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A Fast Follower Ex-Ante Regime: Australia's Proposed New Digital Competition Regime

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A new kid may join the digital tech regulation block. On 2 December, the Australian Treasure proposed a new digital competition regime addressing digital market power. The policy of the Australian legislator and enforcer builds on its long-term digital strategy, triggered in 2017.

For more than seven years now, the Australian Competition and Consumer Commission (ACCC) has investigated, enquired and delved deep into the complexities of digital services and ecosystems to determine the necessity of adopting *ex-ante* regulation. In its latest interim report, the ACCC declared there was a need for such a regulatory instrument. Those results have started to fructify now. The Australian Government opened a consultation period until February 2025 for stakeholders to contribute their thoughts on the adequate design of the regulatory regime. No text has been released yet by the Australian Government or the ACCC, but the proposal sets out a clear regulatory landscape.

This post aims to outline the main features of the (proposed) Australian regulatory regime, as opposed to the EU's DMA, the UK's DMCC -to enter into force on 1 January 2025- and the Japanese Smartphone Act. The Australian reform would join the large family of jurisdictions drawing up a dedicated asymmetrical regulatory instrument to capture the digital space and its competitive dynamics.

The regulation's goals and the services captured by it

On its latest Digital Platform Services Inquiry, spanning 2020 to 2025, the ACCC identified a lack of effective competition in a range of digital platform services. Substantial market power held by large digital platforms provides them with the ability and incentives to engage in conduct that allows them to further entrench their position in those markets.

The Australian Government terms these issues as 'systemic', impacting businesses and consumers alike through higher prices, reduced choice, and lower innovation and quality of products and services. In a similar vein to previous digital regulation addressing market power, the Australian Competition and Consumer Act (CCA) does not protect and promote competition to the extent that it would be desirable, considering the complex characteristics and the dynamic nature of these digital platform markets. Therefore, the Australian legislator proposed an *ex-ante* regulation,

separate and complementary to the CCA.

The Australian *ex–ante* rules would designate specific digital platforms with a critical position in the Australian economy. Similarly to the DMCC, the overarching framework would be established in a two-step process: the CCA would contain the key features of the regulation (e.g., designation, enforcement and compliance mechanisms), whereas those would be later further specified by the Australian Government for each digital service, in consultation with the ACCC. In this context, complementarity would rule between the ACCC's *ex-ante* and *ex-post* powers but the competition authority's capacity to intervene in those digital markets would derive directly from the CCA.

Following this line of thought, the Australian Government proposes the *ex-ante* regime to hold the same objective as the CCA, namely "to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection". At this point in time, the new competition regime would not be particularly targeted to any other objective, but the Australian Government is open to hearing the stakeholders on this point to clarify additional goals to the framework.

The Australian Government acknowledges the need for international cooperation since other jurisdictions in the world have introduced similar rules applying to the same set of digital operators. It does not shy away from recognising that the current legislative reform of the CCA has been informed by these developments. The legislation attempts to capture undertakings based on the services they cater to the market, i.e., digital platform services. Those would be left undefined, just as the DMA does under Article 2(2).

The Australian Government proposes to define them by listing the services captured by the definition, in a similar fashion to the DMA's core platform services (CPS). The list of services is the widest yet to have been proposed on the world stage, with thirteen digital platform services. This is not to say that other digital platform services may be excluded or included in the final list. A comparison of the captured services vis-à-vis the DMA's CPSs can be found below:

Australian proposed competition regime	**Digital Markets Act**
App distribution services (app marketplace services).	Not a CPS (but defined as a type of online intermediation service).
Digital content aggregation platform services.	Online intermediation services.
Social media services.	Online social networking services.
Search engine services (general and specialised).	Online search engines.
Electronic marketplace services.	Online intermediation services.
Video-sharing platform services.	Video-sharing platform services.
Only private messaging services (text, audio and visual).	Number-independent interpersonal communications services.
Operating systems.	Operating systems.
Web browsers.	Web browsers.
Virtual assistants.	Virtual assistants.
Cloud computing services.	Cloud computing services.
Online advertising services (including ad tech services).	Online advertising services.
Media referral services.	–

The designation of those digital platform services diverges from those captured under the DMCC and the Japanese Smartphone Act, in the sense that they are much wider in scope and targeted to particular markets where competition has not been properly protected from the outset. As opposed to those regulatory instruments, the Australian proposal already sets out the enforcement priorities that will apply in designation.

Building on the ACCC's extensive work enquiring about the structural competition problems of some services, issues in the supply of app marketplaces, ad tech services and social media services are a priority for designation. This aspect of the regulation brings two interesting ideas to the competition authority's enforcement. First, those services will lead the authority's enforcement in designating them and subjecting them to the regulation's obligations. The Australian Government is quite adamant in pointing out what its enforcement priorities are so as to make the regulation's application as transparent as possible. Second, the designations will not apply *en bloc* as they did for the DMA. Some services will be captured by the rules before others. For instance, the Minister would make the designation on all those services catered by digital platforms on a particular category of digital platform services, such as ad tech services. All problematic services falling within that sector will follow through to designation as a matter of priority.

The designation process would mimic, to a great extent, the DMCC than the DMA, since both quantitative thresholds and qualitative factors would be considered to perform it. Those two analyses would not follow alternative pathways to designation, but considerations belonging to one and the same analysis. In any case, the undertaking's surpassing of the quantitative Australian-related thresholds seems to be a pre-requisite to designation, since the Government points out that if those are not met, "it is unlikely to be designated". The few qualitative considerations the proposal highlights appear to be quantitative in nature, e.g., the undertaking's market position or the degree of market power held by the digital platform. In fact, one of the factors to be considered is that of the undertaking holding "a critical intermediary position between groups of users, such as businesses and consumers". The wording resembles the DMA's key requirement for designating a gatekeeper considering its position as an important gateway for business users to reach end users.

In practice, the ACCC will conduct an investigation to determine whether designation is warranted for one of the thirteen digital platform services. Following that determination, the ACCC would indicate what services and undertakings should remain captured by the new *ex-ante* regime. In trying to flexibilise the process, the proposal makes provision for the potential publication of a non-confidential version of the ACCC's findings to receive feedback from the stakeholders on the services captured. Since the proposal establishes that the designation process has similar requirements to those of the DMCC, the ACCC would, most likely, conduct its investigation and give notice of its decision to the relevant Minister within 9 months since it was first started. Similarly, the designation decision for the particular digital platform service would apply for a period of 5 years, with a possibility of renewing them.

Applicable obligations and the means to achieve compliance

The Australian proposal is quite enlightening in the sense that it seeks to introduce a hybrid model in terms of the obligations that it will impose on designated undertakings. Some of the provisions will apply to all of them (broad obligations), insofar as they would already be included under the CCA, whereas those same mandates will be tailored per each service via subordinate legislation to

be adopted by the Government (service-specific obligations). The service-specific obligations would go hand in hand with the broad obligations. Lack of compliance with the former will automatically entail the breach of the latter. Enforcement-wise, the Australian Government foresees to complement each designation decision with particular service-specific obligations to make the new regime as flexible, targeted and nuanced as possible.

The proposal only sets out a few examples of the broad obligations it would introduce to the CCA in the form of prohibitions relating to conduct involving, for example, self-preferencing or restrictions on interoperability limiting effective competition. Once they become applicable, the service-specific obligations would impact only one digital platform service to accommodate its idiosyncrasies into the broader obligation. To some extent, the service-specific obligations resemble the specification proceedings the DMA sets out under Article 8(2).

Stemming from the regime's broad objective to benefit Australian consumers and businesses, it provides great scope for leeway for the regulatory targets to justify conduct based on the negative consequences such transformations may bear with regard to consumers or businesses. According to this initial proposal, the ACCC would have the power to grant exemptions enabling prohibited conduct to take place to minimise these unintended consequences. The threshold for granting the exemption would be higher than the currently applicable 'net public benefit' test applicable under Section 90(7)(b) CCA, i.e., that the conduct results (or is likely to result) in a benefit to the public and that benefit outweighs the detriment to the public resulting from the conduct. Although the proposal remains moot in this regard, the Australian Government is considering whether to approximate that threshold of intervention with the DMCC's 'countervailing benefits' test, which requires a broader analysis of the conduct's proportionality with respect to the realisation of those benefits and the necessity that the conduct does not eliminate or prevent effective competition.

Compliance with the broad and service-specific obligations will require proactive monitoring and compliance on the ACCC's side. For that particular purpose, the Australian Government does not seem to have such a neat design of burden allocation across its enforcement of the new digital rules. Even though a few references are made to the DMA's institutional framework as an inspiration to, perhaps, incorporate the obligation to designated undertakings to report compliance with all obligations, the proposal focuses on designing a reactive regulatory framework. In other words, all instruments preliminarily set forth by the Australian Government point to conducting monitoring by imposing record-keeping obligations and extending the ACCC's information-gathering powers from the antitrust framework to the regulation. This stance towards compliance may stifle *de facto* transformations taking place as a consequence of the regulation in the short term since all substantial transformations in the market (i.e., those that the regulatory targets are unwilling to take) will be preceded by the ACCC's direct intervention in some shape or form.

If anything, the Australian proposal displays a wide acknowledgement of the regulatory environment it will apply to. Compliance is no stranger to this fact. The proposal, in fact, paves the way for the designated undertakings to benefit from cross-border compliance. The new regime would include a mechanism to allow platforms to provide their compliance implementations noting they adopted them in other regimes and committing to roll them out in Australia. For instance, any of the designated gatekeepers under the DMA could simply declare that it will roll out its technical implementation of the self-preferencing prohibition in Australia. The undertaking would only have to demonstrate how that solution adapts to the Australian market to benefit its consumers and businesses. By doing this, the new *ex-ante* regime is the first to recognise that international coordination, even in the presence of changing legal standards and thresholds of intervention, holds

as one of the most salient challenges that enforcers will confront.

Key takeaways

The new *ex-ante* regime proposed by the Australian Government following the ACCC's extensive work on digital regulation and dynamics is really promising in terms of the institutional framework it will set out in the immediate future. It adopts the form of asymmetric regulation but seizes every single opportunity to make the regulatory instrument as flexible and nuanced as possible, borrowing tenets from both the DMA and the DMCC.

In any case, there is still some scope for improvement. Since the primary legislation of the regime will be enshrined under the CCA, its objectives are explicitly abstract to avoid deviating too much from bringing benefits to Australian consumers and businesses in the fashion of ensuring an undistorted process of competition in the digital sector. The legislator should delve into defining other objectives as the inspiring principles for designing and introducing new legal standards and thresholds of intervention exclusively for a few targeted undertakings. We must know how to set apart regulation from the application of antitrust. If we fail to do so, then *ex*-ante regimes addressing digital market power simply turn to be speedy versions of antitrust sanctioning proceedings, which, in turn, undermine the antitrust enforcement system in general. This will be especially the case if the proposed rules simply introduce no procedural rules to enhance the ACCC's capacity to monitor and enforce the provisions.

In my own view, *ex-ante* regimes should work on the premise that regulatory targets should bear the brunt of complying with the provisions set out in the law. Their incentives to comply with those rules should also align with that same purpose. A word unspoken throughout the proposal is that of information asymmetries. Big Tech companies operate as ecosystem holders and players in the digital space, and the enforcer must dispose of sufficiently precise tools to disintegrate information asymmetries relating to their decision-making and functioning in those markets. Without a clear reversal of the burden of production against the undertaking, the regulatory regime will lack incentives to steer its targets towards compliance. In fact, even in those cases where regulations have reversed those burdens, enforcers find it difficult to impose sufficiently coercive instruments to address information asymmetries.

At the moment, the Australian regime adopts more of a reactive approach as opposed to a pro-active one, which may pose problems in terms of effective enforcement since the regime assumes that compliance in other jurisdictions already has moved legal standards across the board. That is the case for some mandates. However, for the broad obligations initially sketched out by the proposal, that does not seem to be the case. In this regard, the Australian *ex-ante* rules should strive to gauge the underlying structural problems the ACCC already enshrined on its interim reports, instead of relying on the international coordination mechanisms ensuring uniformity and coherence.

In parallel, the Australian proposal is particularly outstanding in acknowledging the complexity of adopting the fourth (fifth, if we count the German amendment of Section 19a GWB) regime of its kind to capture digital market power with competences to apply remedies and fines within its territorial borders. Golden standards applied across borders and jurisdictions will surely be one of the silver bullets to addressing structural distortions in the digital space. The proposal paves the

way for generating synergies in this respect by making compliance easier for undertakings so that compliance costs do not dramatically ramp up as a consequence of the regime's introduction. Undertakings will be more incentivised to introduce similar compliance solutions if they can simply transplant them from one jurisdiction to another (despite that some of them have already demonstrated a clear reluctance to do so). Conversely, the ACCC and the Australian Government will still have to stand their ground vis-à-vis other enforcers (European Commission, Japan Fair Trade Commission and Competition and Markets Authority, I'm looking at you) to carve out those technical implementations in line with the peculiarities of the Australian market.

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