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Response to Digital Platform Services Inquiry Discussion Paper for Interim Report No. 5

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To: Australian Competition and Consumer Commission

From: Hannah Marshall and Danielle Kroon, Marque Lawyers

1. Introduction

1.1 Marque Lawyers is a Sydney based law firm. We have a particular interest in the Digital Platform Services Inquiry on account of our competition law practice, and more broadly where major digital platforms are necessary trading partners for many of our clients. The role of digital platforms in business and the community is increasingly fraught as they cement their dominance and expand their ecosystems. This in turns lays bare the challenges and shortcomings in our current competition law regime.

1.2 This submission responds to the Digital Platform Services Inquiry Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services (**Discussion Paper**). The particular issue we want to address is the strategy for merger control in relation to digital platforms.

1.3 Digital platforms have a dominance, global footprint and habit of vertical and lateral integrations that create unique circumstances for merger review. This submission is partly responsive to questions 2, 5, 17 and 18 of the Discussion Paper, but primarily raises a higher level concept for the Commission's consideration.

1.4 The unique position of digital platforms, and particularly their capacity for acquisition and expansion, presents a global challenge. This is reflected by the range, volume and often overlapping merger review and enforcement actions occurring in different jurisdictions. To address this challenge, we propose the concept of an international merger review regime, specific to digital platforms.

1.5 This submission sets out the concept at a high level, with the purpose of explaining that it is workable legally and has clear benefits such that it is worth further investigation.

2. Key features of an international merger review body

2.1 We suggest that an international merger review system may operate with the following key features.

(a) An international merger review body, established in cooperation with partner regulators in other jurisdictions and given local effect by legislation.

(b) A set of international merger review laws which apply to designated digital platforms, overseen by the global body. Different regulators around the globe are contemplating how to approach mergers for digital platforms, and whether this will involve a different approach to other mergers given the unique issues posed by digital platforms.

(c) An international merger clearance process undertaken via the global body, which if successful provides an alternative to local merger review processes in participating jurisdictions. This would operate as if the clearance or authorisation had been granted by the regulator in that jurisdiction.

(d) Digital platform-specific merger review laws which take account of the role and dominance of designated platforms.

3. Why establish an international authority

3.1 The starting position is that a system of this nature could only be established where it provides a benefit to the regulators, as they would be required to cede some of their current decision-making and power to a supranational review body. The benefits of this system for the designated platform are clear, there is greater efficiency if they are only required to deal with one body, instead of multiple regulators, in relation to the same acquisition.

3.2 However, there are also benefits for the regulators.

(a) This approach would enable greater cooperation to develop a global system to respond to an inherently global issue. Limiting merger review to a single jurisdiction may be restrictive to the competition analysis, and creating a global body allows for a coordinated approach to be implemented across different jurisdictions. In many cases, the relevant areas of competition extend beyond geographical borders. An international process would better suit competition analyses in the digital environment.

(b) This process allows for sharing resources where multiple regulators would each be expending resources to assess the same acquisition, it may create practical efficiencies where they are assessing this in collaboration with other potentially affected countries. We recognise that there are already examples of international cooperation between competition regulators.

(c) Any concerns regulators may have about ceding power could be managed in the way that the international review body was established. The following are examples of some of the items that could be considered to alleviate any such concerns.

(i) Ensuring that countries that are directly affected have representatives as members on the panel making the determination.

(ii) Determining if a unanimous decision is required, effectively allowing any regulator representative on the panel the power of veto.

(iii) Limiting the scope of the review body only to cases that impact multiple jurisdictions, and allowing for the regulator in each of those jurisdictions to participate.

(d) There is already extensive cooperation between regulators in relation to competition issues,[1] and this review body could be crafted in a way that maximises the potential for efficiency where the relevant information gathering, analysis, testing and decision-making is centralised.

3.3 We also outline some of the broader public benefits of an international review process below in part 6.

4. How an international authority could be established

4.1 Practically speaking, there are three elements that would be required for this regime to function.

(a) **International Agreement:** The agreement between the various countries involved, which is required to set out the procedures to be followed, the law to be applied, the functioning of the regime generally, and the agreement of each State to implement the necessary changes domestically to recognise the legal protection provided by the determination in their jurisdiction.

(b) **Domestic implementation:** Each country would be required to enact domestic legislation:

(i) to require the digital platform to participate in the global merger review process instead of the domestic process (and specify when that occurs, i.e. for all or only specified acquisitions); and

(ii) to recognise the legal protection provided by the merger review body determination in their local jurisdiction.

(c) **Jurisdiction over the digital platform:** There would be two options for this.

(i) The digital platform could elect to 'opt-in' to the global system rather than seek authorisation / immunity in each jurisdiction, thereby consenting to the process and outcome.

(ii) The digital platform could be required to submit to the global merger review process in the domestic legislation, which currently requires it to submit to the process as conducted by the individual regulators.

Both international agreement and domestic implementation would be required, as an international regime will be meaningless if digital platforms are not required to obtain the legal protection and if

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[1] ACCC website: 'Treaties & Agreements'; see also the recent example of collaboration in the ACCC media release 'Five Eyes competition authorities to focus on collusion in international trade'.

any determination made does not provide protection in each of the jurisdictions of the State Parties involved.

4.2 As with any international agreement, there would be multiple issues to be determined to provide comfort to each individual regulator and government that it could accept the determinations of the international body and apply the legal protection in their own jurisdiction. We have identified some of the key issues that would need to be determined.

(a) The composition of the review body panel, e.g. would a panel be comprised with a representative from participating countries (similar to the composition of the bench of the International Court of Justice), would it be comprised of only representatives from potentially affected countries for each specific case, or would it comprise a smaller permanent panel but make provision in the procedures for individual regulators to have a greater ability to put forward submissions / convey their view.

(b) Applicable law, which will be significant for two reasons. Firstly, this needs to be an agreed set of rules for merger clearance for countries that currently have different rules. Secondly, it will also need to consider a broader conception for competition analysis. i.e. not simply the impact in one country. In the context of the digital platforms, this is not a hurdle to overcome but a logical progression.

(c) Recognition or enforcement, including the level of legal protection each country is required to provide to the digital platform based on the determination, e.g. would there be any circumstances where an individual regulator could subsequently prosecute for the acquisition.

(d) Rights of appeal, which will be a key issue for the digital platforms and potentially also to individual regulators. The right of appeal would need to balance the competing desires to allow a digital platform (or possibly regulator, if structured that way) to challenge a determination on specified grounds, against the need for efficiency in a determination affecting commercial business acquisitions.

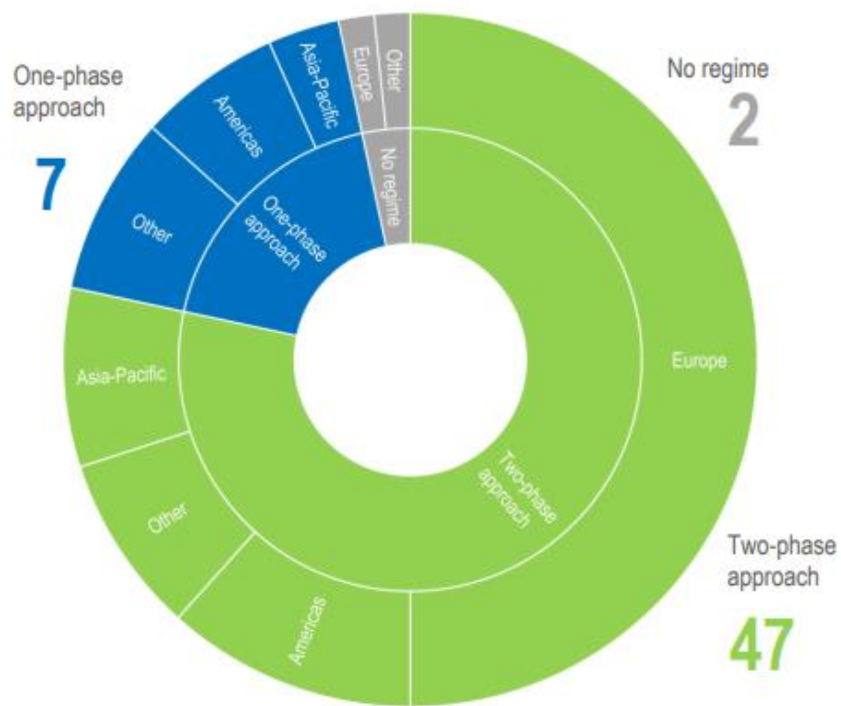
(e) The rights of individual regulators would need to be defined, including whether they have a right of appeal, whether they can put on submissions, and what weight is placed on any submission.

5. A merger review regime tailored to the digital platforms

5.1 Digital platforms like Google and Facebook play a unique and critically important role in business and communities. The scale of their power is unprecedented. They are dominant (if not monopolistic) in their core business areas. And they readily leverage that dominance to expand and enter new business areas. These dynamics justify the design of a bespoke merger review process which specifically accounts for these characteristics. We propose that the following elements would be suitable features.

(a) <u>Mandatory notification and a two-phase process for increased efficiency</u>: The competitive dynamics and social positioning of the major digital platforms warrants a mandatory

notification regime. As discussed below in respect of possible merger tests, even a small acquisition in an emerging market may have substantial ramifications for the future of that market where a digital platform like Google or Facebook is involved. A two stage process would offset the administrative burden of mandatory notification, where low risk transactions can be passed via the first phase and more risky transactions progressed to a second phase of review. Unlike Australia, the majority of OECD CompStats jurisdictions already implement a two-phase process. Figure 1 below reflects the spread of one-phase and two-phase approaches across the 56 participating jurisdictions[2].



Source: Data from the 56 jurisdictions in the OECD CompStats database and OECD analysis based on publicly available information.

Figure 1: OECD reported spread of one-phase and two-phase merger review jurisdictions

(b) An evolved test for competitive impact: There should be a clearance test which contemplates not only single-market analysis but also a broader consideration of dynamic capabilities for digital ecosystems, which transcend traditional market definition. Large digital platforms are not operating in a single market, but rather as part of constantly expanding ecosystems. The Commission discusses this in greater detail in section 4.4 of the Discussion Paper. The competitive dynamics of business ecosystems suggest that they are not well suited to traditional concepts of market analysis. In particular:

(i) they operate across multiple industries;

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[2] OECD Competition Trends 2021, Volume II, page 15 (Figure 2.6).

(ii) they compete with other platforms, other participants in their supply chains (e.g. Google competing across the adtech supply chain, Amazon competing both as a platform and also a seller), and readily enter and take control of new or different industries leveraging their size, resource and data advantage; and

(iii) they typically have the power to control downstream competition among their customers by operating as gatekeepers – regardless of whether they compete downstream themselves (such as Apple via the app store).

One study proposes that assessing 'dynamic capabilities' is a suitable means of measuring the nature and level of competition in the context of digital ecosystems[3]. The hypothesis is that the ability to change and adapt, expand to new markets, respond to shifts in trading conditions or demand, the ability to master new and evolving technologies are the strongest hallmarks of competition for digital ecosystems. By measuring dynamic capabilities, the focus of analysis is less about traditional concepts of market, and more about overall business organisation. For example, analysing acquisitions through a lens of dynamic capabilities might involve considering:

(iv) how many industries an ecosystem crosses (rather than what is the relevant market);

(v) who are competitors across the ecosystem (rather than who are actual/potential suppliers of substitutes);

(vi) is the company investing in dynamic capabilities and what is the strength of its dynamic capabilities (rather than what is the company's market share).

We suggest that the Commission consider an evolving competition test for merger review for digital platforms. This should take account of the different nature of competition for digital ecosystems and progress beyond traditional concepts of market analysis, which no longer suit the digital environment.

6. Benefits of this approach

6.1 **Consistency:** This approach would provide international consistency for the participating countries. The Commission recognised the advantages of this in the Discussion Paper, stating that:

> *Alignment across jurisdictions will help promote regulatory certainty and reduce regulatory burden for affected digital platforms. Regulatory coherence will also assist Australian consumers and businesses to benefit from law reform implemented globally to improve competition and consumer protection.*

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[3] Petit and Teece, *Taking Ecosystems Competition Seriously in the Digital Economy: A (Preliminary) Dynamic Competition/Capabilities Perspective*, Presented to OECD Competition Committee 3 December 2020.

Discussion Paper, pp 6-7

6.2 **Efficient and consistent outcomes:** Larger, or more significant, acquisitions potentially require clearance in multiple jurisdictions, as the risk to competition is not limited to a single jurisdiction given the global nature of the supply. This means that the digital platform is required to submit to a clearance process in each relevant jurisdiction. A recent example is the proposed merger between Cargotec and Konecranes, which was being assessed in the UK, US and Australia[4]. Although not related to the digital platforms, it illustrates the inefficiency (given the effort required for each clearance process, and the nuances between different legal systems meaning it cannot simply be replicated) and the risk of inconsistent outcomes.

6.3 **Global nature of the digital platforms**: Digital platforms are inherently global in nature. Their supply is not limited to a single jurisdiction, and their impact on competition is not limited to a single jurisdiction. The traditional assessment of supply in a specific geographic area is more suited to physical products or discrete service offerings. The advancement of digital blurs the line between a product and a service, the geographic scope of a 'market' and even the assessment of the relevant 'market' for the purpose of competition law analysis. An inherently global problem may require a global solution that reflects the changing nature of supply and competition in this area.

6.4 **Ability to tailor merger review process** to the specifics of large digital platforms operating as broader ecosystems. The competition in the digital economy is increasingly a competition between ecosystems,[5] and it would benefit regulators and the public more broadly to be able to tailor the merger review for these specific digital platforms to take this into account.

6.5 **Potential to leverage the review body** for other, related roles in future, e.g. one idea would be global access regimes for digital platforms, to ensure continued access and supply, consistent privacy or data portability obligations, as more and more businesses and individuals become reliant on the platforms.

7. Conclusion

7.1 The current global environment provides an opportunity for bigger picture reconceptualisation of competition law principles and regulation. We encourage the Commission to take up this opportunity to redesign laws for the digital environment and establish systems which better fit the global digital economy and continue to serve the interests of consumers. We would be happy to answer any questions or elaborate on any aspect of this submission, and we are grateful to the Commission for the opportunity to raise these ideas.

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[4] https://www.accc.gov.au/media-release/cargotec-and-konecranes-merger-cancelled

[5] https://www.oecd.org/daf/competition/competition-economics-of-digital-ecosystems.htm