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**Enforcing competition law in digital markets and ecosystems:  
policy challenges and options**

**Contribution**

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**Roundtable on Enforcing Competition Law in Digital Markets and Ecosystems:  
Policy Challenges and Options**

**Contribution by the Competition Commission of South Africa**

## A. INTRODUCTION

1. The United Nations Conference on Trade and Development will hold a roundtable on 'Enforcing Competition Law in Digital Markets and Ecosystems: Policy Challenges and Options' at the Twenty-second Session of the Intergovernmental Group of Experts on Competition Law and Policy scheduled for July 2024 in *Palais des Nations*, Geneva, in respect of which it has invited written contributions from interested participants. This note serves as the contribution of the Competition Commission of the South Africa (the CCSA) to this roundtable. In this note, the CCSA shares its experiences and approaches to enforcing competition law in digital markets in South Africa.
2. The emergence and rapid adoption of digital platforms presents new opportunities for developing countries, to promote a more inclusive economic growth. However, in order to harness all the promised benefits of digitalisation, the developing nations ought to create a conducive commercial and regulatory environment to exploit all the emerging opportunities. Competition policy is part of the primary levers at government disposal to safeguard the potential opportunities and to also guard against a new era of global concentration and marginalisation of vulnerable businesses.
3. Many competition authorities globally have placed regulations of digital markets at the top of their agendas and South Africa is no different. The novel features and the dynamic nature of these markets challenges regulators to adopt a more proactive approach in order to devise appropriate tools for effective regulation. Authorities have adopted different tools that are appropriate to achieve different objectives.
  - 3.1 The European Union has adopted a regulatory approach to specific identified conduct by large platforms through the Digital Markets Act (DMA) and is staffing a new regulatory team to oversee the implementation of this Act.
  - 3.2 The Competition and Markets Authority in the United Kingdom (CMA) established a Digital Markets Units with dedicated resources to regulate of competition in digital markets. In June 2024 the United Kingdom government also passed into law the Digital Markets, Competition and Consumers Act, which grants the Digital Markets Unit enhanced powers to regulate companies with substantial and entrenched market power in digital markets.

4. The CCSA is taking a different approach and has intervened in digital markets through market inquiries. In 2023 the CCSA concluded a market inquiry into online intermediation platforms and is currently conducting another market inquiry into media and digital platforms.
5. In this contribution we outline the legal framework for market inquiries in South Africa and the benefits of application as an alternative tool in enforcement of digital markets, and one of the potential options that countries may look to adopt. We also touch on merger control in digital markets.

## **B. MARKET INQUIRIES**

6. Market inquiries, also commonly referred to as market studies or market investigations, are conducted by numerous competition authorities globally but there is no universal definition for them.<sup>1</sup> This may be due to the differences in their conception, outcomes and the legal framework applicable in different jurisdictions. In South Africa, a market inquiry denotes a formal inquiry into the general state of competition, the levels of concentration in and structure of a market for particular goods or services.<sup>2</sup>
7. Market inquiries differ from traditional investigations in that, while investigations target specific firm(s) engaged in a specified anti-competitive conduct, market inquiries focus on any feature or combination of features in a market which may have the effect of distorting or restricting competition. The features of a market contemplated in this regard include structural features (such as levels and trends of concentration), the outcomes observed in that market (including prices, customer choice, the quality of goods or services and innovation), conduct by firms in the market and conduct by any firm that supplies goods or services or customers of such firms. This has the advantage of dealing with the entire ecosystem around a market. Inquiries are proactive rather than reactive, seeking to improve competition in a market rather than fix abusive or exploitative conduct.

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<sup>1</sup> OECD 'The role of market studies as a tool to promote competition' (2016) DAF/COMP/GF (2016)4, available at [https://one.oecd.org/document/DAF/COMP/GF\(2016\)4/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2016)4/en/pdf), accessed on 06 June 2024.

<sup>2</sup> Section 43.A(1) of the Competition Act 89 of 1998, as amended.

8. Market inquiries conducted by the CCSA result in binding remedial actions imposed on firms and recommendations to government on changes to regulations or legislation. The far-reaching approach of the market inquiries often produce tangible solutions to dismantle structural barriers to reinforce effective competition in the affected markets post intervention, as opposed to targeted enforcement action that address a specific conduct. The outcomes of market inquiries also provide material benefits for consumers and with the recent legislative amendment they can be used to attain public interest objectives.
9. Despite these benefits, there are shortcomings that are associated with market inquiries. In the main, market inquiries are generally considered to be resource and time intensive. In addition to that, in regulated sectors they can lead to competition authorities encroaching in other regulators' mandate and resulting in duplicated outcomes.<sup>3</sup> These shortcomings are, however, not insurmountable to circumvent. For instance, from its previous market inquiries the CCSA learned that it is market inquiries with a broad scope and unclear objectives that tend to be resource and time intensive, therefore a narrower scope that is informed by the intended outcomes becomes imperative. To avoid the other challenges relating to mandate creep in regulated sectors the CCSA prioritises extensive consultations with all relevant stakeholders in its processes.
10. In conducting market inquiries, the CCSA is guided by Chapter 4A of the Competition Act 89 of 1998 (the Act). The legislation guides the processes to be followed in initiating and conducting a market inquiry, timelines and responsibilities. It also outlines the matters to be decided in a market inquiry and the duty to remedy any findings of adverse effects on competition. Under Section 43B, the Act empowers either the CCSA or the Minister responsible for its administration (currently Minister of Trade, Industry and Competition) to initiate an inquiry into any market if (a) there is any reason to believe that any feature or combination of features of a market for any goods or services impedes, distorts or restricts competition within that market; or (ii) to achieve the purposes of this Act. Section 43C outlines matters that can be decided by a market inquiry and extend the responsibility to test if the conduct found to impede, distort and/or restrict competition leads to any adverse effects on competition in the market. This establishes a different test for market inquiries and a lower threshold in comparison

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<sup>3</sup> Griffiths and Gumbie, 'Probing the value of market inquiries from the perspective of the Banking Enquiry' (2014). Available at <http://www.compcom.co.za/wp-content/uploads/2014/09/Banking-Enquiry-Griffiths-Gumbie.pdf>, accessed on 05 June 2023.

to the test for anti-competitive effect required with other enforcement tools. The same section further enables the authority to consider public interest issues in market inquiries, as it obligates the CCSA to have regard to the impact of the adverse effect on competition on small and medium businesses and those owned or controlled by historically disadvantaged persons, when deciding whether any feature of a market impedes, restricts or distorts competition.

11. Once the test for adverse effects has been satisfied, the legislation requires the authority to take action to remedy, mitigate or prevent any adverse effect on competition identified in the market inquiry, subject to the provisions of any law. This responsibility is integral in ensuring the effectiveness of the market inquiries, as it enables the CCSA to issue binding remedial actions. However, in crafting the remedial actions and determining what is reasonable and practicable, the authority is also required to take into account the nature and extent of the adverse effect on competition, the nature and extent of the remedial action itself, the relation between the adverse effect on competition and the remedial action, the likely impact of the remedial action on competition in the affected market or any other markets, and any other factors that may arise from information obtained during the market inquiry.

### **C. CCSA ENFORCEMENT IN DIGITAL MARKETS**

12. In its efforts to regulate and shape digital markets, the CCSA opted for proactive enforcement. Similar to other developing states, digital markets in South Africa are still at their developing stages, although the rate of adoption is rapidly increasing. In identifying the appropriate tool for intervention, the CCSA opted for the option that could possibly result in effective preservation of the potential for an inclusive digital economy and also protect the interests of small businesses and those owned by the historically disadvantaged persons operating those markets. With such objectives market inquiries became the viable choice. In 2023 the CCSA concluded the Online Intermediation Platforms Market Inquiry (OIPMI) with a host of remedial actions for local and global platforms to comply with. In the same year the authority also launched another market inquiry, focusing on media and digital platforms.

#### **a. ONLINE INTERMEDIATION PLATFORMS MARKET INQUIRY**

13. The CCSA formally initiated the OIPMI on 19 May 2021, focusing on business-to-consumer online platform markets in six categories, including eCommerce, online travel agencies, food delivery, app stores, property/automotive classifieds and general search. The scope of the inquiry was limited to these platform categories as the initial scoping by the CCSA indicated that platforms in these segments affect real business activity across a wide range of the economy.
14. The CCSA found that there is a combination of features that hindered the ability of small platforms to compete with the leading platforms in these markets, resulting in ineffective competition in the identified platform market categories. The value proposition of online intermediation platforms for business users is access to a wider range of customers. Traffic acquisition strategies are therefore imperative for viability of any platform. On the other hand, the value proposition for the consumers is a wide range of content from the business users. Therefore, the leading platforms applied various strategies that distort, restrict and impede competition in ensuring that they maintain both sides of the markets. The CCSA also noted that the business users were highly dependent on the leading platforms, especially the small business users, and as a result were exploited, in terms of price discrimination and general treatment.
15. The CCSA further noted that the South African digital markets were prone to entrenchment by global platforms in some categories as well as large local platforms in other categories. The authority distinguished the scaled platforms with leading positions, noting that in each category there were one or two platforms that attracted the predominant online consumer traffic on which business users were relatively dependent to access online customers. In online travel agencies, food delivery, app stores, and search the CCSA identified global platforms and in other categories, the authority identified large local platforms as the leading platforms.

#### ***General search***

16. Most online search, travel and shopping journeys for goods and services begin on general search, the entry point for most consumers to the Internet. General search leads are considered particularly valuable to platforms because they are intent-based. Google Search is a *de facto* monopoly, accounting for over 90% of all general search across desktop, tablet and mobile devices in South Africa. Given its importance for customer

acquisition, visibility on the Google search is critical and impacts on discoverability and website traffic. On Google Search itself, ranking matters as consumers show a predisposition to click on the first results assuming they are most relevant to the query.

17. Over the years Google search has also evolved to provide more prominence to paid results and Google's own properties relative to organic results for commercial search. The CCSA noted that whilst paid ads are on a cost-per-click auction basis and technically allows any platform to contest for a click, large platforms have considerable advantages, including budget size, contesting more popular commercial search terms given the higher returns on clicks, and the additional quality measures used in determining the outcome, all favour established platforms. Those same quality measures influence organic results and similarly favour larger platforms able to invest in search engine optimisation. The fact that Google allows duplication where a platform appears in paid and organic results, means large platforms can dominate both the top paid and organic search results. The disadvantage faced by small platforms is compounded in the case of platforms owned by the historically disadvantaged persons that lack even venture-capital backing domestically.
18. The CCSA found that Google Search's dominance and business model distorts platform competition, as small and new platforms struggle for visibility and customer acquisition. To address this distortion, the CCSA's remedial actions focused on improving paid and organic result visibility for smaller South African platforms. On organic results, the CCSA required Google to introduce a new platform sites unit (or carousel) to display smaller South African platforms relevant to the search (e.g. travel platforms in a travel search) for free and augment organic results with a content-rich display. Google was also required to introduce a South African flag identifier and South African platform search filter to aid consumers to easily identify and support local platforms in competition to global players. On paid results, the CCSA required Google to provide R180million in advertising credits for small platforms to use in customer acquisition along with free training to optimise advertising campaigns. Google is also required to provide a further R150million in training, product support and other measures for small online firms to offset the competitive disadvantages faced on Google Search.

### ***Online Travel Agencies***

19. In the online travel agencies category, the CCSA identified Booking.com as the leading platform for traditional hotel and accommodation establishments by a huge distance,



with Airbnb only being large in alternative accommodation (which typically includes homes, apartments, villas and house shares). The authority noted that Booking.com has the largest share of bookings in the market, and as a result accommodation providers are highly dependent on the platform for customers.

20. The CCSA noted that Booking.com imposed so-called 'wide price parity' conditions on the business users, which require them to offer room prices to Booking.com that are no less favourable than the room price offered to other OTAs. Wide price parity is widely accepted to be a hardcore restraint of trade even in other jurisdictions, as they distort and restrict price competition between platforms. In essence, the clause prevents other platforms competing with Booking.com on price, which not only harms consumers but impedes other OTAs from charging a lower booking commission to hotels in exchange for lower prices, hindering competition on platform commissions and prices too.
21. In addition to wide parity clauses, Booking.com also imposed so-called 'narrow price parity' which prevent hotels and other establishments from pricing lower on their own websites for online bookings. The ability of accommodation providers to price lower on their own direct channel is imperative for them to be able to develop their own channels, in order to reduce dependency on Booking.com, as it incentivises consumers to book direct. Narrow parity, limit the desire for consumers to book direct as there is no advantage, and potentially a disadvantage where there are loyalty discounts and a generous cancellation policy on Booking.com. The high dependency on Booking.com enabled the platform to extract higher commission fees either directly or through loyalty programmes and other schemes that provide greater visibility and customer acquisition or punish hotels that deviate with low ranking.
22. The CCSA found that Booking.com's wide and narrow price parity clauses are a feature that impedes competition. To remedy the resulting adverse effects, the CCSA's required Booking.com to remove the obligations and inform all hotels and accommodation providers in South Africa that list on its platform.
23. In regard to business user competition, the CCSA noted that Booking.com has increasing influence on bookings by both foreign and domestic travellers, as ranking high on the search results drives bookings. In the context of South Africa, black communities struggle to compete in the tourism sector due to a historical lack of tourism infrastructure development. On the other hand, the OTAs have predominately focused on established tourism and travel destinations and establishments, reinforcing historical

advantage and disadvantage. This is reflected in the small number of listings from establishments owned by the historically disadvantaged persons and the lack of promotion of alternative tourism communities. This market feature impedes the ability of black-owned establishments and communities to compete and remain viable in the tourism industry.

24. The CCSA found that Booking.com's lack of diversification distorts competition from black communities. To remedy this distortion, the CCSA required the platform to put in place substantial programmes to provide funding for initiatives in the identification, onboarding, promotion and growth of small businesses that are owned by historically disadvantaged individuals and/or in black communities on the Booking.com platform.

### **eCommerce**

25. In eCommerce, the CCSA identified a local platform, Takealot, as the leading platform. Takealot operate an intermediation platform, allowing sellers to list and sell their products on the platform, whilst also operating their own retail division, selling their own products on the same platform. In essence, the platform allows businesses to trade within the Takealot platform by listing products on their customer website and using their warehouse and logistics services to fulfil orders for a fee. Takealot has a dominant share of overall online sales in South Africa, including other eCommerce platforms and direct retailer or manufacturer sales channels. The platform has an even stronger position in providing online marketplace services to sellers. Smaller businesses wishing to trade on online marketplaces in South Africa are highly dependent on Takealot.
26. Similar to Booking.com, Takealot imposed a 'narrow price parity' on sellers, preventing them from pricing lower on their own websites, and in the same this practice prevents sellers from reducing their dependency on Takealot. The Inquiry similarly found that Takealot's narrow price parity clause distorts competition and as a remedial action required Takealot to remove the price parity clause and inform all marketplace sellers on its platform.
27. In addition to that, the CCSA found that Takealot engaged in self-preferencing conduct in various forms, undermining the ability of small sellers to compete on the platform. Whilst Takealot opens its online marketplace to third party sellers, it also trades extensively itself through its Takealot Retail division. This created a conflict of interest as Takealot set the rules for the marketplace whilst also competing with the marketplace sellers. This created an incentive for Takealot to favour itself. To address the distortions

arising from the conflict of interest, the CCSA required Takealot to segregate its Retail division from its Marketplace operations and to prevent its retail services from accessing seller data and unilaterally stopping sellers from competing for certain brands.

28. On business user competition, the CCSA found that the business model in eCommerce provided additional restrictions to the participation of businesses owned by historically disadvantaged persons, amongst them that onboarding favoured established businesses along with other promotional features. To address such distortions, Takealot was required to implement a programme that provides (i) personalised onboarding, the waiver of subscription fees for the first three months and at least R2000 advertising credit for use in the first three months, (ii) promotional rebates and the inclusion of the firms owned by historically disadvantaged persons in specific campaigns on the platform, and (iii) a programme to specifically support targeted groups within historically disadvantaged persons such as female, youth and rural enterprises with business mentoring and funding support.

#### ***Food delivery***

29. In restaurant food delivery services, the CCSA identified two leading platforms, Uber Eats and Mr D Food as the leading platforms. The two platforms have all the restaurant chains listed along with thousands of independent restaurants, enabling them to offer consumers a wide choice in any local area and benefit from network effects. These are the only platforms that have national geographic footprint in the country. The other small and emerging platforms operate in localised areas and most often in those areas that are not serviced by the leading platforms, such as townships and small towns. The small platforms are typically operated by resident entrepreneurs without substantial capital backing and ability to offer a similar promotion-led model to the national platforms. Bolt Food is the only other platforms that sought to operate a similar model to the leading platforms. However, the platform discontinued its restaurant food delivery operation in South Africa from December 2023.
30. Food delivery, as with all intermediation services, requires platforms to secure a wide range of restaurants to be an attractive proposition to consumers. Bolt Food and the array of local delivery services had been relatively successful in signing up independent restaurants, but far less so with the restaurant chains even where they are individual franchisees. Many of the restaurant chains prohibited their franchisees from contracting with local or national delivery services that are not approved by the head office. The reasons provided by those restricting franchisees were unpersuasive to the CCSA, as

demonstrated by the fact that some global and national chains did not place such restrictions. This stance by the restaurant chains to restrict their franchisees from listing on other platforms was in part the result of the two leading platforms incentivising them to bring in more of their restaurants and to drive order volumes through their platforms. This was mostly achieved through commission negotiations, where the delivery platforms rewarded more restaurants and volumes with lower commissions on orders. This conduct distorts competition between the leading platforms and other competitors in the market. As a remedial action, the CCSA prohibited national restaurant chains from restricting or dictating the choice of food delivery platform by its franchisees.

31. Another feature that the CCSA found to distort competition in this platform category is lack of transparency in pricing by the leading platforms. Local delivery platforms operate a different model to the national platforms, charging a lower commission fee to restaurants as they do not invest significantly in promotions and tend to charge full delivery fees to customers. Local platforms also do not discriminate to the same extent against independent restaurants to cross-subsidise the chains. This model provides an opportunity for the small platforms to potentially compete through lower everyday menu prices on their platforms relative to the national delivery platforms due to the lower commission, even if they cannot match the promotions. However, the leading platforms were not transparent to consumers, that they charge restaurants a commission fee and that this is typically passed onto consumers through a menu surcharge. To remedy this distortion, the CCSA required Uber Eats and Mr D Food to notify consumers through a pop-up message periodically that they charge restaurants a commission fee for their service, and restaurant in-store pricing may differ from the prices they charge on their service.
32. The CCSA also found that the leading platforms and Bolt Food engaged in below cost pricing practices to attract consumers. The financials of all these food delivery companies showed periods of below variable cost pricing through subsidising delivery charges to the consumer and engaging in substantial promotions, including restaurant funded promotions. This led to the exit of many local delivery platforms. The CCSA issued a warning to the leading platforms to cease such strategies, and indicated its intentions to monitor closely their strategies as they move into townships or small towns where local entrepreneurs have established themselves outside of the shadow of their operations.

33. On business user competition, the CCSA found that the two leading food delivery platforms both offered significantly differentiated terms of service against the independent restaurants by charging a much higher level of commission fees for food orders on their platforms. The CCSA noted that the differentiated treatment of independent restaurants was as a result of their lack of bargaining power as the leading platform's financial reports demonstrated that the difference was not based on costs. This negatively affected the relative pricing of independent restaurants to chains on the platforms, making their menu relatively less attractive to consumers and impacting on their competitiveness.
34. The difference in commission fees also had knock-on effects for platform competition too. The ability to extract higher commission fees from independent restaurants, up to twice that of local delivery platforms, also contributed to the leading platform's ability to engage in the sustained use of aggressive promotions and subsidized delivery. To address this distortion, the CCSA required Uber Eats to implement a standardized tiered commission fee structure that it was already experimenting with at the time of publication of the report, whereby independent restaurants have the option of selecting from a range of commission fees associated with different levels of service and/or monthly/ongoing charges. For Mr D Food, the CCSA required the platform to put in place a promotional rebate for independent restaurants on their gross sales which can be used for discounts or promotions on the platform, along with monthly advertising credits. These effectively reduce the commission fee paid and promote greater sales for the independent restaurants.

### ***Online Classifieds Platforms***

35. In online classifieds, the CCSA focused on two segments, property and automotive vertical classifieds. In online classifieds platforms markets in South Africa these two segments represent the biggest categories. Within the automotive online classifieds, the CCSA identified Autotrader and Cars.co.za as the leading platforms by some distance with over 80% share between them. Within property online classifieds, Property24 is the dominant platform and Private Property is the second largest. Private Property on the other hand has no more than 35% market share. However, the platform also has some unique features that differentiate it from the small platforms in the market. Property24 and Private Property are the only property classifieds platforms that are able to monetise and generate substantial income from their operations in the market. Private Property formed strategic partnerships with the large estate agents in the market and offered them shares to secure, and lock-in, their listings.

36. In property classifieds, the CCSA found that the leading platforms employed different strategies to lock-in the support of estate agents and limit the flow of listings to other competing platforms. Online classifieds platforms typically generate revenue from business users who seek to reach more customers through the platforms. Therefore, platforms with limited listings generate less to no revenue at all. Estate agents typically have budgets for marketing and promotion and look to optimize their budgets between different marketing activities including property classified listings. Both leading platforms sought to lock-in the spend of estate agents through multi-year contracts, limiting opportunities for competing platforms to contest their spend.
37. Property24 offered a multi-year subscription package to estate agencies, which saw those estate agencies that subscribed to the package enjoying discounted listing fees compared to those estate agencies who opted for standard subscriptions. Private Property has achieved the same outcome by offering the largest estate agencies shareholding in the platform and extending discounts to the same agencies in return for their listings. The CCSA found this conduct to distort platform competition as it hindered the ability of small platforms to compete for listings and ultimately generate revenue. To remedy this, the CCSA required Property24 to terminate all the multi-year subscription package contracts with all estate agents and contract all its customers on the same standard terms. For Private Property, the CCSA made an application to the Competition Tribunal for the real estate agencies to divest their shareholding in Private Property and contract with the platform on standard terms.
38. In addition to multi-year contracts, the CCSA also found that the leading platforms limited the flow of listings to small platforms by denying them access to their listing engine software. Estate agents make use of such software to manage and feed their listings onto property classifieds platforms and also onto their own websites. Property24 and Private Property both provided the software to estate agents listing on their platforms but prevented their customers from using the same software to feed onto other platforms. The leading platforms also charged a feed-in fee to those estate agencies that sought to list on their platforms using third-party software. This conduct raised costs for those estate agents wishing to use third-party software providers in order to be able list on the leading platforms sites and on other small platforms sites at the same time. To address these distortions, the CCSA required the leading platforms to provide interoperability at no fee for estate agents to feed listings to other platforms. The CCSA

also required Property24 and Private Property to cease charging estate agents for incoming listings and put an end to multi-year contracts with large agencies.

39. In relation to business user competition, the CCSA found that the leading platforms in both property and automotive classifieds exercise extensive price discrimination based on the volume of listings that an estate agency or dealership lists on the platform, both at a group and at an office level. The CCSA noted that the differences were not based on costs. The primary difficulty for the platforms was justifying the price differentials in excess of 300%. The CCSA further noted that there was no objective value-based pricing model at play but rather relative bargaining power that drives price differences. The discrimination affected smaller estate agents and dealerships marketing abilities, including those owned by historically disadvantaged persons, by limiting their capacity to participate in additional marketing campaigns relative to the national agencies and dealerships. This resulted in lower visibility of the small agencies and dealerships to consumers. To address this distortion, the CCSA required the leading platforms to introduce a Small Independent Business Packages that would significantly reduce the fees for small business users by more than half.

### ***App Stores***

40. In South Africa, mobile devices are the primary means through which the majority of the population engage the digital economy. On the devices, it is through apps, distributed through software application stores, that digital content and services are provided. For businesses and app developers that wish to be part of this lucrative and growing software economy, it is also through the app stores that they access consumers. The CCSA identified Apple App Store and Google Play Store as the leading platforms as they collectively account for the vast majority of mobile users, app downloads and revenues earned in the country. Google Play is the default on Android devices which account for the overall majority of devices, in particular lower end priced smartphones, and hence users. Whilst Apple accounts for fewer smartphone devices, the platform accounts for a much higher share of app downloads and app store revenue due to the high-end target market. Both leading platforms are essential for local app developers accessing the global app market.
41. The revenue model for app stores is to charge a commission on sales only where the application generates revenue through the delivery of digital content. This is to avoid the possibility of discouraging free applications that add value to their devices. To measure those transactions and ensure they are able charge the apps their commission, the

stores do not permit alternative payment processing services on their stores for all in-app payments (IAPs). The exclusion of alternative payment processing methods not only ensures that the commission fees cannot be bypassed by design, but also that the application store owns the customer relationship unless additional logins are required.

42. For apps that provide digital content through other channels, such as websites, PCs or consoles, there are typically means for consumers to pay for the content through these channels. App stores permit consumers to access that content or credits through the applications where there is a login on the app, referred to as the App Store Multiplatform rule and the Play Store's Payments Policy. However, the stores have imposed anti-steering rules to prevent app developers from circumventing their IAP by steering consumers to these outside options. This means that where discovery of the app takes place through the application store, consumers will be ignorant of alternative payment options, limiting their discovery and use. In this manner, the anti-steering rules restrict competition from alternative payment methods for the app available through other channels. The result is high commission fees that are either likely to raise the pricing of apps to the detriment of consumers or reduce the earnings of app developers which impedes investment and innovation. The CCSA therefore found that Google Play and Apple App Store are unconstrained in the commission fees they charge paid app developers and the anti-steering rule limits competition. To address this distortion, the CCSA required Google Play and Apple App stores to stop preventing apps from directing consumers to pay on the app's own website, and to ensure continued free use by consumers of content purchased from that website.
  
43. In regard to business user competition, the CCSA found that the global business model of the application stores limit curation and visibility of local South African paid app developers. Given the market feature of millions of applications overall, and thousands in any single category, being sold through monopoly application stores on different device OSs, discoverability and visibility on those application stores is essential for apps to compete effectively. The app stores provide for discoverability through two main features, namely curation and search. Curation is where store editors identify quality apps and promote them through a wide variety of means such as featured apps, category recommendations, new apps, classics, apps of the day, etc. Given the importance of search for discoverability and the volume of apps in any search results, developers have made increasing use of ads which appear on the search page itself as suggestions and at the top of search results.



44. The CCSA noted that neither the Apple App Store nor the Google Play Store has local curation of apps despite the hundreds of millions in revenue generated from South Africa each year, other than automated curations based on sales or downloads for the South African storefronts, and some geo-relevance criteria applied to certain search terms. Local applications may have particular relevance for domestic consumers, but the lack of local curation meant this would not be a factor in the editorial process, with global apps served up instead. To address this distortion, the CCSA required Google and Apple to also provide a South African curation of apps on their stores and advertising credits to South African app developers.

#### ***Outcomes of the OIPMI***

45. In accordance with the Act, upon completion of a market inquiry, any party that maybe materially and adversely affected by the determination of the of CCSA may appeal against such determination through the Competition Tribunal. In this process the burden of proof is shifted from the authority to the parties as the legislation requires that parties who may wish to appeal ought to prove the adverse effects of the decision or remedial action on their businesses. In the OIPMI the CCSA issued a wide range of remedial actions to a total of twelve leading platforms and five of those platforms are implementing the CCSA's remedial actions including the global firms in different platform categories. Out of the total, there are five platforms that filed appeals with the Competition Tribunal, and the authority entered into settlement negotiations with those platforms to prevent the possibility of prolonged litigation. Most of those platforms have since also agreed to settle and implement the remedial actions, including those that operate in online travel and accommodation and those that are in food delivery services.
46. The impact of the CCSA's remedial actions is expected to aid the authority to achieve its intended objective, for an inclusive digital economy. The remedial actions seek to improve the competitive environment for small businesses and those that are owned by the historically disadvantaged persons. The CCSA engaged stakeholders extensively, including small businesses operating in different platform categories and the findings are based on extensive evidence gathered during the course of the inquiry. The remedial actions were also tested with all the relevant parties, and therefore are a direct response to the competition bottlenecks identified. It is on this backdrop that the CCSA is confident that its remedial actions are effectively changing the market dynamics.
47. For instance, Google is part of the firms that did not contest the CCSA's remedial actions and is implementing them on an ongoing basis. Small platforms in all platform categories

identified visibility on Google Search as a significant barrier to competition. In line with the CCSA's remedial actions Google has committed to provide R180million in advertising credits for small platforms and an additional R150million for training of South African platforms. This has a direct bearing on the ability of small South African platforms in the different categories to contest the market and directly addresses the identified challenges. Similarly with other remedial actions, such as the removal of narrow and wide price parity clauses, termination of multi-year contracts, transparency in pricing, and support for small businesses in all categories are likely to yield positive outcomes for competition in the respective markets.

#### **b. MEDIA AND DIGITAL PLATFORMS MARKET INQUIRY**

48. In October 2023 the CCSA launched the Media and Digital Platforms Market Inquiry. The inquiry is focused on the three broad areas namely, a) the distribution of media content on digital platforms, including search, social media and news aggregation platforms, b) the impact of AI chatbots on the consumption of news, and c) competition within the adtech stack that sells advertising received from direct and referral traffic.
49. Search and social media platforms, including news aggregators, primarily fund themselves through advertising and drive consumer traffic, engagement, and data collection using news media to sustain that revenue stream. Similar to digital media platforms, news media content publishers fund the creation of news content through advertising and depend on engagement and data collection for optimising targeted advertising, although many also incorporate subscription fee revenues to support the funding of news generation. The inquiry is assessing whether online platforms influence the referral traffic to news media websites and whether the bargaining dynamic between the platforms and news media influences the balance of value derived by each party. As AI is increasingly being used in search engines to provide summaries in response to queries, this has the potential to further impact on the referral traffic to news media sites, along with the AI chatbots themselves.
50. The CCSA has included adtech in the inquiry as this is another part of the ecosystem when traffic is referred or received directly. Adtech is also dominated by the same search and social media companies that compete for digital advertising. The inquiry seeks to understand whether the integration in the adtech stack results in the exclusion of rivals and the extraction of additional value in the relationship with publishers.

51. Aside from the bargaining dynamic and outcomes as between the online platforms and media organizations, the inquiry is also assessing whether the platform algorithms might distort competition between domestic and international media, and between mainstream and small domestic media. The inquiry is considering more broadly the impact of platforms on media diversity and plurality. This is aligned with the purposes of the Act and the requirement to interpret the Act in line with the Constitution. The market inquiry is ongoing.

#### **D. MERGER CONTROL**

52. The most commonly articulated challenge in digital market mergers is the acquisition of nascent competitors, referred to as 'killer acquisitions'. These can evade merger notification thresholds where the startups pursue market penetration strategies by offering free services initially, fuelled by venture capital, and only later seek to monetise their service once they have achieved leadership amongst consumers. For developing countries, there is the additional challenge of assessing global tech mergers that potentially impact on domestic markets but either evade thresholds for the same reasons or whose long-term impact may be more complex to assess given the lag in digital market development.
53. Whilst some countries have sought to change their notification thresholds, the risk is that the authority is inundated with merger notifications, many of which have no material effect on competition. In addition, at this stage it is not evident whether 'killer acquisitions' are a feature of digital markets in developing countries where venture capital markets and tech startup ecosystems are considerably smaller than the US or EU. In South Africa the Act provides the CCSA with the powers to require the notification of 'small mergers' within 6 months of being concluded where it deems these may result in a substantial lessening of competition or harm public interest. The challenge is being sufficiently informed of such acquisitions in order to make such a determination.
54. For this reason, the CCSA issued Small Merger Guidelines which required that parties to small mergers inform the CCSA of transactions where the acquisition price met the normal intermediate merger thresholds for revenues or assets.<sup>4</sup> Once parties have informed the CCSA, then a decision can be made whether notification is required or not. The use of the acquisition price rather than revenues or assets is because the acquisition

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<sup>4</sup> [compcom.co.za/wp-content/uploads/2022/09/FINAL-GUIDELINES-ON-SMALL-MERGER-NOTIFICATION\\_.pdf](https://compcom.co.za/wp-content/uploads/2022/09/FINAL-GUIDELINES-ON-SMALL-MERGER-NOTIFICATION_.pdf)

price reflects the underlying value of the human capital/intellectual property assets and revenue potential, rather than physical assets and current revenues. This approach avoids being overwhelmed by notifications whilst empowering the CCSA to selectively assess tech mergers of interest.

55. For instance, the CCSA has used the requirement to notify a merger below the threshold in respect of the Google-Fitbit global merger as Fitbit revenues in South Africa fell below the threshold. This was partly a product of lower overall smartwatch sales due to the lower incomes domestically, but the merger would have an impact on competition due to Fitbit's share of the market. As mergers are permanent changes in the market, the impact would grow moving forward. It is for this reason that the CCSA invokes its small merger notification requirement where the global businesses are substantial even if the domestic size is more limited at the present time. The CCSA also recently assessed the Microsoft Activision merger. Merger assessment also provides the basis for the CCSA to learn about digital markets that it may not otherwise assess and to identify if there are potential features that may warrant further research or investigation.
56. In assessing global tech mergers, the CCSA has sought to collaborate with several larger jurisdictions where the activities may be more widespread and the impact is likely to be larger given the higher incomes and larger market size. This enables the CCSA to appreciate the likely impact of the merger on markets that will become important in the future domestically. The other benefit to global collaboration is that where conditions are imposed on the transaction, then the CCSA can not only contribute to that design, but also South Africans can benefit from its implementation in granting conditional approval by the CCSA. Our experience is that global tech firms will not necessarily implement behavioural remedies in jurisdictions that do not impose conditions.

## **E. CONCLUSION**

57. In identifying the appropriate tool for intervention in digital markets, the main consideration was to find a tool that would allow for a proactive approach for the CCSA. The objective for the authority is to shape these markets in their development stages to circumvent tipping and high levels of concentration. Market inquiries proved to be the most suitable tool, as they allow the authority to address a wide range of competition distortions across the ecosystem, and to aim at interventions that improve competition rather than simply addressing abuse of dominance behaviour.

58. In the OIPMI the CCSA has been successful in its intervention in the market and given the nature of its remedial actions, the intervention is expected to have enduring positive outcomes, in so far as fostering competition in the selected markets. The other enforcement approaches would not have enabled the authority to issue such wide ranging and pro-competitive remedial actions to so many players at the same time.
59. A market inquiry is an alternative option to digital market regulation, such as DMA approach in Europe. Regulation has been considered limited insofar as it is backward looking at conduct currently identified as harmful, and inflexible insofar as the solutions to that conduct. Moreover, its limits extend to the fact it cannot respond to new harmful conduct and workarounds, nor can it address a broader set of market-wide features that may be driving concentration. Of course it has positive aspects too, insofar as it does not require in-depth evidence-based investigations to reach remedial actions.
60. The other consideration for the CCSA in choosing the appropriate tool for intervention is resource allocation. The OIPMI was conducted over a period of two years with limited resources. The authority also largely relied on internal resources and capacity through the process. The approach by other jurisdictions, which requires more resources, and a dedicated team would not have been possible for CCSA. In the ongoing market inquiry, the CCSA is following the same approach and is likely to attain similar success to realise the intended outcomes, including active participation of small businesses and historically disadvantaged persons in these markets.
61. In merger control the CCSA has sought to be active as a means to develop understanding of digital markets and ensure where conditions are placed on global mergers, those apply in South Africa. The CCSA has updated its small merger guidelines to require that it is informed of tech mergers with acquisition price over a particular threshold with the option to notify.
62. In conclusion, developing countries do need to develop options for the regulation of digital markets that is appropriate to the resources and type of issues these markets raise in their countries. This may point to options within current legislative frameworks that are simply more innovatively used.