22 August 2024

VIA EMAIL

Australian Competition & Consumer Commission
23 Marcus Clarke Street
Canberra ACT 2601
digitalmonitoring@accc.gov.au

Re: Invitation to Comment on Digital Platform Services Inquiry 2020-25 Issues Paper

Dear Australian Competition & Consumer Commission:

The Software & Information Industry Association ("SIIA") appreciates the invitation to provide these comments to the Australian Competition & Consumer Commission ("ACCC").

SIIA is the principal trade association for the software and digital information industries worldwide. Among our nearly 400 members are cloud service providers, developers of software (including AI applications), and platforms, as well as digital content providers and users in academic publishing, education technology, and financial services. SIIA is dedicated to fostering a healthy environment for the creation, dissemination, and productive use of information, and we believe in a competition policy that is focused on promoting innovation, protecting the competitive process, and providing consumers with superior products and services at competitive prices.

In conjunction with the 25 July 2024 release of its Issues Paper[1], the ACCC requested written submissions from interested parties in order to foster a better understanding of questions related to three topics: recent international and regulatory developments; key trends in markets for digital platform services; and potential competition issues related to digital platform services. Our submission will focus on the first and last of those questions and follows the outline and section numbering of the Issues Paper.

1. International Regulatory Developments

Over the last several years, multiple jurisdictions, including Australia, have ramped up efforts to rein in what some see as the excesses and anticompetitive conduct of large tech platforms. Below we give an overview of some of the recent regulatory and legislative developments in the European Union, the United Kingdom, and the United States.

a. European Union

In 2019, the European Union's ("EU") Directorate-General for Competition published a report on "Competition policy for the digital era."[2] Following release of the report, the European Commission introduced

[1] *Digital Platform Services Inquiry – March 2025 – Final Report*. Issues Paper, 25 July 2024. Australian Competition & Consumer Commission. Available at https://www.accc.gov.au/inquiries-and-consultations/digital-platform-services-inquiry-2020-25/march-2025-final-report

[2] European Commission, Directorate-General for Competition, Montjoye, Y., Schweitzer, H., Cremer, J., *Competition policy for the digital era*, Publications Office, 2019. Available at https://data.europa.eu/doi/10.2763/407537

the Digital Markets Act ("DMA"), which aims to make digital markets more contestable, competitive, and fair, by imposing a set of conduct obligations and prohibitions on a small group of large online platforms, which have been designated as "gatekeepers" under the act. The DMA was passed into law in March of 2022 and took effect in May of 2023.[3] It is important to understand that the DMA constitutes a new legal framework, which runs in parallel with, but is separate from, the EU's traditional competition law regime.

Among the criticisms of the DMA are that it targets a handful of, mostly, U.S. tech companies and uses arbitrary thresholds to do so. Among the six companies to be designated as "gatekeepers," five are American; no European companies have been designated thus far.[4] Another concern is that the DMA imposes numerous and rigid *per se* rules that apply regardless of whether the conduct in question has been shown to be harmful or not. Add to this, that there is no acknowledgement that many of the covered platforms operate in different markets and have vastly different business models, thereby significantly increasing the risk that potential issues are misdiagnosed, and that proscribed remedies, as a result, end up doing more harm than good.

While the DMA only became fully operational in March 2024, it is already having a substantial negative effect on businesses and consumers in the EU. Among other things, it poses significant challenges for the service industry[5] and small- and medium-sized enterprises ("SMEs")[6]. And due to concerns about how the DMA is being implemented, Apple[7] and Meta[8] recently announced that they will pause the rollout of new product features in the EU later this year.

b. United Kingdom

In 2018, the UK government commissioned a Digital Competition Expert Panel (the "Panel"), to examine and report on competition in digital markets. The Panel's final report[9] made a range of non-binding recommendations designed to address alleged challenges to the enforcement of competition law in digital markets. These recommendations led to the Digital Markets, Competition and Consumer Act 2024 ("DMCC" or the "Act"), which received Royal Assent on 24 May 2024.[10]

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[3] Regulation No. 1925/2022, 2022 O.J. (L265) 1.
[4] European Commission, Digital Markets Act (DMA) website, *Gatekeepers*. Available at https://digital-markets-act.ec.europa.eu/gatekeepers_en
[5] Mirai, *DMA's Negative Impact*. Available at https://www.linkedin.com/feed/update/urn:li:activity:7166372671595634689/
[6] Vano, Vladimir, *Under the Digital Shadow: How the DMA Could Darken the Future for Hotels and SMEs*, April 30, 2024. Available at https://vladimirvano1.medium.com/under-the-digital-shadow-how-the-dma-could-darken-the-future-for-hotels-and-smes-40708bf48b52
[7] Chee, Foo Yun, *Apple to Delay Launch of AI-powered Features in Europe, Blames EU Tech Rules*, Reuters, June 21, 2024. Available at https://www.reuters.com/technology/artificial-intelligence/apple-delay-launch-ai-powered-features-europe-blames-eu-tech-rules-2024-06-21/
[8] Kroet, Cynthia, *Meta Stops EU Rollout of AI Model Due to Regulatory Concerns,* Euronews, July 18, 2024. Available at https://www.euronews.com/next/2024/07/18/meta-stops-eu-roll-out-of-ai-model-due-to-regulatory-concerns
[9] Report of the Digital Competition Expert Panel, *Unlocking digital competition*, March 2019. Crown copyright 2019. Available at https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel
[10] *Digital Markets, Competition and Consumers Act 2024*, c. 13. Available at https://www.legislation.gov.uk/ukpga/2024/13/contents/enacted

Like the DMA, the DMCC establishes a novel and unique competition regulatory regime. But as many other competition laws, its legislative text is short on actual detail.[11] Yet companies designated under it as having Strategic Market Status ("SMS"), are expected to quickly comply with whatever substantial and onerous obligations the Competition and Markets Authority ("CMA") might choose to impose.

Because of the DMCC's opaqueness, we have stressed the need for the CMA to provide clear operational guidance about expectations for and responsibilities of companies that either have been, or are likely to be, designated as an SMS firm under the Act. While the DMCC has not yet taken effect, the CMA's recently published Draft Guidance[12] on how it plans to implement the Act, unfortunately, largely fails to do so.[13]

Moreover, appellate review of the CMA's actions is circumscribed by the judicial review standard[14], which inquires not whether a decision is "correct," but whether it is procedurally defective, illegal, or irrational.[15] In practice, this means that the determination of what is "appropriate and reasonable" in individual cases, absent decisions that are either unlawful or patently absurd, is left entirely to the CMA's discretion, which raises significant rule of law and due process concerns.

In light of the foregoing, we have strongly encouraged the CMA to amend the Draft Guidance to provide businesses and the public substantially more and better guidance about its understanding of critical terms in the DMCC, the type of evidence it will require companies to produce as part of investigations, and, at least, some indication of how it expects to weigh competing interests in its decisional practice. Finally, we have urged the CMA to recognize the need for a limiting principle to guide how it exercises its discretion in individual cases.

c. United States

In 2020, the then-majority staff on the Judiciary Committee in the House of Representatives produced a voluminous report on competition in digital markets.[16] The report resulted in the introduction in the U.S. Congress of a number of digital platform-targeting bills, none of which ultimately went anywhere.

Chief among them was the *American Innovation and Choice Online Act* ("AICOA")[17], which was widely panned as being a poorly drafted solution in search of a problem. In the words of one of America's preeminent antitrust experts, "… AICOA misidentified the sources of harmful market power by being both under- and overinclusive. It [was] underinclusive to the extent that it applie[d] only to online commerce; it was overinclusive

[11] *Ibid.*
[12] *Digital markets competition regime guidance*, CMA 194con DRAFT, Guidance on the digital markets competition regime set out in the Digital Markets, Competition and Consumers Act 2024. Available at https://assets.publishing.service.gov.uk/media/6650a56d8f90ef31c23ebaa6/Digital_markets_competition_regime_guidance.pdf
[13] *SIIA Submission to the CMA on DMCC Consultation*, July 15, 2024. Available at https://www.siia.net/siia-submission-to-the-cma-on-dmcc-consultation/
[14] See *supra* note 10 sections 103(4)(a) and (5).
[15] Courts and Tribunals Judiciary – Judicial review. Available at https://www.judiciary.uk/how-the-law-works/judicial-review/
[16] Majority Staff Report and Recommendations of the United States House of Representatives, Committee on the Judiciary, Subcommittee on Antitrust, Commercial and Administrative Law, *Investigation of Competition in Digital Markets*, 2020. Available at https://democrats-judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf
[17] https://www.congress.gov/bill/117th-congress/senate-bill/2992/text

in that it applie[d] to products and services over which the seller [had] no market power. As a result, its substantive requirements [were] egregiously mistargeted."[18]

3. Identifying Potential or Emerging Issues

Below we provide an overview of potential competition issues in cloud computing and generative AI. We ultimately conclude that new regulations or increased enforcement of existing laws would be unwarranted.

a. Potential Competition and SME Issues in Cloud Computing

According to the National Institute of Standards and Technology ("NIST"), which is an agency under the United States Department of Commerce, "[c]loud computing is a model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computer resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction."[19]

Cloud computing cannot, however, be viewed in isolation. Rather, it is only one segment in the broader market for IT services.[20] Prior to cloud computing in recent years becoming ubiquitous, one hundred percent of a company's IT storage and compute resources were located and managed on-site. And while the cloud segment represents an increasing share of those services, the vast majority of these business needs are still predominantly met through what is known as "on-premises" or "traditional" IT. To put a finer point on it, cloud services, according to some estimates, made up no more than 15 percent of global IT spending in 2021.[21]

One significant benefit of the cloud is its scalability and elasticity of supply and demand. This level of flexibility is of particular import for SMEs. According to a study by the Small Business & Entrepreneurship Council, which is a U.S. organization focused on advancing the interests of entrepreneurs and small businesses, nine in ten small businesses use cloud computing services; eight in ten believe that they have enough cloud providers to choose from; and the vast majority of these businesses say that they are very satisfied with the value for money that they get from their provider.[22]

Importantly, the cloud has helped to democratize access to technology more broadly. One area where this trend is plainly obvious is in artificial intelligence ("AI"), *infra*. Today, even comparatively small companies often need the ability to quickly manage and process vast volumes of data. AI can help these firms automate

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[18] Hovenkamp, Herbert, *Gatekeeper Competition Policy*, March 18, 2023. U of Penn, Inst. For Law & Econ Research Paper No. 23-08, Michigan Technology Law Review (2023), at 5.

[19] National Institute of Standards and Technology, U.S. Department of Commerce, Special Publication 800-145, *The NIST Definition of Cloud Computing*, September 2011, at 2. Available at https://nvlpubs.nist.gov/nistpubs/Legacy/SP/nistspecialpublication800-145.pdf

[20] Song, Minjar, Brattle, *Trends and Developments in Cloud Computing and On-Premise IT Solutions*, December 2021, at 5-6. Available at https://alliance4digitalinnovation.org/wp-content/uploads/2023/06/Brattle-Cloud-Computing-Whitepaper_Dec-2021-2.pdf

[21] Gartner, *IT Key Metrics Data 2022: Industry Measures – Executive Summary*, December 16, 2021. Available at https://www.gartner.com/en/documents/4009145

[22] Small Business & Entrepreneurship Council (U.S.), *Survey: Small Businesses Embrace Immersive Technologies, Feel Secure in the Cloud….*, June 6, 2023. Available at https://sbecouncil.org/2023/06/06/new-survey-small-businesses-embrace-immersive-technologies-feel-secure-in-the-cloud-many-harmed-by-termination-of-immediate-rd-expensing/

routine processes, analyze data, provide additional security, and aid in the development of new product and service offerings.[23]

What makes the cloud truly unique is its flexible pricing model, and how it allows customers to mix and match the cloud solutions that meet their specific needs and price point.[24] This also means that it is in the interest of cloud providers not to create artificial barriers to switching, but rather to make switching as easy as possible. And switching is commonplace. According to one survey, 81 percent of public cloud users use two or more service providers.[25]

Finally, it is worth pointing out that there are more than 1,600 cloud infrastructure startups. Nine of them are unicorns, which means that they have valuations in excess of $1 billion USD.[26] Does this mean that they are destined to become market leaders in their respective segments, or even that all of them will survive long-term? Of course not. Competing on the merits means that all market participants should be given an equal chance to succeed, not that everyone, or most, ultimately will.

In sum, the cloud industry is thriving, dynamic, and highly competitive.

b. Potential Competition Issues in Generative Artificial Intelligence

AI can be defined as "an engineered or machine-based system that can, for a given set of objectives, generate outputs such as predictions, recommendations, or decisions influencing real or virtual environments."[27] As an initial matter, it is important to understand that AI is not a novel concept. It is widely used by governments, businesses, and, in fact, all of us in our everyday lives, and has been for years. A few examples that almost anyone can relate to are internet search engines, social media platforms, and recommendation systems employed by platforms, such as YouTube and Netflix.

It is also important to note that AI does not consist of a stand-alone piece of hardware or software. Rather, it is made up of a combination of interrelated components that must integrate and work together seamlessly in order to generate optimal outputs.[28] This is what is often referred to as the AI stack or AI value chain. One helpful way to think about the AI stack is to break it down into key components, including compute (semiconductors, or chips); data; models (or algorithms); storage (such as cloud computing); AI applications; and people (or "talent").

As with any market, there are barriers to entry in the market for the development of AI models – barriers that are more acute for foundation models ("FMs"), including those that power many generative AI ("GenAI")

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[23] Gewirtz, David, *The future of cloud computing, from hybrid to edge to AI-powered*, ZDNET, March 20, 2023. Available at https://www.zdnet.com/article/the-future-of-cloud-computing-from-hybrid-to-edge-to-ai-powered/

[24] Bipartisan Policy Center, *Cloud Platforms – Interoperability and Portability*, January 2023, at 14. Available at https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2023/01/BPC_Cloud-Platforms_RV2.pdf

[25] Kleyman, Bill, *Just How Hard is it to Move from One Cloud Provider to Another?*, October 28, 2019. Available at https://www.informationweek.com/it-infrastructure/just-how-hard-is-it-to-move-from-one-cloud-provider-to-another-#close-modal

[26] Tracxn, *Emerging Startups 2023: Top Cloud Infrastructure Startups*. Available at https://aviatrix.com/blog/emerging-startups-2023-top-cloud-infrastructure-startups/

[27] National Institute of Standards and Technology, U.S. Department of Commerce, *Artificial Intelligence Risk Management Framework (AI RMF 1.0)*, January 26, 2023, at 1. Available at https://www.nist.gov/itl/ai-risk-management-framework

[28] National Security Commission on Artificial Intelligence (U.S.). Final Report: National Security Commission on Artificial Intelligence, report, March 1, 2021, at 31. Available at https://reports.nscai.gov/final-report/

applications. The following contains a non-comprehensive list of some of the potential barriers to entry that companies might encounter when they decide to try to enter this market. It is helpful to look at barriers at each component in the AI stack.

There are barriers to entry with respect to obtaining the necessary compute resources to analyze data and develop AI applications. There are few manufacturers of the high-quality chips necessary for AI systems, and creating a new chip fab requires not only the requisite know-how but also tens of billions of dollars in costs.

This means that anyone wishing to develop their own FM – rather than participate in the AI market by building apps on top of FMs, for example – will need funds sufficient to purchase chips that can be used to conduct computations or to purchase the use of compute through an infrastructure provider, such as a cloud service provider. Because of a fairly limited number of large cloud service providers, and due to the large capital investments necessary to become a serious player in that market, some commentators have expressed concern that barriers to entry may be too high.[29] At the same time, as detailed above, reliable cloud service providers can significantly lower the costs associated with becoming a new entrant in the FM market because they provide a much quicker and more cost-effective path to building the applications and services necessary to thrive.

An additional barrier is access to data. Along with computational power, access to robust datasets is the lifeblood of FMs.[30] Put differently, without massive volumes of data, there are no FMs. And all the data in the world, irrespective of quality, would in most cases be of limited utility if the data holder did not have access to the extraordinary computational capacity necessary to process it. For example, some analysts estimate that the process of training and refining a model like OpenAI's Chat GPT-3 easily costs more than $4 million USD, while training more advanced models could carry a price tag of more than "the high-single-digit millions."[31]

Any firm that, given its existing product and service offerings, has a direct and plentiful pipeline to the requisite data, therefore, the argument goes, has a competitive advantage. But this is an area where government action can help. Some of the most important data is held by public organizations, and devising methods to make these data available for engineers to use to develop societally beneficial uses of GenAI is a way to lower the barrier to entry quite significantly. In addition, the government can help SMEs make use of publicly available data that often will be too costly (due to the need for storage and compute) for smaller firms to pursue on their own.

The people or "talent" part of the AI stack is also a barrier to entry. Even companies with the requisite computational capabilities and ability to tap bountiful sources of data will not get very far without employees who possess the skills and know-how to build and train marketable FMs.

While people with these skills often can choose from a range of potential employers, many will gravitate toward the companies that can offer the most resources, the best likelihood of success, and the highest pay. That said, to the extent that this is deemed a problem, it is unclear why competition law would be particularly well-

[29] Hoppner, Thomas and Streatfield, Luke, *ChatGPT, Bard & Co.*: An Introduction to AI for Competition and Regulatory Lawyers (February 23, 2023). 9 Hausfeld Competition Bulletin (1/2023), Article 1, Available at https://www.hausfeld.com/en-us/what-we-think/competition-bulletin/chatgpt-bard-co-an-introduction-to-ai-for-competition-and-regulatory-lawyers/

[30] *Ibid.*

[31] Vanian, Jonathan and Lewsing, Kif, *ChatGPT and generative AI are booming, but the costs can be extraordinary*, CNBC, March 13, 2023 (updated April 17, 2023). Available at https://www.cnbc.com/2023/03/13/chatgpt-and-generative-ai-are-booming-but-at-a-very-expensive-price.html

suited to provide an appropriate remedy. Indeed, changes to labour laws or immigrations laws would more appropriately address the needs that younger companies have.

c. New Competition Regulations or Aggressive Enforcement in the AI Space is Unwarranted

There is also the question of whether targeting regulation or enforcement at a few actors in one industry would be an effective use of resources. The available research urges caution. In a paper on the consequences of competition action against large online platforms, the authors concluded that while interventions might achieve some results, they do not necessarily improve competition or benefit consumers.[32] Instead, what they found was that one of the potential downsides of heavy-handed interventions was that it might merely tip the scales in favor of other large, albeit slightly smaller, companies that focus more on efficiency than innovation. In other words, merely hobbling large industry players will not, by itself, create a more competitive or innovative market.[33] The risk of unintended consequences from aggressive enforcement, in other words, could be substantial.

At a recent workshop co-hosted by the U.S. Department of Justice and Stanford University, the Assistant Attorney General in charge of U.S. antitrust enforcement appeared to agree that existing antitrust laws, in fact, are sufficiently malleable to be able to deal with any new issues in the AI context. To wit: "[T]he antitrust laws adapt to changing market realities. The principles of competition enforcement apply, whether an innovation is powered by steam, by transistors, or by reorganizing human thought through machine learning." And along those same lines, the general counsel of the French startup, Mistral, at the same workshop, expressed the concern that if governments are too quick to regulate or ramp up enforcement it could have a range of negative consequences. For example, in forbidding startups to partner with hyper-scalers for compute and distribution, enforcers could make it next to impossible for these startup companies to grow, or even exist.

While the AI market is nascent and largely unsettled, all available evidence points to it being fast-changing and competitive. There are a range of plausible scenarios for where the industry might go next. One possibility is that incumbent companies will be put in a position to entrench their market power, but it is just as plausible that market conditions will evolve in a way that creates circumstances that favor new companies and different business models. At the moment, no one knows which models ultimately will be the most successful.

But what we do know is that many different models, big and small, proprietary and more open source, are likely to succeed. No one model will meet every customer need, and bigger may not always be better. Model developers include well-known companies, such as Microsoft, Meta, and Google. But competition is also being led by dozens of innovative start-ups developing proprietary and open-source models, including OpenAI, Anthropic, Hugging Face, and Cohere, and many others.

Because of this profound uncertainty, we believe that the public interest will be best served by Australian policymakers and enforcers taking a thoughtful, measured, proportional, and evidence-based approach. The role of competition policy is to promote competition, not hinder it.

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[32] Katila, Riitta and Thatchenkery, Sruthi, *The Surprising Consequences of Antitrust Action Against Big Tech*, Harvard Business Review, February 24, 2023. Available at https://hbr.org/2023/02/the-surprising-consequences-of-antitrust-actions-against-big-tech

[33] *Ibid.*

SIIA thanks the ACCC for considering our views. We look forward to continuing our engagement with the Commission on this important issue, and we would welcome the opportunity to answer any additional questions that you may have.

Respectfully submitted,

Morten C. Skroejer
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