Centre for Competition Law and Economics
(A non-profit initiative u/s 8, The Companies Act, 2013)

To

Director, Digital Competition Unit
Market Conduct and Digital Division
Treasury
Langton Cres
Parkes ACT 2600

13th February, 2025

Subject: Consultation on proposed Australian Digital Competition Law regime

Dear Sir/ Ma'am,

We write in reference to the public consultation held by the treasury on the proposed digital competition law regime applicable in Australia.

Please find attached our representation on the matter.

About the Centre

The Centre for Competition Law and Economics (CCLE) is a research organization working in the field of competition law and economics. The Centre publishes research reports, conducts training activities and assists litigating parties at competition fora across the country to advocate consistent interpretation of the Indian competition law. The Centre regularly collaborates with national law universities and other non-profit organizations to organize seminars, conferences and workshops for the relevant stakeholders to generate capacity in the said field based on mutual interest.

We would be happy to discuss more on the topic and will be looking forward to meeting you in person.

Best Regards,
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Consultation on proposed Australian Digital Competition Law regime

General comments

1. Competition in digital markets has posed renewed challenges for antitrust authorities across the globe. This challenge has ultimately led to a rethink of the sufficiency of the ex-post competition law when it comes to addressing anti-competitive conduct in a timely manner and promoting competition in the market.

2. Some of the key contravention decisions which have led to this afterthought include the Google Android order (EU), Google Shopping order (EU), Google AdSense order (EU), Facebook-WhatsApp merger order (EU), Facebook Marketplace order (EU), Apple decision (EU), Facebook data sharing order (Germany), Google AdTech order (France), Google search engine order (US), Google search engine order (India), Google Android order (India), Google pay order (India) and Facebook data sharing order (India) among many others. The bulk of these decisions revolved around 'nudging' and the Big Tech companies indulging in practices such as bundling/ tying, self-preferencing, cross-utilisation of data across subsidiaries and lack of interoperability along with conventional antitrust wrongs of one-sided terms & conditions and restrictive trade practices.

3. This propelled governments across the globe to promulgate rules which ultimately lead to the opening of the ecosystem, contestability and restoration of fair and level playing in the market. Some of the key measures include the European Union (EU) enacting the Digital Markets Act, Germany enacting the 10th amendment to the German Competition Act, Japan passing the Act on Promotion of Competition for Specified Smartphone Software and a host of other countries such as India and Australia currently under consultation to bring such a law.

Specific comments

4. It is highlighted that one of the primary concerns in digital markets is the ability of the platforms to 'nudge' the customers towards allied products and services once the user has logged in the platform. For instance, if a user logs in Google search engine, the company might show a prompt to use Google mailbox of Google maps on the top thereby creating a strong feedback loop and network effects. This nudging gets into a problem when data of the user is the final product of the company through

the sale of advertisements. Worse-off, while the first service is made available through implicit payment by access to user data, the second service may come at an upfront cost.

5. The broad obligations set out in the proposal paper are in line with the global best practices, i.e. a ban on self-preferencing, (anti-competitive) tying, facilitating switching, promoting interoperability and ensuring fair and transparent practices to the extent possible, and address the major competition concerns in digital markets. One other potential broad area is a ban on cross utilisation of data, i.e. obtaining user data for the provision of service 'X' and utilising the same to promote service 'Y'. Such a practice is detrimental to the consumer welfare and has been proscribed most recently by the Indian competition authority.

6. It is highlighted that specific obligations may be reverted only in a case where either certain facts, be it in the form of a market study or investigation report, are already available with the competition body, or in exceptional circumstances with a roll-back provision. The purpose of enacting a separate digital competition law is to ultimately cease the practices which have been already held to be anti-competitive and ensure that market correction happens on a timely basis. Any exercise on sector-specific obligations has to keep this in mind. Generally, the burden of proof for pro-competitive aspects of a business practice, once prohibited under the broad obligations, should shift to the designated entity.

7. As per the proposal paper, the government has currently identified three specific sectors, i.e. app marketplace, AdTech services and social media sector. It is highlighted that based on investigations conducted across the globe, it is already known that some of the major anti-competitive practices in app marketplace include non-listing of third-party apps, anti-steering provisions and levy of high commission fee. Similarly, in the AdTech services, some of the key concerns include lack of transparency, lack of interoperability and arranging the vertical stack in a manner so that advertisers and publishers are nudged and coerced to use Google's products in an economically inefficient manner. Similarly, when it comes to social media services, advertisement practices remain a challenge where Meta (Facebook) as a dominant entity derives an unfair advantage by clubbing user data obtained through WhatsApp and Instagram to provide better quality services to potential advertisers. All these factors need to be accounted for on a sector-specific basis, in addition to the existing ones, to promote competition in digital markets.

8. Since a sector-specific approach has been proposed, the competition authority may further look into 'general search' services. The same is in line with other jurisdictions

such as the US and India which have developed contravention orders against Google which is a dominant enterprise in the market. The authority should look into remedies such as isolating the usage of primary offering of a designated enterprise in the digital ecosystem and in certain cases ensuring sell-off of one part of the business here. The Centre has done elaborate work on AdTech and general search services and is willing to further assist the Commission on this.

Final comments

9. There is some consensus on the objective of digital competition law which is to ensure contestability, fairness and transparency in the market. The same is reflected in the Australian public policy.

10. It is important that timely course correction of the markets remain one of the foremost goals of any such regime. In such a case, any reliance on sector-specific obligations needs to be treated with caution.

11. Competition law operates in a larger set of regulations such as ban on discrimination & bias, data protection laws, consumer protection laws and IPR among others. The government ought to ensure that the regulatory stack works in tandem to ensure equitable outcomes for businesses and users in the economy.