



PLAYING FAIR IN THE DIGITAL PLATFORMS PLAYGROUND

ANGEL FU calls for new “rules of the road” for the digital highway and puts the case for regulatory neutrality and international cooperation

Throughout modern history, technology has been a consistent catalyst for positive change, bringing great advancements in productivity, yet also great uncertainty in terms of how we integrate the changes that technological advances inevitably bring into our existing legal, social and economic frameworks or how we need to modify those frameworks to deal with new realities.

While Henry Ford did not invent the automobile, he did invent the first automobile able to be mass manufactured, the Model T in 1908. That great invention led to great productivity increases in the United States. However, for the first decade of the 20th century in the United States, no road rules existed as to stop signs, traffic signals, traffic lanes or even speed limits for automobiles. The transition from horse and buggy to motor vehicles led to transformational increases in productivity, but also was a time of significant social transition. Lawyer Xenophon P. Huddy, whose book “The Law of Automobiles” was first published in 1906, was the first to raise legal concepts such as the rights of other road users and pedestrians. This led to the “rules of the road” and formed the basis of much road regulation in the United States and elsewhere

that successfully harnessed the benefits of the automobile.

We have come a long way from the development of the motor vehicle and the inception of the “rules of the road”, but similarly, the opportunities of new technology, whether they are automated vehicles or digital platforms, provide new policy challenges that need to be addressed, potentially with a new regulatory framework in a cross-sectoral, multi-jurisdictional world.

The challenge for regulators is particularly acute when the technology catalyst sparks change in an area as sensitive as the communications sector. With the rise of digital platforms that have been described as “custodians of the internet”, consumers have access to more information and entertainment than they could ever hope to consume and individuals have an unprecedented ability to add their own voice to this digital ecosystem.¹

These platforms and technologies have driven innovation and productivity, and facilitated exponential growth in the breadth and depth of material available to consumers in the digital ether. Platforms such as YouTube, Facebook and WeChat now offer more than just a means to connect with others around the world, meaning the lines between “traditional” media businesses

and these platforms are becoming increasingly blurred.

The challenge therefore is how we rethink and adapt the “rules of the road”, which have been in place for traditional media businesses, to regulation of the “custodians of the internet” in a balanced way that achieves regulatory outcomes (a key one being consumer empowerment) without stifling consumer choice or adversely impacting on growth and development in the communications sector. This is particularly the case in the areas of news and journalistic content, as well as in content creation.

AUSTRALIA’S DIGITAL PLATFORMS INQUIRY

Globally, there have been many interesting debates and reviews conducted by various regulatory agencies around “big tech” and digital platforms, such as those dealing with data privacy and targeted advertising.

In December 2017, the Australian government directed the Australian Competition and Consumer Commission (ACCC) to conduct an inquiry into the impact of digital platforms – that is, online search engines, social media platforms and digital content aggregators – on competition in the media and advertising services markets. The final report of the Digital Platforms Inquiry was released in July 2019 and contained 23 recommendations.²

This essay focuses on a key recommendation of the ACCC’s Digital Platforms Inquiry final report: that Australia should implement a harmonised media regulatory framework which is “platform-neutral” (Recommendation 6).³ It also considers contending viewpoints in an international context.

The consumer benefits of digital platforms and the corresponding challenges are certainly not exclusive to Australia. Digital platforms exist in a space which, as suggested by the name, does not belong to a particular geographic region, but rather in a common digital dimension that most global citizens access. As such, there is the need for international cooperation to achieve this harmonised, balanced framework which not only focuses on achieving regulatory outcomes, but also adequately addresses the appropriate development of “rules of the road” for the digital highway that recognise the importance of achieving key policy and social objectives.

In view of various contending perspectives (including from the digital platforms themselves) and based on other international examples, there is a case for transnational regulatory cooperation to seek to achieve a balanced way forward for the regulation of digital platforms.

GLOBAL INITIATIVES

Over a similar period of time, there have been a number of significant reports published by



An eye to the future: IIC Future Leaders Competition winner, Angel Fu, at the IIC’s 50th annual conference in London

overseas governments that considered the same issues as the ACCC’s inquiry. It is notable that the findings reached and the concerns expressed in these reports are broadly consistent with the ACCC’s conclusions. Some examples of these international reviews which clearly demonstrate an alignment with the ACCC’s objectives and concerns include:

- The report of the Cairncross Review which was published by the UK Department for Digital, Culture, Media and Sport in February 2019.⁴ This review reached a number of important conclusions and recommendations, including that measures are required to tackle the uneven balance of power between news publishers and the online platforms

- The House of Lords Select Committee on Communications’ report “Regulating in a digital world” which was published in March 2019.⁵ This report recommended that a comprehensive and holistic framework for regulation that takes into account the role of the digital world in people’s lives, be developed

- The US Federal Trade Commission task force launched in February 2019 to monitor technology markets.⁶ The focus of the Technology Task Force is to examine industry practices in technology markets, conduct law enforcement investigations and review completed mergers in technology markets

- Similarly, the report of the UK Digital Competition Expert Panel led by Professor Jason Furman, “Unlocking digital competition” published in March 2019, made a number of significant recommendations.⁷ These included the creation of a digital markets unit (either as an independent body or as a function of the Competition and Markets Authority or the Office of Communications) tasked with developing a code of competitive conduct to apply to digital companies with strategic market status.

Notwithstanding these international reports, ➡

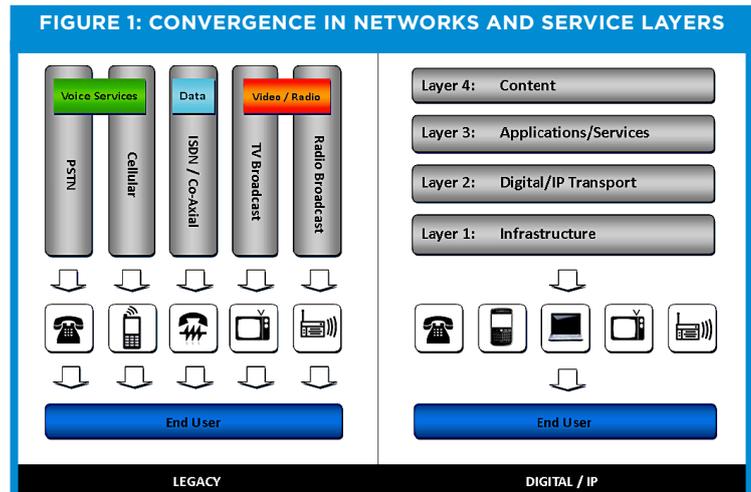
← from an economic perspective, there is little debate that digital platforms offer unparalleled efficiencies in accessing cross-border markets and that they have become essential for businesses and individuals operating in such markets. While the unique gateway position of digital platforms enables them and their users to reach millions of consumers, it also opens up the possibility for harmful trading and data collection practices. The steps taken by governments and regulators to explore what should be done to create an effective business environment have already shown that, while something definitely should be done, the exact path that should be taken is not necessarily as clear.

PROPOSED PLATFORM-NEUTRAL FRAMEWORK

The communications and media landscape is in and has been going through a period of significant transformation, sparking a need for regulators and governments to rethink the way the industry should be regulated. In the Australian context, there have been 20 or so major reviews on this topic over the past decade. There is now broad recognition that the previous distinctions between “traditional” media businesses and digital platforms are now largely redundant and that the existing communications framework does not adequately deal with the changed communications landscape, particularly because the ability for one “publisher” to deliver the same content to different devices over different networks has led to inconsistent regulatory treatment.

Certain key policy objectives that concern the Australian communications landscape were identified through a broad review by the Department of Communications and the Arts in 2016, which drew on work by the Australian Communications and Media Authority (ACMA),⁸ and are acknowledged and reflected in the recommendations of the ACCC’s report. These objectives include, amongst others:

- **Access to services/participation in society:** citizens should have the right to “digital literacy”
- **Competition:** markets should be open and competitive so as to encourage investment, innovation and diversity of choice. Regulatory settings should embody competitive neutrality across platforms and among market participants to minimise potential market distortions
- **Diversity:** there should be a diversity of voice providing fair, accurate and transparent information in the public sphere
- **Australian identity:** the telling of Australian stories through Australian media and communications services and
- **Values and safeguards:** ensuring content and services reflect community standards and users have access to avenues of complaint and redress. In particular the need to protect children from



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harmful material.

As the distinction between the traditionally well-defined industries of telecommunications, broadcasting and online is now largely redundant, the business models and nature of the “traditional” firms operating in the broader communications sector will likely seek to innovate rapidly in response. It follows that the convergence of these previously separate paths (as shown in figure 1, drawn from the ACMA’s “Broken concepts” paper) calls for a harmonised, consistent approach to regulation. The ACCC’s recommendation that there be a harmonised media regulatory framework which is “platform neutral” looks to be a step in the direction of achieving identified key policy objectives.

Existing regulatory imbalance

As noted in the ACCC’s Report, “media regulatory disparity can distort competition by providing digital platforms with a competitive advantage because they operate under fewer regulatory restraints and have lower regulatory compliance costs than other media businesses when performing comparable functions”.⁹ For example, one stakeholder submitted to the ACCC that commercial free-to-air broadcasters are required to screen a collective annual total of at least 1170 hours of programming for children aged up to 14 to meet content quota obligations imposed by the government, despite reporting significant declining audience figures in recent years and that children’s programming quotas on commercial television broadcasters in other jurisdictions, such as the United Kingdom, New Zealand and Canada, have been either wholly abolished or significantly reduced.¹⁰ Moreover, commercial free-to-air broadcasters are also required to comply with minimum Australian content quotas, meaning that Australian programming must comprise at least 55 per cent of the content broadcast on their primary channels between 6am and midnight.¹¹

Another stakeholder highlighted to the ACCC the advantage that digital platforms benefit from by being able to “freely...meet new audience demands and direct almost all resources towards the creation of further revenue” in the broadcasting sphere, in contrast to radio that is “forced” to divert “significant portions of its resources into compliance with the regulatory framework”.¹² A report commissioned by the ACMA in 2014 assessed the financial consequences imposed on commercial television and radio broadcasters by industry codes of practice, and found that commercial TV broadcasters perceived complaints handling to

incur the highest compliance cost, followed by captioning and scheduling-related requirements (which encompasses the classification and placement of commercials).¹³

In contrast, digital platforms are unlikely to have the same degree of compliance costs when supplying their audiovisual content online. Digital platforms such as Facebook and YouTube have far greater flexibility in terms of the frequency and number of advertisements shown in their video content, compared to commercial TV broadcasters which are limited to 13-16 minutes of advertising content per hour.¹⁴ Additionally, the Broadcasting Services (Australian Content in Advertising) Standard 2018 requires that at least 80 per cent of advertising time broadcast annually between 6am and midnight be Australian-produced advertisements.

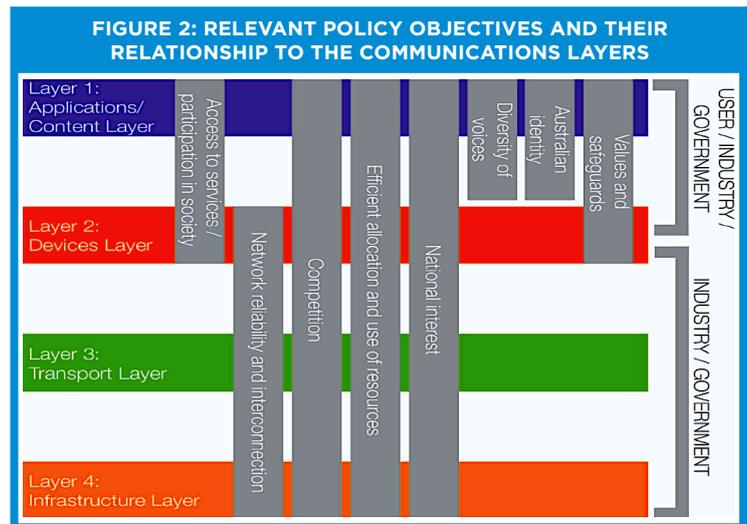
Moreover, the same digital platforms which used to largely offer user-uploaded content, are increasingly competing for content rights directly against the “traditional” media businesses, which exacerbates the effects of the regulatory imbalances. An example of this is when in June 2018, Facebook won exclusive broadcast rights for the Premier League matches in a deal that was reportedly worth approximately GBP200 million, winning the broadcast rights over beIN Sports and Fox Sports Asia.¹⁵

These shifts in the competitive dynamics of the communications landscape necessitate a careful consideration of the question as to whether the current sector-specific, siloed approach is still necessary or appropriate.

The ACCC found that the enduring policy objectives of the Australian media and communications regulations are of “continuing public and commercial significance in Australia and...persist independently of the technology, service or business model used to deliver content and services”.¹⁶ It is therefore important that the proposed platform-neutral framework not only addresses the shortcomings of and gaps in the existing regulatory framework, but also actively seeks to ensure that the key policy objectives are achieved.

Political hurdles

The ACCC notes that the “current, sector-specific approach to media regulation in Australia has not adapted well to digitalisation and media convergence, including not readily capturing new media providers such as digital platforms. This reduces the overall effectiveness of the current media regulatory framework”.¹⁷ While the ACCC acknowledges that the current communications landscape can be re-classified into the four broad “horizontal” layers identified by the ACMA,¹⁸ it does not yet propose a specific course of action to formally implement this classification, noting the



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significance of such reform.¹⁹

In contrast, ACMA has proposed a broader and firmer vision for communications regulation reform, suggesting that the four layers be enshrined in a new Communications Act, replacing the existing vertical silos between telecommunications, spectrum and broadcasting regulations. As shown in figure 2 above (drawn from the ACMA’s submission on the issues paper for the ACCC Digital Platforms Inquiry), these four horizontal layers operate interconnectedly, with each layer in the stack providing services to the next in the chain until services are ultimately provided to the end user, and provide a robust framework to achieve the key policy objectives.

While this is a possible way forward, the fate of some past reforms in the communications area may suggest the reasons why the government has been slow to act. The media ownership law reforms that were passed by the current government in September 2017 are an example of how politicised this industry can be, having been first announced by the government some 18 months prior. Therefore, a potential challenge will be to navigate any proposed reforms through this highly politicised arena and achieve the key policy objectives, such as for “diversity of voices” and “competition”.

Nevertheless, the ACCC’s recommendation that a process, as deemed appropriate by the government, should commence to design a platform-neutral media regulatory framework based on relevant findings from the many recent government reviews, marks a welcome shift from its position in the preliminary report, which called for a further separate, independent review.

Practical challenges

Recommendation 6 aims to address the uneven playing field by focusing the process of designing the new platform-neutral framework on five matters as set out in the ACCC’s Report, being:

- **Underlying principles:** clear platform-neutral guiding principles that are applicable across media formats and platforms, and adaptable to new services, platforms and technologies
- **Extent of regulation:** determination of the appropriate extent of regulation and determining appropriate roles for self-regulation and co-regulation
- **Content rules:** a nationally-uniform classification scheme to classify or restrict access to content consistently across different delivery formats
- **Advertising restrictions:** a consistent system of advertising

← restrictions across all delivery platforms, including online and offline channels

● **Enforcement:** appropriate monitoring and enforcement mechanisms accompanied by meaningful sanctions.²⁰

While recognition of the regulatory imbalances (in particular in relation to content quotas, classification rules and advertising restrictions) is a key first step to levelling the playing field, the nature and operation of digital platforms create practical challenges as to how key policy objectives can be practically achieved.

● Firstly, consumers may be harmed by being exposed to content that has not been subjected to rigorous quality control, content filters or adequate oversight. This was the case when Facebook and other platforms were used to live-stream the 17-minute terrorist attack on two mosques in Christchurch in March 2019, which may be viewed as an example of a service failing to meet the key policy objective of having safeguards to protect children from harmful content. At the time, the digital platforms that were used to live-stream the video content fell outside the regulatory remit and thus could not be investigated or sanctioned.

In response to this event, the Australian government passed legislation in April 2019 which introduced new criminal sanctions against providers of hosting services or content services (including social media services) and internet service providers, and required the expeditious removal of “abhorrent violent material” reasonably capable of being accessed within Australia.²¹ However, there may be some practical challenges for platforms with vast amounts of user-uploaded content (such as Facebook and YouTube) to maintain adequate regulatory oversight and timely, rigorous quality checks and content filters of user-uploaded content, so as to not risk falling foul of any new legislation.

● Secondly, as a consequence of the algorithmic mechanisms that are intrinsic to the effective operation of digital platforms, information (such as journalistic material) and advertisements are “personalised” for each user, making it potentially challenging for both regulators and digital platforms to get a clear indication of the quality and quantity of such materials being presented to individual platform users. Again, the concern is particularly acute when children are at risk of being exposed to targeted online advertising in relation to inappropriate materials, including alcohol marketing. As submitted by the Foundation for Alcohol Research and Education to the ACCC, “[d]espite digital platforms having age requirements, many children under the age of 13 regularly use Facebook, Snapchat and Instagram”, which can increase children’s exposure to alcohol marketing and their likelihood to start drinking earlier.²²

● Another challenge stemming from the algorithmic nature of digital platforms is how digital platforms can ensure a diversity of voices. As “custodians of the internet”, digital platforms have a great responsibility to ensure that information sources are fair, accurate and transparent, particularly when these custodians are the largest source(s) of news referrals.²³ Encouragingly, Facebook announced in April 2019 that it will be expanding its third-party fact-checking practices into Australia.²⁴ When news stories are rated as false, they will be moved lower down a user’s Facebook News Feed. Hopefully a more formal approach towards setting rigorous standards in relation to the delivery of journalistic content is established in parallel, to consistently apply to all digital platforms that deliver this content. A possible way to tackle this challenge may be for the digital platforms to work closely in consultation with governments and regulators to design regulations within the proposed platform-neutral framework that are fit for purpose in ensuring that algorithmic mechanisms involved in curating news and information for digital platform users are transparent and fair.

● A final practical challenge will likely be the inability of these “custodians of the internet” to adhere to Australian content quotas, given the quantity of user-uploaded content that forms

the fabric of their ecosystems. It is not likely to be practical for platforms such as Facebook, YouTube or WeChat to require that their users must create

a certain type of content as a condition of use. It would therefore fall upon such platforms to create “original” content to meet any Australian content quotas. An alternative would be to relax the existing content quotas imposed by legislation, albeit potentially at the cost of diminishing the Australian voice in our communications landscape.



Governments are playing catch-up with the ‘tech giants’.

THE WAY FORWARD

Governments around the world are now playing catch-up with the “tech giants” that have provided people and businesses with opportunities and new ways of social interaction. This has happened before with the advent of the automobile, so it is not a unique challenge. However, the challenge will be to design the new “rules of the road” in a way that empowers consumers, while not causing a traffic jam on the digital highway.

With globalisation, digital platforms continue to develop, converge and perform more functions on an international scale.²⁵ “Overseas” platforms like WeChat have already reached Australian consumers, with significant implications that touch on our democratic processes.²⁶ It is more

critical than ever that the Australian regulators and government are alive to challenges facing their peers in other jurisdictions.

The convergence of regulatory best practices ultimately benefits consumers and the economy. Given the commonality of issues that governments globally are facing, it is likely that the benefits accruing from a considered approach to the implementation of a platform-neutral legal framework following further review, discussion and a coordinated international effort will crystallise in the following benefits:

- Improvement of regulatory parity which enables different businesses that perform comparable functions to be regulated in the same way, thereby levelling the playing field and increasing open and fair competition
- Removal of redundant legislation to reduce overall regulatory costs on media and communications industries and associated regulatory burdens on Government agencies
- Simplification of the complex system of regulations currently in place
- Implementation of more effective safeguards to ensure that community standards and Australian audiences are adequately and consistently protected and
- Establishment of more flexible, technology-neutral principles that are designed to be able to rapidly respond to technological innovations in a dynamic landscape.²⁷

As a matter of principle, policy should be developed with the aim of fostering a fair, transparent and predictable business environment for all users, including traditional media businesses, consumers, and digital platforms. The commonality in the challenges faced by governments and regulators across multiple jurisdictions due to the rise of digital platforms may be likened to that faced by antitrust regulators back in 2000, when the International Competition Policy Advisory Committee (ICPAC) called on the United States to explore the creation of a “Global Competition Initiative”, where government officials, private firms and non-governmental organisations could consult on antitrust matters. ICPAC recommended that this Global Competition Initiative be directed toward “greater convergence of competition law and analysis, common understanding, and common culture” which ultimately led to the formation of the International Competition Network (ICN).²⁸

Since then, the ICN has grown exponentially from the 14 original member jurisdictions (which included Australia, the UK, the US, and the EU) and is the only global body devoted exclusively to competition law enforcement. Hopefully a similar body is established to facilitate the discussion of shared regulatory objectives with the aim of addressing the concerns identified by

international regulators in relation to the digital platforms in a balanced, practical way.

To that end, an international body, comparable to the ICN, should be established to provide a forum for industry participants, governments, and media and competition regulators to build consensus and convergence towards sound policy principles across the global media and competition community.

As noted by the founder and chief executive of Facebook, Mr Mark Zuckerberg:

“I believe we need a more active role for governments and regulators. By updating the rules for the internet, we can preserve what’s best about it – the freedom for people to express themselves and for entrepreneurs to build new things – while also protecting society from broader harms.”²⁹

The goal of the ACCC’s recommendation of a harmonised media regulatory framework that is “platform neutral” is not to achieve absolute uniformity of regulation across media businesses and digital platforms, particularly where they perform different functions.³⁰ However, as noted by Apple CEO Tim Cook, “we have to admit when the free market is not working... it is inevitable that there will be some level of regulation”.³¹

This essay has sought to consider the various contentions from industry participants and regulators in relation to the benefits and detriments of digital platforms. Having assessed the various perspectives and challenges, this essay has sought to put forward a process to create a platform-neutral global media regulatory framework in the form of a media regulatory equivalent of the ICN, to set out clear rules based on sound policy objectives to preserve those little “cracks” in the market, through which the light of competition can shine.³²

ANGEL FU is an associate at Clifford Chance, Australia, and the winner of the IIC’s Future Leaders Competition for 2019 for this article on the topic “Global realities, national choices: Communications policy making in a cross-sectoral, cross-jurisdictional world”.

REFERENCES 1 Gillespie T (2018). Custodians of the internet: Platforms, content moderation, and the hidden decisions that shape social media. Yale University Press. 2 Australian Competition and Consumer Commission (2019). Digital Platforms Inquiry: Final report (ACCC Report). bit.ly/2Rqcc51 3 ACCC Report, p31. 4 Department for Digital, Culture, Media & Sport (2019). The Cairncross Review: A sustainable future for journalism. 12 February. bit.ly/2QZwQ71 5 House of Lords, Select Committee on Communications (2019). Regulating in a digital world. 9 March. bit.ly/2uVPEKF 6 Federal Trade Commission (2019). FTC’s Bureau of Competition Launches Task Force to Monitor Technology Markets. 26 February. bit.ly/37516We 7 HM Treasury (2019). Unlocking digital competition, Report of the Digital Competition Expert Panel. 13 March. bit.ly/367CveF 8 ACMA (2011). Enduring concepts—Communications and media in Australia, November. ACMA (2011). Broken concepts—The Australian communications legislative landscape, August. bit.ly/3720ven 9 ACCC Report, p189. 10 Free TV (2019). Submission to the Digital Platforms Inquiry: Preliminary report, February, p27. bit.ly/35X84Yk 11 Broadcasting Services Act 1992 sect 121G. 12 Commercial Radio Australia (2019). Submission to the Digital Platforms Inquiry preliminary report, February, p6. bit.ly/38eylmp 13 ACMA (2014). The cost of code interventions on commercial broadcasters. March, p4. bit.ly/38jy7e2 14 Free TV (2018). Commercial Television Industry Code of Practice, s5.3. bit.ly/3765nPG 15 Business Insider (2018). Facebook just secured Premier League rights for the next four years. 6 July. bit.ly/2RtZFDp 16 ACCC Report, p196 citing ACMA (2011). Enduring concepts: communications and media in Australia. November, p10. 17 ACCC Report, p196. 18 ACCC Report, p175. 19 ACCC Report, p199. 20 ACCC Report, p199. 21 Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019 (Cth). 22 ACCC Report, p194. 23 ACCC Report, p101. 24 Facebook Newsroom (2019). Working to safeguard elections in Australia. 4 April. bit.ly/2RtB8pj 25 Business Insider (2019). Mark Zuckerberg’s vision for Facebook sounds a lot like China, where I couldn’t buy a cup of coffee without the app that dominates people’s lives there. 8 March. bit.ly/38m5rFD 26 Abacus (2019). Australia has a fake news problem on WeChat and wants Tencent’s help. 9 May. bit.ly/2SDoGXC 27 ACCC Report, p197-198. 28 https://www.internationalcompetitionnetwork.org/about/ 29 The Washington Post (2019). Mark Zuckerberg: The internet needs new rules. Let’s start in these four areas. 31 March. wapo.st/2syp17b 30 ACCC Report, p200. 31 Axios (2018). Apple CEO Tim Cook calls new regulations “inevitable”. 19 November. bit.ly/2FUMU06 32 Commissioner Vestager (2019). Association of European Competition Law Judges Annual Conference, 6 June.