Skyscanner's views on the ACCC's Digital Platform Services Inquiry – March 2025 Final Report - Issues Paper

- Skyscanner welcomes the opportunity to provide its views on the topics contained in the Australian Competition and Consumer Commission's (ACCC) Issues Paper of 25 July 2024.

Introduction

- The growth of the digital economy has provided significant benefits to consumers. In terms of our own industry, it is now easier and quicker than ever to search for, compare and book flights, hotels and other travel services. Consumers who previously would have had to pay a travel agent to find the most suitable options for their tastes and budget can now do so on their own.

- The growth of the online economy is due to a number of developments, including improvements in online search, the spread of smartphones, and the rise of the app economy. The biggest providers of digital platform services, such as Google and Apple, have clearly played a key role in such developments.

- The meteoric rise of today's platforms, however, was possible because they were able to compete fairly with the biggest platforms of the early internet era. It is no coincidence that Google emerged at the same time as Microsoft's conduct was facing significant scrutiny.

- Indeed, active antitrust enforcement is widely credited with being a key enabler of the rise of today's tech giants, especially Google's. *United States of America v. Microsoft Corporation*, by requiring Microsoft to fundamentally change its anticompetitive behaviour, allowed Google and others to thrive.

- Unfortunately, those same companies that benefitted from a level playing field have spent years working to fundamentally tilt the scales in their favour and irrevocably cement their dominance. Having risen to the top of the ladder, they have been seeking to pull it up behind them.

- By using their complete dominance over all the main consumer-access points of the digital economy (online search, web browsers, mobile operating systems and app stores), these companies act in often quasi-regulatory fashion to raise the barriers to entry in their core markets.

- They are also increasingly leveraging their dominance into adjacent markets, and using anticompetitive practices such as self-preferencing to give their adjacent products and services an unfair competitive advantage.

- These dominant platforms have, in short, engaged in a range of anticompetitive practices to protect and expand their monopolies.

- Such behaviour is often justified as being pro-consumer. Creating walled gardens is claimed to be primarily aimed at protecting user privacy and security. Self-preferenced products and services have actually captured a rapidly growing share of the market because they are the preferred option of consumers, and not because they have been placed in the most prominent position on the search engine results page (SERP). The fact that many platform services are offered to consumers for free is also used to defend anticompetitive behaviour.

- Yet the status quo indirectly harms consumers in many ways. Practices such as self-preferencing make it much harder for new companies to flourish in sectors in which a Big Tech platform is operating. This means that consumers are missing out on new products and services and have less choice. Self-preferencing also means that consumers may miss a product or service that they otherwise would have chosen (and may end up paying more than they would have).

- The UK's Competition and Markets Authority (CMA) has also found that advertisers pay more for digital advertising than they would if the market were more competitive. These costs are ultimately passed on to consumers too.

- If *United States of America v. Microsoft Corporation* demonstrated the fundamental role that competition policy can play in enabling the emergence of innovative new services, the intervening years have also demonstrated the deficiencies of ex-post enforcement when applied to digital markets. The fact that there has not been another US antitrust case concluded against any of today's biggest platforms (prior to the ruling against Google in August 2024), and the fact that other cases, such as the *Google Shopping* case in the European Union (EU), have taken so long to reach a conclusion, highlight how unsuited ex-post enforcement is in today's fast-moving digital markets.

- Despite being found in 2017 to have abused its dominance in online search to give its own comparison-shopping service an unfair advantage, that ruling and the fine imposed on Google by the EU Commission are still being appealed. In that time, many promising comparison-shopping sites have gone out of business or have been irrevocably damaged, allowing Google to foreclose competition regardless of the final outcome in the case.

- The recent flurry of regulatory, legislative and judicial attention to the question of digital competition has therefore been welcome, if long overdue. The speed with which digital markets can tip irrevocably, due to a range of factors including network effects and access to data, means that delayed action in this space has been especially damaging. Promising businesses in a range of markets have seen their growth prospects permanently stunted in the time it has taken for ex-post

competition cases to wind their way through the courts and subsequent appeals processes.

- Therefore, the growing consensus among governments around the world that there is an urgent need for a different approach is absolutely correct. An ex-ante framework, which sets the rules of the game up front for the most dominant firms, is needed to complement ex-post enforcement.

- The ACCC has been at the forefront of this global conversation, starting with its first Digital Platforms Inquiry in 2017. Skyscanner welcomes the ACCC's recommendation that a new ex-ante competition regime is needed in Australia, and the Australian Government's in-principle acceptance of this recommendation.

- There are several emerging approaches to ex-ante digital competition regimes, including a rules-based approach best represented by the EU's Digital Markets Act (DMA) and a principles-based approach best epitomised by the United Kingdom's (UK) Digital Markets, Competition and Consumers Act (DMCCA).

- These different approaches each have their own strengths and weaknesses, and so it is absolutely right that the ACCC give due consideration to international developments so it can pursue the most suitable approach for Australia.

- Given Skyscanner's significant and ongoing involvement in the development and implementation of the DMA and DMCCA, as well as our continuing contributions to similar debates elsewhere, our submission will focus solely on the first topic of the Issues Paper: recent overseas legislative and regulatory developments in markets for digital platform services and their impact on competition and consumers.

- Our submission also primarily deals with the issue of self-preferencing, since we have first-hand and ongoing experience of the impact that self-preferencing by a dominant platform can have on challenger firms and consumers (in our case, this relates to Google's self-preferencing of Google Flights on Google Search.

Topic 1: International regulatory developments

<u>EU</u>

- Given the fact that the EU's DMA is already in force, with the gatekeepers having already implemented their first compliance solutions, it should have been possible to make some early observations regarding the DMA's impact on consumers and competition.

- Unsurprisingly, however, several of the gatekeepers have introduced compliance solutions that are incompatible with the DMA. Some gatekeepers have made it very clear that they do not wish to provide greater choice for consumers, and appear

determined to do everything they can to sabotage the DMA. Many observers have labelled this “malicious compliance.”

- Some compliance solutions are now subject to non-compliance proceedings by the European Commission, meaning they are likely to be subject to further revisions over the coming months. The changes that Google has made to its SERP in order to stop giving preferential treatment to Google Flights is one of those compliance solutions that is subject to a non-compliance investigation.

- Simultaneous non-DMA developments have also made it very difficult to assess the early impact of DMA changes. Google rolled out a global update to its ranking algorithm at the same time as it introduced its DMA SERP changes in the EU, muddying the data. It is unclear whether the timing of this algorithm update was intentional, but it has had the inevitable effect of making it very difficult to isolate the specific impact of the DMA changes for market participants.

- Considering all this, the European Commission’s willingness to launch multiple non-compliance investigations against Alphabet, Apple and Meta within weeks of the DMA coming into force was very welcome. Such speedy enforcement action is crucial – from what we understand, all are now in the process of updating their compliance solutions, although it remains to be seen to what extent these will be an improvement.

- **This is, we believe, the first lesson for the ACCC: that many of the firms that are likely to be in scope of any future Australian ex-ante competition regime will only comply with the rules when obliged to, under the threat of significant enforcement action. The underlying legal text must therefore give the regulator significant scope both to require firms to make changes, and to impose significant fines. Once the regulator has those powers, it must demonstrate early and decisively that it is willing to use them, as the European Commission has done.**

- We have also witnessed extensive campaigns by these gatekeepers to delegitimise the DMA, and to weaken support for it among key constituencies, such as consumers and business users. These gatekeepers have threatened to withhold product updates from EU users, warned about increased risks to privacy and security, and claimed that changes introduced to stop self-preferencing will inevitably benefit some business users over others. In the travel sector, for example, Google has repeatedly argued that the changes it has made to the SERP in order to stop self-preferencing Google Flights, Google Hotels, etc, have benefitted large online intermediaries to the detriment of direct suppliers. In this way, different stakeholders are pitted against each other.

- **In light of this, regulators must stand firm against such attempts to undermine support for digital competition regimes, and see them for what they are: attempts to justify half-hearted attempts at compliance. Regulators should not seek to outsource their role of deciding what is and is not compliant by seeking consensus**

among all stakeholders. Regulators should be clear, from the start, about their views regarding a particular compliance solution. Failure to be clear creates a vacuum that allows the gatekeeper to play different stakeholders and interests off against each other. The political debates that this provokes then makes the regulator's role harder, not easier.

- A further issue that has made making an early judgement of the impact of the DMA difficult is a lack of clarity around the metrics to be used to judge compliance and efficacy. In terms of Google's proposals for complying with the ban on self-preferencing, for example, throughout the process it has been hard to discern the criteria that the European Commission is using to assess whether Google is compliant with the DMA, and whether its solutions are effective at providing greater contestability in digital markets.

- **It is helpful to all stakeholders if there is clarity from the start around the metrics that will be used to assess a compliance solution. This means that engagement between third parties, the gatekeeper and the regulator can be more productive, and also makes it much harder for gatekeepers to make spurious arguments and to play different stakeholders off against each other.**

- Despite all these early challenges, and the lack of any definitive data on the impact of the DMA changes so far (at least with regards to the changes to Google's SERP) there is some early data which suggest that the DMA has had a positive impact in terms of market contestability for business users of Google Search.

- Data from SparkToro show that, in 2024, for every 1,000 EU Google searches, 374 clicks go to the open web (that is, a non-Google-owned, non-Google-ad paying property). This figure is higher than the figure in the US, where only 360 clicks go to the open web.

- It is fair to assume that this gap is due to the difference in SERP design between the two jurisdictions, which in turn has only occurred because of the DMA. This difference also indicates that, when presented with a SERP that is not as heavily skewed towards Google products and services, consumers do opt for alternatives.

- As already noted, the European Commission believes that Google's DMA-solution may be non-compliant with the ban on self-preferencing, meaning that Google is likely still self-preferencing its own products and services over others. Therefore, were Google fully compliant, it is likely that the number of clicks going to the open web in the EU would be higher still.

- A greater share of traffic going to non-Google-owned products would, of course, be beneficial for a range of other businesses, publishers, and creators. More traffic means, ultimately, higher revenues and therefore more money to re-invest in their products and services.

- A world in which query clicks go to a bigger range of websites is a world in which consumers have more choice, and a world in which it is easier for new companies to enter a market and thrive, because it becomes easier for them to be discovered by users.

UK

- While the UK's new digital competition regime has yet to formally commence, the recent consultation by the CMA on its draft guidance for implementing the regime has provided some welcome insight into how it will operate.

- All of our observations below relate to the potential or anticipated impacts of the UK regime on competition and consumers, given the UK regime has yet to be applied to a firm with Strategic Market Status (SMS).

- There are some key provisions of the CMA's proposals which we believe could improve the efficacy of the new regime, for both businesses and consumers, and that we believe the ACCC should consider including in any future Australian regime.

- **Firstly, the significant role that formal consultations with third parties will play throughout the UK regime is very welcome. There will be an opportunity for interested third parties to provide their views on SMS investigations, conduct requirements (CR), and pro-competition interventions (PCI).**

- **The timing of these consultations is also a particular strength, given that third parties will be consulted at the start of an SMS, CR or PCI investigation, as well as being able to offer views on any proposed decisions. The ability for third parties, particularly businesses that have been most affected by anti-competitive conduct and have deep knowledge of the given digital activity, to provide their views at the start of the process should make it easier and quicker for the CMA to identify the most effective remedies.**

- Faster and more effective remedies will likely lead to greater competition, and more choice and lower prices for consumers, than would have been the case otherwise.

- Secondly, the CMA is proposing that it have the ability to impose different types of conduct requirement, depending on the specific firm and digital activity under consideration.

- **CRs could be outcome-based, action-focussed, higher-level, or more directive. The CMA will be able to start with a higher-level CR and gradually make them more directive if it identifies compliance issues, or it could choose a directive CR from the start. Having the ability to make a CR as descriptive and directive as possible is likely to be beneficial for consumers and competition for several reasons:**

- It will allow the CMA to learn from developments in other jurisdictions, and immediately identify aspects of compliance solutions that it may deem to be either compliant or non-compliant. This should make the process quicker, and avoid SMS firms being allowed to draw out the process by presenting various iterations of inadequate solutions.

- Having the power to impose more directive CRs also avoids the issues with the DMA identified above, where a lack of clarity regarding what the regulator views to be compliant or non-compliant has made negotiations between gatekeepers, third-parties and the regulator more difficult and drawn out.

- **Another big potential benefit for consumers and competition from the CMA's proposed approach to CRs is that they plan to consult on the metrics that they will use to judge both an SMS firm's compliance with a CR and the efficacy of that CR in achieving its objective.**

- As noted above, clarity for all stakeholders regarding the metrics to be used for a particular CR will make it much easier to spot compliance or efficacy problems earlier, and to fix them. This will ensure that solutions remain effective throughout the time they are in force, and that the benefits to competition and consumers (lower barriers to entry, equal access to consumers, more choice, lower prices, greater innovation) are realised more effectively.

- The imposition of a CR has the potential to generate significant benefits for both competition and consumers. For example, a CR that bans an SMS firm from self-preferencing its own products and services would make give competing firms an equal opportunity to be discovered by consumers. A level playing field would lead to competition on the merits, with existing firms offering the best products or services able to reach the most consumers, and new entrants with innovative and disruptive ideas facing lower barriers to entry. For consumers, this would all lead to more choice, more innovative products, and lower prices.

- **However, the CMA's broad discretion to impose PCIs, which aim at addressing the root causes of market power, likely offer the greatest scope for truly transformational benefits for competition and consumers. We believe that the ability to impose both behavioural and structural remedies (up to and including the break-up of an SMS firm) is important for two reasons. Firstly, in certain circumstances, more extensive remedies may be the most effective means of addressing a particular competition issue. Second, if an SMS firm knows that these tools are available to regulators, they may be more cooperative from the start.**

- We anticipate that the UK's regime is likely to boost competition and lead to more choice for consumers because of the significant enforcement and monitoring powers afforded to the CMA.

- The likely targets of the UK's regime (and any future Australian regime) have demonstrated themselves completely unwilling to act fairly, in a way that is commensurate with their dominance over online markets. They have shown this both in the endless appeals they launch against ex-post enforcement, but also in their approach so far to the EU's DMA. Several gatekeepers have launched appeals against their designations, while others, as noted above, have implemented wholly inadequate compliance solutions.

- The benefits of the regime will only be realised when the regulator has significant powers and is willing to use them swiftly. As already noted, the ability to impose significant financial penalties, along with the ability to impose a whole range of regulatory interventions from orders to cease and/or change certain behaviours to breaking up an SMS firm, should be effective at achieving a change in attitude and approach from SMS firms.

Developments in other markets

- Skyscanner very much welcomes recent developments in a range of other important economies, including India and Japan.

- Generally, the more jurisdictions covered by an ex-ante digital competition regime, the better for consumers globally. That is because there will be less scope for firms that are being regulated in some markets to try and make up for their lost market share by doubling down on practices such as self-preferencing in non-regulated markets. This is a trend we are currently witnessing.

- As a digital level playing field is re-established in ever more markets, it should also make it more likely that innovative new companies emerge from different countries around the world, diversifying the crop of current Big Tech companies. This would be beneficial for consumers in Australia and elsewhere, who may gain access to a wider variety of different services and products from around the world.

- In terms of the approaches to ex-ante regimes emerging beyond the EU and UK, India's proposed approach is particularly interesting as it appears to combine elements of both the EU and UK's approach. The Bill would provide more up-front certainty regarding the types of services in scope, while empowering the competition regulator to design specific and more targeted interventions at individual platforms and their services.

- We would encourage the ACCC to continue to monitor the development of India's proposals, as they may build on the best of the EU and UK approaches.

Conclusion

- Ex-ante digital competition regimes should, in their broadest sense, create more contestable digital markets. In the market that matters most to us, online search, this should mean that users click on a wider variety of open-web links compared to before.

- The early signs from the DMA are that, when Google is unable to so easily self-preference its own products and services, this is indeed what happens (given that in 2024 European users click on more non-Google-owned links compared to their US counterparts).

- This is what online search should be about – helping users to easily find the most relevant results to their particular query. It is not a means for the operator of the online search engine to simply funnel consumers to its own separate products and services, regardless of whether better alternatives are available or not.

- The full benefits of the DMA are still yet to be realised, however, given the gatekeepers' unwillingness to introduce properly compliant solutions.

- This delay is unfortunate and costly, given that in fast-moving digital markets the incumbent's advantage grows greater and greater the longer effective solutions are delayed.

- In this submission, we have attempted to outline some of our key insights from the early months of the implementation of the DMA and the recent passing of the DMCCA, so that similar delays may be avoided in Australia: that compliance is only likely to be achieved if the regulator has significant enforcement powers and demonstrates its determination to use them from the start; that regulators need to be clear from the start about what they consider to be compliant and non-compliant; and that clarity on the metrics that will be used to determine both compliance and efficacy is key.

- With such an approach in place, it will be much harder for regulated firms to frustrate and delay the introduction of compliant solutions.

- The benefits from an effective ex-ante regime could be significant. In terms of competition, a ban on self-preferencing would mean that it is easier for challenger firms to reach consumers and receive the traffic that is rightfully theirs, based on the quality of their product or service. It also means it would be easier for an entrepreneur to start a new business in a sector in which a Big Tech platform also operates and to grow according to the success of his or her idea. For consumers, for whom a greater variety of services will be visible when they input a given query, they will have more choice and therefore a greater ability to find a product or service most suited to their particular needs. The search process may also become easier and more effective for them, as the greater initial choice means they may be less likely to miss (or more likely to identify straight away) an option that is better suited

to their needs. And because the tech giant may now have to genuinely compete with challenger firms on the merits, prices for both the dominant platform's products or services and those of challengers are likely to fall over time (and increase in quality).

- We strongly welcome the ACCC's work on this issue to date, and would encourage it to pursue an approach that learns from best practice abroad, in a timely manner.

- Skyscanner looks forward to continued engagement with the ACCC in the months and years ahead.