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Comments of the International Center for Law & Economics

Australian Government's Consultation on the Proposed New Digital Competition Regime

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I. Introduction

We appreciate the opportunity to comment on the Australian Government's ("Government") consultation on the implementation of a new digital competition regime.[1]

As we outline in our comments, the Government's proposal rests on the assumption that there exists a broad global consensus on the need for *ex-ante* rules for digital platforms. This purported consensus is, however, largely overstated. Australia should not feel pressured to "catch up" with a trend that does not exist. Second, the Government promotes *ex-ante* digital competition rules as "complementary" to an expanding web of regulatory interventions. In practice, however, each new regulation compounds a broader regulatory overload that threatens to result in net social losses. Third, *ex-ante* digital competition rules may reflect the European Union's ("EU") distinct industrial policies that are not necessarily suited to Australia. The EU may also be willing, for political reasons, to accept tradeoffs that Australians are not. Fourth, the Government's focus on ad tech is misplaced. Ad tech is not the hub of anticompetitive behaviour that the Government suggests it is. Fifth, the Government should take lessons from the international experience, particularly that of the EU. As we show, the Digital Markets Act ("DMA") has led to unintended consequences for businesses and consumers alike—reducing functionalities and limiting visibility for smaller players, such as hotels. Finally, and relatedly, the rules and conduct requirements the Government envisions mirror the DMA's flawed and are therefore likely to produce similar adverse outcomes.

II. No Global Consensus About the Need for *Ex-ante* Digital Competition Regulation

The Government and the Australian Competition and Consumers Commission ("ACCC") both suggest that they do not want to be left behind by regulatory trends already adopted in other jurisdictions.[2] As a preliminary point, we contend that no such consensus exists.

To date, only a handful of countries have passed *ex-ante* competition rules for digital platforms.[3] In addition to the EU itself, Germany, Japan, and the United Kingdom have adopted regulatory regimes for digital markets that bear some resemblance to the DMA. Granted, other countries have

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[1] *Digital Platforms – A Proposed New Digital Competition Regime*, AUST. GOV. TREAS. (2 December 2024), https://treasury.gov.au/consultation/c2024-547447 (hereinafter "Proposal Paper").

[2] Press Release, *ACCC Welcomes Consultation on New Digital Competition Regulation*, AUST. COMPET. CONSUM. COMM. (3 December 2024), https://www.accc.gov.au/media-release/accc-welcomes-consultation-on-new-digital-competition-regime. ("The proposed regime is directionally similar to reforms already being implemented or proposed in many international jurisdictions including the European Union, the United Kingdom, Japan and India…This is an opportunity to build on the progress made overseas and by introducing similar changes here, it will help ensure Australian businesses and consumers aren't left behind… We believe the proposed regime will be fit-for-purpose for Australia while being complementary to and cohesive with international approaches").

[3] Thomas Graf, Jackie Holland, Henry Mostyn, & Patrick Todd, *Digital Markets Regulation Handbook*, CLEARY GOTTLIEB, https://content.clearygottlieb.com/antitrust/digital-markets-regulation-handbook/index.html (*last visited* 13 February 2025).

contemplated adoption of such rules (most notably, Brazil, Turkey, South Korea, South Africa, and India), but whether these will ultimately become law remains anyone's guess.

In short: the number of countries that have adopted *ex-ante* rules pales in comparison to those that have not. The United States, most notably, has rejected the path set out by the EU, as is evident from the slow death of the congressional antitrust legislative package in 2023.[4] Moreover, as Hong Dae-Sik and Daniel Sokol have pointed out:

> The United States rejected such a legislative effort and its proponents have come under significant attack by academics and Congress. Likewise, most American courts have rejected this novel approach, and antitrust authorities that have brought lawsuits under such non-traditional legal theories have lost virtually every case, especially when seeking to block corporate mergers.[5]

Other countries' commitments to follow this purported "global regulatory trend" are also teetering.[6] For example, it was recently reported that India could scrap proposed legislation to regulate digital platforms, amid fierce backlash from lawyers.[7] The South Korean government earlier backtracked on its plans to pass the Platform Competition Promotion Act ("PCPA"), which was likewise inspired by the DMA[8] The South Korean government is instead contemplating a more modest—albeit still questionable—reform of its Fair Trade Act.[9] The Philippines competition authority also recently ruled out a DMA-style bill.[10] With the United States increasingly signalling that it will not tolerate

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[4] Lazar Radic & Geoffrey A. Manne, *The ABA's Antitrust Law Section Sounds the Alarm on Klobuchar-Grassley*, TRUTH MARK. (12 May 2022), https://truthonthemarket.com/2022/05/12/the-abas-antitrust-law-section-sounds-the-alarm-on-klobuchargrassley.

[5] Hong Dae-sik & D. Daniel Sokol, *Korea Should Prioritize Innovation, Not Misguided Platform Regulation*, THE KOREA HER. (12 May 2024), https://www.koreaherald.com/view.php?ud=20240512050148.

[6] Sangyun Lee, LINKEDIN (27 September 2024, 00:35:22), https://www.linkedin.com/posts/sangyunl_indian-digital-competition-law-teeters-lawyers-activity-7245289899409448960-0rtV?utm_source=share&utm_medium=member_desktop.

[7] Charles McConnell, *Indian Digital Competition Law Teeters, Lawyers Call for Rethink*, GLOB. COMPET. REV. (26 September 2024) https://globalcompetitionreview.com/article/indian-digital-competition-law-teeters-lawyers-call-rethink.

[8] Chosun Ilbo, *'Monopoly Platform' Regulation Law Falls Away… Fair Trade Commission Cancels Plan Due to Industry Opposition*, NAVER NEWS (9 September 2024), https://n.news.naver.com/mnews/article/023/0003857596?sid=101.

[9] Kang Shin-woo, *Amendment of the Fair Trade Act to Regulate Large Platforms… 'Google, Apple, Naver, Kakao' to Have Jurisdiction*, NAVER NEWS (9 September 2024) https://n.news.naver.com/mnews/article/018/0005832606?sid=101; *see also* Heo Ji-hye, *Platform Law that Changes Direction… Concerns Increase over Standards for Proof of Competition Restriction*, PRESSMAN (9 September 2024), https://www.pressman.kr/news/articleView.html?idxno=84619. Under the revisions, platforms must prove directly that their actions do not harm competitors, and that they benefit consumers and have positive impacts on the market. In other words, the reforms essentially reverse the burden of proof. Critics like Hong Dae-sik warn that stringent oversight could discourage businesses to pursue new initiatives due to a lack of confidence in their ability to meet criteria. ("Ultimately, if companies are not confident in the reasons they present to the Fair Trade Commission when taking certain actions, they will not take the actions".)

[10] Charles McConnell, *Exclusive: Philippine Competition Watchdog Rules Out DMA-Style Bill, for Now*, GLOB. COMPET. REV. (20 September 2024) https://globalcompetitionreview.com/article/exclusive-philippine-competition-watchdog-rules-out-dma-style-bill-now.

excessive foreign regulation of American technology companies, it is possible that more countries will back away from EU-style regulation on this front.[11]

Even in those jurisdictions that have taken steps to adopt "sector specific" competition rules for digital markets, there is no consensus about how such rules should be structured. To be sure, there are important thematic commonalities across so-called digital competition regulations.[12] But on a legal and formal level, these approaches are vastly heterogeneous.

Digital competition rules exist in a "difficult epistemological situation",[13] caught between competition law, sector-specific regulation (despite digital markets lacking the homogeneity of a true "sector"),[14] or something else entirely. Some have called them the "lost child of competition law",[15] reflecting deeper uncertainty about their ultimate purpose—whether it should be fairness, consumer welfare, or equality. These goals are not always compatible and can, at times, be in direct conflict.[16]

For example, some digital competition rules are structured as an extension of the competition-law framework and are sometimes even formally embedded into existing competition law. In principle, where this is the case, it means that the standard goals and rationales of competition law still apply. Germany, for instance, has amended its Competition Act to enable early intervention against threats to competition by large digital firms.[17] The new rules prohibit certain categories of conduct and impose remedies based on structural inquiries, regardless of abuse. Unlike the DMA, the Competition Act's Article 19a permits targeted companies to justify their conduct, but shifts the burden of proof to the defendant, diverging from competition-law norms.

With its draft amendments to Law 4054 (Turkey's Competition Act),[18] Turkey has followed a similar path to Germany, although some of the new provisions go significantly further than even the DMA,

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11 @KTmBoyle, X.COM (11 February 2025, 9:16 AM), https://x.com/KTmBoyle/status/1889317529039913301.

12 Lazar Radic, Geoffrey A. Manne, & Dirk Auer. *Regulate for What? A Closer Look at the Rationale and Goals of Digital Competition Regulation* 22 BERKELEY BUS. L.J. (Forthcoming 2025).

13 Pierre Larouche & Alexandre De Streel, *The European Digital Market: A Revolution Grounded on Traditions*, 12 J.E.C.L. & PRACT. 542 (2021), (arguing that the DMA's conceptual nature is in a "difficult epistemological position").

14 Lazar Radic, *Gatekeeping, the DMA, and the Future of Competition Regulation*, TRUTH MARK. (8 November 2023), https://truthonthemarket.com/2023/11/08/gatekeeping-the-dma-and-the-future-of-competition-regulation.

15 Belle Beems, *The DMA in the Broader Regulatory Landscape of the EU: An Institutional Perspective*, 19 EUR. COMPETITION J. 1–29 (January 2023), https://www.tandfonline.com/doi/full/10.1080/17441056.2022.2129766.

16 Giuseppe Colangelo, *In Fairness We (Should Not) Trust: The Duplicity of the EU Competition Policy Mantra in Digital Markets*, 68 ANTITRUST BULL. 618 (2023), (Arguing that the inherent vagueness of the "fairness" concept is likely to grant regulators excessive discretion for intervention).

17 Press Release, *Amendment of the German Act Against Restraints of Competition*, BUNDESKARTELLAMT (19 January 2021), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB%20Novelle.html.

18 Bahadir Balki, Nabi Can Acar, Helin Yüksel, Mehmet Mikail Demir, Seda Eliri, & Erdem Aktekin, *A New Age for Digital Markets in Turkey? The Draft Amendment to the Law No. 4054 on the Protection of Competition,* KLUWER COMPET. LAW BLOG (25 October 2022), https://competitionlawblog.kluwercompetitionlaw.com/2022/10/25/a-new-age-for-digital-markets-in-turkey-the-draft-amendment-to-the-law-no-4054-on-the-protection-of-competition.

partly due to their open-ended nature. For instance, the Turkish draft amendment would appear to prohibit all forms of tying and bundling, as well as potentially all exclusivity agreements. It also remains unclear whether the prohibitions would apply to all conduct by the designated digital platforms, or only to the "core platform services".[19]

As noted above, South Korea recently scrapped plans for the PCPA.[20] The Korea Fair Trade Commission and the government of recently impeached and indicted President Yoon Suk Yeol[21] instead announced support for amendments to the existing Fair Trade Act.[22] Under the new rules, in cases where designated digital platforms are accused of self-preferencing, tying, or imposing most-favored nation ("MFN") clauses or restrictions on multi-homing, the amendments would raise fines, reverse the burden of proof, and allow interim orders, including cease and desists, to be issued immediately. It also appears—although it is not certain—that the new rules would give targeted companies some leeway to mount a defense, such as by showing procompetitive efficiencies.

There are other proposed and enacted digital competition rules that are at least nominally competition-based, although their approaches differ. The United Kingdom's Digital Competition and Consumers Bill ("DMCC") allows the Competition and Markets Authority's ("CMA") newly created Digital Markets Unit ("DMU") to impose "bespoke" conduct requirements on companies with "strategic market status". This approach contrasts with the DMA, which contains (allegedly) self-executing blanket prohibitions by which all gatekeepers must abide.[23] By contrast, under the DMCC, the DMU determines how each designated firm must conduct itself in order to achieve the law's stated objectives of "fair dealing", "open choices", and "trust and transparency". These conduct requirements must be chosen from a list of "permitted types" (*e.g.*, prohibiting self-preferencing, or requiring choice screens).

S. 29 of the DMCC provides for a "countervailing benefits exception" to conduct requirements. But apart from the fact that the exemption sets a high bar to clear (the behaviour must be "indispensable"), it also only applies once an investigation into breach of a conduct requirement is underway. It is questionable how useful this defense will prove to be in practice.[24]

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[19] Henry Mostyn, Patrick Todd, & Goksu Kalayci, *Turkiye*, CLEARY GOTTLIEB (December 2023), https://content.clearygottlieb.com/antitrust/digital-markets-regulation-handbook/turkey/index.html.

[20] Ilbo, *supra* note 8.

[21] Jean Mackenzie & Ruth Comerford, *Impeached S Korean President Charged with Insurrection*, BBC NEWS (26 January 2025), https://www.bbc.com/news/articles/cr53r1d0jz4o.

[22] Shin-woo, *supra* note 9.

[23] Robert Wildner, *The Digital Markets Act: What a Difference a Month Makes*, MOB. MARK. (9 April 2024), https://mobilemarketingmagazine.com/the-digital-markets-act-what-a-difference-a-month-makes.

[24] Dirk Auer, Matthew Lesh, & Lazar Radic, *Digital Overload: How the Digital Markets, Competition and Consumers Bill's Sweeping New Powers Threaten Britain's Economy*, INST. ECON. AFF. (18 September 2023), https://iea.org.uk/publications/digital-overload-how-the-digital-markets-competition-and-consumers-bills-sweeping-new-powers-threaten-britains-economy.

India is taking a middle path between the DMCC and the DMA, wherein certain firms would be designated as "systemically significant enterprises" and subject to six obligations and prohibitions, albeit with more space for customization by the enforcer. The Indian Draft Digital Competition Bill[25] ("DDCB") supplements the Indian Competition Act ("ICA") but pursues different goals. The ICA's stated goals are the protection of the interests of consumers and free trade, while the DDCB (like the DMA) pursues fairness and contestability.[26]

Meanwhile, in the United States, several bills have been put forward in recent years that are formally separate from existing antitrust law, but cover some of the same conduct as would typically be addressed under U.S. antitrust law—albeit with seemingly different goals and standards.[27] While the U.S. tech bills largely fail to describe their underlying goals, the bills' titles, as well as statements made by their sponsors, suggest a set of overlapping concerns. These include preventing "material harm to competition" (which superficially sounds like an antitrust objective, but as the American Bar Association's Antitrust Section has pointed out, isn't);[28] reducing "gatekeeper power in the app economy"; and "increasing choice, improving quality, and reducing costs for consumers".[29] But the measures also pursue other goals that are less obviously connected to competition, such as creating opportunities for small businesses and entrepreneurs, achieving a level playing field, and ensuring "fair" prices.

Brazil's PL 2768,[30] which has some of the lowest quantitative thresholds for a company to be considered a "gatekeeper" (roughly AU$19.21 million), pursues an expansive grab bag of social and economic goals, including freedom of initiative; free competition; consumer protection; reduced regional and social inequality; combating the abuse of economic power; widening social participation in matters of public interest; access to information, knowledge, and culture; and fostering innovation and mass access to new technologies and access models. Like the DMCC, the obligations would be tailored to each company. The provisions are broadly phrased, however, and some appear open to expansive interpretations. For example, Art.10(IV) prohibits gatekeepers from refusing access to business users—seemingly *tout court* (although Art.11 then requires enforcers to act with proportionality when establishing obligations).

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[25] *Report of the Committee on Digital Competition Law*, GOV. INDIA MINIST. CORP. AFF., (27 February 2024), https://www.mca.gov.in/bin/dms/getdocument?mds=gzGtvSkE3zIVhAuBe2pbow%253D%253D&type=open.

[26] The Competition Act, No. 12 of 2003, India Code (2003), *available at* https://www.cci.gov.in/images/legalframeworkact/en/the-competition-act-20021652103427.pdf.

[27] H.R. 3849, 117th Congress (24 June 2024), https://www.congress.gov/bill/117th-congress/house-bill/3849/text; S. 2992, 117th Congress (2 March 2022), https://www.congress.gov/bill/117th-congress/senate-bill/2992/text; S. 2710, 117th Congress (17 February 2022), https://www.congress.gov/bill/117th-congress/senate-bill/2710.

[28] Radic & Manne, *supra* note 4.

[29] *Id.*

[30] PL n. 2768/2022, CÂMARA DOS DEPUTADOS (Brazil), (10 November 2022), https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=2214237&filename=PL%202768/2022.

Japan, whose Smartphone Act is part of an overarching policy shift "towards a new form of capitalism",[31] covers only four core platform services. By comparison, other digital competition rules typically cover around 10, replicating the DMA's scope. Further, the Smartphone Act's dos and don'ts would only apply when consumers access products or services on their phones (*e.g.*, Google is only prohibited from engaging in self-preferencing on smartphones,[32] but not on laptops or PCs). The Smartphone Act also allows greater scope for privacy and security exemptions. Whereas the DMA only allows for such exemptions in the case of interoperability and sideloading (the Smartphone Act does not mandate sideloading), it appears that privacy, safety, and user protection constitute valid justifications for most types of conduct covered by the Smartphone Act.[33]

The South Africa Competition Commission ("SACC") has called for remedial actions against popular intermediation platforms.[34] These are largely the usual "GAMMA" suspects (Google, Apple, Meta, Microsoft, and Amazon); it explicitly would include Amazon, despite the company's absence in South Africa at the time. Presumably, the SACC would impose these remedies within the framework of the South African Competition Act. Uniquely, the SACC explicitly admits that its proposed remedies aim to redistribute wealth from the targeted digital companies to South African companies, historically disadvantaged peoples ("HDPs"), and small and medium-sized enterprises ("SMEs").[35] The SACC recommends requiring Google to add identifiers and filters to help consumers identify and support local platforms and to directly *pay* competing SMEs and black-owned firms ZAR150 million (roughly AU$12.84 million) to offset Google's competitive advantage.[36]

This has at least two implications for Australia. First, the "consensus" the Government aims to replicate domestically is vastly overstated. Second, Australia's proposal is unlikely to be "complementary and cohesive with international practices", because those practices themselves lack cohesion. Instead, it would introduce yet another layer of regulatory complexity, further disrupting digital platforms, their users, and the businesses that rely on them.[37]

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[31] *Grand Design and Action Plan for a New Form of Capitalism: 2023 Revised Version*, JPN. CABINET SECR. (2023), *available at* https://www.cas.go.jp/jp/seisaku/atarashii_sihonsyugi/pdf/ap2023en.pdf; *Outline of the Act on Promotion of Competition for Specified Smartphone Software*, JPN. FAIR TRADE COMM. (Jun. 2024), *available at* https://www.jftc.go.jp/file/240612EN3.pdf; @laz_radic, X.COM (14 August 2024, 6:17 a.m.), https://x.com/laz_radic/status/1823665316200899036.

[32] Simon Vande Walle, *Is the EU's Digital Markets Act Going Global? How Japan Is Crafting Its Own Version of Digital Regulation with the Smartphone Act*, EU RENEW (21 August 2024), https://eu-renew.eu/is-the-eus-digital-markets-act-going-global-how-japan-is-crafting-its-own-version-of-digital-regulation-with-the-smartphone-act.

[33] JFTC, *supra* note 31.

[34] *Online Intermediation Platforms Market Inquiry*, COMPET. COMM. S. AFR. (2000-2019), https://www.compcom.co.za/online-intermediation-platforms-market-inquiry.

35 *Id.* at 1.

36 *Id.* at 3.

[37] Proposal Paper, *supra* note 1, at 4-5.

III. *Ex-ante* Digital Competition Regulation Adds Fuel to Australia's Bonfire of Overregulation

The Government's Proposal Paper claims that *ex-ante* digital competition rules would "complement" existing and forthcoming regulations, including the proposed Scams Prevention Framework, the government's response to the Privacy Act Review, Digital ID laws, the News Media and Digital Platforms Mandatory Bargaining Code, and ongoing initiatives related to artificial intelligence ("AI"). [38]

Rather than serving as complements, however, these rules are just as likely to deepen Australia's growing problem of overregulation, thereby further hindering digital platforms' ability to deliver value to users and businesses. In a sea of regulations, one more regulatory overreach might seem insignificant, or it could be the final straw that breaks the camel's back.

Studies in regulatory theory often suggest that, when multiple regulatory frameworks are implemented simultaneously, their combined effect can lead to "regulatory overload". This can cause inefficiencies and unintended consequences that are not easily anticipated by looking at each rule in isolation. In other words, regulatory overload has synergistic effects.

In this vein, researchers have shown how multiple overlapping regulations can obscure policy objectives and hinder the development of effective and clear regulation;[39] that the total regulatory burden from multiple regulations often exceeds what might be expected by merely adding individual regulatory impacts together, causing "convex deadweight costs";[40] and how the accumulation of regulations can lead to increased costs and inefficiencies.[41] For example, one study showed that between 1949 and 2005, the accumulation of federal regulations slowed U.S. economic growth by an average of 2% annually.[42] If regulation had stayed at its 1949 level, the 2011 U.S. GDP would have been approximately $39 trillion—3.5 times higher—resulting in a loss of around $129,300 per person in the United States. Another study mentioned earlier showed that:

> By distorting the investment choices that lead to innovation, regulation has created a considerable drag on the economy, amounting to an average reduction of 0.8 percent in the annual growth rate of the US GDP. This seemingly small annual reduction has large

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[38] *Id.*, at 5.

[39] J.M.M. van den Brink, M.J.M. van Rijswick, & J.M.A. van Kempen, *Regulatory Overlap: A Systematic Quantitative Literature Review*, 17 REG. GOV. 1131, 1132 (2021) (finding that "Regulatory failure caused by overlapping regulations is ubiquitous, with examples in all jurisdictions across a range of disciplines").

[40] *Economic Report of the President*, EXEC. OFF. PRES. (March 2019), 81, *available at* https://www.govinfo.gov/content/pkg/ERP-2019/pdf/ERP-2019.pdf ("The deadweight cost function is convex; if the tax is increased by 10 percent, the deadweight costs of the tax increase by more than 10 percent. As we discuss in detail below, the regulatory deadweight cost function is also convex. A new regulatory action that increases regulatory costs by 10 percent increases the cumulative regulatory cost burden by more than 10 percent").

[41] Patrick MacLaughlin, Nita Ghei, & Michael Wilt, *Regulatory Accumulation and its Costs*, MERCATUS POLICY BRIEF (2016).

[42] John W. Dawson & John J. Seater, *The Economic Impact of Regulation: A Literature Review*, 18 J. REGULATORY ECON. 137 (2013).

> implications. The slower economic growth associated with regulatory accumulation resulted in an economy that was $4 trillion smaller in 2012 than it could have been without such regulatory accumulation.[43]

This flips the Government's argument about "complementarity" on its head, suggesting that the cumulative impact of regulations is likely to be greater than the sum of their individual effects, potentially doing more harm to the Australian digital sector than each regulation would on its own.

Consider the News Media Bargaining Code. These regulations have already imposed significant costs and caused unintended consequences, which could easily be exacerbated by parallel *ex-ante* digital rules targeting the same companies. In response to the proposed code, Meta banned the sharing and viewing of news content on Facebook in Australia. This led to a significant reduction in news consumption on the platform. One study found that, while some users sought alternative news sources, others experienced a decline in news consumption, potentially increasing their exposure to misinformation.[44] The Independent Media Alliance opined that the ban would be "terrible for not only the industry, but for Australian democracy".[45] While Meta eventually reversed the ban and reached a deal that allowed news sharing to resume, the situation had significant ramifications. Larger publishers negotiated deals for compensation from Meta, but smaller news outlets faced sunk revenue losses.

While Google, in comparison, has been more willing to negotiate, there is a caveat. In Australia, Google agreed to pay news companies only after intense negotiations. In the end, Google secured terms more favourable to its business model, opting for case-by-case payments rather than a fixed, uniform payment model. While large companies like Australia's own News Corp can absorb these transaction costs, smaller outlets may struggle. Google also had the ability to choose which content to display—and pay for—on its platform. Put simply, if you turn Google into a news buyer, it will shop around.

More recently, Australia has considered shifting the News Media Bargaining Code to function as a digital-services tax, either explicitly or *de facto*. The *de facto* version would make it compulsory for companies to carry news links. As a result, the compelled companies would subject to extraction. This shift could mean that Australian companies lose whatever arrangements they have made with Google. When New Zealand proposed legislation (currently stalled) with a similar effect, Google stated it would withdraw from the country's news market entirely if enacted.[46]

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[43] MacLaughlin, Ghei, & Wilt, *supra* note 41.

[44] Ying Gu, Stephanie Lee, & Yong Tan, *News in the Dark: Effects of Facebook's Australian News Ban on News Consumption*, SSRN (5 April 2024), https://ssrn.com/abstract=4790864.

[45] Josh Taylor, *Facebook's Potential News Ban Already Affecting Smaller Australian Media Outlets, Inquiry Told*, THE GUARDIAN (21 June 2024), https://www.theguardian.com/media/article/2024/jun/21/facebooks-potential-news-ban-already-affecting-smaller-australian-media-outlets-inquiry-told.

46 Giles Dexter, *Fair News Bargaining Bill in Limbo as Minister Says It Is Not Ready*, RADIO N.Z. (13 November 2024), https://www.rnz.co.nz/news/political/533666/fair-news-bargaining-bill-in-limbo-as-minister-says-it-is-not-ready.

Ultimately, major media companies with significant bargaining power, like News Corp and Nine Entertainment, were the main beneficiaries of the agreements made under the News Media Bargaining Code. These large publishers offered more varied content that was valuable to Google because it attracted a larger audience and thus increased ad revenue. In addition, large publishers were able to command higher payments, making them more likely to receive favourable treatment, in terms of visibility on Google's platform. Conversely, smaller or independent news outlets that did not strike agreements with Google risked being excluded from Google's news services or search results or receiving much less exposure than they would have in a but-for world.[47]

The question of how this scenario could be seen as benefiting the public—rather than large, politically powerful entities like News Corp—remains unanswered. Additionally, there is the issue of the combined impact of regulatory overload. Smaller outlets, who less able to negotiate for visibility on Google's search engine, may face further challenges from prohibitions on self-preferencing. When self-preferencing is banned, companies like Google tend to auction off the top search spots, favoring incumbents with deep pockets.[48] As a result, smaller outlets that could previously appear at the top due to content relevance are now unlikely to secure those prime positions.

In other words, self-preferencing bans turn the currency of search rankings from relevance into actual money. While smaller companies could once compete based on relevance, they now face being crowded out by more financially robust competitors. The combined effect of the News Media Bargaining Code and a ban on self-preferencing could therefore lead to the demotion of content from smaller, yet relevant, business users—an outcome that would harm both these businesses and, most importantly, end-users.

In addition, prohibitions on the cross-use of data, or cumbersome requirements that are tilted against consent, could affect digital platforms' ability to provide tailored, targeted ads. This would be another nail in the coffin of small businesses, which disproportionately rely on targeted advertising to break into new markets and reach customers.

IV. Australians May Not Want the Same Tradeoffs as the EU

It is hardly surprising that some countries would get "cold feet" about enacting strict *ex-ante* digital competition rules.[49] To the keen observer, the prospect always loomed that such rules might be little more than a quirk of EU industrial policy. As ICLE Senior Scholar Lazar Radic has noted,[50] prior to the DMA's adoption, many leading European politicians touted the law's text as a protectionist

[47] Paul Karp, Amanda Meade, & Josh Butler, *Meta, TikTok and Google Will Be Forced to Pay Australian News. What Does It Mean for You?,* THE GUARDIAN (12 December 2024), https://www.theguardian.com/australia-news/2024/dec/12/meta-tiktok-and-google-to-be-forced-to-pay-for-australian-news.

[48] *See infra*, Section VI.

[49] *See* McConnell, *supra* note 7; Ilbo, *supra* note 8; McConnell, *supra* note 10.

[50] Radic, *supra* note 14.

industrial-policy tool that would hinder U.S. firms to the benefit of European rivals.[51] French President Emmanuel Macron summarized it well when he said:

> If we want technological sovereignty, we'll have to adapt our competition law, which has perhaps been too much focused solely on the consumer and not enough on defending European champions.[52]

Insofar as these goals are—or may be—unique to a particular time and place (*i.e.*, the EU in the 2020s), it is reasonable to assume they will not necessarily be shared by everyone. Some countries may be more interested in attracting digital platforms than in regulating,[53] "disciplining",[54] or punishing them.[55] Echoing the argument that "one size does not fit all" when it comes to digital competition regulation,[56] Dae-sik and Sokol note that among the reasons *ex-ante* digital competition rules are inappropriate for South Korea is the marked differences between that nation's economic, legal and regulatory context and that of the EU:

> Europe chose to regulate heavily for protectionist reasons. It lacks the tech infrastructure, innovative companies, and unicorns that are present in other vibrant economies like Korea. [...] While Korea has approximately three times more unicorns than Japan, despite having a smaller gross domestic product, the adoption of a DMA-like approach may hurt Korea's innovation advantage.[57]

Similarly, Samir Ghandi argues that the DMA's "one-size-fits-all" approach would not work "for a dynamic Indian market with its own vibrant tech ecosystem".[58]

Other, less technologically intense countries like South Africa might have a still different set of priorities, such as attracting foreign direct investment to drive growth and the development of essential infrastructure. As Radic and ICLE President Geoffrey Manne have written:

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[51] Mathieu Pollet, *France to Prioritise Digital Regulation, Tech Sovereignty During EU Council Presidency*, EURACTIV (14 December 2021), https://www.euractiv.com/section/digital/news/france-to-prioritise-digital-regulation-tech-sovereignty-during-eu-council-presidency; Lazar Radic, *Digital-Market Regulation: One Size Does Not Fit All*, TRUTH MARK. (17 April 2023), https://truthonthemarket.com/2023/04/17/digital-market-regulation-one-size-does-not-fit-all.

[52] Barbara Moens & Paola Tamma, *Macron and Merkel Defy Brussels with Push for Industrial Champions*, POLITICO (18 May 2020), https://www.politico.eu/article/macron-and-merkel-defy-brussels-with-push-for-industrial-champions.

[53] Oles Andriychuk, *Do DMA Obligations for Gatekeepers Create Entitlements for Business Users?*, 11 J. ANTITRUST ENFORC. 123, 123-32 (28 December 2022), https://academic.oup.com/antitrust/article/11/1/123/6964483.

[54] Geoffrey A. Manne, Dirk Auer, & Sam Bowman, *Should ASEAN Antitrust Laws Emulate European Competition Policy?*, 67 SINGAP. ECON. REV. 1637 (31 March 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3709730.

[55] *See, e.g.*, Oles Andriychuk, *Do DMA Obligations for Gatekeepers Create Entitlements for Business* Users?, 11 J. ANTITRUST ENFORCEMENT 123, 127 (2022) ("The means for allowing the second-tier ersatz-Big Tech to scale up is punitive: to slow down the current gatekeepers by imposing upon them a catalogue of exceptionally demanding obligations".) (Emphasis added); *id.* at 131 ("This punitive nature of the DMA also means that the obligations can be blatantly arduous and interventionist".) (emphasis added).

[56] Radic, *supra* note 51.

[57] Dae-sik & Sokol, *supra* note 5.

[58] McConnell, *supra* note 7.

> Developing countries like South Africa should be especially wary of importing untested competition rules that impose government-mandated designs on the business models and user interfaces of innovative companies. It's not trite to say that South Africa's market is not the same as the EU's. The consequences of unsound competition policy here may be to stymie foreign investment and domestic innovation exactly where they are needed most. [...] This is a far cry from the untested, pre-emptive constraints contemplated by the [SACC].[59]

The point is countries' needs are as varied as the countries themselves. This does not preclude the possibility of common rules and standards; after all, most of the world's competition-law systems have converged around some version of the consumer welfare standard.[60] But one explanation for this commonality can be found in how the consumer welfare standard fares when compared to the alternatives:

> The objective nature of the choice and interpretation of legal antitrust standards exists on a spectrum, and the [consumer welfare standard's] conceptual congruence, measurability, and its connection to aspects that are almost universally considered to be relevant parameters of competition (price, innovation, quality) brings it closer to objectivity and further away from subjectivity.[61]

Conversely, once it is understood that the DMA represents an attempt to pass off a *sui generis*, subjective policy choice as a universal regulatory paradigm, the case for harmonization quickly withers. Clearly, not everyone is on board with trading economic performance for a set of questionable political goals.[62] In this sense, one frequent criticism of *ex-ante* competition rules is that they ignore—or, at the very least, significantly downplay—the effects on consumer welfare and innovation (the traditional bastions of competition policy). Instead of focusing on protecting competition to the benefit of consumers, digital competition rules commit the cardinal antitrust sin of protecting competitors. As former Federal Trade Commission ("FTC") Commissioner Maureen Ohlhausen has put it:

> Some recent legislative and regulatory proposals appear to be in tension with this basic premise. Rather than focusing on protection of competition itself, they appear to impose requirements on some companies designed specifically to facilitate their competitors, including those competitors that may have fallen behind precisely because they had not

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[59] Lazar Radic & Geoffrey A. Manne, *South Africa's Competition Proposal Takes Europe's DMA Model to the Extreme*, TRUTH MARK. (15 August 2023), https://truthonthemarket.com/2023/08/15/south-africas-competition-proposal-takes-europes-dma-model-to-the-extreme.

[60] Christine S. Wilson, *Welfare Standards Underlying Antitrust Enforcement: What You Measure Is What You Get*, FED. TRADE COMM. (15 February 2019), *available at* https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf; Svend Albæk, *Consumer Welfare in EU Competition Policy,* EUR. COMM. (2013), *available at* https://competition-policy.ec.europa.eu/system/files/2021-09/consumer_welfare_2013_en.pdf.

[61] Nicolas Petit & Lazar Radic, *The Necessity of a Consumer Welfare Standard in Antitrust Analysis*, PROMARKET (18 December 2023) https://www.promarket.org/2023/12/18/the-necessity-of-a-consumer-welfare-standard-in-antitrust-analysis.

[62] Dirk Auer, *The Broken Promises of Europe's Digital Regulation*, TRUTH MARK. (12 March 2024), https://truthonthemarket.com/2024/03/12/the-broken-promises-of-europes-digital-regulation.

> made the same investments in technology, innovation or product offerings. For example, the Digital Markets Act (DMA) would force a 'gatekeeper' company to provide business users of its service, as well as those who provide complementary services, access to and interoperability with the same operating system, hardware, or software features that are available to or used by the gatekeeper. While this would restrain gatekeepers and presumably facilitate the interests of the gatekeeper's rivals, it is not clear how this would protect consumers, as opposed to competitors.[63]

This, of course, is only surprising if one falls for the story that digital competition rules—and the DMA, in particular—were ever intended to protect competition or consumer welfare. The readily apparent goal is instead to redistribute rents, protect competitors, and level down gatekeepers, even if it comes at the expense of consumers.[64] There is no better example of this than the DMA, whose preamble explicitly disavows consumer welfare and economic efficiency as irrelevant under the new rules.

As commentators around the world have pointed out, this approach is likely to stymie dynamism in digital markets and harm consumers. As noted above, Dae-sik and Sokol argue against introducing *ex-ante* digital competition regulations in South Korea, contending that such rules would stifle innovation, decrease investment, hurt startups and consumers, and jeopardize South Korea's status as a regional leader in tech innovation.[65] Carmelo Cennamo and Juan Santaló further argue that the DMA could produce a host of other harmful unintended consequences.[66] For example, undermining gatekeepers' ability to control access to their platforms could ultimately lead to lower levels of innovation. Obligations like data-sharing could reduce gatekeepers' incentives to accumulate and process data, thereby diluting the competitive benefits and product improvements that result from such collection.

Some consumers and policymakers may be willing to accept these tradeoffs in pursuit of equity, fairness, contestability, "reining in" tech giants, or some other goal.[67] But others, reasonably, may not. Thus, commentators from both within and outside the EU have increasingly questioned the need for rules that mechanically apply preset default solutions to the complex tradeoffs that have typically characterized competition-law analysis. This is of particular concern in dynamic markets driven by innovation, where uncertainty is endemic and where, except in the most egregious of

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[63] John Taladay & Maureen Ohlhausen, *Are Competition Officials Abandoning Competition Principles?*, 13 J.E.C.L. & PRACT. 463 (5 July 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4042226.

[64] Radic, Manne, & Auer, *supra* note 12.

[65] Dae-sik & Sokol, *supra* note 5.

[66] Carmelo Cennamo & Juan Santaló, *Potential Risks and Unintended Effects of the New EU Digital Markets Act*, ESADE ECPOL (February 2023), *available at* https://www.esade.edu/ecpol/wp-content/uploads/2023/02/AAFF_EcPol-OIGI_PaperSeries_04_Potentialrisks_ENG_v5.pdf.

[67] Adam Cohen, *New Competition Rules Come with Trade-Offs*, GOOGLE BLOG (5 April 2024), https://blog.google/around-the-globe/google-europe/new-competition-rules-come-with-trade-offs.

cases,[68] even the wisest enforcers can't know *a priori* whether or not given conduct is procompetitive.[69] Against this backdrop, tales of a supposed consensus in support of a special set of competition rules for digital platforms are rooted more in fantasy than in reality.

There is also the question of whether the Government can make such far-reaching decisions about tradeoffs without substantial democratic discussion and debate. The Government's proposed framework would include broad obligations to target anticompetitive conduct contained in primary legislation and service-specific obligations to clarify the broad requirements contained in subordinate legislation (*e.g.*, regulations). Though many of the categories of conduct sound straightforward and technical, they implicate several policy-laden decisions that broad obligations cannot capture, as well as competing interests that subordinate legislation would struggle to balance.

For instance, "restrictions on interoperability that limit effective competition" implicates multiple types of interoperability (*i.e.*, technical, syntactic, and semantic interoperability and organization) each of which poses unique and personal tradeoffs in terms of user security, privacy, and flexibility. Other categories the Government's proposal would seek to regulate, such as digital advertising, affect broad swathes of the economy and thus implicate substantive matters of policy. Without meaningful democratic deliberation, the Government's framework risks imposing rigid, one-size-fits-all regulations on complex and deeply consequential tradeoffs that require a nuanced and inclusive policymaking approach.

V. Focus on 'Ad Tech' as a Hub of Anticompetitive Conduct Is Misguided

The Proposal Paper states that advertising technology ("ad tech") would be a priority for the new regime.[70] In a previous report, the ACCC found that:

> there is a lack of transparency in the supply chain, and that Google's vertical integration and strength in ad-tech services has allowed it to engage in a range of conduct which has lessened competition over time and entrenched its dominant position.[71]

These findings should, however, be put into context. For years, regulators and competition watchdogs have expressed concern about competition in the digital-advertising business. Like the ACCC and the Government, they have noted that digital advertising appears to be dominated by a handful of large firms, including Google, Facebook, and—to a lesser extent—Amazon. Some claim that this dominance allows these firms—and Google, in particular—to engage in anticompetitive

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[68] Mario Monti, *Why and How? Why Should We Be Concerned with Cartels and Collusive Behaviour?*, EUR. COMM. (11 September 2000), https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_00_295.

[69] Geoffrey A. Manne, *Error Costs in Digital Markets*, GAI REPORT ON THE DIGITAL ECONOMY 3 (November 2020), *available at* https://gaidigitalreport.com/wp-content/uploads/2020/11/Manne-Error-Costs-in-Digital-Markets.pdf.

[70] Proposal Paper, *supra* note 1, at 6, 9-10.

[71] *Digital Advertising Services Inquiry 2020-2021, Final Report*, AUST. COMPET. CONSUM. COMM (28 September 2021) https://www.accc.gov.au/about-us/publications/digital-advertising-services-inquiry-final-report.

conduct to extend their market power and to earn supercompetitive profits at the expense of advertisers, publishers, and consumers. But Manne and ICLE Senior Scholar Eric Fruits have argued that, based on the information that is publicly available, many of the most significant claims made against Google's ad-tech business are based on a misunderstanding of U.S. antitrust law, or of the details of the ad-tech market itself.[72] While Manne and Fruits' study focuses on the United States, the findings can, to a significant extent, be extrapolated to Australia.

As they note, digital advertising provides the economic underpinning for much of the internet. Targeted digital advertising on independent websites is often facilitated by intermediaries that match advertisers and websites automatically, displaying ads to those users for whom they are most relevant. The technology powering this intermediation has advanced enormously over the past three decades. Some now allege, however, that the digital-advertising market is monopolized by its largest participant: Google.[73]

Ultimately, however, this is a version of the "big is bad" argument, in which conduct by dominant incumbent firms that makes competition more difficult for certain competitors is viewed as inherently anticompetitive—even if the conduct confers benefits on users. Under this approach, the largest firms are seen as acting anticompetitively if they do not share their innovations or reveal their business processes to competing firms. As a result, creating new and innovative products, lowering prices, reducing costs through vertical integration, and enhancing interoperability among existing products is miscast as anticompetitive conduct.

In contrast, competition laws—including Australia's own—are intended to foster innovation that creates benefits for consumers, including innovation by incumbents. The law does not proscribe efficiency-enhancing unilateral conduct on the grounds that it might also inconvenience competitors, or that there is some other arrangement that could be "even more" competitive. While this might benefit *some* competitors in the short run, over the longer term, it will tend to stifle competition by discouraging innovation and investment and promoting free riding.

Moreover, competition law generally does not second guess unilateral conduct simply because it may hinder rivals. Any such conduct must first be shown to be anticompetitive—that is, to harm consumers or competition, not merely certain competitors. In multisided markets, this means finding not simply that some firms on one side of the market are harmed, but that the combined net effect of challenged conduct across all sides of the market is harmful.

Regulators, however, often fall into what has been deemed the "nirvana fallacy", in which real-life conduct is compared against a hypothetical "competition-maximizing" benchmark and anything that falls short is deemed worthy of intervention. That fanciful approach would pervert businesses'

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[72] Geoffrey A. Manne & Eric Fruits, *The Antitrust Assault on Ad Tech: A Law & Econ Critique*, INT'L CTR. L. ECON. (2022), *available at* https://laweconcenter.org/wp-content/uploads/2022/11/ICLE-White-Paper-2022-11-03-The-Antitrust-Assault-on-Ad-Tech-A-Law-Economics-Critique.pdf.

[73] *United States v. Google LLC*, No. 1:23-cv-00108 (D.D.C. 2023).

incentives to innovate and compete and would make an unobtainable "perfect" that exists only in the minds of some economists and lawyers the enemy of a "good" that exists in the market.

In the case of the Proposal Paper, many of the interventions appear to be geared toward destroying or undermining Google's vertical integration in ad tech.[74] But these heavy-handed interventions risk hampering the quality of Google's ad-tech service. Vertical integration plays a crucial role in streamlining supply chains by reducing inefficiencies and coordination issues, ultimately lowering transaction costs, and passing the benefit onto consumers. Additionally, forcing Google to unbundle its ad-tech operations could diminish its incentive to innovate, as it would expose proprietary advancements to potential replication by rivals. Rather than fostering competition and efficiency, these interventions may disrupt a well-functioning market, leading to higher costs, reduced service quality, and slower innovation in digital advertising.

VI. The Comparative Experience with *Ex-Ante* Rules for Digital Platforms

The Government is adamant that *ex-ante* rules for digital platforms will benefit everyone in Australia, but especially businesses and consumers. The EU's experience with the DMA, however, tells a much more nuanced and less flattering story. Two lessons emerge from the DMA's implementation for the Government's *ex-ante* proposal: there are going to be winners and losers, and there will be unintended consequences. The Government and Australians more generally should brace themselves for both. Below are concrete examples of the inherent tradeoffs and unintended consequences following the EU's implementation of the much-vaunted DMA.

Take, for example, self-preferencing. The DMA's self-preferencing ban has made it increasingly difficult for platforms to offer certain functionalities in Europe. For example, Google has removed features like maps, hotel bookings, and reviews from its search results. Until it can accommodate competitors who offer similar services (if this is even possible), these specialized search results will remain buried several clicks away from users' general searches. Not only is this inconvenient for consumers, but it has important ramifications for business users.

Take hotel bookings, for example. Early estimates suggest that clicks from Google ads to hotel websites decreased by 17.6% because of the DMA. DMA implementation also caused clicks and bookings on Google Hotel Ads to sink by as much as 30%.[75] As a result, the volume of direct bookings dropped as much as 36%, "increasing hotel dependence on intermediaries, which seriously damages their profitability".

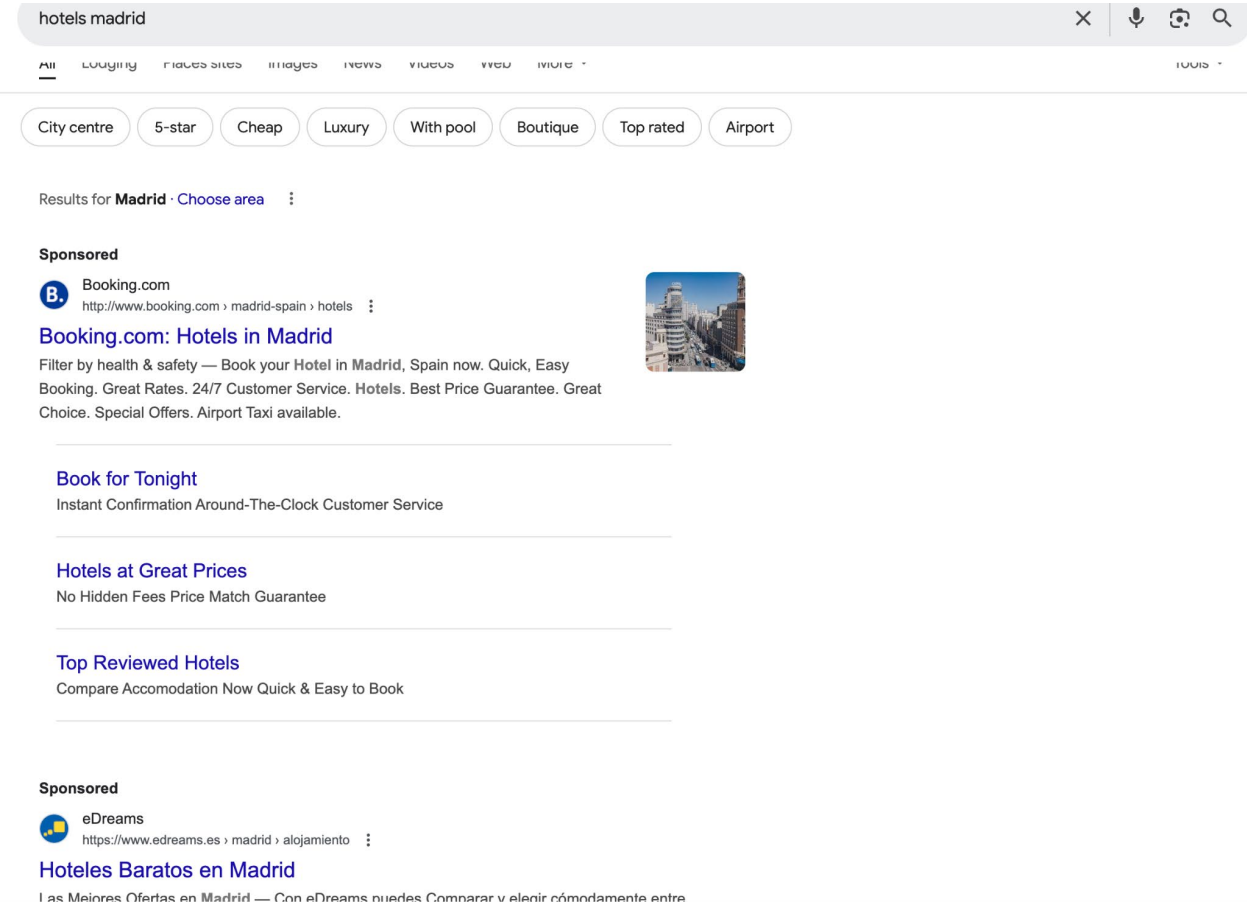
By prohibiting Google from placing its own vertical services (Google Maps, Google Flights, and Google Hotel Ads) first, "the presentation of hotel offers to users based in DMA markets is less

[74] Proposal Paper, *supra* note 1, at 20-21.

[75] Javier Delgado, *DMA Implementation Sinks 30% of Clicks and Bookings on Google Hotels Ads*, MIRAI (7 May 2024), https://www.mirai.com/blog/dma-implementation-sinks-30-of-clicks-and-bookings-on-google-hotel-ads.

organised, clear and intuitive".[76] Previously, Google Search provided a direct display of hotels, featuring relevant details like prices, distance from the user, and images. Now, the top search results point to intermediaries like Booking.com and eDreams (see Figure 1). The irony, of course, is that Booking.com is itself a designated "gatekeeper" under the DMA.

FIGURE 1: Post-DMA Google Search for Madrid Hotels



This sort of regulatory intervention does not make the market more "fair or contestable". It merely robs Peter to pay Paul, while also robbing the consumer. As a study by hotel-industry consultant Mirai finds:

> Prior to DMA, Google's taxonomy of results was the result of decades of effort by the company to refine its results in order to provide an optimized search experience that would connect supply and demand in a way that was ideal for both.
>
> This pre-DMA search experience offered hotels participating directly in the Google Hotel Ads product, the option to present their inventory (availability and room rates) in a way that was both efficient from the standpoint of distribution cost, and enriched for the user, as it integrated the experience of other services, e.g. Google Maps. This way of

[76] *Id.*

> presenting information was clear, relevant and intuitive, and maximized purchasing decisions such as hotel bookings for those users who were so inclined.[77]

Users therefore now face a less intuitive booking experience, with limited access to aggregated hotel offers, simplified calendar pricing, and streamlined tools like Google Travel. Consumer frustrations include being redirected to search-engine results instead of the Travel section, and additional clicks being required to complete actions that previously required just one.

So, who has Art.6(5) really benefitted? Clearly not hotels: they have been subjected "to the toll of intermediation, strangling direct sales and holding users and hotels captive to less profitable, less independent business models".[78]

Google has also removed other functionalities to comply with Art. 6(5). In March 2024, the company announced it had "removed some features from the search results page which help consumers find businesses, such as the Google Flights unit".[79] Google noted that the DMA had produced unintended consequences, including a suboptimal user experience and impact to businesses.

> We've always been focused on improving Google Search to help people quickly and easily find what they're looking for. … Rules that roll back some of these advances represent a fundamental shift in competition policy. We encourage other countries contemplating such rules to consider the potential adverse consequences — including those for the small businesses that don't have a voice in the regulatory process.[80]

For its part, Apple has highlighted another quality-degrading consequence of the DMA: the obligation to allow competing app stores onto the iOS platform and to allow apps to be downloaded directly from their websites (commonly known as "sideloading").[81] In practice, this "openness" means allowing third-party applications to bypass controls and protections implemented to safeguard users' security and privacy.[82] This is already happening in Europe, where Apple has been forced to allow Epic Games to launch an alternative app store on iOS.[83] While this may seem a positive development for (some) developers and consumers, it could also harm user trust in the platform and thus decrease the total number of transactions, to the detriment of all parties involved (business users, consumers, and the owner of the platform).

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[77] *Id.*

[78] *Id.*

[79] Oliver Bethell, *Complying with the Digital Markets Act*, GOOGLE BLOG (5 March 2024), https://blog.google/around-the-globe/google-europe/complying-with-the-digital-markets-act.

[80] Cohen, *supra* note 67.

[81] *See* Jon Porter & David Pierce, *Apple Is Bringing Sideloading and Alternate App Stores to the iPhone*, THE VERGE (25 January 2024), https://www.theverge.com/2024/1/25/24050200/apple-third-party-app-storesallowed-iphone-ios-europe-digital-markets-act.

[82] *See Complying with the Digital Markets Act*, APPLE (2024), *available at* https://developer.apple.com/security/complying-with-the-dma.pdf.

[83] Kim Mackrael, *Apple's Hold on the App Store Is Loosening, at Least in Europe*, WALL ST. J. (16 August 2024), https://www.wsj.com/tech/epic-games-apple-app-store-europe-44ceda50.

Indeed, "[p]hishers are using a novel technique to trick iOS and Android users into installing malicious apps that bypass safety guardrails built by both Apple and Google to prevent unauthorized apps".[84] This sort of attack will be more effective in the absence of the protections provided by Apple's App Store.[85] Recently, a porn app, "Hot Tub", made its way into the iOS, further validating at least some of Apple's concerns over safety, privacy and security (and undermining the integrity of the iOS' "clean" brand image in the process).[86]

In addition to diminishing the quality of existing digital services, the DMA has significantly delayed the introduction of new digital products and services in the EU. A notable example is Meta's Threads, which launched nearly six months later in the EU than in other regions–frustrating users eager for an alternative to X.com (formerly known as Twitter) following Elon Musk's acquisition of the company.[87]

Delayed releases appear to be a trend in the EU, as Apple recently announced that it would withhold the release of its latest features from the EU market, including Apple Intelligence, due to regulatory uncertainties.[88] Apple Intelligence is now scheduled to be released in Europe in April 2025,[89] seven months later than in the United States and closer to the release of the iPhone 17 than the iPhone 16. These events indicate that, rather than fostering a more competitive digital landscape, the DMA risks isolating EU consumers from innovative technological advancements, undermining its intended purpose.

VII. Assessing the Government's Proposed Interventions

The Government outlines several potential interventions, ranging from default pre-installation interventions to prohibiting self-preferencing and tying. Ultimately, these interventions must be carefully evaluated against current market realities and the risk of unintended consequences.

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[84] Dan Goodin, *Novel Technique Allows Malicious Apps to Escape iOS and Android Guardrails*, ARSTECHNICA (21 August 2024), https://arstechnica.com/security/2024/08/novel-technique-allows-malicious-apps-toescape-ios-and-android-guardrails.

[85] *See id.*, at 6 ("Both mobile operating systems employ mechanisms designed to help users steer clear of apps that steal their personal information, passwords, or other sensitive data. iOS bars the installation of all apps other than those available in its App Store, an approach widely known as the Walled Garden").

[86] Jess Weatherbed, *The First "Approved" iPhone Porn App is Coming to Europe*, THE VERGE (3 February 2025) https://www.theverge.com/news/604937/iphone-ios-porn-app-hot-tub-altstore-pal-eu.

[87] Clare Duffy, *Meta's Threads is Now Available in the EU*, CNN (14 December 2023), https://www.cnn.com/2023/12/14/tech/metas-threads-eu-launch/index.html.

[88] Rohan Goswami, *Apple Intelligence Won't Launch in EU in 2024 Due to Antitrust Regulation, Company Says*, CNBC (21 June 2024) https://www.cnbc.com/2024/06/21/apple-ai-europe-dma-macos.html.

[89] *Apple Intelligence Is Available Today on iPhone, iPad, and Mac*, APPLE (28 October 2024), https://www.apple.com/ie/newsroom/2024/10/apple-intelligence-is-available-today-on-iphone-ipad-and-mac ("This April, Apple Intelligence features will start to roll out to iPhone and iPad users in the EU. This will include many of the core features of Apple Intelligence, including Writing Tools, Genmoji, a redesigned Siri with richer language understanding, ChatGPT integration, and more").

A. Default and Preinstallation Interventions

The Government contemplates additional restrictions on default search positions and pre-installation agreements.[90] Such interventions should, however, be evaluated against existing measures and changing user behaviour. Recent empirical work suggests that choice screens' effectiveness depends heavily on their design and implementation.[91] Furthermore, default restrictions could have unintended consequences for competition. Many smaller search engines currently compete for default positions through revenue-sharing agreements with device manufacturers and browsers. With two-sided markets, however, restricting these agreements could paradoxically harm competition by removing a key mechanism through which alternative search engines currently reach users.[92]

B. Forced Interoperability

The Government favours mandating interoperability, including of third-party app stores.[93] As noted above, sideloading and third-party app stores can lead to significant security and privacy risks. As Jane Bambauer has observed:

> EU lawmakers should be aware that the DMA is dramatically increasing the risk that data will be mishandled. Nevertheless, even though a new scandal from the DMA's data interoperability requirement is entirely predictable, I suspect EU regulators will evade public criticism and claim that the gatekeeping platforms are morally and financially responsible.[94]

Indeed, some of these privacy and security concerns have already materialized.[95] Relatedly, the decreased control over an operating system's content would, in turn, also eliminate one of the primary competitive differences between the iOS and Android. Indeed, centralized app distribution and Apple's "walled garden" model increase interbrand competition because they are at the core of what differentiates Apple from Android. Apple's business model historically has focused on being user-friendly, reliable, safe, private, and secure. For Apple (and its users), the touchstone of a good platform is not its "openness", but its carefully curated selection and security, understood broadly

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[90] Proposal Paper, *supra* note 1, at 21.

[91] Omar Vasquez Duque, *Active Choice vs. Inertia? An Exploratory Assessment of the European Microsoft Case's Choice Screen*, 19 J. COMP. L. & ECON 60. (2023).

[92] Erik Hovenkamp, *The Competitive Effects of Search Engine Defaults*, SSRN (14 November 2024), at 21, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4647211 ("If a potential entrant (if successful) can obtain a default, this increases its ex ante investment and raises the probability of entry. In this case, the default may raise dynamic consumer welfare").

[93] Proposal Paper, *supra* note 1, at 22.

[94] Jane Bambauer, *Reinventing Cambridge Analytica One Good Intention at a Time*, LAWFARE (8 June 2022) https://www.lawfaremedia.org/article/reinventing-cambridge-analytica-one-good-intention-time.

[95] *See infra*, Section VI.

as encompassing the removal of objectionable content, protection of privacy, and protection from "social engineering", and the like.

By contrast, Android has bet on the open platform model, which sacrifices some degree of security for the greater variety and customization associated with more open distribution. These are legitimate differences in product design and business philosophy. As Jonathan Barnett has explained:

> Open systems may yield no net social gain over closed systems, can impose a net social loss under certain circumstances, and . . . can impose a net social gain under yet other circumstances.[96]

Because consumers and developers could reasonably prefer either ecosystem, it is not clear that loosening Apple's control over the App Store would necessarily improve consumer welfare or lead to more app transactions market wide. Under the guise of fostering competition on Apple's platform, the forced standardization of interoperability mandates would thus instead eliminate competition where it matters most—*i.e.*, at the interbrand, systems level.

C. Banning Self-Preferencing

The Proposal Paper also advocates a prohibition of self-preferencing.[97] As noted above, self-preferencing prohibitions have led to some unexpected—and probably unwelcome—outcomes in the EU.[98] The notion that the ability to give preferential treatment to one's products is inherently anticompetitive contradicts "over a century of antitrust jurisprudence, economic study, and enforcement agency practice" that have firmly established that "the competitive effects of a vertically integrated firm's 'discrimination' in favor of its own products or services… generally produce significant benefits for consumers".[99]

It also flatly contradicts a number of empirical studies showing that even the welfare of competitors (to say nothing of consumers) may often be improved by such self-preferencing.[100] While enforcement of such provisions may benefit certain competitors in the short run, they create perverse

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[96] Jonathan M. Barnett, *The Host's Dilemma: Strategic Forfeiture in Platform Markets for Informational Goods*, 124 HARV. L. REV. 1861, 1927 (2011).

[97] Proposal Paper, *supra* note 1, at 21.

[98] *See infra*, Section VI.

[99] *See* Geoffrey A. Manne, *Against the Vertical Discrimination Presumption*, CONCURRENCES NO. 2-2020 (2020), at 1; *see also* Barnett, *supra* note 96; Andrei Hagiu & Kevin Boudreau, *Platform Rules: Multi-Sided Platforms as Regulators*, in PLATFORMS, MARKETS AND INNOVATION (Annabelle Gawer, ed. 2009).

[100] Manne, *id.*, at 1-2 (citing examples from the literature showing that complementors and consumers alike often benefit from platform self-preferencing); *see also* Sam Bowman & Geoffrey A. Manne, *Platform Self Preferencing Can be Good for Consumers and Even Competitors*, TRUTH MARK. (4 March 2021), https://laweconcenter.wpengine.com/2021/03/04/platform-self-preferencing-canbe-good-for-consumers-and-even-competitors.

incentives over the long run for rivals, who may underinvest in ensuring their own viability due to such regulations inefficiently insuring them against their own business misjudgements.[101]

D. Limiting Product Integration

The Proposal Paper also targets tying and bundling, including the bundling of in-app payment systems ("IAPs") with app stores.[102] The latter concern likely pertains to Apple's imposition of a 30% fee on payments made through its iOS platform, while simultaneously prohibiting third-party in-app purchases (IAPs).

But it should be asked what outcomes the Government hopes to achieve by compelling Apple to permit third-party IAPs on iOS. Even under such a scenario, Apple would still be entitled to compensation for platform access and the use of its intellectual property. Interestingly, the 30% fee appears to align with industry norms, as Steam, Nintendo eStore, PlayStation, GOG, and Xbox Game Store all apply similar charges.[103] This raises the pertinent question of why Apple is being singled out for regulatory scrutiny. Are all these companies operating as monopolies and gatekeepers? If so, why are they not encompassed within the Government's proposed *ex-ante* regulatory framework?

Moreover, even if Apple is required by law to allow third-party IAPs, the company could then allow independent payment processors to compete, charge an all-in fee of 30% when Apple's IAP is chosen, and, in order to recoup the costs of developing and running its App Store, charge app developers a reduced, mandatory per-transaction fee (on top of developers' "competitive" payment to a third-party IAP provider) when Apple's IAP is not used.

Indeed, where such a remedy has already been imposed, that is exactly what Apple has done. In the Netherlands, where Apple was required by the Authority for Consumers and Markets ("ACM") to uncouple distribution and payments for dating apps, Apple adopted the following policy:

> Developers of dating apps who want to continue using Apple's in-app purchase system may do so and no further action is needed. … Consistent with the ACM's order, dating apps that . . . use a third-party in-app payment provider will pay Apple a commission on transactions. Apple will charge a 27% commission on the price paid by the user, net of

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[101] On self-inflicted dependence, *see* Geoffrey A. Manne, *The Real Reason Foundem Foundered*, INT'L CTR. L. ECON. (2018), at 6, *available at* https://laweconcenter.org/wp-content/uploads/2018/05/mannethe_real_reaon_foundem_foundered_2018-05-02-1.pdf ("A content provider that makes itself dependent upon another company for distribution (or vice versa, of course) takes a significant risk. Although it may benefit from greater access to users, it places itself at the mercy of the other—or at least faces great difficulty (and great cost) adapting to unanticipated, crucial changes in distribution over which it has no control. This is a species of what economists call the 'asset specificity' problem").

[102] Proposal Paper, *supra* note 1, at 21.

[103] Tom Marks, *Report: Steam's 30% Cut is Actually the Industry Standard*, IGN (7 October 2019), https://www.ign.com/articles/2019/10/07/report-steams-30-cut-is-actually-the-industry-standard.

> value-added taxes. This is a reduced rate that excludes value related to payment processing and related activities.[104]

It's not hard to see the fundamental problem with this approach. If a 27% commission, plus a competitive payment-provider fee, permits more "competition" than complete exclusion of third-party providers, then surely a 26% fee would permit even more competition. And a 25% fee more still. This would entail precisely the kind of price management by regulators that has generally been considered antithetical to competition and competition law.

VIII. Conclusion and Recommendations

The Government's proposal rests on the mistaken premise that there is a global consensus on *ex-ante* digital competition regulation. Australia's push to match similar measures enacted in a handful of other jurisdictions risks exacerbating an already burdensome regulatory landscape. While the EU has embraced strict digital platform rules, Australians may not be willing to accept the same tradeoffs in terms of innovation and consumer choice.

The Government's focus on the ad-tech sector as a hub of anticompetitive conduct overlooks that market's complexity and existing competitive dynamics. Comparative experience with *ex-ante* rules for digital platforms highlight both the risks and limited successes of such interventions, raising concerns about their effectiveness in the Australian context.

Drawing on both the empirical evidence and theoretical frameworks discussed above, the Government should carefully reconsider the need for *ex-ante* competition regulation of digital platforms. The rapidly evolving nature of digital search markets suggests a more nuanced approach may be appropriate.

If the Government nonetheless proceeds, we recommend the following principles for any subsequent interventions:

- Adopt an "innovation first" approach to remedies that preserves incentives for both incumbents and new entrants to develop novel search technologies.
- Focus on removing barriers to competition, rather than imposing detailed conduct requirements. Light-touch interventions often prove more effective than prescriptive regulation in fast-moving technology markets.
- Establish regular review periods to assess the continued appropriateness of any interventions.

By carefully considering the dynamic nature of competition and focusing on forward-looking analysis, the Government can help ensure that Australian consumers and businesses benefit from continued innovation in the digital economy.

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[104] *Distributing Dating Apps in the Netherlands*, APPLE, https://developer.apple.com/support/storekit-external-entitlement (*last visited* 13 February 2025).