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6 February 2023

Submission to the Treasury consultation on ACCC's recommendations

Dear Sir/Ma'am,

Please find enclosed our submission to Digital Platforms: Government consultation on ACCC's regulatory reform recommendations.

We are happy to address any follow-up questions you might have. Please note that the views expressed in this submission are solely ours and should not be attributed to Monash University.

Kind regards,

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1. The ACCC's Digital Platform Services Inquiry, Interim Report No. 5 (the Inquiry, henceforth) makes a number of recommendations for more competitive and fair digital platform services. We think most of consumer recommendations and competition recommendations are sensible. Competition recommendations are more or less in line with the EU's Digital Markets Act (DMA). We agree with the DMA that there is a need for differential regulation for large digital platforms (LDPs). We do not think that designating them as gatekeepers and subjecting them to more scrutiny through ex ante prohibitions and obligations will have harmful effects on Australia. Gatekeeper designation can raise costs for LDPs by proscribing certain conducts and requiring certain compliance. If the DMA's definition of gatekeeper is applied, Australia is unlikely to have its own designated LDPs. Thus, such a designation is expected to level the playing field for relatively smaller digital businesses in Australia. These are our general points in response to your **Questions 25 – 26**. In the following, we will focus in more detail on two areas that we are familiar with through our research.

2. **Existing regulatory frameworks are not adequate in the digital era and need to be adapted to regulate large digital platforms more effectively (Your questions 1 – 3).**

Existing regulatory frameworks for assessing potentially anticompetitive business conducts follow the steps of market definition, assessment of market power, and the design of necessary remedies or enforcement. As we argue below, defining markets for multi-sided digital platforms is much more complex than it is for traditional businesses. Remedies and enforcement take time, which can be too slow in the fast-evolving digital era. For example, Microsoft's antitrust case lasted from 1998 to 2001. The US DOJ's litigation against Google was filed in 2020 and is still ongoing. Given this, we think it makes sense to introduce some form of ex ante regulation as in the DMA that applies to gatekeepers or designated LDPs. Just as in the DMA, the threshold for designated LDPs can be in terms of size (such as annual turnover, the number of users, etc.) rather than market share because the latter requires well-defined markets in the first place.

The Inquiry does not make specific recommendations for merger reform. But we believe a review of the ACCC's existing merger guidelines is of paramount importance. Our specific focus is on merger notification. Australia is one of a few countries in the world where merger notification is voluntary. In pursuant of the Competition and Consumer Act 2010, Section 50, the ACCC's merger guidelines stipulate that merging parties are encouraged to notify the ACCC well in

advance of completing a merger when the post-merger market share will be greater than 20% in the relevant market/s. In traditional industries, such a voluntary notification regime may achieve objectives similar to those achieved by compulsory notification regimes but at lower costs to merging parties and the regulator.¹

However, mergers involving LDPs are different in a number of ways. First, mergers can affect multiple market segments. It is well known that defining markets that a multi-sided platform operates in is much less straightforward than defining markets for businesses in more traditional industries.² In particular, the SSNIP test results heavily depend on which side(s) of the platform is under consideration and which cross-group externalities are accounted for when considering increasing price on one side. Second, there is a significant information asymmetry between the regulator and merging parties, which makes it difficult for the regulator to assess possible competitive effects of the merger on all relevant market segments. A recent merger between Google and Fitbit is a case in point. The market segments directly affected by Google-Fitbit merger are the market for wearable devices and the advertising market. But a closer look at Google's business model in recent years shows that the digital health market is potentially a much larger segment that can be affected by the merger.³ Australia was an exception in that the ACCC objected to the Google-Fitbit merger, although it was cleared in the EU and multiple other jurisdictions. Third, challenging and breaking up consummated mergers involving tech firms can be notoriously difficult and time consuming. As a result, they can go under the radar of competition authorities. Indeed, the five largest tech firms have made over 400 acquisitions globally over the last 10 years, but none was blocked and very few had conditions attached to approval. As the Nobel laureate, Professor Jean Tirole argues, since old-style regulation is impractical for tech firms, competition policy including merger review to "prevent the eggs from being scrambled in the first place" may remain the main policy tool in the digital era.⁴ In Australia, the Google-Fitbit merger went ahead despite the ACCC's objection, which has now become an enforcement investigation of a completed merger. Finally, groundbreaking innovations in the digital space are often done by small-scale start-ups. Acquisitions of start-ups by LDPs can have profound implications on the pre- and post-acquisition innovation incentives of not only the LDPs

¹ Choe, C., and C. Shekhar (2010). Compulsory or voluntary pre-merger notification? Theory and some evidence. *International Journal of Industrial Organization* 28(1): 10-20.

² Hovenkamp, E. (2018). *Antitrust Policy for Two-Sided Markets*. Available at SSRN 3121481.

³ Chen, Z., Choe, C., Cong, J., and N. Matsushima (2022). Data-driven mergers and personalization. *RAND Journal of Economics*, 53(1): 3-31.

⁴ Tirole, J. (2020). *Competition and the industrial challenge for the digital age*. Working paper.

and start-ups directly involved in the transaction, but also the non-target competing start-ups.⁵ In order to carefully accounting for these innovation incentives, ACCC needs to take a more dynamic perspective when reviewing start-up acquisitions done by LDPs. In particular, ACCC needs to be informed of the potential acquisition early enough so it will have enough time to at least preliminarily assess the acquisition' impact on innovations in both the market in question and the adjacent markets.

In view of the above considerations, we argue in favor of making merger notification compulsory for designated LDPs. The market share test for notification threshold can be complex to apply because of the difficulty in defining relevant markets. For example, in the Google-Fitbit merger case, while the threshold for the advertising market will be routinely satisfied, that for the wearable devices market or digital health market would not be. Given that there are many strategically driven acquisitions in the digital markets (e.g., killer acquisitions) for which the static market share test would be meaningless, we argue in favor of requiring designated LDPs to notify all their acquisitions.

As stated previously, we do not think this will have harmful effects on Australia. A caveat for implementing mandatory notifications is that it can cause notifications to lose their signaling effects and an increase in the ACCC's costs of assessing notified mergers. However, given that designated LDPs' acquisitions may seriously damage competition, we think obliging designated LDPs to notify all their intended acquisitions is a safer option.

3. Consumer Data Right (CDR) may not be effective in promoting competition through data sharing in digital markets (Your questions 4 – 6).

Consumer Data Right (CDR) may foster competition and innovation by facilitating data sharing through data portability. This may be the case in markets with reasonably healthy competition and the absence of network effects such as banking and energy. But in digital markets with highly asymmetric competition and network effects, CDR will no longer be enough. Most LDPs operate in such markets. For example, take the market for social networking services. Given the dominant position enjoyed by Meta (Facebook, Instagram), it is difficult to imagine a user to request porting

⁵ Teh, C., Banerjee D., and C. Wang (2022). Acquisition-induced kill zone. Monash University Department of Economics working paper 2022-24.

her data to a competing SNS provider, should such a competitor enter the market. Consequently, the large amount of data held by Meta will continue to work as a barrier to entry, despite CDR.

This may call for an intervention beyond CDR to promote competition. A possible intervention is data sharing through mandated bargaining akin to that involving news media and digital platforms. On the other hand, we do not think the national access regime is directly applicable because data in itself cannot be deemed essential unless the access seeker has data analytics capabilities that can turn the data into useful input to producing goods and services.

There are several issues to consider in addressing privacy concerns associated with data sharing. First, a wholistic approach is needed starting from data collection to data processing and sharing, and to data retention and storage. Data collection needs to follow the data minimization principle as recognized in the OAIC's privacy guidelines. Second, there needs to be a review of existing data retention laws. The Telecommunications Act 1979 requires retention of data for at least 2 years while the ASIC requires companies to keep record for seven years. In the wake of high-profile data breaches in Optus and Medibank, one needs to examine if these requirements are sensible in the digital age. These data retention requirements can be also inconsistent with privacy regulations such as the GDPR where individuals have the right to data erasure. Third, there needs to be a robust way to anonymize data before sharing, for example, by leveraging differential privacy. Differential privacy has set the industry standard for a robust privacy-preserving mechanism and has been adopted by public (U.S. Census Bureau, Australian Bureau of Statistics, among others) as well as private (Microsoft, Google, and Apple) organizations.⁶ The current Australia's Privacy Act allows for the sharing of anonymized personal data, by social media platforms, online marketplaces, and cloud storage providers. But traditional data anonymization is not a fool-proof mechanism.⁷ The revised code needs to ensure that organizations take necessary measures to protect personal data against unauthorized access, manipulation, disclosure, or destruction.

⁶ Differential privacy method (DP-method) is a privacy-preserving method used in handling sensitive personal data. It is a mathematical framework aimed at protecting sensitive information in datasets by adding controlled amounts of noise to data during analysis without compromising the privacy of individuals. Hence, a perpetrator will be unable to redetermine a particular individual from the dataset. In Australia, the use of the DP-method is not legally enforced on organizations. But the DP-method is used in various industries in Australia, including the government (Australian Bureau of Statistics in the 2021 Census of Population and Housing), to help ensure that sensitive data is protected while still allowing organizations to use and analyse the data for research and policymaking.

⁷ Rocher, L., Hendrickx, J. M. and Y.-A. de Montjoye (2019). Estimating the success of re-identifications in incomplete datasets using generative models. *Nature Communications*, 10:3069.

Moreover, fines and sanctions should be imposed on organizations that fail to comply or intentionally re-identify anonymized data for targeting, marketing or brokerage. Finally, improving cybersecurity around APIs that are used for data sharing is essential. All of the above issues call for a close collaboration and coordination involving multiple agencies such as the ACCC, ACMA, ASIC, OAIC, etc.

Our last point, albeit slightly off the topic, relates to CDR and the review of Australia's Privacy Act, where the GDPR serves as a blueprint. The GDPR's main aim is to enable consumers to better protect their digital privacy. In this sense, we agree with the GDPR's right to explicit (opt-in) consent and the right to portability. But the GDPR also recognizes that individuals 'own' their data, leading to another privacy right called the right to erasure. We think that the right to erasure in its current form is likely to do more harm than good. Data is 'co-produced' by a consumer and the digital service she uses. For example, a driver's navigation record on Google Maps is a joint product between the driver and Google Maps. Giving the sole ownership to the driver, and hence the right to erasure, can result in loss of valuable data that other drivers may benefit from. If privacy protection is the main objective, then the data can be anonymized rather than being completely erased on demand. Recognizing joint ownership of data is also something that can be considered in the review of Privacy Act 1988.

4. Details matter in designing codes for specific competition issues and sometime a direct regulation on platform fees perform better (Your questions 13-18).

In general, we welcome the designation and code of conduct model proposed by the ACCC for the new competition regime. The associated network effects, supply-side scale economics, and advantages in the use of data distinguish digital markets significantly from traditional markets. The proposed changes are in the same spirit of the existing competition law, but are more adapted to the digital markets, and can be used to more directly to address new competition issues concerning LDPs.

Among the possible anti-competition conducts mentioned in Recommendation 4, we strongly support developing a code to prevent self-preferencing practices. To the best of our knowledge, there do not exist convincing economic theories or evidence that can justify use of self-preferencing. It only harms efficiency and consumers by distorting the match between consumers

and products, softening competition between first-party and third-party products, and dampening small third-party sellers' innovation incentives. We therefore recommend the new competition framework to take a strong position in objecting self-preferencing. In our view, self-preferencing should be defined as the LDPs' systematic bias towards their own products, despite knowing they are inferior to the third-party substitutes. However, we note that it can be difficult in practice for the ACCC to identify LDPs' self-preferencing behavior as it is challenging to understand how exactly LDPs' ranking algorithms work, based on which to produce evidence to show that LDPs systematically favor their own products.

Another competition issue mentioned in Recommendation 4 is regarding price parity clauses (PPCs), commonly used by online travel agencies (OTAs). While it is often true that a Wide Price Parity Clause (WPPC), which prohibits hotels from lowering prices on any competing channel, harms consumers, the welfare implication of a Narrow Price Parity Clause (NPPC), which still allows hotels to set lower prices on competing OTAs, is not clear-cut. An NPPC may benefit consumers if OTAs' fixed investments play an important role and the competition between OTAs is effective enough. We support the ACCC's current position of allowing OTAs to impose NPPCs but recommend being extra cautious in following several European countries to abolish all forms of PPCs completely.⁸

In practice, forbidding WPPCs may not always achieve the desired antitrust goal. While the formal price parity requirements are no longer in place, hotels may fear the implicit PPCs such as a demotion in the ranking. They therefore choose not to lower prices on competing channels. These implicit PPCs are difficult for the ACCC to detect and prevent. In this case, a direct cap set on OTA fees can be effective in improving efficiency when it accounts for the efficiencies OTAs create.⁹ This type of direct regulations bypasses the difficult implementation problem. Even when the implicit PPCs are absent, it is *a priori* unclear whether the fees set by OTAs, or other types of digital marketplaces, are in general too high. The ACCC needs a formula to calculate the efficient fees for different platform services. A direct cap can be used if the fees are indeed too high relative to the efficient fees.¹⁰

⁸ Wang, C. and Wright, J., 2020. Search platforms: Showrooming and price parity clauses. *RAND Journal of Economics*, 51(1), pp. 32-58.

⁹ Gomes, R. and Mantovani, A., 2020. Regulating platform fees under price parity. CEPR Discussion Paper No. DP15048.

¹⁰ Wang, C. and Wright, J., 2022. Regulating platform fees. Working paper.