

Submission on Digital Platforms Inquiry

By: Simon Thompson
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Introduction

I am an Australian Lawyer and England and Wales qualified Solicitor. I have worked at technology and internet focused startups in London and Berlin.

I am currently completing a Masters of E.U and transnational Information Technology and Intellectual Property law at University of Göttingen, Germany. I am completing a thesis on the effective regulation of data centric online platforms.

I have provided submissions to the relevant questions that were provided in the Digital Platforms Inquiry Issues Paper dated 26 February 2018. The submissions have been divided into the relevant questions as set out in the Digital Platforms Inquiry Issues Paper dated 26 February 2018. The questions have been shortened and paraphrased for ease of formatting. The questions numbers remain for ease of reference and the relevant submission is below each question.

1.1. The relevant platforms

The relevant platforms are any digital platform that allows for the distribution of content or advertising via digital means. This would begin with: Google, Facebook, Instagram, Twitter, Snapchat, Apple News, and LinkedIn. It should also include 'dating app' digital platforms such as Tinder and Bumble, music digital platforms such as Pandora and Spotify, video digital platforms such as Youtube and Vimeo, 'messaging app' digital platforms such as WhatsApp, Telegram, iMessage, because these digital platforms either already distribute or have the ability to distribute targeted advertising in the future. Other forms of digital platforms which are not directly involved in the delivery of advertising or media should also be included, such as Apple Pay.

1.2. Consideration of current non news digital platforms

The Inquiry should consider digital platforms that do not currently provide access to news and journalistic content. It is highly likely that instant messaging applications that do not currently distribute advertising will either be purchased by a digital platform that does distribute advertising (this has already occurred with the Facebook/WhatsApp merger). When an instant messaging app is acquired by a digital platform that distributes advertising, the digital platform that distributes advertising will either incorporate the data that is held by the instant messaging app (this has happened in the Facebook / WhatsApp merger) or the messaging app will begin to be used as a platform for the distribution of advertising.

1.3. What 'news and journalistic content' is relevant

All News and Journalistic content is relevant. Since the demise of traditional paid newspapers to deliver news and journalistic content, news and journalistic content has steadily decreased in quality to a point where it is merely content that is generated to drive advertising revenues. Not only is there a problem with the decrease in quality of journalism, there is also a problem of paid advertorials posing as news. Possibly the greatest problem is is 'fake news' where unverified and factually incorrect news is widely distributed.

1.4. Location of production or location supply of content

The enquiry should focus on news and journalist content supplied to consumers in Australia. In todays world most news and journalistic content would not actually be produced in Australia.

1.5. Metrics for quality

Factual accuracy, impartiality and in depth analysis. These are not easily quantifiable and quantification cannot be automated. The producers of content that provide accurate, impartial and in depth analysis, the better.

3.2. Market definition

It is well known that the definition of a market for digital platforms is fraught with difficulty.^{1,2}

Traditionally markets have been defined by demand or supply side substitutability by using the Small but Significant and Non-Transitory Increase in Price ('SSNIP') test³ However, this test fails when applied to digital platforms for the following reasons:

1. Consumers of the digital platforms do not pay for access to the services so they are not affected by any Small but Significant and Non-Transitory Increase in Price.
2. For many digital platforms consumers cannot effectively multihome. This means that a consumer cannot easily extract their data and take that data to another competing digital platform. So even if consumers were charged a fee for using a digital platform and that fee was increased theoretically by 5-10%, the effect of this increase would be muted by the lack of ability for the consumer to multihome and use another competitor in the same market. The lack of ability for consumers to multihome results in digital platforms being a 'Competitive Bottleneck'.⁴
3. When applied to Supply-side substitution, in some cases the digital platforms are the only means for the distribution of advertising so they are also a 'Competitive Bottleneck'.

It has been proposed that the SSNIP test can be adopted for two sided markets. A 'SSNDQ' (small but significant decrease in quality)⁵ has been proposed and applied in cases involving digital platforms as an alternative, where instead of a price increase, a decrease in quality of the platform is used. This method may be acceptable depending on the type of platform, however it will not be acceptable as a blanket measure.

In recent working papers from the German Competition Authority (the Bundeskartellamt) it has been posited that in situations where a market platform with a 'Competitive Bottleneck' has a large amount of market power it might be reasonable to define a market that comprises only that platform.⁶

For digital platforms there is no 'one size fits all method' that can be used for market definition. Each type of digital platform will require a bespoke method and analysis and traditional models will require adjustment in order to properly define the relevant market.

¹ Evelin Hlina, *Dominant Undertakings In The Digital Era: A Call For Evolution Of The Competition Policy Towards Article 102 TFEU?*, p 137. Available at: <http://www.icc.qmul.ac.uk/media/icc/gar/gar2016/4.Evelin-Hlina-Essay-GAR-2016.pdf>

² David S. Evans Richard Schmalensee, *The Antitrust Analysis Of Multi-Sided Platform Businesses Working Paper 18783* p.21-23. Available at: <http://www.nber.org/papers/w18783>

³ *Queensland Cooperative Milling Association Ltd/Defiance Holdings Ltd*, re proposed merger with Barnes Milling Ltd (1976) ATPR 40-012, 17248.

⁴ Armstrong, M., *Competition in two sided markets*, RAND Journal of Economics Vol. 37, No. 3, Autumn 2006 pp. 668–691, p. 677.

⁵ *Beijing Qihu Technology Co., Ltd. v. Tencent Technology (Shenzhen) Company Limited and Shenzhen Tencent Computer Systems Company Limited*, Adjudication Committee of the Supreme People's Court, China. para. 2. English translation available at: <https://cgc.law.stanford.edu/wp-content/uploads/sites/2/2017/04/GC78-ENGLISH.pdf>

⁶ Wismer, S., Rasek, A. *Market definition in multi-sided markets - Hearing on Re-thinking the use of traditional antitrust enforcement tools in multi-sided markets*. 21-23 June 2017: http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/OECD_2017_Competition_Committee_multi-sided%20markets.pdf?__blob=publicationFile&v=3

3.3. Assessment of Market Power

Market power can be assessed using traditional means, however giving more weight to the specifics of platform and network markets in the digital economy,⁷ these are the relevance of direct and indirect network effects, the economies of scale, the prevailing types of use on the opposite market side (single-homing/multi-homing) and the degree of differentiation the access to data and the innovation potential of digital markets.

3.4. Market power

(a) Realistic alternatives

There are no realistic alternatives to digital platforms. This is true both within the market for specific established digital platforms and when one searches for alternatives outside of the market for digital platforms. Digital platforms are a unique and recent invention. They have completely changed the way that consumers communicate, use internet services and trade in their daily lives. Traditional advertising or media distribution techniques cannot compete for the market with digital platforms because of their fundamental differences. Because there are no real alternatives to digital platforms, there is no way to effectively constrain their behaviour,

(b) Switching platforms and growth

At present in Australia it is generally not easy to switch between digital platforms because there is no legislative mechanism in place to enforce data portability and therefore facilitate multihoming. Article 20 of the EU General Data Protection Regulations requires that data controllers (in this case digital platform operators) give personal data to the data subjects in a structured, commonly used and machine readable format with the right to transmit that data to another data controller without hindrance. When Australia recently amended the Privacy Act it did not include provisions to easily facilitate data portability. If Australia had provisions that facilitated data portability it would allow people to multihome, avoiding lock in to a specific digital platform and would also level the playing field allowing other digital platforms to develop.

(c) Switching difficulties

Digital platforms generally do not allow users to extract their data in a machine readable format that would allow users to that that data and upload it into a new digital platform. This locks users into using a specific digital platform and is one reason why we have a handful of 'Mega sized' digital platforms with no real alternatives or competitors.

(d) User numbers

Jean-Charles Rochet and Jean Tirole first characterised and studied the economics of two sided markets.⁸ In short, for a mobile platform to succeed it needs users and those users need a counterpart such as sellers (Ebay, Amazon), Drivers (Uber), Dates (Tinder, Bumble), other users (Facebook, Snapchat, Instagram, WhatsApp). Some digital platforms require additional parties such as merchant terminals and banks (Apple Pay, Google Pay, Samsung Pay). The thing common to all of these platforms is that they require a critical mass of users and counterparts before they are successful, otherwise no one will use them. It is this network effect that makes digital platforms so valuable and so unique. This does not mean that it is only viable for one or two digital platforms to provide a similar service at the same time. It only means that a handful of

⁷ Working Paper, 'The Market Power of Platforms and Networks' June 2016, available at http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Zusammenfassung.pdf;jsessionid=61C7014D36E4609812B02A5A874C47A8.2_cid362?__blob=publicationFile&v=4

⁸ Jean-Charles Rochet and Jean Tirole, "Platform Competition in Two-Sided Markets," Journal of the European Economic Association 1, no. 4 (2003): 990-1209.

platforms have been successful in generating the scale required to reach the critical mass that means that a prosperous digital platform can operate. If multihoming was possible, and people could take their data and more easily switch between digital platforms, it would mean that more competing digital platforms would exist because more digital platforms could reach the critical mass required to be successful.

(e) Difficulties in competing

The main difficulties faced by providers in establishing a new competing platform is getting users to switch from the platform that they currently use to the new competent platform. If multihoming was easier or facilitated by legislation similar to Article 20 of the EU General Data Protection Regulations, this would allow more competing digital platforms to enter the market and compete both for the market and within the market for digital platforms.

There are also technological barriers to entry for a digital platform. A good example of this is Apple Pay and 'Beem', the competitor mobile digital wallet which (according to media reports)⁹ is being developed by 3 large Australian banks as a competitor to Apple Pay. However, after Apple Pay has been in existence for a number of years, 'Beem' is still not operational or available for iPhone owning consumers to use. It seems that some of Australia's largest banks lack the resources to quickly build an Application or purchase a prebuilt 'white label' application that makes use of QR code scanning technology to facilitate payments.

(f) Behaviours that indicate the exercise of market power.

Initial research reveals many instances where digital platforms have engaged in behaviour that indicate an exercise of market power. A non exhaustive list is below:

1. Facebook

The German competition authority (The Bundeskartellamt) has already assumed that Facebook is dominant on the German market for social networks. As they are the dominant social network provider, they are in a position in that market where consumers that use them must accept their terms of service. Consumers are not given any choice and therefore cannot consent to the terms on which Facebook collects and distributes users personal data. Websites that make use of a Facebook 'Like' button transmit data from the users browsers back to Facebook and then assimilates this data with the users Facebook account. This currently occurs even if the user is not logged into Facebook when they visit the website with the 'Like' button. Facebook is also assimilating users data from WhatsApp and Instagram with users Facebook profiles.

Facebook makes users grant Facebook extensive permission to use their personal data in order to use the platform. In doing this Facebook use exploitative business terms¹⁰ and this in itself is an abuse of market power or a dominant market position.

2. Apple Pay

Apple Pay is the only digital platform that allows financial institutions to assess single-homed iPhone using consumers (41.2% of the Australian smartphone market).¹¹ This results in Apple Pay having large amounts of market power. They can dictate terms to financial institutions, set arbitrary fees and due to the lock-in effect (for an iPhone user to multi home and make use of an alternative payment platform they would need to purchase a new smartphone) there is no real possibility for multihoming.

⁹ <https://www.commbank.com.au/guidance/newsroom/next-generation-mobile-payments-and-wallets-201710.html>

¹⁰ http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/2017/Hintergrundpapier_Facebook.pdf?__blob=publicationFile&v=6

¹¹ Applicants Submission dated 26 July 2016, available at: Available at: <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/bendigo-and-adelaide-bank-ors-authorisation-a91546-a91547> p. 6

3. Twitter

PeopleBrowsr, Inc. et al. v. Twitter, Inc.¹² In this case Twitter exercised its dominant position and large amount of market power and refused PeopleBrowser continued access to the 'Twitter Firehose', a unlimited grant of access to all tweets on twitter. PeopleBrowser was a firm that analysed Twitter Data and monetised this. The case was settled on terms where Twitter granted access to the 'Firehose' for a limited amount of time.

As seen from above, the types of users that are at risk are:

1. Consumers, due to breaches of their personal privacy as is occurring in the Facebook case above.
2. Businesses when a digital platform forecloses on their market as Twitter tried to do in the PeopleBrowsr, Inc. et al. v. Twitter, Inc. case above.
3. Large corporate users such as major banks being effectively blocked from access to 41.2% of the Australian smartphone digital platform payments market in the case of Apple Pay.

3.5. Behaviour that excludes competitors or potential competitors

Digital platforms routinely engage in contact that exclude competitors. Facebook has made 61 acquisitions since 2005.¹³ Google has made over 200 acquisitions since 2001.¹⁴

It can be seen from the PeopleBrowsr, Inc. Et al. v. Twitter, Inc.¹⁵ that Twitter originally negotiated terms with PeopleBrowser for access to the 'Twitter Firehose' and then effectively revoked this access when Twitter decided to enter the business of data analytics. It was an attempt by Twitter to exclude their competitor who was already establish in this industry and completely reliant on Twitter for its vital input - Twitter data.

It can be seen from the Facebook / WhatsApp merger that Facebook acquired a competing social network, WhatsApp and they paid 19 billion dollars for it.

3.18. Impacts of digital platforms, causation and permanency

Digital Lock in and lack of multihoming

Consumers are being locked into digital platforms due to no regulatory requirement for data portability. Because digital platforms are not required to provide data portability, consumers cannot multihome and therefore there is a lack of competition amongst digital platforms.

Erosion of privacy and intellectual property rights

Consumers are also having their privacy eroded by low privacy standards for personal data. Consumers are generally not informed about data privacy and do not read, engage with or understand the terms and conditions that are attached to digital platforms. For example Facebook users must grant Facebook a transferable, sub licensable, royalty fee worldwide IP license to to all content.¹⁶

This term is materially misleading because Facebook states that all users 'own' their content, but then Facebook grants themselves a transferable, sub licensable, royalty fee worldwide license to

¹² *PeopleBrowsr, Inc. Et al. v. Twitter, Inc.*, No. C-12-6120 EMC, 2013 WL 843032 (N.D. Cal. March 6, 2013)

¹³ https://en.wikipedia.org/wiki/List_of_mergers_and_acquisitions_by_Facebook

¹⁴ https://en.wikipedia.org/wiki/List_of_mergers_and_acquisitions_by_Alphabet

¹⁵ *PeopleBrowsr, Inc. Et al. v. Twitter, Inc.*, No. C-12-6120 EMC, 2013 WL 843032 (N.D. Cal. March 6, 2013)

¹⁶ ¹⁶ <https://www.facebook.com/legal/terms/update>

use all content that a user posts. This grants Facebook effective control over the users content. How is a lay person supposed to understand that when they grant Facebook a licence on these terms, they cede all control of their content to Facebook?

3.19. Advantages and disadvantages of digital platforms

Advantages

Consumer Advantages include the provision of innovative internet services such as social media, google internet search, google docs, gmail and calendar for free.

Disadvantages

Consumers are unknowingly paying for these 'free' internet and social media services by giving away their private data, intellectual property rights and allowing digital platforms to routinely conduct surveillance on them.

3.20. Terms and conditions of digital platforms compared to other media sources

News and Journalistic content obtained from traditional media outlets such as newspapers, radio and television are provided on basic, understandable and familiar terms and conditions. At its most complicated it is a simple contract of sale. The consumer provides the money, they purchase a hard copy of the newspaper. For radio and television users, the user freely chooses the source.

When consumers use digital platforms they are subjected to terms of service and privacy policies which they, for the most part, are not aware of, do not engage with and do not understand.

Take Facebook's privacy policy,¹⁷ which contains a clause which allows Facebook to harvest users information from third party websites that contain a Facebook 'Like' button, even when the user does not use the Facebook 'Like' button on the third party website. The relevant part of Facebooks Privacy policy is extracted below:

*"Information from websites and apps that use our Services.
We collect information when you visit or use third-party websites and apps that use our Services (like when they offer our Like button or Facebook Log In or use our measurement and advertising services). This includes information about the websites and apps you visit, your use of our Services on those websites and apps, as well as information the developer or publisher of the app or website provides to you or us."*

Facebook also stores data on servers located in the US which are subject to routine surveillance by the National Security Agency as part of it's PRISM mass surveillance program.¹⁸ Generally, Australian consumers are not aware that by accessing their news and media in Australia via Facebook, they are being subjected to a widespread surveillance program conducted in the United States by the United States National Security Agency.

Users are also forced to grant a broad Intellectual Property licence to Facebook for the worldwide use of all of their content.¹⁹ The relevant part of Facebook's terms is extracted below:

¹⁷ Available at <https://www.facebook.com/about/privacy>

¹⁸ Details available at: https://www.washingtonpost.com/wp-srv/special/politics/prism-collection-documents/?tid=a_mcctx

¹⁹ <https://www.facebook.com/legal/terms/update>

“You own all of the content and information you post on Facebook, and you can control how it is shared through your privacy and application settings. In addition: For content that is covered by intellectual property rights, like photos and videos (IP content), you specifically give us the following permission, subject to your privacy and application settings: you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook (IP License). This IP License ends when you delete your IP content or your account unless your content has been shared with others, and they have not deleted it.”

3.21. Awareness of terms and value of data

Generally consumers are not aware of, do not engage with and do not understand the privacy policies that digital platforms use. One could say that this is of no consequence because digital platforms currently have so much market power that they can unilaterally dictate unfair terms to consumers and they leave consumers no ability to choose the terms on which they use digital platforms.

This could easily be rectified by making digital platforms offer real and meaningful alternatives to users. For example, users could be given a limited service or a service for a fee where the consumer isn't required to divulge and surrender control of their personal information or intellectual property to the digital platform. The same digital platform could also offer a full service or a free service where consumers could, with their informed consent, freely divulge as much personal information as they choose and surrender all intellectual property rights to the digital platform.

3.22. Price of media content

The price of traditional media has reduced and as a result so has its quality. The price of media content supplied by digital platforms is provided in exchange for the consumers personal data. As such the price of media content supplied by digital platforms is not free but at present personal data does not have a monetary value because people freely give it away.

3.23. Awareness and informed consent for the collection and use of data

Data is the effective price paid by consumers for the use of digital platforms.

Consumers are generally not aware of and do not provide informed consent for the collection and use of their data.

Facebook's Privacy policy²⁰ extendeds to over 2500 words. Facebook's terms of service²¹ extend to over 3640 words. Most consumers do not read or understand these documents. I urge any person working on this review to go home and ask their family members or ask random people on the street during a lunchtime whether they know and understand what the following concepts mean: 'US Privacy Shield', 'transferable, sub licensable, worldwide, royalty free IP licence', 'right to be forgotten', 'data collection from third party websites'. The majority of consumers have no idea what these concepts are or how they apply to them.

Notwithstanding this, currently it is of no consequence if consumers do understand and have the ability to give informed consent for the use of their data because generally consumers have no ability to choose on what terms they give digital platforms access to their data. Digital platforms have so much market power that they can dictate harsh and unfair terms to consumers.

²⁰ <https://www.facebook.com/about/privacy/>

²¹ <https://www.facebook.com/legal/terms/update>

Consumers must accept these terms because digital platforms have become so embedded in consumers lives it is difficult to function without them.

3.24. Quality or choice fo media content

Digital platforms have at least contributed to a decline in the quality of media content supplied to Australian consumers because they provide a constant source of low quality media content to consumers for 'free' - consumers pay by divulging and making available their personal data. It is unclear whether digital platforms are solely responsible or whether a causative link can be shown between digital platforms and a decline in the quality of media content. Another major contributor or cause to the decline in quality of media content has been a move to online delivery of media content and a reluctance by consumers to pay for this content. Media content that is paid for such as the New Yorker magazine remains of a high standard.

The use of algorithms could have the effect of 'shuttering' people into only being exposed to media content that will result in them paying attention to the advertising that accompanies that media content. It may also 'shutter' them into only being exposed to news that they see as appealing. In this situation people would be exposed only to news that they like (its easier to preach to the converted then to deliver news which does not align with a consumers personal views and beliefs), not which is of importance to society to be widely reported and read.

3.25. Do consumers value access to their data?

Generally Australian consumers are not aware of the data that they are sharing with digital platforms, therefore it is impossible for them to value their data privacy. The concept of personal data being 'valuable' or being used as 'payment' for access to a digital platform are not concepts that are readily popularised or understood by the general public. This is also true for the benefits that arise from digital platforms using personal data, such as more relevant search results from search engines.

Australia has been a country that has not experienced widespread surveillance, its effects and the impacts on society that occur when the widespread collection of peoples private data results in that data being used for purposes that are adverse to peoples freedoms and way of life. Germany is the leader in data privacy for a good reason, some of its citizens experienced widespread surveillance from the 1930's until late into the 1980's. Consumers in Germany value their data privacy because they have experienced what can happen when private data is used for detrimental purposes.

Currently most Australian consumers only see the benefits of giving away their personal data - free internet services. They are not aware of the costs.