



Competition Regulation for Digital Markets in Africa:

LESSONS FROM SOUTH AFRICA

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1. Leading participants

- ▶ In 2009, the top five companies (measured by market capitalization) did not feature any technology company.
- ▶ In 2018, the top five companies were: Apple, Alphabet, Microsoft, Amazon.com and Tencent Holdings.
- ▶ Today, the economic power of the FAAGs (Facebook, Amazon, Apple and Google) is undeniable.
- ▶ The CCSA's OIPMI preliminarily identified leading platforms in South Africa by category:
 - ▶ Software app stores: Google Play Store and Apple App Store
 - ▶ eCommerce: Takealot
 - ▶ Property classifieds: Property24 and Private Property
 - ▶ Automotive classifieds: Autotrader and Cars.co.za
 - ▶ Food delivery: Mr Delivery and UberEats
 - ▶ General Search: Google Search

2. Competition Issues in Digital Markets

Digital platforms that operate within it are generally characterized by their two-sided or multi-sided nature.

One side offers services to consumers (sometimes for a zero monetary price) in order to obtain consumers' attention and data, which they monetise.

The other side offers advertising opportunities to advertisers for a fee. Advertising is the biggest source of revenue for major digital platforms.

Competition issues have been identified from Google's advertising services on Google Search.

Economic contemplations which characterize digital markets include upfront investment costs, strong network effects, economies of scale, economies of scope in data, and low distribution costs that allow for a global reach.

Evidence of deliberate strategies to retain early leadership by major platforms benefiting from first mover advantages.

Common competition issues identified in various jurisdictions: forced free riding, abusive leveraging of dominant position (self-preferencing), tying and bundling, high commission fees, unfair terms and conditions and unfair treatment of smaller suppliers on the platform.

3. The South African Competition Legislation

- ▶ The big question: is current competition law and policy adequate to deal with competition concerns emanating from digital markets?
- ▶ The CCSA has taken positive steps towards regulating digital markets:
 - ▶ Amendments to the Competition Act
 - ▶ Application of the Act to cases within digital markets in South Africa:
 - ▶ Merger control
 - ▶ Abuse of dominance and prohibited practices
 - ▶ Cartel conduct
 - ▶ Published a strategic view on regulating competition in the digital economy.
 - ▶ The paper identified market inquiries as one of the most effective tools to (1) promote and retain competition in markets where common industry practices may collectively contribute to the hindering of competition and (2) addressing barriers to participation in such markets
 - ▶ The ongoing digital markets market inquiry, i.e. Online Intermediation Platforms Market Inquiry.

3.1. Merger Control

- ▶ Of the 87 mergers in digital markets notified between 2011 and 2018,
 - ▶ 82 were approved without conditions
 - ▶ 5 were approved with public interest conditions
- ▶ CCSA acknowledged possible underenforcement and that no conditions had been imposed to address substantive competition concerns.
- ▶ This was until the prohibition of the MIH/WeBuyCars merger in 2018.
 - ▶ TOH: (1) Removal of potential entrant from the market and (2) Conglomerate or portfolio effects
- ▶ Google LLC(USA) and Fitbit Inc. (USA) was approved with conditions
 - ▶ Small merger filed at request of the CCSA. Section 13(1)a
 - ▶ TOH: (1) Removal of potential competition, (2) Input foreclosure, (3) Using Fitbit data to enter a different market (provision of digital health) and (4) Preventing future competition in the provision of digital health.
- ▶ Section 12A(k), ensures against merger creep/ killer acquisitions

3.2. Abuse of Dominance and Prohibited Practices

- ▶ CCSA highlights challenges for abuse of dominance enforcement in digital markets:
 - ▶ Jurisdictional reach
 - ▶ Meeting evidentiary burden for effects
 - ▶ Assessing market power
- ▶ Debate: (1) how abuse of dominance enforcement should be modified and (2) when are cases the right tool to tackle a given competition concern.
- ▶ GovChat v Facebook (interim relief application)

3.3. Cartel Conduct

- ▶ Use of algorithms have created modern and advanced ways for market players to collude
- ▶ Traditional methods such as corporate leniency programmes may not be an effective way of detecting cartel conduct in digital markets.
- ▶ Different analytical and technical skills may be required
- ▶ The forex trading cartel case
 - ▶ Used traditional methods
 - ▶ Jurisdiction issues
- ▶ Section 4(1)(b) prohibits restrictive horizontal practices and captures collusion using algorithms to set prices and monitor compliance.
- ▶ Challenge: lack of requisite skills for cartel detection using data analytical tools.

3.4. Online Intermediation Platforms Market Inquiry (OIPMI)

- ▶ CCSA published its Provisional OIPMI Report on 13 July 2022 and is currently reviewing public comments and responses from affected parties on its provisional findings and recommendations.
- ▶ The OIPMI focused on four areas of competition and public interest:
 - ▶ Market features that may hinder competition amongst platforms
 - ▶ Market features that may hinder competition amongst business users
 - ▶ Market features that give rise to exploitative treatment of business users
 - ▶ Market features that may negatively impact on the participation of SMEs and/or HDP firms
- ▶ Platform competition issues: undermining price competition, leveraging visibility, loyalty schemes
- ▶ Business user competition issues: exploitative fees, fee discrimination, selling visibility, self-preferencing conduct and restrictive terms and conditions.
- ▶ SMEs and/or HDP firm issues: lack of participation by HDPs in online platform markets
 - ▶ Platform level: lack of funding to compete against big platforms
 - ▶ Business user level: discrimination and exploitation, inability to secure start-up financing, inability to secure domestic distribution agreements

4. The Digital Economy on the African Continent

- ▶ African Continental Free Trade Area Agreement
 - ▶ Cross-country cooperation and collaboration
- ▶ Either regional level regulation or individual jurisdiction regulation of digital markets.
- ▶ Three crucial factors to consider when crafting regulation for African markets:
 - ▶ African economies are much smaller with a greater limitation and constraint on enforcement resources
 - ▶ African markets are highly concentrated
 - ▶ African markets are filled with vast inequality and poverty
- ▶ Best mechanism: regional and perhaps even continental coordination
- ▶ Less resource constraints on individual jurisdictions
- ▶ Suggested regulatory provisions:
 - ▶ Merger regulation
 - ▶ Abuse of dominance
 - ▶ Market Inquiry



Thank you!