A Revised Evidentiary Standard of Proof for Digital Markets

The proliferation of interim relief applications in recent years has seen the Competition Tribunal ("Tribunal") consider abuse of dominance contraventions using the *prima facie* standard. While interim in nature, the increase in the reliance of this standard of proof has managed to provide much needed relief to firms while the Competition Commission ("Commission") fully investigates the alleged contravention. The Competition Act No.89 of 1998, as amended ("the Act") already contains this standard for specific abuse of dominance contraventions under the Act coupled with the reverse onus provision. The complexities brought on competition authorities when it comes to the regulation and prosecution of big tech firm's raises the question of whether it may be time to consider a different standard of proof in order to provide sufficient regulation of digital markets. The *prima facie* evidentiary standard of proof coupled with the reverse onus provision presents an attractive approach which competition authorities can consider implementing in order to ensure the better prosecution of big tech firms. The success which the Commission has had with the *prima facie* standard and the reverse onus provision shows that competition regulation in South Africa may benefit from this type of regulation when it comes to digital markets.

Simphiwe Gumede

Introduction

The regulation of digital markets has increasingly become more important globally. The various regulatory amendments and enactments which have been introduced by competition agencies in various countries such as Germany[1], the United Kingdom[2] ("UK"), and the European Commission's Digital Markets Act ("DMA")[3] have highlighted the serious nature with which the regulation of the digital economy is being taken. *Ex ante* regulation has been one of the most effective ways through which competition agencies have been able to ensure compliance with competition law by digital platforms and firms alike in various jurisdictions around the world. The recently completed Online Intermediation Platforms Market Inquiry ("OIPMI") by the Competition Commission of South Africa ("the Commission" or "CCSA") represents the latest edition of a competition agency's attempt to regulate digital markets within their respective jurisdiction.

The struggles of the CCSA to successfully[4]. prosecute abuse of dominance prohibited practices in traditional markets begs the question whether the current framework would be appropriate when applied to digital markets. While the difficulty in prosecuting digital platforms and/or firms which operate within digital markets for these types of contraventions in South Africa is yet to be fully understood the contemplation of a *prima facie* evidentiary burden of proof for the prosecution of firms who contravene the abuse of dominance provisions within these markets may assist in securing successful

[1] Germany introduced the 10th amendment to the German competition Act in early 2021 in order to proceed more effectively against anti-competitive conduct, particularly of major digital companies. (https://www.bundeskartellamt.de/EN/Economicsectors/Digital_economy/digital_economy_node.html)
[2] On 25 April 2023 the United Kingdom published the Digital Markets, Competition and Consumers Bill. (https://bills.parliament.uk/bills/3453)
[3] The DMA came into force on 1 November 2022 (https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2021)690589.
[4] This includes the successful prosecution of *Competition Commission and South African Airways (Pty) Ltd* [2005] ZACT 50 and *Computicket (Pty) Ltd v Competition Commission of South Africa* [2019] ZACAC 4 for a contravention of the section 8 provisions of the South African competition law. However there have also been a number of losses including *Sasol Chemical Industries Limited v Competition Commission* [2015] ZACAC 4; *Uniplate Group (Pty) Ltd v The Competition Commission of South Africa* [2020] ZACAC 10; and *Competition Commission of South Africa v Media 24 (Pty) Limited* [2019] ZACC 26.

prosecutions. The *Gov Chat v Facebook and WhatsApp*[5] *("GovChat")* interim relief application, in the Competition Tribunal ("Tribunal"), provides an important window into the application of the *prima facie* standard of proof in abuse of dominance contraventions as they relate to a digital platform.

This paper will consider the possibility of a *prima facie* evidentiary burden of proof which can be applied within digital market in order to prosecute firms which contravene the abuse of dominance provisions of the Competition Act No.89 of 1998, as amended ("the Act"). This paper will begin by considering the importance of regulating digital markets in general. Secondly, this paper will consider some of the key findings and remedial action of the OIPMI and whether some of the identified findings could have been categorised as potential abuse of dominance contraventions. Finally, this paper will discuss the *prima facie* evidentiary burden of proof and consider whether this may be a standard that can be considered within the context of digital markets.

Regulating Digital Markets

The proliferation of digital markets in recent years, especially through digital platforms, has seen the need for competition laws to play catch up in an attempt to try and ensure fair competition and compliance with the necessary competitive constraints within those markets. The technologies which have driven the growth of digital platforms "constitute key elements of the fourth industrial revolution."[6] The importance of digital markets cannot be understated with them making up an estimated 4.5% to 15.5% of the global GDP being constituted by the digital economy in 2019.[7] The key drivers of digital markets have been

[5] Case No: IR165Nov20

[6] X Fu, E Avenyo and P Ghauri "Digital platforms and development: a survey of the literature" (2021) 11 *Innovation and Development* 315.

[7] N de Luca, G Olivieri and F Moroni "The Abuse of dominant Position in Digital Markets: Google Shopping Case" (2021/2022) at page 14-15.

understood to be " extreme returns to scale [and scope], the presence of network externalities and data."[8]

While not unique to digital markets, economies of scale in the digital economy spread drastically due to the nature of the products and the services which are provided.[9] The existence of network externalities in digital markets means that a new entrant is required to not only offer a higher quality of product at a low cost but also needs to convince users of an incumbent service to migrate to its own services.[10] The role of data in digital markets is one of the central characteristics of these markets. Through the use of superior algorithms the collection of and access to data on an ongoing basis has the ability to reinforce a digital platforms or digital firms advantage in a market.[11] As pointed out the existence of these characteristics are not unique to digital markets and platforms however, the manner in which they have been used within digital markets by digital platforms has caused them to gain *inter alia* market dominance and also distort competition.[12] The need therefore for competition agencies to re-consider their toolkits with regard to how best to approach the prosecution of firms which operate within these markets is paramount.

One of the criticisms which has been levelled against competition authorities, in general, especially when it comes to intervention is that investigations (and by extension prosecutions) tend to be slow and thus by the time that enforcement mechanisms are deployed, those markets may have already been irreparably harmed by the impugned conduct.[13] This may be as a result of the lack of knowledge surrounding how these markets work and how best to address abuse of dominance contraventions which take place in these markets. Hovenkamp points out that "the problem with digital platforms is

[8] Ibid at 23.
[9] Ibid.
[10] Ibid at 26.
[11] Ibid at 25.
[12] Ibid at 14.
[13] D Geradin and D Katsifis "Strengthening effective antitrust enforcement in digital platform markets" (2021) 4.

that at present we know less about them than we know about traditional markets…how they function and what are the competitive effects of their behaviour."[14] What appears to be clear is that these markets are fast moving. Thus, the need for timely intervention is crucial if irreparable harm to competition is to be prevented.[15]

The lack of knowledge surrounding digital markets can also be attributed to the limited insight which competition authorities have when it comes to how data is collected and processed by digital platforms.[16] The impact of this lack of insight means that competition authorities are not just on the back foot when it comes to understanding digital platforms but also they are unable to determine a few key elements as they relate to digital markets more broadly. These key elements include the relevant market i.e. market definition, the determination of dominance and the appropriate theory of harm.[17] This, it is submitted, is likely to make the prosecution of abuse of dominance cases in digital markets challenging especially when consideration is given to how "the digital economy contains unique features that serve both to differentiate and to complicate antitrust analysis. Large tech firms trade heavily, although not exclusively, in digital content; they have different cost structures than most traditional firms; they often operate on "two-sided" markets; and they are heavily involved in distribution with both direct and indirect network effects."[18]

Funta argues that "[c]ompetition is the central driver of digital change. At the same time, digitization is intensifying competition in many areas and economic activity is changing in many ways."[19] The need for competition agencies to intervene in the regulation of digital markets goes without saying however it is important to note that despite the urgency of this, the current toolkit as it relates to the prosecution of abuse of dominance cases does

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[14]H Hovenkamp "Antitrust Presumptions for Digital Platforms" (2023) *U of Penn, Inst for Law & Econ Research Paper* 3.
[15] D Geradin and D Katsifis op cit note 13 at 14.
[16] Ibid at 16.
[17] N de Luca, G Olivieri and F Moroni op cit note 7 at 43 – 59.
[18] H Hovenkamp "op cit note 14 at 3.
[19] R Funta "Economic and Legal Features of Digital Markets" (2019) 10(2) *Law, Economics and Social Issues Review* 173 at 173.

not appear to be adequate. One of the unfortunate occurrences is that because competition agencies are constantly playing catchup to firms which operate within digital markets, high information gaps begin to appear. In light of this, it is crucial to note that "the technical complexity of the matters at stake and the fact that competition authorities have the burden of proof [coupled with] the informational gap between enforcers and platforms typically slows down investigations, which can easily take 4-5 years." [20]

A. Ex Ante Regulation

As pointed above, the recently completed OIPMI conducted by the CCSA and published in July 2023, was South Africa's first competition law related study within digital markets. While *ex ante* regulation has been criticised for not addressing unfair trading practices on some platforms[21], the European Commission ("EU Commission") appears to differ with this view. The European Commission notes that some of the reasons for the existence of the DMA is firstly, the presence of a "small number of platforms that dominate the digital economy as intermediaries between consumers and businesses… [and] second is the acknowledgment that ex-post antitrust enforcement is not quick enough to address anticompetitive conduct by big digital platforms in the digital market."[22]

When consideration is given to the South African economy, the presence and participation of firms within various digital markets has brought with it new and interesting challenges particularly for our understanding of how they work and the dangers which they pose both from a regulatory point of view as well as from a personal security point of view. The Commission points out that, when initiating the OIPMI, it had reason to believe that there were certain features of online intermediation platforms which are capable of impeding, distorting, or restricting competition.[23] This reason, provided by the Commission, sounds

[20] D Geradin & D Katsifis op cit note 13 at 17.
[21] R Funta "Data, Their Relevance to Competition and Search Engines" (2021) 15 *Masaryk University Journal of Law and Technology* 119 at 136.
[22] N de Luca, G Olivieri and F Moroni op cit note 7 at 61.
[23] Online Intermediation Platforms Market Inquiry Report (July 2023) para 1 (page 16).

similar to those of the EU Commission, in justifying and/or defending the reason for the promulgation of the DMA. Nevertheless, it is important to consider, briefly, the areas which the OIPMI focused on and what some of the recommendations were. In considering the findings and the recommendations of the OIPMI, this paper will focus on those specific platforms where the CCSA made findings which appear to fit the category of certain contraventions of the abuse of dominance provision of the Act.

The OIPMI in South Africa

The role of market inquiries within South Africa broader economic framework has gained increasing prominence. They have enabled the CCSA to introduce competition and economic reforms which promote competition throughout a market.[24] In terms of section 43B(1) of the Act, the CCSA is capable of establishing a market inquiry if it *inter alia* has reason to believe that any feature or combination of features of a market impedes, distorts or restricts competition.[25] The scope of the OIPMI was "[o]nline intermediation platforms facilitate transactions between business users and consumers (or so-called "B2C" platforms) for the sale of goods, services and software, and the scope includes eCommerce marketplaces, online classifieds and price comparator services, software application stores and intermediated services such as accommodation, travel and food delivery. The scope includes digital advertising insofar as it may pose a barrier to platform or business user competition, and the extent to which those platforms also offer intermediation services."[26] Importantly the OIPMI recognized that by their very nature digital markets implicate global firms some of which do not have physical head offices in South Africa however their platforms have an impact on domestic customers and businesses listed on their platforms.[27] To this, it is important to point out that section 3 of the Act indicates that its provisions (the Competition Act) applies to "*all economic activity*

[24] OECD "Using Market Studies to Tackle Emerging Competition Issues –Contribution from South Africa" (2020) Pg 9 (https://one.oecd.org/document/DAF/COMP/GF/WD(2020)34/en/pdf) – Accessed on 15 September 2023.
[25] Section 43B(1) of the Act.
[26] OIPMI para 2 (page 16).
[27] OIPMI para 10 (page 18).

within, or having an effect within, the Republic." The OIPMI findings with respect to a selected list of platforms were:

A. Software Application Stores

This OIPMI noted that The Apple App Store and Google Play Store collectively account for the vast majority of mobile users, app downloads and revenues earned in SA. Both Google Play and Apple's App store are essential for local app developers accessing the global app market. The revenue model is to charge a commission on sales only where the app generates revenue through the delivery of digital content.[28]

Both 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 app store (both Google Play and Apple Appe Store) owns the customer relationship unless additional logins are required. The stores (Google Play and Apple's App Store 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.[29]

The Anti-steering rules restrict competition from alternative payment methods which ultimately results in high commission fess that are either likely to raise the pricing of apps to the detriment of consumers or reduce the earnings of app developers which impedes the earning of app developers which impedes investment and innovation.[30] There have been some adjustment to the anti-steering rules (following litigation) which has seen both

[28] OIPMI page 8.
[29] OIPMI page 8 -9.
[30] OIPMI page 9.

Apple and Google allow app developers to communicate with consumers through other means i.e. an external link on the app directly to the app developers website for example.

The OIPMI 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.[31] The OIPMI noted that discoverability is important. This is usually achieved by 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.

- Search - 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.[32]

The OIPMI found that the global business model of the application stores limit curation and visibility of local SA paid app developers.[33]

i. Remedial Action Proposed

The OIPMI proposed that Google Play and Apple's App stores 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.[34] This action is designed to restrict

[31] OIPMI page 9.
[32] OIPMI page 9.
[33] OIPMI page 9.
[34] OIPMI page 9.

the fees which Google Play and the Apple App Store can earn (as currently they are unconstrained). Furthermore, this particular measure is already being done by both Google and Apple in other jurisdictions therefore this is nothing more than a continuation of that here in South Africa.

Google and Apple must also provide a South African curation of apps on their app stores and advertising credits to SA app developers.[35] This is an attempt to try and increase the visibility of local SA developed apps on their respective platforms.

B. Online Classifieds

Within classified verticals, property and automotive represent the biggest categories. Within the automotive online classifieds, Autotrader and Cars.co.za represent the leading platforms by some distance with over 80% share between them.[36]

Within property online classifieds, Property24 is the dominant platform and Private Property is the second largest. Private Property is uniquely placed in that it is a partnership with the large national estate agencies through the Estate Agency Property Portal Company ("EAPPC"), facilitated by the industry association, Rebosa. As a result, Private Property has been able to secure, and lock-in, most of the listings.[37]

The OIPMI found that in property classifieds features which hinder platforms, other than the two leading platforms, from securing listings include:

- Estate agents make use of listing engine software ("syndication software") to manage their listings and feed them onto their own websites, and those of

[35] OIPMI page 9.
[36] OIPMI page 9 – 10.
[37] OIPMI page 10.

property classifieds. 70% of estate agents wishing to list on alternative classified platforms face considerable practical barriers to doing so, raising the cost of using those platforms that deters use and their development as competing platforms.

- The two leading property classifieds have also reinforced their position in syndication software through charging a monthly R500 for feed in from external syndication software. The fee means for smaller agents especially it will always be cheaper to use the software of the leading platforms, impeding competition at a syndication software level.

- Marketing budget of estate agents must be optimized as well as possible through different marketing activities. Property24 and Private Property have sought to lock-in this spend through multi-year contracts, limiting opportunities for competing platforms to contest this spend.[38] The OIPMI found that these features impede competition.

The leading platforms in both property and automotive classifieds exercise extensive price discrimination based on the volume of listings that an agency or dealer brings, both at a group and at an office level. These differences are not based on cost but rather value provided, and thus larger agents and dealers bring more listings and hence provide more value to the platform. The OIPMI found that the leading platforms in both property and automotive classifieds exercise extensive price discrimination based on the volume of listings that an agency or dealer brings, both at a group and at an office level.[39]

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[38] OIPMI page 10.
[39] OIPMI page 10.

The effect of the discrimination on smaller agents and dealers, including HDPs, is that the marketing budget does not go as far, forcing SMEs to forego additional marketing activities relative to the national agencies and dealers, resulting in lower visibility to the consumer. For new estate agent and auto dealer entrants high and discriminatory fees pose a barrier to entry as it raises costs during the establishment phase of the business…This will impede competition and participation by black-owned agents and dealers in particular, whose lack of historic wealth accumulation reduces the extent of financial resources at startup. [40]

ii. Remedial Actions Proposed

Property24, Private Property and PropData must provide interoperability at no fee for estate agents to feed listings to other platforms. Property24 and Private Property must cease charging for incoming listings and put an end to multi-year contracts with large agencies. Rebosa must cease to support Private Property as the preferred platform for the industry. Divestiture will be sought from the Tribunal.[41]

The property and automotive platforms must substantially reduce their prices to SME agents and dealers to a level closer to that of larger agents and dealers.[42] The OIPMI report then makes firm specific pricing orders namely:

- Property24 must introduce a Small Independent Business Package ("SIBP") for business users with 30 leads or less priced at an average per lead or listing level within 15% of the average of all other business users, reducing to 10% later.[43]

[40] OIPMI page 11.
[41] OIPMI page 10.
[42] OIPMI page 11.
[43] OIPMI page 11.

- Autotrader must also introduce a SIBP for dealers with 20 listings or less, with the average cost per listing to be priced within 15% of the average for dealers on other rate bands, reducing to 10% later.[44]

- Cars.co.za must price its Flexi and Dynamite package at an average cost per listing that is within 15% of the weighted average cost per listing of its other Packages and introduce a premium offer for these packages.[45]

All leading platforms must introduce an HDP Programme except for Private Property. This is seen as a way to try and encourage the introduction and participation of black-owned agencies and dealers within the online classifieds space.[46]

C. Food Delivery

The OIPMI found that UberEats and Mr D Food are the leading platforms in restaurant food delivery and 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.[47]

The OIPMI further found that many chain restaurant Head Offices restrict their franchisees to only contracting with the two leading platforms in this space because the two leading platforms incentivizing them to bring in more of their restaurants and to drive order volumes through their platforms. This is mostly achieved through commission negotiations, where the delivery platforms reward more restaurants and volumes with lower commissions on orders. The OIPMI noted that this impedes competition.[48]

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[44] OIPMI page 11.
[45] OIPMI page 11.
[46] OIPMI page 11.
[47] OIPMI page 12.
[48] OIPMI page 12.

The OIPMI found that local delivery services charge lower commissions than when compared to the national food delivery services which ultimately means that customers are able to pay lower rates for their food ultimately. This is because of the lack of transparency to consumers of the commission fee which ultimately leads to higher food charges.[49]

Furthermore, the OIPMI found wide price parity clauses requiring the same pricing across delivery platforms. Whilst Uber Eats has removed these from their contracts, they have not informed restaurants which means many may still apply the rule. The OIPMI found that these clauses to adversely affect competition with local delivery platforms.[50]

The financials of all three national food delivery companies have shown periods of below variable cost pricing through subsidising delivery charges to the consumer and engaging in substantial promotions, including restaurant funded promotions.[51] Crucially these appear to no longer be the case however close monitoring of this will be necessary going into the future. The OIPMI found that the price differentiation impedes competition on and between platforms.[52]

iii. Remedial Action Proposed

To address the distortion found, national restaurant chains are prohibited from restricting or dictating the choice of food delivery platform by its franchisees.[53] This specifically looks

[49] OIPMI page 12.
[50] OIPMI page 12.
[51] OIPMI page 12.
[52] OIPMI page 12.
[53] OIPMI page 12.

at restricting chain restaurants from contracting with any food delivery service they would like.

On a lack of transparency, UberEats and Mr D Food are required 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.[54] …second distortion (i.e. price parity clauses), UberEats is required to clearly inform restaurants that it has removed this requirement and Bolt Food is to remove this requirement and inform restaurants.[55]

UberEats must implement the standardized tiered commission fee structure it is currently experimenting with 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.[56] Mr D Food must put in place a promotional rebate for independent restaurants on their gross sales which can be used for discounts or promotions on Mr D Food, along with monthly advertising credits.[57] These two measures will effectively reduce the Commission fee paid and promote greater sales for the independent restaurants.[58]

D. Key Takeaways

In contemplation of the findings of the OIPMI, one cannot help but consider whether the types of contraventions which would have necessitated prosecution by the Commission in light of the OIPMI's findings. For example, the identification of price discrimination by some platforms against HDP owned businesses could have attracted section 9(1) of the

[54] OIPMI page 12.
[55] OIPMI page 12.
[56] OIPMI page 13.
[57] OIPMI page 13.
[58] OIPMI page 13.

Act; the identification of long-term exclusive leases and restrictions on the choice of delivery service provider, by head offices, could have attached section 8(1)(c) and/or section 8(1)(d)(i) contraventions.

The findings and recommendations of the OIPMI will hopefully go a long way in assisting to regulate online intermediary platforms in South Africa and the manner in which they comply with the provisions of the Act. While the OIPMI's impact is yet to be seen, it is important to point out that the OIPMI provides *ex ante* regulation. To this end, it is submitted that the need to ensure that *ex post* regulation is also provided is fundamental, especially if dominant firms which operate in digital markets, including intermediary, platforms contravene the prohibited practice provisions of the Act.

While the role of market inquiries (in general) is to provide *ex ante* regulation of markets and ensure that the broader economic objectives are achieved within markets, the question of whether the Commission would have the appetite and ability to prosecute firms operating in digital markets is one to consider. It has been pointed out that the unique competition features which digital, online and big data markets have brought still require careful study with regard to whether traditional competition tools of enforcement would be adequate and effective in addressing concerns which appear in these markets.[59]

As will be discussed next, the difficulties which the Commission has faced in successfully prosecuting firms which operate within brick-and-mortar markets leaves one wondering whether prosecutions within digital markets are likely to occur at all under the current evidentiary burden which the Commission has.

[59] OECD "Using Market Studies to Tackle Emerging Competition Issues –Contribution from South Africa" (2020) Pg 9 (https://one.oecd.org/document/DAF/COMP/GF/WD(2020)34/en/pdf) – Accessed on 15 September 2023.

A *Prima Facie* Standard

A. The Abuse of dominant position

When the Commission (or a complainant) refers a complaint, under section 8 of the Act, to the Tribunal for adjudication, there are certain requirements which it must successfully plead in order to obtain the relief which it seeks. Sutherland points out that with specific reference to sections 8(1)(a) and sections 8(1)(b), which relate to excessive pricing and a refusal to grant access to an essential facility respectively, these provisions are self-contained.[60]

Section 8(1)(c) on the other hand covers conduct of a general exclusionary nature. This section is used as a catch all provision for exclusionary conduct which does not fall into the specified category of conduct which is outlined under section 8(1)(d) of the Act. The Commission (or complainant) will be successful if it is able to prove that "the act in question had an anti-competitive effect that outweighs any pro-competitive gain proved by the respondent."[61] The Commission, having pleaded the dominance of the respondent, must then specifically show that the alleged conduct is exclusionary. In other words, the conduct must meet the definition contained in the Act of exclusionary conduct i.e. "…an act that impedes or prevents a firm from entering into, participating in or expanding within a market."[62] Once this has been done, the Commission must then show (or plead) that the alleged exclusionary conduct is anti-competitive and that this outweighs any efficiency justification for the conduct.[63]

As pointed out above under section 8(1)(d) of the Act, the specific types of exclusionary act that are prohibited by the Act are listed. Section 8(1)(d) lists six specific types of

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[60] Sutherland "Competition Law of South Africa" Issue 16 page 7-35.
[61] Ibid.
[62] Section 1(xiii) of the Act.
[63] *Competition Commission v South African Airways (Pty) Ltd* 18/CR/Mar01 [2005] ZACT 50 para 132 and para 134.

exclusionary acts that are prohibited so long as the Commission (or complainant) proves that the act in question had an anti-competitive effect and the respondent does not prove that the action resulted in certain pro-competitive gains that outweighed that effect.[64] The Tribunal, has previously held that, with respect to section 8(1)(d) of the Act "*…the burden of proof shifts to the respondent who must prove that the efficiency justification outweighs the anticompetitive effect.*"[65]

Roberts has previously pointed out that there are high hurdles that the CCSA (or a complainant) would have to jump in order to successfully prove abuse of dominance cases in South Africa.[66] In making these comments, Roberts cited the limited number of abuse of dominance cases where abuse was actually found to exist by the Tribunal i.e. *Patensie*[67] and *SAA*[68]*.* The only case which can be add to this short list is *Computicket*[69] which was also not overturned on appeal. For completeness one can also add two excessive pricing cases which the CCSA successfully prosecuted during the Covid-19 pandemic, namely *Babelegi*[70] and *Dischem*[71].

The emphasis on proving anti-competitive effects in a market means that the ability to enforce the provisions of the Act especially against firms which operate within digital markets, will always be severely limited. This is principally because of how difficult it is to prove anti-competitive effects. As highlighted above, the limited number of successfully prosecuted abuse of dominance cases appears to be further evidence of the difficulty

64 Sutherland op cit note 60 at 7-35.

65 *Competition Commission v South African Airways (Pty) Ltd* 18/CR/Mar01 [2005] ZACT 50 para 135.

66 S Roberts "Assessing the record on competition enforcement against anti-competitive practices and implications for inclusive growth" working paper 27 February 2017 at page 19. https://www.redi3x3.org/sites/default/files/Roberts%202017%20REDI3x3%20Working%20Paper%2027%20Competition%20policy%20and%20inclusive%20growth.pdf) accessed on 17 September 2023.

67 *Competition Commission v Patensie Sitrus Beherend Beperk* CR017Jun01. Further to this, Patensi's appeal to the CAC on the same conduct was dismissed with costs (*Patensie Sitrus Beherend v Competition Commission and Others* [2003] ZACAC 4).

68 *Competition Commission v South African Airways (Pty) Ltd* 18/CR/Mar01 [2005] ZACT 50

69 *Competition Commission v Computicket (Pty) Ltd* CR008Apr10.

70 *Babelegi Workwear and Industrial Supplies CC v Competition Commission of South Africa* [2020] ZACAC 7.

71 *Competition Commission and Dis-Chem Pharmacies Ltd* CR008Apr20.

surrounding the effects-based approach. In the EU, The Guidance on the Commission's Enforcement Priorities (adopted in 2008) applying to Article 102 of the TFEU, it has been pointed out that part of the reason for the 'effects-based' approach was to help align Article 101[72] of the TFEU and Article 102[73] of the TFEU with the EU Commission's practice and the state of the law as it relates to merger control.[74] The Guidance on the Commission's Enforcement Priorities also sought to clarify the EU Commission and the EU Court's approach towards exclusionary conduct which had been seen as being very legalistic.[75]

The need for an agile and focused intervention competition mechanism in order to successfully prosecute firms which operate within digital markets is essential if competition policy is to stay abreast of this fast-paced market. When one considers that in these markets, irreparable harm is only prevented through timely intervention.[76] Simply put the difficulty which the CCSA faces in successfully proving abuse of dominance cases in the 'much better understood' 'bricks and mortar' markets indicate that the task is only likely to become more difficult when it comes to the less understood and much more complex digital markets.

B. A Revised Approach

Hovenkamp hails as one of the most important achievements of antitrust decision making was the adoption of a more presumptions-based approach. He argues that "[u]nder that approach a plaintiff must prove a prima facie case, identifying with some particularity a particular practice, and why it represents an anticompetitive exercise of market power. At that point the burden of proof shifts to the defendant to offer a procompetitive justification

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[72] Which deals with anti-competitive agreements between two or more independent market operators.
[73] Which deals with prohibited abusive behaviour by companies holding a dominant position.
[74] F Castillio de la Torre 'Is the Effects-Based Approach Too Cumbersome?: Taking Stock of Recent Practice and Case Law on Article 102 TFEU' in Claici, A., Komninos, A. and Waelbroeck, D. *The Transformation of EU Competition Law: Next Generation Issues, Kluwer Law International* (ed) (2023) 146.
[75] Ibid at 146 – 147.
[76] D Geradin & D Katsifis op cit note 13 at 14.

for its restraint."[77] While made within the context of a critique of the undermining of the presumptions approach by the Supreme Court (in the United States), in favour of an approach which required the Federal Trade Commission ("FTC") to prove its case in the entirety before any evidentiary shift in the burden of proof.[78] Hovenkamp ultimately concludes that before there is any change in antitrust policy towards digital platforms, more work needs to be done to understand how they work and the implications of a more robust approach to their regulation.[79]

In order to properly outline the *prima facie* standard which a party must meet, it is important to firstly outline the evidentiary burden which is required by the parties in order to advance their respective sides of the case. In the ordinary sense, a presiding judge or panel would consider the evidence which is presented by the parties through the lens of a particular standard of proof in order to determine whether to convict or acquit (in a criminal context) or to grant or refuse a particular application or action which has been placed before them.[80] This is often referred to as the burden of proof.

Dlamini argues that the phrase 'burden of proof' had metaphorical significance to it as it was used in order to assist a jury to understand which party had to establish a particular fact.[81] The meaning of a burden of proof has been further refined to mean – " a) the burden of persuading the jury to find for a party; and b) the burden to leading evidence to rebut evidence led by the other side."[82] The first burden can also be regarded as the persuasive burden which remains the obligation of the state (in a criminal context) or the one who accuses (in a civil context) throughout the entire case. The second burden can

[77] H Hovenkamp op cit note 14 at 13.
[78] H Hovenkamp op cit note 14 at 13 – 14.
[79] H Hovenkamp op cit note 14 at 37 -38.
[80] A le Roux-Kemp "Standards of Proof" (2021) 31(3) *Obiter* 686 at 686.
[81] CRM Dlamini "The burden of Proof: Its role and meaning" (2003) 14 *Stell. LR* 68 at 71.
[82] Ibid at 72.

be regarded as an evidential burden which is capable of shifting to the accused in order to rebut the evidence which has been adduced against them.[83]

It is important to point out that when it comes to the evidential burden, only once the initiating party has established a *prima facie* case against the respondent firm will the burden be discharged.[84] At this point, the evidential burden will then shift to the respondent firm to rebut the evidence. Within the competition law space, this illustration of the shifting evidential burden is upon the establishment of a *prima facie* case which has been best played out in the newly crafted excessive pricing provision captured under section 8(1)(a) of the Act. In *Babelegi* the Competition Appeal Court ("CAC") pointed out that "*…the reformulated section 8(2) read together with section 8(3) of the Act imposes an evidential burden on the [Respondent firm], once dominance is established, to rebut the prima facie case against it.*"[85] In essence it is the duty of the CCSA to ensure that it produces evidence of a contravention of section 8(1)(a) which is clear enough to establish a *prima face* case before the evidentiary burden is shifted.

The establishment of a *prima facie* case raises interesting questions with respect to what type of evidence would need to be presented to meet this threshold. The proliferation of interim relief applications has drawn sharp attention to the type of evidence which is needed to meet this *prima facie* case threshold within the context of interim relief applications. In *Emedia Investments Proprietary Limited South Africa v Multichoice Proprietary Limited and Another* [86] the CAC, within the context of interim relief proceedings pointed out that "*[a]s long as there is <u>clear and non-speculative evidence about possible anti-competitive effects</u>, then serious consideration must be given to the granting of the relief."* [87] This crucial tenet outlines the fundamental requirement of what

[83] Ibid at 88.
[84] A le Roux-Kemp op cit note 80 at 687.
[85] *Babelegi Workwear and Industrial Supplies cc v Competition Commission of South Africa* para 56.
[86] [2022] ZACAC 9.
[87] *Emedia Investments Proprietary Limited South Africa v Multichoice Proprietary Limited and Another* para 93.

a *prima facie* case looks like. Specifically, an applicant must present clear and non-speculative evidence about the possible anti-competitive effects of the alleged conduct for the *prima facie* standard to be met.

In *York Timbers v South African Forestry Company*[88] the Tribunal (within the context of interim relief proceedings) provided an outline of how evidence is weighed and applied when determining whether an applicant has made out a *prima face* case.[89] Specifically, the Tribunal pointed out that a court must take the facts which have been alleged by the applicant together with those which have been alleged by the respondent which the applicant cannot dispute and consider whether, in light of the probabilities, the applicant should on those facts establish the existence of a prohibited practice at the hearing of the complaint referral.[90] As pointed out, the Tribunal in *York Timber* provides a framework for the determination of an interim relief application when it considers how a *prima facie* case is established. It is submitted that the difference which would exist in a complaint referral (for example) is that the clear and non-speculative evidence, adduced by the applicant, about possible anti-competitive effects would be enough for the CCSA to trigger the shifting of the evidential burden over to the respondent to then explain why its conduct does not amount to what has been alleged. This approach would be analogous to section 8(2) of the Act. As has been argued elsewhere, the Tribunal has already started engaging with digital markets and their respective complexities as it relates to the abuse of dominance provisions of the Act[91] in the interim relief application brough by GovChat against Facebook in January 2021. While interim in nature, and given the suggested approaches above, the case provides an important illustration with respect to the complexities of digital markets and the need for a *prima facie* standard.

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[88] IR078Feb01.
[89] *York Timbers v South African Forestry Company* para 64- 66.
[90] *York Timbers v South African Forestry Company* para 64.
[91] S Gumede. & P Manenzhe "Competition regulation for digital markets: The South African experience." (2023) 31 *AJIC* 1.

C. *GovChat v Facebook*

In *GovChat*[92] *v Facebook* the Tribunal was requested, by GovChat, to prevent Facebook (WhatsApp's owners) from 'off-boarding' GovChat from the WhatsApp paid business messaging platform or application programming interface.[93] GovChat argued that WhatsApp is dominant and that its conduct amounts to a prohibited practice, namely a contravention of section 8(1)(d)(ii) and section 8(1)(c) of the Act.[94] It is important to note that because this was an interim application, the standard of proof for success was a *prima facie* case.

The Tribunal identified a market for Over The Top ("OTT") messaging applications in which WhatsApp was active. The Tribunal distinguished the WhatsApp platform from other services[95] as a user only required internet connection on a suitable phone and was capable of sending and receiving a variety of media including "*photos, music, videos, voice memos, animated GIFs and even documents like MS Word or PDF files.*"[96] Another important distinguishing feature identified was WhatsApp's end-to-end encryption.[97] These distinguishing technological features caused the Tribunal to categorise WhatsApp in a narrower market for OTT messaging applications together with other internet based

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[92] GovChat is a government online services platform which is also available via mobile app which was co-created in collaboration with the South African government and offers a solution to the roll out of the Social Relief of Distress Grant with the Department of Social Development and South African Social Security Agency (SASSA). This was especially crucial during the height of the Covid-19 pandemic. The ability for citizens to apply for social grants online or using their mobile phones meant that long queues were cut drastically at SASSA offices. This service is incredibly important to South Africa, a country which has an extremely high level of citizens who depend on social grants from the government and who often have to travel long distances to register and/or apply for a social grant.

[93] GovChat (Pty) Ltd, Hashtag Letstalk (Pty) Ltd and Facebook Inc., WhatsApp Inc., Facebook South Africa (Pty) Ltd Case No: IR165Nov20. Para 2.

[94] Section 8(1)(d)(ii) prohibits a dominant firm from *"refusing to supply scare good or services to a competitor or customer when supplying those goods or services is economically feasible"* and Section 8(1)(c), in the alternative, prohibits a dominant to, *"engage in an exclusionary act, other than an act listed in paragraph (d)…"*

[95] These included SMS, MMS, USSD.

[96] GovChat (Pty) Ltd, Hashtag Letstalk (Pty) Ltd and Facebook Inc., WhatsApp Inc., Facebook South Africa (Pty) Ltd Case No: IR165Nov20 para 39 and 40.

[97] GovChat (Pty) Ltd, Hashtag Letstalk (Pty) Ltd and Facebook Inc., WhatsApp Inc., Facebook South Africa (Pty) Ltd Case No: IR165Nov20 para 41.

apps such as WeChat, Facebook Messenger and Snapchat.[98] The Tribunal established that WhatsApp was dominant in the relevant market by accepting that, (1) 89% of all internet users between the ages of 16 and 64 reporting having used WhatsApp; (2) at least 58% of all mobile phone users having downloaded WhatsApp; (3) WhatsApp comes pre-loaded on almost all Android smartphones; and (4) that mobile networks in South Africa offer "WhatsApp data bundles."[99]

In assessing the alleged contravention, the Tribunal observed that it is very difficult to duplicate OTT apps without extensive capital investment and thus they fall within the meaning of scarce.[100] The Tribunal found, on a *prima facie* basis, that WhatsApp selectively applying its terms and conditions in support of their own business service providers (BSPs) rendering services to government departments and its direct approach to GovChat's government clients indicated that WhatsApp sought to foreclose GovChat from the market.[101] The Tribunal further found that GovChat had established a *prima facie case* of anticompetitive conduct on the part of WhatsApp by threatening to off-board GovChat from the WhatsApp platform in favour of its own BSPs. In light of all of this, the Tribunal concluded that GovChat had *prima facie* met the requirements of section 8(1)(d)(ii).[102]

While the Tribunal was able to make findings on a *prima facie* basis, the question remains whether the same would be true on a balance of probabilities standard of proof especially when consideration would also need to be had to the anti-competitive effects of Facebooks conduct of offboarding. As stated above, the dynamic nature of digital

[98] GovChat (Pty) Ltd, Hashtag Letstalk (Pty) Ltd and Facebook Inc., WhatsApp Inc., Facebook South Africa (Pty) Ltd Case No: IR165Nov20 para 42.
[99] GovChat (Pty) Ltd, Hashtag Letstalk (Pty) Ltd and Facebook Inc., WhatsApp Inc., Facebook South Africa (Pty) Ltd Case No: IR165Nov20 para 55.
[100] GovChat (Pty) Ltd, Hashtag Letstalk (Pty) Ltd and Facebook Inc., WhatsApp Inc., Facebook South Africa (Pty) Ltd Case No: IR165Nov20 para 113.
[101] GovChat (Pty) Ltd, Hashtag Letstalk (Pty) Ltd and Facebook Inc., WhatsApp Inc., Facebook South Africa (Pty) Ltd Case No: IR165Nov20 para 140 – 141.
[102] GovChat (Pty) Ltd, Hashtag Letstalk (Pty) Ltd and Facebook Inc., WhatsApp Inc., Facebook South Africa (Pty) Ltd Case No: IR165Nov20 para 152.

markets, the sophistication of the manner in which data is collected and analysed and the challenges in proving anti-competitive effects when it comes to exclusionary conduct may pose a serious challenge for the CCSA should they refer this matter for adjudication. A *prima facie* standard of proof coupled with a reverse evidentiary burden would give the CCSA (or GovChat in the instance of a self-referral) a much stronger chance of successfully proving its case. A reverse onus would require Facebook (and WhatsApp) to show that their conduct does not amount to a refusal to supply scarce goods which are economically feasible to supply to a customer instead of only having to justify their conduct on technological and/or efficiency or pro-competitive gains.

Conclusion

Hovenkamp's sentiments surrounding the need to better understand digital platforms (and by extension digital markets) before there is any change of policy are sobering. The discussion presented above however and the limited success which the CCSA has had in the successful prosecution of abuse of dominance cases in 'brick and mortar' markets is concerning. While better understanding of how digital platforms (and by extension digital markets) what we know already, it is submitted, is more than enough to consider a potentially different approach. The use of algorithms, the information asymmetries which exists between the CCSA and digital platforms and the challenges surrounding the ability to prove anti-competitive effects are reason enough to consider a new standard.

Furthermore, it is submitted that the findings of the OIPMI appear to suggest that potential abuse of dominance contraventions are being committed by digital platforms. The OIPMI has attempted to address these through remedial actions which it has suggested however it should be noted that this is only one aspect of competition policy namely *ex ante* regulation. *Ex post* regulation and the enforcement tools also need to form part of the CCSA's arsenal if they are to successfully regulate these platforms (and markets). It is also worth noting that while the OIPMI has crafted remedial actions, some digital

platforms have sought to take these on appeal and/or review and thus their implementation is still the subject of judicial scrutiny.

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