

Trade and Development Board: Intergovernmental Group of Experts
on E-Commerce and Digital Economy

“Policy and Regulatory responses at national, regional and international levels to transform the opportunities and challenges in the data-driven economy into inclusive trade and development”

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competition regulation for a growing and inclusive economy



competition commission
south africa

Outline and perspective

Outline

- Competition Enforcement Authorities: South Africa
- Industrial Revolutions Over Time
- Policy considerations in the age of E-Commerce for Africa: Opportunities and Challenges
- Need for competition regulation in e-commerce: past reports
- Need for competition regulation in e-commerce: current thinking
- Competition regulation in e-commerce: Some experience in South Africa
- Competition regulation in e-commerce: Experience in other selected jurisdictions
- Way forward: Response

Perspective

President of the Republic of South Africa, H.E. Cyril Ramaphosa on the occasion of State of the Nation Address, 7 February 2019

On the fourth industrial revolution...

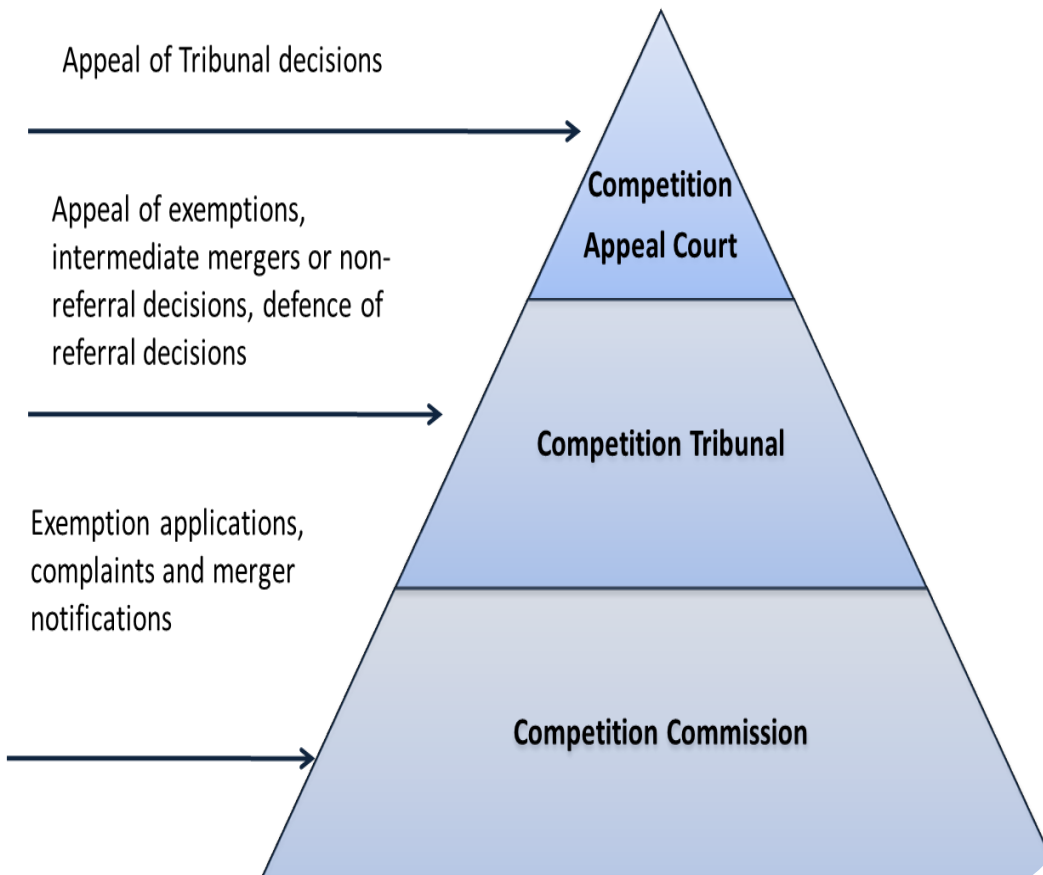
“To ensure that we effectively and with greater urgency harness technological change in pursuit of inclusive growth and social development, I have appointed a Presidential Commission on the 4th Industrial Revolution... It will identify and recommend policies, strategies and plans that will position South Africa as a global competitive player within the digital revolution space.”

On the Square Kilometre Array...

“The successful construction in the Northern Cape of the MeerKAT telescope, the world’s largest and most sensitive radio telescope, and the development of the Square Kilometre Array has enabled South Africa to develop capabilities in areas such as space observation, advanced engineering and supercomputing.”

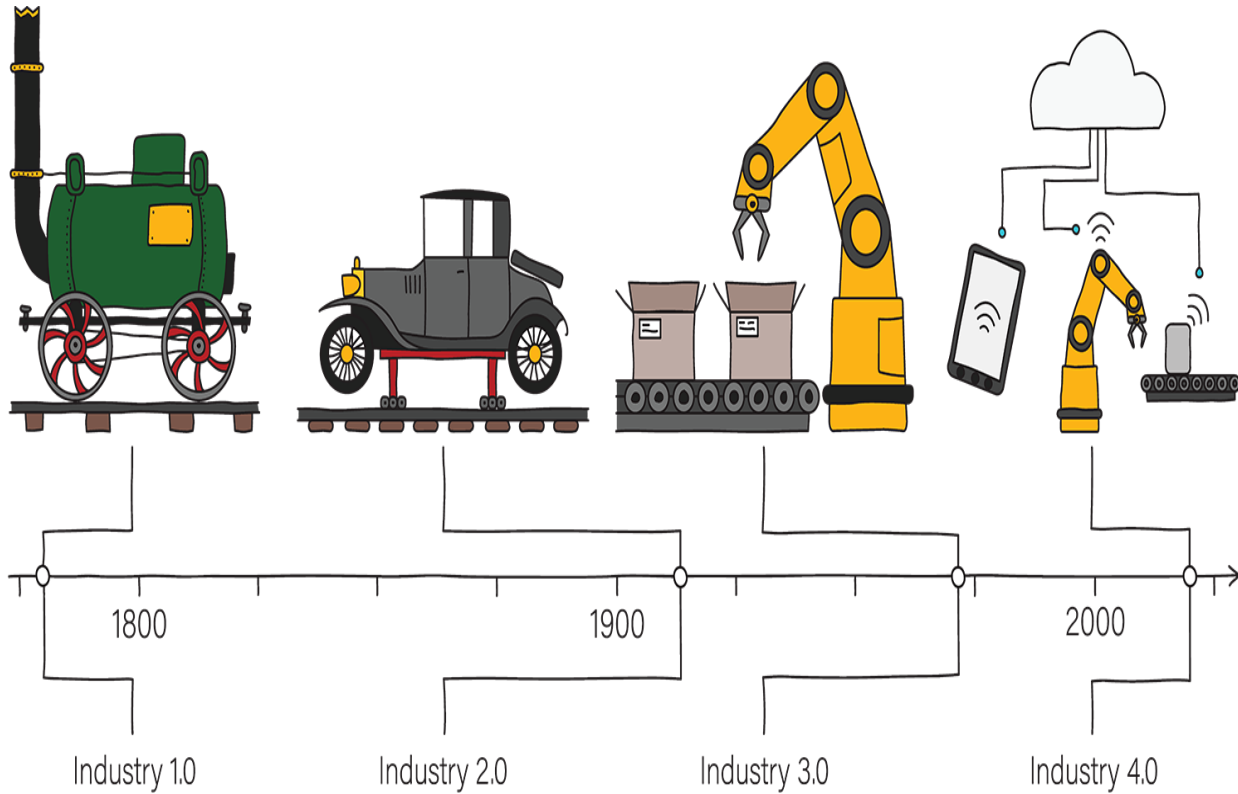
Competition Enforcement Authorities in South Africa

Constitutional Court



- Prior to democracy in 1994, the South African government played a prominent role in the economy including in the operation & functions of competition law & policy
- Competition law regulation gave a lot of discretion to the Government (through a designated Ministry) in the operation of what was then known as the Competition Board. The economy was characterised by state-sanctioned cartels & state monopolies
- Following the advent of democracy in 1994 the new South African government gave high priority to redressing economic imbalances corresponding to racial divisions in the country – strong competition policy became an important tool
- The Competition Act (as amended) was introduced in 1998 and became operational on 1 September 1999 including its relevant enforcement institutions:
 - ❑ **Competition Commission** - which reports to Parliament through Ministry (Economic Development Department-EDD) which appoints Commissioner and Deputy Commissioner(s) and Commissioner appoints staff
 - ❑ **Tribunal** - which reports to Parliament through EDD, members of Tribunal (including Chairperson and Deputy Chairperson) are appointed by President of the Republic of South Africa on recommendation of Minister EDD, Chairperson is responsible for appointing staff
 - ❑ **CAC** - is analogous to a High Court with its judges being appointed by the President on recommendation of the Judicial Services Commission, not a court of first instance but rather considers appeals and reviews of the Tribunal but is the court of last instance on all competition-related matters

Industrial Revolutions Over Time



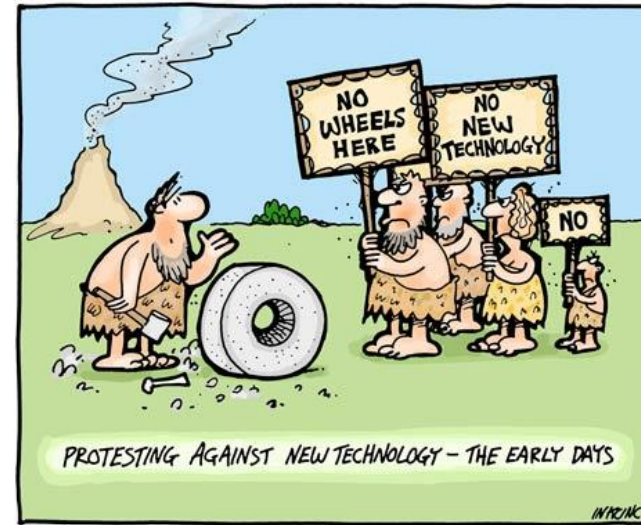
The Industrial Revolution begins. Mechanization of manufacturing with the introduction of steam and water power

Mass production assembly lines using electrical power

Automated production using electronics, programmable logic controllers (PLC), IT systems and robotics

The 'Smart Factory'. Autonomous decision making of cyber physical systems using machine learning and Big Data analysis. Interoperability through IoT and cloud technology.

<https://www.simio.com/applications/industry-40/history.png>



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<https://www.weforum.org/agenda/2016/07/why-do-people-resist-new-technologies-history-has-answer/>



<https://www.usatoday.com/story/money/careers/employment-trends/2017/10/04/your-job-automated-70-americans-say-no/731200001/>

Opportunities

Africa Trade

- The African Union States (55) account for approx. 3% world trade, which is quite low
- In 2016, 3 major African importers (Egypt, South Africa and Algeria) and 3 major exporters (South Africa, Nigeria and Angola) accounted cumulatively for 39% of total AU imports and exports
- Intra-African trade as a share of total trade in Africa is still low

E-commerce Landscape

- Innovative landscape - growth of mobile money through mobile phone technology – Kenya's M-Pesa used by approx. 50% of informal business for mobile payments (inclusive growth, trade development)
- Internet penetration in South Africa is over 55%, Mauritius is over 51% and Nigeria over 25% - still room for improvement and opportunities for growth

Challenges

- Lack of infrastructure development raise barriers to entry which limit access to digital markets:
 - ❑ Internet services – 5G/spectrum
 - ❑ Financial services systems – reliable and trusted payment systems to facilitate trade e.g. M-Pesa , Jumia
 - ❑ Transport connectivity – roads, customs, border control (integration agenda to assist in raising the flow of goods and services within Africa)
 - ❑ Logistics networks – post office network or delivery firms (reliability)
 - ❑ Education – readiness to produce appropriate workforce
- Highest ranking African country in UNCTAD B2C E-Commerce Index 2018 (Africa) is 55/151 (Mauritius) (https://unctad.org/en/PublicationsLibrary/tn_unctad_ict4d12_en.pdf)
- Given sizes of individual African countries, difficult to integrate into global e-commerce system alone. Critical mass is necessary – speaks to integration agenda
- Global tech giants not investing (taxes, localisation) in Africa in order to facilitate and participate in the development and growth of trade in Africa

Need for competition regulation in e-commerce: past reports

Previous Work on Online Competition

- OECD Competition Committee: Vertical Restraints for On-line Sales (2013)
<http://www.oecd.org/competition/VerticalRestraintsForOnlineSales2013.pdf>
- International Competition Network Special Project Report on Vertical Restraints in Online Retail (2015)

Competition Concerns

- Resale Price Maintenance (RPM) – upstream firm requires downstream firm to charge a price that is either not lower or higher or is the mandated price by upstream firm
- RPM facilitating conduct – downstream firm agrees to limitations on conduct and/or positive obligations that may facilitate RPM conduct e.g. not advertising upstream firm's product for less than an agreed minimum price
- Across Platform Parity Agreements – arrangements between seller & online trading platform where seller undertakes to charge a price on the platform that is no higher than the price charged on other platforms
- Online sales ban or limitations – upstream firm prohibits or limits downstream firm from selling goods/services online at all OR from selling goods or services online via certain online platforms
- Geographic Price Discrimination – upstream firm charges different prices to downstream entities or consumers in different geographic location

Conclusions/Recommendations

- Previous investigations by competition authorities into online retail focused on vertical restraints primarily relating to travel and e-books e.g. [Booking.com UK OFT \(2010\)](#), [Austrian Competition Authority \(2012\)](#), [Swiss Competition Commission \(2012\)](#), [Hungarian Competition Authority \(2013\)](#), [German Competition Authority \(2015\)](#), [Apple iBooks DG;Comp and US FTC \(2011\)](#), [Geo-blocking Pay-TV DG:Comp \(ongoing\)](#)
- Past investigations by competition authorities will be useful for ex-post analysis to determine whether existing tools (analytical tools used in assessing offline vertical restraints) are sufficient to deal with online vertical restraints
- Cooperation important given the cross-

These were first attempts at examining online competition dynamics. It is clear that online market dynamics have evolved rapidly. However, there is still time to pick up this type of work again in order to develop and share learnings over time and perhaps guidance on competition regulation in these markets

Need for competition regulation in e-commerce: current thinking

Problem

- E-commerce depends on well-functioning markets
- Utility and communications costs still high
- Digital markets on the rise
- Dominance of e-commerce firms e.g. Amazon, Alibaba
- Constraints for rising e-commerce firms in Africa e.g. Jumia (Nigeria), Takealot (South Africa)
- Networks effects - lead to high entry barriers and engenders market power

Enforcement challenges

- Existing competition regulation tools inadequate
- Vast issues: privacy, consumer protection, market power, network effects
- Lack of coordination in enforcing the 'little' we know

South Africa specific response:

- Focus on cost of connectivity (market inquiry into data costs)
- Focus on removing constraints in retail markets (market inquiry)
- Focus on understanding digital markets (through BRICS, Commonwealth and national government)

Possible remedies

- Data mobility and fostering open systems seem to be the emerging consensus
- Need for a code of competitive conduct for digital markets
- Equip regulators to tackle complex digital markets
- Global coordinated solution
- *See UK's Furman report on 'Unlocking Digital Competition' and Tirole's contribution (Keynote EU)*

Competition regulation in e-commerce: Some experience in South Africa

- Ensuring markets that are enablers of e-commerce are working in South Africa – competition interventions in these markets:
 - ❑ Data Inquiry – published a preliminary report recently relating to the state of competition in the market for data services in South Africa including:
 - Market structure & barriers to entry
 - Impact of sector regulations on competition
 - Strategic behaviour by large fixed & mobile incumbents
 - Costs faced & profits earned by fixed and mobile network operators
 - Current arrangements for sharing network infrastructure
 - Investment in infrastructure by operators and access to and allocation of spectrum
 - ❑ Banking inquiry (2006)
 - Cost of banking services still high in South Africa – “**Review of the Competition Commission Banking Enquiry**” by Endesha 2014 – ex-post review found that online banking in South Africa still expensive largely due to banking regulations which have meant that online payment solution providers like PayPal cannot directly enter the South African banking market but rather have to partner up with a local bank raising costs (currency conversion, transaction fee by local bank) to consumers e.g. PayPal in South Africa costs up to 8% of value of transaction compared to 4% in the UK and USA
 - Competition is increasing – entry of digital banks (no physical branches) Discovery Bank, Bank Zero, TymeBank
 - ❑ Takealot/Kalahari (2015)
 - Merger involved 2 of the largest online retailers in South Africa Takealot Online & Kalahari.com. There was a horizontal overlap in online retailing of consumer goods & products with high market shares/monopoly. However, market dynamics indicated that in South Africa found that brick & mortar retailers constrain online retailers - customers were once-off purchasers.

Competition regulation in e-commerce: Experience in other selected jurisdictions

- Response to the growth and penetration of big data and e-commerce by competition regulators has varied globally
- USA – concerns about the “bigness” of Amazon, Facebook and Google

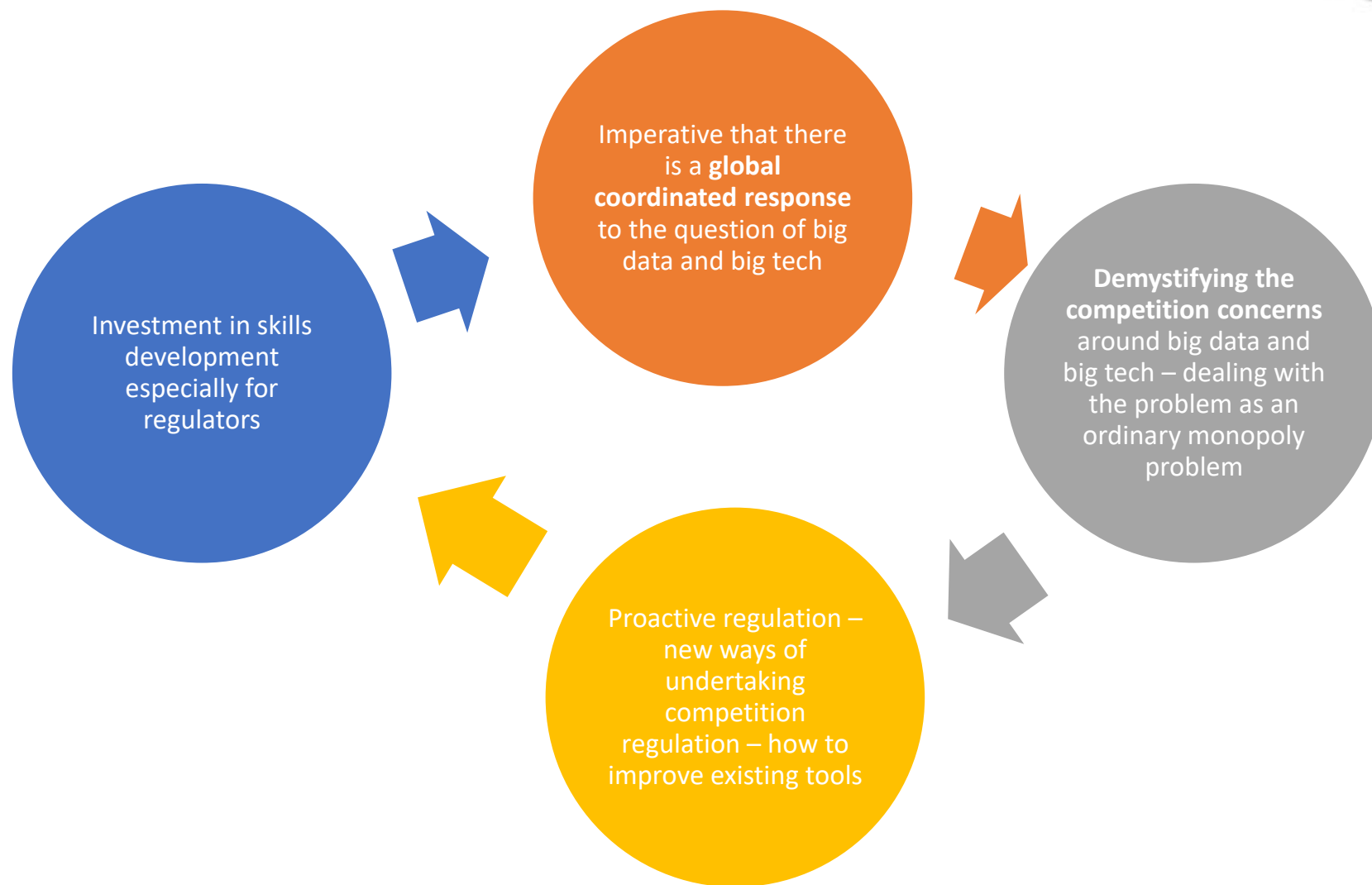


US Senator Elizabeth Warren & 2020 presidential candidate, “Today’s big tech companies have too much power — too much power over our economy, our society, and our democracy. They’ve bulldozed competition, used our private information for profit, and tilted the playing field against everyone else. And in the process, they have hurt small businesses and stifled innovation”

- European Commission has zoned in on big data and big tech companies which is reflected in the antitrust cases pursued in Europe:
 - ❑ Google I – small shopping search services – fined €2.4bn
 - ❑ Google II - web-browser and search apps onto Android mobile devices – fined €4.3bn
 - ❑ Google III – Google’s role as an ad broker for websites where DG:Comp looked into exclusivity agreements for online ads with its subsidiary AdSense for Search product – fined €1.49
 - ❑ France, Germany, United Kingdom and Netherlands also looking to begin its investigations into Google
 - ❑ Germany’s Bundeskartellamt imposed restrictions on Facebook in relation to its ability to process user data across its Facebook, Instagram and WhatsApp platforms without the voluntary consent of the platform user

Way Forward: Response

The monopoly problem poses risks of higher prices, reduced incentives to innovate. Solutions may be structural i.e. breaking up big tech firms but this must be done within the context of ordinary competition rules supported by evidence of requisite harm. Old non-digital networks such as essential facilities (e.g. a transmission grid for electricity or a local loop in fixed line telecommunications) are easier to define in terms of boundaries to determine conditions of access. Although we can define 'data' is important/essential however it is harder to define the boundaries of data in order to determine the parameters for conditions of access (own emphasis).



Thank you

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