ON THE AUSTRALIAN COMPETITION & CONSUMER COMMISSION'S DIGITAL PLATFORMS SERVICES INQUIRY, INTERIM REPORT NO. 5: REGULATORY REFORM

COMMENT OF THE GLOBAL ANTITRUST INSTITUTE, ANTONIN SCALIA LAW SCHOOL, GEORGE MASON UNIVERSITY

We submit this comment to the Australian Treasury[1] for consideration in relation to the regulatory reform recommendations of the Australian Competition & Consumer Commission's (ACCC's) Digital Platform Services Inquiry, Interim Report No. 5: Regulatory Reform (September 2022)—hereinafter the "ACCC Report."[2] Our comments are based on our extensive experience and expertise in competition law and economics generally, and specifically with respect to economic and competition issues in digital markets.[3] As an organization committed to promoting sound economic analysis as the foundation of antitrust enforcement and competition policy, the Global Antitrust

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[1] *See Digital Platforms: Government Consultation on ACCC's Regulatory Reform Recommendations, Consultation Paper*, AUSTL. GOV'T, THE TREASURY (Dec. 2022), https://treasury.gov.au/sites/default/files/2022-12/c2022-341745-cp.pdf.

[2] *See Digital Platform Services Inquiry, Interim Report No. 5: Regulatory Reform*, AUSTL. COMPETITION & CONSUMER COMM'N (Sep. 2022), https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20September%202022%20interim%20report.pdf [hereinafter *ACCC Report*].

[3] The Global Antitrust Institute (GAI), a division of the Antonin Scalia Law School at George Mason University, is a leading international platform for economic research and education that focuses on the legal and economic analysis of key antitrust issues confronting competition agencies and courts around the world. University Professor Joshua D. Wright is the Executive Director of the GAI and a former U.S. Federal Trade Commissioner. Professor of Law Douglas H. Ginsburg is a Senior Judge, U.S. Court of Appeals for the District of Columbia Circuit, Chairman of GAI's International Board of Advisors, and a former Assistant Attorney General in charge of the Antitrust Division of the U.S. Department of Justice. Professor Bruce H. Kobayashi is the Paige V. and Henry N. Butler Chair in Law and Economics, Co-Founder of GAI and former Director of the Bureau of Economics, Federal Trade Commission (FTC). Associate Professor John M. Yun is the Deputy Executive Director of the GAI. Adjunct Professor Abbott B. Lipsky, Jr. is Director of the Competition Advocacy Program for the GAI, former Acting Director of the FTC's Bureau of Competition and former Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice. Dr. Alexander Raskovich, the GAI's Director of Research, formerly served for more than three decades as a research economist in the Antitrust Division of the U.S. Department of Justice. The GAI gratefully acknowledges the contributions of Antonin Scalia Law School student Thyme Hawkins for excellent research assistance.

Institute ("GAI") commends the Treasury for inviting public submissions in regard to the important topics covered in the ACCC Report.

I. Justified Competition Regulatory Reform Requires Cost-Benefit Analysis

In September 2022, the ACCC released its fifth interim report on regulatory reform after seeking commentary on a preliminary version of the ACCC Report.[4] The ACCC Report recommends, *inter alia*, several far-reaching regulatory proposals focused on competition policy—namely, placing "targeted obligations" on a wide range of conduct by "Designated Digital Platforms," i.e., big tech companies.[5] The recommended "targeted obligations" would cover conduct including self-preferencing, tying, exclusive agreements, use of defaults, platform design, interoperability, data portability, "unfair" terms of service, and price parity clauses.[6] While the ACCC Report is short on specifics to implement and operationalize these regulatory controls, a regulatory body would be responsible for promulgating new "codes of conduct" after consulting with the targeted digital platforms, industry participants, and other stakeholders.[7]

This comment revisits some of the themes we addressed in our prior submissions to the ACCC.[8] It also addresses the broader policy question of what the proper justification should be for implementing new competition regulations. In doing so, we will forgo discussing whether current Australian laws—namely, the Competition and Consumer Act 2010 (CCA) and Australian Consumer Law (ACL)—are adequate to address the competition and consumer protection

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[4] *See Digital Platform Services Inquiry, Discussion Paper for Interim Report No. 5: Updating Competition and Consumer Law for Digital Platform Services*, AUSTL. COMPETITION & CONSUMER COMM'N (Feb. 2022), https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry.pdf. The GAI submitted comments to the ACCC on the preliminary report. *See* GLOB. ANTITRUST INST., *On the Australian Competition & Consumer Commission Digital Platform Services Inquiry's Discussion Paper for Interim Report No. 5: Updating Competition and Consumer Law for Digital Platform Services, Comment of the Global Antitrust Institute, Antonin Scalia Law School, George Mason University* (Geo. Mason L. & Econ. Rsch. Paper No. 22–12, Apr. 18, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4084885. We borrow portions of that comment for this current comment.

[5] *See ACCC Report*, *supra* note 2, at 11–14.

[6] *See id.* at 12–14.

[7] *See id*. at § 5.2.

[8] *See* GLOB. ANTITRUST INST., *supra* note 4; GLOB. ANTITRUST INST., *Australian Competition & Consumer Commission's Digital Platforms Inquiry, Preliminary Report, Comment of the Global Antitrust Institute, Antonin Scalia Law School, George Mason University* (Geo. Mason L. & Econ. Rsch. Paper No. 19–04, Jan. 22, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3321837.

concerns expressed in the ACCC Report.[9] Foregoing this discussion is not to suggest this is not an important debate. On the contrary, this debate should be settled before seriously considering the augmentation of the current Australian laws with new regulations. In *arguendo*, we will proceed under the presumption that the current laws have gaps and are inadequate in one way or another to address the alleged problems raised by the ACCC and other stakeholders.

The central point of this comment is that competition regulations best serve the interest of the public when they pass a cost-benefit analysis.[10] This fundamental proposition protects the public and a nation's economy from burdensome regulatory costs when there is not a corresponding level of benefits to justify those costs. Regulations are not magical solutions to problems but potentially, and often do, bring a whole new set of problems[11]—some anticipated and some unanticipated (that is, unintended consequences).[12] Yet, regulations can and do bring solutions that improve social welfare. However, without a solid basis in a cost-benefit assessment based on credible, causal estimates of the effects of such regulations,[13] competition regulations can pass under often well-meaning pretenses yet bring tremendous harms and impediments to competition and economic progress. Relatedly, unlike other harms, the effects of burdensome competition regulations may be less visible and less immediately felt. Indeed, economic effects often occur at the margin and compound over time. In turn, these effects can severely impact the growth trajectory of a nation's economy even with "marginal" reductions in annual growth rates.[14]

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[9] The ACCC Report spends considerable time dismissing the argument that current Australian laws are sufficient to address the perceived harms raised in the report. *See ACCC Report*, *supra* note 2, at §§ 2.2–2.3.

[10] *See, e.g.*, THOMAS A. LAMBERT, HOW TO REGULATE: A GUIDE FOR POLICYMAKERS 13 (2017) ("This ultimate goal—minimize the sum of error and decision costs—is really just a form of cost–benefit analysis.").

[11] UCLA economist Harold Demsetz famously made this point when he explained the proper policy comparison compares the current system with all its benefits and faults with an alternative system (e.g., new regulations) with all its benefits *and faults*. The failure to consider the faults of alternative systems—while focusing solely on the faults of the current system—yields the "nirvana fallacy." *See* Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1 (1969).

[12] *See, e.g.*, Sam Peltzman, *The Effects of Automobile Safety Regulation*, 83 J. POL. ECON. 677 (1975).

[13] *See* Joshua D. Angrist & Jörn-Steffen Pischke, *The Credibility Revolution in Empirical Economics: How Better Research Design is Taking the Con Out of Econometrics*, 24 J. ECON. PERSP. 3 (2010).

[14] For example, if we compare an annual, economic growth rate of 3.5 percent versus 4 percent, then, at the end of a 20-year period, an economy will be 10 percent smaller with the former compared to the latter, which is a significant change in trajectory from just a half-of-a-percentage difference in the growth rate.

As an illustration of the costs of regulation the impact markets and competition, consider the effects of the EU's recent General Data Protection Regulation (GDPR). At the time of its implementation in 2018, the GDPR was hailed as shifting the balance of power to consumers and "a chance to flip the economics of the industry."[15] The reality, however, has been quite different. While the economic evidence is still emerging, the results so far range from decidedly negative to mixed.[16] For instance, Jia et al. find "negative post-GDPR effects after its 2018 rollout on European ventures, relative to their counterparts in the US and the rest of the world," including Australia.[17] Janßen et al. find direct harm to consumers in the form of reduced availability of apps on mobile devices.[18] Garrett et al. estimate that the GDPR has led to significant declines in page views per week and corresponding revenue declines, so the authors conclude their results "clearly illustrate the difficulty and high costs of privacy regulation."[19] Moreover, the GDPR's burdens are regressive; to explain, the GDPR seems to be doing more to entrench incumbents and market leaders rather than leveling the playing field, and, as a consequence, the "GDPR disproportionally hurts smaller firms."[20] Other researchers, however, have found

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[15] Nitasha Tiku, *Europe's New Privacy Law Will Change the Web, and More*, WIRED (Mar. 19, 2018), https://www.wired.com/story/europes-new-privacy-law-will-change-the-web-and-more/.

[16] *See generally* Garrett A. Johnson, *Economic Research on Privacy Regulation: Lessons from the GDPR and Beyond* (Working Paper, Nov. 29, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4290849 ("The economic literature on the GDPR to date has largely—though not universally—documented harms to firms. These harms include firm performance, innovation, competition, the web, and marketing. On the elusive consumer welfare side, the literature documents some objective privacy improvements as well as helpful survey evidence.").

[17] Jian Jia, Ginger Zhe Jin, & Liad Wagman, *The Short-Run Effects of GDPR on Technology Venture Investment* 1, 5 (Working Paper, May 22, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=328912 ("The negative effects manifest in the number of financing rounds, which, after GDPR's rollout, exhibit a 26.1% reduction in the number of monthly venture deals by EU ventures compared to their US counterparts.").

[18] Rebecca Janßen, Reinhold Kelser, Michael E. Kummer, & Joel Waldfogel, *GDPR and the Lost Generation of Innovative Apps* 2 (Nat'l Bureau of Econ. Rsch. Working Paper No. 30028, May 2022), https://www.nber.org/papers/w30028 ("[W]e estimate that the depressed post-GDPR entry rate [of mobile apps] would give rise to a long-run 32 percent reduction in consumer surplus and a 30.6 percent reduction in aggregate usage and therefore revenue. Whatever the benefits of GDPR's privacy protection, it appears to have been accompanied by substantial costs to consumers, from a diminished choice set, and to producers from depressed revenue and increased costs.").

[19] Samuel Goldberg, Garrett Johnson, & Scott Shriver, *Regulating Privacy Online: The Early Impact of GDPR on European Web Traffic & E-Commerce Outcomes* 24–25 (L. & Econ. Ctr. Geo. Mason U. Scalia L. Sch. Rsch. Paper Series No. 22–025, Jul. 16, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3421731.

[20] Johnson, *supra* note 16, at 21.

no short-run effect on global internet interconnection agreements due to the GDPR[21] and improved targeting to consenting users (although this benefit is somewhat offset by consumers that opt-out).[22] Overall, the economic research on the GDPR illustrates that the impact of competition regulations can be multi-faceted and place real burdens on market participants.

As a general principle, the quality and quantity of evidence required to support a substantial expansion of competition regulatory authority and oversight, as well as support the creation of new regulatory bodies and/or codes, must be correspondingly high to justify such sweeping disruptions to the operations of a key sector of an economy. This principle respects that condemning procompetitive conduct can cause large disruptions and lead to large "error costs." Additionally, this principle is in accord with the Australian Government's position on the importance of cost-benefit analysis to the evaluation of regulatory initiatives. As the Australian Government's recent *Guidance Note* makes clear, "The Australian Government is committed to the use of cost-benefit analysis (CBA) to assess regulatory proposals in order to encourage better decision making."[23] The *Guidance Note* further states that

> In principle, CBA measures the efficiency or resource allocation effects of a regulatory change. It calculates the dollar value of the gains and losses for all people affected. If the sum is positive, the benefits exceed the costs and the regulatory proposal would increase efficiency.[24]

Critically, such cost-benefit analyses are completely absent in the ACCC Report. Rather, the report merely *asserts* harm without offering any demonstration of harm. To the credit of the ACCC Report, it includes numerous acknowledgments of consumer benefits as well[25]—yet, puzzlingly, it ultimately ignored those benefits. The ACCC Report does recommend that the future

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[21] *See* Ran Zhuo, Bradley Huffaker, KC Claffy, & Shane Greenstein, *The Impact of the General Data Protection Regulation on Internet Interconnection* (Nat'l Bureau of Econ. Rsch. Working Paper No. 26481, Apr. 2020), https://www.nber.org/papers/w26481.

[22] Guy Aridor, Yeon-Koo Che, & Tobias Salz, *The Economic Consequences of Data Privacy Regulation: Empirical Evidence from GDPR* (Nat'l Bureau of Econ. Rsch. Working Paper No. 26900, Mar. 2020), https://www.nber.org/papers/w26900.

[23] OFF. OF BEST PRAC. REGUL., *Guidance Note: Cost-Benefit Analysis*, AUSTL. GOV'T, DEP'T OF THE PRIME MINISTER & CABINET 1 (Mar. 2020), https://obpr.pmc.gov.au/sites/default/files/2021-09/cost-benefit-analysis.pdf.

[24] *Id*. at 1. *See also* Bruce H. Kobayashi & Joshua D. Wright, *Antitrust and Ex-Ante Sector Regulation*, *in* THE GLOBAL ANTITRUST INSTITUTE REPORT ON THE DIGITAL ECONOMY (Joshua D. Wright & Douglas H. Ginsburg eds., 2020).

[25] *See infra* Part II for documentation of the acknowledged benefits of the various business practices under scrutiny.

regulator of big tech companies should remain "flexible" and consider these potential benefits when implementing the various ex ante competition regulations.[26] This strikes us as kicking the proverbial can down the road. The entire debate over big tech business practices involves an acknowledgment that these business practices involve complex tradeoffs and could, in some instances, lead to anticompetitive harm but, in perhaps many other instances, lead to procompetitive effects. Therefore, cases involving the conduct of Designated Digital Platforms are best adjudicated on a case-by-case basis that weighs the various effects rather than wholesale condemnation of classes of conduct by classes of companies. The argument that society is better off with a new competition regulator who will create ex ante regulations that will somehow navigate these tradeoffs—without generating substantial and costly regulatory errors—is unpersuasive. Again, the burden is on the ACCC to demonstrate that the Designated Digital Platforms and their respective conduct cause such widespread harm to justify such a drastic reordering of critical markets.

A standard element of a sound cost-benefit analysis of competition regulation is an evaluation of the regulation's expected error costs: the consequences of producing false positives (condemning procompetitive activities) and false negatives (permitting anticompetitive activities) in assessing the dynamic competitive effects of conduct, weighted by an assessment of the probabilities of each type of error occurring.[27] Regulating to achieve a probability of zero false negatives without also weighing the probability of false positives ignores the "anti-competitive" effects of regulations that deter beneficial (or, at worst, harmless) competitive behavior. A holistic cost-benefit analysis considers the effect of competition regulation on consumer interests in the event of both false positives and false negatives.

As matters stand, the ACCC Report proposes regulatory policies that not only lack sufficient evidence of their salutary effects but also, by their nature, will likely retard competition and innovation to the detriment of consumers of digital services. Further, the report advances an unconvincing justification for passing the new regulations: to harmonize Australia's regulatory policies with the rest of the world—especially the EU.[28] Jumping on a train going in the wrong direction is not a mark of progress and sound policy but rather the opposite.

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[26] *ACCC Report*, *supra* note 2, at 11.

[27] *See* Frank H. Easterbrook, *Limits of Antitrust*, 63 TEX. L. REV. 1 (1984); James C. Cooper, Luke M. Froeb, Dan O'Brien, & Michael G. Vita, *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639, 639–54 (2005); Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. COMPETITION L. & ECON. 1, 153–202 (2010).

[28] *ACCC Report*, *supra* note 2, at 47 ("Many other jurisdictions are already introducing new competition and consumer measures for digital platforms. In the ACCC's view, it is in the

Ultimately, we urge the Treasury, when considering the ACCC Report's proposal to create these new ex ante regulatory codes and corresponding enforcement authority, to weigh the costs and benefits carefully and comprehensively to the furtherance of competition and consumer interests—and not to the protection of competitors.[29] Unfortunately, at times the ACCC Report falls into the trap of elevating the welfare of competitors over consumers and overall social welfare. For instance, while acknowledging that economies of scale and scope can "benefit consumers" and "lower average costs," the report is concerned that achieving these efficiencies "has the potential to raise barriers to entry and expansion."[30] Yet, all competitive advantages, in a sense, raise "barriers to entry" to the extent that those advantages make life more difficult for rivals. Examples include developing better technology or other intellectual property, building a stronger brand name, and having a more efficient distribution network. The expansive use of the term "barriers to entry" is precisely why some economists have advocated the incorporation of welfare considerations into the definition of "barriers to entry."[31] In other words, if competition policy involves a misplaced concern for business practices that make it harder for rivals to compete—such as efficiently lowering one's costs—, then we are elevating the interests of competitors over the public's interest in vigorous competition.

In the remainder of this comment, we address several of the specific proposals of the ACCC Report and discuss how the report provides almost no evidence showing the targeted business practices are harming consumers, nor does existing evidence show that the proposed regulatory reforms would create an improvement in social welfare. On the contrary, good conceptual reasons suggest

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interests of Australian consumers and businesses to consider reforms here in Australia in parallel with the reforms occurring internationally.").

[29] A sound cost-benefit analysis of competition policy cannot focus largely or exclusively on so-called harm to competitors. Losses by competitors are not a bug but a feature of a competitive market economy; indeed, they are a defining feature of the competitive process. As business rivals strive to win customers, the gains of one tend to come at the expense of others. The competitive process necessarily leaves losers in its wake, but precisely because the winnowing based on competitive merit is the driving force behind gains to customers and the wider economy. Without more, an action taken by a firm that tends to win customers for itself at the expense of rivals is not a lessening of competition; it is an expression of competition. A necessary condition for a finding of lessened competition is a finding that the firm's action redounds to the detriment of consumers, not rivals.

[30] *ACCC Report*, *supra* note 2, at 6.

[31] *See* Franklin M. Fisher, *Diagnosing Monopoly*, 19 Q. REV. ECON. & BUS. 7 (1979); C.C. von Weizsäcker, *A Welfare Analysis of Barriers to Entry*, 11 THE BELL J. ECON. 399, 401 (1980) (where the author proposes a definition of a "barrier to entry" to include a loss of efficiency rather than just a cost that an entrant needs to incur, which would rule out economies of scale as a barrier to entry).

the proposed regulations will do more harm than good. Additionally, we address the wisdom of targeting regulations to specific companies, such as Designated Digital Platforms.

II. Addressing Specific Practices and Problematic Presumptions

The thrust of the regulatory proposals related to competition policy in § 6 of the ACCC Report is to rein in the competitive striving and performance improvements of large digital platforms so that smaller rivals will not fall too far behind. This misplaced focus on the interests of competitors, without adequate consideration of the ultimate effects on consumers, carries the risk of stultifying competition and denying consumers its benefits.

To illustrate, the ACCC Report clearly recognizes the potential benefits to consumers from the various practices that they ultimately call to be regulated. For instance, the report explains that "[w]hile there can be pro-competitive reasons for some of this conduct, such conduct can have the effect of extending or entrenching the positions of platforms with market power."[32] Although the former clause in this statement acknowledges possible beneficial effects of complex business practices, the latter clause is highly problematic. Specifically, almost all competitive gains worth obtaining "can have the effect of extending or entrenching" a firm's market position. In fact, the hope of obtaining a stronger market position by outcompeting a rival is almost universally recognized as a desirable, welfare-enhancing feature of market economies.[33] Yet, the ACCC appears to suggest that procompetitive effects are offset by firms gaining greater market success *in the process of providing those procompetitive effects*. Such a view focuses exclusively on static market considerations—particularly the welfare of rivals—at the expense of a dynamic perspective on the incentives to innovate and succeed. To this point, in the very next sentence, despite acknowledging possible procompetitive effects, the report advocates "[t]argeted and detailed ex ante regulatory obligations that limit the scope for anti-competitive conduct."[34] What is entirely missing is an explanation of how the unnamed regulatory body can

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[32] *ACCC Report*, *supra* note 2, at 12.

[33] The ACCC recognized this point in an earlier report on the digital economy. *See Digital Platforms Inquiry, Preliminary Report*, AUSTL. COMPETITION & CONSUMER COMM'N, at 36 (Dec. 2018), https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry.pdf ("Australian law does not prohibit a firm from possessing a substantial degree of market power. Nor does it prohibit a firm with a substantial degree of market power from 'out-competing' its rivals by using superior skills and efficiency to win customers at the expense of firms that are less skillful or less efficient. This conduct is part of the competitive process, which drives firms to develop and offer products that are more attractive to customers, and should not be deterred.").

[34] *ACCC Report*, *supra* note 2, at 12.

achieve this directive by distinguishing specific procompetitive instances of a particular form of conduct from anticompetitive ones via regulatory obligations.

In the following sections, we analyze some of the specific practices targeted in the report. Namely, we consider the regulation of self-preferencing, use of pre-installed software and defaults, and interoperability. We close by considering a central component of the policy recommendation: targeting specific companies rather than conduct itself or industries as a whole.

A. Self-Preferencing

The first business practice that the ACCC Report identifies as potentially problematic is self-preferencing.[35] An example of self-preferencing is when Google promotes its specialized search results, e.g., Google Maps, within its general search results, i.e., Google Search. The report recommends, for instance, adopting a regulatory "code for search services" to "prohibit Designated Digital Platforms from providing favourable treatment to their own products and services in ranking, indexing, and crawling."[36] Again, the report acknowledges that "[n]ot all forms of self-preferencing by digital platforms are problematic, and some may be benign or even pro-competitive."[37] Further, "[t]here may also be circumstances where a digital platform's first-party offering is better suited to a consumer's requirements."[38] Thus, if self-preferencing has the potential to both benefit and harm consumers, then what precisely would the regulation(s) entail? Even more concerning, the report concedes that the "ACCC has not, to date, examined whether Google has engaged in anti-competitive self-preferencing in the supply of general search services in Australia."[39] This admission, while laudable for its transparency, reveals the fundamental shortcoming of the report: a lack of evidence to justify the implementation of onerous and market-changing ex ante regulations.

Also, as we noted in a GAI submission to the *Bundesministeriums für Wirtschaft und Energie*:

> [A] platform may engage in self-preferencing for legitimate and procompetitive reasons. This point is self-evident from its widespread use across the digital economy—irrespective of a firm's market share. Considering "bias" as inherently a cause of competitive harm runs the risk of equating procompetitive conduct, such as technological advances and innovation, with

[35] *Id.* at § 6.1.
[36] *Id*. at 124.
[37] *Id*. at 125.
[38] *Id*.
[39] *Id*. at 128.

> anticompetitive foreclosure. For example, a digital platform's offer of an enhanced product that provides additional benefits to consumers could be considered anticompetitive. The critical question should be whether the underlying conduct benefits consumers through innovation and an improved product rather than whether it makes life more difficult for rivals. The mere existence of own-content bias itself does not answer this critical question. Conduct that harms rivals merely because it provides a more valuable product and therefore attracts consumers is the essence of competition and illustrates the core logic of the maxim that competition law protects competition, not competitors.[40]

Moreover, even in the extreme case of a secure monopoly, the monopolist would consider the opportunity costs of self-preferencing. If a rival could deliver higher value net of cost to an installed-base customer than the monopolist, such a trade would produce greater gains relative to self-supply.[41] The monopolist could likely capture some of those incremental gains and would thereby find third-party supply more profitable than self-supply. The relevant questions then, for purposes of assessing whether self-preferencing by a large digital platform hampers competition, are (1) whether the platform is indeed a monopolist insulated from competition,[42] and (2) whether rival supply would render that monopoly less secure. If the answer to (1) is yes and (2) is no, self-preferencing may hamper competition. Otherwise, self-preferencing may be procompetitive or harmless.

Ultimately, self-preferencing is, as the ACCC Report repeatedly acknowledges, a business practice that can have substantial procompetitive effects. The practice can exist in all sectors of the economy across the market power spectrum. Self-preferencing manifests itself in various forms including private labeling, shelf-space positioning, and using proprietary technology and inputs. We ultimately hold the position that:

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[40] GLOB. ANTITRUST INST., *Before the Federal Ministry of Economic Affairs and Energy "GWB Digitalization Act" Comment of the Global Antitrust Institute, Antonin Scalia Law School, George Mason University* 11–12 (Geo. Mason L. & Econ. Rsch. Paper No. 20–31, Nov. 11, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3728105.

[41] The point does not only apply to the supply of goods and services, but also to other forms of intermediated interaction among platform participants. *See* Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 1–44 (1960).

[42] A finding of monopoly or dominance should be based "on sound economic analysis, i.e., a showing that the firm profitably can raise price, or reduce output, quality or the rate of innovation (relative to a competitive norm) in a particular well-defined relevant market." GLOB. ANTITRUST INST., *supra* note 40, at 10.

> Whether one agrees with the FTC's or EC's findings [on the Google Shopping case], both investigations (as well as the earlier Microsoft litigation) demonstrate that agencies and courts have tackled this problem [of self-preferencing] and are able to rule on it. These investigations and litigation are not easy to conduct. They take time, and their findings are not always crystal clear. This undoubtedly causes some frustration on the part of third parties and outside observers, but it is in no small part due to the fact that the consequences of such conduct for consumers and for economic welfare are themselves often unclear or ambiguous. The question is whether a change in presumption [or regulations] regarding preferencing would yield better outcomes. While various digital reports advocate for a change in presumption, they are short of actual evidence that preferencing causes welfare losses. As various commentaries of the FTC's case against Google have shown, there are strong procompetitive rationales for the conduct.[43]

Further, outright condemnation of practices—absent compelling evidence of systematic harm from practices—would move antitrust away from an effects-based approach to an approach used in an earlier era where many procompetitive practices were per se condemned.[44] For instance, Kobayashi and Wright detail studies showing how forced vertical disintegration during the earlier era of per se condemnation reduced consumer welfare.[45]

B. Pre-Installations and Defaults

In § 6.3, the ACCC Report identifies exclusive pre-installation and default agreements as another type of conduct to regulate.[46] The ACCC Report recognizes that "pre-installation of apps can be useful for consumers," yet it states "pre-installing only one platform's apps can affect competition outcomes due to consumers' tendency to stick with default services."[47] This tendency reveals "consumer behavioural biases" when firms set defaults.[48] Thus, the report suggests the regulatory "code for search services could require Designated Digital Platforms to provide choice screens in respect of specific services that act

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[43] *See* John M. Yun, *Does Antitrust Have Digital Blind Spots?*, S.C.L. REV. 305, 342–43 (2020).

[44] *See* Kobayashi & Wright, *supra* note 24, at 873.

[45] *Id*. at 874.

[46] *ACCC Report*, *supra* note 2, at 139 ("The ACCC recommends that additional competition measures for digital platforms should include obligations that address exclusive pre-installation arrangements and defaults where these harm competition.").

[47] *Id*. at 144.

[48] *Id*. at 151.

as 'search access points.'"[49] The ACCC Report advances "that mandating choice screens, in combination with other measures, could improve competition and increase proactive consumer choice in the supply of search services."[50]

The ACCC's concern with pre-installation and default agreements is based upon the presumption that the use of defaults is a symptom of market power and abuse rather than a pervasive feature of the modern economy. As the Nobel economist Richard Thaler has pointed out, "Defaults are ubiquitous and powerful. They are also unavoidable in the sense that for any node of a choice architecture system, there must be an associated rule that determines what happens to the decision maker if she does nothing."[51] Unsurprisingly, then, defaults are common to virtually every type of industry from consumer electronics to software to online services; thus, their presence by itself does not imply market power. Additionally, default settings can allow a provider to enhance the consumer experience and can save significant transaction and usage costs for consumers of the product.

Further, firms decide to set defaults based on weighing the benefits and costs.[52] The benefits are reducing transaction costs; for example, defaults allow the consumer to use a product immediately and improve the consumer experience by allowing the firm to optimize the "set up." Costs can include researching the default that provides the best experience, creating a product robust to changes in defaults, and the consumer costs incurred in changing the default. Firms internalize these tradeoffs and make a decision.

Thus, a regulatory call for sweeping choice screen mandates in response to the use of pre-installation and default agreements by market leaders could reduce welfare in a range of highly plausible scenarios.[53] As Wright & Ginsburg explain: "even if a particular default rule meant to offset a cognitive bias will reduce some individual errors in decisionmaking, failure to calibrate the default rule to the distribution of true preferences may impose social costs upon rational decisionmakers that are greater than any benefits in error reduction."[54] Defaults

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[49] *Id*. at 139.

[50] *Id.* at 148.

[51] Richard H. Thaler, Cass R. Sunstein, & John P. Balz, *Choice Architecture*, *in* THE BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY 428, 430 (Eldar Shafir ed., 2013).

[52] *See* Yun, *supra* note 43, at 343-47.

[53] *C.f.*, George Bittlingmayer & Thomas W. Hazlett, *DOS* Kapital*: Has Antitrust Action Against Microsoft Created Value in the Computer Industry?*, 55 J. FIN. ECON. 329 (2000) (examining antitrust enforcement actions and related remedies against Microsoft in the 1990s and the negative impact those actions and remedies had on the computer industry as a whole).

[54] Joshua D. Wright & Douglas H. Ginsburg, *Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty*, 106 NW. U.L. REV. 1033, 1052 (2012); *see also* Gregory Mitchell, *Why Law*

can have a strong efficiency justification, and the likelihood of this efficiency does not go away when the firm happens to have a market leading position.[55] Therefore, regulatory reform targeting defaults and pre-installation agreements by mandating choice screens needs evidentiary support the choice screens would produce greater efficiencies than the defaults do themselves. The ACCC Report does not provide such evidence.[56]

C. Interoperability

The ACCC Report also identifies increasing interoperability as a regulatory goal.[57] Specifically, "Apple, and to a lesser extent Google, restricts interoperability on their mobile OS and app stores. We are concerned that these restrictions are likely to have impacted competition, including in related markets where Apple and Google compete with third-party providers of apps and services."[58] Again, in a nod to procompetitive justifications, the report recommends that any interoperability "obligations should be drafted in a way that does not impede a Designated Digital Platform from taking reasonable and necessary actions to protect user privacy and the security and integrity of their hardware or software."[59] What is vitally missing, however, is an assessment of

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and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence, 91 GEO. L.J. 67 (2002) (characterizing the policy prescriptions of behaviorists as relying upon the empirically false assumption that people uniformly suffer from certain cognitive biases); Jonathan Klick & Gregory Mitchell, *Government Regulation of Irrationality: Moral and Cognitive Hazards*, 90 MINN. L. REV. 1620, 1627–28 n.20 (2006).

[55] The point is foundationally based on recognizing both that (a) there is an opportunity cost to active choice screens and (b) there are clear benefits to defaults. While the cost of making a choice may seem minimal for a fully informed consumer—other than the time to make all the choices, this is not true for a less informed consumer. For instance, there can be material uncertainty as to whether each available option integrates as well with the operating system and related features/software. As for the benefits, it has long been recognized that defaults are part of the "design" of a product and, like other dimensions of design, firms compete over offering better defaults. *See, e.g.*, Jeff Atwood, *The Power of Defaults*, CODING HORROR (Jan. 10, 2007), https://blog.codinghorror.com/the-power-of-defaults/ (in discussing the value of setting good defaults: "There's nothing to install. There's nothing to configure. It just works. That's the power of defaults. Defaults are arguably the most important design decisions you'll ever make as a software developer. Choose good defaults, and users will sing the praises of your software and how easy it is to use. Choose poor defaults, and you'll face down user angst over configuration, and probably a host of tech support calls as well.").

[56] *See ACCC Report*, *supra* note 2, at 146 (discussing the consideration of costs and benefits of implementing choice screens must be considered before imposing such a regulatory obligation).

[57] *ACCC Report*, *supra* note 2, at § 6.5.

[58] *Id*. at 157.

[59] *Id*.

whether this disruption to a firm's design and property rights benefits consumers at all.

Essentially, interoperability mandates require firms to share their intellectual property with rivals. This mandate poses several problems. First, questions remain as to whether such a mandate would actually solve the problem at issue: the entrenchment of market leaders. Further, even if greater interoperability achieves the objective of boosting rivals' success, will this gain in interoperability depress incentives to innovate? Relatedly, will market leaders engage in inefficient "upgrades" and technology shifts in order to constantly force rivals to adapt to their system? In other words, by tethering rivals' costs to a leading platform's product design decisions, the platform now has an additional mechanism to impede rivals.

Second, interoperability inevitably brings rivals closer together and furthers their economic interdependence, which can result in more consumer harm rather than its mitigation. Specifically, having firms coordinate on the design and infrastructure of their products raises concerns about anticompetitive coordination, that is, agreements that restrict competition rather than sharpen it. Further, firms could "standardize" in an overly technical and complex manner with the intent to hinder, rather than facilitate, entry. Such standardization would serve only to entrench the incumbents.

Third, increased interdependence on a dominant platform could translate into less differentiated products where competitors within a market converge to match common features and designs. This can result in market stagnation and a more fragile ecosystem. For instance, if a leading platform is hit by an outage or, even, unravels altogether, the market would not be as robust to withstand these unpredictable events. As a consequence, this can increase uncertainty and reduce the resiliency of markets.

Finally, forced sharing has dampened incentives and reduced innovation.[60] In *Verizon Communications v. Trinko*, Justice Scalia raised serious concerns regarding any type of duty to deal with one's rivals:

> Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.[61]

[60] *See, e.g.*, Thomas W. Hazlett & Anil Caliskan, *Natural Experiments in U.S. Broadband Regulation*, 7 REV. OF NETWORK ECON. 460 (2008).
[61] 540 U.S. 398, 407–08 (2004).

Similarly, in a perhaps less well-known quote from Justice Breyer's concurrence in *AT&T Corp. v. Iowa Utilities Board*,[62] the Justice makes clear the dangers of forced sharing:

> Even the simplest kind of compelled sharing, say, requiring a railroad to share bridges, tunnels, or track, means that someone must oversee the terms and conditions of that sharing. Moreover, a sharing requirement may diminish the original owner's incentive to keep up or to improve the property by depriving the owner of the fruits of value-creating investment, research, or labor. And as one moves beyond the sharing of readily separable and administrable physical facilities, say, to the sharing of research facilities, firm management, or technical capacities, these problems can become more severe. One would not ordinarily believe it practical, for example, to require a railroad to share its locomotives, fuel, or work force. Nor can one guarantee that firms will undertake the investment necessary to produce complex technological innovations knowing that any competitive advantage deriving from those innovations will be dissipated by the sharing requirement. The more complex the facilities, the more central their relation to the firm's managerial responsibilities, the more extensive the sharing demanded, the more likely these costs will become serious. See generally 1 H. Demsetz, Ownership, Control, and the Firm: The Organization of Economic Activity 207 (1988). And the more serious they become, the more likely they will offset any economic or competitive gain that a sharing requirement might otherwise provide. The greater the administrative burden, for example, the more the need for complex proceedings, the very existence of which means delay, which in turn can impede the entry into long-distance markets that the Act foresees. . . .
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> Nor are any added costs imposed by more extensive unbundling requirements necessarily offset by the added potential for competition. Increased sharing by itself does not automatically mean increased competition. It is in the unshared, not in the shared, portions of the enterprise that meaningful competition would likely emerge. Rules that force firms to share every resource or element of a business would create not competition, but pervasive regulation, for the regulators, not the marketplace, would set the relevant terms. . . . Regulatory rules that go too far, expanding the definition of what must be shared beyond that which is essential to that which merely proves advantageous to a

[62] 525 U.S. 366 (1999).

single competitor, risk costs that, in terms of the Act's objectives, may make the game not worth the candle.[63]

Considering the numerous possible anticompetitive effects of forced sharing, the ACCC, the Treasury, and any other regulatory authority should demonstrate targeted obligations to foster greater interoperability would benefit consumers prior to adopting the regulatory reforms proposed in the ACCC Report.

III. Applying Unique Standards to an Arbitrary Class of Large Digital Platforms is Questionable

One approach the report uses to limit the impact of its regulatory proposals is to target specific companies, such as Designated Digital Platforms.[64] This approach is similar to the global trend of targeting specific, large platforms with designations as "gatekeepers" or other similar labels.[65] The inherent problem is the difficulty in identifying a class of large technology firms whose characteristics are distinct from other classes of firms to qualify them for rules different from those of economics-based competition analysis.

Thus, every proposed definition of a large digital platform (or "gatekeeper," or "covered platform," or "company of paramount significance") is inherently arbitrary and formalistic. No underlying principle in basic competition policy or economic analysis suggests the merits of any different approach, or any particular or unique approach. A different approach does not clearly connect with the key economic concepts (market power, etc.) that have always guided the sound interpretation of competition law. We urge the Treasury, and the ACCC or any other agency involved in the formulation of new policies and rules governing competitive conduct, to continue to apply rigorous and well-tested economics-based antitrust concepts uniformly to all entities. While many of the largest digital platforms may owe their competitive positions to network effects and the unique characteristics of multisided platforms, there is no support for the view that traditional economic-based analysis of business conduct cannot account adequately for these unique characteristics.

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[63] *Id*. at 428–30.

[64] *ACCC Report*, *supra* note 2, at 114 ("Designation criteria should aim to identify the digital platform services that hold a critical position in the Australian economy and that have the ability and incentive to harm competition.").

[65] For instance, the European Union's Digital Markets Act (DMA) relies on both quantitative and qualitative criteria. It designates a dominant platform as a "gatekeeper," a provider of core platform services based upon a significant effect on the internal market. *See* Eur. Comm'n, Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act), COM/2020/842 final, Art. 3 (Dec. 15, 2020).

The better course is for the Treasury to adopt the measures appropriate to produce needed improvements in the principles and procedures of transaction review (e.g., a suspensive mandatory notification/approval regime) and gain experience with transactions involving Designated Digital Platforms or the targeted business conduct before concluding that drastic reforms are essential to address the concerns expressed in the report.

IV. Conclusion

Australia's National Competition Policy Review of 1993 (hereafter "Competition Policy"),[66] which first recommended the establishment of an Australian competition commission, noted that "[t]he greatest impediment to enhanced competition in many sectors of the economy are the restrictions imposed through government regulation."[67] The relevance of this warning of the potential deleterious effects of government regulation on competition has not waned in recent years with developments in the digital economy.[68] On the

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[66] *See* AUSTL. GOV'T PUB. SERV., *National Competition Policy Review*, (Aug. 25, 1993), http://ncp.ncc.gov.au/docs/National%20Competition%20Policy%20Review%20report,%2020The%20Hilmer%20%Report,%20August%201993.pdf.

[67] *Id*. at xxix.

[68] Further, placing regulatory controls on the digital sector is contrary to the broader deregulatory movement in Australia, which kicked off in the 1970s in the financial sector—where the prior regulatory scheme caused "financial repression." *See* Stephen Grenville, *The Evolution of Financial Deregulation*, RSRV. BANK AUSTL. (1991), https://www.rba.gov.au/publications/confs/1991/grenville.html; *see also* Chris Berg, *The Campbell Committee and the Origins of "Deregulation" in Australia*, 451 AUSTL. J. POL. SCI. 711 (2016) (arguing the "Campbell Committee," the group generally credited with the deregulation of the financial sector, also restrained the extent of reform and deregulation of the financial sector). More recently, on July 1, 2000, Australia deregulated the milk industry, and, after examining the results, the ACCC "broadly concludes that Australian milk consumers are better off." *See* AUSTL. COMPETITION & CONSUMER COMM'N, *Impact of Farmgate Deregulation on the Australian Milk Industry: Study of Prices, Costs and Profits* xvi (Apr. 2001); *see also* Yu Sheng, Will Chancellor, & Thomas Jackson, *Deregulation Reforms, Resource Reallocation and Aggregate Productivity Growth in the Australian Dairy Industry*, 64 AUSTL. J. AGRIC. & RES. ECON. 477, 478 (2019) ("We show that the reform contributed to industry-level productivity growth, not only by raising average within-farm technological progress, but also through resource reallocation between farms with different productivity."). The deregulation movement is ongoing with recent Australian administrations releasing their "deregulation agendas," and the Australian government established the Deregulation Taskforce in 2019. Jonathan Curtis, *Deregulation Agenda*, PARLIAMENT AUSTL. (Oct. 2020), https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview202021/DeregulationAgenda (describing the goal of the Deregulation Taskforce as "'ensuring that, where regulation is required, it is implemented with the lightest

contrary, the growing importance of the digital economy counsels circumspection and care in assessing the effects of new regulatory restrictions.

The Competition Policy defined competition as "the striving or potential striving of two or more persons or organizations against one another for the same or related objects,"[69] and described the workings of competition as follows:

> Competition provides the spur for businesses to improve their performance, develop new products and respond to changing circumstances. Competition offers the promise of lower prices and improved choice for consumers and greater efficiency, higher economic growth and increased employment opportunities for the economy as a whole.[70]

Yet the ACCC Report now condemns this striving and improvement in performance that benefits consumers as "barriers to entry and expansion" to rivals. The protection of competitors to the detriment of consumers through government regulation was anathema to the founding Competition Policy, and neither the ACCC nor the Treasury should embrace it.

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touch—that it is designed and applied in the most efficient and timely way, with least cost on businesses'").

[69] AUSTL. GOV'T PUB. SERV., *supra* note 66, at 2 (quoting Kenneth Dennis, *'Competition' in the History of Economic Thought* (Oct. 1975) (Ph.D. dissertation, University of Oxford) (on file with the University of Oxford)).

[70] *Id*. at 1.