



***Digital Platforms: Government's consultation on  
ACCC's regulatory reform recommendations***

***Comments from Yahoo  
February 2023***

**1. Introduction**

- 1.1. Yahoo is pleased to provide comments in response to this consultation.
- 1.2. Yahoo is a leader in communications, digital content, and advertising, and a provider of search services. The company includes diverse media and technology brands, including Yahoo and AOL, that engage approximately a billion people around the world. For business partners, we provide a suite of services to help amplify growth and drive more meaningful connections across advertising, search and media.
- 1.3. More specifically, Yahoo is a provider of consumer email and curated news and lifestyle content. Yahoo also provides B2B advertising intermediary services. These services are distinctly different from the services which are the main focus of the ACCC's recommendations. We comment in this response on where it would be appropriate to more tightly target or nuance policy to reflect the different characteristics of these services and avoid unintended impacts.
- 1.4. We provide some general comments in this submission. We may add to these comments during the further stakeholder consultation that is planned.

**2. General comments**

- 2.1. The ACCC's report assesses consumer harms and competition issues together and proposes a complex mix of interventions and regulation to address the concerns it has identified. It would provide greater clarity - particularly to competing firms - if the two areas of policy were clearly separated.
- 2.2. For example, the EU's Digital Services Act is an economy-wide approach to online harms while the Digital Markets Act is a targeted ex-ante regime to regulate designated 'gatekeepers' and enable competition. Likewise, the forthcoming UK Competition and Digital Markets Bill is expected to comprise two distinct sections, one introducing a targeted pro-competition regime aimed at firms with entrenched market power and the other introducing selected amendments to the existing ex-post - and economy-wide - regime for consumer protection and competition.
- 2.3. It is important that any economy-wide regulation of digital services is developed in a thoughtful way, guided by clear regulation principles including proportionality (meaning the minimum intervention necessary to achieve the objective), targeting, scalability and affordability so as not to disadvantage competing firms which face other disadvantages in the market.

- 2.4. Government should also carefully plan the timing and sequencing of legislation to amend consumer protection and competition law. Competing firms experience a challenging and unpredictable commercial and legal landscape. In many parts of the world, these firms are experiencing a rapid increase in the regulatory cost of doing business in digital markets and this typically precedes the introduction of effective competition regulation. There is a clear link between increased regulatory costs and decreased competition and marketplace diversity.

### 3. Consumer recommendations

- 3.1. We have commented previously that the ACCC has defined “digital platforms” very broadly to encompass not only social media and marketplaces, but a far wider group of digital services which do not share the same characteristics, principally the ability of consumers to connect with each other and to post and share user generated content. The ACCC’s definition, for example, includes email and content aggregation services. It would be appropriate to narrow the definition in line with legislative developments in other markets.
- 3.2. It will be important for Government to design and target policy accordingly, focusing on the harms to be addressed and the characteristics of the services where they occur. Government policy must give legal certainty to providers of services that do not offer the functionality which facilitates the harms in question and where intervention lacks a robust evidence base. For example, webmail services are subject to rules on unfair contract terms in the UK and EU but are excluded from the EU’s Digital Services Act and the UK’s Online Safety Bill which primarily concern social media and market places. Government could also consider ‘tiering’ regulation. The EU’s DSA, for example, introduces specific additional rules for ‘platforms’, separate from other hosting providers.
- 3.3. The presence of B2B advertising intermediaries in the definition of “platforms” is anomalous. Ad intermediaries operate in a complex and open supply chain which is wholly different to ‘platforms’ and requires regulation that reflect relevant differences. Ad intermediaries are wholly B2B entities and do not contract with consumers which is a key concern of the ACCC’s recommendations. Both EU and UK, for example, are developing policy for ad intermediaries separately from platforms in recognition of the complexity of the supply chain and the need to consider impacts on other parties, in particular news publishers. Given then the role global technical standards play in this supply chain, international alignment is crucial.
- 3.4. New proposals should be limited to addressing specific gaps in consumer law. Where guidance can be provided on the application of existing rules to instances of unfair trading or consumer contracts in digital markets, this should be explored as a first step.
- 3.5. As noted above, proposals should target the source of a consumer detriment and be specific as to which service types they apply to and which they do not. Overly broad proposals would sweep in to scope services which do not experience an issue nor operate functionality which could cause it.

- 3.6. Consumer protection policy which needs to be economy-wide - such as rules on unfair contracts and unfair trading - must therefore be carefully designed and implemented to ensure that they are appropriately targeted at the service or technical functionality which produces the consumer detriment and are proportionate, scalable and affordable for companies of all sizes. Government should consider developing guiding principles for economy-wide regulation. The UK, for example, has developed a Digital Regulation Plan for this purpose<sup>1</sup>.
- 3.7. Government should be open to different solutions for different business models or supply chains but which deliver the same consumer outcome. Government should forbear from regulation designed principally to be punitive to very large platforms. Such interventions are likely to be disproportionate for other service types and firms of different sizes.
- 3.8. The ACCC has identified scams as a particular concern. This is a broad issue and involves scams in organic content (mainly in social media) and malicious actors exploiting paid-for advertising to draw consumers into offline scams. It is important that Government addresses each type of scam activity separately and designs specific approaches for each. This would avoid unintended consequences; particularly where complex supply chains require collaborative and concerted action by multiple actors in order to deliver a desired consumer benefit.
- 3.9. For example, advertising intermediaries in the open demand advertising supply chain have invested in solutions to address scams perpetrated in paid-for advertising. Demand-side technical standards<sup>2</sup> have been developed to identify malicious advertisers and exclude them from the supply chain. Sell-side equivalents of these standards were adopted quickly by publishers to address misselling of inventory. Similar swift adoption is required on the buy-side to effectively address fraud and scams. Government endorsement of these standards would help drive up rates of adoption.
- 3.10. The design and focus of proposals in paid-for advertising should also reflect how malicious advertisers enter the advertising ecosystem. Experience shows that malicious advertisers mainly enter the supply chain where they are able to sign up online and pay by credit card with limited or no prior verification. It may be appropriate to omit from scope demand-side ad intermediaries that do not offer these features and onboard advertising via a robust account management system. Government should also explore complementary approaches including targeted investment in criminal prosecutions to act as an effective deterrent.
- 3.11. The ACCC has expressed concern about the use of personal data for personalised services. Government should consider evolving consumer attitudes to the value exchange between the processing of personal data and the availability of digital services that are free at the point of use. Research<sup>3</sup> shows an increasing acceptance of this value exchange with respect to brands that consumers trust, particularly

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<sup>1</sup> See <https://www.gov.uk/government/publications/digital-regulation-driving-growth-and-unlocking-innovation>

<sup>2</sup> See <https://liquidm.com/buyers-json-leading-the-way-on-buy-side-transparency/>

<sup>3</sup> See <https://globaldma.com/consumer-attitudes/>

among younger users who are more sensitive to price and less able to afford fee-based services.

- 3.12. More generally, concerns about the processing of personal data and so-called 'dark patterns' are best addressed via targeted and proportionate amendments to domestic privacy laws. Government should avoid overlapping or conflicting legal frameworks which reduce legal certainty and predictability and may impact investment decisions.

#### **4. Competition recommendations**

- 4.1. The ACCC's thorough inquiry has surfaced a number of competition issues which it concludes cannot be addressed under existing competition rules. This mirrors similar developments in other markets, as set out in Attachment A.
- 4.2. In contrast with other markets, the ACCC has conflated consumer protection and competition issues and sets out a single set of proposals to address both under the umbrella of "competition recommendations". This approach is fraught with difficulties and is likely to result in unintended consequences and collateral impacts for the wider industry, including competing firms.
- 4.3. We would urge Government to align with other markets and carefully design and target interventions to address competition and consumer issues separately and independently of each other. This process must include detailed assessments of proportionality and necessity for each.
- 4.4. There may be a small number of consumer protection concerns that arise because firms with market power do not have the same incentives as competing firms to address a particular issue. It may be appropriate to consider these under an ex-ante competition framework so that interventions do not unfairly target firms for whom market forces have incentivised effective action. These areas should be identified on a case-by-case basis in consultation with market participants.
- 4.5. The proposed ex-ante competition rules aim to target companies with entrenched market power, where traditional ex-post rules have been too cumbersome or have become ineffective. Ex-ante rules should be used infrequently and in specific and narrow circumstances. These exercises focus on preventing firms with market power from taking advantage of their market position while separately and simultaneously addressing the root causes of market power. The strength of such proposals lies in how they narrowly target interventions on firms with proven market power and focus on removing barriers which hinder competition.
- 4.6. The ACCC's report sets out options for identifying firms that should be designated for ex-ante regulation but does not recommend a preferred approach. Government will need to consult further on available options to define an approach that both meets the policy objectives and avoids unintended impacts.
- 4.7. For example, in markets characterised by the presence of a 'gatekeeper', sizable challenger companies are particularly important to the existence of competition, as smaller companies simply cannot compete. Thus, the Government should avoid quantitative thresholds for ex ante regulation that might capture competing

providers which are large in size but which no competition authority would define as exercising market power.

- 4.8. Further, Government should avoid quantitative rules which place a *presumption* on challenger companies and then require them to disprove their 'gatekeeper' status. This approach places the burden on the competing provider, rather than a competition authority, to prove it cannot exercise market power. This would require significant allocation of time and financial resources, further hampering competition and cementing the position of genuine gatekeepers. Avoiding a presumption of gatekeeper status would support genuine challengers in devoting their resources to competition and bring them more certainty.
- 4.9. A prior, targeted and in-depth economic assessment process by an expert competition authority is preferable and would more surgically target firms with entrenched market power. Some quantitative thresholds (like minimum revenue thresholds) may be applied to make it clear which firms are out of scope of designation<sup>4</sup>.
- 4.10. Additionally, an ex-ante regime which includes enforceable codes would be an effective approach to address anticompetitive conduct by designated providers in certain digital activities. Such codes would have many advantages, for example they could be targeted to specific conduct and adjusted over time if they become ineffective or the anti-competitive conduct has ended.
- 4.11. Both the designation process and the development of codes should be overseen by an expert regulator. The design process should be open and informed by close consultation with interested stakeholders as to content and target outcomes. The process should avoid design features that could further disadvantage competing firms, for example by controlling standards-setting processes or directing their innovation and investment efforts.
- 4.12. The ACCC's report makes a number of other recommendations regarding fair dealing with business customers and transparency, and cites a number of legislative developments in other markets (including the EU's P2B Regulation and the EU's Digital Services Act). It is important to note again that none of these policies apply to ad intermediation. Other markets, including the UK and EU, are still at the early stages of examining this supply chain and are taking a fresh and evidence-based approach because of its complexity, the significant body of pre-existing standards and self-regulation as well as the need to consider the interests of other parties, in particular news publishers.

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<sup>4</sup> See

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1073164/E0274068\\_8\\_CP\\_657\\_Gov\\_Resp\\_Consultation\\_on\\_pro-comp\\_digital\\_markets\\_Accessible.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1073164/E0274068_8_CP_657_Gov_Resp_Consultation_on_pro-comp_digital_markets_Accessible.pdf)