modern Economy Conference

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ACCC Chair Gina Cass-Gottlieb
Session 2: Modern Regulatory Challenges[1]

Competition regulation is a cornerstone of market economies, designed to deter the creation, strengthening and entrenchment of market power by way of anti-competitive agreements, mergers that stifle competition, and other abusive practices so that competition may be fostered and consumers protected at all levels of the supply chain. However, the realisation of economic and social benefits from competition regulation requires that regulation and regulators are flexible and willing to evolve to address revealed shortcomings and to meet new challenges. Today regulators must adapt to the rise of digital platforms, rapidly changing technologies, the net zero transition and globalisation among other ongoing changes if we are to continue to drive better market outcomes.

This paper discusses a number of modern-day challenges to competition, and the shifting sources and character of harm. These challenges call on a broad set of considerations in assessing how to best address them.

1. Challenges

The rise of digital platforms

One of the most pressing challenges of modern competition regulation is the rise of large digital platforms. This rise impacts a range of competition and regulatory issues from concerns about anti-competitive mergers to misuses of market power.

[1] This paper is written by Dr Lilla Csorgo, Chief Economist ACCC and Gina Cass-Gottlieb

Anti-competitive mergers

Innovation drives economic growth, fosters competition, and benefits consumers. In the context of mergers and acquisitions, there is the risk of stifling innovation if agencies over-reach in their enforcement. If, however, they aren't forceful enough, they may allow market power to arise or become entrenched. To date, agencies have erred on the side of not being sufficiently forceful. Digital platforms are serial acquirers. These acquisitions have not just been horizontal ones, but also vertical and conglomerate mergers that have acted to expand market power to related markets and entrench power in core ones.

Between 2008 and 2018, Amazon, Facebook (now Meta) and Google made approximately 300 acquisitions, 60% of which involved firms that were less than four years old. While many acquisitions by large digital platforms are likely to be pro-competitive or benign, there appears to be a pattern of acquisitions of businesses that may evolve into potential competitors that has strengthened the acquirer's position of market power.[2] In the case of smaller acquisitions, there is the additional challenge of competition agencies becoming aware of such acquisitions in the first place.

The concerns, however, are not limited to acquisitions of smaller market participants, and it extends to non-horizontal mergers. In such an environment, a consideration of broader patterns of dynamic competition is necessary since how products do or could interrelate may not always be easily discernible at the time of acquisition. For example, a digital product may have a pattern of use that could, in combination with another platform, be an effective launchpad to challenge an incumbent platform. As such, the incumbent platform may seek to circumvent such a challenge by acquiring the digital product. Historical non-horizontal acquisitions of note include, Google's acquisitions of YouTube, DoubleClick, and Waze, and Meta's acquisitions of Instagram and WhatsApp (although, with the benefit of hindsight, these latter could be considered as more traditional horizontal overlaps).[3]

Challenges around acquisitions of nascent and other potential competitors, serial acquisitions, and vertical and conglomerate mergers are not unique to digital platforms, but they can be particularly acute in such markets due to their fast-paced and dynamic nature, significant market concentration, high barriers to entry, and expanding ecosystems. Network effects also mean that the gains from achieving market power are often substantial, as such market power is more likely to be enduring.[4]

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[2] "Digital platform services inquiry, Interim report No. 5 – Regulatory reform", Australian Competition & Consumer Commission, September 2022, p 36.

[3] "Digital platform services inquiry, Interim report No. 5 – Regulatory reform", Australian Competition & Consumer Commission, September 2022, p 39.

[4] "Digital platform services inquiry, Interim report No. 5 – Regulatory reform", Australian Competition & Consumer Commission, September 2022, p 59.

Digital platform markets are also characterised by non-price competition. Post-merger, it may be that consumers are unlikely to face higher prices, but they may experience reduced privacy, limited choices, or diminished innovation. Such impacts can be harder to assess.

Misuses of market power

Concerns about digital markets extend to the misuse of market power. Digital platforms often serve as gatekeepers to critical markets such as search engines, e-commerce, digital payments, and social networking, so that they are well-positioned to leverage that market power into related markets or to act to foreclose entry.

Digital platforms often benefit from structural market characteristics such as economies of scale and network effects that protect the platforms' market power, including in the longer term. For example, the cost and time required to build up the necessary user base to achieve competitive scale might involve years of losses with no guarantee of any return. This makes digital market particularly prone to "tipping"; that is, a market favouring a single, dominant firm. In such markets, even effective competition enforcement is unlikely to foster competitive outcomes, at least in the short term.[5] In addition to this "natural" protection, platforms may undertake strategic actions (including aforementioned mergers) to maintain their competitive advantage. While such conduct may constitute misuses of market power, effectively addressing the consequent entrenchment of market power through competitive law enforcement – already typically a long, uncertain, and costly process – can be particularly challenging in digital platform markets.

The sheer time required for enforcement action means that any remedy may take a long time to be realised, but also that it may come too late to restore competitive dynamics. Any remedy is, of course, premised on the detection and proof of anti-competitive conduct. While, again, this often challenging in any market, elements of the complexity of structures, interlinked agreements in different parts of digital supply chains, and inaccessible and opaque algorithms and machine learning driven market outcomes can make it that much more so in the case of digital platforms.

The above-noted economies of scale and network effects also make it challenging to discern market power outcomes that are potentially attributable to misuses of market power versus those that otherwise characterise the market. Additional analytical challenges can include the prevalence of multi-sided markets, and low or zero monetary prices on one-side of such markets. As discussed further below, steps taken by incumbents (including by way of

[5] "Monopolisation, Moat Building and Entrenchment Strategies," OECD Roundtables on Competition Policy Papers, 2024, p 5.

merger) to help assure rivals' unequal access to relevant data can further reinforce their competitive advantage.

Use of and access to data

Data is an increasingly valuable resource. It can, for example, be used to improve products and services, develop and innovate across products, target consumers more effectively, and make more informed business decisions, including by providing insights into rivals' strengths and weaknesses.[6] Companies that control vast amounts of data often have a significant competitive advantage. For example, interconnection between platforms, apps, operating systems, and digital services can create a seamless and preferred consumer experience. As a result of this myriad of uses, data has emerged as a new dimension of market power.

Companies without such data access may face barriers to selling their products, notwithstanding the product's competitive appeal, and struggle to gain the necessary critical mass of data.

Steps that can be taken by incumbents to reinforce rivals' unequal access to data include preventing interoperability across platforms such that users, even if they can access their own data, cannot combine multiple services (for example, a user might be prevented from using one service provider to store their photos and another to display them). Users may thus be 'locked' into certain ecosystems, with incumbents successfully leveraging market power from one market to another.

Vertical integration by a platform into the products and services provided by its business users both provides it revenue from the complementary service and an incentive for it to access its rivals' commercially sensitive information For example, on the former, Apple and Google may be incentivised to develop their own versions of apps being provided by third parties on their mobile app stores (or incorporate their functionalities directly into the mobile device) in order to capture more of the value from the complement both in revenue and increased data capture. Similarly, Amazon may be incentivised to develop similar versions of popular products being offered by third parties on its marketplace.[7] This can undermine rivals' incentives to compete vigorously or could facilitate coordination. For example, access to such information may give the incumbent the ability to pre-empt or quickly undercut competitors' procompetitive actions, so discouraging them from pursuing competitive

[6] "Monopolisation, Moat Building and Entrenchment Strategies," OECD Roundtables on Competition Policy Papers, 2024, p 17.
[7] F Zhu, Friends or foes? Examining platform owners' entry into complementors' spaces, Journal of Economic and Management Strategy, 28:1 (2019), p 3. Digital Platforms Services Inquiry Interim report 7: Report on expanding ecosystems of digital
platform service providers

opportunities. Alternatively, access to competitors' commercially sensitive data may facilitate coordination between the incumbent and its rivals.

Data access and use also raises questions around data ownership, including questions around whether consumers have been misled or properly informed about their data use, as well as privacy and/or copyright violations. As such, issues around data are not limited to the market power that platforms may have as a result of the data they control or the strategic steps they may take to entrench or extend that market power benefit, but also whether their data advantage was legitimately obtained.

AI

There are several potential competition issues with respect to AI that mirror those raised generally in digital platform markets. Generative AI, for example, is likely to have features that make it tend towards concentration and positions of market power. These include concentrated control of key inputs, including data at scale, specialised chips, computing capacity advantages, cloud storage capacity, and specialist technical expertise. Because of these characteristics, new entrants may find it difficult to compete with digital platform services that have developed and control foundational AI models.

Generative AI may also increase users' interactions with particular digital platforms. This on its own can decrease the likelihood of consumer switching. It also provides a setting for conduct that reinforces or raises switching costs, further strengthening the market power of already dominant platforms.

There is also potential to use AI to set prices, determine bids, or more generally to profit maximise. This raises the spectre of either explicit or implicit 'algorithmic co-ordination' across competing firms. For example, in March 2024 the US Federal Trade Commission and the Department of Justice took action to fight algorithmic collusion in the residential housing market. The agencies filed a Statement of Interest in the case of Duffy v. Yardi Systems Inc, a case related to competing landlords and their use of a common provider of pricing algorithms to artificially inflate rental prices. The agencies claim that the landlords' joint use of a pricing algorithm could constitute price fixing in violation of the Sherman Act.[8]

Globalization and cross-border markets

Multinational corporations operating across borders can make it more difficult for any single nation to enforce its competition laws effectively. For example, a company's conduct may raise competition issues in Australia but have little by way of controlling mind, decisionmaker

[8] "Price fixing by algorithm is still price fixing," Hannah Garden0Monhiet and Ken Merber, US Federal Trade Commission Business Blog, 1 March 2023.

and decision-making documentation within Australia, rendering it more challenging to compel information relevant to an investigation.

Different jurisdictions having different approaches to antitrust enforcement can also lead to inconsistencies and inefficiencies in enforcement, particularly with respect to companies that operate on a global scale.

Environmentally sustainable future

There is a need for urgent action on environmental sustainability. Environmental harm, including climate change and biodiversity loss, represents a special category of threat to the community and economy which requires action by all stakeholders, including the business community. Competitive markets are crucial to driving the investment and innovation needed to support the transition to a greener, more sustainable economy. However, there may be instances where businesses working together may be better placed to achieve better environmental outcomes. For example, an individual business may have insufficient volumes to justify the investment necessary to achieve an environmental objective, or a business acting on its own may end up at a competitive disadvantage relative to its rivals, including as a result of other businesses freeriding on its efforts.

In such instances, competition law should not be a hinderance to businesses acting together to achieve sustainability objectives. At the same time, there is a need to assure that such collaborations are not at the needless expense of conditions that support competition, nor that they act as a screen to anti-competitive conduct.

Conflicting government stakeholder priorities

Government privatisation processes have in principle sought to increase efficiencies as compared to when assets are under government ownership. However, owners of monopoly infrastructure, in seeking to maximise sales revenue, have at time sold such assets without any regulatory controls. This has come at the cost of monopoly pricing and a reduced incentive by the owners to invest in the infrastructure.

The Port of Newcastle is a stark example where an absence of adequate regulatory framework led to an unconstrained monopoly charging inefficiently high prices. Even when a degree of regulatory oversight is put in place, such as in the case of the Port of Melbourne, the Essential Services Commission VIC found that the port used its market power in the setting of rents.

More generally, even when government stakeholder priorities are not in conflict, good competition practices – including preserving or promoting the conditions for competition to the extent possible – do not always inform government policy.

2. The way forward

Merger reform

The merger reform bill currently before the Australian Parliament in addition to the significant change to a mandatory suspensory notification regime, the reform includes substantive features to address challenges around both serial acquisitions and mergers that substantially lessen competition by entrenching market power.

The ability to address serial acquisitions has been a priority for the ACCC through the reform process. The Bill assists in two ways. To better capture serial acquisitions, the reforms enable the turnover from relevant acquisitions within the previous three years by the acquirer or target to be aggregated for the purpose of the thresholds, irrespective of whether each individual merger was notifiable. In addition, the impacts of all mergers within the previous three years can be aggregated as part of the assessment of the notified merger. So where there is a series of smaller prior acquisitions which, when aggregated, have the cumulative effect of substantial lessening competition, the merger before the ACCC can be considered on that basis.

Further, the Bill includes a clarification that a substantial lessening of competition includes 'creating, strengthening or entrenching a position of substantial market power in any market'. This makes it clear that the merger assessment should focus on the enhancement of a position of market power, not just on the magnitude of the incremental change arising from an individual acquisition (which may not individually raise competition concerns).

While these are important steps, some challenges in Australia and in other jurisdictions will likely remain. These include minority investments short of control, which may mute the incentive to compete, acquisitions that consist mainly or solely of the acquisition of scarce inputs such as staff with specialised skills, and partnerships, including those in the AI space.

Competition enforcement tools

Modern regulatory challenges can also be met with judicious use of existing and new competition enforcement tools. These can include increased use of available datasets and the application of empirical techniques, the use of behavioural insights, and improved consideration of non-price effects. Competition enforcement can also benefit from a more appropriate and so flexible approach to the timeframes over which it considers competitive impacts, with greater consideration of potential longer-term effects.

Where available, the ACCC will also consider the use of any targeted ex ante codified obligations that are able to change as services and markets develop. These would be framed in close consultation with stakeholders to help assure their effectiveness.

Ex ante regulation in digital markets

The current approach to competition issues that arise in digital platform markets typically involves reactive measures, such as penalties or remedies imposed after dominance and a related misuse of market power is established. However, there are benefits to developing proactive strategies that can identify potential anti-competitive behaviours before they harm the market.

Australia is in the enviable position of not being first out of the gate on the use of proactive strategies, and so is well-positioned to learn from other jurisdictions.

Our recommended approach is to designate critical intermediary platforms with targeted service-specific code obligations. Such measures would work alongside Australia's existing competition laws to address anti-competitive conduct, unfair treatment of business users, and barriers to entry and expansion by potential rivals.

This work is informed by the ACCC's years of inquiry and deep engagement with stakeholders across international and domestic industry, and is well informed by consumer and business user experience. Our aim is to promote competition and consumer welfare through proportionate, well-designed regulation that is targeted to harms and is appropriately enforced. Such regulation would better allow Australian businesses that deal or compete with large, global digital platforms to have the capacity to grow and innovate without being held back by digital platform self-preferencing, unfair trading practices or anti-competitive restraints in the way Australian businesses offer apps and services to consumers on digital platforms. At the same time, this must be done without stifling dynamism or hindering competition.

This approach would sit in the global context as an internationally coherent one that is sufficiently flexible to nimbly respond to changing technologies, business models and regulatory developments.

Data access

Access to data can be a necessary input to support strong competition, including by lowering barriers to entry, and by allowing competitors to efficiently and effectively improve their products and services. This could include data to better allow rival search engines to improve their products, and data to train algorithms for generative AI.

Means to increase data access include calls to treat 'big' data as public utility, mechanisms that allow for data portability, and imposing data-sharing requirements on dominant firms.

Arguments made in favour of treating certain datasets as public utilities that allow for equal and non-discriminatory access note that big data has natural monopoly characteristics in that the complexity and the cost of the infrastructure required to recreate it would be inefficient. This, however, does not mean that firms which benefit from such data as an input are also natural monopolies. Rather, given the ubiquity of the use of data, such markets include not just the digital products that give rise to big data, but also a myriad of markets from manufacturing to retailing. Better data access could allow for improved competition in related markets.

Data portability refers to the ability to move data across from one data-holder to another, including across different applications, programs, or cloud services, as well as retailers, such as banks, telecommunication service providers, and public utilities. It is a user-driven means of data-sharing. The nature and scope of any such portability can vary by sector, the nature and scope of the data subject to portability, the extent and mode of third-party access, and other factors.[9]

A 2021 OECD report found that empowering users to play a more active role in the use of their data by way of data portability can help to increase competition, consumer choice, and data-driven innovation. It warned, however, that transferring data to destinations not controlled by the original data holder can increase digital security and privacy risks. The OECD's related recommendations include government promotion of data portability standards and interoperability requirements,[10]

As of 2020, the Competition and Consumer Act contains a 'Consumer Data Right' (CDR). The CDR gives both individual and business consumers expanded rights of access to data held about them by businesses, and the right to share such data with accredited third-party recipients. The CDR is being rolled out in stages, with banking and energy sectors already underway. It is to be followed by non-bank lending and other sectors. The objective of the CDR is mainly consumer-focused, better allowing them to compare products and services to find offers that best match their needs, but this, in turn, can help spur competition.

Imposing data sharing requirements on digital platforms has also been raised. The OECD noted that it is unclear whether a refusal to provide data to one's competitors would constitute a refusal to deal in the context of competition law. Moreover, it noted that it is unclear whether access to raw data would be helpful for competitors, or whether access

[9] "Mapping Data Portability Initiatives, Opportunities and Challenges", OECD Digital Economy Papers, December 2021, p 5.

[10] "Mapping Data Portability Initiatives, Opportunities and Challenges", OECD Digital Economy Papers, December 2021, pp 5-6.

remedies would create investment disincentives.[11] Nonetheless, requiring data access remains on agencies' radar as a competition remedy. There are also examples of its use. For example, the Canadian Competition Bureau successfully brought a case against the Toronto Real Estate Board (TREB) for restricting access to its real estate listing service database (containing current and historical information) to only its members. The Canadian Competition Tribunal ordered TREB to remove its restrictions, making the data widely available, including to 'discount' agents.[12] [13]

There are particularly sensitive intersections between competition, consumer, and privacy issues in digital markets in relation to digital data practices. As such, we need careful consideration of privacy of personal information, and close engagement with privacy regulators. For example, in many cases we may want to protect consumers' privacy by limiting excessive, opaque collection of user data by the digital services with which they interact.

To support a streamlined and cohesive approach to regulating digital platforms, the ACCC participates in a collaborative forum with other Australian regulators – the Office of the Australian Information Commissioner (OAIC), the Australian Communications and Media Authority (ACMA), and the eSafety Commissioner (eSafety) – called the Digital Platform Regulators Forum (DP-REG). Through DP-REG, members share information about, and collaborate on, cross-cutting issues and activities involving the regulation of digital platforms. This includes consideration of how competition, consumer protection, privacy, online safety and data issues intersect.

AI

There is a need to ensure healthy competition in the provision of AI technology and services, as well as related markets affected by the uptake of AI. We also want to ensure appropriate safeguards and protections are in place for consumers.

The ACCC has previously stated publicly that any regulatory and governance response to address the risks associated with AI should start by considering the extent to which Australia's existing regulatory frameworks already provide appropriate safeguards. When gaps are identified, the ACCC recommends considering how existing frameworks may be strengthened and enhanced.

Competition issues with respect to AI can also be lessened by appropriate ex-ante regulation

[11] "Abuse of Dominance in Digital Markets", OECD, 202, p 27.

[12] Much of the information was not available on other public sources in 2016, and the Competition Tribunal noted there was no readily available substitute for the full range of information and services.

[13] "Abuse of Dominance in Digital Markets", OECD, 202, p 28.

in digital markets and improved data access. However, the potential use of AI to coordinate is an ongoing concern.

Environmentally sustainable future

Australia has the advantage that its competition law allows for the consideration of competitor collaborations that are in the net public interest. The ACCC may grant authorisation if it is satisfied that the likely public benefit resulting from proposed conduct or agreement outweighs the likely public detriment (that is, it results in a net public benefit). The authorisation test is sufficiently broad and flexible to enable the ACCC to take environmental sustainability benefits into account. To bring greater clarity to the availability of authorisations in the sustainability space and the ACCC's approach to such authorisation, the ACCC published draft sustainability collaboration guidelines in July 2024, which we are in the process of finalising.[14]

Government competition considerations

The ACCC welcomes governments' commitment to revitalising Australia's National Competition Policy framework through the Competition Policy Review and the engagement of states and territories. We have proposed a bold approach in pursuit of updated competition principles and the reform agenda.

Our submissions have included consideration of the benefits of new competition principles on the demand side (recognising that consumer choices and behaviour can enliven competition); addressing governments role in market stewardship and design; and critical clarifications to the competition principles to ensure government privatisations and monopoly pricing by key infrastructure providers with natural monopoly characteristics can be appropriately dealt with by competition policy. [15]

International cooperation

The ACCC benefits from sharing of challenges and approaches with other agencies, including domestically with other digital platform regulators, and internationally through the OECD, ICN and in bilateral discussions with key agencies in UK, Europe, US and throughout the Pacific. Given global business models and conduct by dominant firms, coherent, consistent regulatory approaches are essential. There is presently consideration underway

[14] "Sustainability collaborations and Australian competition law: A guide for business", Draft for consultation, ACCC, July 2024.

[15] ACCC Submission to Competition Policy Review 13 February 2024 and ACCC Initial Submission in response to the Revitalising National Competition Policy Consultation Paper September 2024

of legislative amendments to address ability to compel production of documents and information by overseas incorporated companies that engage in business in Australia.

Conclusion

The challenges of modern regulation are real, complex, ongoing and ever-evolving. Competition agencies must be nimble, flexible and innovative in the tools they rely on to address them, but there can also be a need for reformed regulations, codified obligations, and best-practice international cooperation designed to help assure that markets remain competitive in the first place.