Microsoft Pty Limited
1 Epping Road
North Ryde NSW 2113

www.microsoft.com

National Products and Services 13 20 58
ABN 29 002 589 460

[**PUBLIC VERSION – CONFIDENTIAL INFORMATION REDACTED**]

Microsoft

13 February 2019

Morag Bond and Kate Reader
Co-General Managers - Digital Platforms Inquiry
Australian Consumer and Competition Commission
175 Pitt Str.
Sydney NSW 2000

CONFIDENTIAL

Dear Ms. Bond and Ms. Reader,

We appreciate the opportunity afforded to the public by the Australian Competition and Consumer Commission (**ACCC**) to comment on the ACCC Digital Platforms Inquiry Preliminary Report (dated December 2018) (**preliminary report**). As the ACCC is aware, Microsoft is a developer and operator of digital platforms used by many Australians. Microsoft believes that digital platforms – as the preliminary report acknowledges – offer innovative and popular services to consumers that have revolutionized the way consumers communicate with each other, access news and information and interact with businesses. But, as the preliminary report also recognises, they raise a host of complex questions about their impact on society and give rise to a range of significant public policy issues. Microsoft supports the ACCC's work to explore the impact of digital platforms and consider what steps could be taken to ensure the continued supply of news and journalism, critical to a well-functioning democracy; to facilitate healthy and vibrant competition in news media and advertising; and to inform, empower, and protect consumers.

Overview

Microsoft wishes to address four key issues in relation to the ACCC's preliminary report:[1]

- *Privacy protections – multi-jurisdictional harmonisation:* Microsoft supports in principle Preliminary Recommendation 8 in relation to the strengthening of privacy protections. Microsoft considers that it is important to ensure harmonization with global privacy standards (such as the General Data Protection Regulation (**GDPR**)). Digital platforms are inherently global, and privacy obligations that are globally interoperable will drive better outcomes in the online environment while avoiding inefficiencies and the risk of creating a complex web of incompatible and competing standards.

---

[1] While not a focus of this submission, Microsoft also encourages the ACCC with respect to Preliminary Recommendations 6 and 7 (regarding defamation, copyright infringement and disinformation) to ensure that the legislation or regulations ultimately pursued and implemented take into account the different roles that different types of digital platforms play in the ecosystem, with a recognition that "one-size" fits all solutions may be inadequate and inappropriate. For example, one solution may work well for an online hosted community where the platform provider actively curates the community via a Code of Conduct or Terms of Service to deliver a narrowly focused experience, e.g., social media, an online video repository, or an online gaming platform. But that same solution may be ill-suited to an ad network that delivers content to a user or to a search engine which aims to empower a wide range of users to seek out and find generally available third-party information on the Internet. Microsoft will continue to stay engaged in the process as these recommendations progress to specific legislative and regulatory proposals and will provide additional feedback, if and when appropriate.

- *Unintended consequences of a blanket prohibition against setting a default internet browser and search engine:* Microsoft has concerns regarding Preliminary Recommendation 3, which recommends the blanket prohibition on setting a default internet browser and search engine. As currently framed, the preliminary recommendation may have the unintended consequence of further entrenching dominant companies by reason of their strong brand recognition, thereby raising barriers to entry and expansion of smaller rivals. Microsoft submits that it is appropriate, given the ACCC's preliminary findings, not to impose this prohibition against internet browsers and search engines without market power.

- *Merger law reform proposal requires additional guidance to avoid false positives:* Microsoft notes that the consideration of additional factors under s 50(3) of the Competition and Consumer Act 2010 (CCA) proposed by Preliminary Recommendation 1 raises unique challenges for mergers and acquisitions in the technology sector. Additional public consultation and guidance would help the ACCC avoid false positives that can chill innovation and discourage companies from taking beneficial risks.

- *Regulatory monitoring and oversight should avoid chilling competition from new entrants and smaller market participants*: Microsoft has concerns that Preliminary Recommendations 4 and 5 as currently framed may create unintended consequences for smaller digital platforms, serving to further entrench dominant digital platforms. Further, Microsoft encourages the ACCC to recognize the importance of ensuring such oversight properly balances the need to achieve the ACCC's goals of transparency and accountability, while avoiding the risk of chilling competition.

Privacy protections

Microsoft welcomes the ACCC's call to better enable consumers to make informed decisions and have greater control over privacy and the collection of personal information. Such information and control is critical not only for the protection of consumers vis a vis digital platforms, but also for the protection of institutions and global competitiveness in this age of digital transformation, especially in emerging technologies such as artificial intelligence (AI). Preliminary Recommendation 8 identifies specific areas for legislation, including notice and consent requirements, the erasure of personal information, penalties for breach and more. In respect of each topic, Microsoft encourages the ACCC to ensure that the changes implemented build upon global privacy standards, namely the GDPR, and remain interoperable with such standards.

Microsoft believes that strong privacy laws that are consistent and interoperable with global standards will improve the viability of the online ecosystem. Digital platforms are inherently global, which necessarily challenges traditional notions of territorial jurisdiction. As a result, unilateral actions to regulate privacy risk unavoidable conflicts of laws and balkanization of the internet. In Microsoft's view, a common legal standard for digital platforms will drive better and more efficient outcomes for competition and social welfare. We believe that GDPR is a good baseline for that standard and that global privacy laws, at every level of government, should be interoperable with and build upon that standard.

And, to the extent that such privacy laws extend beyond digital platforms and encompass all online services, interoperability with global standards benefits Australian businesses. Microsoft has made significant investments to develop systems that enable our customers to cost-effectively comply with current global privacy obligations at scale. When new laws are interoperable with global standards, our

base cloud services offerings can enable compliance with the new laws, without customers needing to purchase a separate solution. This approach enables our customers to meet their privacy obligations, while concentrating their investments on innovation, rather than compliance. This is a particular efficiency for our small and mid-size customers that would not be able to independently achieve the same level of compliance and therefore might otherwise be shut out of certain markets, or, worse, provide non-compliant services in certain markets. Accordingly, increased complexity or inconsistency between global standards may have the unintended consequence of raising barriers to entry for small to mid-size companies in Australia, limiting significant potential competition.

Blanket Prohibition against Setting a Default Internet Browser and Search Engine

Preliminary Recommendation 3 recommends that suppliers of operating systems be required to provide users with options for an internet browser (rather than providing a default browser) and suppliers of internet browsers be required to provide users with options for search engines (rather than providing a default search engine). Microsoft understands from the preliminary report that this recommendation is targeted at reducing the "default bias" that ACCC sees as contributing to the maintenance of a dominant browser's substantial market power in the supply of search services.[2] By reducing customer inertia, the ACCC seeks to reduce the barriers to entry and expansion by smaller rivals in the search services market.

Microsoft submits that in order to achieve that aim, without creating an unintended consequence of raising barriers to entry and expansion or further entrenching substantial market power, Preliminary Recommendation 3 should not be applied to non-dominant internet browsers and search engines:

- *Preliminary Recommendation 3 may prevent or hinder competition from smaller search services providers:* Microsoft appreciates the importance of ensuring that users understand the options available to them and have the ability to choose the software that they want to use. However, we believe that the proposed approach – eliminating the ability of any suppliers to become the default internet browser or search engine – sweeps too broadly. As drafted, it will eliminate an important means for smaller competitors to gain a foothold to attract new users, depressing rather than increasing competition.

  When users have difficulties assessing differences between software, they tend to rely on brand to make choices. As a result, distribution deals – in which a device manufacturer agrees to pre-install software and, where relevant, set it as the default – is a common practice in the IT industry. Such deals provide suppliers with the opportunity to get lesser-known software in front of users.

  [Confidential]

  [Confidential]

  In 2009, the European Commission explored how it might increase internet browser competition vis a vis the then-dominant browser: Internet Explorer. It opted to require the display of an internet browser choice screen to users only when Internet Explorer had been set as the default. If Firefox, Opera, or some other non-dominant browser had been set as the default, the choice screen would not appear, and the default would be preserved. This approach enabled smaller

---

[2] Preliminary Report at pg. 65.

players to compete for distribution and promotion by device manufacturers while ensuring that users were presented with an additional choice if the dominant offering were already the default.

- *Preliminary Recommendation 3 may serve to entrench the market power of a dominant provider:* prohibiting the ability of suppliers to become the default setting for non-dominant internet browsers and search engines, may serve to further support Google's substantial market power. This is because, as noted above, given a choice, users will tend to default to the most well-known brand.

User interaction with the IE choice screen in Europe confirmed that users selected the most recognized brand and not lesser known solutions. In 2010, when the browser choice screen first rolled out across Europe, it was viewed by users 157 million times. Roughly [confidential] million users (or [confidential] of the total) simply dismissed the set of choices to keep Internet Explorer as the default. Of the [confidential] million users who made an affirmative choice, another [confidential] million (or [confidential] percent of all users) chose Internet Explorer. Thus, when presented with the choice, roughly [confidential] percent of users chose Internet Explorer. [confidential] chose Chrome and another [confidential] chose Firefox. But, importantly, smaller lesser known offerings were [confidential] selected. For example, SlimBrowser and Flock were selected [confidential] percent of the time and GreenBrowser was selected just [confidential] percent of the time.

The recent experience in Russia also bears out the same conclusion that well recognized and dominant offerings are the primary beneficiaries when a choice screen is shown. In August of 2017, Google began rolling out a choice screen in Russia for search settings on Android.[3] We understand that the screen offers Google Search, Yandex Search and the smaller Mail.Ru search. As of August of 2017 when the decision was first implemented, Google's search share on mobile devices in Russia was 63.61 percent, Yandex was 34.56 percent and Mail.Ru was 0.48 percent.[4] Over the last nearly year and a half, Mail.Ru has seen no growth. The choice screen has only served to switch share between the two dominant providers. Yandex passed Google in November 2018, growing to 52.03 percent while Google has fallen to 46.55 percent. Mail.ru's share was essentially unchanged at 0.61 percent usage.[5]

Furthermore, it is also worth noting that the current proposal would harm not just smaller internet browsers and search engines like Microsoft Edge and Bing, but it will also undermine the business models for independent internet browser providers. Many internet browser suppliers offer the browser for free but monetize by selling the search engine default setting. For example, the "lion's share of Mozilla's revenue . . . comes from deals that send [its] queries in Firefox to search engines such as Google, Yandex and Baidu."[6] If internet browser suppliers are no longer able to sell default settings to those search engines, Mozilla can no longer make money on its browser. This change risks the business model and ultimately the viability of independent internet

---

[3] http://fortune.com/2017/08/07/google-search-russian-android/
[4] http://gs.statcounter.com/search-engine-market-share/mobile/russian-federation/2017
[5] http://gs.statcounter.com/search-engine-market-share/mobile/russian-federation/2018
[6] https://www.cnet.com/news/google-firefox-search-deal-gives-mozilla-more-money-to-push-privacy/

browsers. Indeed, if other geographies adopt the proposal as the preliminary report proposes, Firefox would likely fail as a standalone internet browser option.

For these reasons, Microsoft believes it is critical to allow non-dominant competitors to negotiate distribution as the default internet browser and search engine on devices without choice screen interference.

If despite the negative impact on competition, ACCC believes non-dominant suppliers of internet browsers and search engines should not be permitted to establish initial default settings, Microsoft believes such a solution should only be offered on devices for which there is a proven problem preventing users from choosing software other than the initial default. As explained above, this is not an issue on Windows computers. Microsoft Edge and Bing are set as the defaults on most Windows-based laptops and desktops, yet they account for less than [confidential] percent of usage in Australia on such devices. Given that users of such devices have no problem changing internet browsers and search engines, requiring suppliers of operating systems and internet browsers to offer users options on those devices makes little sense, even if it might be appropriate on other devices.

Merger Laws and Processes

With respect to the ACCC's review of mergers and acquisitions in Australia, Preliminary Recommendation 1 proposes including in the list of mandatory factors to be taken into account under s 50(3) of the CCA: (1) whether the acquisition will remove a *potential* competitor and (2) the amount and nature of data to which the acquiror will gain access. Microsoft submits that while these amendments will not substantively change the matters which the ACCC can take into account in assessing the merger, applying the proposed factors to mergers and acquisitions in the technology sector are fraught with complexity.

- What constitutes an acquisition of a "potential competitor" is open to broad interpretation, increasing the danger of false positives and a corresponding reduction in innovation. An analysis of "potential" competition can quickly become speculative and cause hypothetical future considerations to outweigh substantiated efficiencies. It is difficult to predict with certainty whether the acquisition of a nascent competitor is anti-competitive because it might reduce pressure on incumbents or pro-competitive because it allows the combined entity to achieve new efficiencies and bring new benefits and offerings to consumers. Indeed, the technology industry is littered with failures, proving that it is exceedingly difficult – even for venture capitalists, business executives and engineers steeped in the industry – to predict with accuracy what companies will ultimately succeed and exert a competitive restraint in the marketplace.

- False positives – blocking acquisitions that are pro-competitive – can also impede entrepreneurial exit and undermine investment in risky but innovative new technologies. Exiting an investment is a critical event for start-ups built by serial entrepreneurs and venture capital investors. Indeed, exit frees previously invested capital that can be reinvested to fuel new innovation. The tech start-up pipeline is driven in large part by the need for an "exit" for founders and financial backers, and yet the IPOs are increasingly difficult to launch. This means that most often larger companies are the ones to help founders realize the vision and potential of the technology. Overenforcement could undercut incentives to take risks, stall this pipeline, and chill disruptive innovation.

- Finally, gaining access to additional data – even if sizeable and valuable – is not necessarily problematic. From a competition perspective, data are simply a class of assets that vary in their competitive significance. Digital products and services generate so much data at such little cost that data has become ubiquitous. Data are also non-exclusive and non-rivalrous, meaning that data use by one firm does not impede or devalue its use by others. The value of data in most circumstances is not durable over time; data frequently become stale. Moreover, because machine learning and AI services require a wide variety of data, it is rarely the case that a competitor would have exclusive control over all sources of necessary data and any substitutes.[7] Therefore, while a competitor might theoretically obtain control over data essential to competition in a relevant market, the nature of data makes this a remote possibility, which existing analytical tools can detect and address. Additional guidance is necessary to enable competition regulators to separate cases requiring closer scrutiny from the bulk of cases where data control and usage is economically beneficial, drives innovation and is competitively benign.

Microsoft submits that given the complexities, the ACCC would benefit from a further round of public consultation which is specifically focused on these merger issues.

Regulatory Monitoring and Oversight.

Several of the proposed recommendations call for greater regulatory monitoring and oversight of the advertising and related business of and the ranking of news and journalistic content by "large digital platforms." The harm sought to be addressed by the ACCC is that in circumstances where a digital platform (e.g., Facebook and Google) have market power, and their presence across multiple levels of the supply chain, they have an ability and incentive to affect competition across various markets more broadly.[8]

In light of the ACCC's findings, the monitoring and oversight can serve a valuable function to promote transparency and accountability. However, Microsoft submits that it is necessary to avoid unintended consequences for smaller operators of digital platforms (by preventing or hindering their ability to compete by raising costs). For example, the threshold at which it applies should be more robust to avoid sweeping in digital platforms without market power. Any digital platform which generates more than AU $100 million per annum revenue in Australia is unlikely to exhibit market power as the total online advertising expenditure in Australia alone was $8 billion in 2017 (significantly greater than $100 million).[9] The consequence is that such a threshold may add significant costs to smaller digital platforms, like LinkedIn, Bing or MSN, with an insignificant share of the online advertising business and no power to impose unfair terms or conditions or foreclose competition. The burden of compliance with the requirements of oversight and requests for information that it may generate could easily raise the costs of doing business to unprofitable levels and hamper the ability of smaller digital platforms to compete.

---

[7] While machine learning techniques generally rely upon large data sets for training algorithms, the utility of a machine learning model depends on its ability to deliver predictive insights that are not obvious from any single source of data. As such, it is the multi-dimensionality of the data inputs and the signals that they provide that matters; simply having more of the same data is not enough. Valuable insights are gained from assembling and interrogating heterogeneous sets of data across multiple categories with sophisticated analytics to deliver unique insights and better explanatory power. It is rare that a single entity will control all relevant datasets.

[8] Preliminary report at pg, 10.

[9] Preliminary report at pg, 34.

To better target monitoring and oversight, the ACCC could consider, instead, a market share threshold which excluded from significant regulatory requirements market participants with limited presence.

Additionally, to the extent that such monitoring or oversight depends on a review and evaluation of the algorithms used by a digital platform, there ought to be realistic expectations of what that review or evaluations might accomplish. Achieving useful explanations of the behavior of AI systems and their components – what is often referred to as "intelligibility"[10] – can be quite complex and highly dependent on a host of variables, precluding anything resembling a "one-size-fits-all" approach. Intelligibility is an area of intense, cutting-edge research. While Microsoft recognizes the need for accountability for an algorithm, publishing the algorithms underlying AI systems and digital platforms will rarely provide meaningful transparency. And it could have unintended adverse consequences on the integrity of competition in associated markets. With the latest (and often most promising) AI and machine learning techniques, such as deep neural networks, there typically is no algorithmic output that would help people understand the subtle patterns that systems find. And disclosing nothing more than granular code underlying a complex AI system or digital platform will not ensure that that system is operating fairly or predictably.

Microsoft is working with the Partnership on AI and other organizations to develop best practices for enabling meaningful transparency of AI systems without undermining incentives to innovate. This includes a variety of methods, such as an approach to determine if it's possible to use an algorithm or model that is easier to understand in place of one that is more complex and difficult to explain. This is an area that will require further research to understand how machine learning models work and to develop new techniques that provide more meaningful transparency.

Confidentiality

Please also be aware that this response contains Microsoft business secrets and confidential information. Microsoft claims confidentiality pursuant to s 95ZK of the CCA in respect of this letter. Disclosure of the contents referred to in this letter could cause significant harm to Microsoft's competitive position.

We would welcome the opportunity to discuss our observations and comments in greater detail directly with the ACCC at the appropriate time. In the interim, please let us know if you have any questions.

Sincerely,

Tom Daemen
Director, Corporate, External, and Legal Affairs
Microsoft Australia and New Zealand

---

[10] Microsoft and others have described this goal of making AI understandable to humans as fundamental to "transparency." In policy circles, transparency represents not only the idea that people should be able to understand and monitor how AI systems behave, but also that those who use AI systems should be honest and forthcoming about when, why, and how they choose to deploy them. In AI and machine learning circles, the term "intelligibility," often used interchangeably with the term "interpretability," refers to the concept of making the behavior of AI systems, or components of systems, understandable to humans.