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Microsoft welcomes Treasury's invitation to comment on the Australian Competition and Consumer Commission fifth interim report in the Digital Platform Services Inquiry published in November 2022 (**ACCC report**).

We offer the following views, informed by our experience as a widely diversified technology company:

- 1) we consider that one potentially effective approach to supplementing existing competition laws is by implementing measures to ensure that gatekeepers who act as unavoidable intermediaries between consumers and suppliers of goods and/or services do not distort competition through control of their intermediation platforms;
- 2) we support the development of a designation process focused on determining whether any given platform is a gatekeeper who is an unavoidable trading partner;
- 3) we support the development of designation criteria that maintains sufficient flexibility to adapt to rapidly evolving markets and a transparent process with appropriate checks and balances as well as robust judicial review mechanisms;
- 4) we urge lawmakers to maintain domestic and international regulatory dialogue to coordinate any reforms pursued; and
- 5) we consider that the evolving challenges of scams and other harmful content online are best addressed via internationally-consistent reforms and a collaborative approach between regulators and industry.

1) Supplementing competition measures to address gatekeeper conduct

In light of international developments and the ubiquity of digital platforms in intermediating Australian consumers' activities online, and as the ACCC has identified, Microsoft considers that now is an appropriate time to consider how to address the competition and consumer harms that have been identified by the ACCC while ensuring that Australian consumers can continue to benefit from innovation and cutting-edge technology.

The ACCC has identified concerns arising from its inquiry into consumer digital platforms such as search, social media, and content aggregation services and have proposed recommendations that Microsoft believes can provide the basis for developing a sensible set of fair solutions that maintain effective competition and innovation.

Microsoft encourages Treasury to direct any new competition measures to specific and identified harms from the unique challenges posed by gatekeepers to complement, rather than

replace, Australia's existing competition laws. The *Competition and Consumer Act 2010* (the **Act**) has played, and will continue to have, an important function in maintaining competitive markets in Australia.

2) Maintaining a focus on gatekeeper platforms

As the ACCC has identified, there are some cases in which a large digital platform has become a 'gatekeeper' or 'important intermediary' that makes them a 'must have' for many suppliers to reach consumers.¹ These 'gatekeepers' often exhibit a combination of the unique economic characteristics that the ACCC has identified as contributing to market power, e.g., strong direct and/or indirect network effects.² As the ACCC has found, due to the 'must have' nature of services supplied by gatekeepers and their role as unavoidable intermediaries between consumers and businesses, existing competition laws can struggle to address identified harms in markets where gatekeepers operate.³

It is crucial for reforms to remain gatekeeper-focused to avoid the unintended consequences that may arise if new regulations were too broadly applied to market challengers and to emerging technologies. As the ACCC notes, applying carefully crafted new obligations or prohibitions on dominant intermediaries can enable competition.⁴ However, imposing the same obligations or prohibitions on emerging or smaller rivals who are already at a competitive disadvantage can have the opposite effect by exacerbating that competitive disadvantage, undermining those challenger firms' ability to compete effectively and entrenching the dominance of the gatekeepers.

Conduct that may be anti-competitive when engaged in by a gatekeeper can be procompetitive when undertaken by challengers. For instance, self-preferencing by a dominant firm may serve to cement its dominance, while self-preferencing for a challenger firm may be a necessary strategy to gain sufficient name recognition and user base to break into a market with a dominant incumbent.

Gatekeeper-focused competition reforms will also increase the coherence of Australia's new regime, minimise its implementation costs and enhance its effectiveness. It will establish a principled balance between the important considerations of certainty and flexibility. This principled approach can help avoid the uncertainty – and risk of extensive litigation – that Treasury's paper highlights.

3) A flexible and transparent designation process supported by judicial review

In Microsoft's view, effectively targeting gatekeepers in the ACCC's concept of 'Designated Digital Platforms' requires a flexible and transparent process that is supported by robust review mechanisms. We support the ACCC and Treasury's recognition that flexibility and transparency are critical to accommodating for dynamic and fast-evolving business models and technologies.

To ensure sufficient flexibility to accurately target the right entities, we consider that the designation process requires consideration of qualitative measures in addition to any quantitative measures. While quantitative criteria can provide a clear definition, they are ill-suited for the often-nuanced analysis required to properly identify true gatekeepers acting as unavoidable intermediaries. For example, different digital platform services with similar user numbers may enjoy very different market significance depending on the other characteristics of the specific services including differences in intensity of use.

¹ ACCC Report, p 40.

² ACCC Report, pp 6-7.

³ ACCC Report, p 40.

⁴ ACCC Report, p 54.

Not all “large” platforms or platforms with a certain number of users, accounts, or transactions are gatekeepers with, as the ACCC describes, “an important intermediary position.”⁵ For example, the scale and number of users necessary to compete in internet search may be significantly larger than the number of users for an online marketplace. Moreover, as dynamic markets grow, shift, and evolve, it is likely that even sector-specific quantitative thresholds are likely to be inadequate to identify true gatekeepers and are certain to risk being overinclusive and potentially also underinclusive at the same time. Flexibility is also needed to tailor obligations to the competition issues relevant to that service as these change over time. Flexibility can help avoid unintended consequences that can occur in adopting a ‘one-size-fits-all’ approach.

As such, Microsoft recommends any designation criteria include qualitative considerations such as those proposed by the ACCC, including consideration of market power and position as an important intermediary. The former will help ensure criteria are not overinclusive of seemingly “large” platforms which do not have market power. The latter will help keep the reforms focused on the unique challenges presented by a gatekeeper. Including qualitative criteria to identify gatekeepers will also help align Australia’s new competition measures with key overseas developments including, for example, the United Kingdom’s proposed targeted codes of conduct.

Microsoft welcomes Treasury’s focus on the appropriate checks and balances on decisionmakers across various policy stages. As identified in research by the Australian National University’s [Tech Policy Design Centre](#), checks and balances on the power of regulators are especially important, as their independence from Governmental supervision is generally enshrined in statute.⁶ It is important to enact appropriate democratic safeguards including strong judicial review into the designation process while also respecting and preserving the independence of regulators.

We would welcome the opportunity to discuss in more detail how to achieve flexibility and transparency in the ACCC’s proposed reforms as the consultation process progresses.

4) Maintaining domestic and international regulatory dialogue to coordinate reforms

To the extent possible, any reforms pursued in response to the ACCC recommendations should be coordinated with other relevant agencies domestically as well as internationally. Globally consistent regulations will drive better outcomes in these markets by facilitating cross-border expansion, increasing legal certainty, and lowering regulatory burden by avoiding inefficiencies and the creation of a complex web of incompatible standards. Coordination may also create opportunities to drive greater effectiveness across multiple dimensions internationally.

In addition, we support Treasury’s focus on coordinating any proposed competition measures with relevant agencies domestically. As the ACCC notes, many of the issues that arise in the digital platform context intersect with the responsibilities of multiple different regulators in Australia. Regulatory schemes administered by the eSafety Commissioner, the Australian Communications and Media Authority and the Office of the Australian Information Commissioner, including those currently under development, may directly overlap with areas that the ACCC’s recommendations cover. Domestic regulatory coherence will enable a regulatory landscape that works for all stakeholders and avoids unintended consequences in other regulatory areas.

Along with this domestic and international coherence, Microsoft welcomes the ACCC and Treasury’s shared desire to maintain dialogue with relevant stakeholders. In Microsoft’s

⁵ ACCC report, p 117.

⁶ Australian National University, Tech Policy Design Centre, [Tending the Tech Ecosystem Report](#), p11.

experience with implementing enforceable commitments in relation to Windows, regulatory engagement was essential to ensure Microsoft appropriately implemented the commitments having regard to its specific circumstances. Facilitating open, constructive engagement on reform proposals achieves clarity and promotes effective, as well as efficient, compliance.

(5) Collaborative and internationally consistent approach to protecting consumers online

In considering consumer protection reforms, internationally-coordinated reforms consistent with regimes recently-enacted overseas, such as the European Union's *Digital Services Act* would be beneficial in the Treasury's consideration of consumer protection reforms. The risks and issues arising from harmful online content may often cross borders. Because of this, ensuring that consumer reforms in Australia are in concordance with regulations promulgated in other jurisdictions will help to ensure that online services can take actions that are consistent, compliant, and effective.

Microsoft agrees with the ACCC's view that harmful online content such as scams, harmful apps, and fake reviews have the potential to cause considerable consumer harm. We support the actions the Government has already taken on this important issue. For instance, we welcome the Government's October 2023 announcement providing funding for the ACCC to establish a National Anti-Scams Centre in collaboration with other agencies, which was an important step in embarking on a coordinated and collaborative approach to safeguard the community against the dangers of scams.

Microsoft is committed to tackling online harms in an increasingly complex world and online environment. We take seriously our responsibility to help keep users safe on our services and to contribute to building a safer online ecosystem. We have implemented various systems across our diverse range of products and services to prevent, detect, and address illegal or harmful content and build positive online communities. We are continually working to improve these systems.

Disrupting the malicious third-party activity such as scams, harmful apps, and fake reviews is an ongoing battle. As ACCC Chair Gina Cass-Gottlieb has observed, 'The fight against scams [is] never ending and ever-evolving'.⁷ We share this view that the challenges are ever-evolving. Solving such challenges requires an adaptable regulatory framework with room to evolve as new challenges and new technologies emerge. Additionally, scams, harmful apps, and fake reviews relate to a diverse range of content and harms. Specific regulatory measures targeted at addressing clear and well-defined types of content and harm are more likely to be effective and less likely to have unintended consequences.

The process also requires whole-of-society collaboration to develop, test, and refine what works best. A multi-stakeholder approach that brings stakeholders from a range of sectors together to share expertise and ideas is more likely to achieve an impactful outcome in this area. Multistakeholder engagement is important to obtain perspectives on the many different types of online services and the different types and prevalence of harms on these services. An informed and risk-based approach involves recognising the unique characteristics of different services and tailoring regulatory solutions to meet the changing online landscape and fit both the nature of the service and the type of harm.

⁷ <https://www.scamwatch.gov.au/news-alerts/making-australia-the-worlds-hardest-target-for-scams>

Further engagement

As Treasury considers next steps with respect to the ACCC report's recommendations, Microsoft hopes to engage further with Treasury on the scope and substantive content of implementing guidance, regulation, or legislation.

We believe that our experience as a developer, operator and enterprise user of various technology products and services used by many Australians provides a useful basis to contribute to the development of the proposed supplemental measures.

We would welcome directly engaging with Treasury in this consultation process or at any other appropriate time.

Kind regards,

Microsoft Australia and New Zealand