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

Richard Eccles and Thomas Jones

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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

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
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.
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 11: Interactions of digital platforms with their users

CONSUMERS
- Connecting and communicating with other users
- Consuming published content
- Producing and publishing their own content

DIGITAL PLATFORMS
Focus of the inquiry:
- search engines
- social media platforms
- news aggregators
Other examples (out of scope):
- music and video
- streaming services
- online dating apps
- job search services
- classifieds and real estate

CONTENT CREATORS / PUBLISHERS
Providing content or services that individuals are seeking

ADVERTISERS
Advertising to individual consumers using digital platforms
- extensive reach / traffic
- targeting via user data

Access to user data and attention and/or financial payment
User-facing app providing access to content / services
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*

**The way to grow**

Market capitalisation, $bn

![Graph showing growth of Google, Amazon, and Facebook](image)

*Source: Bloomberg, *Latest*

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**U.S. Tech Giants Still Growing**

Market cap of U.S. tech and internet companies (in billion U.S. dollars)

- Apple
- Microsoft
- IBM
- Google/Alphabet
- Facebook
- Amazon
- Yahoo

![Graph showing market caps of U.S. tech companies](image)

*Source: Yahoo! Finance, As of April 20*
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.
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

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
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
- **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**: 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

Richard Eccles
Richard.Eccles@twobirds.com

Thomas Jones
Thomas.Jones@twobirds.com

twobirds.com

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