CCIA Comments on the Australian Treasury's Consultation Document on the Australian Competition and Consumer Commission's Regulatory Reform Recommendations

The Computer and Communications Industry Association (CCIA)[1] welcomes the opportunity to comment on the Australian Treasury's (Treasury) consultation document on the Australian Competition and Consumer Commission's (ACCC) regulatory reform recommendations[2] (the Consultation Paper), released on December 20, 2022.

Online digital services platforms offer innovative and popular services to consumers and play an important role throughout the economy, not only in those areas typically associated with the so-called "digital" companies. As highlighted by the general introduction of the Consultation Paper, digitalization has revolutionized the way consumers and businesses interact with each other. The Consultation Paper is a response to the ACCC's fifth Interim Report in its Digital Platform Services Inquiry (DPSI Fifth Report) that suggests that there are market features of digital platforms that may impede, distort or restrict competition. CCIA strongly believes that for the Treasury to determine whether there is a need to address possible competition concerns in this area, it is important to fully and accurately understand the various business models behind different digital platforms and the industries in which they operate.

When analyzing the ACCC's recommendations in the DPSI Fifth Report, the Treasury should take into account business realities. As such, it is important for the Treasury to continue to reexamine the ACCC's positions detailed in the DPSI Fifth Report to fully reflect on the underlying business models of these complex services and revisit the ACCC's provisional proposals and recommendations accordingly.

CCIA's comments outline the benefits digital platform services provide for consumers and discuss the important considerations the Treasury and regulators should take into account in considering whether any new regulation is required and, if so, whether there are alternatives to the ACCC's proposals, and the design of any proposed regulation. Therefore, our comments (i) provide general observations regarding the Consultation Paper (*Part I);* (ii) discuss specific recommendations of the Consultation Paper (*Part II*); and (iii) detail key principles to guide regulatory proposals (*Part III*).

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

[2] Digital Platforms: Government Consultation on ACCC's Regulatory Reform Recommendations. December 20, 2022, available at https://treasury.gov.au/sites/default/files/2022-12/c2022-341745-cp.pdf.

I. General Comments

The Consultation Paper states that "there is a significant amount of work being progressed internationally, as different jurisdictions make decisions on updating their consumer and competition regulation to suit the current and future digital environment."[3] Although policymakers often find themselves under significant pressure as other regulators develop national digital programs, CCIA would like to caution that running faster to adopt regulations in this important area is not necessarily the best strategy for policymakers and legislators.

The Consultation Paper questions if Australia should seek to largely align with an existing or proposed international regime and "the benefits and downsides of Australia acting in advance of other countries or waiting and seeking to align with other jurisdictions."[4] While it may be useful to study jurisdictions that have adopted new and novel digital regulatory measures, the Treasury should not assume that measures from the most active and vocal jurisdiction would be the best choice for Australian consumers and the economy. As mentioned in the Consultation Paper, "in the global context, Australia is a smaller market than many of the jurisdictions at the forefront of digital platform regulation and will need to consider the most effective way for it to manage digital competition."[5] In this regard, the Treasury should avoid relying on international regulatory developments without analyzing the context, purpose, and objective of the particular regulation and considering their potential impact on the Australian economy and consumers.

It should be considered that some proposed regulatory reforms are the result of particular political and economic dynamics. As the Consultation Paper highlights, "no platform-specific regulatory approach has been established for a significantly long enough period to provide a proven regulatory template to draw on. This highlights the importance of consultation to ensure an effective policy framework is developed for the Australian context."[6] Therefore, rather than following untested international experiments, Australian policymakers should take advantage of the opportunities to learn from the experience in those jurisdictions, some of which are already emerging, for example in relation to the costs imposed on regulators or the lack of certainty regarding the obligations being imposed. In parallel, the Treasury should continue to focus on gaining a comprehensive understanding of the unique dynamics of the Australian economy to determine if there really is a need for reform in the first place.

Another overarching point of the Consultation Paper is to determine how the Government should respond to the ACCC's recommendations to introduce specific reforms for digital platforms. In this regard, CCIA encourages the Treasury to avoid the arbitrary scoping of new rules to specific platforms. Proposed reform recommendations should be rules of general applicability and not be

[3] *Id.* at 13.
[4] *Id.* at 14.
[5] *Id.*
[6] *Id.* at 4.

designed and enforced only against particular companies. More importantly, CCIA strongly believes that the Treasury should carefully consider whether categorizing a few companies as digital platforms and implementing additional and costly rules only to such platforms is, in fact, the best path forward for the Australian economy. In addition, Australia should seriously consider whether rules likely to target predominantly American companies risk running afoul of the robust protections against discrimination in the Australia-United States Free Trade Agreement (AUSFTA), given the likelihood that many competing Australian and third-country service suppliers will be exempt from such obligations.[7]

It is also crucial to consider that Section 2 of the Australian Competition and Consumer Act 2010 establishes that "the object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection." In accordance with this provision, the purpose of competition law should continue to be promoting consumer welfare instead of implementing regulations against specific companies that, as the Consultation Paper also highlights, "play a central role in facilitating the interactions between consumers and businesses."[8]

The Consultation Paper refers to the ACCC's conclusion that relying only on existing regulatory frameworks would lead to adverse outcomes for Australian consumers and businesses.[9] In this regard, CCIA would emphasize that overly complex, intrusive, or broad regulatory regimes are likely to deter entry and investment from innovative companies. Therefore, CCIA strongly believes that, before proposing any new regulation, the Australian Government should take two steps. First, it should carefully evaluate if existing antitrust and consumer protection provisions and tools are in fact appropriate to combat potentially anticompetitive conduct that affects consumers. New regulation may only be *necessary* to address particular, demonstrated harms. It is important to note that, even though in its DPSI Fifth Report the ACCC claimed that enforcement of existing laws may be too slow for digital markets, the ACCC has not brought any competition proceedings against any digital platform in Australia. Therefore, the explanations included in the DPSI Fifth Report to support this position are based on digital platform enforcement cases abroad. Even if the above claim regarding the speed of enforcement is true, *ex-ante* regulations will not solve this concern.

Second, the Treasury should consider whether the existing competition framework provides alternatives that could achieve the same objectives without the cost and complexity of a new regulatory regime. Indeed, as the Treasury itself recognizes in its Consultation Paper, "all policy alternatives need to be assessed, including voluntary or self-regulatory approaches."[10] CCIA

[7] *AUSFTA* Arts. 10.2 and 11.3.
[8] Consultation Paper, at 4.
[9] *Id.* at 6.
[10] *Id.*

considers that, even if it is demonstrated that the existing framework is not sufficient, there are alternatives to *ex-ante* codes and new regulations that should be taken into consideration. For example, the Japanese regime has adopted a co-regulatory approach focused on transparency over outright prohibitions. Before accepting the ACCC's recommendations, CCIA strongly recommends that the Treasury carefully evaluate the range of alternatives that already exist to determine which may be better suited to the Australian legal framework and economy.

Finally, the Consultation Paper states that "the recommendations of the Inquiry need to be examined within a broader context of Government policy affecting digital platforms." In fact, CCIA would like to stress that digital regulation must be a coordinated effort through multiple policy areas given the interconnectedness of competition, data privacy, consumer protection, intellectual property, and other policy areas. In addition to the impact from a competition enforcement and policy perspective, regulatory proposals in the digital economy may have significant consequences in areas such as data privacy, national security, cybersecurity, and intellectual property that could lead to negative implications for consumers and businesses. It is vitally important for the Treasury to analyze the impact any proposed regulation may have on these policy areas.

II. Specific Comments

1. Competition Recommendations

The ACCC has recommended that the Government develop a new competition framework to apply to large digital platforms that hold a "critical position in the Australian economy and that have the ability and incentive to harm competition."[11] These digital platforms would be subject to mandatory codes that regulate their actions on specific digital services, *ex ante*. According to the recommendations included in the ACCC's DPSI Fifth Report, these measures should be implemented through mandatory codes for digital platforms based on principles set out in legislation. Each code would address a single type of digital platform service and contain targeted obligations.

The ACCC's recommended competition measures seem to be more closely aligned with the UK Government's proposed approach (which is not yet finalized or implemented), which suggests applying a regulator-developed mandatory code of conduct to digital platforms with "Strategic Market Status." As in the UK, the ACCC proposes to define digital platforms based on a combination of quantitative and qualitative criteria. However, it also suggests that the proposed *ex-ante* codes should be developed in relation to a specific service, and a digital platform is designated with respect to that service.

[11] *Id.* at 9.

In this regard, it is crucial to analyze what criteria would be used to define "anticompetitive" conduct and what the proposed prohibitions – targeted at specific companies and services – would mean for the everyday consumer regarding many of the services they enjoy and find beneficial. Australian policymakers should think more broadly and consider what the *ex-ante* regulation's impact would be on consumers and small businesses that have benefited from these products and services. As such, it is important to distinguish between types of conduct that may be legitimate and pro-competitive and those that may be prohibited upfront by a "digital code." Before implementing an *ex-ante* regulation, it is very important to analyze its impact considering all the possible consequences that digital-specific regulation could bring for consumers, innovation, and the economy.

For example, the first conduct that the ACCC's DPSI Fifth Report identifies as potentially problematic is self-preferencing. However, the economic literature shows that self-preferencing is a practice that can produce significant procompetitive effects and benefit consumers in numerous ways.[12] Under a self-preferencing prohibition, it seems that the only clear-cut way for a platform to avoid legal scrutiny may be to stop selling its own products. However, this would significantly harm consumers and innovation.[13]

As another example, the ACCC's DPSI Fifth Report identifies increasing interoperability as an obligation to be considered for digital platforms. CCIA encourages interoperability as a way to increase "market contestability" and reduce barriers to entry, and believes that practices such as multi-homing and switching can help keep markets open to entry and expansion. However, forced data sharing poses risks to user privacy. Furthermore, this obligation can affect integrity and security, since tools and technologies to fight spam, scams, and other harmful activities would be compromised if third-party apps are not obligated to meet those same standards and allow such tools to work on their networks. In addition, there is the risk of disclosing businesses' confidential information and facilitating collusion. It may also create competitive distortions where different participants in a market use different business models. It is unclear whether such an obligation would require, for example, a digital platform-based retailer to provide data to a large, national department store or electronics retailer and whether that obligation would be reciprocal. Similarly, would a social messaging platform be required to provide data to telecommunications carriers that supply competing SMS services and would the digital platform have reciprocal rights? Last, and very important, forced data sharing could enable even more dramatic harms, such as theft or corruption of data, unauthorized cyber intrusion, widespread disinformation, and manipulation.

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[12] *See*, *e.g.,* Competition Policy International. B. Hoffman & G. Shinn, SELF-PREFERENCING AND ANTITRUST: HARMFUL SOLUTIONS FOR AN IMPROBABLE PROBLEM, available at https://www.clearygottlieb.com/-/media/files/cpi--hoffman--final-pdf.pdf; H. Hovenkamp, GATEKEEPER COMPETITION POLICY, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4347768.

[13] *Id.*

Given the complexity of online digital services and the potential unintended consequences derived from the proposed *ex-ante* regulation, CCIA recommends some alternatives to (a) implement guidance from a regulatory perspective regarding acceptable conduct; and/or (b) design regulations, if any are needed, at a *principle level* rather than targeting and scoping particular companies and imposing specific prohibitions in the proposed *ex-ante* codes. Rules-based or form-based approaches based on international examples where the long-term effects are yet to be seen risk significant unintended consequences. This is particularly true in light of the unique market circumstances in which competition complaints have arisen, and understanding that some commonly-referred assumptions may be misleading: multi-sided markets do not always "tip," network effects are not necessarily an entry-barrier, and leveraging into adjacent markets is not inherently problematic.[14] The relevant competition principles are well expressed and implemented in the existing provisions of Part IV of the Australian Competition and Consumer Act 2010.

Additionally, in response to the question raised in the Consultation Document, whether proposed *ex-ante* codes should be mandatory or voluntary, CCIA strongly supports that a *voluntary* implementation of the codes should be preferred rather than a mandatory one. The voluntary proposed *ex-ante* codes can encourage firms to implement best practices and measures that the firms themselves are in the best position to rapidly design and adopt, depending on the specific characteristics and dynamics of each one of their products and services.

In any case, given the significant consequences of the introduction of any *ex-ante* regulatory regime in Australia, CCIA encourages the Australian Government to extensively consult with relevant stakeholders before implementing any regulation. CCIA underscores the importance of the Government ensuring that there is a proper and sufficient consultation process following each one of the ACCC's recommendations.

Furthermore, as mentioned in the Consultation Paper, the ACCC has recommended that the appropriate regulator develop digital service-specific codes in consultation with the different policymakers, as well as the agencies responsible for enforcement. Based on the above, the Treasury has raised governance questions, such as whether the ACCC should be the agency that designates and then is also responsible for enforcement. The Consultation Paper observed that designation decisions could be made by the appropriate regulator or a government minister, and that "appropriate governance arrangements are critical to any new regulatory framework" adding that "at a high level, it is important that the responsibilities are allocated to the right entities,

[14] *See*, *e.g.,* OECD Network Effects and Efficiencies in Multi-sided Markets, available at https://one.oecd.org/document/DAF/COMP/WD(2017)40/FINAL/en/pdf; Oxera, How Platforms Create Value for Their Users: Implications for the Digital Markets Act (2021), available at https://www.oxera.com/wp-content/uploads/2021/05/How-platforms-create-value.pdf; Oxera, The Benefits of Online Platforms (2015), available at https://www.oxera.com/wp-content/uploads/2018/07/The-benefits-of-online-platforms-main-findings-October-2015.pdf.pdf; H. Hovenkamp, GATEKEEPER COMPETITION POLICY, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4347768

taking into account their expertise and accountabilities, and that the various aspects of the regulatory process are subject to appropriate oversight."[15] In this regard, CCIA supports the Treasury's position and believes that it is crucial for all the involved agencies to be coordinated to avoid unintended consequences derived from miscommunication among regulators. There might be concerns over actions by regulatory and enforcement agencies that do not clearly fall within the legitimate specified scope of the agency's authority. Also, it is important to evaluate possible conflicts among agencies to analyze all potential unintended consequences derived from the implementation of the *ex-ante* regulation before its implementation.

Finally, it is important to consider that any new *ex-ante* regulation should preserve due process protections, including judicial review and oversight. The Treasury has recognized the above and has identified the need for safeguards as a key question for its Consultation Paper.[16] CCIA agrees that Treasury needs to carefully consider how to design any regime properly with appropriate safeguards. CCIA encourages the Treasury to consider that the integrity of any new regime should give stakeholders the opportunity to provide comments regarding the specific regulation in all stages of the regulatory process and be secured by suitable procedural protections and review mechanisms. Any mandatory *ex-ante* codes or new regulations should include these procedural safeguards and clear procedures to protect due process and defense rights as well as access to merits and judicial review.

2. Consumer Recommendations

As part of the DPSI Fifth Report, the ACCC identified the potential for consumer harms from scams, fake reviews, and harmful apps on digital platforms. In the ACCC's view, the current consumer laws seem to have gaps that prevent some forms of "unfair practices" from being appropriately addressed.

Accepting that it is fundamental to combat illegal consumer harms attributed to digital platforms, it is also important to distinguish design practices that are clearly deceptive, unfair, and pose a significant risk of harm to consumers, and certain design practices including user control prompts and content recommendations that are frequently used to enhance and provide value to consumers. Additionally, it is important to consider that appropriate consumer-directed controls and communications may vary in the context of a particular service. In the fast-changing technology landscape, companies are in the best position to rapidly adapt to the latest changes and best practices in design interfaces.

Another important point that the Treasury should consider is that, although it is important to address these consumer issues, these are not digital platform-specific. On scams, CCIA strongly

[15] Consultation Paper, at 12.
[16] *Id.* at 13.

recommends working with all sectors instead of imposing regulations only on digital platforms, which are more often the victims than the perpetrators and therefore have every incentive to stop scams. Similarly, on dispute resolution, the approach should be to focus on different industries and the particular types of disputes and issues derived from that litigation, instead of designing a generic process on anything that may involve a digital platform.

Finally, we note that the Australian Government has implemented unfair contract terms reforms and that the Government is discussing an unfair practices prohibition. Therefore, before considering further consumer-focused legislative reforms, these two reforms should be given time to take effect and the Treasury can then assess which specific harms exist and design an appropriate response.

III. Key Principles to Guide Regulatory Proposals

Without adopting and complying with some basic principles, an *ex-ante* regulation would run the risk of harming consumers, competition, and innovation. Therefore, CCIA offers the following harmonizing principles that, in addition to the ones mentioned in *Part I*, the Australian Government should take into account to ensure that any proposed regulation is effective, proportionate, and does not lead to unintended consequences.

1. Clearly Identify Competition Policy Goals and Evaluate the Need for New Regulation

Identifying the desired outcomes of any new regulation in a clear and unambiguous manner is a key element in determining policy goals. As mentioned in the Australian Government Guide to Regulatory Impact Analysis[17] (Australian Regulatory Guide) "policy makers should clearly demonstrate a public policy problem necessitating Australian Government intervention, and should examine a range of genuine and viable options, including non-regulatory options, to address the problem."

With this in mind, from a competition policy perspective, it is important to first analyze to what extent any new regulation is directed towards the general purpose of competition – that is, promoting efficiency and consumer welfare. Second, it is crucial to determine whether the existing enforcement frameworks provide more proportionate ways to achieve the desired outcomes. Third, it would be important for regulators to identify if the objectives of the intended competition regulation also include non-competition goals, which potentially could be addressed through other industrial policy tools in a more efficient manner. It should also be acknowledged that economy-wide harms are better addressed by economy-wide reforms, rather than platform-specific regulation.

[17] *See* Australian Government Guide to Regulatory Impact Analysis (2020), *available at* https://oia.pmc.gov.au/resources#guidance-on-impact-analysis.

2. Protect Consumers and the Economy

Digital platforms provide Australian consumers and businesses tremendous benefits. Numerous studies have confirmed the many ways in which digital services and multi-sided business models reinforce and stimulate competition in the market.[18] Given the dynamic and innovative nature of digital markets, any new regulation for platforms needs to take into account wider potential implications for businesses and consumers. Therefore, we encourage the Treasury thoroughly assess whether the benefits of any proposed digital platform regulation would outweigh its potential negative impact on Australian consumers and the economy in general.

For Australia to attain its overarching goal of facilitating fair competition, investment, and innovation, any proposed regulation should not contradict the competition enforcement and policy framework and should continue to focus on enhancing consumer welfare, also taking into account the business models and ecosystems that create value for consumers and the economy. It is important that measures should ensure the continued promotion of customer choice and competition, which are two key components of economic growth and prosperity.

3. Protect Innovation

The digital economy is characterized by product, process, and service innovation. Innovation enhances consumer welfare not only in the form of price reduction but it also brings about improvement in the services that customers enjoy. An overly burdensome and heavy-handed regulation could significantly hinder innovation and harm economic growth in an economy. In practice, implementing an overly rigid *ex-ante* regulation would have enormous repercussions in terms of how the impacted companies would develop their products, as any regulation would bring about significant uncertainty and challenges regarding its implementation.

4. Preserve Business Freedom

Digital economy regulation should preserve business freedom and choice of pro-competitive business models. Consumers and end users exercise this right when they choose to accept the terms of dealing with platform operators. These private enterprises should continue to have the freedom to judge the fairness of their agreements.

5. Maintain Competitive Neutrality

[18] *See*, *e.g.,* Oxera, How Platforms Create Value for Their Users: Implications for the Digital Markets Act (2021), available at https://www.oxera.com/wp-content/uploads/2021/05/How-platforms-create-value.pdf ("Having an in-depth understanding of how platforms create value for their users and wider society is critical as policymakers seek to design regulatory interventions in these markets.").

Additionally, any proposed remedy should endeavor to maintain competitive neutrality.[19] Ex-ante regulations that blatantly favor or inhibit particular market participants risk delegitimizing both the regulation and its underlying policy goal and may lead to reduced investment and entry into Australian markets.

6. Prevent Distortive Dependencies

Experience shows that government-mandated access conditions lead to long-running government-led renegotiations of terms of service.[20] In dynamic and diverse digitally-enabled markets, imposing new and untested *ex-ante* access conditions risks tying future innovation to ongoing regulatory oversight.

7. Provide Legal Certainty and Predictability

Ex-ante regulation needs a workable and future-proof mechanism for balancing the interests of consumers, suppliers, and other ecosystem participants in an open market economy with free competition. To provide legal certainty, this centralized oversight of the digital economy should be based on a coherent, objective, and administrable governance and enforcement framework. Additionally, as stated in the Australian Regulatory Guide "the information upon which policymakers base their decisions must be published at the earliest opportunity."

8. Evidence-based Approach

CCIA encourages the Treasury to review the evidence and past experience and focus the proposed regulatory framework on the types of conduct that are recognized to be demonstrably harmful for competition, rather than seeking to address theoretical or speculative harm, which would risk overregulation to the detriment of innovation. CCIA's recommendation is for the ACCC and the Treasury to embrace a balanced, evidence-based approach to regulation.

CCIA also recommends that prior to proposing a new platform regulation, the Australian policymakers gather evidence through extensive consultation to confirm and justify that there is in fact a need for the rules to be changed or for additional rules to be imposed on digital platforms. If the need for new rules is identified and confirmed, those new rules should be proportional to the impact of potential harm. New rules should aim to promote competition and

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[19] "It is a fundamental principle of competition law and policy that firms should compete on the merits and should not benefit from undue advantages for example due to their ownership or nationality." OECD, Competitive Neutrality in Competition Policy, available at https://www.oecd.org/competition/competitive-neutrality.htm.

[20] For example, the European directive in the telecom sector was originally created with the aim to "reduce ex ante sector specific rules progressively as competition in the market develops." European Parliament and Council Directive on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) (March, 7 2002), available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002L0019&from=EN. Nearly 20 years later, subsequent EU directives governing the telecommunications sector are still working on that aim.

enable continuous innovation in the marketplace while preventing competitive harm and unfettered regulatory discretion.

9. Implement Procedural Protections to Involve Affected Companies and Relevant Policy Makers

As stated in the Australian Regulation Guide, "policy makers should consult in a genuine and timely way with affected businesses, community organisations and individuals, as well as other policy makers to avoid creating cumulative or overlapping regulatory burdens." Therefore, CCIA stresses the importance of the Australian Government ensuring that there is a sufficient consultation process and stakeholder engagement on the ACCC's recommendations, especially in areas in which the regulation can have significant economic impacts.

Additionally, if a new *ex-ante* regime is implemented, the integrity of the regime should also be secured by suitable procedural protections and review mechanisms. In particular, full merits review by a court should be available for decisions that have legal consequences for affected companies.

10. Analyze the Costs and Benefits of Implementing New Regulation

Finally, due to the significant economic impact of regulating digital platforms in Australia, it is crucial that the Treasury and the Government play an active role in engaging with relevant stakeholders and market players in the development of any *ex-ante* regulatory regime. Introducing new regulation for platforms is not costless, especially given the dynamic and innovative nature of digital markets. As a result, the ultimate objective of any new regime should be to promote competition and innovation.

To ensure that the cost of any new regime does not outweigh its benefits, the rules should allow conduct that is clearly pro-competitive or completely benign and recognize justifications for legitimate protections. Without appropriate cost and benefit analysis, an *ex-ante* regulatory regime may outlaw legitimate and pro-competitive forms of conduct, to the detriment of consumers and businesses that use these platforms. It is important to consider that, as established in the Australian Regulatory Guide "the policy option offering the greatest net benefit — regulatory or non-regulatory — should always be the recommended option."

CCIA is pleased to provide this input on the Consultation Paper and welcomes any questions from the Treasury.