

# Regulators' focus on digital markets

One of the Commerce Commission's priorities for 2019/20 is online retail, with New Zealanders spending around \$42 bn a year on online purchases.

The Commission is focusing on identifying potential harm to consumers, educating traders and consumers and taking enforcement action where appropriate. The Commission has also expressed its intention to maintain connection with international agencies to share knowledge relating to technological change in the digital age and related consumer harm.

This alert notes some of the competition and consumer regulator activity internationally. We observe key themes at two levels:

- Policy discussion over some big issues such as: the degree to which there is market power in 'big data', how concerned regulators should be at that and whether current tools are adequate to deal with issues; impacts in a range of areas, such as media and journalism, and online advertising; and issues in the uses of consumers' data.
- More conventional consumer law themes, such as misleading online reviews, postings by influencers, and 'pressure selling' techniques on platforms.

## Regulatory focus internationally

### Australia

The ACCC found that many adverse effects associated with digital platforms flow from the dominant market power of Google and Facebook. This has distorted the ability of businesses to compete in advertising and media and has meant that consumers are not adequately informed about how their data is used and collected.

The final report contained 23 recommendations, in areas of competition law, consumer protection, media regulation and privacy law. Notably, the ACCC recommended it establishes a specialist digital platforms branch providing regular reports to Government, and recommended additions to the merger test under s 50(3) Competition and Consumer Act 2010 (Cth) that would influence the assessment of data-heavy mergers.

### United Kingdom

In 2015, the CMA undertook a fact-finding project on the commercial use of consumer data. It concluded that regulation was key to ensure respect for privacy and that consumers should have access to more information about how their data is collected and used.

The CMA is undertaking a market study of digital advertising, with a final report due in July 2020. The focus is on analysing market power and consumer knowledge about the use of data. Potential remedies identified include recommendations to Government for the development of a forward-looking regulatory regime and legislative change.

### European Parliament

A 2015 study *Challenges for Competition Policy in a Digitalised Economy* identified ten distinct problems for digital markets that are caused by, or result in, competition issues. The report recommended that competition authorities rely on self-correcting market powers and that policy focuses on encouraging innovation and preventing the creation of entry barriers.

The European Commission has also undertaken several inquiries into the e-commerce sector, with a final report from May 2017 identifying wide-ranging competition and consumer issues.

### Japan

In 2017, the Japan Fair Trade Commission reported on 'big data' utilisation within the framework of competition policy. The Commission found that utilisation of new data is important in Japan because of its low productivity and concluded that hasty competition regulation would hamper this too much. The Commission stated its desire to keep watch on specific issues, including digital cartels.

### Italy

The Italian Competition Authority, Communications Authority and Data Protection Authority launched a joint sector inquiry on 'big data' in May 2017. The Authorities aim to identify issues relating to the use of data, and to create a regulatory framework protecting personal data, competition and consumer rights.

### Canada

The Competition Bureau published a report in February 2018 that covers challenges to competition policy in light of 'big data' and innovation. The report focuses on cartels, deceptive marketing practices, mergers and monopolistic practices in the new digital sphere. The Bureau concluded that there are new challenges for competition law and enforcement.

### Germany

Between 2015 and 2018, the Federal Cartel Office published three studies as part of the *Competition and Consumer Protection in the Digital Economy* series. The reports relate to big data and competition, challenges for antitrust law, and online advertising.

The German Monopolies Commission also published a 2015 report on competition policy challenges in the digital market, finding that special regulation is not necessary, but existing competition law needs to adapt.

### France

The French Competition Authority undertook an information-gathering exercise to assess competition in the online advertising sector. In the 2018 final report, the Authority stated it would continue to monitor the market for potentially anti-competitive behaviour.

### Germany and France joint work

Germany's Federal Cartel Office and France's Competition Authority together investigated the impact of possession and use of data on competition. The 2016 report outlined the role of data in competition analysis, highlighting that data is a source of market power and that transparency can have negative impacts on competition.