

Digital Platforms under Fire – What Australia Can Learn from Recent Developments in Europe

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[Pre-print of article published in *Alternative Law Journal* 43(4)(2018) pp. 275-282]

Introduction

On 3 August 2018, the Australian Competition & Consumer Commission (ACCC) issued a media release in which it emphasised that ‘[o]ver the next year the ACCC will further increase its enforcement action, expand its work on data, algorithms and digital platforms’.¹ This is hardly surprising given the constantly increasing role that data, algorithms and digital platforms play in society – to the extent they ever were, these are no longer fringe issues. And the direction articulated in the ACCC media release is part of a clear international trend of a harsher regulatory attitude towards digital platforms. To see that this is so, we need only consider recent matters such as the public reaction to the Cambridge Analytica scandal,² the impact of the European Union’s General Data Protection Regulation (GDPR) that came into effect 25 May 2018³ and Facebook CEO Mark Zuckerberg appearing before both the US Congress and the European Parliament.⁴

The hardening attitude in Australia is illustrated by calls for strengthening Australia’s data privacy laws,⁵ and by the fact that the, then Treasurer, Hon Scott Morrison MP, on 4 December 2017 called upon the ACCC to hold an inquiry specifically into digital platforms.⁶ Further, it can also be seen in court decisions.

Having discussed one such court decision, we give a brief overview of the ACCC’s digital platforms inquiry. The remainder of the article is devoted to bringing attention to a selection of particularly relevant European developments that may usefully inform how Australia proceeds in this arena, and that may be considered in the ACCC’s final report due to be provided to the Treasurer on 3 June 2019. Overall, we seek to emphasise the need to think of regulation more

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holistically, and call upon the ACCC to make recommendations that are effective without reducing the ability of digital platforms to innovate.

A Harsher Attitude by Australian Courts

The most extreme example of a hardening attitude by Australian courts is Pembroke J's unfortunate judgment in *X v Twitter Inc.*⁷ There, the Supreme Court of New South Wales granted an order requiring Twitter to remove content anywhere in the world posted by one of its users. In fact, the order went as far as to require Twitter (a foreign defendant) to block or remove – with worldwide effect – future postings (regardless of subject matter!) made by the unidentified (potentially foreign) person responsible for the postings at issue in the dispute.

Domestic orders affecting what content may be accessed in other countries are always controversial; just consider how we would be affected if Australians could not access content merely because the content in question offended local law in North Korea, Russia or Pakistan. However, what makes Pembroke J's decision even more alarming is the limited attention he directed at the matter's nexus to Australia. Pembroke J had no difficulty finding jurisdiction over the dispute even though the primary relief sought against the foreign defendants included injunctions intended to restrain their conduct outside Australia, and the only contact with Australia that Pembroke J emphasised was that: '[a]mong other things, the injunction sought to compel or restrain the performance of certain conduct by the defendants everywhere in the world. That necessarily includes Australia.'⁸

Given that the action was initiated in Australia, it is perhaps likely that the plaintiff is based, or at least active, in Australia. However, based only on how Pembroke J expressed the judgment, it seems possible for any party anywhere in the world to bring action in Australia, against any company in the world, seeking global blocking of Internet content. While such a prospect may bring joy to some Australian law firms, this highlights that judges need to take greater care in how they frame their judgments. Surely it remains true that, if both the plaintiff and defendant are out of Australia, an Australian court would typically consider itself a clearly inappropriate forum and would likely decline jurisdiction?

For our purposes it is also interesting to note that Pembroke J used his judgment to send a message to the tech industry more generally in gratuitously noting that the applicable legal (equitable) principles are 'equally applicable to Facebook, Instagram and any other online

service or social networking web site that could be used to facilitate the posting of confidential information or private images belonging to another person.’⁹

And given that Twitter – a company with its main seats in the US and in Ireland – did not show up to defend the action, it is significant that Pembroke J emphasised that Twitter still is within the Court’s reach without assistance from the legal systems in the US and Ireland: ‘there are assets in the jurisdiction [namely through Twitter Australia Holdings Pty Limited], whether or not, given the non-appearance of the defendants, a monetary judgment for costs in favour of the plaintiff is enforceable in California or the Republic of Ireland.’¹⁰

If this is the direction the Australian legal system is taking, it will be difficult to complain when totalitarian states around the world request Twitter, Facebook and Google to globally block all content critical of their leaderships or religious ideas and concepts. Through Pembroke J’s ill-advised judgment, we are certainly heading towards a very slippery slope in the context of the long-running discussion about Internet jurisdiction issues. It is a direction that is neither effective, nor supportive of innovation

The ACCC’s Digital Platforms Inquiry

Under the Terms of Reference, the ACCC’s digital platforms inquiry is focused on:

the impact of digital search engines, social media platforms and other digital content aggregation platforms [...] on the state of competition in media and advertising services markets, in particular, in relation to the supply of news and journalistic content, and the implications of this for media content creators, advertisers and consumers.¹¹

Thus, the scope is broad, which is reflected in the ACCC’s Issues Paper of 26 February 2018,¹² as it, directly or indirectly, engages with topics such as:

- The role, and market power, digital platforms hold, and should hold in society;
- The role of journalism;
- The funding of news and journalistic content;
- How Australian’s access news and journalistic content, and its effect on advertising spending;
- How we measure the ‘quality’ of news and journalistic content;
- Data privacy, big data and the role of consent;
- Algorithms, discrimination and the ‘filter bubble effect’ (ie users being less exposed to new information and conflicting points of view); as well as
- Impacts on elections¹³ and democracy.

The importance of these topics cannot be called into question. The list covers a range of issues in consumer protection, data privacy and competition law – of great societal importance – that have already attracted considerable attention in other jurisdictions such as the EU, and which could be informative to the ACCC investigation.

European Context: Select Decisions Targeting Google and Facebook

This section provides an overview of recent decisions on consumer protection, data privacy and competition involving Google and Facebook in the EU. To align the discussions with the ACCC inquiry, distinction is made based on whether the decisions address competition or data privacy and consumer protection issues. The competition discussions are further nuanced into platform and data privacy concerns, with the latter increasingly coming under the radar of competition authorities.

Competition Law - Platform-Related Conducts and Concerns

On 27 June 2017, the European Commission fined Google Euro 2.42 billion (approx AUD 3.78 billion) for abusing its dominant position in the market for general Internet search ‘by giving illegal advantage’ to its specialised search service, Google Shopping.¹⁴ As part of this strategy, Google made changes to its search algorithms that put results from its shopping service at or near the top of the general search results and demoting results from its competitors, which was found to be in breach of the Treaty on the Functioning of the European Union, Article 102, which addresses abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it.¹⁵



Figure 1: Google’s Conduct (adopted from Commission)

According to the Commission, the conduct ‘has the potential to foreclose competing comparison-shopping services, which may lead to higher fees for merchants, higher prices for consumers, and less innovation.’¹⁶ The decision requires Google to treat rival comparison-shopping and its own service equally. The remedy has drawn comparisons with net neutrality and its extension to search.¹⁷ Google has appealed the decision.

Pending appeal, a few points merit emphasising. First, the decision shows the Commission’s willingness, as opposed to US counterparts, to experiment with theory of harms that cater to the digital reality. The decision is the first of its kind that applies leveraging theory on ‘a conduct resulting from algorithmic design choices’.¹⁸ The Commission views the decision as a precedent that will inform how dominant companies make algorithmic design choices that affect other firms.

Many have criticised the decision for lack of concrete theory of harm¹⁹ and for imposing a disproportionate burden on companies’ ability to set up ranking and selection criteria.²⁰ Furthermore, the open-endedness of the remedy, ie equal treatment, is another noteworthy point that cuts both ways. On the positive side, it is an attempt to avoid overreach by imposing specific design decisions that interfere with the freedom of companies. Some have commended the Commission for lessons learned following its failed remedy to untie Windows and Media Player in its Microsoft decision.²¹

On the negative side, it creates uncertainty for competitors. As part of its plan to comply with the decision, Google has proposed to operate its comparison service as a separate business and introduce a scheme where all companies can bid to get the top spot in the search results.²² However, many competitors have indicated the difficulty of matching Google Shopping’s bids because of Google’s financial muscle and the fact that cash would not be leaving the company.²³ Early signs from the implementation of the bidding scheme raise questions on the effectiveness of the scheme to address the competition concerns because reports show that Google holds up to 99% of the shopping results.²⁴ Interestingly, a UK High Court exempted Google from antitrust liability for similar conduct,²⁵ which shows that Member States might take a different path than the Commission, least until the Courts have their final say.

On 18 July 2018, the Commission fined Google Euro 4.34 billion (approx AUD 6.78 billion) for abusing its dominant position in the market for licensable mobile operating systems (MOS) by imposing ‘illegal restrictions on Android device manufacturers and mobile network operators.’²⁶ The figure below shows the three illegal restrictions.

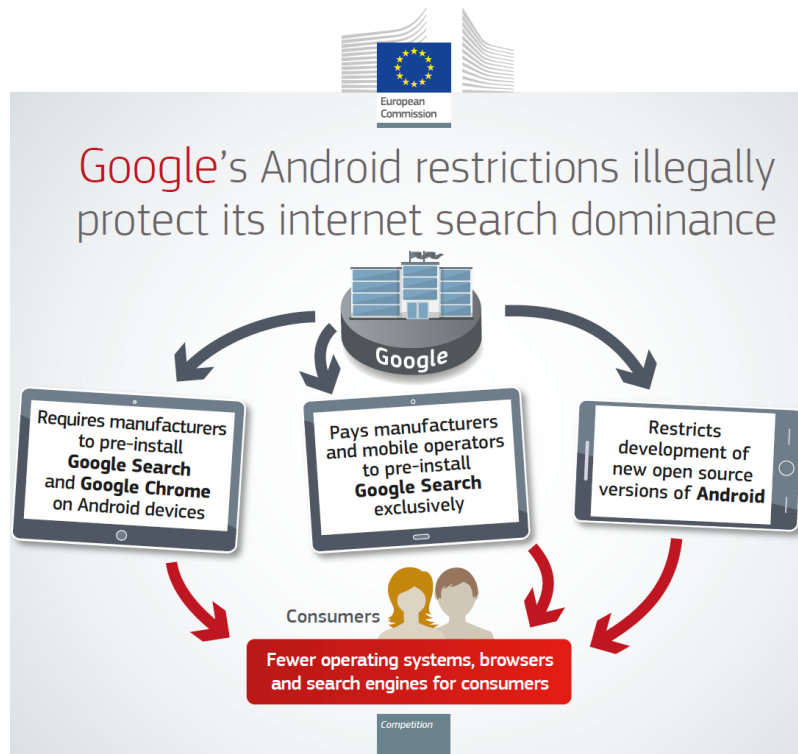


Figure 2: Google's Conduct (adopted from Commission)

The first involves bundling where device manufacturers that wish to install Play Store on their devices are also required to pre-install Google Search and Chrome browser.²⁷ The second relates to financial payments to large device manufacturers and mobile operators on the condition that they exclusively pre-install Google Search. The third relates to prohibition imposed on device manufacturers that wish to install Play Store or Search in their devices from selling even a single device running on a competing Android OS such as Android Fork.

The Commission held that these practices have cemented Google's dominance in general search, denied rival search engines the possibility to compete on merits and harmed further innovation in MOS. The decision requires Google to end these practices within 90 days or face additional penalties. In light of existing practice and case law, the theory of harm in the Google Android matter seems more robust than in the Google Shopping case. However, there is no dearth of critics.²⁸ One such critics pertains to the exclusion of Apple's iOS Mobile OS from the relevant market and that the decision punishes open systems such as Android OS, as opposed to Apple's closed system.

Apart from the above decisions, there are pending complaints against Google for expelling apps from its platform and for copying content, known as scrapping, from websites without payment.²⁹ Whether this conduct violates competition rules remains to be seen, but the Commission seems to recognise that not all platform-related harmful conduct can be addressed using competition law. Thus, the Commission has proposed a Regulation addressing

transparency and fairness of platforms in their dealings with businesses.³⁰ The Regulation's aim is to ensure 'a fair, predictable, sustainable and trusted legal environment for business users, corporate website users, providers of online intermediation services and online search engines alike'.³¹ The proposal targets providers of online intermediation services, primarily e-commerce platforms, app stores, social media and, to a limited extent, search engines.³²

The proposal recognises the intermediaries as key enablers of business-to-consumer transactions and thereby facilitating efficient access to (cross-border) markets.³³ However, this central role comes with a power 'to engage in a number of potentially harmful trading practices' that can have significant effect on the commercial success of business users. Such harmful practices include delisting of goods/services, suspending accounts without reason, lack of transparency in rankings, and access to, and use of, data collected by customers and preferential treatment of own services.³⁴ Added to this is a lack of a legal framework addressing these practices. Where there is an emerging regulatory framework, it risks fragmentation with potentially negative effects on cross-border trade.³⁵

Hence, the proposed Regulation would impose some obligations requiring intermediaries to: (1) be transparent on how they rank and list results (Art 1); (2) provide a statement of reasons for suspending or terminating intermediation services (Art 4); (3) publish main parameters for their ranking (Arts 5 and 6); (4) provide for an internal system for handling complaints (Art 6); and (5) list one or more mediators with which the provider is willing to engage where an issue has not been resolved by the complaint system (Art 9).

Increased Attention to Data Privacy in Competition Analysis

With the growing importance of personal data for commercial purposes, data privacy has attracted considerable attention in competition law discussions, particularly when companies in data-rich industries merge. One approach gaining traction is to factor in data privacy as a non-price competition parameter. This approach treats data privacy as a quality, choice or innovation component of a product/service and certain data privacy harms as reductions in these parameters that need to be accounted for in competition analysis.

The *Facebook/WhatsApp* decision is the first to recognise data privacy as a non-price competition parameter. In its decision approving the merger, the Commission stated that in markets for consumer communications, data privacy and data security constitute key parameters of competition.³⁶ The Commission, however, failed to assess the impact of the merger on the incentives of the parties to compete on data privacy and data privacy policies, which led to

some negative reactions.³⁷ In this regard, the *Microsoft/LinkedIn* decision represents a step forward. Having already identified data privacy as ‘a significant quality’ parameter between Professional Social Networks (PSNs), the Commission held that if Microsoft were to pre-install and integrate LinkedIn with Windows OS and Office products, it would reduce consumer choice in relation to data privacy.³⁸ This is because such conduct would foreclose PSN providers such as XING that ‘offer a greater degree of data privacy protection than LinkedIn’.³⁹ The decision recognises that the choices users have when providing their data and their ability to control its use are key quality attributes of PSNs. It also shows that reductions in the level of data privacy could result from classic anticompetitive conducts, eg tying, provided competition authorities recognise data privacy as a form of non-price competition.

In an investigation that has attracted considerable attention, the *Bundeskartellamt* (German Competition Authority) found that Facebook has abused its dominant position in the market for social networks by imposing unfair data privacy terms. According to the authority, Facebook’s data collection practices from third party sources are unfair in the light of ‘European data protection principles’ and an abuse of dominance under German competition law.⁴⁰

Three points require particular mention. First, this is perhaps the first case where harms to data privacy are at the centre of competition law investigation. Some of the consumer harms identified include users’ loss of control on how ‘their personal data are used’, lack of choice to avoid merging of their data and ‘a violation of users constitutionally protected right to informational self-determination’.⁴¹

Second, it resorts to data privacy law as a benchmark for assessing abuse. This is particularly relevant because the lack of a concrete benchmark for measuring degradation in data privacy is a key source of scepticism for incorporating data privacy into competition analysis.⁴² Although the move seems unprecedented, it is consistent with precedents from the Commission and EU courts where other legal norms (eg IP) provide normative guidance in the application of competition law.

Third, the case raises important institutional questions, such as what role Data Protection Authorities (DPAs) should play in such assessments. The need for closer collaboration has been empathised by many including the European Data Protection Supervisor (EPDS), which has moved to establish a digital clearinghouse that facilitates cooperation among data protection, consumer protection and competition law authorities.⁴³ The *Bundeskartellamt* should be commended for involving these authorities in its investigation.

Data Privacy under the Radar of Consumer and Data Protection Authorities

Default data privacy settings have been at the centre of recent investigations involving Facebook and WhatsApp. Following a lawsuit by the Federation of German Consumer Organisations (VZBV), the Berlin Regional Court assessed the legality of Facebook's five default settings, including a pre-activated location service that shares users' location when chatting with other people and pre-ticked-box that allows search engines to link users' profiles to their results.⁴⁴ The Court ruled that consent was required to activate these settings by default and found that Facebook did not obtain such consent. Similarly, the Italian Competition and Consumer Protection Authority (AGCD) has held that, through its default settings, WhatsApp has forced users to accept the sharing of their data with Facebook following the merger. The agency indicated that 'the pre-selection of the option to share the data' and 'the difficulty of effectively activating the opt-out option once the Terms of Use were accepted' prevented users from making effective choices.⁴⁵

Turning to Unfair Data Privacy Terms and Conditions, the Berlin Court has held eight clauses in Facebook's terms of use to be invalid, including Facebook's real name policy and its ability to use users' names and profile pictures for 'commercial, sponsored or related content' and to transfer their data to the US.⁴⁶ However, the Court rejected VZBV's claim that Facebook's advertisement of its service as 'free' is misleading. Although consumers exchange consideration through their data, such data, the Court noted, is 'intangible' and 'cannot be regarded as a cost.'⁴⁷ Similarly, the AGCD invalidated some of WhatsApp terms as unfair, including terms concerning limitations of liability, the ability to unilateral terminate the service without advance notice and the choice of the law of the State of California as only governing law for disputes.⁴⁸

In the context of inadequate consent, it is worth observing how, following an action by the Privacy Commission, the Brussels Court of First Instance held that Facebook's collection of data from third party websites through its 'plug-ins', eg 'Like', are illegal under Belgian data privacy rules.⁴⁹ The Court noted that such plug-ins allow Facebook to collect data about users, including their IP addresses, the URL of visited page and browser ID, which are of 'very sensitive nature' as they may relate to health, sexual and political preferences of a person.⁵⁰ The Court found the practice illegal both in relation to non-Facebook and Facebook users because Facebook fails to obtain 'any legally valid consent' under Belgian data privacy law.⁵¹ Facebook was ordered to delete all data collected in Belgium illegally under the supervision of an

independent expert group and ensure that third parties to whom it provided the data do the same or face a penalty of Euro 250,000 daily (approx AUD 390,000).⁵²

Lessons for the ACCC

Several important lessons can be drawn from the above decisions and initiatives that could be relevant to the ongoing ACCC inquiry and for Australia more generally. First, the effective enforcement of the rights of individuals in the digital environment requires moving beyond the ‘either-or’ mentality toward a holistic approach that combines measures from consumer, data privacy and competition rules. Related to this, the developments highlight the need for closer collaboration among different regulatory agencies. Competition and consumer protection authorities are addressing data privacy issues while DPAs have shown their willingness to work in closer collaboration with these authorities. We note in passing that, in the Australian context, there is little evidence of such collaboration despite a March 2002 memorandum of understanding between the ACCC and the then Office of the Federal Privacy Commission.⁵³

Second, the developments highlight the need for new approaches to the application of existing rules. The inclusion of data privacy as a non-price parameter in competition assessment is an instance of a new way of thinking in applying existing rules. This development brings competition policy closer to the digital reality where users technically ‘pay’ for services that have no monetary cost with their personal data, as it recognises the possibility of companies’ exercising market power by reducing the level of privacy protection.

Third, the developments highlight the need to sharpen existing rules⁵⁴ and enact new ones where the existing rules are inadequate. The Commission proposal on platform transparency and fairness is a case in point, and recognises the limits of existing rules in addressing harmful platform-related practices towards business users.

Concluding Remarks

There was a time when discussions of the regulation of digital platforms (and other Internet intermediaries) were predominantly concerned with ensuring that such actors were provided with sufficient protection to ensure that they could achieve their potential and blossom. Section 230 of the *Communications Decency Act*⁵⁵ – with its broad immunity for online intermediaries – is a prime example, but this focus on protection was by no means restricted to the US. A similar attitude can, for example, be seen in the European Union’s E-commerce Directive,⁵⁶ as well as in Australia’s *Broadcasting Services Act 1992* (Cth) Schedule 5 Online services, clause 91. The days of protection-focus are, however, well and truly over it seems.

There can be no doubt that consumers need to be given appropriate safeguards in their dealings with the Internet giants who often are based overseas. Equally, it is obvious that we must ensure fair competition in the media and advertising services markets, and we must clearly protect our democracies from manipulation.

At the same time, we do well to remember that digital platforms exist because we see reasons to use them. The popularity of social media is such that governments have also opted to use them as one of their primary means of communication, and who would want to go back to a pre-search engine Internet? Thus, great care must be taken to ensure that any reform helps create a digital platform environment that – as a whole – serves consumers better, not worse.

Acknowledgments

Samson Esayas is grateful for the generous financial support he received from the Norwegian Research Council for his research stay at Queensland University of Technology (QUT), Faculty of Law. He is also thankful for the wonderful working environment and the hospitality he received at QUT. Special thanks go to Angela Daly for her warm welcome and support throughout this stay.

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