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COMPETITION LAW AND TECHNOLOGY, MEDIA & TELECOMMUNICATIONS SECTOR ALERT

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Competition regulation in the digital era

In the wake of the fourth industrial revolution, a "digital market" is burgeoning, with some firms exponentially larger than others, having benefited from first mover advantages, network effects, massive data repositories and ongoing diversification. The COVID-19 pandemic has turbo-charged demand for digital services, providing significant opportunities for growth while also allowing established players to consolidate their lead. In some ways, digital markets are subject to different dynamics than traditional markets and regulators around the world have been grappling to understand the state of competition and the adequacy of existing laws and policies to protect competition in the digital era. A key concern is the extent to which powerful, established players may be able to dig in, limiting scope for competition down the track. As the online economy becomes pervasive, the perceived competition threat of entrenched monopolies and oligopolies has become intertwined with a political and public interest thread as governments wrestle with the impact of platforms that rival State power in their ability to monitor, reach, and influence citizens.

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In South Africa, the Competition Commission (Commission) recently announced two key interventions in this space:

- (1) the publication of a report on the digital economy, and
- (2) the publication of draft terms of reference (ToR) to initiate a market inquiry into online intermediation platforms (OIPMI).

Paper on Digital Economy

The Commission published a second edition of its seminal paper on the digital economy on 24 February 2021 (Paper).

The Paper suggests that competition law and various other regulatory interventions should work together to give effect to the purpose of the Competition Act in a way that ensures inclusive economic growth, by enhancing employment levels and giving small and medium sized enterprises (SMEs) and firms owned or controlled by historically disadvantaged persons (HDPs) an opportunity to participate in fast-growing digital markets both locally and globally.

The Paper provides a useful framework to analyse the South African digital economy through a competition law lens. Moreover, the Paper provides an overview of how competition in digital markets might be harmed in the context of mergers, cartel conduct, abuse of dominance, and vertical restraints. Under each type of conduct, the Commission has identified the current challenges, emerging views from other jurisdictions, and a set of strategic action points on how it intends to enforce competition law.

The Commission notes that competition in the digital economy can be promoted with the collective intervention of regulatory and industrial policy. In the Paper, the Commission calls upon Government to invest *inter alia* in technological infrastructure, coupled with a data privacy and consumer protection regime to ensure that SMEs and consumers are protected.

Competition regulation in the digital era ...continued

The Commission has a statutory period of 18 months to finalise a market inquiry and so has proposed to narrow the scope of the market inquiry to cover “*online intermediation platforms*” (which link businesses to consumers in the provision of goods and services, including the generation of transaction leads).

OIPMI

The Commission’s Paper recognised that market inquiries represent an effective tool to address anti-competitive outcomes in digital markets. With alacrity, the Commission has published draft ToR to initiate the OIPMI.

Digital platforms cover a lot of ground, with each one potentially raising its own set of concerns. The Commission has a statutory period of 18 months to finalise a market inquiry and so has proposed to narrow the scope of the market inquiry to cover “*online intermediation platforms*” (which link businesses to consumers in the provision of goods and services, including the generation of transaction leads). The following types of platforms are intended to be covered in the OIPMI:

- eCommerce marketplaces;
- online classifieds;
- travel and accommodation aggregators;
- short term accommodation intermediation;
- food delivery;
- App stores; and
- other platforms identified in the course of OIPMI.

Out of scope are platforms designed to attract and hold the attention of consumers, building massive data repositories in the process, which are monetised for digital advertising (key

examples are search and social medial platforms) and platform-based Fintech offerings (especially payment systems). The Commission has indicated that the former might best be tackled through international policy coordination (it seems States are free to collude against firms in the notional public interest!) while the latter requires the intervention of other financial regulators through, for instance, the Intergovernmental Fintech Working Group.

By focussing on online intermediation platforms, the Commission can largely avoid the vexed issue of data extraction that is preoccupying policy makers around the world, while targeting an emerging route to market that clearly impacts local businesses looking to enter the platform market or utilise platforms to sell goods and services. This is very much in line with prevailing policy aimed at creating space for SMEs and HDP businesses to enter and flourish – effective competition for and between online sales platforms is perceived to be key in the face of digital expansion.

The Commission will focus on three areas:

- market features that may hinder competition amongst the platforms themselves;
- market features that give rise to discriminatory or exploitative treatment of business users; and
- market features that may negatively impact on the ability of SMEs and HDP firms to participate.

Competition regulation in the digital era...continued

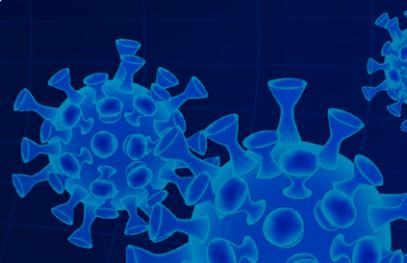
The ToR includes a lengthy introduction and background setting out many of the theories of harm that have been levelled at large platform providers, betraying a predilection to cite allegations and ongoing investigations in other countries as findings of fact.

The ToR includes a lengthy introduction and background setting out many of the theories of harm that have been levelled at large platform providers, betraying a predilection to cite allegations and ongoing investigations in other countries as findings of fact. Conduct singled out for assessment includes:

- Whether certain trading tactics raise barriers to entry and reduce competition amongst platforms in South Africa. The Commission lists price parity (Most Favoured Nation) clauses (which may limit the ability of new entrants to compete on price); exclusivity (to prevent multihoming by sellers); loyalty incentives and predation (which could prevent new entrants from gaining critical mass); and conglomerate leveraging (by firms with multiple platforms in the digital ecosystem, allowing for greater data exchange, cross promotion and self-preferencing) as potential anticompetitive conduct.
- Whether terms with sellers on a platform are discriminatory or unfair, particularly towards SMEs and HDI firms. The OIPMI recognises that big platforms have the potential to make or break small businesses looking for online routes to market. The Commission will look at: self-preferencing by the platform owner; discriminatory pricing; restrictions on promotions; inflated access pricing; and use of and fair access to transaction data. This line of inquiry reflects the increasing onus on big businesses to play a role in contributing to the growth of SME and HDP firms.
- The impact of ranking algorithms and "pay for position" promotional opportunities on less well-resourced competitors on the platform and any attendant effect on consumer choice.
- Apart from unilateral conduct described above, the OIPMI will also look at impact of network effects, capital costs and marketing costs as potential barriers to entry that policy intervention could look to mitigate.

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Competition regulation in the digital era...continued

The digital economy appears both ripe for growth and vulnerable to domination as the speed with which ground can be gained and staked out is something that traditional competition enforcement strategies are not geared to address.

Some might perceive a risk that the OIPMI is partly a tactic to fast-track evidence gathering for enforcement outside of the more adversarial complaint process. However, provided that the Commission resists the temptation to prejudge certain market features as necessarily anticompetitive (for instance, network effects and price parity arrangements might bring benefits to users of both sides of the platform that should not be demonised in every instance) the OIPMI should prove useful to establishing a framework to better understand the dynamics at play in a sector of the economy that is set to become all-important.

What appears to be missing from the ToR is specific consideration of the various other routes to market that may be employed by suppliers, including the interaction between online channels and so-called "bricks and mortar" outlets – and whether intervention may be necessary to protect the off-line channel.

It is clear that the OIPMI is to be conducted with some urgency. Once final terms of reference are published the market inquiry will commence, to be finalised within 18 months. When the OIPMI is finalised, the Commission will provide a set of binding recommendations as to whether *inter alia* the existing competition laws and policies are adequate to address market power and possible anti-competitive conduct in online intermediation platforms. In addition, the Commission can use the process to resolve market failures and concerns through enforcement action and advocacy measures.

The Commission appears to recognise that any pointed remedies flowing from the OIPMI should be limited to addressing "entrenchment strategies" by dominant platforms "to ensure that markets are contestable and prevent irreversible concentration." Beyond that, the Commission will explore whether any uniform rules might be recommended that should apply to all platform operators, such as codes of conduct and other directives being introduced in other jurisdictions.

The digital economy appears both ripe for growth and vulnerable to domination as the speed with which ground can be gained and staked out is something that traditional competition enforcement strategies are not geared to address. Arguably no one yet has the measure of how competition will play out in the future and whether greater or less intervention may ultimately be the best course for a dynamic and innovative digital space. What is clear is that regulators around our "brave new" world are no longer happy to adopt a "wait and see" attitude in the face of perceived market power of incumbents who increasingly touch every aspect of our business and personal lives. The Paper and the OIPMI will set in motion initiatives to drive competition and provide access and equal opportunity to firms and consumers in South Africa.

Once the Commission commences its inquiry, platform owners, new platform developers, platform users, and those looking to enter the market will have an opportunity to participate and help shape the process with balanced and comprehensive input.

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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