Written submission to Australian Competition & Consumer Commission (ACCC)
Digital Platform Services Inquiry

28 October 2024

Dear ACCC's Digital Monitoring team,

We are writing to you in response to the issues paper on the **10th and final report of the ACCC's Digital Platform Services Inquiry** which will highlight significant regulatory developments, major trends in digital platform markets, and potential and emerging issues in this space.

The ACCC's report highlights that there is a global effort to regulate "**anti-competitive self-preferencing, tying and bundling practices, addressing barriers to switching, and promoting access to third-party applications on a platform or service".** Indeed, it is imperative that competition on the merits is respected and that regulators globally address this conduct for the well functioning of the PC environment, including browsers.

As the ACCC gathers insights on recent overseas legislative and regulatory developments as well as potential and emerging competition and consumer issues in the digital platform services space, we believe it is essential to continue sharing insights into the PC environment and in particular the browser market. This is because PCs continue to be a critical gateway for users to access digital services and for companies to develop other markets such as AI, cloud and cybersecurity, to name a few.

In our experience, there are a number of barriers to entry and to switching in the Windows desktop environment that can be regulated ex-ante. Some of these tactics include:

- **Adding obstacles to setting a new default browser**, and changing users' default settings back to Edge on regular updates.
- Using **deceptive or misleading prompts** on Windows and Edge that encourage users who look for an alternative browser to go back to Edge or discourage users from downloading another browser altogether.
- **Force-opening links in its own services** such as Teams/Outlook/Microsoft365 into Edge, even when a user sets a different default browser.
- **Flagging alternative browser downloads as malware** and thwarting their download.
- Making it impossible to switch the default browser when a device is run in S-Mode. This is **particularly relevant** because only applications available via the Microsoft Store can be installed in S-Mode, and many browsers are simply not available; and because Microsoft encourages original equipment manufacturers (OEMs) to pre-configure a certain percentage of their devices to run in S-Mode in return for a rebate.

These practices not only harm competition for desktop browsers but also severely restrict user choice. At the same time, as these practices give an unfair advantage to Microsoft's services, its market position as the dominant operating system gets further entrenched, hindering alternative operating systems.

Overall, these technical obstacles and pop up messages appearing on Edge and Windows **undermine and discourage the consumer's choice of an independent browser**. The lack of a choice screen makes alternatives less readily accessible to consumers who might want to switch away from the preinstalled (and heavily promoted) Edge browser.

The ability for Microsoft to foreclose competition is rooted in the fact that all Windows PCs come with Edge pre-installed and set as the system default browser. **No other browser can aspire to match Edge's unparalleled distribution advantage on Windows**. Further compounding the issue, Edge is the most important gateway for consumers to download an alternative browser on Windows PCs. This means that the unfair tactics employed by Microsoft on Edge to undermine consumer choice of alternative browsers can be highly effective in preventing effective contestability since users are prevented from downloading alternative browsers in the first instance.

This is why, when defining digital markets, it is key to understand **how consumers behave and how they make choices**, in addition to the traditional product and geographic dimensions. This is particularly relevant in the presence of tying and bundling, even where the undertaking does not hold a high market share in adjacent markets but where consumers/users are forced to use services of the dominant undertaking in their journey to access or download alternative services.

When assessing the misuse of market power, it is also important to consider characteristics in an ecosystem such as **whether the digital platform with market power has adjacent products or services whose presence is ubiquitous**. Indeed, recognizing the ubiquitous presence of adjacent services that are tied to a dominant operating system, has allowed the European Commission to intervene[1] in order to protect competition on desktop PCs. Where such ubiquitous presence is the result of **tying and bundling**, not the result of competition on the merits, ex-ante regulation may prevent a contagion effect in future with other application software[2].

We therefore welcome "**Recommendation 4: Targeted competition obligations**" with mandatory service-specific codes that prevent digital platforms from abusing their entrenched position, in particular where there is proven misbehavior. Similar to the EU's Digital Markets Act, such targeted obligations can comprise:

- Obligation to "**allow and technically enable end users to easily un-install any software applications**".

[1] https://ec.europa.eu/commission/presscorner/detail/en/ip_04_382
[2] https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3446

- Obligation to "**allow and technically enable end users to easily change default settings**" including "prompting end users, at the moment of the end users' first use of an online search engine, virtual assistant or web browser a list of the main available service providers".
- A prohibition **not to** "**engage in any behavior that undermines effective compliance with the obligations** regardless of whether that behaviour is of a contractual, commercial or technical nature, or of any other nature, or consists in the use of **behavioural techniques or interface design**".
- A prohibition **not to** "**degrade the conditions or quality of any of the services provided** to business users or end users", including by "offering choices to the end-user in a non-neutral manner, or by subverting end users' or business users' autonomy, decision-making, or free choice via the **structure, design, function or manner of operation of a user interface or a part thereof**".

As the ACCC continues to consult on this matter and in particular in the drafting of such codes, we would be happy to expand on the above points. Should you have any questions on our remarks, please do not hesitate to contact us.

Yours sincerely,

Opera

Vivaldi

Waterfox

Open Web Advocacy

Wavebox