



COMPETITION LAW ALERT

15 JULY 2022



CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

IN THIS ISSUE

Robust intervention recommended in the Commission's preliminary report on the online platform inquiry

On 13 July 2022, the Competition Commission of South Africa (Commission) released for public comment its provisional report (Report) following a 14-month inquiry into the online platforms market (the Inquiry). The document is comprehensive and ambitious in equal measure and reveals the regulator's fervent intention to take meaningful steps to regulate business practice in the digital space.



FOR MORE
INSIGHT INTO
OUR EXPERTISE
AND SERVICES

Robust intervention recommended in the Commission's preliminary report on the online platform inquiry

On 13 July 2022, the Competition Commission of South Africa (Commission) released for public comment its provisional report (Report) following a 14-month inquiry into the online platforms market (the Inquiry). The document is comprehensive and ambitious in equal measure and reveals the regulator's fervent intention to take meaningful steps to regulate business practice in the digital space.

The Inquiry focused on online intermediation platforms, which included platforms facilitating eCommerce, app stores, travel and accommodation, food delivery, and online classifieds.

The Inquiry identified market features that have adverse effects on competition – both amongst the various platforms, as well as between businesses using these platforms – or result in exploitation due to a lack of competition. Furthermore, the Inquiry considered the extent to which small and medium enterprises and Historically Disadvantaged Persons (HDPs) participate and compete.

The Inquiry sought to identify so-called "leading platforms": those that receive the most consumer traffic, upon which business users are dependent, and which are likely to be entrenched. The Report thus covers a number of household names such as Takealot, Property24 and Mr Delivery, as well as international players such as the Apple and Google App stores, UberEats and Google Search.

The Inquiry's provisional findings look to address a number of concerns identified across the various categories of platforms, including:

- **Lack of transparency over pay-for-position rankings** – to be addressed with stricter rules on how and where paid results can be displayed and ranked.
- **Exploitative and discriminatory fees which exclude smaller businesses that cannot match the spend of larger players** – to be addressed with fee caps and standard rate cards.
- **Asymmetric business terms that allow the platform to be paid ahead of the business user** – to be addressed by allowing customers to pay the business directly rather than through the platform.
- **Platform exclusivity restricting direct sales or use of other channels** – to be addressed by allowing this only at the behest of the supplier, not the platform.

2022 RESULTS

CHAMBERS GLOBAL 2011 - 2022 ranked our Competition Law practice in Band 2: competition/antitrust.

Chris Charter ranked by **CHAMBERS GLOBAL 2018 - 2022** in Band 1: competition/antitrust.

Andries le Grange ranked by **CHAMBERS GLOBAL 2022** in Band 4: competition/antitrust.

Lara Granville ranked by **CHAMBERS GLOBAL 2022** in Band 5: competition/antitrust.

Albert Aukema ranked by **CHAMBERS GLOBAL 2020 - 2022** as an upcoming competition/antitrust lawyer.



Robust intervention recommended in the Commission's preliminary report on the online platform inquiry

CONTINUED

- **Self-preferencing conduct** – to be addressed by separating retail operations from operation of the marketplace, fair access to data, removal of “algorithm bias” and other measures to ensure equal treatment of users.
- **Inadequate app store competition, sideloading restrictions and a lack of discoverability of South African apps** – to be addressed by regulation of commission fees, curation and improved visibility of local apps.

TARGETED OBLIGATIONS

The above remedies are to be imposed only on the identified “leading platforms”, many of which may feel unfairly targeted in circumstances where challengers are not similarly restricted. Given that many of the markets may be

more dynamic than the Report suggests, targeted obligations could have unintended consequences for competition down the line.

No doubt, concerns will be raised about the extent to which such robust management of business models amounts to regulatory overreach. While business users and start-ups (especially the more marginalised ones the Inquiry’s recommendations seek to protect) stand to benefit, in some respects this may be to the initial detriment of consumers, who may face higher prices for goods where deep discounting on larger platforms may now be restricted. The Commission may counter with the argument that in due course, more robust competition between and on platforms will result in lower prices, as well as an increased ability for small businesses to compete on price (rather than on paying for visibility).

TRANSFORMATION IN THE DIGITAL ECONOMY

The Inquiry’s provisional views on HDP participation indicate that the digital economy is far less transformed than the broader economy, which itself is relatively untransformed. The Report recognises that there are significant challenges rooted in funding and support. Notably, the Inquiry found that capital generation through seed funding and venture capital is limited for HDPs – often these are only available if the investors expressly mandate that funding go to HDP entrepreneurs.

In response, the Report recommends that private investors and government funding channels specifically commit to HDP mandates. More directly, it recommends that all leading platforms provide HDP businesses with personalised onboarding, waiving of onboarding costs and fees, free promotional credits, fees that do not exceed the best placed users, and opportunities for consumers to discover HDP businesses on the relevant platform.



Robust intervention recommended in the Commission's preliminary report on the online platform inquiry

CONTINUED

The findings and recommendations are provisional. Nevertheless, they portend potentially stringent and costly efforts for the platforms affected, should these become final. The Commission's well-intended but stringent remedies could have undesirable effects on the growth of an economy that is largely reliant on foreign investments. Stakeholders and the public have a short, six-week window, until close of business on 24 August 2022, to make submissions to the Inquiry on these findings and recommendations. All submissions should be sent to oielmi@compcom.co.za.

Parties interested in making submissions to the Inquiry should substantiate their submissions with evidence (where relevant); such parties are encouraged to consider the strategic and legal consequences of making submissions, or failing to make submissions.

The Inquiry is expected to release a further version of the report within the next few weeks, pending the resolution of certain confidentiality claims. The final report is currently expected in November 2022.

**CHRIS CHARTER, TAIGRINE JONES
AND LEAGO MATHABATHE**



The Legal 500 EMEA 2022 Results graphic features a dark blue background with a diagonal line of light blue and yellow. The text is white and blue. The logo 'The LEGAL 500' is at the top left, with 'EMEA' below it. To the right, '2022 RESULTS' is written in large white letters. Below the logo, there are three lines of text, each starting with 'The Legal 500 EMEA 2022 recommended' followed by a name and a description of their achievement.

The LEGAL 500
EMEA

2022 RESULTS

The Legal 500 EMEA 2022 recommended our **Competition Law practice** in **Tier 2** for competition.

The Legal 500 EMEA 2022 recommended **Chris Charter** as a leading individual for competition.

The Legal 500 EMEA 2022 recommended **Naasha Loopoo** as a 'rising star' for competition.

The Legal 500 EMEA 2022 recommended **Lara Granville** as a leading individual

OUR TEAM

For more information about our Competition Law practice and services in South Africa and Kenya, please contact:



Chris Charter

Practice Head & Director:
Competition Law
T +27 (0)11 562 1053
E chris.charter@cdhlegal.com



Sammy Ndolo

Managing Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E sammy.ndolo@cdhlegal.com



Albert Aukema

Director:
Competition Law
T +27 (0)11 562 1205
E albert.aukema@cdhlegal.com



Lara Granville

Director:
Competition Law
T +27 (0)11 562 1720
E lara.granville@cdhlegal.com



Andries le Grange

Director:
Competition Law
T +27 (0)11 562 1092
E andries.legrange@cdhlegal.com



Susan Meyer

Sector Head: Healthcare & Pharmaceuticals
Director: Competition Law
T +27 (0)21 481 6469
E susan.meyer@cdhlegal.com



Njeri Wagacha

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E njeri.wagacha@cdhlegal.com



Leago Mathabathe

Senior Associate:
Competition Law
T +27 (0)11 562 1927
E leago.mathabathe@cdhlegal.com



Reece May

Senior Associate:
Competition Law
T +27 (0)11 562 1071
E reece.may@cdhlegal.com



Nelisiwe Khumalo

Associate:
Competition Law
T +27 (0)11 562 1116
E nelisiwe.khumalo@cdhlegal.com



Mmakgabo Makgabo

Associate Designate:
Competition Law
T +27 (0)11 562 1723
E mmakgabo.makgabo@cdhlegal.com

BBBEE STATUS: LEVEL ONE 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.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.
Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114
E cdhkenya@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdh Stellenbosch@cdhlegal.com

©2022 11309/JUL

