ACCC SEEKS TO CURB DIGITAL PLATFORM MARKET POWER, FACEBOOK HITS BACK

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By: Ayman Guirguis

IN BRIEF

- The Australian Competition and Consumer Commission (ACCC) released the Preliminary Report[1] of its Inquiry into Digital Platforms (Report) on 10 December 2018.
- The ACCC finds that each of Google and Facebook has **substantial market power** in online search, search advertising and news media referral markets (Google) and; in social media, display advertising and news media referral (Facebook).
- The Report's **11 preliminary recommendations** include the following proposals:
  - Creation of a new "regulatory authority" to monitor, investigate and report on large digital platforms' activities, particularly the algorithms used to display and rank advertising and content;
  - Amendment to merger rules to address the data acquired in a transaction and the removal of potential competitors, as well as voluntary prior notification of acquisitions by platforms;
  - Data protection laws to be amended to ensure informed, active consent by consumers around use of data, to provide options for deleting personal data and to improve enforcement and remedies for breaches of privacy laws;
  - Technology-neutral media laws in areas such as content regulation, complaints and classification; and
  - New laws to make unfair contract terms illegal, not merely voidable.
- The Report identifies **nine areas for further analysis**, including the establishment of a digital platforms ombudsman, measures to improve quality, choice and funding of news journalism, price monitoring of intermediary services, measurement of advertising results, the deletion of user data on request and a general prohibition on "unfair practices."
- The ACCC announced it has **five current investigations** into digital platforms.
- Facebook claims many of the ACCC's recommendations are unnecessary and unworkable, including the key recommendation of establishing an algorithm regulator.
- **Submissions on the Report are due 15 February 2019**. The ACCC will submit its final report on 3 June 2019.

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WHAT DOES THE REPORT COVER?

The Digital Platforms Inquiry was referred to the ACCC in December 2017, following changes to Australia's media ownership rules. The reference was focussed on the impact of platforms in media and advertising markets but the matters to be examined were not limited to those issues. The "platforms" addressed in the Inquiry are search engines (notably Google), social media platforms (Facebook) and other digital content aggregation platforms.

The Report observes the dramatic changes in advertising over the last 10 years, with online advertising growing from approximately AUD2 billion in 2008 to over AUD8 billion in 2018. It also notes that for every AUD100 spent, AUD47 goes to Google, AUD21 goes to Facebook and AUD32 goes to all other websites.

The Report does not directly address online commerce platforms such as eBay or Uber nor "sharing economy" platforms. Nevertheless, many of the ACCC's findings and recommendations—particularly those relating to the use of data—may ultimately have broader application.

DIGITAL PLATFORMS HAVE QUICKLY GAINED SUBSTANTIAL MARKET POWER

The starting point for the Report is a finding that platforms have gained overwhelming market shares in their primary markets in a very short time. Google was founded in 1998 and has an estimated 95% share of the search engine market; Facebook, founded in 2004, has approximately 80% share of the social media market.

Market share alone is not the same as substantial market power. However, the Report supports the conclusion on market power because of the size of the market shares, as well as rapid growth in market share, often from aggressive acquisition of smaller, innovative competitors. Since 2005, Facebook has acquired over 70 companies, including Instagram and WhatsApp; Google has acquired over 200 companies since 2001, including YouTube and DoubleClick.

Large market shares in digital platforms can also be locked-in by network effects between groups of platform participants: the more consumers use a platform, the more attractive it becomes to other consumers and content providers seeking an audience. Large platforms may become unavoidable gateways and can monetise this effect through the sale of advertising.

The ACCC finds that Google has market power in online search markets and Facebook in social media. It also considers both platforms have power in online advertising markets and for news referral services.

Possessing market power is not illegal, and the ACCC does not suggest divestiture of parts of the platform businesses.[2] Instead the Report recommends increased scrutiny of mergers and measures to promote consumer choice of browsers and search engines.

Preliminary recommendation 1 proposes to introduce two new factors to be considered when assessing the competition impact of mergers:

- The likelihood of the removal of a *potential* competitor, not just current market participants, and
- The amount and type of data an acquirer would gain as a result of a transaction.

Preliminary recommendation 2 suggests the ACCC ask large platforms to give advanced notice of acquisitions and provide sufficient time to review the acquisition fully.

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Legally, these changes would not be radical. The ACCC can already consider any factors affecting competition, which may include data and the impact of potential competitors, although they are not mandatory. The ACCC only recommends *voluntary* pre-notification of proposed mergers, not the compulsory filings that exist overseas.

In practice, the recommendations may indicate an intention by the ACCC in its merger review role to examine more closely data issues and the purchase of small, innovative competitors and to intervene more often in digital mergers.

Preliminary recommendation 3 is that suppliers of operating systems and devices be required to give consumers a choice of browser, rather than a default, and for browsers to include a choice of search engine.

The recommendation draws on the results of important cases in the US and EU that resulted in remedies against Microsoft and Google to promote consumer choice. As the ACCC notes in the Report, search engines and browsers place great value on being installed as a default because of consumer inertia. The recommendation draws on behavioural economics to counter that consumer bias, which may itself be a barrier to competition.

ALGORITHMS AS THE KEYS TO DIGITAL COMMERCE

Algorithms are used by platforms to select and rank the content and advertising displayed in response to user search requests. They play a critical role in the success of businesses that interact with consumers online – increasingly all businesses.

Media content providers and advertisers submitted to the ACCC that they are no longer able to plan and run their businesses without an understanding of the factors that influence search results and some notice of changes to those factors.

Platform operators argued that revealing algorithms would lead content providers and advertisers to "game" them by tweaking content to push it up the rankings, regardless of interest to consumers. Ultimately, they submit, consumers and competition should determine whether an algorithm successfully balances the interests of different users.

The ACCC expresses three main concerns about the use of algorithms:

- Lack of transparency and information about changes to algorithms creates uncertainty for media content providers and advertisers that rely on platforms to access consumers and may lead to excessive pricing of advertising services;
- There is potential for discrimination by a platform in favour of its own businesses in related markets, such as shopping comparison, travel or apps; and
- Advertisers may not be able to verify whether their advertisements are served to the intended audience and may be subject to "ad fraud", where fraudulent operators set up websites, sell advertising space and use bots to click on sponsored ads, generating revenue for themselves (as the website owner) and the search platform that refers traffic.

These concerns raise different aspects of the same issue: information asymmetry between users and platforms gives platforms power to implement algorithms without users being able to understand the choices available or to negotiate if they could.

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Preliminary recommendations 4 and 5 propose a new "regulatory authority" to oversee platforms with revenues of over AUD100 million. The regulatory authority would have powers to obtain information on algorithms, to investigate complaints and publish reports and recommendations.

The Report does not recommend new enforcement powers, such as orders to change an algorithm. Instead, the approach relies on increased disclosure to a regulator to lower the incentive to design algorithms that distort competition in advertising, media and other related markets.

CREATING A LEVEL MEDIA PLAYING FIELD

Publishers, broadcasters and other media businesses claimed that platforms enjoy the benefits of hosting content without having to comply with media and content regulation, placing traditional media at a disadvantage. Platforms argue that it would be impractical to apply the same regulatory structure, given their role as aggregators, not creators, of content.

The Report addresses "regulatory imbalance" in areas such as copyright, advertising standards, and journalistic ethics and telecommunications regulation. The ACCC's view is that technologically-neutral regulation would be beneficial but it recognises the practical difficulties of setting common standards across different technologies.

Preliminary recommendation 6 is to establish an independent review of content regulation, with the aim of developing technology-neutral standards.

Preliminary recommendation 7 is that the Australian Communications and Media Authority develop a rule that would provide for the removal of copyright-infringing material from online platforms.

CONSUMER DATA CONSENT PROVISIONS TO BE ENHANCED

The Report acknowledges the enormous benefits that digital platforms have brought consumers, including many services provided at zero monetary cost. Instead, consumers give platforms their attention and, more importantly, access to and use of personal data.

The Report argues current consent arrangements are flawed: privacy notices provided to consumers are long and often too complex to be understood by most consumers, they are offered on a "take-it-or-leave-it" basis, and delivered as default choices that may be pre-selected against consumers' interests.

Preliminary recommendation 8 suggests several amendments to the Privacy Act to ensure a consumer's consent to data collection and use is fully informed, based on express choice rather than a "pre-ticked" option. The recommendation also includes a right for consumers to erase personal information if they withdraw consent.

Preliminary recommendation 9 calls on the Office of the Australian Information Commissioner to develop an enforceable code of conduct for data protection on digital platforms.

Preliminary recommendation 10 supports a recommendation by the Australian Law Reform Commission for the introduction of a new tort relating to serious invasions of privacy.

Unfair Contract Terms to be Illegal

Preliminary recommendation 11 recommends that unfair contract terms be made illegal.

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Currently, such terms may be rendered void and unenforceable but do not provide a basis for penalties. The Report recommends this as a general change to the law – applying not only to digital platforms and not only to privacy terms.

UNFINISHED BUSINESS – AREAS FOR FURTHER ANALYSIS

The complexity of the issues facing the ACCC is reflected in the fact that the Report raises several areas on which further work is to be done, including:

- Measures to support choice and quality of news and journalism, including news literacy online and measures to fund the production of news and journalism;
- The creation of a digital platforms ombudsman;
- Monitoring of intermediary pricing; and
- A general prohibition on "unfair practices" to be introduced to the ACL.

The proposals to support news and journalism raise issues arguably outside the traditional remit of the ACCC as a competition and consumer regulator. Ideas raised in the Report include steps to tackle so-called "fake news" and the atomisation of news (or "echo chambers") by requiring platforms to "badge" news articles from "trustworthy" sources. The ACCC is also considering whether to recommend government support for small publishers or tax deductibility for personal subscriptions to traditional print media.

The ACCC will also consider recommending the creation of an ombudsman to consider complaints against platforms from consumers, advertisers or media content providers.

WHAT DOES THE REPORT MEAN FOR BUSINESS?

Platforms Face Increasing Regulation Internationally

There is a clear trend in Australia and overseas to intervene in digital markets. In its June 2018 issue, the *Economist* published a mock email to the CEOs of digital platforms.[3] It noted "all your services remain wildly popular with consumers…" but warned, "'Tech' is not yet a four-letter word but it could soon become one". The memo suggested the platforms voluntarily undertake reforms, some similar to the ACCC's recommendations.

There is a clear global trend to greater regulation. The European Commission (EU Commission) has been at the forefront of introducing reforms in the area and has started litigation that is beginning to have practical impacts. Germany amended its competition law in 2017 to include data, network effects and innovation in market analysis. In the U.S. too, recent hearings by the Federal Trade Commission (FTC) suggest more active enforcement of antitrust laws is likely. On 12 December 2018 representatives from the EU Commission, FTC and U.S. Department of Justice met specifically to discuss digital markets and possible remedies in the event of breaches of competition laws.

Also on 12 December, the Japan Fair Trade Commission published an interim report into digital platforms and came to similar views, mainly that:

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- Digital platforms provide a wide range of services and benefits to businesses and consumers but that the sector tends to create situations where markets become monopolised; and
- There is a need to ensure that the equality of competitive conditions are maintained and a need for transparency to maintain fairness.

In the face of those changes, platforms may choose to follow the Economist's advice and adopt some of the less-interventionist reform proposals.

Several Preliminary Recommendations Extend Beyond Platforms

Beyond platforms, the preliminary recommendations to make unfair contracts illegal, rather than only void, would most likely be extended to other sectors. The ACCC has proposed such a change for some time and the Inquiry may provide a foothold for the change to be adopted.

Similarly, the introduction of changes to data privacy protection and the possible introduction of an "unfair practices" law should be on the radar of non-platform businesses as well.

The Report Reflects a More Active, Regulatory Role by the ACCC

In launching the Report, ACCC Chair Rod Sims noted the ACCC was conscious of that policy issue, and that journalistic standards and media diversity are "fundamental to a society" and that the nature of news and media as public goods justified government involvement in regulating the market.

The Digital Platforms Inquiry is one in a series of "market studies" the ACCC has been asked to undertake, that cover areas from beef to banking and financial services. The recommendations from the reports almost always extend beyond traditional competition and consumer law. The influence of traditional media entities in the Report is clear and the ACCC has appropriately considered those submissions. The lesson is that it is arguably more important than ever to engage early with such inquiries and to ensure the ACCC has submissions supporting your business' case.

FOOTNOTES

[1] Report is available at: https://www.accc.gov.au/focus-areas/inquiries/digital-platforms-inquiry/preliminary-report

[2] In releasing the Report, Rod Sims cast doubt on whether the ACCC would seek a divestiture remedy, stating "it would not be clear what the role of divestment would be."

[3] https://www.economist.com/briefing/2018/01/20/the-techlash-against-amazon-facebook-and-google-and-what-they-can-do

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KEY CONTACTS



AYMAN GUIRGUIS
PARTNER

SYDNEY
+61.2.9513.2308
AYMAN.GUIRGUIS@KLGATES.COM

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