14 February 2025

Director, Digital Competition Unit
Market Conduct and Digital Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Director,

Consultation response – A new digital competition regime

We are writing to respond to your "new digital competition regime" stakeholder consultation, based on our academic and industry experience researching the use of mechanisms such as interoperability mandates to improve competition in digital markets, and advising civil society groups in the EU and UK as digital competition reform legislation was debated and enacted in those jurisdictions.

Our response is based on comparative analysis, rather than directly addressing the specific Australian experience. We expect this to be complementary to other national analyses.

Recently, Prof. Brown has undertaken an independent assessment commissioned by Meta [5] relating to the European Commission's proposed Digital Markets Act (DMA) measures on connected devices interoperability for Apple's iPhone operating system, iOS.[1] Prof. Marsden and Brown together consulted for GLOCOM (International University of Japan) as part of a major study of app stores and interoperability across Asia, the US, UK and Europe in 2022 [4].

We hope you receive a broad range of consultation responses. As we are sure you are aware, many startups and Small/Medium-sized Enterprises (SMEs) have very limited resources to do this type of detailed work. In the EU, as Green Member of Parliament Alexandra Geese has publicly commented: "Part of the problem is the fact that many tech associations in Brussels, even those purporting to represent small- and medium-sized enterprises, are often bankrolled by Big Tech… For many lawmakers now, it has become unclear as to which SME organizations in Brussels they can trust as genuinely representing the voices of smaller players in the market."[2]

We have heard concerns from firms of various sizes fearing retaliation if they publicly criticise the very largest tech firms, which are likely to be covered by the proposed Australian regime. Web developer association Open Web Advocacy (OWA, founded in March 2021 by Australian brothers Alex and James Moore) has noted:

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[1] European Commission, *DMA.100203 – Consultation on the proposed measures for interoperability between Apple's iOS operating system and connected devices,* 18 Dec. 2024, at https://digital-markets-act.ec.europa.eu/dma100203-consultation-proposed-measures-interoperability-between-apples-ios-operating-system-and_en

[2] S. Stolton, Big Tech astroturfing — Who speaks for small EU companies? *EU Influence newsletter*, 26 Nov. 2021, at https://www.politico.eu/newsletter/politico-eu-influence/big-tech-astroturfing-who-speaks-for-small-eu-companies-eyes-on-washington-2/

> *A number of our contributors wish to remain private as they are concerned that publicly confronting gatekeepers will cause issues with their jobs or businesses.*[3]

Third-party app store provider Epic Games has similarly pointed out in a blog post: “Developer quotes are anonymous due to fear of retaliation from Apple”.[4]

Interoperability as a tool for Internet regulation

As well as their pro-competitive impact, the concluding chapter of our 2013 MIT Press book *Regulating Code* analysed the uses of digital services interoperability requirements for a range of related public policy objectives, such as network neutrality and privacy.

We have been working since then analysing them alongside network neutrality rules (a specific form of interoperability requirement, for access Internet Service Providers), and since the late 2010s their inclusion in digital market legislation such as the EU’s DMA and the UK’s DMCCA.

In particular, we would like to highlight these five highly relevant reports we have variously authored:

1. IB, *Interoperability as a tool for competition regulation*, OpenForum Academy (2020)
2. IB, *The technical components of interoperability as a tool for competition regulation*, OpenForum Academy (2020)
3. IB, *Private messaging interoperability in the EU Digital Markets Act*, OpenForum Academy (2022)
4. CM/IB, *App stores, antitrust and their links to net neutrality: A review of the European policy and academic debate leading to the EU Digital Markets Act*, Internet Policy Review vol. 12 issue 1 (2023)
5. IB, *Security, privacy and the European Commission’s proposed iOS interoperability requirements for connected devices under the Digital Markets Act*, Fundação Getulio Vargas Law School discussion paper (2025)

Our responses to your specific consultation questions follow below, but we would be happy to provide any further information should it be helpful.

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[3] OWA, *Contributors & Supporters*, u.d., at https://open-web-advocacy.org/contributors/

[4] Epic Games, *App Store Economy is Far From Open, Despite Efforts by Epic, Developers, and Regulators in the EU*, 23 Jan. 2025, at https://www.epicgames.com/site/en-US/news/app-store-economy-is-far-from-open-despite-efforts-by-epic-developers-and-regulators-in-the-eu

With best wishes,

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Specific stakeholder question responses

2. Is the proposed scope of digital platform services targeted appropriately? Are there any digital platform services that should be added or removed?

The proposed list is very similar to the DMA's. It is noticeable that the European Commission is yet to designate any cloud computing or virtual assistant services (despite the popularity of Amazon's Alexa, as well as Android and iOS's default voice assistants).[5] More transparency about the reasons for this would be beneficial for all stakeholders.

One intense area of debate since the DMA was agreed is whether one or more types of AI service should be added as a new type of Core Platform Service (CPS). Lawyers have noted that AI will often already be covered as part of the already-defined CPSes, where provisions on non-discrimination, transparency, access, and fairness could have a significant effect.[6] The EU has also recently passed other, highly relevant pieces of legislation, including the *Digital Services Act*, *Data Act*, *Data Governance Act*, and *AI Act*. And the EU's comprehensive data protection rules obviously apply wherever personal data is processed, with enforcement action already taken by national authorities against OpenAI's ChatGPT[7] and investigations launched into DeepSeek R1.[8]

While there have been a number of national competition authority studies of competition and AI, there does not yet seem to be a consensus on whether one or more new types of AI-related CPS should be added to the DMA. The arrival of the supposedly much lower-cost DeepSeek R1

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[5] European Commission, *Gatekeepers*, last updated 14 Oct. 2024, at https://digital-markets-act-cases.ec.europa.eu/gatekeepers

[6] P. Hacker, J. Cordes and J. Rochon, *Regulating Gatekeeper AI and Data: Transparency, Access, and Fairness under the DMA, the GDPR, and Beyond* (December 9, 2022). Available at SSRN: http://dx.doi.org/10.2139/ssrn.4316944

[7] C. Coyer, OpenAI Hit With First AI GDPR Fine by Italian Privacy Body, *Bloomberg Law*, 20 Dec. 2024, at https://news.bloomberglaw.com/privacy-and-data-security/openai-hit-with-first-ever-ai-gdpr-fine-by-italian-privacy-body

[8] Euroconsumers, *The full story of DeepSeek: how Euroconsumers is driving action for consumers*, 31 Jan. 2025, at https://www.euroconsumers.org/the-full-story-of-deepseek-how-euroconsumers-is-driving-action-for-consumers/

has raised further important questions regarding scalability and the type of entry barriers to so-called generative AI.[9]

However, enforcement of the existing DMA rules, including the designation of cloud computing services (essential for access to the very high "compute" resources and data storage needed for training and "inferencing" with so-called Large Language Models) and virtual assistants (which are likely to play a key role as interfaces to so-called "agentic" AI), would seem to be an important first step.

3. Do you agree with the proposal that app marketplaces, ad tech services and social media services should be prioritised as the first services to be investigated for designation under the framework?

App marketplaces are clearly central to mobile operating system control and monetisation of the entire platform ecosystems which surround iOS and Android smartphones. Ad-tech services are the basis for a significant part of Google, Meta and Amazon's revenues, with a 2023 analysis finding the three firms "account for over 70% of global public companies' digital ad revenues".[10] All three are designated under the DMA. Given the apparent consumer preference for ad-supported "free" services, this makes them central to the whole app and online service economy.[11] Social media services (alongside the closely-related video-sharing platforms) have perhaps the biggest societal impact of all of the digital services included in the consultation (section 2.2).

These are good reasons for prioritising these three services for investigation. As key underpinning technologies for the digital economy, operating systems, search engines, web engines and browsers could be next.

In our reference [4] above, we review the various economic and non-economic factors in the European policy debate which lead to a DMA obligation (Article 6(4)) for designated operating systems to enable third-party app stores. We also explain how these rationales link to longer-running policy debates over network neutrality, a feature of comparative Internet access service regulation for over twenty-five years.

5. Would the proposed quantitative thresholds and qualitative factors appropriately target entities that are significant to Australian consumers, businesses and the economy? What other quantitative thresholds or qualitative factors should be considered to ensure they are adaptable to a variety of circumstances? How could any risks of over and under capture be mitigated?

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[9] K. Ng, B. Drenon, T. Gerken and M. Cieslak, *DeepSeek: The Chinese AI app that has the world talking*, BBC News, 4 Feb. 2025, at https://www.bbc.com/news/articles/c5yv5976z9po

[10] M. Otter, Global Digital Advertising Revenues – A Look at the Big Three: Alphabet (GOOGL), Meta Platforms (META), Amazon.com (AMZN), *Visible Alpha* (2024), at https://visiblealpha.com/blog/global-digital-advertising-revenues-a-look-at-the-big-three-alphabet-googl-meta-platforms-meta-amazon-com-amzn/

[11] K. Shampan'er and D. Ariely, Zero as a special price: The true value of free products, *Marketing Science*, 26 (6) pp.731-902, 1 Nov. 2007, at https://web.mit.edu/ariely/www/MIT/Papers/zero.pdf

We would highlight three relevant experiences of “under capture” in the operation of the DMA so far.

Due to the precise wording of the DMA, the European Commission (EC) has so far struggled to designate any cloud computing services based on the default quantitative tests, despite the oligopolistic structure of that market and the existing designations of the three largest providers (Amazon, Microsoft and Google), which one analysis found “account for more than 60% of the ever-growing [global] cloud market, with the rest of the competition stuck in the low single digits.”[12] It seems that the alternative qualitative designation mechanism will need to be used – but so far the EC has lacked the enforcement resources to do so.

Secondly, in 2024, the EC decided to accept Apple’s argument that iMessage should not be designated as a Core Platform Service, as it “is not an important gateway for business users to reach end users” and appears to have “a much lower number of users and in particular a significantly lower intensity of use as compared to other NIICS” (Number-Independent Interpersonal Communications Services).[13]

However, it is arguable this decision took an overly-narrow view of the DMA as a business-to-consumer instrument, when in fact a significant factor in Apple’s market power comes (narrowly) from the same-side network effects generated by the default installation of iMessage across well over a billion iPhones and iPads,[14] and (more broadly) how Apple uses this to strengthen its own cross-service “ecosystem”. This “ecosystem” aspect received limited attention during the DMA legislative process, but more recent academic research has emphasised its importance.[15]

Deposition evidence in the *Epic v. Apple* case in the Northern District of California (4:20-cv-05640) claimed Apple founder and CEO Steve Jobs wanted to “tie all of our products together, so [Apple] further lock[s] customers into [its] ecosystem” (§53). Similarly, Craig Federighi, Apple’s Senior Vice President of Software Engineering and the executive in charge of iOS, apparently feared that “iMessage on Android would simply serve to remove [an] obstacle to iPhone families giving their kids Android phones” (§58(c)). This was recognised in the inclusion in the DMA by the European Parliament (against the wishes of the European Commission) of the Article 7 interoperability requirement for NIICS.

Meta’s NIICS WhatsApp and Facebook Messenger *have* been designated, and are close to implementing the interoperability functionality required.[16] The company has undertaken

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[12] F. Richter, Amazon Maintains Cloud Lead as Microsoft Edges Closer, *Statista*, 1 Nov. 2024, at https://www.statista.com/chart/18819/worldwide-market-share-of-leading-cloud-infrastructure-service-providers/

[13] COMMISSION IMPLEMENTING DECISION of 12.2.2024 closing the market investigation opened by Decision C(2023)6077, pursuant to Article 17 of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector, *C(2024) 785 final*.

[14] S. Singh, iPhone Users & Sales Statistics 2025 (Worldwide), *demandsage*, 1 Jan. 2025, at https://www.demandsage.com/iphone-user-statistics/

[15] See for example University College London professor and former head of the Greek competition authority I. Lianos, Re-orienting competition law, *Journal of Antitrust Enforcement*, 10 (1) pp. 1-31, 28 Feb. 2022, at 10.1093/jaenfo/jnac003

[16] Meta, An Update on How We’re Building Safe and Secure Third-Party Chats for Users in Europe, 6 Sep. 2024, at https://about.fb.com/news/2024/09/an-update-on-how-were-building-safe-and-secure-third-party-chats-for-users-in-europe/

significant R&D to implement a “privacy-centric approach to building interoperable messaging services”.[17]

Finally, in 2024 the EC accepted X Corporation’s similar argument that its online social networking service (formerly known as Twitter) should not be designated, as it was “not an important gateway for business users to reach end users.”[18] The full decision has not yet been made public, but it seems curious that a service so large it has proven influential in many countries’ national politics,[19] and resilient to significant decreases in quality[20] following massive staff layoffs when it was acquired by Elon Musk,[21] should not be subject to any of the DMA’s obligations.

In both the iMessage and ex-Twitter cases, quantitative measures (of business users) understated the importance of these services to the market power of their owners, and in X’s case its impact on entire societies.

14. Are there particular obligations or design features in similar regimes in international jurisdictions the government should consider including or not including in a regime in Australia?

Table 1 of the consultation document gives interoperability examples only in relation to mobile operating system providers. However, they apply almost identically to desktop operating systems (Microsoft Windows has been designated under the DMA), even if those have (at least since the *USA v. Microsoft Corporation* antitrust case[22] in the late 1990s/early 2000s) generally been much more open to competitors.

For both operating systems and virtual assistants, the DMA applies a broad interoperability requirement (Article 6(7)). However, while Article 50 of the DMA allows the EC to mandate the production of technical standards by the European standardisation bodies (e.g. CEN/CENELEC and ETSI), these are of limited use in such a fast-evolving technical environment. The “specification” process as it has been implemented so far by the European Commission may be a better approach[23] (while perhaps providing greater opportunity for civil society input).

The DMA also has a very specific interoperability obligation (Article 7) for NIICS. The European Parliament also applied it to social networking services, but the EU Member States would not accept this in the final legislation, mainly due to safety concerns. However, the rise of “open”

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[17] Meta, Making messaging interoperability with third parties safe for users in Europe, *Engineering at Meta*, 6 Mar. 2024, at https://engineering.fb.com/2024/03/06/security/whatsapp-messenger-messaging-interoperability-eu/

[18] *European Commission Daily News*, 16 Oct. 2024, at https://ec.europa.eu/commission/presscorner/detail/en/mex_24_5324

[19] C. Meyes-Osterman, Elon Musk uses X to roast European leaders, promote the far right, *USA Today*, 8 Jan. 2025, at https://eu.usatoday.com/story/news/world/2025/01/08/elon-musk-european-politics/77503561007/

[20] D. Hickey, D. M. T. Fessler, K. Lerman and K. Burghardt, X under Musk’s leadership: Substantial hate and no reduction in inauthentic activity, *PLOS One, 20* (2): e0313293, 12 Feb. 2025, at https://doi.org/10.1371/journal.pone.0313293

[21] D. Saull, Here’s What Happened After Elon Musk Cut 80% Of X’s Employees—As He Eyes Reshaping Federal Workforce, *Forbes*, 6 Feb. 2025, at https://www.forbes.com/sites/dereksaul/2025/02/05/heres-what-happened-after-elon-musk-cut-80-of-xs-employees-as-he-eyes-reshaping-federal-workforce/

[22] 253 F.3d 34. See related documents at https://www.justice.gov/atr/case/us-v-microsoft-corporation-browser-and-middleware

[23] Z. Meyers, Balancing security and contestability in the DMA: the case of app stores, *European Competition Journal*, Apr. 2024, at https://doi.org/10.1080/17441056.2024.2340869

social networking services such as Mastodon and Bluesky, as well as the launch of Meta's partly-open Threads, has demonstrated safety issues can be dealt with in interoperable social networks. The EC recently commissioned a study of the impact of Article 7, and whether it should be extended to social networking services, as is foreseen in the three-yearly review of the DMA required by its Article 53.

In the case of these type of services, with greater technical maturity, it may be appropriate for regulators to specify technical standards which regulated firms must implement and comply with – for example, Signal's *de facto* standard for encrypted messaging (also implemented by WhatsApp and a range of other services), or the ActivityPub or ATProto standards underpinning Mastodon/the "fediverse" and Bluesky. It would seem inefficient – and risk regional fragmentation – for the EC or any other regulator to ask a local standardisation body to reimplement an existing technical standard.

The policy background to this ongoing debate is dealt with in detail in our references [1], [2] and [3] above.

15. What are the benefits and risks of various international approaches to exemptions (such as the EU's Digital Markets Act and the UK's Digital Markets, Competition and Consumers Act)?

Two related sets of "exemptions" to obligations in the DMA have proven important in practice.

The first protects the security of operating systems and messaging/conferencing services (NIICS). Articles 6(4) and 6(7) both explicitly allow a gatekeeper to take "strictly necessary and proportionate" measures to protect the "integrity of the hardware or operating system", while recitals further stress the importance of both gatekeeper and access seeker complying with relevant EU law, particularly relating to data protection and cybersecurity. Similarly, Article 7 contains specific provisions relating to end-to-end encryption of messages between interoperable systems (see our reference [3] above). There, the gatekeeper may take measures to ensure third-party providers "do not endanger the integrity, security and privacy of its services". These provisions are vital to protecting the end-users of these systems.

The second DMA exemption limits gatekeeper operating system and virtual assistant interoperability obligations to third-parties to be non-discriminatory compared to its own services. This Article 6(7) obligation extends to "the same hardware and software features accessed or controlled via the operating system or virtual assistant… as are available to services or hardware provided by the gatekeeper."

This has proven an important distinction as the European Commission has specified these obligations for Apple's iOS in much greater detail, in response to complaints from Apple that iOS interoperability would significantly damage the security and privacy of its iPhones. This case is discussed in much greater detail in our reference [5] above.

22. Are increased monetary penalties and/or new specific non-monetary penalties required in the new digital competition regime? If so, why?

The EU's ever-escalating scale of potential fines in digital legislation, from the General Data Protection Regulation (GDPR) through to the Digital Services Act, DMA and Artificial Intelligence Act, has not so far been the bottleneck for enforcement against the trillion-dollar companies that are most challenging for these regimes. The ability of certain EU Member States to offer lax enforcement alongside low corporate tax rates to attract foreign direct investment was almost-fatal for the GDPR,[24] although cross-border supervisory cooperation via the European Data Protection Board, and an apparent change in approach by the Irish government, are belatedly improving this situation – alongside further legislative harmonisation of enforcement.[25]

The EU co-legislators learned from this lesson and created somewhat more centralised enforcement by the European Commission in later digital laws, while leaving space for national regulators and private parties (vital to avoid regulatory overload and capture). While this EU-specific history may be of lesser importance for Australian Commonwealth legislation, the evidence of the enthusiasm of regulated firms for circumventing such rules is not, and the DMA's explicit anti-circumvention rule (Article 13) may be more important in future disputes.

The bright line nature of the DMA and its obligations helps enforcement, without exceptions for "economic efficiency" or similar which could be dragged through the EU courts for a decade like traditional antitrust cases, battling between teams of expensive lawyers and economists. But the ultimate test of this approach will be how far gatekeepers comply in the medium term.

So far, the EC has displayed impressive tenacity in using the enforcement mechanisms available to it under the DMA, such as the specification proceedings for iOS and connected devices. It has already persuaded Apple to change some of the most objectionable parts of its original DMA compliance proposals, such as blocking direct downloads of apps to iPhones (rather than via third-party app stores).

However, some still remain, such as its "Core Technology Fee" of 50 cents per-user per-year beyond the first million annual installations (with exceptions for non-profits, educational institutions and non-commercial developers, and a three-year phase-in period when developers reach $10m in revenue).[26] Web developer association OWA has commented:

> *Apple is attempting to charge fees on interactions between customers and businesses of which they have no part and provide no service beyond that which comes with their operating system by default. These are apps not installed via Apple's app store on*

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[24] V. Hordern, *Ireland's approach to enforcing the GDPR*, TaylorWessing, 13 Feb. 2023, at https://www.taylorwessing.com/en/global-data-hub/2023/february---gdpr-enforcement/irelands-approach-to-enforcing-the-gdpr

[25] COM (2023) 348: *Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL laying down additional procedural rules relating to the enforcement of Regulation (EU) 2016/679*, at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52023PC0348

[26] Apple, *Understanding the Core Technology Fee for iOS and iPadOS apps in the European Union*, u.d., at https://developer.apple.com/support/core-technology-fee/ and European Commission, *CASE DMA.100206 – Apple new business terms*, 24 June 2024, at https://ec.europa.eu/competition/digital_markets_act/cases/202431/DMA_100206_50.pdf

> *devices that Apple has already sold at incredibly high margins to consumers. This type of behavior is clearly against both the intent and letter of the DMA.*[27]

The much-larger US firm Epic Games has similarly complained:

> *Even in places like the European Union where policy makers have passed laws, Apple and Google's non-compliance continues to undermine competition and developer and consumer choice. So far none of the 100 highest grossing mobile game developers are willing to distribute their games on the Epic Games Store because of the Core Technology Fee and Apple and Google's onerous restrictions and scare screens.*[28]

Epic has offered to cover the cost of developers' CTF payments while the European Commission's investigation into Apple's alleged non-compliance continues, while noting "[t]his is not financially viable for every third party app store or for Epic long term".[29] A final EC decision is due by 25 March 2025.[30]

26. Would it be appropriate for government to recover the costs of administering the regime from industry?

The DSA, originally part of the same legislative proposal as the DMA, includes this measure (in Article 43), but the DMA does not – more through lack of time than any particular objection to it from the European Parliament or Council. A very recent proposal from France, Germany and the Netherlands reportedly proposes to add it to the DMA.[31] This is especially important given the lack of resources available for enforcement by the European Commission.

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[27] OWA, *Apple DMA Review v.1.0*, at https://open-web-advocacy.org/apple-dma-review/#core-technology-fee-should-be-removed

[28] Epic Games, footnote 4.

[29] *Ibid*.

[30] *Commission sends preliminary findings to Apple and opens additional non-compliance investigation against Apple under the Digital Markets Act*, 24 June 2024, at https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3433

[31] L. Bertuzzi, Tech companies should see tighter AI competition rules, EU countries say, *MLex*, 10 Feb. 2025, at https://www.mlex.com/mlex/articles/2295724/tech-companies-should-see-tighter-ai-competition-rules-eu-countries-say