Australian Competition
& Consumer Commission
Views from the Software Developer Community

April 14, 2022

The Developer Community's Views on Issues and Proposals in the Digital Platform Services Inquiry Interim Report no. 5

On behalf of our membership of more than 70,000 software developers, app publishers, and stakeholders in the mobile ecosystem, the Developers Alliance is pleased to submit comments to the Australian Competition & Consumer Commission on the software developer community's views on the Digital Platform Services Inquiry Interim Report No. 5. The Developers Alliance appreciates the Commission's examination of potential competition and consumer issues related to the mobile ecosystem, and urges the Commission to continue to recognize the vital role of software developers in ensuring the creation of effective policy in this area. We previously submitted comments in the Commission's inquiry into app marketplaces and search. Since our last submission we have presented our arguments in the EU Android appeal, and have intervened in the Competition and Markets Authority review of the Meta / Giphy case in the UK, in support of digital startup acquisitions[1].

Background

The Developers Alliance (the "Alliance"), founded in January 2012, is an industry association operating in Australia, the United States and the European Union that supports software developers as entrepreneurs, innovators, and creators. The Alliance supports developers and the app ecosystem by (i) promoting innovation and growth

[1] https://www.developersalliance.org/press-releases/developers-alliance-application-to-intervene-in-support-of-the-meta/giphy-merger-approved

through collaboration, networking and education; (ii) delivering resources and support that enable developers to advance in their areas of expertise; and (iii) advocating for policies that promote developers' interests, including in the areas of data privacy and security, intellectual property, competition, and innovation.

Introduction

In Chapter 3 of the Report the ACCC reviews the facts and conclusions from this ongoing inquiry, noting with unease that some conclusions are no longer valid and that the facts have changed. New entrants have emerged as significant challengers in markets previously labelled as unassailable. Venture capital has found its way into each of the target segments, and each of the platform companies investigated has mounted significant challenges to the others. We have learned that network effects mean that every consumer is really multiple consumers and that free-time is a better measure of unsatisfied consumption than an empty wallet is.

The report lacks clarity in its treatment of each digital platform as unique but also part of a category in need of regulation. While each is a large company that facilitates - and participates - in a multi-sided digital market, the nature of the goods, services, and market participants involved on each platform is quite different. While it may be appropriate to assess the rights and obligations platform owners owe to other generic market participants in a common framework, grouping social media services regulation with physical goods makes no sense. Platform regulation should focus on the dynamics of digital platform markets, not on the specifics of any single marketplace. On the other hand, regulation of the exact services and products that move in each market is best analyzed and assessed separately.

Competition law begins with the definition of markets and competitors. The market for digital platforms is highly competitive and very dynamic, with no single company able to muster the resources to dominate the space. Today there is little doubt that any of the platform companies the report refers to could challenge the others on their own turf and that nothing - resource availability, funding, or scale - would prevent them from doing so. The fact that Apple's app store dominates the market for Apple app stores isn't a market analysis; it is a tautology. Smartphones are social media services - their primary

purpose is to connect us so we can share - as much as Facebook is. Nothing impedes Elon Musk, Donald Trump, or a hedge fund from launching a viable competitor to any of today's existing social media services, should they desire. All that's needed is a big enough appetite and a little determination.

Our four overarching observations of the report and the inquiry behind it are these: first, rather than the static market the inquiry originally presumed, time has shown us that the platform space is unstable and contestable; second, the best economic regulation shapes markets by creating incentives and disincentives while retaining freedom to innovate and react to change; third, the digital economy is global, fully integrated, and adapting in real time to consumer pressure, such that much of the intervention contemplated just a year ago is no longer relevant or useful; and fourth, commingling platform regulation with content regulation, online market regulation, or app store regulation will inevitably result in a framework full of overlaps and loopholes that is ripe for misunderstanding and litigation.

The software developer community has over 20 million global members. They sit at the heart of everything digital. From any market connected to the web they can build products and services for any other. Australian developers target a global market of billions of consumers, not a national market of 25 million. And they reach those markets with the help of digital platform companies that span the globe and buffer them from the complexity of international commerce.

As in previous reports from this inquiry, the ACCC repeats what developers believe; that they are victims of a system that extorts their effort and blocks their success. This is absolutely false, as our global conversations, surveys, and developer outreach repeatedly tells us.

The developer community is diverse. They represent all political parties, ethnicities, genders, socio-economic roots and aspirations, and they seldom speak with one voice. That some developers support the ACCC conclusions is without doubt, since much of what is being considered would entrench large, established developer companies. Rather than increase competition generally, it would simply transfer power to a small number of already successful founders, and disassemble the system by which their emerging competitors could raise a challenge.

We thank you for the opportunity to share our views, and welcome the opportunity to expand on any of the points below on our member's behalf.

Report Questions

1. What competition and consumer harms, as well as key benefits, arise from digital platform services in Australia?

The benefits of digital platform services for consumers and businesses are clear, ubiquitous, and beyond debate. For the developer community, platforms provide the tools, training, support and services they need to create products and get them to market. These ecosystems did not spring into existence based on entrepreneurial foresight, but evolved over time in response to the needs of the various markets that the platforms serve. For the developer community, they solved problems inherent in the scale and specialization issues that prevent a software engineer or digital founder from taking a good idea and digital skills, and turning them into a viable business. These challenges include monetization, marketing, integration, compliance, and ultimately user access (among others).

It is our opinion, and that of our community, that without the role of platform stewards it is unlikely that a stable arrangement of non-platform competitors can emerge to create a viable market for their skills.

2. Do you consider that the CCA and ACL are sufficient to address competition and consumer harms arising from digital platform services in Australia, or do you consider regulatory reform is required?

Attributes such as data privacy and cybersecurity play a unique role in digital markets. Where new markets bring unique questions it may be incumbent on regulators to bring in appropriate reforms. Other societal values, such as accessibility, freedom of expression, affordability, competition and the like, are common to both digital and physical markets. In those cases, regulators should first look to existing tools and

remedies and prioritize regulatory harmony in the overlapping worlds of digital and physical markets. The best regulatory regimes avoid parallel regulation of analogous issues in digital versus physical markets.

In general, academic analysis of digital markets is still immature, and much of what we “know” is more theory than it is understanding. Rather than building new, monolithic regulatory structures on shaky ground, we would encourage modest, targeted and temporary measures that encourage markets to develop in defined ways without mandating that they must. In parallel, we support regulatory inquiry to better understand the underlying forces at play, and to quantify the impacts of unique digital market dynamics (such as network effects and tipping), and re-evaluate established physical market analogies (such as monopoly control of resources), in markets defined by zero incremental costs and near infinite scalability.

In the areas of data privacy and cybersecurity, new regulatory schemes are likely required. We strongly encourage a clearly defined scope for reforms like these, as using privacy regulation to manage market competition, or bundling product safety and cybersecurity have been a challenge in other jurisdictions. We recognize that regulatory agencies may be eager to extend their existing mandates into digital markets that seem tangential to their current focus, but in fact require very different skills and experience in a regulator. For software developers (who do not typically come from regulated industries), clarity on when rules apply, and to whom, is an absolute necessity.

3. Should law reform be staged to address specific harms sequentially as they are identified and assessed, or should a broader framework be adopted to address multiple potential harms across different digital platform services?

There is an increasing trend globally to use the tools of competition law and anti-trust as a substitute for tailored regulation. To the extent that harmful and illegal behavior is identified, regulators should act expeditiously to both correct market failures and signal other participants on what is acceptable.

Broader frameworks are more appropriate when novel issues arise that are unique to digital markets. There is a danger here of over-broad regulation where regulators fail

to realize that many platform services are unique and distinct from one another. To the extent that digital services access data, a broad and comprehensive data privacy law is appropriate. Mandating interoperability as a principle applicable to hardware, operating systems, marketplaces, communication services and social media is overly broad, as these segments are significantly different in both market structure and technical foundation. In any case the developer community would be better served by a system which encourages or discourages platform behavior rather than prohibiting or mandating in a rapidly evolving market.

4. What are the benefits, risks, costs and other considerations (such as proportionality, flexibility, adaptability, certainty, procedural fairness, and potential impact on incentives for investment and innovation) relevant to the application of each of the following regulatory tools to competition and consumer harms from digital platform services in Australia?

The markets that digital platforms facilitate vary widely, from deeply linked to technology (as in mobile smartphone ecosystems), to others tightly coupled with physical systems (online markets for physical goods and their fulfillment logistics). The developer community is most deeply impacted by regulation focused on purely digital services.

In general, digital service markets are highly dynamic, as is obvious even in the timescale of the current inquiry. Some of the fundamental assumptions and conclusions from earlier reports are no longer valid. This highlights the danger in relying on outright prohibitions and obligations except in very specific circumstances where it is unquestionable that the issue at hand is demonstrably harmful and universally condemned (CSAM, for example). Codes of practice are more flexible, with the added advantage of bringing together appropriate stakeholder viewpoints and domain experts. Expert agencies with rule making authority also allow for ongoing adaptation as new issues and innovations arise, again with stakeholder input (though the danger of political capture can emerge). The other alternatives listed in the report rely on market

intervention based on either a specific case or an overarching economic policy, assuming that a generic intervention will improve things in all cases.

In general, the developer community has been able to thrive in the digital ecosystems their platform partners facilitate. That is not to say that incentives are perfectly aligned, or that there is no tension between market participants. Developers rely on the hardware, software, services and tools that their smartphone platform partners provide, and many have found success inside the markets they've built. Developers rely on alternative ecosystem *models* competing for their time and talents to maintain balance with their larger platform partners. Given the dynamic nature of the many systems which must come together to get an app to market, stakeholder participation and flexibility are a fundamental requirement for any potential market oversight.

Developers do not feel they have any regulatory influence, and hence they distrust regulatory intervention. This inquiry does little to help change that; while developer voices are present, the frameworks proposed speak of nothing but the impact on platform owners - with no mention of what will be put in place to keep developer businesses whole after the dust settles. On the other hand, their platform partners have a vested interest in developer success, but an imbalance in power means that individual developers aren't always treated fairly. Developers do perceive that the complete ecosystem - platforms and market participants - are accountable to the public and must do better *as a whole* to avoid ill conceived intervention by policy makers.

With this as backdrop, we reiterate the developer community's belief that industry-led proposals based on broad stakeholder input are the best approach for positive and sustainable change.

5. To what extent should a new framework in Australia align with those in overseas jurisdictions to promote regulatory alignment for global digital platforms and their users (both business users and consumers)? What are the key elements that should be aligned?

The internet presents many challenges for regulatory frameworks based on political boundaries. A user in Australia can have a virtual presence almost anywhere in the world, and many of the services and content they access will be provided by international providers present in many countries at once. Any attempt to craft an Australia-specific regulatory model will relegate the country to a virtual island, for both good and ill. The developer community is unanimous in our support of international regulatory harmony as a pre-requisite for international market access.

The question as to which of the emerging International frameworks to support, and the degree of harmony, are more nuanced. We support the separation of content regulation and data privacy regulation from platform regulation, given that content and privacy norms are specific to jurisdiction and culture. We support the separate regulation of content management tools and processes (international) from content classification (local). Beyond this, none of the international proposals address developer concerns in any adequate way.

Developers need a harmonized framework that: 1) maintains a cohesive ecosystem through which they can market their products; 2) balances stakeholder power through increased transparency and accountability; 3) is flexible and adaptable to both technical innovation and consumer needs; and 4) encourages participation, competition and consumer choice.

6. Noting that the ACCC has already formed a view on the need for specific rules to prevent anti-competitive conduct in the supply of ad tech services and also general search services, what are the benefits and risks of implementing some form of regulation to prevent anti-competitive conduct in the supply of the following digital platform services examined by this Inquiry…

The markets for social media services and online private messaging are highly competitive and merit no intervention.

Electronic marketplace services are varied in both their attributes and structure. At a general level, the rights and obligations of generic marketplace participants (to the extent these are different from their real-world counterparts) should be clearly

articulated. For app marketplaces in particular, rules around transparency would amplify existing pro-competitive incentives.

7. Which platforms should such regulation apply to?

The developer community is deeply reliant on the ecosystems of device and operating system owners. The fact that all digital platforms own and share some of the intellectual property in their ecosystems should not be overlooked. Apple's devices are not generic computers simply because they are both hardware and software. The fact Apple has chosen to open their ecosystem to third party developers has enabled a dynamic and competitive market for apps. They could just as easily have closed the ecosystem, licensed apps from a few third parties, and avoided platform complexity all together.

The loss of competing app ecosystems would fundamentally damage the market for third party apps. Emerging, small and mid-size developers without an established brand would need to shift from marketing to millions of users to selling to a handful of "walled gardens" in a market ten years past its prime.

Platform regulation will not benefit the vast majority of software developers, rather it would entrench the large and established participants that currently lobby for change.

8. A number of potential regulatory measures could increase data access in the supply of digital platform services in Australia and thereby reduce barriers to entry and expansion such as data portability, data interoperability, data sharing, or mandatory data access…

Data is not the "new oil" - it's the new sand. It is ubiquitous, near infinite, and worthless in its raw state. Refined, transformed, and combined it becomes as valuable as microchips. The value of data is not intrinsic, it is in its utility in the right hands. In this sense, data regulation must either consider the underlying raw material, or the refined one with its associated intellectual property. Further, the overlap between data privacy and data access adds complexity to permitted uses, stewardship and shared rights.

App developer attitudes towards data are varied and largely dependent on how data is accessed or used by their services. Given that utility and dataset size and quality are related, many developers rely on tools and services from data holders rather than take on the burden themselves. In general, developers would welcome a voluntary market in data with appropriate rights and obligations, but would oppose mandated interoperability or sharing absent a commercial incentive. Since most data is a mix of personal and non personal, this is a highly complex undertaking that is potentially beyond the scope of the current inquiry.

9. Data limitation measures would limit data use in the supply of digital platform services in Australia…

There is no doubt that the availability of sophisticated datasets has had a profound impact on innovation, driving tremendous societal benefits in areas as diverse as healthcare, civic planning and industrial systems. The ability to manage, process and innovate around this data is limited by the scale of the compute and scientific resources required - such that platform companies, governments, and large industrial players tend to occupy the space. Limiting platform access to data would limit the benefits the data could provide. Again, the overlap of data access and data privacy make this a complex undertaking that is not unique to platform companies and better dealt with on a stand-alone basis.

10. In what circumstances might increasing data access be appropriate and in what circumstances might limiting data use be appropriate? What are the relative benefits and risks of these two approaches?

In what circumstances should potentially personal data be indiscriminately shared by private companies or the government? What scientific advances should be overlooked to avoid commercial advantage to their discoverers? These are large questions worthy of significant analysis.

11. What additional measures are necessary or desirable to adequately protect consumers against…

Dark patterns online should be regulated in the same way as dark patterns offline. Whether canceling my subscription to the Daily Mail is done by phone, post or online, the regulations in play should be consistent.

Fraudulent or exploitive apps benefit from two layers of prevention today, through both laws and commercial incentives. Regulations make fraud and false advertising illegal, while app stores have a commercial incentive to protect their brand and increase consumer trust in their services. Commercial app stores invest significant resources in educating and assisting developers with compliance and best practices for privacy and security. Ultimately, app stores also filter out apps that could harm consumers. Regulations which limit app store's ability to protect consumers, or allow users to bypass their safeguards, are counterproductive.

Harmful content too, is limited by regulation and commercial incentives. Again, there is both a brand and social incentive for platforms to limit harmful content consistent with their users norms and values. Regulations which limit or create liability for content moderation are thus also counterproductive.

12. Which digital platforms should any new consumer protection measures apply to?

Consumer protections should apply universally, regardless of the virtual or real-world categorization of the services in play. New protections, if required, should apply equally online and offline. Practices which are permitted offline should not be prohibited online (for example, there is currently no prohibition - and theoretical benefit - from allowing offline retail stores to offer white label goods in competition with their suppliers).

13. Should digital platforms that operate app marketplaces be subject to additional obligations regarding the monitoring of their app marketplaces for malicious or exploitative apps? If so, what types of additional obligations?

The app ecosystem is a delicate balance where often the participant best suited to act or oversee a particular function does so, to the benefit of the whole. App stores balance the consumer desire for beneficial new apps with excess filtering of new developer products. Increasing the obligation on app stores will come at the cost of fewer apps, fewer small developers, and reduced consumer choice. These are trade-offs that free markets make every day.

Today's app stores compete for developers and consumers in part based on how they approach consumer protection vs. consumer choice. Regulations that mandate a single model are unlikely to find the right balance, and certainly can't evolve with the market over time. Since this inquiry began, we have seen the emergence of "privacy nutrition labels", as a market-driven response to consumers increasing awareness of malicious apps. It's no accident these appeared on their own and have become a competing feature on more than one platform.

Transparency and consumer awareness are the keys to enable the market to self correct without the heavy hand of government bureaucracy.

14. What types of fair-trading obligations might be required for digital platform services in Australia? What are the benefits and risks of such obligations? Which digital platforms should any such fair-trading obligations apply to?

Regulatory inquiry, such as the ACCC's, has been a significant driver of digital platform changes in recent years. The transparency regulators have brought to fees, restrictions and practices by digital platforms has resulted in significant improvements, and has clarified the purpose and appropriateness of other behaviors.

We again disagree with the ACCC's conclusion that app stores are somehow a separate market from the ecosystems they serve, or that these are somehow monopolies. Developers can accept either Apple's, or Google's, or Microsoft's, or Sony's terms to reach their markets, or they can migrate en mass to the platform that serves them best, increasing the value of that platform to consumers by starving the competitor

of great apps. Developers do not see monopolies in their market, as our member surveys show.

App Store policies and terms of service are the primary mechanism by which ecosystem stewards manage the competing incentives of the various participants to keep the ecosystem in balance. The history of digital technology is littered with platforms that failed in this task. Where terms are unreasonable, current law provides mechanisms to challenge and punish anti-competitive behavior.

15. Should specific requirements be imposed on digital platforms (or a subset of digital platforms) to improve aspects of their processes for resolving disputes with business users and/or consumers? What sorts of obligations might be required to improve dispute resolution processes for consumers and business users of digital platform services in Australia?

Our developer polling shows our community strongly favors industry-led processes over government intervention. In particular they welcome stakeholders like industry executives, standards bodies or ombudsmen to take the lead in dispute resolution.

16. In what circumstances, and for which digital platform services or businesses, is there a case for increased transparency including in respect of price, the operation of key algorithms or policies, and key terms of service?

Developers are most concerned with the app approval process, and their ability to escalate, clarify or appeal decisions. They would appreciate increased transparency of ranking and recommendation processes, but recognize the need for discretion to preempt fraud and gaming of the system.

17. Do you consider that reform is required to ensure that Australia's merger laws can prevent anti-competitive acquisitions by digital platforms? Why/why not?

The Developers Alliance is an intervenor in Meta's appeal of the CMA's denial of their Giphy acquisition in the UK. Giphy is a small developer, representative of many in

our community. We have intervened to brief the tribunal on the implications of extraterritorial reach and international comity on the decision.

Digital startups are not ashamed to admit they hope to profit from their innovations. In a digital market, this requires initial funding to build and prove a product, additional funding to scale, and eventually returns via profits or a sale. Many in our community are well equipped to get a small business off the ground, but few have the skills, appetite or resources to take it to the massive scale digital markets require. In many cases, they leave this task to established players, such as platforms, who have the resources and know-how. This model of “outsourced R&D” has been a tech company staple for decades. It encourages investors to support businesses knowing they have an exit strategy, and it brings innovation to market faster and cheaper than platforms could on their own.

We are confident that existing merger laws are fit for the task in digital markets. Much has been made of “killer acquisitions”. If it existed, this would be a losing strategy, since a clever entrepreneur would simply clone the dead idea and stand in line to be killed for a profit - over and over again. The CMA’s new approach is to ignore probability and assume all startups carry the seed of market domination over the incumbent, and thus that any acquisition removes a serious competitor from a hypothetical market of the future. We believe this is nonsense.

18. Without prejudice to whether reform is required, what are the benefits and risks (including in relation to implementation and potential impacts on incentives for innovation and investment) of the proposals to address anti-competitive acquisitions by digital platforms, identified in this Discussion Paper…

We remain confident in the ability of competition law to manage complex digital acquisitions. Beyond that, the developer community is keenly aware of the size and complexity of the integration that these acquisitions require, and we already see the strain this is causing inside platform companies. Their appetite may be infinite, but their capacity is not. As is often the case, size drives complexity, which impacts adaptability.

Platform companies have all the incentives they need to only acquire what they can manage and integrate, and the market is fully capable of valuing these transactions.

19. Which digital platforms should be subject to tailored merger control rules, and what criteria or assessment process could be employed to identify these platforms?

We've seen no evidence to support disparate rules for digital versus real-world companies.