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## GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

## DEPARTMENT OF ECONOMIC DEVELOPMENT

NO. 330

9 April 2021



## ONLINE INTERMEDIATION PLATFORMS MARKET INQUIRY

### TERMS OF REFERENCE

9 APRIL 2021

#### 1. INITIATION OF A MARKET INQUIRY

- 1.1. The Competition Commission ("Commission") will conduct a market inquiry into online intermediation platform services<sup>1</sup> in South Africa (the "Online Intermediation Platforms Market Inquiry" or "OIPMI"). The OIPMI will be initiated in terms of section 43B(1)(a) of the Competition Act 89 of 1998 (as amended) given that the Commission has reason to believe that there exist market features which impede, distort or restrict competition amongst the platforms themselves, and which undermine the purposes of the Act. These reasons are set out below along with the scope of the inquiry.
- 1.2. The Commission is committed to the principles of fairness, transparency, and integrity and will conduct the OIPMI in accordance with these principles. The Commission will allow stakeholders fair and reasonable opportunity to provide input into the OIPMI process. All the submissions received will be considered by the Commission before final findings and conclusions are reached.

#### 2. BACKGROUND TO DIGITAL PLATFORM MARKET CONCERNS AND SCOPING

##### *Digital platform concerns and the use of a market inquiry*

- 2.1. Digital platform markets have been at the forefront of the global competition law debates in recent years due to the growing importance of digital platforms in the economy and the high levels of concentration in many of these markets. The debate has typically focused on digital platforms which intermediate online transactions

<sup>1</sup>Online intermediation services include eCommerce marketplaces, software application stores and intermediated services such as accommodation, travel, transport and food delivery.

between business and consumers given that these have network effects which drive a potential winner-take-all outcome, and their relative importance for business users in accessing consumers through online trading and advertising, especially by small and medium enterprises (“SMEs”).

- 2.2. In line with these global trends, the Commission last year published for public comment a strategic view on regulating competition in the digital economy<sup>2</sup>. Following written submissions and consultations with stakeholders, that report has been finalised. The report highlights a feature of many digital platform markets which is the tendency to both product/service line and conglomerate concentration that is subsequently difficult to reverse once entrenched. This may in part be due to economic features of these markets such as first-mover advantages from the positive network effects of two-sided markets and further product development advantages from data accumulation. However, it may also be due to deliberate strategies to retain early leadership (such as most-favoured-nation (“MFN”) pricing rules with partners), acquire competitive threats (so-called “killer acquisitions”) and leverage dominance in some areas to exclude or limit rivals in others (such as self-preferencing of data and platform access). This requires competition law to not only consider new theories of harm but also to act proactively against potential entrenchment strategies to ensure markets are contestable and prevent irreversible concentration. Ensuring markets are contestable also requires competition policy tools to facilitate access by potential entrants.
- 2.3. The report also concluded that market inquiries represent more effective tools to promote and retain competition in markets where common industry practices may collectively contribute to the hindering of competition. Furthermore, it concluded that market inquiries also provide a more effective means of drawing balanced conclusions and addressing barriers to participation in such markets, particularly by SMEs and firms owned and controlled by historically disadvantaged persons (“HDP owned firms”). The report indicates that digital platform markets are a case in point and the Commission believes an inquiry can address market features in these markets which may hinder competition or undermine the purposes of the Act.
- 2.4. The Commission’s preference for a market inquiry in the context of digital platform market features is in line with major jurisdictions globally which have broader market

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<sup>2</sup> Competition Commission (September 2020) Competition in the Digital Economy.

inquiries (or market investigations) to address the unique challenges of digital markets<sup>3</sup>. This stems from a general recognition that normal enforcement tools may be inadequate on their own to prevent initial market leaders from durably entrenching their position and addressing the durable nature of already dominant platforms<sup>4</sup>, reducing platform competition as a result. It also stems from a recognition that the dependency of business users, especially SMEs, on these platforms creates the opportunity for exploitative and/or exclusionary conduct in addition to have platform competition concerns. Such inquiries have also typically identified the need for remedial action to address such market features of digital platforms<sup>5</sup>.

- 2.5. The scope of digital platforms is extremely wide, covering a host of different platform types and competition or public interest issues. The Commission is of the view that an inquiry of such breadth so as to cover all digital platforms markets and issues is not

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<sup>3</sup> For instance, both the Competition and Markets Authority (“CMA”) and Australian Competition and Consumer Commission (“ACCC”) have instituted market inquiries into aspects of digital markets. The CMA in the UK recently concluded an inquiry into digital advertising markets, recommending regulatory action to address competition issues (including the excessive extraction of data and market power in the value chain) [CMA (June 2020) Online Platforms and Digital Advertising final report. Accessible at <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study>]. The ACCC recently concluded a Digital Platforms Inquiry into platforms for free services monetized through advertising and the impact on the media, recommending a mandatory bargaining code between the search engines and media companies. The ACCC has subsequently initiated a five year Digital Platform Services Inquiry which would tackle different platforms and issues. Digital advertising markets and Application stores are amongst the first few markets to be reviewed [ACCC (2019) Digital Platforms Inquiry final report. Accessible at <https://www.accc.gov.au/focus-areas/inquiries-finalised/digital-platforms-inquiry-0/final-report-executive-summary>]. The Competition Commission of India (“CCI”) recently conducted a market study of eCommerce in India, traversing marketplaces for goods as well as accommodation and food delivery services which identified contractual conduct which has scope to reduce competition in the context of a market leading position [CCI (2020) Market Study on eCommerce in India. Accessible at : [https://www.cci.gov.in/sites/default/files/whats\\_newdocument/Market-study-on-eCommerce-in-India.pdf](https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-eCommerce-in-India.pdf)].

<sup>4</sup> See for instance the conclusions of the US House of Representatives investigation into competition in digital markets which recommended, amongst other things, specific measures to restore competition in certain online markets and strengthen antitrust laws. The former included aspects such as non-discrimination, prohibition of abuse of superior bargaining power and presumptions against further mergers by dominant platforms. [Nadler, J. and Cicilline, D. N. Investigation of Competition in Digital Markets. US House of Representatives, Majority Staff Reports, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary. Accessible at [https://judiciary.house.gov/uploadedfiles/competition\\_in\\_digital\\_markets.pdf](https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf)].

<sup>5</sup> For instance, the European Union has enacted the Platform to Business Regulations which seek to promote fairness and transparency for business users of online intermediation platforms. [European Union Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services. Accessible at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R1150&from=EN>]. In December 2020, the European Commission proposed the Digital Markets Act which seeks to regulate the few large platforms which mediate the majority of online transactions in core platform services and therefore are considered gatekeepers to consumers. [European Commission Proposal for a Regulation of The European Parliament and of The Council on contestable and fair markets in the digital sector (Digital Markets Act). Accessible at [https://ec.europa.eu/info/sites/info/files/proposal-regulation-single-market-digital-services-digital-services-act\\_en.pdf](https://ec.europa.eu/info/sites/info/files/proposal-regulation-single-market-digital-services-digital-services-act_en.pdf)].

desirable, or achievable within the 18 month period of an inquiry as set out in the recent amendments to the Act. The Commission has therefore sought to narrow the scope of the inquiry to a particular set of digital platforms with common competition issues.

*Categorisation of platforms and focus area*

- 2.6. One may split digital platform markets into three broad categories based on type of online offering, each of which has a different monetization strategy and as a result may raise different competition and public interest issues. The three broad categories include:
- 2.6.1. Platforms intermediating goods and services between businesses and customers, which are typically monetised on commission/sales business models. These may include eCommerce marketplaces, software application stores, so-called match-making platforms for accommodation or food services, and aggregation services such as travel or similar classifieds.
- 2.6.2. Search and social media platforms which tend to be monetised by targeted advertising based on consumer data extracted from offering the service for free. These also include the associated digital advertising ecosystem developed around these services and content publishers.
- 2.6.3. A third distinct category is the so-called Fintech market, including new emerging payment systems operators. These are distinguished from the other two categories largely insofar as these technological platforms and startups usually operate within a pre-existing financial market regulatory context where prudential and customer security issues are highly prominent.
- 2.7. Each of these markets may raise a slightly different set of competition and public interest issues to each other, but which are typically common across platforms within each of these categories.
- 2.7.1. For online intermediation services there may be few issues around consumer data extraction, given the monetization strategies and limited consumer data based on interaction with the platform alone. Rather, the issues may revolve around conduct relating to business users, such as conduct which may create

barriers to entry for rival platforms or result in unfair trading conditions for the business users. The importance of certain platforms for reaching consumers may make business users dependent on them, with issues arising in terms of self-preferencing, unfair trading terms, extraction of business data and the potential distortion from ranking algorithms. Whilst these platforms may facilitate participation by SMEs or HDP owned firms, they may also discriminate against and exploit them in the process, undermining participation. Internationally, the focus has tended to be on business to consumer (B2C) platforms rather than business to business (B2B) or consumer to consumer (C2C) platforms, since the former may have greater tendencies to concentration. Given the importance of these platforms for participation in the digital economy by business, especially SMEs, and the potential existence of one or two market leaders across a number of platform markets in South Africa, ensuring competitive platform markets and fair conduct is an imperative for South African business users more broadly, especially in the context where commerce is increasingly shifting online.

- 2.7.2. In contrast, advertising based services may raise substantive issues around consumer data exploitation and dominance within the digital advertising ecosystem to the detriment of content publishers and advertisers. As consumers effectively pay for these services through their attention and data, concerns arise when there is an excessive extraction of data to drive higher revenues and when there are potential ill effects of increased targeted advertising, such as personalized pricing or denial of service. In addition, the digital advertising market power of search and social media giants, including their vertical integration in the value chain, may raise concerns that both domestic content providers may not get a fair share of the advertising revenue generated by their content and it is possible that domestic advertisers may be charged an excessively high price for such advertising.
- 2.7.3. In Fintech markets the primary issues may revolve around the gatekeeper role of traditional financial institutions to consumers and their data, which are important for innovators to access in order to offer innovative new services and/or directly contest incumbents. Such data may include the financial transactions of the customer which provides rich information on spending levels and patterns of use to credit assessment and other financial tools. In addition,

authorised access to accounts in order to process payments is a requirement for innovative payment mechanisms that may be cheaper and more efficient than established payment mechanisms.

- 2.8. The Commission is of the view that competition and public interest aspects of Fintech markets are best addressed through a collaborative approach with other regulators. In particular, given the important role of financial regulators in Fintech markets, a collaborative approach can achieve the competition objectives in a manner that does not undermine prudential and data security considerations. The Intergovernmental Fintech Working Group (“IFWG”) provides such a forum and includes all relevant regulators such as the Commission, the Financial Services Conduct Authority, the Prudential Authority and the South African Reserve Bank. The Commission aims to use the IFWG structure to further understand and address competition issues in Fintech markets. Since joining the IFWG, the Commission has facilitated the initiation of a working group on Open Finance which should ensure progression of this agenda in South Africa.
- 2.9. The Commission is of the view that both online intermediation platforms and digital advertising in South Africa are candidates for a market inquiry. However, the Commission has prioritised an inquiry into online intermediation platforms given their importance to business user participation in the online economy, especially by SMEs and HDP owned firms, and the ability to shape such markets domestically given that competition typically is shaped by contracts and investments within the domestic economy. The online economy has greatly accelerated under the Covid-19 pandemic and access to online opportunities for domestic businesses is likely to be critical for economic recovery and inclusive growth as recognised in the Economic Recovery and Reconstruction Plan. Already, there may be growing concentration and market leadership in many of these platform markets and it is essential that market conduct and features are assessed to ensure that these markets are contestable, preventing any dominance that may exist from becoming durably entrenched. Given the potential dependency of business users on these platforms for accessing online consumers, it is also an imperative under the purposes of the Act to ensure that SMEs and HDP owned firms are not the subject of exploitation and unfair treatment.
- 2.10. Digital advertising markets remain a concern for the Commission and indeed antitrust authorities globally, given the potential negative outcomes for domestic consumers,



content publishers and businesses using digital advertising. However, these markets are global in nature and the issues now relatively well known. Interventions required to improve the contestability of these markets most likely need to occur on a global scale for global competitors to emerge<sup>6</sup>, even though the outcomes for domestic consumers and businesses can be addressed through interventions of a local nature. In addition, the competition issues simultaneously raise other concerns such as independent media funding and data privacy. The Commission will consider the best course of action for these markets, which may include a further market inquiry, targeted abuse of dominance investigations or over-arching regulation.

*Online intermediation platforms domestically*

- 2.11. As identified in the Commission's report on Competition in the Digital Economy, as well as the plethora of inquiries and regulatory action globally, there are features of online intermediation platforms which may impede, restrict or distort platform competition but also competition between business users on those platforms. Furthermore, there are features of these markets which may undermine the public interest insofar as the potential exploitation of business users, including SMEs and HDP owned firms, which may hinder their effective participation in the online economy.
- 2.12. Domestically, market leaders have been observed emerging across several online intermediation platform markets, which may be indicative of growing concentration. In addition, some of the firms feature across many of these markets, providing potential scope for conglomerate advantages such as customer data exchange, cross-promotion and self-preferencing, as well as scope economies in distribution. Internationally, a number of market features in online intermediation platforms have been found to hinder platform competition, foreclose business users or exploit SMEs and HDP owned firms in certain cases. Such features may exist domestically and their effect will need to be assessed.
- 2.13. The market features of online intermediation platform markets that may potentially hinder platform competition are generally identified as including, but not limited to, the following:

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<sup>6</sup> There are several global antitrust initiatives aimed at trying to reduce the market power of the leading "big tech" firms through increased contestability, such as addressing the issue of paying for default status on devices, meta data sharing on search queries and even the potential unravelling of past acquisitions.

2.13.1. MFN or Price Parity Clauses have been observed across travel aggregators and many intermediated services such as food delivery. Platforms securing first-mover advantage may utilize their must-have status to negotiate preferable agreements with suppliers on their platform, which could potentially be entrenched with MFN clauses. A potential effect of these clauses may be to reduce competition on price or commission between new platforms and incumbents, reducing the scope for competitive rivalry to attracting consumers where the incumbent has a distinct advantage. Overall, wide MFNs have been found to be associated with higher retail prices.<sup>7</sup> A number of international platforms operating in South Africa have been found to use such clauses in other jurisdictions to the detrimental effect of the travel industry and consumers. The position in South Africa requires assessment.

2.13.2. Exclusive contracts can similarly reduce rivalry if they prevent business users multi-homing across platforms, denying new entrants from expanding by making their platform less attractive without a broader set of business users. Even if contracts are not exclusive, volume rebates and other incentives may achieve the same outcome as they incentivise businesses not to multi-home.

2.13.3. Predation allegations have also arisen in eCommerce platforms specifically, but are a possible feature of all platforms. Whilst losses may be required initially to get both sides of the platform to critical mass, there may also be an incentive to continue driving well beyond that stage in order to entrench dominance through market wide scale and scope, leaving little room for other platforms to reach such scale. Platforms may also engage in selective predation where reductions in margins are used to snuff out new entry once a rival starts gaining traction.

2.13.4. Conglomeration may also be used to gain an unfair advantage over rivals, including the conglomeration of consumer data across numerous online platforms and cross-promotion on those platforms. Merger activity has revealed that some online intermediation businesses in South Africa are seeking to

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<sup>7</sup> Sean Ennis, Marc Ivaldi and Vicente Lagos. 2020. Price Parity Clauses for Hotel Room Booking: Empirical Evidence from Regulatory Change. [https://www.tse-fr.eu/sites/default/files/TSE/documents/doc/wp/2020/wp\\_tse\\_1106.pdf](https://www.tse-fr.eu/sites/default/files/TSE/documents/doc/wp/2020/wp_tse_1106.pdf)

develop portfolios of platforms which may provide scope to strengthen their market position.

2.14. The market features of online intermediation platform markets that may hinder competition and exclude business users are generally identified as including, but not limited to, the following:

2.14.1. The “dual role” played by platform providers as the platform operator for the marketplace, and also as sellers, may provide incentives to “favour itself” relative to third party business users. This may be facilitated by manipulating the ranking of the platform provider’s search whereby results are biased to favour own products or preferred business users. This can lead to a decrease in the intensity of competition and worsening of price/quality and/or simply lead consumers to make suboptimal choices for given levels of prices/qualities.

2.14.2. Aside from altering the ranking, other strategies such as removing business users from the platform or restricting their ability to price or promote lower than the platform’s own product are strategies that may seek to achieve the same outcome. The Commission is already starting to receive complaints of this type in relation to domestic platforms.

2.14.3. The use of business user transaction data with customers that is not in the public domain may also be used to identify means to challenge successful business users by replicating their offering and targeting their customer base with personalised offers.

2.14.4. Ranking and conduct may also discriminate against a class of business user such as SMEs and HDP owned firms as against established businesses. Whilst this may not favour the platform, it still distorts competition amongst business users serving to exclude a class of user. For instance, higher commission fees for SMEs, HDP owned firms or independent businesses may eventually marginalize these users on the platform as they are forced to impose higher prices or accept suboptimal margins. The use of volume discounts and pay for position may similarly favour larger established businesses, sidelining new entrants, HDP owned firms and SMEs.

2.15. The market features of online intermediation platform markets that may exploit business users are identified as including, but not limited to, the following:

2.15.1. Platforms that are important to access a set of online customers or which are an important route to market for SMEs and HDP owned firms will generate a degree of dependency that may result in exploitation of their business user base. This may result in the imposition of unfair terms & conditions, high charges, and the unfair transfer of risk or costs. High listing fees or commissions are one form of exploitation. The unfair transfer of risk/cost has often related to customer returns and refunds internationally, but instances of such complaints domestically already occur.

2.16. Aside from specific business model practices that exist amongst online intermediation platforms which may hinder competition or undermine the purposes of the Act, there are also general market features which may limit competition. These include, but are not limited to, the role of network effects in reinforcing a first-mover advantage, large capital costs to sustain losses initially for later entrants challenging market leaders, or simply the general digital advertising model on search that benefits those able to pay-for-position and bid on the search terms of new rivals.

2.17. Similarly, there may be other barriers faced to SMEs and HDP owned firms from participating in the online economy even through online platforms. This may include, but is not limited to, the capital, systems and technologies required to interface and deliver against the platform requirements.

2.18. In conclusion, the Commission is of the view that there are substantial reasons to believe that there are market features of online intermediation platforms domestically that may impede, distort or restrict competition, or alternatively undermine the purposes of the Act. This is reinforced by the fact that the Commission has received complaints alleging anticompetitive conduct in some of the platform markets. Furthermore, there is substantial benefit to an inquiry that may shed light on what is occurring in these markets and whether these features are impacting on platform competition and the participation of SMEs/HDP owned firms.

2.19. This is particularly in the context where it is important to pre-emptively act to ensure that any dominance or market leadership that may exist does not become durably

entrenched such that it is irreversible, an objective shared by many competition authorities globally. It is also important in the context where online commerce has accelerated under the Covid-19 pandemic and is fast becoming an essential route to market for many South African businesses. Features which may undermine the participation of SMEs or HDP owned firms in online commerce will undermine inclusive growth and entrench traditional market concentration in the future.

### 3. SCOPE OF THE INQUIRY

- 3.1. Consistent with section 43B of the Act, the OIPMI will focus on whether there are any digital platform market features which may impede, restrict or distort competition and/or undermine the purposes of the Act.
- 3.2. The OIPMI will focus on online intermediation service platform markets which intermediate transactions between business users and consumers (or so-called “B2C” platforms), including the generation of transactions leads (such as the case with online classifieds and travel aggregators). These include the following platforms:
  - 3.2.1. eCommerce marketplaces;
  - 3.2.2. Online classifieds;
  - 3.2.3. Travel and accommodation aggregators;
  - 3.2.4. Short term accommodation intermediation;
  - 3.2.5. Food delivery;
  - 3.2.6. Application stores; and
  - 3.2.7. Other platforms identified in the course of the inquiry.
- 3.3. The scope of the inquiry will specifically exclude e-hailing services which were the subject of a previous inquiry, and which intermediate between consumers and gig economy workers rather than business users. Other pure gig economy platforms, intermediating a customer with an individual service provider, are also excluded from the ambit of the inquiry. The inquiry will also not focus on search and social media more broadly, along with the broader digital advertising ecosystem, except insofar as
  - a) such digital advertising may pose a barrier to competing platforms expanding or business users from participating in the online economy, or
  - b) the extent to which those platforms also offer online intermediation services themselves (such as B2C communication services).The inquiry will also not focus on Fintech platforms except

insofar as the role of payment services in facilitating transactions on the online intermediation platforms.

- 3.4. The inquiry is broadly focused on three areas of competition and public interest, namely a) market features that may hinder competition amongst the platforms themselves, b) market features that give rise to discriminatory or exploitative treatment of business users, and c) market features that may negatively impact on the participation of SMEs and/or HDP firms. Whilst the inquiry will consider how consumer and business data advantages may shape competition, the inquiry will specifically exclude broader data privacy issues.
- 3.5. The main objectives of the inquiry into online intermediation services are to:
- 3.5.1. Evaluate trends in adoption and use of the different online intermediation platform markets, including the identification of leading platforms across each market;
  - 3.5.2. Evaluate whether any market features, platform conduct and/or contracts and terms of use with business users and consumers are likely to have the effect of raising barriers to entry and reducing competition amongst platforms domestically. These include, but are not limited to, MFN or price parity clauses, exclusive contracting, loyalty incentives, conglomerate leveraging (incl. data and advertising) and predation;
  - 3.5.3. Evaluate other barriers to entry and expansion by rival platforms, including but not limited to network effects, capital costs and consumer marketing costs;
  - 3.5.4. Evaluate whether platform conduct, contracts, prices and terms of use with business users are discriminatory or unfair, and the likely effect thereof on consumer choice, competition amongst business users and the participation of SMEs and HDP owned firms. This includes, but is not limited to, the existence of self-preferencing conduct, discriminatory pricing, promotional or pricing restrictions, inflated access pricing and access to / use thereof of business user transaction data.
  - 3.5.5. Evaluate whether the ranking algorithms used by platforms, including any pay for position or promotional opportunities, negatively impact competition on the

merits, consumer choice and/or the participation of SMEs and HDP owned business users;

- 3.5.6. Evaluate any other barriers to entry into online commerce for SMEs and HDP owned firms, including but not limited to marketing costs, technological and product challenges;
- 3.5.7. Evaluate the extent to which the findings and any identified remedies in respect of core platforms are generalisable across online intermediation platforms;
- 3.5.8. Determine appropriate remedies where an adverse effect on competition or the purposes of the Act are found as set out in section 43C(3) of the Act.

#### **4. MARKET INQUIRY TIMELINES AND PROCESS**

- 4.1. The OIPMI will commence 20 business days after the publication of these Terms of Reference and the final report will be completed within 18 months, as per the statutory requirements of sections 43B(2) and 43B(4)(a) of the Act respectively. The Guidelines for Participation have been published on the Commission's website ([www.compcom.co.za](http://www.compcom.co.za)) and details on the administrative phases of the inquiry will be published at the commencement of the inquiry. At that point, members of the public and businesses will be invited to provide written representations and information to the inquiry.

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