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Digital Platform Services Inquiry 2020-2025  
Australian Competition and Consumer Commission  
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Microsoft welcomes the opportunity afforded by the Australian Competition and Consumer Commission (**ACCC**) to respond to the *Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services*, February 2022 (**Discussion Paper**). As the Discussion Paper notes, it is an appropriate time to consider whether and how the current *Competition and Consumer Act 2010 (Act)* including consumer protection laws may be enhanced to address the competition and consumer harms that have been identified by the ACCC.

The ACCC, and regulators and legislators around the world, have identified serious concerns arising from digital platforms. The ACCC and others have proposed (and implemented) what we believe will be effective and fair solutions that support competition and innovation as well as open platform ecosystems. We offer the following observations as both an operator of a widely popular (and effectively regulated) open platform, Windows, and as a developer of apps and services that rely on access to other companies' platforms. Our observations focus on the following topics:

- Regulatory tools to implement reform, which should be complementary to existing tools under the Act, in response to Chapter 7 of the Discussion Paper; and
- Potential rules that may be implemented, particularly regarding app stores, self-preferencing and general search services, and some of the proposals for change to potential merger review standards, in response to Chapter 8 of the Discussion Paper.

### **Regulatory tools for potential reform**

The ACCC in Chapter 7 of its Discussion Paper invites feedback on regulatory tools to implement potential reform. In particular, it poses important questions around the benefits, risks and costs of various regulatory tools, as well as the extent to which Australia should be aligned with overseas jurisdictions.

Microsoft believes that good regulation suited to addressing challenges unique to digital markets should complement, and not replace, existing competition law enforcement. The Act has played an important function in maintaining competitive markets in Australia.

As the ACCC considers possible options for reform, it has noted that legislative proposals to improve contestability and enable competition in digital markets are already underway in various countries. To the extent possible, reforms should be coordinated with other relevant agencies domestically (eg. those that form part of the newly established Digital Platform Regulators Forum) as well as internationally. Otherwise, remedies may have unintended consequences in other areas of regulatory concern and may conflict with obligations imposed both by domestic regulations and by other jurisdictions. Coordination may also open up opportunities to drive greater effectiveness across multiple dimensions and, potentially, at a broader scale.

In this light, we have 3 main suggestions:

(1) Regulations should focus on gatekeeper platforms functioning as intermediaries

As the ACCC recognises, *'where new regulation is sought to address the consequences of market power, for example, it is likely this would only apply to a few large digital platforms, identified by objective criteria... such as occupying a gatekeeper position'*.<sup>1</sup> Microsoft is supportive of a clear definition of the platforms to be subject to regulation, directed to specific and identified harms, focused on platforms that are "gatekeepers".

The importance of reforms being gatekeeper-focused is crucial. While applying new obligations or conduct prohibitions on dominant intermediaries can serve to increase competition, imposing the same obligations or prohibitions on firms that might challenge that dominance can have the opposite effect. Additional burdens placed on firms that are already at a competitive disadvantage to dominant incumbent firms could undermine those challenger firms' abilities to continue to operate. Similarly, conduct which is anti-competitive when engaged in by a dominant leader may be critical and pro-competitive for challengers.

In Microsoft's view, while quantitative measures can provide a clear definition, they will not be sufficient on their own. For example, different platforms with the same number of users may enjoy very different market significance depending on the specific platforms. The scale and number of users necessary to compete in internet search may be significantly larger than the number of users associated with a very successful online marketplace. Similarly, not all platforms with high numbers of users should be considered intermediaries or "gatekeepers". The essence of a "gatekeeper" is the gatekeeper's role in intermediating between consumers and suppliers of goods and/or services as an unavoidable trading partner, for which intervention is warranted. This distinguishes the concerns around technology that businesses may use as an input or building block for running and operating their business (e.g., enterprise software or cloud computing services to host websites, building an expense app for employees, or ordinary course of business analysis of sales data), as compared to technology that intermediates businesses from their customers.

(2) Maintaining regulatory dialogue

Microsoft welcomes the maintenance of open constructive engagement with the ACCC on the reform proposals. Microsoft observes from its experience with implementing enforceable commitments in relation to Windows that regulatory engagement and dialogue were essential to ensure compliance, and that commitments were appropriately implemented having regard to the specific facts and circumstances. Accommodating for regulatory dialogue achieves clarity and assists to operationalize compliance efficiently and effectively.

(3) Flexibility to accommodate different business models and technologies

Microsoft agrees with the ACCC that to be effective, a new framework must provide sufficient legal certainty for market participants, while being flexible enough to adapt to digital platform services' dynamic nature. Flexibility is also important to ensure any regulatory scheme can accommodate the many different business models and technologies in these industries and does not result in unintended consequences by adopting a too-rigid approach.

Microsoft welcomes the opportunity to discuss with the ACCC the appropriate amount and type of flexibility in more detail as it progresses its reform options.

## Potential new rules and measures

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<sup>1</sup> Discussion Paper at p 6

In Chapter 8 of the Discussion Paper, the ACCC has posed questions in relation to potential measures that could be put in place to address various competition and consumer law harms, including preventing anti-competitive conduct such as prohibitions against self-preferencing, and promoting open platforms to stimulate innovation and competition. We focus on three main areas:

#### (1) App stores

The ACCC's March 2021 Interim Report correctly identified concerns with competition on mobile operating systems and app stores on those platforms. Microsoft's experience has been consistent with that of other third-party app developers that must accept the dominant app store operators' policies in order to reach users of their apps: certain of these policies either prevent us entirely from offering competitive cloud game streaming apps to mobile users, or limit services such as the use of alternative in-app purchase payment processing systems. Such policies benefit the app store operators' own products and services to the detriment of Australian users.

Microsoft believes that potential reform should seek to address such self-preferencing conduct in app markets. In this regard, Microsoft published a new set of Open App Store Principles in February 2022, which apply to the Microsoft Store on Windows, and to the next-generation marketplaces Microsoft will build for games. These Principles are grounded in app store legislation being considered by governments internationally, including by the United States, the European Union, the Republic of Korea, and elsewhere.<sup>2</sup>

We refer to our Principles to illustrate potential principles for app store reform that are consistent with protecting choice, ensuring fairness, and promoting innovation. Some of these commitments reflect the ACCC's past recommendations in relation to app stores set out in the Discussion Paper.<sup>3</sup> For example, Microsoft has made commitments to:

- Treat apps equally in our app store without unreasonable preferencing or ranking of our apps or our business partners' apps over others;
- Be transparent about rules for promotion and marketing in our app store, and apply these consistently and objectively;
- Continue to enable developers to choose whether they want to deliver their apps for Windows through our app store, from someone else's store, or "sideloaded" directly from the internet;
- Continue to give developers timely access to information about the interoperability interfaces for Windows that our own app products use; and
- Enable Windows users to use alternative app stores and third-party apps, including by changing default settings in appropriate categories.<sup>4</sup>

These principles build on a more limited set of principles for the Microsoft Store on Windows that we adopted in 2020, which for example now allows other app stores to be distributed within the Microsoft Store on Windows.

#### (2) General search services

The ACCC has already concluded in its September 2021 Interim Report that regulatory measures should be introduced to prevent anti-competitive conduct in relation to general search

Microsoft has previously made submissions where it addressed its concerns regarding introduction of a mandatory choice screen in a market that is tipped so dramatically in favour of Google. We reiterate

<sup>2</sup> Microsoft, 'Adapting ahead of regulation: a principled approach to app stores', 9 February 2022: <https://blogs.microsoft.com/on-the-issues/2022/02/09/open-app-store-principles-activision-blizzard/>

<sup>3</sup> Discussion Paper at p 86

<sup>4</sup> Microsoft, 'Adapting ahead of regulation: a principled approach to app stores', 9 February 2022: <https://blogs.microsoft.com/on-the-issues/2022/02/09/open-app-store-principles-activision-blizzard/>

that choice screens are unlikely to do much on their own to change competitive dynamics in search and browser markets.

Microsoft considers that additional measures are necessary to make the search market fully contestable. One example would be to prevent gatekeepers in search from locking up default settings or from being pre-installed, particularly on mobile devices.

Microsoft welcomes the ACCC's continued consideration of both the benefits and potential risks of such regulation and encourages it to consider Microsoft's previous recommendations relating to the design of a potential choice screen (as set out in its 15 April 2021 submission).<sup>5</sup>

### (3) Adequate scrutiny of acquisitions

The ACCC has invited questions concerning potential merger law reform in Australia. Microsoft is supportive of the need for greater scrutiny and oversight of mergers in digital markets. Microsoft's observation is that regulators have been effectively using their existing tools to do so. Microsoft would caution against proposals to reverse the burden of proof on merger parties to establish the lack of competitive harm from a proposed acquisition, or on rules that deem certain acquisitions to be anti-competitive. Such reforms have the potential to operate as a ban on mergers absent permission – which does not appear commensurate to the harm sought to be addressed.

In practice, imposing such a handbrake on acquisitions will serve as a barrier to entry to many start-ups, whose investors commit funding in the knowledge that there are a range of exit opportunities, including acquisition by a larger competitor. While merger review ought to be rigorous, there is no basis to presume a merger is anticompetitive. There are many reasons why a start-up may not be able to continue to compete as it matures, but the innovation it has brought to market can nevertheless be optimally deployed to benefit a broader range of customers. The unintended consequence of rules that reverse the onus of proof and deem mergers anticompetitive may be to stifle the growth of a vibrant and well-funded start up community, and the innovation that it generates.

## Conclusion

Microsoft acknowledges the issues identified to date by the ACCC's Digital Platform Services Inquiry and welcomes the ACCC's proposal to consider at this point in time potential solutions to address the specific concerns identified.

We look forward to continuing to cooperate with any information or views that will be helpful to your process.

Kind regards,

A solid black rectangular box redacting the signature of Thomas Daemen.

Thomas Daemen

Director, Corporate, External, and Legal Affairs

Microsoft Australia and New Zealand

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<sup>5</sup> Microsoft submission to ACCC DPSI Interim Report, 15 April 2021: <https://www.accc.gov.au/system/files/Microsoft.pdf>