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Steering Digital Markets Towards Development

By Tembinkosi Bonakele

Following a preliminary scoping of South Africa's digital economy, the South African Competition Commission ("CCSA") launched its market inquiry into digital markets earlier this year. The purpose of the inquiry is to optimize market conditions for the growth of small businesses and firms owned by historically disadvantaged persons, given the high levels of poverty, unemployment and inequality prevailing in the South African economy. Similarly, the scope of the inquiry is limited to online intermediation platforms because of the impact of intermediation platforms on small businesses and firms owned by historically disadvantaged persons. So far, the inquiry has received 134 written submissions from market participants and heard 51 oral submissions to date. The CCSA launched the inquiry because international studies and domestic experience indicated that there were features of online intermediation platforms which could impede, restrict or distort competition between platforms (inter-platform competition) but also competition between business users on those platforms (intra-platform competition). The inquiry is looking to explore these features with a view to understanding market dynamics, recommending solutions and instituting further action where necessary.

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I. INTRODUCTION

On May 19, 2021, the South African Competition Commission (“CCSA”) launched its market inquiry into digital markets. While several competition agencies the world over have launched inquiries into digital markets, the CCSA’s inquiry differs in two material respects: (1) it seeks to optimize market conditions for the growth of small businesses and firms owned by historically disadvantaged persons or HDP’s; and (2) its scope is limited to online intermediation platforms. As I write, the inquiry is conducting its first round of public hearings which are set to end on November 19, 2021. So far, the inquiry has received 134 written submissions from market participants and heard 51 oral submissions to date.

II. RATIONALE FOR THE INQUIRY

South Africa’s economy is plagued by rampant unemployment, stark income inequality, and incessant poverty. The arrival and rapid rise of the digital economy presents South Africa with an opportunity to reverse this pervasive triple scourge of unemployment, inequality, and poverty. But in order to harness the promised benefits of digitalization, South Africa must create a commercial and regulatory environment designed to extract those benefits and distribute them in a way that ensures inclusive economic growth, that has greater participation by black and women-owned firms, and produces increased and meaningful employment.

Unfortunately, for all its promise, the digital economy in developing countries already threatens a new era of global concentration and, with it, the further marginalization of vulnerable countries and businesses. Therefore, specific regulation is required to avoid outcomes that could harm the development of small businesses, consumers and ultimately the economic growth so needed in South Africa’s developing economy. The need for such regulation has become all the more urgent with the advent of COVID-19, which is set to move more products and services online at a rapid pace.

In pursuit of a focused and informed approach to digital markets, the CCSA published a report in early 2021 on how it views digital markets, their role in economic development, and the potential concerns arising from them that could hinder inclusive economic growth. The report highlights a feature of many digital platform markets, i.e. the tendency towards 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 arising from the positive network effects of two-sided markets, and further product development advantages arising from data accumulation.

However, it may also be due to deliberate strategies to retain early leadership (such as most-favored-nation (“MFN”) pricing rules with partners), to acquire competitive threats (so-called “killer acquisitions”), and to 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 that markets are contestable and to prevent irreversible concentration. Ensuring that markets are contestable also requires competition policy tools to facilitate access by potential entrants. The report 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 provide a more effective means of drawing balanced conclusions and addressing barriers to participation in such markets, particularly by small businesses and firms owned by historically disadvantaged persons. The report indicated that digital platform markets were a case in point. The CCSA subsequently launched a market inquiry in order to address market features in these markets which might hinder competition or undermine the purposes of South Africa’s Competition Act of 1998, as amended.

III. SCOPE OF THE INQUIRY

Given the very wide reach of digital markets, the CCSA sought to narrow the scope of the inquiry for high impact and relevant outcomes. Before zeroing in on a specific focus area for the inquiry, we split digital platform markets into three broad categories based on the type of online offering at issue, each of which had a different monetization strategy and, as a result, raised different competition and public interest issues.

The three broad categories were:

- platforms intermediating goods and services between businesses and customers, which were typically monetized on commission/sales business models. These would include e-commerce marketplaces, software application stores, so-called match making

platforms for accommodation or food services and aggregation services such as travel or similar classifieds;

- search and social media platforms which tend to be monetized through 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; and
- a third distinct category was the fintech market, including new emerging payment systems operators. These were distinguished from the other two categories largely insofar as these technological platforms and start-ups usually operated within a pre-existing financial market regulatory context where prudential and customer security issues were highly prominent.

Each of these markets raised a slightly different set of competition and public interest issues to each other, but which were typically common across platforms within each of these categories. The broad concerns we identified in each category are summarized in Table 1.

Table 1: Broad competition concerns by category

Category	Concerns identified
Intermediating platforms	<ul style="list-style-type: none"> • Self-preferencing • Unfair trading terms • Extraction of business data • Potential distortion from ranking algorithms
Search and social media platforms	<ul style="list-style-type: none"> • Consumer data exploitation • Reduced revenue for advertising firms • Dominance to the detriment of advertising firms and publishers • Excessive pricing to domestic advertisers
Fintech platforms	<ul style="list-style-type: none"> • Gatekeeper role of traditional financial institutions may lead to (1) blocking access to consumer data; and (2) authorized access to accounts

After some consideration, the CCSA concluded that the competition and public interest aspects of fintech markets were best addressed through a collaborative approach with other regulators. In particular, given the key role of financial regulators in fintech markets, a collaborative approach would better achieve the competition objectives, in a manner that did not undermine prudential and data security considerations. Consequently, the CCSA opted not to include fintech markets in the market inquiry.

Digital advertising markets remained a concern for the CCSA, and indeed antitrust authorities globally, given the potential negative outcomes for domestic consumers, content publishers, and businesses using digital advertising. However, these markets were global in nature and the issues had become relatively well known. Interventions required to improve the contestability of these markets most likely needed to occur on a global scale for global competitors to emerge, even though the outcomes for domestic consumers and businesses could be addressed through interventions of a local nature. In addition, the competition issues simultaneously raised other concerns such as independent media funding and data privacy. For this reason, the CCSA chose not to include digital advertising markets in the market inquiry but left the door open for a future, more focused inquiry into some aspects of these markets.

The CCSA thus prioritized an inquiry into online intermediation platforms given their importance to business user participation in the online economy - especially by small businesses and firms owned by historically disadvantaged persons - and their ability to shape such markets domestically given that competition typically is shaped by contracts and investments within the domestic economy. We observed that the online economy had greatly accelerated during the COVID-19 pandemic, and access to online opportunities for domestic businesses would likely be critical for economic recovery and inclusive growth, as recognized in the Economic Recovery and Reconstruction Plan of the government. We were concerned that there could already be growing concentration and market leadership in many of these platform markets and therefore it was essential that market conduct and features were assessed to ensure that these markets were contestable, preventing any dominance that already existed from becoming durably entrenched. Given the potential dependency of business users on these platforms for accessing online consumers, it was also an imperative under the purposes of the Competition Act to ensure that small businesses and firms owned by historically disadvantaged persons were not the subject of exploitation and unfair treatment.

IV. FOCUS ON ONLINE INTERMEDIATION PLATFORMS

Informed by international studies and domestic experience, the CCSA observed that there were features of online intermediation platforms which could impede, restrict, or distort competition between platforms (inter-platform competition) but also competition between business users on those platforms (intra-platform competition). Furthermore, there were features of these markets which could undermine the public interest insofar as the potential exploitation of business users, including small businesses and firms owned by historically disadvantaged persons, which could hinder their effective participation in the online economy.

Table 2 below sets out the inter-platform and intra-platform competition concerns that the market inquiry set out to explore.

Table 2: Inter-platform and intra-platform competition concerns

Inter-platform competition concerns	Intra-platform competition concerns	Concerns that straddle inter- and intra-platform competition
Most favored nation or price parity clauses in contracts	Unfair terms and conditions	Self-preferencing where platform owner plays a dual role
Exclusive contracts that prevent multi-homing across different platforms	Excessive fees and commissions	Resale price maintenance by the platform owner
Volume rebates that disincentivize multi-homing across different platforms	Disproportionate transfer of risks or costs	Exploiting business user transaction data
Predatory pricing on e-commerce platforms		Ranking practices that disadvantage small and HDP businesses
Conglomeration of consumer data across multiple platforms within one stable		Volume discounts that disadvantage small and HDP businesses
Cross-promotion of platforms within one stable		

Aside from specific business model practices that exist among online intermediation platforms which may hinder competition or undermine the purposes of the Act, the CCSA observed that there were also general market features which could limit competition. These included: (1) the role of network effects in reinforcing a first-mover advantage; (2) large capital costs to sustain losses initially for later entrants challenging market leaders; (3) the general digital advertising model on search that benefitted those able to pay for position and bid on the search terms of new rivals.

Similarly, there could be other barriers faced by small businesses and firms owned by historically disadvantaged persons from participating in the online economy even through online platforms. These included the capital, systems and technologies required to interface and deliver against the platform requirements.

Ultimately the CCSA was concerned that there were substantial reasons to believe that there were market features of online intermediation platforms domestically that could impede, distort, or restrict competition, alternatively undermine the purposes of the Competition Act. This was reinforced by the fact that the CCSA had received complaints alleging anti-competitive conduct in certain platform markets. Furthermore, there was substantial benefit to an inquiry that could shed light on what was occurring in these markets and whether these features were impacting on platform competition and the participation of small businesses and firms owned by historically disadvantaged persons.

This was particularly in the context where it was important to pre-emptively act to ensure that any dominance or market leadership that could exist did not become durably entrenched such that it became irreversible, an objective shared by many competition authorities globally. It was also important in the context where online commerce had accelerated under the COVID-19 pandemic and was fast becoming an essential route to market for many South African businesses. Features which could undermine the participation of small businesses and firms owned by historically disadvantaged persons in online commerce would undermine inclusive growth and entrench traditional market concentration into the future.

V. HEARING SCHEDULE

As mentioned, the CCSA officially launched the online intermediation market inquiry on May 19, 2021. As part of the inquiry the CCSA received both written and oral submissions. Having received the written submissions, the inquiry now expects to hear oral submissions throughout November 2021. Included in the list of market participants that will make oral submissions are Takealot, Google (search travel and shopping), Wedash, UberEats, Travelstart, Flightstart, Safarinow, and Bolt Food.



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