



24 February 2023

Director, Digital Competition Unit
Market Conduct Division
The Treasury
Langton Cres
Parkes ACT 2600

By email: digitalcompetition@treasury.gov.au

Dear Director,

Digital Platforms: Government consultation on ACCC's regulatory reform recommendations

Digital Content Next (DCN) appreciates the opportunity to make a submission to the Treasury's consultation on the Australia Competition and Consumer Commission's (ACCC) regulatory reform recommendations for digital platforms. DCN represents many of the Internet's most trusted and respected publishing brands. Founded in 2001, DCN is the only trade organization dedicated to serving the unique and diverse needs of high-quality digital content companies that manage trusted, direct relationships with consumers and marketers.

Executive Summary

The ACCC's 'Digital platform services Inquiry, Interim report No. 5 – Regulatory reform' (DPSI Regulatory Reform Report) finds the current regulatory settings in Australia are inadequate to address specific competition and consumer issues and recommends a new regulatory framework. This builds on the advertising technology (ad tech) specific findings in the ACCC's Digital advertising services Final Report (DAS Report) published in August 2021 that led to the ACCC recommending at that time that it 'should be given powers to develop sector specific rules to address conflicts of interest and competition issues in the ad tech supply chain.'¹

Our submission primarily responds to Treasury's threshold question 1, competition questions 13, 17 and 18, and questions 26 and 27 regarding priority and alignment with international jurisdictions.

In summary, we agree with the ACCC's conclusion that relying only on existing regulatory frameworks would lead to adverse outcomes for Australian consumers and businesses, and we support an ex-ante framework that includes mandatory codes for digital platforms with 'significant market status'.

Further, many of the harms and concerns identified in the DAS Report (following an inquiry that commenced in 10 February 2020) are ongoing. Google continues to hold a dominant market position in the ad tech supply chain, owning the exchange by which advertising is bought and sold, and representing both the buyers and sellers and gives rise to competition concerns at each level of this market. The analogy referred to by U.S. Department of Justice Assistant Attorney General Jonathan Kanter is illustrative:

¹ DAS Report, 11.

in late 2016, a Google digital advertising executive asked the following question in an internal email exchange: “[I]s there a deeper issue with us owning the platform, the exchange, and a huge network? The analogy would be if Goldman or Citibank owned the [New York Stock Exchange]?” The answer to Google’s rhetorical question is: yes.²

It is essential and urgent that the competition issues that harm the supply chain for ad tech services in Australia be remedied. Following the thorough sector-specific DAS inquiry already undertaken by the ACCC and the success of codes in Australian regulation, we submit that a **mandatory ad tech specific-code be prioritized by the Government**.

Harms identified by the ACCC

Findings in the DAS Report (August 2021)

In August 2021, the ACCC found:

- (a) Ad tech services perform a critical role in the digital economy.³ However, competition for ad tech services in Australia is ineffective.⁴ Weak competition in the supply of ad tech services can harm Australian advertisers, publishers and consumers since advertisers are likely paying more to ad tech providers for poorer quality services,⁵ publishers are likely paying more for digital advertising services thereby reducing their revenue, investment and quality, and consumers are likely paying more for goods and services supplied by advertisers and receiving reduced quality or access to information and services published online.⁶
- (b) Google is the largest supplier of ad tech services across the entire ad tech supply chain – no other provider has the scale or reach across the ad tech supply chain that Google does. It is a key 'publisher' or source of ad space and supplies ad inventory to advertisers on its own properties including YouTube, Gmail and Google Search.⁷
- (c) Google's dominance in the ad tech supply chain creates problems for competition generally and advertisers and publishers specifically.⁸ Over more than a decade, Google’s vertical integration and strength in ad tech services has allowed it to engage in a range of conduct which has lessened competition over time and entrenched its dominant position, including by engaging in self-preferencing conduct which has likely interfered with the competitive process.⁹

Further, the ACCC said it was considering the specific allegations that have been made against Google over the course of the DAS inquiry under the competition provisions of the *Competition and Consumer Act 2010 (CCA)*.¹⁰

In August 2021, the ACCC recommended it be given the power to develop sector specific rules to apply to those providers of ad tech services that meet pre-defined criteria linked to their market

² Ibid.

³ The ACCC estimated in the DAS Report that open display channels, the focus of that report, were worth around \$2.8 billion in Australia in 2020, or around 43% of total amount spent on display advertising (\$6.5 billion). The Interactive Advertising Bureau Australia estimated that between 2008-2020, spending on digital advertising grew from \$1.7 billion to \$9.5 billion (DAS Report, 2).

⁴ DAS Report, 1.

⁵ DAS Report, 9.

⁶ DAS Report, 3.

⁷ DAS Report, 5.

⁸ DAS Report, 5.

⁹ DAS Report, 1, 7.

¹⁰ DAS Report, 9.

power and/or a strategic position to address the greatest concerns to efficiency or competition in the supply of ad tech services in Australia.¹¹

Findings in the in the DPSI Regulatory Reform Report regarding ad tech services (September 2022)

In DPSI Regulatory Reform Report, the ACCC continued to observe high levels of concentration and Google's entrenched market power in relation to ad tech services and re-iterated its findings in the DAS Report that Google is the dominant supplier of ad tech services across the ad tech supply chain.¹² In particular, the ACCC found:

- (a) Google's vertical integration throughout the ad tech supply chain has enabled it to engage in self-preferencing conduct and tying/bundling which has interfered with the competitive process.¹³ The ACCC remained concerned that Google is giving its own ad tech services favorable treatment compared to ad tech services provided by third parties.¹⁴ It also remained concerned that YouTube ad inventory being tied to Google's ad tech services can hinder competition in ad tech services, particularly for demand-side platform services.¹⁵
- (b) Access to a broad range of high quality first-party data and third-party data has enabled Google to supply personalised content and targeted advertising through its ad targeting and ad attribution services.¹⁶ Google's access to this data increases barriers to entry and expansion in the supply of ad tech services and appears to have provided it with a competitive advantage in the supply of ad tech services.¹⁷ The ACCC remained concerned that data-related barriers are limiting the ability of rivals to compete with digital platforms that have large data holdings in ad tech services.¹⁸
- (c) There is a lack of transparency in the supply of digital advertising and tech services, particularly the operation of ad tech auctions, prices and fees charged for ad tech services and the performance of demand-side services.¹⁹ This makes it difficult for advertisers and publishers to accurately assess and make informed choices about which ad tech services and digital advertising providers will best meet their needs based on performance and value.²⁰ The ACCC re-iterated its previous findings that while some transparency issues exist across the ad tech industry, the greatest transparency issues relate to Google's publisher ad server and demand-side platform services.²¹

The ACCC again recommended that sector-specific rules be developed to address competition issues with ad tech services and identified targeted obligations that should be included, such as:²²

¹¹ DAS Report, 1, 11.

¹² DPSI Regulatory Reform Report, 7, 37, 129, 204-205.

¹³ ACCC, 'Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services', February 2022, 40.

¹⁴ DPSI Regulatory Reform Report, 124, 129-130.

¹⁵ DPSI Regulatory Reform Report, 133, 136-137.

¹⁶ DPSI Regulatory Reform Report, 167.

¹⁷ DPSI Regulatory Reform Report, 167.

¹⁸ DPSI Regulatory Reform Report, 166.

¹⁹ DPSI Regulatory Reform Report, 174-175.

²⁰ ACCC, 'Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services', February 2022, 101.

²¹ DPSI Regulatory Reform Report, 176.

²² DPSI Regulatory Reform Report, 130.

- (a) prohibiting 'designated' digital platforms from treating their own ad tech services more favorably than ad tech services provided by third parties;²³
- (b) prohibiting 'designated' digital platforms from requiring advertisers to use their own ad tech services to purchase ad inventory that they supply;²⁴
- (c) requiring 'designated' digital platforms to share third party data (and/or facilitate data portability in respect of that data) or imposing data limitations on a 'designated' digital platform (e.g. to keep certain data separate);²⁵
- (d) requiring 'designated' digital platforms to share first-party data, subject to data-related competition issues in ad tech not being managed through current industry initiatives;²⁶ and
- (e) requiring 'designated' digital platforms to: (i) provide publishers with the ability to compare bids received from all sources in an auction; (ii) facilitate independent assessment of the performance of their services; and (iii) provide average fees and take rates for their services (if current industry initiatives to improve transparency in the ad tech supply chain are not effective).²⁷

We generally support the targeted obligations listed above and consider them consistent with a number of targeted reforms proposed overseas. However, we look forward to participating in further consultation on the composition of targeted obligations if an ad-tech specific code is to be developed.

Enforcement Concerns

Enforcement of existing competition and consumer laws 'ex-post' is not sufficient to address the issues in markets for digital platform services as identified by the ACCC in the DAS Report and DPSI Regulatory Reform Report. New regulation is required to address anti-competitive behaviour by large digital platforms and ensure fair treatment of digital platform users. Other jurisdictions are already introducing such measures and Australia cannot afford to 'wait and see'.

Ex post enforcement is too slow

As the ACCC outlined in the DPSI Regulatory Reform Report, ex post enforcement of competition and consumer laws through 'traditional' investigations and court proceedings is lengthy and is necessarily retrospective.²⁸ In the DAS Report, it similarly found that enforcement action under the CCA alone 'is insufficient to address the type and scale of concerns arising in ad tech and will fail to remedy the systemic competition concerns identified.'²⁹ The ACCC also found that investigation and court proceedings fail to remedy concerns with the immediacy which is often required to prevent long lasting harm.

International enforcement actions against large digital platforms demonstrate the lengthy nature of these types of proceedings. For example, in Europe³⁰:

²³ DPSI Regulatory Reform Report, 124.

²⁴ DPSI Regulatory Reform Report, 132.

²⁵ DPSI Regulatory Reform Report, 165.

²⁶ DPSI Regulatory Reform Report, 168.

²⁷ DPSI Regulatory Reform Report, 174, 177, 179.

²⁸ DPSI Regulatory Reform Report, 48-50.

²⁹ DAS Report, 10.

³⁰ DPSI Regulatory Reform Report, 49.

- The Google Shopping case took more than 7 years from the time the European Commission opened a formal investigation to a decision on Google's appeal being handed down by the General Court and Google being fined;
- The Google Android investigation took more than 7 years from the time the European Commission opened a formal investigation to a decision on Google's appeal being handed down by the General Court and Google being fined; and
- The Google AdSense case took 9 years from the time the European Commission opened a formal investigation to Google being fined.

In the United States, a Department of Justice (DoJ) case against Google for allegedly maintaining monopolies in search and search advertising is scheduled to go to trial in September 2023, 3 years after the DoJ filed the complaint.

Such lengthy proceedings are a particular issue in digital platform markets, which are dynamic and constantly evolving.

Enforcement is a game of whack-a-mole

The ACCC has also acknowledged that there are significant limitations in the use of enforcement actions to address type and scale of concerns arising in ad tech. Currently, enforcement actions confined to focus on a very specific breach of the CCA are not well-suited to the systemic concerns that the ACCC is seeking to address, which cover conduct over many years and relate to multiple separate ad tech services.³¹ For example, enforcement action under current laws may not address situations where one instance of the conduct ceases as a result of enforcement action, but where the platform is able to adapt and achieve the same competitive impact through different behaviour.³² Enforcement therefore becomes a game of 'whack-a-mole' and necessitates regulatory reform to address competition concerns where enforcement has fallen short.

Large digital platforms treat fines as a 'cost of doing business'

Despite the recent reforms to maximum penalty thresholds in Australia, the ACCC has conceded that it is difficult to obtain remedies that address the cause of the problem or provide sufficient penalties to deter very large global platforms from engaging in similar conduct in the future.³³

One case that demonstrates this is Apple's non-compliance with an order by the Netherlands Authority for Consumers and Markets (upheld by the District Court of Rotterdam) that Apple amend its terms and conditions to allow Dutch dating apps to direct their customers to payment options outside the app. The order was subject to periodic penalty payments of €5 million each week and, due to Apple's continued non-compliance, it was required to pay the maximum penalty of €50 million.³⁴ This demonstrates that any reform needs to be mandatory with large penalties attached for contravention so large digital platforms do not treat fines for non-compliance as a cost of doing business.

³¹ DAS Report, 10

³² Ibid.

³³ DAS Report, 11.

³⁴ Authority for Consumers & Markets, 'Apple fails to satisfy requirements set by ACM', 24 January 2022, available at: <https://www.acm.nl/en/publications/apple-fails-satisfy-requirements-set-acm>; and Authority for Consumers & Markets, 'ACM: Apple changes unfair conditions, allows alternative payments methods in dating apps', 11 June 2022, available at: <https://www.acm.nl/en/publications/acm-apple-changes-unfair-conditions-allows-alternative-payments-methods-dating-apps>.

New frameworks and enforcement activities to deal with digital platforms

Ad-tech specific

Other jurisdictions, such as the United States, are seeking to address the anti-competitive harms specifically occurring in the ad tech market. In May 2022, Senator Mike Lee introduced a bill in the United States Senate to promote competition in digital advertising (titled 'Competition and Transparency in Digital Advertising Act' (CTDA Act)).³⁵ It received bipartisan support, with Senator Lee being joined by Senators Ted Cruz (Republican) and Amy Klobuchar and Richard Blumenthal (Democrat) in introducing the bill. A nearly identical bill is expected to be re-introduced in the coming weeks.

The CTDA Act seeks to restore and protect competition in digital advertising in two ways:

- Prohibiting large digital advertising companies from owning more than one part of the digital ad ecosystem if they process more than \$20 billion in digital ad transactions. This would mean that, if they meet the threshold, a supply-side platform could not own a demand-side platform (and vice versa), an ad exchange owner could not own a supply-side platform or demand-side platform, and buyers and sellers of digital advertising could not own a demand-side platform or supply-side platform (except to sell their own advertising inventory).
- Requiring medium-sized and large digital advertising companies that process more than \$5 billion in digital ad transactions to abide by several requirements to protect their customers and competition. The key requirements include:
 - (best interest duty): in the course of providing services as a brokerage, using reasonable diligence, care and skill to act in the best interests of brokerage customers and not put their own interests ahead of those customers;
 - (best execution duty): seeking the most favorable terms reasonably available under the circumstances for each order transaction of the brokerage customer;
 - providing transparency to customers so that customers can verify the company is acting in their best interest;
 - (firewalls): erecting firewalls to prevent abuse and conflicts of interest if allowed to operate on both sides of the market; and,
 - (fair access duty): providing fair access to every buyer and seller in the exchange, including with respect to performance and information related to transactions, exchange processes, and functionality.

While the US Congress considers this legislation, on 24 January 2023, the DoJ, along with eight Attorneys General, filed a civil antitrust lawsuit against Google for monopolising multiple digital advertising technology products in violation of existing laws, specifically the Sherman Act.³⁶ The complaint alleges that Google monopolizes key digital advertising technologies, collectively referred to as the 'ad tech stack', which website publishers depend on to sell ads and advertisers

³⁵ Available at: <https://www.lee.senate.gov/services/files/7384B096-04C3-4A3A-9796-80D22483026F>. See also: https://www.lee.senate.gov/2022/5/lee-introduces-digital-advertising-act?utm_source=substack&utm_medium=email.

³⁶ United States Department of Justice, 'Justice Department Sues Google for Monopolizing Digital Advertising Technologies', 24 January 2023, available at: <https://www.justice.gov/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies>.

rely on to buy ads and reach potential customers. The DoJ alleges that, over the past 15 years, Google has engaged in a course of anticompetitive and exclusionary conduct that included:

- locking in content creators through tying arrangements;
- manipulating auctions, including by giving itself a "first look" and then "last look" advantage over competing ad exchanges;
- blocking industry participants from using rivals' technologies and punishing those that tried;
- amassing and abusing its rivals' bidding data; and,
- depriving customers of choice by degrading the quality of Google's own services.³⁷

Mr Kanter has drawn on the stock exchange analogy referred to in his opening remarks when the lawsuit was filed, noting the dominance Google possesses in owning the exchange by which advertising is bought and sold, and representing both the buyers and sellers.³⁸

However, the DoJ faces challenges in its case under current laws and enforcement remedies. As it stands, the Sherman Act does not create any specific duties for Google to act in customers' best interests by virtue of its position as the owner of the largest ad exchange and acting on behalf of buyers and sellers on that exchange. It is also rare for a United States court to order a divestiture remedy, as sought by the DoJ in respect of the Google Ad Manager Suite.³⁹ The CTDA Act would provide for this kind of separation by prohibiting large digital advertising companies from owning more than one part of the digital ad ecosystem if they process more than \$20 billion in digital ad transactions and also creates duties on medium and large advertising companies to act in the best interests of customers.

The retrospective nature of this lawsuit, some 15 years after the conduct is alleged to have commenced, also demonstrates that enforcement alone is not sufficient to deal with systemic conduct and incentives that result in anti-competitive effects.

Other reform to digital platforms

As the ACCC outlined in the DPSI Regulatory Reform Report and Treasury has summarized in Appendix A of its Consultation Paper, several other jurisdictions have implemented, or are considering implementing, ex-ante reform with the common goal of introducing efficient regulation that can address potential competition harms in digital platform markets.⁴⁰ For example:

- **European Union:** The *Digital Markets Act* (DMA) and *Digital Services Act* (DSA). The DMA was approved by the European Parliament and the Council in July 2022 and targets gatekeepers that provide 'core platform services', including 'advertising services'.⁴¹ Reform includes requiring gatekeepers of advertising services to provide advertisers with access to the performance measuring tools of the gatekeeper and the information

³⁷ United States Department of Justice, 'Assistant Attorney General Jonathan Kanter Delivers Remarks on Lawsuit Against Google for Monopolizing Digital Advertising Technologies', 24 January 2023, available at: <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-lawsuit-against-google>.

³⁸ K Swisher and S Galloway, Pivot podcast episode 'Meta Shakes Off the FTC, and AAG Jonathan Kanter takes on Google', 3 February 2023.

³⁹ Ibid; [342] of complaint filed by United States in the matter of *U.S. and Plaintiff States v. Google LLC* (1:23-cv-00108).

⁴⁰ DPSI Regulatory Reform Report, 60-63.

⁴¹ European Commission, 'Questions and Answers: Digital Markets Act', October 2022, available at: https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2349.

necessary for advertisers and publishers to carry out their own independent verification of their advertisements.⁴²

- **Germany:** New provisions of the German Competition Act came into effect in January 2021. The provisions enable the German competition authority to prohibit certain anti-competitive practices by designated platforms, being those that possess 'paramount significance for competition across markets'.⁴³ There is overlap between the German prohibitions and the ACCC's proposed targeted obligations for ad tech designated platforms, including prohibition on anti-competitive self-preferencing, anti-competitive tying and bundling and data-related barriers.
- **United Kingdom:** The UK Government has proposed a regime for digital markets which would regulate designated digital platforms, being those with 'Strategic Market Status' (ie, substantial and entrenched market power).⁴⁴ Like the ACCC's recommendations, the proposal seeks to address anti-competitive self-preferencing, anti-competitive tying and bundling, data-related barriers, and fair trading and switching concerns.⁴⁵ A draft bill is expected to be developed by April 2023, with legislation introduced in 2024.
- **United States:** The United States House Antitrust Subcommittee has considered several bipartisan bills to address anti-competitive practices of large digital platforms (including the CTDA Act referred to above).
- **Japan and South Korea** have also taken similar action to improve transparency and fairness in digital platform markets.

Each of these proposals are based on common principles and policy objectives and generally seek to develop service-specific rulemaking regimes that will apply to platforms of strategic significance. Each regime seeks to address common anti-competitive harms in a sufficiently agile and efficient way and to address the deficiencies of existing competition laws and regulation experienced in each of these jurisdictions. Like existing competition law regimes, there may be nuances in language, threshold and appeal processes but alignment on principle and regulation appears to be already established.

Priority and alignment with other jurisdictions

At question 26 of the Consultation Paper, the Treasury has asked whether Australia should act in advance or wait and seek to align with other jurisdictions. We do not see any benefit in waiting for much needed reform to address the anti-competitive harms that the ACCC has identified as occurring in ad tech services for over a decade.⁴⁶ The harms identified are not new issues and continue to harm competition, advertisers, publishers and consumers in Australia. As described above, even where specific rules or legislation are yet to be implemented overseas, roadmaps for these jurisdictions are similar to the mandatory service-specific code recommended by the ACCC.

We therefore submit mandatory service-specific codes need to be developed in Australia to 'ensure Australia has the right regulations in place to be a leading digital economy'⁴⁷ and such

⁴² Ibid.

⁴³ Available at https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html#p0071.

⁴⁴ Government of the United Kingdom, Command Paper CP 657, 'A new pro-competition regime for digital markets', May 2022, available at <https://www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets/outcome/a-new-pro-competition-regime-for-digital-markets-government-response-to-consultation>

⁴⁵ Ibid.

⁴⁶ DAS Report, 1, 7.

⁴⁷ Consultation Paper, 5.

reform should be a prioritized. Anti-competitive harms in ad tech have only been exacerbated by delay so Australia cannot afford to continue to "wait and see".

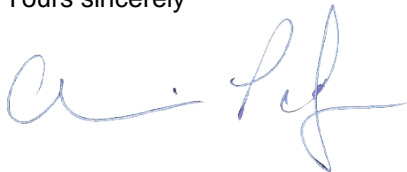
Conclusion

We support the ACCC's recommendations 3 and 4 as outlined in the Consultation Paper. In an effort to address longstanding and ongoing competition concerns in digital platform markets in Australia, we support mandatory service-specific codes for 'designated' digital platforms with targeted obligations that can change over time. This proportionate reform is targeted and capable of adapting to a dynamic and complex digital environment and will allow Australia to align its regulation with that being developed internationally (as appropriate). The proposed codes would be set out in subordinate legislation, which would allow obligations to be efficiently added, amended or removed in response to new concerns.⁴⁸ Additionally, under subordinate legislation, the code would be subject to disallowance by Parliament. This will allow the government to provide the necessary checks and balances to ensure that any obligations introduced are proportionate and targeted to specific issues.

In particular, we support the ACCC's recommendation for sector-specific rules to be developed to address competition issues in the ad tech market in Australia which would apply to providers of ad tech services that meet pre-defined criteria linked to their market power and/or a strategic position. The competition concerns in the market for the supply of ad tech services remain ongoing and this recommendation has not shifted since August 2021. The ACCC has already conducted a thorough inquiry into ad tech services, therefore completing the necessary ground work for a code for ad-tech services to be developed as a matter of priority.⁴⁹

Further, given the ACCC's history of effective implementation of codes to regulate markets characterized by market power, including the News Media and Digital Platforms Mandatory Bargaining Code, the Franchising Code of Conduct, the Horticulture Code of Conduct and Oil Code of Conduct, and its role in the DAS Report and the DPSI Regulatory Reform Report, we believe the ACCC has the necessary expertise and experience to develop and enforce mandatory codes for digital platform services.

Yours sincerely



Chris Pedigo
SVP, Government Affairs
Digital Content Next



Jason Kint
CEO
Digital Content Next

⁴⁸ DPSI Regulatory Reform Report, 111.

⁴⁹ DAS Report, 1.