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# COMPETITION LAW ALERT

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### Update on the Online Intermediation Platforms Market Inquiry

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## Ambition laid bare: DTIC Competition Policy for Jobs and Industrial Development is now for all to see

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Financial crises, global pandemics and the foibles of modern society has no doubt contributed to a surging “*cult of policy*” among the political elite in South Africa and around the world. To be called a “*policy work*” is no longer a slur, but a mark of expertise and practically guarantees tenure within the State machinery... and the Department of Trade, Industry and Competition (DTIC) is currently blessed with quite likely the wonkiest policy architects in the Cabinet.

Off the back of the 2021 Budget Vote on 18 May, the DTIC Minister has published a slew of transformative policy documents – including a Statement on Localisation for Jobs and Industrial Growth and a long-awaited [Practice Note on Broad-based ownership schemes](#). While Minister Patel’s policy on underwear during the early lockdown still sits uncomfortably (so to speak), his latest moves appear far more measured and farsighted.

In line with his hands-on approach to competition enforcement, the Minister has also released a [Competition Policy for Jobs and Industrial Development](#) (Competition Policy). At less than seven pages, the Policy is punchy and digestible and serves as a useful precis of the policy approach the Minister has taken over the past few years and will continue to drive, especially insofar as interventions in mergers are concerned.

At the outset, the Competition Policy is ambitious. It, “*aims to address our high levels of economic concentration and promote effective competition that supports industrialisation, builds dynamic firms, protects and creates jobs and promotes economic inclusion and transformation.*” While that is a lot to expect from a competition regulator, the DTIC is also seizing other levers to help drive the policy – amendments to the Companies Act; developing trade policy under the AfCFTA; specific legislation addressing wage differentials and governance on director pay and other financial disclosure; and new thinking on a “*Social and Solidarity Economy*” are all in the pipeline.

In the mergers space, the Competition Policy is squarely focussed on public interest and reveals a truth that those in the business of notifying mergers have long understood: the impact of a transaction on certain public interest factors will attract as much, if not more, scrutiny as the effects on competition. In addition, the government will increasingly be looking to M&A players in South Africa deliberately and expressly to contribute to transformation ideals. As the Policy indicates: “*Agreements reached between merging parties and government, using the provisions of the Competition Act, have produced significant developmental outcomes in a range of areas and provide a guide to the market of the kinds of concerns that policy-makers will explore with merger parties.*”

## Ambition laid bare: DTIC Competition Policy for Jobs and Industrial Development is now for all to see...continued

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### Five public interest considerations are highlighted in the Competition Policy.

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By way of agenda points, five public interest considerations are highlighted in the Competition Policy:

1. **Employment:** Mergers that result in job losses will be of concern. While there is recognition that a merger may need to reshape the employment profile (e.g. to address duplications in key functions) this will need to be ameliorated by other job-friendly measures, including: maintaining overall aggregate headcount for three to five years; commitments to expand employment after a merger (with measurable targets); and quantified financial support for skills development.
2. **Broad-Based Ownership:** Merging parties will need to account for any impact on broad-based ownership. A change in ownership through a merger is seen as an opportunity also “to have a greater number of black South Africans drawn into ownership.” A greater focus will also be placed on providing workers with ownership stakes, coupled with board representation.
3. **Supplier Development:** With a focus on developing small and medium businesses and localisation of production, merging parties in key industrial sectors or regions will be expected to maintain, if not improve, levels of local procurement. Where a local business is acquired by a foreign firm, concerns around displacing local value chains are acute. The Policy may also require a commitment to maintain headquarters in South Africa to ensure that decisions with local impact are taken in close proximity to operations.
4. **Investment:** The DTIC will look favourably on mergers that include investments in the economy over and above the purchase price and beyond capex already anticipated absent a merger.
5. **Downstream beneficiation:** As part of the Minister’s industrialisation policy, acquisitions involving key resources (e.g. in the mining or agricultural sector) will need to show support for local beneficiation, particularly in downstream sectors where job creation is likely.

Although the above reflect the key areas where an intervention by the DTIC might be expected, there will be no compunction about leveraging the particular context of a merger to drive other policy goals, such as environmental sustainability.

In practical terms, the DTIC’s policy approach matters because the Competition Act empowers the DTIC to participate in any merger investigation as custodian of the public interest effects of mergers. The Competition Authorities are required to consider the views of the DTIC and are often aligned with the DTIC on policy. A failure sufficiently to account for the public interest in any merger filing will lead to delays at best. At worst, the DTIC can intervene in mergers before the Competition Tribunal and appeal decisions to the Competition Appeal Court.

The Competition Policy provides a granulated codification of the “hot buttons” to consider when contemplating a merger. The DTIC has so far been mindful not to suggest that South Africa is hostile to M&A, particularly foreign investment. Accordingly, not every merger will beget a full workover from the Minister,

## Ambition laid bare: DTIC Competition Policy for Jobs and Industrial Development is now for all to see...continued

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and in most instances one or two of the factors will be considered rather than a full suite of conditions. In addition, where a merger creates an obvious public interest concern on one or more of the factors, a positive effect on the other factors can be used to secure support for the merger. In high profile mergers, the Minister will often look only to catalyse and pin down additional benefits and investments that appear to make sense in the context of the merger, and which merging parties can get behind.

Certainly, one might quibble with certain aspects of the Competition Policy – it is perhaps short on empirical evidence to back up certain claims (for instance, that dominant firms invariably disadvantage customers, offer inferior products and result “in increased imports depriving the local economy from expanding industrial output and jobs”) and some terms could

benefit from clearer definitions (“dynamic firms” and “industrialisation” are cases in point). It also avoids the important caveat that a merger that has no negative impact on the public interest ought not to be interfered with (and so rather betrays a sense that M&A is somehow value extractive for the economy rather than a sign of vibrancy).

Nevertheless, the Competition Policy is something that architects of significant M&A transactions in South Africa should add into the mix early when considering a deal. It is essential reading as a transparent account of the Minister’s manifesto on competition policy, and merging parties that can demonstrate buy-in on its key tenets will enjoy a smoother pass to merger approval and ongoing support from the DTIC.

*Chris Charter*



## Update on the Online Intermediation Platform Market Inquiry

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As part of the Online Market Inquiry, the Commission will be looking to keep tabs on global developments in the space, to help ensure alignment with international practice.

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On 19 May 2021, the Competition Commission formally launched its market inquiry into online intermediary platforms (Online Market Inquiry). The Inquiry will be of interest to owners of online market places, new platform developers, platform users and anyone with a stake in the digital economy. The Inquiry has been launched amid concerns around the world relating to the potential distortive impact of disproportionately large firms in the e-commerce space. As the digital economy moves forward at light speed, an increasing dependence on online platforms could leave consumers and suppliers vulnerable.

At the same time, effective e-commerce can be a major economic driver, providing new routes to market and a more efficient experience for consumers.

The Online Market Inquiry will be chaired by James Hodge, the Commission's Chief Economist and Acting Deputy Commissioner. As part of the Inquiry, the Commission will be looking to keep tabs on global developments in regulating the digital space, to help ensure alignment with international practice.

A final statement of issues has been published for comment by 18 June 2021. In addition, stakeholders are encouraged to complete the first of a likely series of (needless to say) online surveys, also by 18 June 2021. Certain market participants earmarked by the Commission can also expect initial requests for information to be received in short order.

In terms of the latest administrative timetable published, a summary of the key steps are as follows:

- ∞ Following the analysis of the submissions received on the Statement of Issues, the Inquiry will publish a second Statement of Issues in the week of 9 August 2021 focused on key emerging issues for stakeholders to make submissions. The Inquiry will also conduct further online surveys around emerging issues and further information requests to some market participants. Submissions from the second Statement of Issues should reach the Inquiry by 10 September 2021, along with online survey responses.
- ∞ The Inquiry aims to conduct online virtual public hearings with stakeholders from 1 to 19 November 2021.
- ∞ Following the public hearings, the Inquiry may hold direct engagements with particular stakeholders and request further information on issues emerging from the hearings.
- ∞ By the first week of May 2022, the Inquiry anticipates releasing its preliminary findings and recommendations.
- ∞ The Inquiry will invite submissions on these findings and recommendations by 10 June 2022, before releasing its final findings and recommendations in November 2022.

# Update on the Online Intermediation Platform Market Inquiry...continued

The Commission is committed to the principles of fairness, transparency and integrity and will conduct the Inquiry in accordance with these principles.

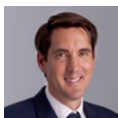
The Commission is committed to the principles of fairness, transparency and integrity and will conduct the Inquiry in accordance with these principles. To give effect to this, the Commission has published guidelines for participation in the Inquiry (Guidelines). These Guidelines contain rules of participation that will apply to all firms wishing to participate in the Inquiry, a summary of the key points are included below.

<p><b>Powers of the Commission</b></p> <ul style="list-style-type: none"> <li>∞ The Commission may assess the subject-matter of the Inquiry by gathering information through various sources ranging from written submissions, targeted information requests, questionnaires and surveys, research studies, data reviews, direct and public consultations, focus group discussions, sites visits and formal public hearings.</li> <li>∞ Moreover, the Commission has the power to issue summons and interrogate market participants and may even compel the production of books, documents and other object that may have a bearing on the Inquiry.</li> </ul>	<p><b>Who may participate?</b></p> <ul style="list-style-type: none"> <li>∞ The following types of online platforms are intended to be covered in the Inquiry: eCommerce marketplaces, online classifieds, travel and accommodation aggregators, short term accommodation intermediation, food delivery, application stores and other platforms identified in the course of the Inquiry.</li> <li>∞ Business entities along the digital platforms value chain, end-users, government departments, public entities, regulatory authorities, industry associations and any other stakeholder that may be able to provide information that is relevant to the Inquiry may participate in the process.</li> </ul>
<p><b>Methods of Participation</b></p> <p>A market participant wishing to participate may make:</p> <ul style="list-style-type: none"> <li>∞ Written submissions in line with “ <i>Form OIPMIT</i>”.</li> <li>∞ Oral submissions are only permitted if the market participant has first made written submissions and has provided information to the Commission on issues to be addressed at public hearings. Interested parties must specify on “<i>Form OIPMIT</i>” their willingness to make oral submissions.</li> </ul>	<p><b>Handling of information and data</b></p> <ul style="list-style-type: none"> <li>∞ The Commission wishes for market participants to submit information on a voluntary basis through written submissions, questionnaires, requests for information and testimony.</li> <li>∞ If oral testimony is made in the public hearings, the market participant will either be sworn in or required to make an affirmation.</li> <li>∞ Parties have the right to claim confidentiality over any information if it falls within the meaning of “<i>confidential information</i>” as set out in the Competition Act. Access to confidential information and/or documents submitted to the Inquiry shall be governed by the provisions of the Competition Act and Rules.</li> </ul>

Chris Charter and Naasha Loopoo

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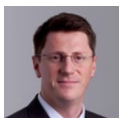
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### BBBEE STATUS: LEVEL TWO CONTRIBUTOR

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.

### PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

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