

Antitrust Takeaways For Tech From New Australian Report

By **Eamon O’Kelly and Noni Nelson** (October 22, 2019, 3:23 PM EDT)

The Australian competition law watchdog recently concluded an investigation into big technology’s market power, the first comprehensive investigation of its kind in the world. The final report contains 23 proposals for broad-sweeping reforms that address the dominance of companies like Facebook Inc. and Google Inc. in media and advertising markets.

The rest of the world now finds itself waiting to see what this down-under jurisdiction will do, because whatever reforms are enacted in Australia will inform regulatory policy across the globe. Investigations into these industries have already begun closer to home, including here in the U.S. This article predicts what the Australian government might decide to implement and highlights possible ramifications for antitrust enforcement in the U.S. and beyond.

On July 26, the Australian Competition and Consumer Commission concluded its digital platforms inquiry and released a final report containing 23 proposals for reform. The Australian government will decide by the end of the year whether to implement some or all of these proposed reforms. Although Australia is a relatively small player in the international legal world, the impact of the report should not be underestimated.

For one, it is the first in-depth analysis of its kind in the world. The scope was large: the ACCC conducted a detailed investigation under competition, consumer protection, unfair trading, privacy and data protection laws to produce a 619-page report. The commission received 180 written submissions, issued 60 statutory notices compelling the production of documents and held countless meetings with interested parties, members of the public and international regulatory authorities.

These findings will of course reverberate around the world because of the global nature of the technology industry. Although the report focused on “digital search engines, social media platforms and other digital content aggregation platforms ... on competition in media and advertising services markets” — essentially Google and Facebook — it will also affect other platforms. Given the trend of heightened scrutiny and proactive enforcement currently underway elsewhere around the world, the report’s proposals may be of particular interest to lawyers practicing in the U.S.

Below are some of the ACCC’s key findings and proposals for reform in relation to competition law.

Key Competition Law Findings

Google and Facebook have market power in digital advertising and news.

Not surprisingly, the report concluded that Google and Facebook have substantial market power and that this power is unlikely to decrease in the short and medium term. What is interesting however, are the specific product markets in which the ACCC determined that such power exists. The report found that in Australia, Google has substantial market power not only in the market to supply general



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search services but also in search advertising services.

Similarly, it found that Facebook has substantial market power in the supply of social media services as well as display advertising services. The report pulled back from a draft finding in the preliminary report that Google and Facebook have market power in "news media referral" services, finding instead that each has substantial bargaining power in its dealings with news media businesses.

One notable difference in the way in which these relevant product markets were defined in Australia, compared to how they might be defined in the U.S. and Europe, is the report's exclusion of online marketplaces, specifically Amazon.com Inc., from its review. Although Amazon has a relatively small presence in Australia, where it only began operations in 2017, its sizable market share in other jurisdictions means that Amazon is likely to be included in similar analyses conducted in jurisdictions where it has a larger presence. Including Amazon in such analyses could also lead to reductions in Google and Facebook's relative market shares in those other jurisdictions compared to Australia.

Data is power.

The report found that Facebook and Google's market power comes from their access to, and ability to control, users' data. Both companies operate multi-sided platforms whereby they offer consumers a free service in exchange for the use of a highly granular level of personal data, which they then monetize through advertising. The report found that Facebook and Google's dominance creates high barriers to entry and network effects, which those platforms leverage in order to constantly refine their services and cement their position in the market. Disruption from other players is therefore particularly difficult.

For example, in Australia, Google has a 96% market share of general search advertising revenue, and Facebook has a 51% market share of display advertising revenue (with no other share being higher than 5%). Almost half the Australian population (43%) uses online news platforms as their primary news source, with 33% accessing news through social media, 20% through search engines, and 12% through news aggregators (such as Google News and Apple Inc. News), as compared to 30% accessing news directly from the websites of news organizations.

Each user generates data that the companies collect and the ACCC made a clear determination that the use of large troves of user data creates a competition law issue. This finding rebutted the platforms' argument that the use of such data should be open to anyone who can collect and understand it and thus should not be subject to competition regulation.

Three Proposed Reforms

Attorneys in the U.S. and abroad should be aware of the following important proposals for competition reform that, if implemented by the Australian government, could serve as guideposts for reform in the U.S.

New, Specialized Enforcement Powers

The ACCC had indicated in its preliminary report that it intended to recommend the establishment of the world's first independent digital platform watchdog. However, it ultimately backed away from this proposal in favor of creating a specialized enforcement branch within the ACCC.

While platforms expressed relief about this change, the recommendation still means that platforms can expect a harsher level of scrutiny going forward rather than any kind of easing off by regulators. In particular, the ACCC highlighted that the platforms' use of "opaque" algorithms that result in "significant potential for self-referencing" would be an area of focus.

The report also disclosed that the ACCC has five investigations of possible breaches of competition law underway, one in connection with a potential misuse of market power and four in connection with potential contraventions of consumer law that are expected to conclude "later in the year." There will also be a further 18-month inquiry specifically into competition for the supply of advertising technology and online advertising services by advertising and media agencies.

This increased scrutiny of digital platforms reflects the current international trend of more robust

antitrust law enforcement, including recently in the U.S., which has traditionally taken a more hands-off approach. For example:

- The U.S. Department of Justice is currently conducting a broad review of online platforms;
- The Federal Trade Commission is also examining rivals' complaints about Amazon's exclusionary conduct;
- A group of state attorneys general (led by Texas) is currently examining whether Google stifles innovation and harms the market for digital advertising; and
- On Sept. 6, attorneys general in eight states (led by New York) announced an antitrust investigation into whether Facebook has stifled competition and hampered consumer choice.

Mandatory Notification of Competitor Acquisitions

One small win for platforms was the report's firm rejection of the proposal that certain aspects of their business should be broken up, with the ACCC instead recommending limits to the ability to make anti-competitive acquisitions going forward. In particular, the report expressed concerns over Google and Facebook's practice of acquiring potential competitors, specifically referring to Facebook's acquisition of Instagram Inc. and Google's acquisition of Waze Mobile Ltd.

Similar issues have already arisen in the U.S. where the FTC is currently examining Facebook's acquisition of competitors. The ACCC's proposed solution is to add the following factors as compulsory considerations when assessing the anti-competitiveness of a merger:

- The likelihood that an acquisition would result in the removal of a potential competitor and
- The nature and significance of assets, including data and technology, being acquired directly or through the body corporate.

The report also recommended that large digital platforms agree to implement a voluntary notification protocol that would require them to provide advance notification to the ACCC of any proposed competitor acquisitions that may affect competition in Australia. The ACCC wants large digital platforms and regulators to work together to agree on the precise details of the protocol, such as setting a minimum transaction value threshold, which Facebook and Google appear to support so far.

However, the ACCC has indicated that it will ask the government to implement the protocol unilaterally if cooperation is not forthcoming. This is similar to the process already in place in the U.S. whereby advance notification is required for certain merger transactions; however, platforms may see increased scrutiny of competitor acquisitions within that existing framework.

Allowing Customers to Choose Default Settings

The report also took issue with the practice of preinstalling Chrome and Safari browsers on Android and Apple devices. It recommended that the Australian government require Google to give Android users the ability to choose their preferred search engine and internet browser within six months of that function becoming available in Europe.

The change in Europe came about as part of the fallout from Google's antitrust violation in relation to marketing its own apps in an anticompetitive fashion, for which it also received a \$5 billion fine.

Given that change is underway in Europe and possibly in Australia, it may not come as a surprise to see a similar measure introduced in the U.S. in the future.

Looking Forward

The report spearheads a new era of regulators being willing to go after digital platforms and underscores the growing tension between competition enforcement and big tech. Silicon Valley companies fear that reforms that are accepted and enacted in Australia will shape the debate in other jurisdictions, especially the U.S. This fear is well-founded given the large number of reviews currently underway, many of which will not conclude until after Australia has decided what action to take.

At the same time, lawmakers and commentators in the U.S. are urging regulators to be more aggressive.[1] Whatever happens in Australia will therefore be an important blueprint for reform in the U.S., one that suggests that stricter enforcement is on the way, especially in the areas of data collection, online advertising, competitor acquisitions and protecting consumer choice. The fact that Australia is likely to implement the three reforms discussed above in some way or another makes these areas of interest for those practicing in the U.S.

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[1] An unlikely advocate for stricter antitrust scrutiny includes Professor Luigi Zingales of the University of Chicago, a school known for its normally “hands-off” competition ideology, who recently proclaimed: “The world has changed, and inevitably the Chicago position has to change, too.” See <https://www.nytimes.com/2019/09/15/technology/university-of-chicago-technology-antitrust.html>. See also: <https://www.nytimes.com/2019/09/17/technology/senate-antitrust-tech-hearing.html>.