ON THE AUSTRALIAN COMPETITION & CONSUMER COMMISSION DIGITAL PLATFORM SERVICES INQUIRY'S DISCUSSION PAPER FOR INTERIM REPORT NO. 5: UPDATING COMPETITION AND CONSUMER LAW FOR DIGITAL PLATFORM SERVICES

COMMENT OF THE GLOBAL ANTITRUST INSTITUTE, ANTONIN SCALIA LAW SCHOOL, GEORGE MASON UNIVERSITY

We submit this comment to the Australian Competition & Consumer Commission (ACCC) for consideration in relation to its Digital Platform Services Inquiry, Discussion Paper for Interim Report No. 5: Updating Competition and Consumer Law for Digital Platform Services (February 2022)—hereinafter "Discussion Paper."[1] Our comments are based on our extensive experience and expertise in antitrust law and economics generally, and specifically with respect to economic and competition issues in digital markets.[2] As an organization committed to promoting sound economic analysis as the foundation of antitrust enforcement and competition policy, the Global Antitrust Institute ("GAI") once

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[1] *See* AUST. COMPETITION & CONSUMER COMM'N, *Digital Platform Services Inquiry, Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services*, (Feb. 2022), https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry.pdf [hereinafter *Discussion Paper*].

[2] The Global Antitrust Institute (GAI), a division of the Antonin Scalia Law School at George Mason University, is a leading international platform for economic research and education that focuses on the legal and economic analysis of key antitrust issues confronting competition agencies and courts around the world. University Professor Joshua D. Wright is the Executive Director of the GAI and a former U.S. Federal Trade Commissioner. Professor of Law Douglas H. Ginsburg is a Senior Judge, U.S. Court of Appeals for the District of Columbia Circuit, Chairman of GAI's International Board of Advisors, and a former Assistant Attorney General in charge of the Antitrust Division of the U.S. Department of Justice. Professor Bruce H. Kobayashi is the Paige V. and Henry N. Butler Chair in Law and Economics, Co-Founder of GAI and former Director of the Bureau of Economics, Federal Trade Commission (FTC). Associate Professor John M. Yun is the Deputy Executive Director of the GAI. Adjunct Professor Abbott B. Lipsky, Jr. is Director of the Competition Advocacy Program for the GAI, former Acting Director of the FTC's Bureau of Competition and former Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice. Dr. Alexander Raskovich, the GAI's Director of Research, formerly served for more than three decades as a research economist in the Antitrust Division of the U.S. Department of Justice. The GAI gratefully acknowledges the substantial contributions of Antonin Scalia Law School students Adrian Bielecki, James Carideo, Narae Choi, Jacob D. Hopkins, John P. McInerney, C. D. Ostlund, Payton T. Thornton and Bradley T. Vorv in the preparation of this Comment.

again commends the ACCC for inviting public submissions in regard to the important topics covered in the Discussion Paper.

I. GAI's 2019 Comments Remain Relevant

In 2019, the GAI submitted comments to the ACCC on its Digital Platform Services Inquiry Preliminary Report.[3] These comments from three years ago remain pertinent to the current Discussion Paper. In particular, the economic evidence in the Discussion Paper remains insufficient to support its policy recommendations. As we stated in 2019, the quality and quantity of evidence required to support a substantial expansion of regulatory authority and oversight, as well as the creation of new regulatory authority, must be sufficient to show that the benefits from the proposed changes—to competition and consumers—are likely to exceed the costs. This is in accord with the Australian Government's position on the importance of cost-benefit analysis to the evaluation of regulatory initiatives.

As the recent *Guidance Note* makes clear, "The Australian Government is committed to the use of cost-benefit analysis (CBA) to assess regulatory proposals in order to encourage better decision making."[4] The *Note* further states:

> In principle, CBA measures the efficiency or resource allocation effects of a regulatory change. It calculates the dollar value of the gains and losses for all people affected. If the sum is positive, the benefits exceed the costs and the regulatory proposal would increase efficiency.[5]

Such cost-benefit analyses were absent in the Preliminary Report and remain absent from the Discussion Paper. Of greater concern, arguments put forward in the Discussion Paper reflect a fundamental misunderstanding of the nature of competition that calls for reflection and reevaluation.

We urge the Commission to subject its potential regulatory policies to careful and comprehensive cost-benefit analyses, weighing costs and benefits to the furtherance of competition and consumer interests, not the protection of competitors.

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[3] John M. Yun, Douglas H. Ginsburg, Joshua D Wright, & Abbott B. Lipsky, *Comment of the Global Antitrust Institute, George Mason University School of Law, on the Australian Competition & Consumer Commission's Digital Platforms Inquiry*, *Preliminary Report*, GEO. MASON L. & ECON. RSCH. PAPER NO. 19-04 (Jan. 22, 2019), available at SSRN: https://ssrn.com/abstract=3321837.

[4] AUST. GOV'T DEP'T OF THE PRIME MINISTER & CABINET, OFFICE OF BEST PRACTICE REGUL., *Guidance Note: Cost-Benefit Analysis*, (March 2020), https://obpr.pmc.gov.au/sites/default/files/2021-09/cost-benefit-analysis.pdf.

[5] *Id*. at 1.

A sound cost-benefit analysis of competition policy cannot focus largely or exclusively on so-called harm to competitors. Losses by competitors are not a bug but a feature of a competitive market economy—indeed they are a defining feature of the competitive process. As business rivals strive to win customers, the gains of one tend to come at the expense of others. The competitive process necessarily leaves losers in its wake, but precisely because of the winnowing based on competitive merit it is the driving force behind gains to customers and the wider economy. Without more, an action taken by a firm that tends to win customers for itself at the expense of rivals cannot be taken as a lessening of competition; it is an expression of competition. A necessary condition for a finding of lessened competition is a finding that the firm's action redounds to the detriment of *consumers*, not *rivals*.[6]

A standard element of a sound cost-benefit analysis of regulation is an evaluation of the regulation's expected error costs: the consequences of reaching false positives (condemning procompetitive activities) and false negatives (permitting anticompetitive activities) in assessing the dynamic competitive effects of conduct, weighted by an assessment of the probabilities of each type of error occurring.[7] Assigning a zero value to the probability of false negatives would bias the cost-benefit analysis against consumer interests by ignoring the anticompetitive effect of regulations that deter beneficial (or, at worst, harmless) competitive behavior.

As matters stand, the Commission appears to be moving toward regulatory policies for which there is not only insufficient evidence for their salutary effects, but which by their nature appear *designed* to retard competition and innovation to the detriment of consumers of digital services. The sharpest condemnation of these policies comes from the Discussion Paper itself.

II. The Discussion Paper Misconceives the Meaning of Competition

A passage that reveals the Discussion Paper's basic misconception of competition merits quotation at length. Section 4.5, on the importance of data, describes several ways in which data can purportedly be used to lessen competition by generating competitive advantages:[8]

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[6] *See generally* Joshua D. Wright, *Moving Beyond Naïve Foreclosure Analysis*, 19 GEO. MASON L. REV. 163-1198 (2012).

[7] *See* Frank H. Easterbrook, *Limits of Antitrust*, 63 TEX. L. REV. 1 (1984); James C. Cooper, Luke M. Froeb, Dan O'Brien and Michael G. Vita, *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639-654 (2005); Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. COMP. L. & ECON 1 153-202 (2010).

[8] *See Discussion Paper*, *supra* note 1, at 33-34.

> There are several types of competitive advantages that derive from access to large data holdings:
>
> 1. Data may allow a firm to improve its products and services or assist in the development of new products. This may result from the insights provided by the data or from the opportunity to train algorithms using the data. As a consequence, a positive feedback loop may arise if the improvements attract more users, which, in turn, allows the firm to obtain access to more data.
>
> 2. Data may enhance a platform's ad targeting service, potentially increasing its advertising revenue.
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> 3. Data may increase profitability by allowing a firm to improve its ability to forecast product demand and market trends.
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> Due to the competitive advantages described above, a lack of access to comparable data resources can create barriers to entry, expansion and innovation for new entrants and smaller rivals in digital platform markets. These barriers can be difficult for smaller rivals to overcome, which weakens the competitive constraint posed by small and potential competitors on established digital platforms.

This inverts the basic understanding of competition on the merits. The essence of the competitive process is rivals striving to gain competitive advantages one over another—by lowering costs, improving quality and developing innovative goods—the better to serve customers and thereby win them over. Competition necessarily creates winners and losers: firms that deliver higher value to consumers win; those that cannot improve or adapt lose. In this way, competition delivers a growing stream of benefits to consumers. Conversely, the delivery of a growing stream of benefits to consumers is reflective of the operation of a competitive process.

Taking at face value the characterization of "positive feedback loops" in the Discussion Paper's text quoted above, these are positive not only in their effect on a platform's scale, but also on the value the platform delivers to its customers. Notably, positive feedback loops with data do not happen on their own. Unlike standard network effects, which are based on the size of the network, having more data does nothing other than take up more memory. Rather, an additional cost "step" is required to transform data into something that offers value. Different firms will have different abilities to make this transformation, which is another

form of competition.[9] Nor is it the case that large platforms have, by virtue of their large data holdings, created barriers to further competition. This assertion is belied by the Discussion Paper's own characterization of platforms striving to make gains through positive feedback loops. Nobel Laureate Sir John Hicks wrote that "The best of all monopoly profits is a quiet life."[10] An ongoing process that delivers increasing consumer benefits is more reflective of competition than monopoly.

Moreover, throughout the Discussion Paper "competitive advantages" by larger platforms receive hostile treatment as "barriers to entry and expansion" by smaller rivals.[11] This is despite the consumer benefits that the striving for competitive advantage delivers. Indeed, in the Discussion Paper competitive advantages are condemned *because* of the benefits they deliver. Throughout the Discussion Paper, the competitive process is itself taken to be anticompetitive—a manifest contradiction. The antithesis of competition would be a stifling regulatory regime that restrains innovators in how they can use their innovations to benefit and thereby win customers, and whose incentives to innovate are impaired by requirements to share the use of their innovations with rivals.

Australia's National Competition Policy Review of 1993 (hereafter "Competition Policy"),[12] which first recommended the establishment of an Australian competition commission, noted that "[t]he greatest impediment to enhanced competition in many sectors of the economy are the restrictions imposed through government regulation."[13] The relevance of this warning of the potential deleterious effects of government regulation on competition has not waned in recent years with developments in the digital economy. On the contrary, the growing importance of the digital economy counsels circumspection and care in assessing the effects of new regulatory restrictions.

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[9] *See, e.g.*, Alexander Krzepicki, Joshua D. Wright, & John M. Yun, *The Impulse to Condemn the Strange: Assessing Big Data in Antitrust*, CPI ANTITRUST CHRON. 16 (Feb. 2020); *see also*, John M. Yun, *Does Antitrust Have Digital Blind Spots?*, 72 S.C. L. REV. 305, 322 (positive feedback loops with data "is entirely premised on increasing quality to users (which increases users' welfare). . . . [I]ncreasing product quality makes all participants on a platform better off—surely something that competition policy should be encouraging. It is a remarkable twist of antitrust logic to suggest that a practice is ultimately harmful to social welfare (and thus demands a regulatory solution) simply because it improves a product too much and hinders entrants' ability to compete on equal terms.").

[10] *See* John R. Hicks, *Annual Survey of Economic Theory: The Theory of Monopoly*, 3 ECONOMETRICA 1-20 (1935).

[11] *See* Harold Demsetz, *Barriers to Entry*, 72 AM. ECON. REV. 47 (1982).

[12] *See* AUST. GOV'T PUB. SERV., *National Competition Policy Review*, (Aug. 25 1993), available at: http://ncp.ncc.gov.au/docs/National%20Competition%20Policy%20Review%20report,%2020The%20Hilmer%20%Report,%20August%201993.pdf.

[13] *Id*. at xxix.

The Competition Policy defined competition as "the striving or potential striving of two or more persons or organizations against one another for the same or related objects,"[14] and described the workings of competition as follows:[15]

> Competition provides the spur for businesses to improve their performance, develop new products and respond to changing circumstances. Competition offers the promise of lower prices and improved choice for consumers and greater efficiency, higher economic growth and increased employment opportunities for the economy as a whole.

Yet this striving and improvement in performance that benefits consumers are now condemned in the Discussion Paper as "barriers to entry and expansion" by rivals. The protection of competitors to the detriment of consumers through government regulation was anathema to the founding Competition Policy; it should not be embraced by this Commission.

III. Many of the Discussion Paper's Proposals Could Harm Competition

The thrust of many of the regulatory proposals in § 8 of the Discussion Paper is to rein in the competitive striving and performance improvements of large digital platforms so that smaller rivals will not fall too far behind. This misplaced focus on the interests of competitors, without adequate consideration of ultimate effects on consumers, carries the risk of stultifying competition and denying consumers its benefits.

A. Exclusionary Conduct

The Discussion Paper's § 8.1 lays out proposals to curb exclusionary conduct by large digital platforms. Although the term "exclusionary" is not defined, from the context the term appears to be meant in the narrow sense of conduct that wins new customers to the platform, thereby "excluding" rivals from that business. But conduct that is exclusionary in this "naïve"[16] sense falls well short of a showing that competition has been impeded and consumers harmed.

[14] *Id*. at 2 (quoting F.G. DENNIS, *'COMPETITION' IN THE HISTORY OF ECONOMIC THOUGHT* (Arno Press 1977)).

[15] *Id*. at 1.

[16] *See Wright*, *supra* note 6.

1. Self-Preferencing

We refer the Commission to GAI's recent (Nov. 2020) submission to the *Bundesministeriums für Wirtschaft und Energie*:[17]

> [A] platform may engage in self-preferencing for legitimate and procompetitive reasons. This point is self-evident from its widespread use across the digital economy—irrespective of a firm's market share. Considering "bias" as inherently a cause of competitive harm runs the risk of equating procompetitive conduct, such as technological advances and innovation, with anticompetitive foreclosure. For example, a digital platform's offer of an enhanced product that provides additional benefits to consumers could be considered anticompetitive. The critical question should be whether the underlying conduct benefits consumers through innovation and an improved product rather than whether it makes life more difficult for rivals. The mere existence of own-content bias itself does not answer this critical question. Conduct that harms rivals merely because it provides a more valuable product and therefore attracts consumers is the essence of competition and illustrates the core logic of the maxim that competition law protects competition, not competitors.

Moreover, even in the extreme case of a secure monopoly, the monopolist would take into account the opportunity costs of self-preferencing. If a rival could deliver higher value net of cost to an installed-base customer, there would be gains to such trade relative to self-supply.[18] The monopolist could likely capture some of those incremental gains and thereby find third-party supply to be more profitable than self-supply. A relevant question then, for purposes of assessing whether self-preferencing by a large digital platform hampers competition, is—first, to determine whether the platform is indeed a monopolist insulated from competition[19]—and second, whether rival supply would render that monopoly less secure.

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[17] Abbott B. Lipsky, Douglas H. Ginsburg, John M. Yun, Bruce H. Kobayashi & Joshua D. Wright, *Before the Federal Ministry of Economic Affairs and Energy "GWB Digitalization Act" Comment of the Global Antitrust Institute, Antonin Scalia Law School, George Mason University*, GEO. MASON LAW & ECON. RESEARCH PAPER NO. 20-31, at 11-12 (Nov. 2020).

[18] The point is not limited to the supply of goods and services, but also to other forms of intermediated interaction among platform participants. *See* Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1-44 (1960).

[19] A finding of monopoly or dominance should be based "on sound economic analysis, i.e., a showing that the firm profitably can raise price, or reduce output, quality or the rate of innovation (relative to a competitive norm) in a particular well-defined relevant market." Lipsky et al, *supra* note 17, at 10.

2. Restrictive or Discriminatory Terms

Some discriminatory price and non-price terms are typically necessary for a multisided digital platform to operate effectively. Given indirect network effects across differing sides of a platform, participation and usage intensity on one side of the platform affect participation and usage intensity on another. Attracting participants to both sides and maximizing the gains from intermediated trade typically requires managing these indirect network effects. The mere existence of "unfair" or discriminatory terms is not dispositive to finding those terms to be anticompetitive. Such terms are often observed in cases of intense platform competition. For example, many dating platforms charge higher fees to men than to women to balance participation on the two sides.

B. Addressing Data Advantages

§ 8.2 of the Discussion Paper offers regulatory proposals to address the purportedly anticompetitive effects of "data advantages" generated by the competitive process itself, insofar as those advantages redound to the benefit of a large digital platform. Here the Discussion Paper is explicit in describing a tradeoff between efficiency and "leveling the playing field":

> Measures limiting use of data may result in decreased efficiency from reduced access to data for the platforms subject to data separation requirements. However, data separation also has the potential to limit a dominant incumbent's ability to leverage its data advantage across markets, thereby leveling the playing field, which could be expected to improve competition and dynamic efficiency.[20]

But in sacrificing efficiency, by hobbling a platform's ability to serve customers so as to keep it more "level" with the lesser abilities of rivals, the Commission is treating the preservation of more equal market shares as if this were "competition." On the contrary, competition is a dynamic process of firms jockeying to win customers, a process that can result in unequal shares. To impede that process would be to restrict competition to the detriment of consumers.

C. Increased Transparency

In § 8.5, the Discussion Paper treats transparency (or the lack thereof) as a significant competition issue. To make a homely analogy, consider a shopper at a grocery store contemplating whether to buy a particular packaged food. The shopper sees the product's retail price, ingredients list, caloric content, etc. These are all features relevant to the shopper's purchasing decision. What the shopper

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[20] *Discussion Paper, supra* note 1, at 93.

does not see is the producer's costs broken down by ingredient. Would affixing this additional information to the package help the shopper to make a better purchasing decision? Standard economic theory answers in the negative. But are matters starkly different in digital platform services?

> "A key area of opacity in the supply of digital platform services is in relation to the prices paid for supply of digital advertising and ad tech services. A lack of pricing transparency makes it difficult for advertisers and publishers to accurately assess and make informed choices about which ad tech services and digital advertising providers will best meet their needs, which may lead to higher prices or lower quality services."[21]

Here the Discussion Paper makes the point that, because the platform acts as intermediary between advertisers and publishers, each side of the platform may observe only its own pricing terms, not those of the other side. The platform (perhaps implicitly) receives a payment for its services as intermediary, driving a wedge between what the advertiser pays and the publisher receives.

Would information on the magnitude of this wedge (assuming the sophisticated participants cannot already back it out) help advertisers and publishers to make better choices of which platform to use as intermediary? Not necessarily. The platform participant's own price conveys sufficient information, just as the retail prices (and non-price features like ingredients) of substitute grocery goods suffice to inform a shopper's purchasing decision. Competition among platforms will tend to drive down the intermediation wedge as platforms strive to win the participation of both advertisers and publishers. As the wedge shrinks, the prices paid by advertisers will tend to fall and the receipts by publishers will tend to rise. These price signals alone are sufficient for competition to operate. Conversely, no amount of transparency could remedy a lack of competition.

The Discussion Paper also proposes a gauntlet of disclosure requirements regarding data usage by large digital platforms:[22]

- "requiring the provision of certain types of information or data regarding the operation or outcomes of key algorithms for regulators, researchers, and stakeholders";
- "mandating prior notice of significant changes to key algorithms";

[21] *Id.* at 101.
[22] *Id.* at 102.

- “requiring independent verification of the performance of key algorithms”;
- “requiring the provision of information regarding how digital platform services use data to provide their services.”

These disclosure requirements would cast a pall over innovation in algorithm design, innovation that would allow a platform to better serve its customers. But apparently that is a feature not a bug in the Commission’s misguided view of competition. The apparent goal is to restrain a platform from benefiting consumers too greatly and thereby gaining customers at the expense of struggling rivals. We once again urge the Commission to reconsider its misguided policy of favoring competitors over competition.

D. Adequate Scrutiny of Acquisitions

For structural transactions[23] whose legality under the substantive standard of Section 50 FCCA is contested by the ACCC, the Commission ultimately must proceed in Federal Court, bearing the burden to establish that a transaction contravenes Section 50 in order to secure relief. Section §8.6 of the Discussion Paper poses questions about a list of proposed reforms to this system, echoing proposals trailed in earlier speeches by (now former) ACCC Chairman Sims. The Discussion Paper requests input on the various elements of reform, and how they might be applied to a category of “large digital platforms.” The Discussion Paper provides no support, however, for the basic notion that standards applicable to structural transactions involving “large digital platforms” should involve any material departure from the type of careful, case-by-case economics-based analysis that has been the hallmark of merger review throughout the world for decades. In particular, as discussed in detail below, the Report’s suggestion of greater reliance on structural presumptions runs contrary to the substantial body of sound economic research demonstrating that concentration alone is a poor predicter of competitive performance.

1. Pre-Merger Notification and Review

The procedures applicable to structural transaction review in Australia differ in material respects from those of other jurisdictions. Most notably, there is currently no mandatory prior notification, review, or approval requirement in

[23] The phrase “structural transaction” as used herein is intended as a generic reference to acquisitions, mergers, concentrations between undertakings, formation of full-function joint ventures, and other similar transactions typically subject to competition laws and procedures that are particularly adapted to such activity, as distinct from more general competition provisions applied to restraints of trade or restrictive agreements, such as limited-function joint ventures, specialization agreements, distribution agreements, intellectual property licenses, *etc.*

Australia, as there is for example in the EU[24] and the US[25]. Implementing a mandatory structural transaction notification or notification and approval regime has become the norm in scores of jurisdictions around the world.[26] Following suit would bring Australia into closer alignment with international practice, and within a short period of time might give the Commission and Australian lawmakers and policy scholars a substantial base of data on the impact of the changes—specifically, on whether the Commission would be better empowered by that step alone to take effective action against transactions viewed as anticompetitive according to international best practices or other guidelines already accepted.

Two-phase notification systems like those in the EU and US impose substantial costs, however, on both the filers and on reviewing authorities, which must husband scarce enforcement resources. A large majority of mergers have no negative effect on competition.[27] The Commission cannot efficiently evaluate the competitive merits of every transaction, nor should it be concerning itself with transactions that do not meet a threshold that warrants attention to the possibility of material anticompetitive impact. Any proposal that mandates reporting should include clear and consistent guidelines that lead to a thorough but concise review of deals that have a potential to raise competitive concerns.

The GAI, therefore, applauds the principled ideas underlying the Discussion Paper's proposals to introduce "compulsory notification of acquisitions *above specific thresholds*" (emphasis added), together with "a simple notification-waiver process (or pre-assessment for those transactions below the notification threshold) so that the significant majority of acquisitions that are unlikely to raise any competition issues are cleared expeditiously with minimal regulatory burden."[28]

2. "Deeming" Provisions for Acquisitions Involving Firms with Substantial Market Power

The Discussion Paper's description of the Commission's proposal for a so-called "deeming provision" in merger review sends mixed signals. On one hand, the Discussion Paper refers to

> A new deeming provision that would prohibit acquisitions where one of the merger parties has substantial market power

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[24] Commission Regulation 139/2004 of 20 Jan. 2004, On The Control of Concentrations Between Undertakings (The EC Merger Regulation), 2004 O.J. (L 24) 1-22 (requiring notification and approval prior to consummation).

[25] 15 U.S.C. § 7(A) ("Hart-Scott-Rodino Act") (requiring notification and termination of a specified waiting period prior to consummation).

[26] *See* OECD, *OECD Competition Trends*, at 52-53 (2020).

[27] *Id.* at 56

[28] Discussion Paper, *supra* note 1, at 104.

> and, as a result of the acquisition, that position of substantial market power would be likely to be entrenched, materially increased or materially extended.[29]

Taken in isolation, that statement seems unremarkable. Assessing whether a merger is likely to entrench, materially increase or materially extend substantial market power is a common objective of merger analysis—with the critical proviso that the incremental market power attending the merger not flow from competition on the merits. A merger that induces the merged firm's goods and services to become more attractive to consumers, with the effect of growing the firm's unit sales and perhaps rendering the demand for its goods and services less elastic, is procompetitive and should clearly not be condemned. Rather, merger analysis should seek to determine whether a merger will likely have adverse effects on consumers, restricting unit sales, degrading quality, slackening the pace of innovation, or the like.

In any case, earlier in the Discussion Paper, a "deeming provision" appears to be described as a presumption of harm based on "pre-defined criteria" such as structural factors.[30] As such, the proposed deeming provision would not be a competitive effects analysis, as suggested in the text above, of whether the merger under review is likely to have adverse effects on consumers, but rather the absence of any such analysis, presumably because the analysis is deemed unnecessary.

The cost-benefit analysis of such a deeming provision would have a very high bar to pass. Nor does the Discussion Paper attempt to undertake that analysis. Has the Commission deemed that justifying a blanket deeming provision is unnecessary? On the basis of error cost analysis, such a regulation could only be justified if using structural factors to infer competitive outcomes had a zero probability of false positives. This enforcement posture would border on the preposterous. On the contrary, there is a large literature in empirical economics that shows concentration measures are a very poor measure of competitive performance across industries,[31] and that pre-merger concentration is a poor predictor of post-merger performance.[32]

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[29] *Id*.

[30] *Discussion Paper, supra* note 1, at 83.

[31] *See* Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J.L. & ECON. 1 (1973) (showing that cross sectional relationship between concentration and profits can be explained by increased efficiency); Douglas H. Ginsburg & Joshua D. Wright, *Philadelphia National Bank: Bad Economics, Bad Law, Good Riddance*, 80 ANTITRUST L. J. 201 (2015) (discussing the decline of the SCP paradigm).

[32] Volker Nocke & Michael D. Whinston, *Concentration Screens for Horizontal Mergers*, NBER WORKING PAPER NO. W27533 (July 2020), available at SSRN: https://ssrn.com/abstract=3658827.

3. Reversing the Burden of Proof

The Discussion Paper proposes that the "ACCC (or Australian Competition Tribunal on appeal) [is] to clear an acquisition only where satisfied that it is not likely to substantially lessen competition." This would reverse the international norm regarding allocation of the burden of proof, which requires the reviewing agency to establish that an acquisition substantially lessens competition.

Placing the burden of proof on the merging parties may appear to ease initial merger review for the ACCC, but it is more likely to clog the merger review system with unneeded systemic costs and ultimately restrain competition and chill innovation.

Reversing the burden onto the merging parties coupled with a mandatory formal merger notification regime will bombard the ACCC with copious amounts of documents to review – merger compliance will be akin to requesting a public review of every merger that meets the notification threshold. In 2019-2020, the ACCC reviewed 288 mergers that were submitted under its informal clearance process or identified through monitoring and intelligence gathering – 89 percent of which did not require a detailed review because of the low risk that competition concerns would be raised.[33] Of the 288 mergers submitted, 95 percent were cleared unconditionally.[34] Implementing a formal mandatory merger notification regime will certainly result in an influx of merger notifications to the agency. Furthermore, managing an influx of merger notifications coupled with shifting the burden of proof to the merging parties will increase administrative and compliance costs.

The Hart-Scott-Rodino Act in the U.S. provides the agencies with a mandatory pre-merger notification program in which the agencies were notified of 1,637 transactions in 2020 (a 21.6 percent decrease from 2019, in which 2,089 transactions were notified).[35] In 2020, only 28 transactions were issued a Second Request (public review).[36] Were the ACCC to receive a similar number of notifications, when they are accustomed to reviewing only 11% of the transactions under the informal process – that would be an increase of roughly 6,150%, which would be impractical. Ultimately, compliance of this nature would be extremely time-

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[33] *See* Australian Competition and Consumer Commission and the Australian Energy Regulator, Annual Report 2019-20 (Oct. 2020), p. 53, available at: https://www.accc.gov.au/system/files/ACCC%20and%20AER%20Annual%20Report%202019-20.pdf.

[34] *Id*. at 57.

[35] *See* Federal Trade Commission and Department of Justice Antitrust Division, Hart-Scott-Rodino Annual Report: Fiscal Year 2020, pp. 01-02, available at: https://www.ftc.gov/system/files/documents/reports/hart-scott-rodino-annual-report-fiscal-year-2020/fy2020_-_hsr_annual_report_-_final.pdf.

[36] *Id*.

consuming, economically detrimental, and cost-prohibitive for the ACCC as well as the merging parties.

Considering that the ACCC has traditionally found most transactions submitted are not problematic and rarely opposes a transaction outright, a significant change in the standard seems unjustifiable and unreasonable. Clogging the system with unneeded process burdens will likely lead to stifling of competition and innovation. The new system is proposed to be suspensory – every merger applicant subject to the notification requirement will be prohibited from merging until merger parties obtain clearance from ACCC. This lag will stifle economic growth and innovation to the extent that it delays competitively innocuous or beneficial transactions.

Compliance costs associated with reversing the burden of proof will likely prevent firms from merging or deter firms from considering competitively beneficial mergers in the first place. In 2014 the median estimated cost of compliance with a second request in the United States was $4.3 million, with a range of $2 million to $9 million.[37] Each year, this cost increases. Costs even remotely similar to these, delays in consummation, and the consequent barriers to entry will certainly lessen economic growth.

The proposals are clearly aimed at conditioning the legal environment to facilitate successful merger challenges by the ACCC. Unless it is demonstrated objectively that reversing the burden is necessary to solve some identified problem, however, flipping the burden of proof is problematic. If the ACCC chooses to follow the broader international pattern by implementing a suspensive merger notification regime, it should retain the burden of proof in its present form.

4. Reducing the Standard of Proof

The ACCC is concerned that the standard of Section 50 – requiring proof of a "likely" substantial lessening of competition resulting from an acquisition – is overly lax. To address this concern, the Discussion Paper includes a proposal to lower the probability threshold to a "possibility that is not remote" or alternatively to replace it with a "balance of harms" assessment.[38]

In any case, the ACCC should be aware that each of these proposals not only departs from standards commonly adopted in other major jurisdictions with

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[37] Peter Boberg and Andrew Dick, "Findings from the Second Request Compliance Burden Survey," The Threshold: Newsletter of the Mergers & Acquisitions Committee (Sep. 2014), p. 33, available at http://www.crai.com/publication/findings-second-request-compliance-burden-survey.

[38] *Discussion Paper*, *supra* note 1, at 106.

substantial experience using *ex ante* merger control review systems but also has distinct and significant downsides.

The Digital Report's proposal departs from the practice of two of the world's most experienced competition regimes – the European Union and the U.S. Under EU law, when evaluating a merger, the European Commission is required to undertake prospective analysis consisting of an examination of how a merger might alter the factors determining the state and structure of competition on the markets affected. Such an analysis makes it necessary to envisage various chains of cause and effect with a view to ascertaining which of them are the most likely.[39] As a result, the Commission must demonstrate that a merger more likely than not will impede effective competition significantly[40]. Under U.S. law, in order to successfully challenge a proposed merger, the government must show that it is likely to substantially lessen competition.[41] The requisite standard of proof requires more than "mere" or "ephemeral" possibility of competitive harm.[42]

Even apart from the question whether the proposed standard diverges from accepted practice in other major jurisdictions, the ACCC's proposals suffer from significant deficiencies. First, the proposed tests are over-inclusive and can lead to prohibition of mergers that would most likely be procompetitive. As the ACCC rightly points out, it is difficult to predict the future competitive impact of the target (with and without the acquisition); this problem raises concerns in particular in dynamic markets which include, but are not limited to, digital markets. However, the difficulty in predicting the future does not warrant changes that create an over-inclusive standard for assessment of likelihood of anticompetitive effects.

Against this background, lowering probability of competitive harm required to block a merger (i.e., replacing "likely" with "possibility that is not remote" standard) would result in an over-inclusive standard disregarding procompetitive effects resulting from structural transactions. As a result, the authority could block

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[39] Judgment of the Court of Justice of the European Union of 16 January 2019, European Commission v United Parcel Service, C-265/17 P, paragraph 32; Judgment of the General Court of 28 May 2020, CK Telecoms UK Investments Ltd v European Commission, T-399/16, paragraph 108.

[40] T. Kuhn, *The 16th Anniversary of the SIEC Test Under the EU Merger Regulation – Where Do We Stand?*, Journal for Competition Law (Zeitschrift für Wettbewerbsrecht, ZWeR) (June 25, 2020). Available at SSRN: https://ssrn.com/abstract=3635289

[41] United States v. AT&T, Inc., 916 F.3d 1029, 1032 (D.C. Cir. 2019).

[42] *Id.* at 1032 ("Although Section 7 requires more than a 'mere possibility' of competitive harm, it does not require proof of certain harm. . . Instead, the government must show that the proposed merger is likely to substantially lessen competition. . ."); FTC v. Tenet Health Care, Inc., 186 F.3d 1045, 1051 (8th Cir. 1999) ("Section 7 deals in probabilities not ephemeral possibilities.").

a merger even if the most likely result of the merger would be procompetitive and the possibility of anticompetitive effects would be far less likely.

Under the "balance of harms" approach,[43] which is an alternative to simply lowering the required probability of competitive harm, this deficiency is, to some extent, mitigated by the fact that – instead of completely disregarding procompetitive effects – it balances such effects with potential harms resulting from the merger. However, adopting a "balance of harms" approach would result in basing merger policy on low probability scenarios that could result in significant harm.[44] This approach could put significant weight on worst-case outcomes, which might overcome evidence of potential beneficial impacts from a merger. It would also make the merger control process highly sensitive to small changes in probability estimates.[45]

Furthermore, it would significantly increase administrative costs of the merger control process, because it would require extensive information regarding quantified harms and benefits as well as their probabilities.[46] In this context, it must be highlighted that a transaction may lead to numerous outcomes, each of which has different levels of procompetitive and anticompetitive potential effects. In order to apply a "balance of harms" approach properly, each of these scenarios would need to be thoroughly examined – not only in terms of their probability but also expected benefit or harm. This concern should be of particular relevance for the ACCC given the fact that it would require significant investments in merger control units.

5. Reliance on Structural Presumptions

Report Sections 8.6.6 and 8.6.7 propose to establish a structural presumption for mergers involving firms with "substantial market power"[47] similar to the presumption established by the Supreme Court of the United States in *United*

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[43] Report of the Digital Competition Expert Panel, Unlocking digital competition (Mar. 2019), p. 100, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

[44] John M. Yun, *Are We Dropping the Crystal Ball? Understanding Nascent & Potential Competition in Antitrust*, 104 MARQ. L. REV. 613 (2021).

[45] John M. Yun, *Potential Competition, Nascent Competitors, and Killer Acquisitions*, The Global Antitrust Institute Report on the Digital Economy (2020), p. 665.

[46] *Id.* at 665 (noting that such an approach ". . . assumes agencies have good estimates of these various probabilities and welfare outcomes."); Jeffrey M. Wilder, Acting Deputy Assistant Att'y Gen., United States Dep't of Justice, Remarks at the Hal White Antitrust Conference: Potential Competition in Platform Markets (June 10, 2019), available at: https://www.justice.gov/opa/speech/acting-deputy-assistant-attorney-general-jeffrey-m-wilder-delivers-remarks-hal-white (highlighting that ". . . it is not clear that we currently can estimate reliably the probabilities and other inputs we would need to weigh expected harms and benefits.").

[47] Preliminary Report, *supra* note 3, at 108.

States v. Philadelphia National Bank to remedy an "insufficient focus on the structural conditions for competition."[48] The use of structural presumptions does not, however, comport with modern economic understanding and may deter pro-competitive transactions.[49]

First, modern economics rejects the structure, conduct, performance (SCP) paradigm, which forms the basis for structural presumptions. The SCP paradigm envisioned a systematic relationship between market concentration (in isolation) and a variety of performance measures. Under the SCP paradigm, market concentration alone was believed to result in higher prices, lower product quality, and other indicia of poor competitive performance. Before the United States became more receptive to empirically supported microeconomic analysis, structural presumptions based upon SCP led to aggressive intervention, even where risks to competition were clearly minimal at best.[50] At its peak in the 1960s and early 1970s, the SCP paradigm was the best economists had to offer for understanding whether markets would behave competitively. More recent and more sophisticated research, however, finds the correlation between market concentration and profitability, which formed the bedrock of SCP analysis, was better explained by the superior efficiency of larger firms, refuting SCP's central contention.[51]

Considerable economic research now supports the conclusion that even concentrated markets can behave competitively. The modern economic understanding is that market concentration and firm shares may help to identify markets potentially susceptible to adverse effects from transactions, but cannot be relied upon as dispositive. A variety of economic characteristics of a market may be influential in predicting the competitive effects of a transaction – entry requirements (cost, time), various forms of supply elasticity (including repositioning), product and transaction characteristics, dynamic elements of technology, demand, etc. Advocates for structural presumptions argue that the more concentrated a market becomes, the easier it is for the participants to collude (explicitly or tacitly) or behave less competitively. As an abstraction, this does not seem like an unreasonable proposition. But ultimately the notion of a monotonically increasing risk to competition as a function of concentration is specious.

For example, even John Kwoka, a current economic advisor to the Federal Trade Commission and advocate for structural presumptions, found in a study

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[48] 374 U.S. 321, 363 (1963).

[49] *See* Easterbrook, *supra* note 7, at 22; Douglas H. Ginsburg & Joshua D. Wright, *Philadelphia National Bank: Bad Economics, Bad Law, Good Riddance*, 80 ANTITRUST L.J. 377, 393 (2015).

[50] *See* Ginsburg & Wright, *supra* note 49.

[51] *See* Demsetz, *supra* note 31.

that once there are three substantial rivals in an industry, this risk largely dissipates due to the incentive the firms have to compete against each other for the greater share of profits.[52] Moreover, purely market share percentage-based structural presumptions are not responsive to different market realities,[53] and are most appropriate to deter behavior with a strong magnitude of economic harm.[54] Thus, while presumptions may be appropriate if they are grounded in "well-accepted economic theory," a structural presumption would not be appropriate in this context.[55] As is often pointed out, the U.S. merger guidelines have gradually eased away from such presumptions (compare, for example, the 1968 Merger Guidelines with the 2010 Horizontal Merger Guidelines in the U.S.), largely based on the recognition that more refined tools are now available to assist in predicting the competitive effects of structural transactions.[56]

6. Digital Platforms and Entrenched Market Power

Former Chairman Sims' proposed reforms to Australia's merger review framework would have substantial effects on the Australian economy broadly. Chairman Sims, as well as the ACCC interim reports that informed his comments, place particular emphasis upon digital platforms, going so far as to propose a separate framework for reviewing acquisitions made by digital platforms with significant market power. Although the growth of digital markets may give rise to novel challenges for regulators, the ACCC has not put forth sufficient evidence to support the adoption of a separate merger review scheme aimed exclusively at digital platforms.

The ACCC has been careful to focus its attention primarily on large digital platforms with significant market power that entrench their market power

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[52] John E. Kwoka, *The Effect of Market Share Distribution on Industry Performance*, 61 REV. ECON. & STAT. 101 (1979) (finding that once there are *three substantial* rivals in an industry, the data suggest collusion becomes impossible or very unstable).

[53] *See* Easterbrook, *supra* note 7, at 22 ("The seller of 100% of a particular good may have no power if consumers have substitutes or if rivals can make the good as cheaply. On the other hand, there may be tens of possible markets, each offering a little insight into conditions of competition.").

[54] *See id.*

[55] Ginsburg & Wright, *supra* note 49, at 394.

[56] *Compare* U.S. Dep't of Justice, *Merger Guidelines* § 2 (1968) ("Market structure is the focus of the Department's merger policy chiefly because the conduct of the individual firms in a market tends to be controlled by the structure of that market, *i.e.*, by those market conditions which are fairly permanent or subject only to slow change (such as, principally, the number of substantial firms selling in the market, the relative sizes of their respective market shares, and the substantiality of barriers to the entry of new firms into the market)."); *with* 2010 Horizontal Merger Guidelines § 4 ("The Agencies' analysis need not start with market definition. Some of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition, although evaluation of competitive alternatives available to customers is always necessary at some point in the analysis.").

through the strategic use of acquisitions. The February 2022 inquiry report specifically identified Meta (formerly Facebook), Google, Apple, and Amazon as digital platforms that would be subjected to this new scrutiny. Crucially, however, the report fails to establish that these platforms are abusing their market position or stifling competition in the first place.

The report's treatment of Google illustrates this point. The report asserts that Google's high market share in general search services is indicative of its market power. But the premise is flawed. For one, this definition, which uses a platform's share of users as a proxy for market power, is based narrowly on general searches. A definition that included specialized searches such as TripAdvisor for travel and booking inquiries, Yelp for dining and nightlife related searches, and Amazon for product searches is likely to produce a more accurate picture.

Additionally, market share may be indicative of popularity, but it does not inherently translate to market dominance. A more relevant question to consider is whether a platform can operate independently of competitors. In the search engine market, this may be questioned, as Google faces competition from established search engines such as Bing! as well as newer entries such as DuckDuckGo. The presence of other competitors provides the incentive for Google to constantly improve its product through changes to its algorithm. The fact that these alternatives do not have a high "share" as such in a purported general search market does not allow other competitive threats to be disregarded, nor does it follow that consumers do not view these alternatives as viable.

As stated above, the report also focused on Meta as enjoying significant market share in the social media services market, and Apple with regard to mobile operating systems, through Apple iOS. The report merely uses Facebook's popularity among users as evidence of its "significant market power." As with Google, this assertion is highly flawed. For one, a barometer of market power based upon popularity alone does not account for the fact that the vast majority of Facebook users frequently engage with other social media platforms and applications. Further, Facebook's market share alone does not indicate the presence of an uncompetitive market. In fact, social media platforms have unique characteristics, such as low start-up costs and low switching costs on the part of the user, which makes entry into the market uniquely attainable. The low barrier to entry is evidenced by the fact that existing incumbents, such as Facebook, face significant competition from newer entries into the market. Contrary to the picture painted by the ACCC's report, it is Snapchat – not Facebook – that is the most popular social media platform for users aged 12-17.[57] Similarly, TikTok, which was first introduced in 2016, has over 1 billion active monthly users. Both of these

[57] *See, e.g.*, Yun, *supra* note 9, at 334.

platforms have achieved astonishing growth in a remarkably short time, even overtaking Facebook among younger demographics of users.

Regarding Apple's market power, the ACCC report places significant emphasis on Apple OS and thus the power Apple has over the distribution of mobile applications. As the report states, in order for applications to reach Apple users, developers must offer their apps through the App Store. Even so, the number of apps in Apple's App Store increased from 500 in 2008 to 2 million in 2018. This staggering increase over ten years suggests that entry into the app market is not particularly difficult, even in the face of Apple's market power.

The ACCC also alleges that these digital platforms have been engaging in anticompetitive behavior through acquisitions of nascent rival platforms. According to the ACCC, these nascent acquisitions entrench these firms' market position, eliminate rivals, raise barriers to entry, and hamper competition in the digital market. The most high-profile example is Facebook's acquisition of Instagram in 2012. The assumption that nascent competitor acquisitions produce anticompetitive effects that are harmful to innovation and the consumer are central to the ACCC's proposed regulatory scheme for digital platforms. But this position is hardly uncontested.[58] Perhaps more than any other sector of the economy, the digital sphere is fast-developing and largely unpredictable. That unpredictable nature makes it very difficult to determine which start-up ventures are genuine competitors to existing platforms with large market share.

Additionally, true "killer acquisitions" where an existing platform acquires a direct competitor seem quite rare. Rather, digital platforms tend to acquire smaller companies that complement their existing product in a less direct way, harnessing that innovation for the benefit of consumers. Additionally, rather than stifle competition, there is evidence to suggest that acquisitions spur innovation in the digital market. Investors in small start-up firms primarily realize profits on their investment through the sale of the firm to an established company. If the ACCC implements a special merger review framework for digital platforms, the result will likely be a decrease in start-up funding, and accordingly a decrease in digital innovation.

The ACCC report has failed to establish that large digital platforms use their market share to create an anticompetitive market. Therefore, there is an

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[58] *See, e.g.*, Lear Report, Ex-Post Assessment of Merger Control Decisions in Digital Markets, Final Report, Document Prepared by Lear for the Competition and Markets Authority (May 2019) ("[T]he merger [between Facebook and Instagram] has also generated significant efficiencies to the benefit of users and advertisers."), available at: https://www.learlab.com/wp-content/uploads/2019/06/CMA_past_digital_mergers_GOV.UK_version-1.pdf.

insufficient justification for the wholesale adoption of a new merger review framework aimed at digital platforms.

7. Applying Unique Standards to an Arbitrary Class of Large Digital Platforms is Unsupported

Chairman Sims has proposed special rules for transactions involving "Large Digital Platforms." There are similar efforts underway in other jurisdictions: the EU proposes unique standards for transactions involving "gatekeepers." The US is considering legislation involving special rules for "covered platforms," and Germany has adopted special rules for "companies of paramount significance." The variety of these definitions reflects the difficulties of identifying any class of large technology firms whose characteristics are somehow distinct and sufficient to qualify them for rules different from those of economics-based competition analysis.

The European Union's proposed Digital Markets Act (DMA), for example, relies on both quantitative and qualitative criteria. It designates a dominant platform as a "gatekeeper," a provider of core platform services based upon a significant effect on the internal market.[59] A "gatekeeper" is defined as a gateway for business users to reach end-users that possesses an entrenched and durable position now or in the near future.[60] In addition to the qualitative criteria of gatekeeper, the designation also requires EUR 6.5 billion European Economic Area annual turnover, or EUR 65 billion market capitalization and 45 million monthly active end users of the platform.[61] Because of its two-fold definitions based upon both quantitative and qualitative criteria, the EU definition creates a high level of ambiguity.[62] Where one platform meets qualitative criteria but does not meet other quantitative criteria, or vice versa, the EU proposal adds six more factors to determine whether a platform is a gatekeeper.[63] These additional factors add even greater ambiguity.[64]

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[59] Eur. Comm'n, Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act), Art. 3, COM (2020) 842 final (Dec. 15, 2020).
[60] *Id*. at Art. 3(1).
[61] *Id*. at Art. 3(2).
[62] Monika Schnitzer at al., *International Coherence in Digital Platform Regulation: an Economic Perspective on the US and EU Proposals*, 4-5, (2021).
[63] *Id.* at Art. 3(6). Where the platform satisfies qualitative requirements of gatekeeper but does not meet the quantitative threshold, the six factors the Commission shall consider are (1) the size of the platform, (2) the number of business users, (3) entry barriers, (4) scale and scope effect, (5) business user and end user lock-on, and (6) other structural market characteristics. On the other hand, if the platform satisfies the quantitative threshold but not quantitative requirements, the Commission is entitled to order investigative measures. If the platforms fail to comply with the measures, the Commission shall designate the provider as a gatekeeper.
[64] Schnitzer et al., *supra* note 62.

The US proposal, the American Choice and Innovation Online Act of 2021 (ACIOA), on the other hand, uses qualitative criteria such as sales, number of users including business users, and capital.[65] It defines the regulated platform as a "covered platform" that has at least US-based 50 million active users or 100,000 active business users on the platform per month and exceeds $600 billion net annual sales or market capitalization.[66] Under these simple definitions, only five dominant digital platforms (Google, Apple, Meta, Amazon, and Microsoft) are "covered."[67]

Germany's approach to defining a unique class of large technology companies introduces other arbitrary standards that differ from those of both the EU DMA and the U.S. ACIOA. The 10th Amendment to the Competition Act (ARC) increased the threshold amounts defining dominant digital platforms to reduce the number of platforms identified.[68] Under the new amendment, a company is subject to merger control by the Bundeskartellamt when its worldwide turnover exceeds €500 million, German turnover of one party exceeds €50 million, and German turnover of at least one other party exceeds €17.5 million.[69] Along with the threshold requirement, dominance is presumed when a company's share in a relevant market exceeds 40%.[70]

Every proposed definition of a large digital platform (or "gatekeeper" or "covered platform" or "company of paramount significance"), however, is inherently arbitrary and formalistic. There is no underlying principle in basic antitrust policy or economic analysis that suggests the merits of any different approach, or any particular or unique approach. It is unclear how any of these criteria can be connected with the key economic concepts (market power, etc.) that have always guided the sound interpretation of competition law. We urge the ACCC to continue to apply rigorous and well-tested economics-based antitrust concepts uniformly to all entities. While many of the largest digital platforms may owe their competitive positions to network effects and the unique characteristics of two-sided markets, there is no support for the view that these characteristics cannot be taken into account adequately in traditional economic-based analysis of structural transactions.

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[65] American Choice and Innovation Online Act of 2021, H.R. 3816, 117th Cong. § 2(g)(4) (2021).
[66] *Id*.
[67] Schnitzer et al., *supra* note 62, at 5.
[68] Act Amending the Act against Restraints of Competition for a Focused, Proactive and Digital Competition Law 4.0 and Amending Other Competition Law Provisions, § 35, 2021 (Ger.) Official English translation is available at https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html#p0378.
[69] *Id*. § 35.
[70] *Id*. § 18.

The better course is for the ACCC to adopt the measures appropriate to produce needed improvements in the principles and procedures of transaction review (e.g., a suspensive mandatory notification/approval regime) and gain experience before concluding that drastic reforms – to standard of proof, to burden of proof, to presumptions based on structure, to appellate review – are essential to address the narrow issues that may arise with regard to transactions involving a larger technology firm.