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Digital Platforms under Scrutiny:
Recent competition and regulatory
reviews in the UK and Australia

Seminar for the Oxford University
Centre for Competition Law and Policy

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21st May 2019

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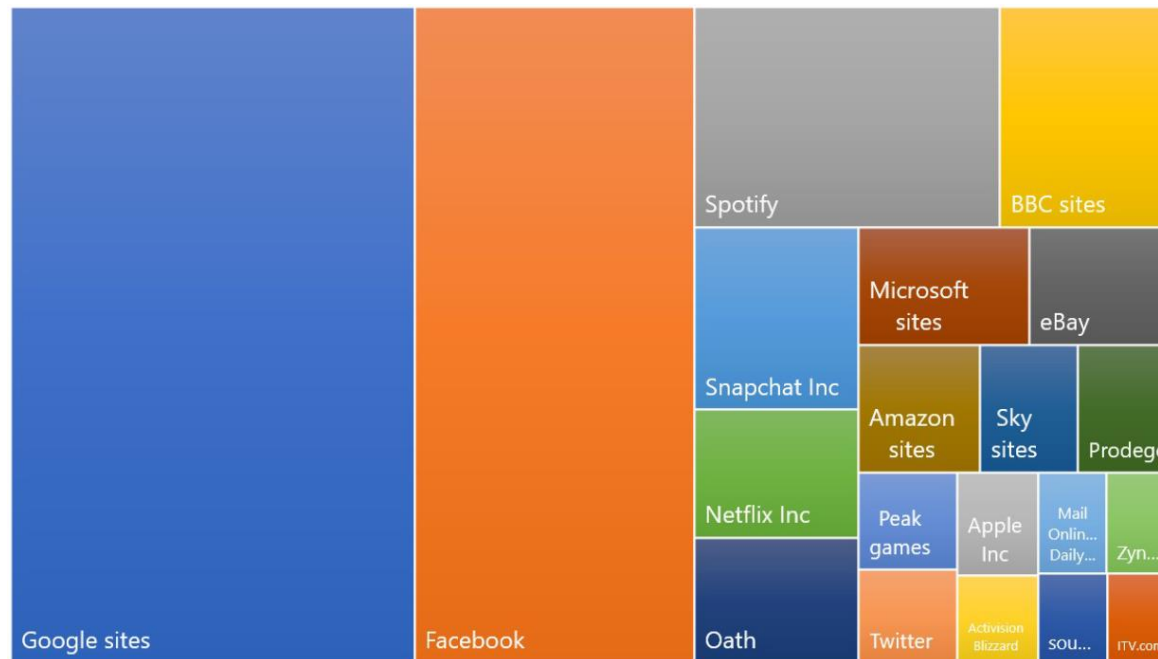
Unlocking Digital Competition

The UK Digital Competition Expert Panel's Report

Richard Eccles

Digital markets characteristics

- Computing power, big data, networked processing and cloud-based systems creating new markets
- Digital platforms result in "tipping to" a single winner in a short period
- Consumers tend to "single-home"
- Incumbent platforms become "first choice access points for time-constrained consumers" and "the core route to market for many suppliers"
- The share of time spent by UK users on top 20 sites is very concentrated:

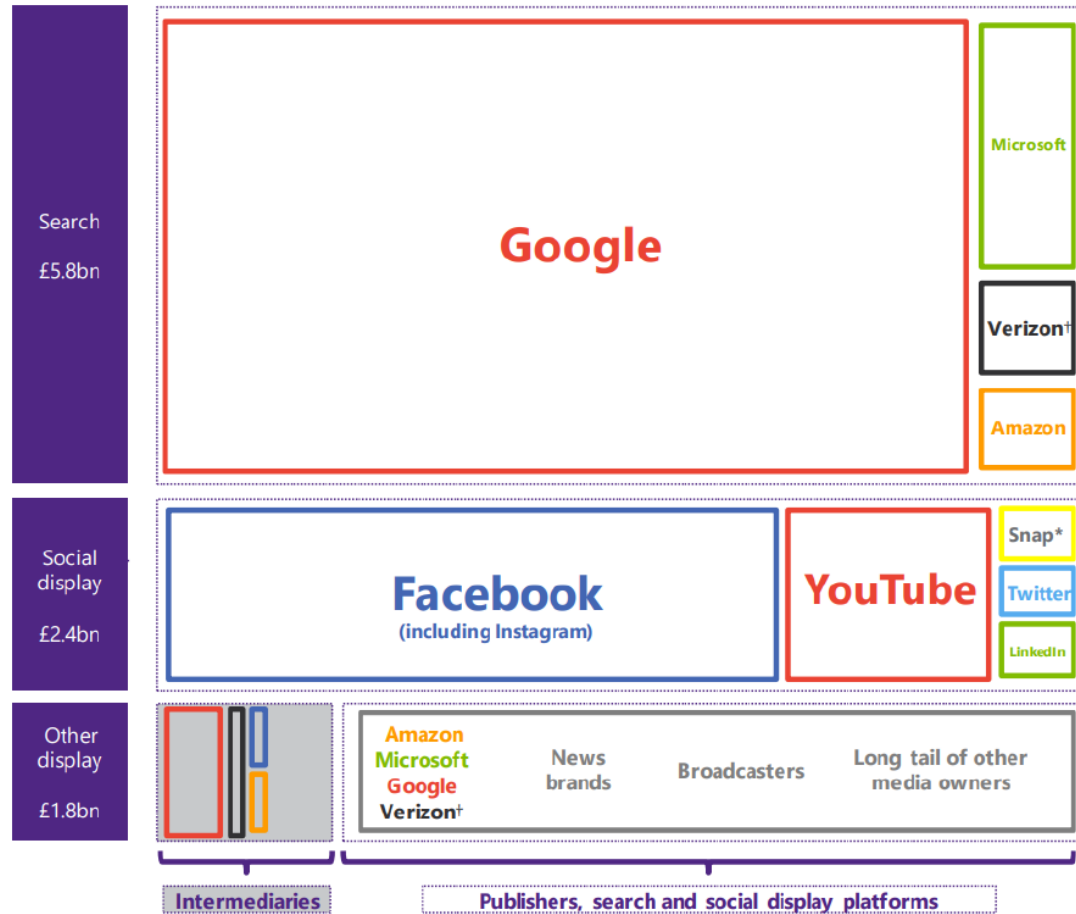


Source: Comscore, as presented in the Expert Panel Report

Key features of digital platforms

- Social media provide consumers with services at no monetary costs for matching them with advertising content
- Digital advertising is the revenue-generating side of platform services
- Consumers pay for services by providing their data
- But consumers could be extracting greater value in return for their data
- Misuse of consumer data and harm to privacy may indicate low quality caused by a lack of competition

Market shares of online advertising expenditure



Ownership: □ = Google □ = Facebook □ = Microsoft □ = Verizon □ = Amazon □ = Snap □ = Twitter □ = Other

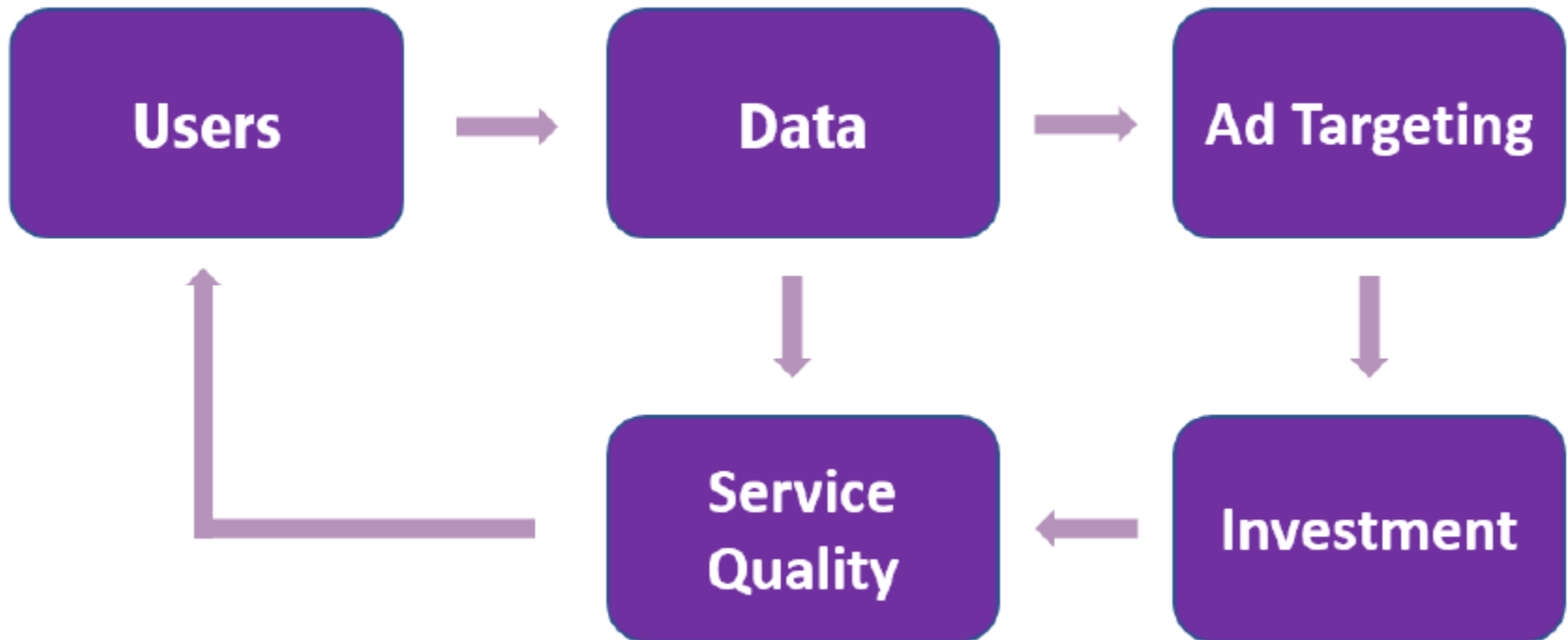
* Snap is generally included in the social display category, although it describes itself as a camera and communications company.

† Verizon Media Group (formerly Oath)

Source: Plum Consulting, as presented in the Expert Panel Report

Feedback loops

- Dominant platforms benefit from "user and monetisation feedback loops"



Source: OECD, as adapted and presented in the Expert Panel Report

European Commission Expert Advisors' Report

- *Competition Policy for the Digital Era* – report by expert advisors in April 2019 for the EC
- Key characteristics identified:
 - Extreme returns to scale
 - Network externalities
 - Data: evolution of technology makes it possible for companies to collect, store and use large amounts of data, a key ingredient of AI and a crucial input to many online services

Competition policy changes recommended by the Digital Competition Expert Panel

- The need for rapid intervention to promote competition before the market tips to concentration
- The need for competition authorities to be forward-looking and mindful of harm to potential competition
- The need for fast action that directly targets and remedies problematic behaviour by incumbent operators
- Greater use needed of interim measures by the CMA, especially following the lowering of the legal threshold

Market investigations

- There are limitations in using market investigations - as the remedies are relatively static
- Binding orders cannot be revised and updated when the nature of the required solutions changes
- Specific remedies resulting from a market investigation may quickly go out of date
- However, the Panel calls for the CMA to conduct a market study into the digital advertising market

Merger control: Panel recommendations

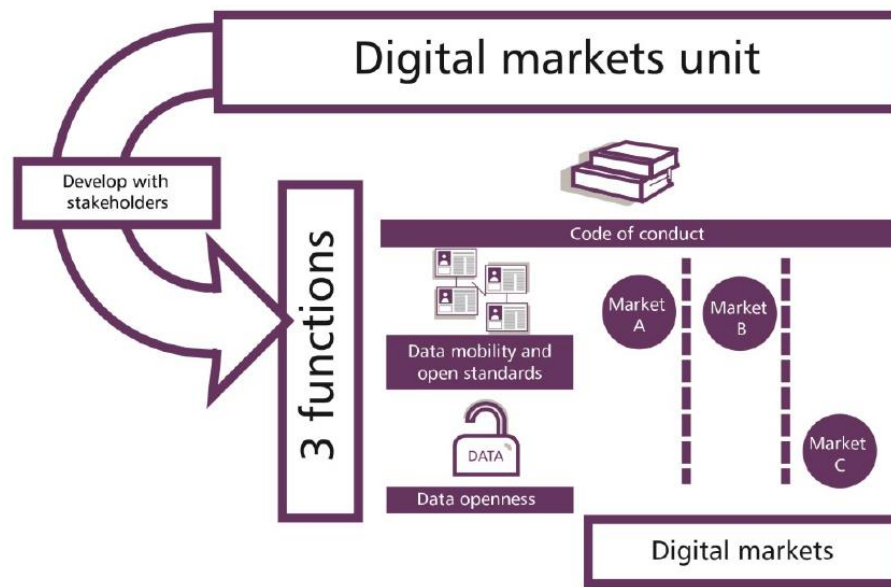
- Under-enforcement and false negatives
- Carl Shapiro, 2018: *"one promising way to tighten up on merger enforcement would be to apply tougher standards to mergers that may lessen competition in the future, even if they do not lessen competition right away."*
- The CMA should:
 - Prioritise scrutiny of mergers in digital markets
 - Closely consider impacts on potential competition in its case selection and assessments
 - Address lower likelihood but high-impact concerns regarding potential competition
- Digital companies designated with *strategic market status* should be required to inform the CMA of all intended acquisitions

The "balance of harms" approach

- Killer acquisitions (strategic acquisitions of small digital companies, to protect a dominant position) have sometimes been allowed because of insufficient likelihood of competitive harm
- A "balance of harms" approach should be introduced whereby the scale as well as likelihood of harm should be taken into account
- Thus, where a merger is viewed as unlikely to result in harm but such harm would be significant, the authorities should intervene

Digital Markets Unit

- The Panel recommends establishing a new Digital Markets Unit within either Ofcom or the CMA, as an independent subsidiary of either
- The Unit would have new primary powers in relation to digital companies which hold a *strategic market status*
- The Unit will be required to introduce a digital platform code of conduct (applying to digital platforms having *strategic market status*)
- This will be an *ex ante* regime operating alongside conventional competition policy



Source: the Expert Panel Report

Examples of unacceptable behaviour by platforms with strategic market status

- An online marketplace excluding rival sellers from its platform
- Self-preferencing by a platform of its own services
- An online platform penalising a user for providing a more attractive offering on another site

Core objectives of the Code of Conduct

- Business users to be provided with access to designated platforms on a fair, consistent and transparent basis
- Users not being unfairly restricted from utilising alternative platforms or routes to market
- Enforcement of a clearer and more detailed set of rules should prevent negative outcomes before they occur, or at least remedy them before it is too late for the parties involved
- Personal data mobility
- Systems with open standards

Recommendations of the EC Advisors' Report

- The strategies employed by dominant platforms aimed at reducing competitive pressure should be forbidden in the absence of clear consumer welfare gains
- Incumbents should have the burden of proof for showing the pro-competitiveness of their conduct, especially if the dominant platform tries to expand into neighbouring markets
- Any measure by which a dominant platform restricts multi-homing should be subject to a burden of providing a solid efficiency defence.
- Self-preferencing by a vertically integrated dominant platform should be subject to the burden of proving that such conduct has no long run exclusionary effects
- Dominant platforms acquiring small start-ups should bear the burden of showing that the adverse effects on competition are offset by merger-specific efficiencies

International

- The global scope of digital markets means that competition authorities will increasingly need to work together
- Competition authorities should develop a shared set of internationally applicable assessment methods
- Government should support closer co-operation between national competition authorities in:
 - Monitoring potential anti competitive practices arising from new technologies, and
 - Developing remedies to cross-border digital mergers

Strategic recommendations of the Panel

- **Strategic recommendation A:** To sustain and promote effective competition in digital markets, government should establish and resource a pro-competition digital markets unit
 - tasked with securing competition, innovation, and beneficial outcomes for consumers and businesses.
- **Strategic recommendation B:** Merger assessment in digital markets needs a reset.
 - the CMA should take more frequent and firmer action to challenge mergers that could be detrimental to consumer welfare through reducing future levels of innovation and competition,
 - supported by changes to legislation where necessary
- **Strategic recommendation C:** the CMA's enforcement tools against anti-competitive conduct should be updated and effectively used, to help them play their important role in protecting and promoting competition in the digital economy.

Strategic recommendations of the Panel

- **Strategic recommendation D:** The government, CMA and the Centre for Data Ethics and Innovation should continue to monitor how use of machine learning algorithms and artificial intelligence evolves to ensure it does not lead to anti-competitive activity or consumer detriment, in particular to vulnerable consumers.
- **Strategic recommendation E:** The CMA should conduct a market study into the digital advertising market encompassing the entire value chain,
 - using its investigatory powers to examine where competition is working effectively and whether consumers harms are arising
- **Strategic recommendation F:** Government should engage internationally on the recommendations it chooses to adopt from this review,
 - encouraging closer cross-border co-operation between competition authorities in sharing best practice and
 - developing a common approach to issues across international digital markets.

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ACCC's Digital Platforms Inquiry

Digital platforms, news and journalism 'down under'

Thomas Jones

The ACCC's Digital Platforms Inquiry

Scope of the inquiry

- A 'world first' inquiry into digital platforms' impact on advertising and traditional media, and in particular, the impact on news and journalistic content
- The ACCC has, somewhat controversially, been able to take a 'more holistic approach' given its remit covering both competition law and consumer law
- A key issue raised in the preliminary report was the extent to which platform service providers are exercising market power in commercial arrangements with the creators of journalistic content and advertisers



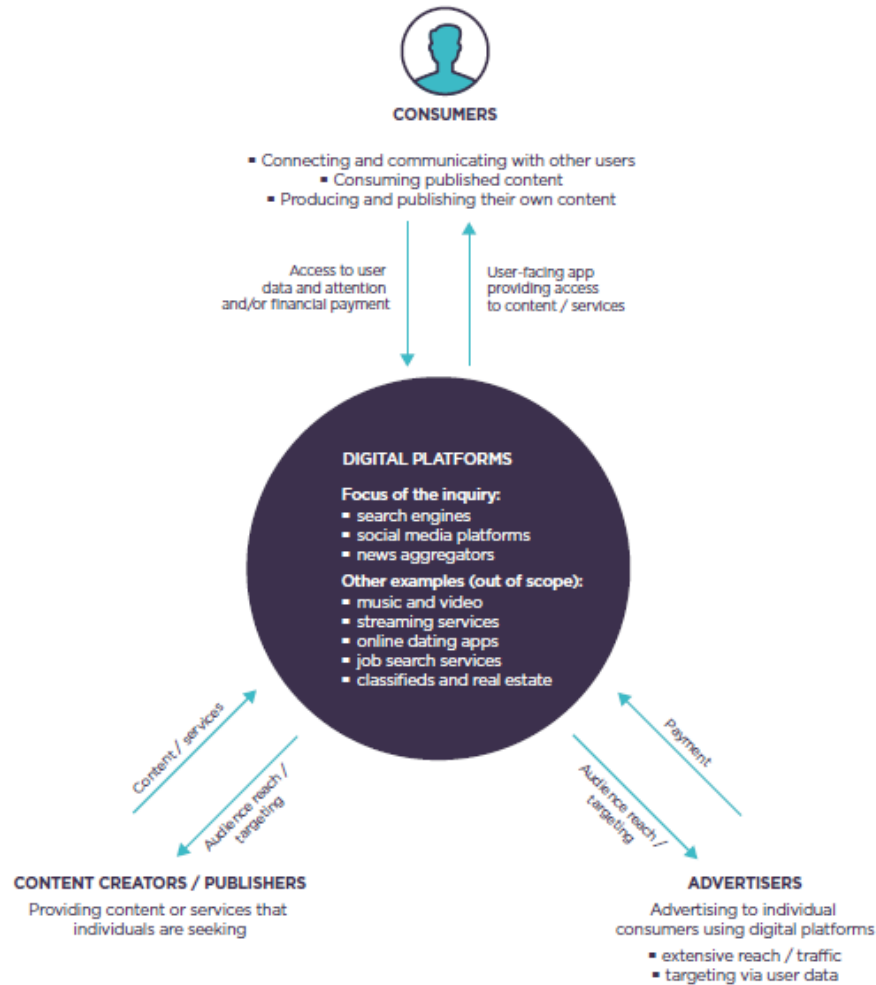
The ACCC's Digital Platforms Inquiry

The preliminary report

- The preliminary report was published in December 2018: all 350 pages
- 11 recommendations: wide ranging changes to the law/introduction new laws and standards, and the establishment of a regulatory authority aimed at increasing transparency about algorithms
- Finding that Google and Facebook have substantial market power in a variety of markets, including a novel "news media referral services" market
- Final report is due next month in June 2019

Multi-sided markets

Figure 1.1: Interactions of digital platforms with their users



The 2012 Convergence Review

This review was one of the most significant reviews of Australian media policy in recent years.

It focused on three areas:

- media ownership and control
- content standards
- promoting locally produced content.

The Final Report suggested:

- a move away from platform regulation, to a framework which focussed on the size and relevance of content entities
- suggested changes to media ownership rules, content regulation and Australian content.



Response to Christchurch massacre

The Christchurch massacre occurred on 15 March 2019.

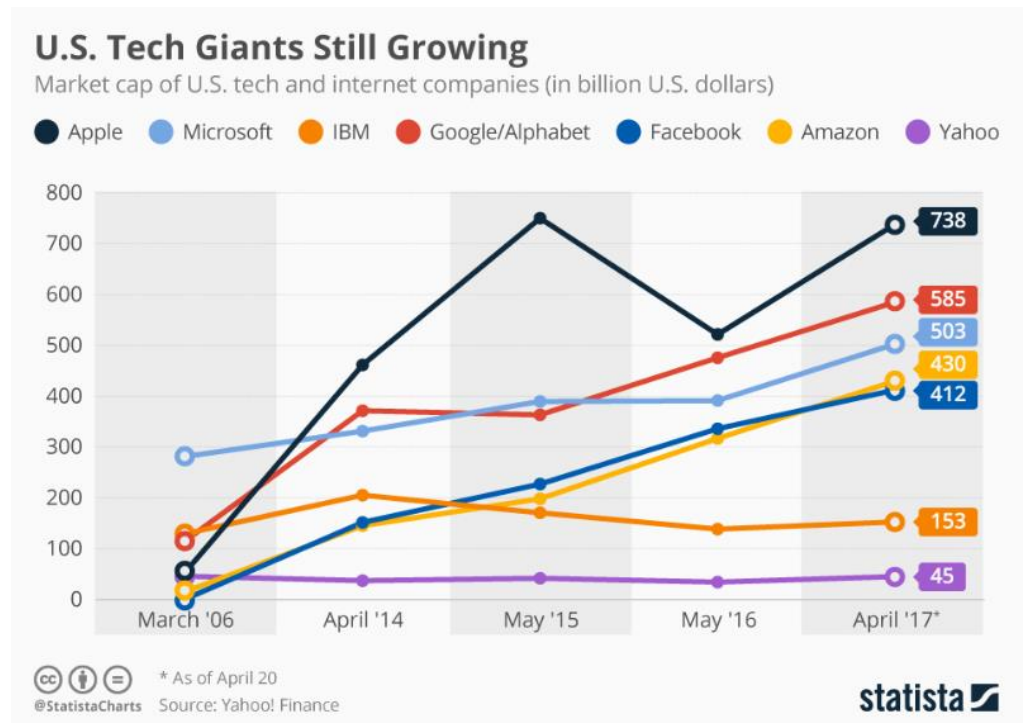
Three weeks later the Australian Parliament passed new laws making it a crime for social media platforms not to quickly remove "abhorrent violent material".

The crime is punishable by three years in prison and a fine of \$10.5 million, or 10 per cent of the platform's annual turnover, whichever is larger.

Bipartisan support for laws despite criticism from platforms.

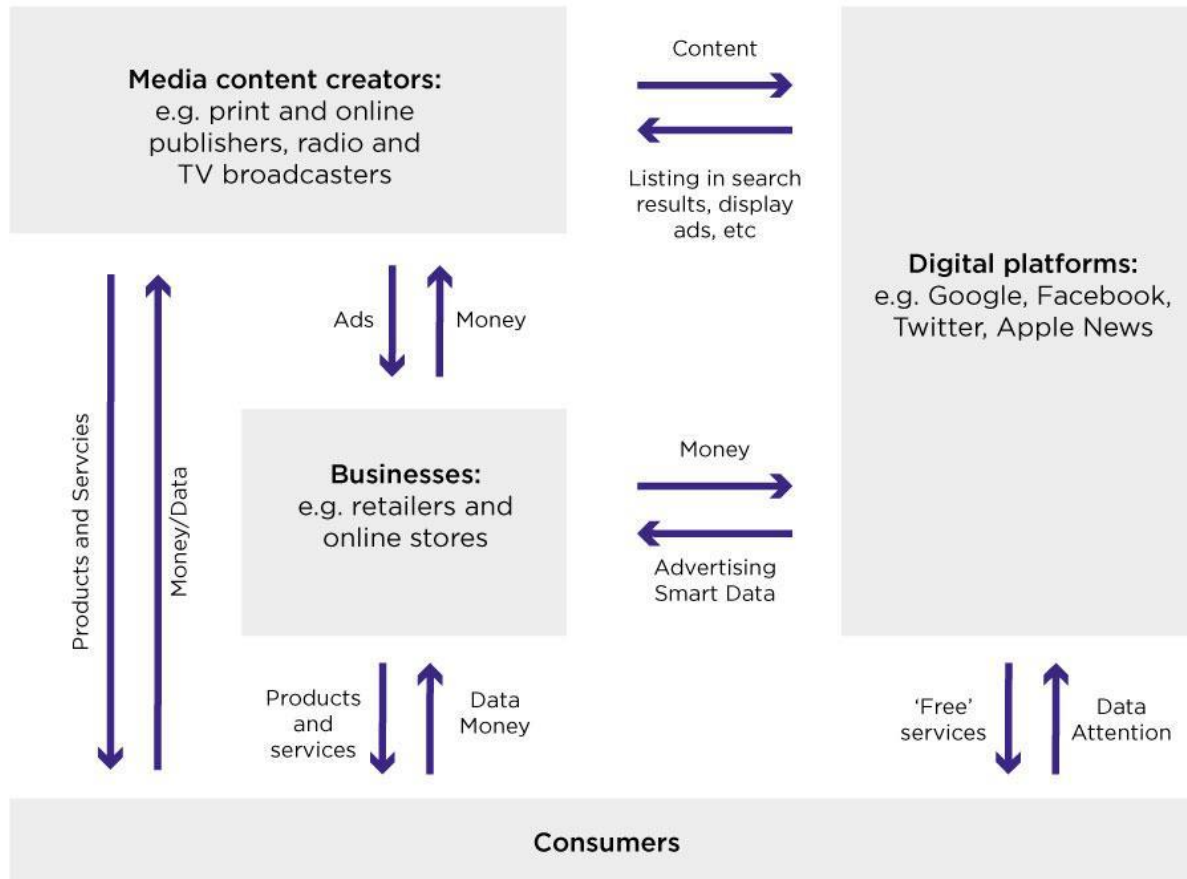
Meanwhile...

Speed of growth and size of corporate monopolies



Digital platform business model

How Google and Facebook monetise their services



Source: Extracted from Figure 3, 'Big Data Ecosystem' from OECD, Bringing Competition Policy to the Digital Era: Background note by the Secretariat, 29-30 November 2016, p 12. Figure has been updated and adjusted as relevant to the Australian context and matters of key relevance to the Inquiry.

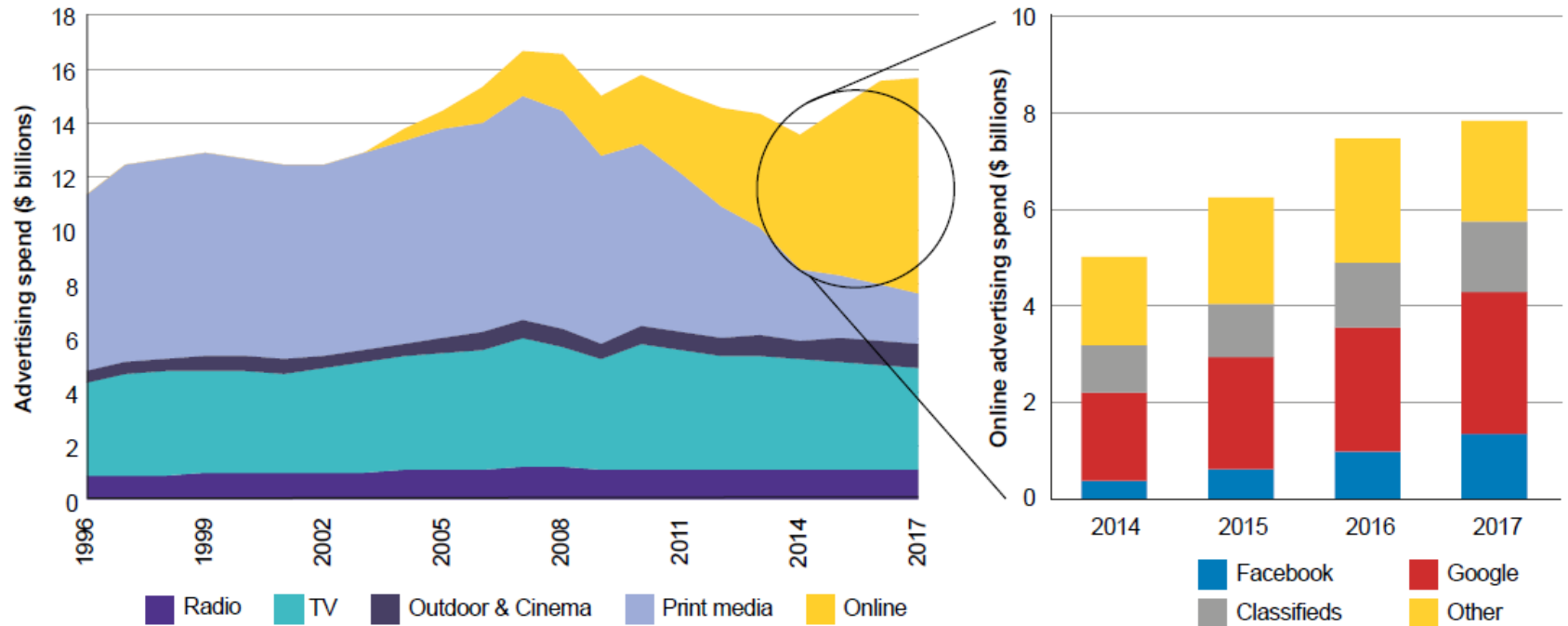
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Why it's all about advertising \$

Australian online advertising expenditure

Figure 1: Australian advertising expenditure by media format and digital platform



The 11 preliminary recommendations

Competition law

1. Amendments to our merger provisions – importance of 'potential competitors', data
2. Advance notification of acquisitions – Facebook/WhatsApp/Instagram; Google/YouTube
3. No default operating systems or browsers – Google reportedly paid Apple \$9 billion in 2018 and \$12 billion in 2019 to remain as Safari's default search engine
4. Regulatory authority to monitor, investigate and report on discriminatory conduct
5. Regulatory authority to monitor, investigate and report on ranking of news and journalistic content and the provision of referral services to news media businesses

The 11 preliminary recommendations

Competition and consumer/privacy law

6. Separate review on the media regulatory framework and content production – to overcome regulatory imbalance that may give digital platforms an unfair advantage
7. Mandatory "take-down" requirement for copyright infringing material
8. Amendments to the privacy laws around consent; use and collection of personal information; direct rights of action for individuals; third party certification scheme and penalties for breaches
9. Code of Practice for digital platforms to provide increased transparency and control over the use and collection of personal information
10. Statutory cause of action for serious invasions of privacy
11. Amendments to the Australian Consumer Law's unfair contract terms

The 11 preliminary recommendations

What's not there?

The ACCC stopped short of :

1. Recommending divestiture
2. Treating platforms like a public utility
3. A universal standard of fair, reasonable and non-discriminatory dealings with users

Finding of substantial market power

The ACCC made a finding (subsequently contested by the platforms) that Google and Facebook have substantial market power in the following markets:

- **The supply of online search** – where Google has a 94% market share
- **The supply of online advertising** – Google and Facebook receive over 50% of all online advertising and this is growing
- **The supply of "news media referral services"** – Google and Facebook are a 'must have', with over half of online news and content sourced from a digital platforms and 94% share in search
- **The supply in Australia of social media services** – Facebook has 17 million monthly users in Australia and 2.2 billion monthly users globally
- **The supply of display advertising** – Facebook/Instagram have a 46% market share, remainder of the market highly fragmented

Market power analysis

What did the ACCC look at?

- High market shares
- Barriers to entry and expansion
- Brand strength
- Data obtained from various markets, combining them to the advantage of the platform
- User inertia and 'default' arrangements
- Information asymmetry
- Multi-sided nature – users, content providers, advertisers
- Direct/indirect network effects that shore up market power
- The platforms' power being non-transitory

Finding of substantial market power

In assessing Google and Facebook's market power, the ACCC did not take the position that data is ubiquitous, non-rivalrous, low cost and easy to collect...

... instead finding they have advantage in scope to collect user data on a large scale. That is, they collect data to become attractive to advertisers, use the advertising revenue to attract more users to the platform, and the cycle continues.

Use and collection of consumer data is therefore a central issue in the inquiry, and is the reason why there are preliminary recommendations that propose significant amendments to Australia's privacy legislation.

Final recommendations

What might they be?

Clearly there will be more regulation. We are likely to see:

- The creation of a regulatory body with monitoring and investigative powers, which is inline with other governments' approaches
- Platforms being held responsible for the content they publish given the impact on society and control they exert
- Possible tweaking of the recommendations that have the object of increasing transparency, based on further information obtained by the ACCC in relation to the ad tech supply chain
- An industry code of conduct like the *Food and Grocery Code of Conduct*
- Overhaul of privacy legislation, with heftier fines than the GDPR
- Additional recommendations?

Current and future enforcement action

Watch this space in Australia

The ACCC has indicated it has 5 investigations underway into potential misuse of market power and breaches of consumer law:

- Misuse of market power law - requirement to show purpose/effect/likely effect, of substantial lessening of competition
- Not an easy task in the context of platforms
- One of the misuse of market power investigations involves access restrictions for an app developer
- Going forward, key issue will be globally coordinated responses: issues and impacts are global
- ACCC likely to go on a roadshow with final report
- Watch this space

A global issue

Regulating digital giants

Regulators in the EU (and UK), US and AU independently moving in the same direction, clear similarities, albeit some differences:

- **April 2018:** Congress grills Facebook CEO over data misuse
- **Dec 2018:** AU ACCC's Draft Report on the Digital Platforms Inquiry
- **Feb 2019:** UK's Cairncross Review: A sustainable future for journalism
- **Feb 2019:** US FTC Bureau of Competition announces creation of the FTC Technology Taskforce
- **March 2019:** UK's Furman report: "Unlocking digital competition, Report of the Digital Competition Expert Panel"
- **March 2019:** US Senator Elizabeth Warren, presidential candidate, commits to breaking up the big digital companies if elected
- **April 2019:** EC report 'Competition Policy for the Digital Era'
- **June 2019:** AU ACCC's final report on the Digital Platforms Inquiry is expected

Facebook CEO calls for globally consistent regulations

Thank you & Bird & Bird

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