CCIA's Comments on the ACCC's Discussion Paper for Interim Report No. 5: Updating Competition and Consumer Law for Digital Platform Services

The Computer and Communications Industry Association (CCIA)[1] welcomes the opportunity to submit comments on the Australian Competition and Consumer Commission's (hereinafter "ACCC") Discussion Paper for Interim Report No. 5: Updating Competition and Consumer Law for Digital Platform Services (hereinafter "the Discussion Paper"),[2] released on February 28, 2022.

As the ACCC notes, the so-called "digital platforms" offer innovative and popular services to consumers, and have revolutionized the way consumers and businesses interact with each other. However, reiterating CCIA's previous comments on the ACCC's digital platform inquiry,[3] CCIA believes that for the ACCC to determine whether there is a need to address possible concerns from both competition and consumer protection viewpoints, it is important to fully and accurately understand the industry, as well as the business models, operations, and constraints in which the so-called "platforms" operate.

When conducting this type of inquiry, CCIA encourages the ACCC to take a deeper look into the services or business models of potential concern to ensure that any reform proposals are made with an understanding of all the competitive dynamics involved in the relevant sector. Developing reforms without undertaking a detailed review of the services or business models of potential concern could result in proposals that would be contrary to consumers' benefits. As such, it is important for the ACCC

[1] CCIA is an international, not-for-profit trade association representing a broad cross section of communications and technology firms. For fifty years, CCIA has promoted open markets, open systems, and open networks. The Association advocates for sound competition policy and antitrust enforcement. CCIA members employ more than 1.6 million workers, invest more than $100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. For more, visit www.ccianet.org.

[2] Digital Platform Services Inquiry, Discussion Paper for Interim Report No. 5: Updating Competition and Consumer Law for Digital Platform Services (Feb. 28, 2022), Australian Competition and Consumer Commission, *available at* https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry.pdf.

[3] *See, e.g.*, CCIA Comments to the ACCC Digital Platforms Inquiry Preliminary Report (Feb. 15, 2019), *available at* https://www.accc.gov.au/system/files/Computer%20%26%20Communications%20Industry%20Association%20%28February%202019%29.PDF. *See also* CCIA Submission in Response to the ACCC's Paper on "Mandatory News Media Bargaining Code" (June 5, 2020), *available at* https://www.accc.gov.au/system/files/Computer%20%26%20Communications%20Industry%20Association.pdf.

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to reexamine the very general positions detailed in the Discussion Paper to fully reflect on the underlying industry dynamics of these complex services and to revisit its preliminary proposals and recommendations accordingly.

CCIA's comments focus on the ACCC's proposals for an *ex ante* regime for digital platforms in Australia. Given the benefits digital platforms provide for consumers there are important considerations the ACCC and Government should take into account when designing any proposed *ex ante* regime. The ACCC must consider that the principles underlying any regulatory proposal do not risk harming competition and ultimately consumers, but uphold value creation and preserve incentives to innovate. Our comments provide some suggested approaches in response to the ACCC's proposals regarding sharing user data, a platform-specific merger control regime, suggested *ex ante* rules, and the steps required before looking to impose a new *ex ante* regime.

I. Key Considerations and Principles to Guide Regulatory Proposals

Digital platforms provide Australian consumers and businesses tremendous benefits. Given the dynamic and innovative nature of digital markets,[4] any new regulation for platforms needs to take into account wider potential implications for businesses and consumers. As such, we encourage the ACCC to critically assess whether the benefits of any proposed *ex ante* regime would outweigh its potential negative impact. In this regard, a key consideration is whether the existing enforcement frameworks, including competition, consumer protection, and data privacy, already provide more proportionate ways to achieve the desired outcomes. Clarifying not only the proposed *ex ante* regime in detail but also the expected outcomes of such proposed framework is particularly important for consumers and businesses alike.

CCIA also encourages the ACCC to focus any consideration of new regulatory frameworks on the types of conduct that are recognized to be harmful, rather than seeking to address theoretical or

[4] *See*, *e.g.*, Nicolas Petit & David J. Teece, *Innovating Big Firms and Competition Policy: Favoring Dynamic over Static Competition*, 30 Indus. & Corp. Change (2021).

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speculative digital platform issues. In fact, the latter would risk overregulation to the detriment of innovation, competition, and consumers. Separately, it is also important to acknowledge that certain economy-wide harms (such as online scams and opaque data practices) are better addressed by economy-wide reforms, rather than platform-specific regulation.

Accordingly, CCIA's strong recommendation is for the ACCC to embrace a balanced, evidence-based approach when considering new regulatory frameworks. For example, in relation to data and access concerns, an evidence-based approach would take into account consumer benefits, business confidentiality, and security considerations.

When designing any proposed *ex ante* regime, CCIA recommends that the ACCC and policy-makers adopt the following key principles:

1. The ultimate objective of any proposal is to promote competition and innovation in the marketplace.
2. The overarching framework aims to prevent competitive harm and permits evidence-based justifications.
3. The reforms are necessary and proportionate to the seriousness of anticipated harm and the likelihood of it occurring.
4. The integrity of a new regime is secured by suitable procedural protections and review mechanisms. In particular, full merits review by a court should be available for decisions that have legal consequences for affected companies.
5. Evidence and consultation are necessary to justify changes to the rules, while preventing unfettered regulatory discretion.
6. The reforms are consistent with other regulatory regimes in Australia and overlapping obligations are avoided.

Adopting a principles-based approach will ensure that any reforms address the harms that are

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established in a proportionate way while ensuring there is no loss of competition, innovation, and consumer benefits.

II. Concerns Regarding Mandating Platforms to Share Data with Third Parties and Granting Third Parties Access to Data

The ACCC's proposals to mandate platforms to share data with third parties and granting third parties access to data (*e.g.*, click-and-query search data) would reduce incentives to compete and innovate. The prospect of forcing platforms to share assets with rivals discourages innovation — both by the asset owner, who knows they have to share the benefits, and by the rivals, who know that if someone else develops a successful asset, they also get access to it, so there is no incentive or need for rivals to create their own.

Forced data sharing poses risks to user privacy as well: Australian users would have less control over their data if digital platforms are mandated to share their data with third parties. Even though the Discussion Paper contemplates ensuring that such proposals come with controls to protect privacy, ensuring any such controls are robust and cannot be reverse-engineered by determined parties would be an ongoing challenge. In addition, there is the risk of disclosing businesses' confidential information and facilitating collusion. Lastly, and very importantly, forced data sharing could enable even more dramatic harms, such as widespread disinformation and manipulation.

Data portability can help drive innovation and competition by enabling consumers to securely switch among services from different providers, empowering them to try new services, and allowing them to choose the offering that best suits their needs. Measures to promote common frameworks and open systems for consumers to move data between services could have similar benefits to data portability, provided that the actual data sharing would be at the consumers' request and there are robust industry standards, protocols, and processes in place.

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III. Risks of Limiting the Ability of Platforms to Share User Data Internally

Rigid rules to limit or ban cross-service use of data could prevent users from enjoying the benefits that such data use brings. For example, enabling sharing of data across products allows for information to be accessed or controlled centrally across multiple products, rather than needing to separately manage this for each service. In addition, cross-device or product data sharing provides consumers with additional security measures and fraud detection. Introducing measures to limit cross-service data could risk severely impacting the value that digital platforms offer to the Australian market and ultimately consumers.

IV. No Current Evidence for the Need to Establish a Platform-specific Merger Regime

Australia's merger regime is working well and able to effectively review and prevent anticompetitive acquisitions. It seems that there is no evidence that the ACCC is unable to address anticompetitive acquisitions in the digital sector.

Mergers and acquisitions play an important and positive role in the economy, including as a driver of innovation and investment. While it is critical to guard against transactions that are likely to have a negative impact on competition, it is imperative that Australia's merger regime not prevent mergers that are pro-competitive (depriving users of benefits) or competitively benign (depriving sellers of the opportunity to maximize the recovery of their investments and the return on their innovation).

With respect to a digital platform-specific merger test, the risks of such proposals have been recognized internationally.[5] It's also been established that digital platform mergers are often pro-competitive.[6] First, acquisitions can provide an important exit option for innovators as well as an

[5] *See*, *e.g.*, Furman et al., *Unlocking Digital Competition – Report of the Digital Competition Expert Panel* (HM Treasury, Mar. 13, 2019) ("Furman Report"), *available at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf; Crémer et al., *Competition Policy for the Digital Era – Report for the European Commission* (Apr. 4, 2019) ("Special Advisors' Report"), *available at* https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

[6] *See*, *e.g.*, Susan Woodward, *Irreplaceable Acquisitions: Proposed Platform Legislation and Venture Capital* (2021), *available at* http://www.sandhillecon.com/pdf/Woodward_Irreplaceable_Acquisitions.pdf.

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important route to market for their technologies. Second, the evidence of anticompetitive acquisitions by digital platforms (including so-called "killer acquisitions") is weak at best. Finally, proposals to lower the standard of proof for digital mergers are disproportionate and could have the same negative effect as an outright ban on acquisitions.

The ACCC is also proposing an economy-wide merger control reform. Prudent regulation in this area would call first for economy-wide reforms to the merger control regime (but only if there is evidence the current regime is not working) and then determining if the facts support any features in addition to the economy-wide regime for mergers involving digital platforms. As there is no such evidence, CCIA respectfully submits that a digital platform-specific merger notification regime and legal test should not be adopted in Australia. If the ACCC and the Australian Government wish to pursue broader merger reform, this should be subject to proper consultation mechanisms, done on an economy-wide basis first, following which it should be considered whether there is evidence about any gaps in enforcement that would need to be specifically addressed by digital platform-specific rules.

V. Need for a Cost-Benefit Analysis vs. Overly Rigid *ex ante* Rules

Introducing new regulation for platforms is not costless, especially given the dynamic and innovative nature of digital markets. The ultimate objective of any new regime should be to promote competition and innovation for the benefit of consumers.

Due to the potential significant economic impacts of *ex ante* regulation, it is crucial that the Government plays an active role in engaging with relevant stakeholders and market players in the development of any *ex ante* regime to understand the costs and benefits involved.

In CCIA's view, new regulation should only be introduced after a comprehensive analysis of the costs and benefits. For example, the cost of new regulation should be assessed by taking into account whether: existing tools, such as use of existing competition, consumer protection, and data privacy laws, are sufficient or there are any gaps these existing frameworks do not capture; conduct that is clearly pro-competitive or competitively benign is permitted; and defenses for legitimate protections such as user safety, security, quality, and functionality are allowed.

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Without undertaking an appropriate cost-benefit analysis of the relevant harms identified and operation of the proposed reforms, an *ex ante* regime may outlaw legitimate and pro-competitive forms of conduct to the detriment of consumers and businesses that use these platforms.

VI. Concerns Regarding Potential Scoping of New Rules to Specific Platforms

CCIA encourages the ACCC to avoid arbitrary scoping of new rules to specific digital platforms. Proposed reforms should apply to all relevant actors and should not be designed and enforced only against a few companies originating from the United States.

The application of new rules only to designated companies raises concerns on potential conflicts with international trade commitments included in the Australia-U.S. Free Trade Agreement (AUSFTA). If any regulation would single out U.S. companies for a specific regulatory regime, excluding domestic digital platforms, there would be potential conflicts with AUSFTA commitments on national treatment[7] and most favored nation requirements.[8]

VII. Additional Comments on Consumer Protection

It is important to distinguish design practices that are clearly deceptive, unfair, and pose a significant risk of harm to consumers, and certain design practices including user control prompts and content recommendations that are frequently used to enhance and provide value to consumers in a manner consistent with user desires and expectations.

In the fast-changing technology landscape, companies are in the best position to rapidly adapt to the latest changes and best practices in design interfaces. Furthermore, appropriate consumer-directed controls and communications may vary in the context of a particular service, and those that work well for a particular browser or mobile app may not be well-suited for use with emerging technologies such as connected devices or augmented and virtual reality.

[7] AUSFTA Arts. 10.2 and 11.3.
[8] *Id.* Arts. 10.3 and 11.4.

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Prescriptive regulation of design features may also negatively impact competition on product and service features if user interface features are required to appear and function in an identical manner. Finally, strict regulation of the design of user interfaces could limit the ability of organizations to transmit complete and accurate information to users during notice and consent flows.

VIII. International Experience

CCIA would like to caution against relying on international regulatory experiments in this area. Digital reforms are currently being considered in various jurisdictions. However, as of today, only one jurisdiction has introduced an *ex ante* regulatory framework, and the results of this reform are not yet available. While it is clearly useful to understand international proposals, CCIA is concerned that the context to those reforms is often lost. For example, some proposed reforms are the result of particular political dynamics and there are emerging concerns about the impact of digital-specific reforms. Also, other international reforms are approaching implementation, which will introduce further issues and challenges as those reforms take effect. For this reason, CCIA urges the ACCC to avoid rushing to adopt reforms potentially reflecting international regulatory experiments, without first allowing some time to gauge how those are working or whether the reforms are harming consumers and innovation. The ACCC's role is to ensure that Australia's competition regime is fit for purpose and supports the domestic economy, promotes innovation, and delivers benefits to consumers.

IX. Digital Platforms Should Have the Opportunity to Comment on Specific *ex ante* Rules before the ACCC Recommends Them to Government

The Discussion Paper is a useful starting point for the debate on *ex ante* regulation in Australia. The Paper canvasses a wide range of topics at a high level covering competition and consumer law as well as merger law reform proposals. While an open approach to consultation allows for genuine debate on the issues, the ACCC's Final Report is due to the Government in September 2022, which is less than 6 months from now. This is a very short time for the ACCC to properly and fully consider all third-party views. Moreover, this timeframe does not provide an opportunity for detailed

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feedback on the ACCC's preferred form of *ex ante* regulation. For example, following the initial submissions, there is no interim "draft report" that would provide affected parties with the opportunity to engage with the ACCC on its preferred form of *ex ante* regulation. Given the very material and significant consequences of the introduction of an *ex ante* regime in Australia, we encourage the ACCC to extensively consult with relevant stakeholders. In addition, we stress the importance of the Government ensuring that there is a proper and sufficient consultation process following the ACCC's recommendations.

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