

Competition Regulation for Digital Markets in Africa: Lessons from South Africa

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Abstract

“The aim of this paper is to propose a pragmatic approach to the regulation of competition concerns that are brought about by digital markets in Africa. Questions have been raised globally about the adequacy of traditional competition tools to regulate digital markets. By examining some of the recent developments in South Africa regarding digital markets and the current inquiry underway in this space, ideas can be borrowed and used throughout the continent in order to provide for an effective competition regulatory framework. This article further suggests important legislative changes which may need to be made in order ensure that competition regulation effectively regulates digital markets.”

1. Introduction

Since the introduction of the internet connectivity, the growth in the digital economy has been rapid throughout the world. This has provided businesses that are ploughing their trade in the digital economy with an unprecedented large reach. Much like the traditional economy¹, the digital economy has brought about a new set of challenges with regards to competition regulation. Traditional competition tools, which have been successfully applied to prevent the establishment of monopolies and/or elevated levels of concentration within the traditional economy have come into great scrutiny given the difference in the dynamics of digital markets. There are novel features of the digital economy that shape interventions in digital markets and lead competition practitioners to approach competition regulation in the digital economy with a different mindset than would the traditional economy.

South Africa has had to confront competition concerns in the digital economy, and this has called to question the adequacy of the current competition framework to handle these concerns.² The African continent, more broadly, is also not immune to the infiltrations of the digital economy and the challenges which these will bring. This paper seeks to examine the degree to which South African competition law has managed to navigate the terrain of the digital economy and what lessons can be learned by the African continent in order to regulate competition concerns in the digital economy.

2. The Leading Market Participants

The degree to which digital markets have taken over our daily living is incomprehensible. Users around the world have grown fond of digital platforms i.e., from connecting with loved ones through social media, to banking digitally, to shopping online, to selling property on classifieds platforms, to buying food through food delivery apps, booking flights and accommodation online, downloading apps on software application stores, etc. This growth and prominence has been made possible by large digital platforms that have caused significant disruptions to the traditional economy over the last decade.³ A brief examination of the top five companies in the world, and their respective industries, by market capitalization in March 2009 and the top five companies in

¹ Traditional economy is built on businesses which are held together through bricks and mortar.

² The Competition Commission of South Africa (CCSA), *Competition in the Digital Economy*, Version 2, 2020.

³ United Nations Conference on Trade and Development, *Competition Issues in the Digital Economy* (2019) 2.

the world (and their industries) by market capitalization in March 2018 will reveal just how far the digital economy has taken growth and influence over our daily lives.⁴

Table 1: Top Five Companies in the World (2009 and 2018)

2009 ⁵			2018 ⁶		
Company	Market Capitalisation	Industry	Company	Market Capitalisation	Industry
Exxon Mobile	\$337 billion	Oil and gas	Apple	\$851 billion	Technology
Petro China	\$287 billion	Oil and gas	Alphabet ⁷	\$719 billion	Technology
Walmart	\$204 billion	Consumer services	Microsoft	\$719 billion	Technology
Industrial and Commercial Bank of China	\$188 billion	Financial	Amazon.com ⁸	\$701 billion	Consumer services
China Mobile	\$175 billion	Telecoms	Tencent Holdings ⁹	\$496 billion	Technology

Source: United Nations Conference on Trade and Development¹⁰

As depicted in the table above, in 2009 the top five companies did not include any technology company, and by 2018 the face of the world had completely changed as the top five companies were all digital platforms. Today, the economic power of the FAAGs (Facebook, Amazon, Apple, and Google) is undeniable. These companies provide digital infrastructure for social networking sites, marketplaces, application stores and search engines, respectively. Not only do these firms run these marketplaces, but they also compete in them – a position that enables them to write one set of rules for others, while they play by another.¹¹

On 19 May 2021, the Competition Commission of South Africa (“CCSA”) initiated a market inquiry into online intermediate platforms i.e., the Online Intermediate Platforms Market Inquiry (“OIPMI”). Online 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 included

⁴ Companies were measured by market capitalization.

⁵ Table 1: United Nations Conference on Trade and Development, *Competition Issues in the Digital Economy* (2019) 2.

⁶ Table 2: United Nations Conference on Trade and Development, *Competition Issues in the Digital Economy* (2019) 3.

⁷ Alphabet is the parent company of Google and has been since 2015.

⁸ Amazon.com is an online marketplace where various goods are traded.

⁹ Tencent Holdings is a Chinese technology and entertainment company.

¹⁰ United Nations Conference on Trade and Development, *Competition Issues in the Digital Economy* (2019) 2.

¹¹ Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations – Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary of the House of Representatives (2022), page 2.

eCommerce marketplaces, online classifieds, and price comparator services¹², software application stores and intermediated services such as accommodation, travel, and food delivery.¹³ The CCSA has provisionally identified the following platforms as leading platforms in their respective platform categories:

Table 2: Leading Platforms in South Africa 2022

Platform Category	Leading Platforms
Software app stores	Apple App Store Google Play Store
eCommerce	Takealot
Property classifieds	Property24 Private Property
Automotive classifieds	Autotrader Cars.co.za
Food delivery	Mr Delivery UberEats
General search ¹⁴	Google search

Source: CCSA¹⁵

These platforms were identified as leading platforms, not necessarily because they are dominant (as it is unnecessary to establish dominance in a market inquiry), but because they have the features of dominance given their position in their markets.¹⁶

3. Competition Issues in Digital Markets

The digital economy has brought with it challenges especially from a regulation perspective. The kind of economics which drive markets within the digital economy have provided significant challenges for competition law and thus rendered it virtually inadequate on its own to regulate.¹⁷

¹² This included Insurance Price Comparator Sites,
¹³ Competition Commission of South Africa, OIPMI Summary Report, page 2
¹⁴ As an input to platform competition.
¹⁵ Competition Commission of South Africa, OIPMI Summary Report, page 46
¹⁶ The CCSA only identified leading platforms in platform categories that warranted remedial action against firms holding a lead.
¹⁷ Idris Ademuyiwa and Adedeji Adeniran *Making Competition and Antitrust Regulations Work for Africa* (2020) 8.

There are significant characteristics of the digital economy that have brought to caution the way intervention in digital markets should be approached.

One of the prominent characteristics of the digital economy is that the digital platforms which operate within it are generally characterized by their two-sided or multisided nature.¹⁸ On one side, digital platforms offer services to consumers (sometimes for a zero monetary price) in order to obtain consumers' attention and data, which they monetise. This data is often seen as a commodity valuable enough to influence big data companies' ability to "make decisions which have economic, environmental and even social impacts or effects on a variety of topics including health, education or society in general."¹⁹ The role of data to firms which operate in digital markets is paramount because it becomes the manner (more often than not) in which market power is conferred.²⁰ This represents a fundamental shift from the traditional understanding of market power which is traditionally understood as the ability to maintain prices above market prices.²¹ On the other side, digital platforms sell advertising opportunities to advertisers. Advertising is the source of most of the revenue earned by major digital platforms.²² Competition issues have been identified from Google's advertising services on Google Search. Google has substantial market power in supplying general search services globally.²³ Scale is important to general search engine competition for both consumers and search advertisers alike. Greater scale improves the quality of a general search engine's algorithms, expands the audience reach of a search advertising business, and generates greater revenue and profits.²⁴ Google was able to achieve greater scale over the years and entrench its market power by contractually obligating device manufacturers to pre-install Google Search, place it on the Home Screen and set it as the default search engine.²⁵ Google went as far as paying Apple billions of dollars annually to be the default on Safari.²⁶ Google

¹⁸ Which essentially facilitates the interaction of two or more separate characters at the same time.

Competition issues in the digital economy - United Nations Conference on Trade and Development (2019) [Competition issues in the digital economy (unctad.org)] 13 May 2022 page 3.

¹⁹ Digital Economy Report (2021) – Cross-boarder data flows and development: *For whom the data flow* Page 5

²⁰ Competition issues in the digital economy - United Nations Conference on Trade and Development (2019) [Competition issues in the digital economy (unctad.org)] accessed on 13 May 2022 page 6.

²¹ Filipe Da Silva & Georgina Núñez "Free competition in the post-pandemic digital era - The impact on SMEs" (United Nations) page 8.

²² The Australian Competition and Consumer Commission, Digital Platforms Inquiry (June 2019), page 58.

²³ The Australian Competition and Consumer Commission, Digital Platforms Inquiry (June 2019), page 58.

²⁴ United States of America et al, vs Google LLC, case no 1:20-cv-03010, filed 20 October 2020, page 13.

²⁵ https://assets.publishing.service.gov.uk/media/61b794d6d3bf7f05545e1416/Appendix_E_-_Google_agreements_with_device_manufacturers_and_app_developers.pdf [Access date: 08 August 2022]

²⁶ It is estimated that Google paid Apple USD15 billion in 2021 to be the default search engine on Safari. See <https://www.forbes.com/sites/johanmoreno/2021/08/27/google-estimated-to-be-paying-15-billion-to-remain-default-search-engine-on-safari/?sh=425f6dda669b> [Access date: 08 August 2022]

also offered Revenue Share Agreements to device manufacturers.²⁷ Distorted search results, due to prominent positioning being awarded to business users that pay for advertising on the platform, have the potential to mislead consumers especially in markets where customer journey starts on general search (e.g. the purchasing of a house/car, a search for a holiday destination etc.). Furthermore, business users that cannot afford paid advertising on Google Search are at risk of being undiscoverable. Ranking first and within the top 4 for a given search is critical to drive traffic to one's website.²⁸

Platforms do tend to be pushed towards monopolization due to various economic features of the market. The economic contemplations and considerations which characterise digital markets include upfront investment costs;²⁹ strong network effects;³⁰ economies of scale;³¹ economies of scope in data³²; and low distribution costs that allow for a global reach.³³ There has also been evidence of deliberate strategies to retain early leadership by major platforms benefiting from first mover advantages. Common competition issues identified in various jurisdictions include forced free riding arising from the use of business users' competitively sensitive information about both sellers and consumers. Forced free riding arises "when a platform appropriates innovation by other firms that depend on the platform for access to consumers."³⁴ Another issue identified is abusive leveraging where a firm can use (or leverage) its dominant position in one market to favour its products in a related market.³⁵ This type of conduct can take the form of self-preferencing where there is evidence of preferential treatment of own products and/or services. A more established issue also identified in the digital market is tying and bundling. In the US, there were concerns relating to Amazon requiring sellers to buy advertising as a condition to sell

²⁷ Revenue Share Agreements ensured that smartphone manufacturers receive a cut of the advertising revenue that Google made from the use of Google Search advertising.

²⁸ Competition Commission of South Africa, OIPMI Provisional Report, Chapter 2: Travel and Accommodation, page 77.

²⁹ Which increases the barrier to entry for potential rivals.

³⁰ Where more users on the one side of the platform makes the platform more valuable to the other side. Network effects can result in virtuous cycles whereby growing users on one side drives growing users on the other, which then repeats itself.

Competition Commission of South Africa, Online Intermediate Platforms Market Inquiry Summary Report, page 8

³¹ The marginal cost of including additional users is insignificant, close to zero.

³² High and increasing returns to the use of data. The control of big data and use of machine learning, algorithms and analytics generates enormous digital intelligence for the data controller

³³ Stigler Centre (2019) "*Stigler Committee on digital platforms, final report*".

Idris Ademuyiwa and Adedeji Adeniran *Making Competition and Antitrust Regulations Work for Africa* (2020) 8.

³⁴ <https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf>, page 53 [Access date: 29 July 2022]

³⁵ <https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf>, page 54 [Access date: 29 July 2022]

on the platform.³⁶ A new envelopment strategy in digital markets identified is privacy policy tying, where a dominant firm can impose data collection terms on its consumers that allows it to use consumer data in a wide set of circumstances. It can use data collected in the market for which it is dominant to enter a new market with an overlapping user base (even if the products are not related in terms of usage).³⁷ Several jurisdictions have received concerns regarding exploitative practices by large platforms in the form of high commission fees, unfair terms, and conditions of access to the platform and the treatment of smaller suppliers on the platform.

The market power conferred on major platforms has become the source of several concerns raised by various jurisdictions in the digital economy. An adaptation of an understanding on how digital markets operate is key if competition authorities are to be effective in achieving their fundamental purpose of ensuring competitive markets.

4. The South African Competition Legislation

The rapid growth of digital markets and their evident tendency towards concentration brought to question whether current competition law and policy is adequate enough to deal with competition concerns emanating from digital markets around the world. This gave rise to the urgent requirement for competition policy to pro-actively identify and prevent entrenchment strategies by major platforms before they become too difficult to reverse.³⁸ The CCSA has taken positive steps towards regulating digital markets. Although they are still at their infancy in wrestling with digital markets, the cases which they have grappled with have highlighted the flexibility with which the recently amended Competition Act No.89 of 1998, as amended, (“the Act”) can contend with mergers and abuse of dominance cases within digital markets.³⁹ The underlying purpose of these amendments was best captured by the crafters of the bill who denoted that, the objective of the amendments is to address *“two persistent structural constraints on the South African economy,*

³⁶ Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations – Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary of the House of Representatives (2022), page 291.

³⁷ <https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf>, page 55 [Access date: 29 July 2022]

³⁸ The Competition Commission of South Africa (CCSA), Competition in the Digital Economy, Version 2, 2020, page 7.

³⁹ The Competition Act No.89 of 1998 was amended by the Competition Amendment Act No.18 of 2018, with many of the new provisions only coming into effect from February 2020.

*namely, the high levels of economic concentration in the economy and the skewed ownership profile of the economy.*⁴⁰

In September 2020, the CCSA then published a strategic view on regulating competition in the digital economy.⁴¹ The paper identified four features of the digital economy in South Africa namely, rapid and responsive innovation which is presented by digital markets; concentration in digital markets which is often created by first-mover advantages, data accumulation and network effects; the ease of entry in some secondary and tertiary levels of digital markets; and the rapid pace of change.⁴² The report concluded by identifying market inquiries⁴³ as one of the most effective tools to promote and retain competition in markets where common industry practices may collectively contribute to the hindering of competition as well as addressing barriers to participation in such markets. It therefore came as no surprise when the CCSA launched the OIPMI in 2021. The CCSA stated that the Inquiry stems from a *“general recognition that normal enforcement tools may be inadequate on their own to prevent initial market leaders from durably entrenching their position...”*⁴⁴ It is worth noting that amendments to Section 43 of the Act includes an insertion of section 43C which mandates the Commission to have specific regard (when conducting a Market Inquiry) to the effects which a feature of a market will have on Small and Medium Enterprises (“SME’s”) and Historically Disadvantaged Individuals (“HDI’s”)⁴⁵ and section 43E which makes outcomes of market inquiries binding on market participants,⁴⁶ solidifying market inquiries in South Africa as one of the most effective tools to address the prevalent issues in highly concentrated markets.

Thus, this section examines how the application of the Act has managed to provide regulation for digital markets in South Africa by discussing the ongoing OIPMI and the manner in which the CCSA applied the Act in cases within digital markets in order to deal with issues in the digital economy.

⁴⁰ Minister of Economic Development - *Competition Amendment Bill B23B* (2018) page 24.

⁴¹ The CCSA, *Competition in the Digital Economy*, Version 2, 2020.

⁴² The CCSA, *Competition in the Digital Economy*, Version 2, 2020, page 5-6.

⁴³ “Market Inquiry” means a formal inquiry in respect of the general state of competition, the levels of concentration in and structure of a market for particular goods or services, without necessarily referring to the conduct or activities of any particular named firm. An adverse effect on competition is established if any feature, or combination of features, of a market for goods or services impedes, restricts or distorts competition in that market. This is different from a traditional investigation where focus is placed on a specific contravention by particular firms.

⁴⁴ Online Intermediation Platforms Market Inquiry – Terms of Reference (9 April 2021) *Government Gazette No.330* para 2.4.

⁴⁵ Section 43C of the Act was amended by section 25 of Act 18 of 2018 and reinserted by section 26 of Act 18 of 2018.

⁴⁶ This is reflected in the provisions of the Bill itself which creates a mechanism to enable the conversion of a structural remedy to a binding order of the Competition Tribunal.

4.1. Merger Control

The CCSA acknowledged possible underenforcement with regards to merger control in digital markets in South Africa.⁴⁷ This can be seen in how, of the 87 mergers in digital markets notified between 2011 and 2018, 82 were approved without conditions and the remaining 5 were approved with public interest conditions.⁴⁸ The CCSA further acknowledged that no conditions have been imposed to address substantive competition concerns. However, this was until the prohibition of the MIH/WeBuyCars merger in 2018.

MIH (t/a OLX) and WeBuyCars LM183Sep18

This proposed merger involved the acquisition of 60% of the shares in We Buy Cars (Pty) Ltd (“WeBuyCars”) by MIH eCommerce (Pty) Ltd (“MIH”) t/a OLX South Africa (“OLX”). For purposes of this transaction, it is important to understand that OLX is an online classified advertising platform which “...carries advertisements for a broad range of goods and services for purchase and sale, including used cars.”⁴⁹ OLX is wholly owned subsidiary of Naspers which operates a “an online specialised (vertical) classified advertising platform for the purchase and sale of used and new vehicles called *The Car Trader (Pty), t/a AutoTrader*.”⁵⁰ WeBuyCars on the other hand operates as a guaranteed buyer and seller of used cars.

The theories of harm examined were (1) unilateral effects, specifically the removal of a potential entrant into the market, and (2) portfolio effects with the proposed merger likely to entrench Naspers dominance.⁵¹ Pre-merger Naspers had already acquired a controlling interest in FCG.⁵²

⁴⁷ The CCSA, Competition in the Digital Economy, Version 2, 2020, page 7

⁴⁸ The CCSA, Competition in the Digital Economy, Version 2, 2020, page 7

⁴⁹ *MIH eCommerce Holdings Pty Ltd t/a OLX South Africa and WeBuyCars Pty Ltd* supra note 47 Para 2

⁵⁰ *Ibid*

⁵¹ *MIH eCommerce Holdings Pty Ltd t/a OLX South Africa and WeBuyCars Pty Ltd* supra note 47 Para 113.

⁵² Naspers Group had acquired a 34.92% and by November 2019 it had increased its shareholding into one of a controlling interest in FCG.

* FCG, is a Berlin-based firm operating in various countries, buys used vehicles from private individuals and from car rental companies. FCG then sells the used vehicles to dealers (it does not sell to individual consumers). FCG's model operates on the basis that whilst ownership of the used vehicle may transfer briefly to FCG, it does not take vehicles into stock, which would require real estate space. FCG describes itself as a middle-man between a private seller and a dealer and is able to negotiate competitive prices for sellers through the aggregation of demand.

The Tribunal identified a narrow market for car-buying services.⁵³ The Tribunal pointed out that car-buying services are different from traditional dealers because a car buying service focuses on (1) the provision of immediate cash for a high volume of used cars,⁵⁴ (2) a good reputation coupled with a good marketing strategy⁵⁵, (3) it offers an online platform which increases its geographic reach making it easier for private sellers to approach dealers on the platform without having to travel from one dealer to another,⁵⁶ (4) they are far quicker and more convenient than traditional dealers,⁵⁷ and (4) they offer a much greater scale at which they can buy and store cars, which is something that traditional car dealers are unable to do.⁵⁸

In assessing the likelihood of the removal of a potential entrant from the market the Tribunal pointed out that in terms of the merging parties' strategic documents and those of FCG⁵⁹, they (FCG) were "*poised to enter the market in South Africa but for the proposed merger.*"⁶⁰ The Tribunal further pointed out that FCG was set to be a formidable entrant in South Africa in competition with WeBuyCars because it was able to achieve success in the other developing markets in which it had operated in.⁶¹ Furthermore, through Naspers and OLX it would be able (in the South African market) to have access to capital and leads to buy cars and then sell them on the Autotrader platform.⁶² This led the Tribunal to conclude that FCG would have become a formidable competitor to WeBuyCars had it entered South Africa.

The Tribunal then examined the second theory of harm which was conglomerate or portfolio effects. This theory of harm analysed whether Naspers complementary businesses including OLX and Autotrader (as well as its broader portfolio of businesses including its media and technology

⁵³ The merging parties' own strategic documents stated that "...traditional dealers do not exert any meaningful constraint upon car-buying services such as WeBuyCars" and the evidence presented during the hearing, including a survey which was done by Autotrader, confirmed that traditional car dealers were customers of WeBuyCars rather than competitors.

MIH eCommerce Holdings Pty Ltd t/a OLX South Africa and WeBuyCars Pty Ltd supra note 47 Para 179.

⁵⁴ *MIH eCommerce Holdings Pty Ltd t/a OLX South Africa and WeBuyCars Pty Ltd* supra note 47 Para 180.1.

⁵⁵ *MIH eCommerce Holdings Pty Ltd t/a OLX South Africa and WeBuyCars Pty Ltd* supra note 47 Para 180.2.

⁵⁶ *MIH eCommerce Holdings Pty Ltd t/a OLX South Africa and WeBuyCars Pty Ltd* supra note 47 Para 180.3.

⁵⁷ WeBuyCars can buy a car directly from the premises of the seller and then load the car onto their website soon thereafter.

MIH eCommerce Holdings Pty Ltd t/a OLX South Africa and WeBuyCars Pty Ltd supra note 47 Para 180.4.

⁵⁸ *MIH eCommerce Holdings Pty Ltd t/a OLX South Africa and WeBuyCars Pty Ltd* Case No: LM183Sep18 Para 180.5.

⁵⁹ These included FCG's public statements, email exchanges between WeBuyCars and OLX / FCG.

⁶⁰ *MIH eCommerce Holdings Pty Ltd t/a OLX South Africa and WeBuyCars Pty Ltd* supra note 47 Para 226.

⁶¹ *MIH eCommerce Holdings Pty Ltd t/a OLX South Africa and WeBuyCars Pty Ltd* supra note 47 Para 227.

⁶² *Ibid.*

assets⁶³) could be leveraged to entrench WeBuyCars' dominance in the car-buying services market post-merger.⁶⁴ The Tribunal observed that WeBuyCars would be able to leverage off of OLX's market position in private listing offerings as customers would be able to receive a quote from WeBuyCars automatically just by listing their vehicle on the OLX website.⁶⁵ With no competitor in the market to constrain WeBuyCars, the Tribunal concluded that the competition harm identified was likely to arise. Furthermore, the Tribunal highlighted that Autotrader would be provided with "...over 30 years of WeBuyCars' intricate data on both the cars and consumer behaviour..." and this would enable it to set better purchase and sale prices of vehicles coupled with an established dealership network to on-sell vehicles to.⁶⁶ The Tribunal further observed that the combination of all these advantages and synergies, as well as FCG's technological abilities in the car industry,⁶⁷ would raise barriers to entry and expansion in the car-buying services market. Thus, in all likelihood, entrenching WeBuyCars in the market.⁶⁸

Google LLC (USA) and Fitbit Inc. (USA) 2020Sep0045

This was a small merger which was filed at the request of the CCSA.⁶⁹ The theories of harm were: (1) the removal of potential competition in the production and supply of wearable devices;⁷⁰ (2) input foreclosure⁷¹; (3) using Fitbit data or data collected from wrist worn wearable devices to enter the market for the provision of digital health and; (4) preventing future competition in the provision of digital health."⁷² In assessing these theories, the CCSA did not conclude on a relevant market however it did consider the national upstream market for (1) the production and supply of OS for wrist-worn wearable device and (2) the production and supply of OS for smart mobile

⁶³ Prosus: "a global consumer internet group and one of the largest technology investors in the world"; Media 24: "Media24 is Africa's leading media group, with a sizeable presence in digital and traditional publishing and publications, distribution and financial data"; Takealot: "Takealot is South Africa's largest e-commerce retailer with a mission to be the most customer-centric online shopping destination in Africa, Takealot has grown rapidly since its launch in 2011." (<https://www.naspers.com/companies>) – Accessed on 9 June 2022.

⁶⁴ *MIH eCommerce Holdings Pty Ltd t/a OLX South Africa and WeBuyCars Pty Ltd* supra note 47 Para 251.

⁶⁵ *MIH eCommerce Holdings Pty Ltd t/a OLX South Africa and WeBuyCars Pty Ltd* supra note 47 Para 290.

⁶⁶ *MIH eCommerce Holdings Pty Ltd t/a OLX South Africa and WeBuyCars Pty Ltd* supra note 47 Para 384.

⁶⁷ "FCG's use of analytical software and data collated over time allows it to purchase a vehicle knowing what the demand and price points for the vehicle are so that the vehicle can be resold immediately." *MIH eCommerce Holdings Pty Ltd t/a OLX South Africa and WeBuyCars Pty Ltd* supra note 47 Para 50.

⁶⁸ *MIH eCommerce Holdings Pty Ltd t/a OLX South Africa and WeBuyCars Pty Ltd* supra note 47 Para 385.

⁶⁹ The Competition Act 89 of 1998 section 13(1)(a) states, "a party to a small merger is not required to notify the Competition Commission of that merger unless the Commission requires it to do so..."

This merger was also notified in the EU, UK, and Australia.

⁷⁰ Fitness trackers and/or smartwatches

⁷¹ Leveraging of Google's dominance in the provision of Operating Systems ("OS") for Android mobile devices into the market for the production and supply of wrist-worn wearable devices.

⁷² *Google LLC (USA) and Fitbit Inc. (USA)* supra note 46 para 14-18.

devices, as well as (3) the national downstream market for the production and supply of wrist-worn wearable devices.”⁷³

The CCSA found that Google’s entry into the market for the supply of wearable devices through this transaction would lead to the removal of Fitbit as a non-vertically integrated competitor in the market.⁷⁴ The CCSA also noted that this transaction would raise the barriers to entry in the market and would also enhance Google’s already existing data which would allow for it to enhance its dominance in the advertising market.⁷⁵ However, the CCSA found that it was unlikely that Google would be able to foreclose Fitbit’s competitors because Google’s Wear OS was not a significant input in the production and supply of wrist-worn wearable devices.⁷⁶

The merger was approved with conditions imposed on Google. Although these conditions were behavioural, they all attempted to ensure that Fitbit’s rivals could still compete effectively within the digital economy.

Conclusion on merger control

The analysis of the mergers above provides an important purview into the competition authorities’ ability to apply key analytical principles to mergers (including an assessment of the conglomerate effects of digital markets) in order to oversee mergers in digital markets. The current legislative framework, including the recent amendments to merger control regulation, is sufficient to allow for the scrutiny of all digital mergers and to understand the emerging ownership in start-ups where required.⁷⁷ The framework allows for the CCSA to require that small mergers be notified on request. This allowed the CCSA to examine the perimeters of the market and require that Google agree to conditions which would have otherwise not been present because the merger was classified as a small merger. The further significance of this is that the CCSA is able to monitor and effectively regulate possible ‘killer acquisition’ which technology companies have a habit of embarking on in an effort to further entrench their dominance in a market. The South African competition framework, in being able to evaluate its applicability to digital markets, has shown that it is flexible enough to contend with mergers in digital markets thus far. However, calls have

⁷³ *Google LLC (USA) and Fitbit Inc. (USA)* supra note 46 para 13.

⁷⁴ *Google LLC (USA) and Fitbit Inc. (USA)* supra note 46 para 25.

⁷⁵ *Google LLC (USA) and Fitbit Inc. (USA)* supra note 46 para 36.

⁷⁶ *Google LLC (USA) and Fitbit Inc. (USA)* supra note 46 para 26.

⁷⁷ The CCSA, *Competition in the Digital Economy*, Version 2, 2020, page 31.

been made for a change in measurement of merger notification thresholds,⁷⁸ considering the prevalence of ‘killer acquisitions,’ given that some digital firms may not meet the usual turnover or asset-based thresholds. Competition Authorities can benefit from a further definition of assets where assets are not restricted in their definition and may include intangible assets (such as intellectual property) as well as data assets.⁷⁹

4.2. Abuse of Dominance and Prohibited Practices⁸⁰

The CCSA highlights several challenges for abuse of dominance enforcement in digital markets⁸¹ such as, (1) jurisdictional reach as competition authorities may struggle to hold to account global entities with limited presence in SA, especially where evidence is located elsewhere; (2) meeting the evidentiary burden for effects;⁸² and (3) assessing market power with more focus on competitive relationships and strategies as opposed to market shares.⁸³ The CCSA faces the same challenge as many jurisdictions on whether the current regulatory framework applies to new and disruptive technology. There is an active debate in the competition policy community about (1) how abuse of dominance enforcement should be modified to take into account the unique features of digital markets and (2) when abuse of dominance cases are the right tool to tackle a given competition concern.⁸⁴

GovChat⁸⁵ v Facebook (interim application)

⁷⁸ Germany has lowered its merger threshold. The ACCC, where Australia allows for voluntary notifications, is seeking to make certain businesses notify the ACCC of proposed acquisitions.

⁷⁹ The CCSA, Competition in the Digital Economy, Version 2, 2020, page 31.

⁸⁰ At the writing of this essay there was a pending application for interim relief which was before the Competition Tribunal and was brought by eMedia against MultiChoice’s decision to drop four channels. The matter was heard on 25 April 2022 and the decision was yet to be delivered. This essay essentially only focused on matters which had decisions delivered by the Competition Tribunal so as to examine the application of the Act to digital markets. The South African competition framework has also had to deal with cartel conducted in the banks matter. Unfortunately, the application of the South African competition framework in this case has lent itself unable to test because the matter has been challenged vociferously by the Respondent.

⁸¹ The CCSA, Competition in the Digital Economy, Version 2, 2020, page 35 and 36.

⁸² It is currently the case in South African law that the authority bears the onus of demonstrating harm from potentially exclusionary practices which may be challenging in dynamic and unfamiliar markets such as the digital market.

⁸³ There are new types of market power developing such as ‘gatekeeper’ market power.

⁸⁴ <https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf>, page 57 [Access date: 28 July 2022]

⁸⁵ 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

This was an application for interim⁸⁶ relief which was brought by GovChat requesting the Tribunal to prevent Facebook (WhatsApp's owners) from 'off-boarding' GovChat from the WhatsApp paid business messaging platform or application programming interface.⁸⁷ 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.⁸⁸ It is important to note that because this was an interim application, the standard of proof for success was a *prima facie* case. The case however provides an important purview into the manner in which the Act is able to be applied within a digital market.

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 services⁸⁹ 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.*"⁹⁰ Another important distinguishing feature identified was WhatsApp's end-to-end encryption.⁹¹ These distinguishing technological features caused the Tribunal to categorise WhatsApp in a narrower market for OTT messaging applications together with other internet based apps such as WeChat, Facebook Messenger and Snapchat.⁹² 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-

using their mobile phones meant that long cues 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.

⁸⁶ Interim relief is granted by the Competition Tribunal on application by a complainant in relation to an alleged prohibited practice. A party who complains to the Commission about a prohibited practice is able to obtain an interim interdict from the Competition Tribunal against the firm or firms it claims are guilty of engaging in conduct prohibited under Chapter 2 of the Act. See *Principles of Competition Law in South Africa By Kelly L, Unterhalter D, and others (2016) at page 74*. Interim relief is governed by section 49C of the Act and "...it has to be lodged within a reasonable time..." see *Schering (Pty) Ltd and Others v New United Pharmaceutical and Others [2001] ZACAC 5*.

⁸⁷ GovChat (Pty) Ltd, Hashtag Letstalk (Pty) Ltd and Facebook Inc., WhatsApp Inc., Facebook South Africa (Pty) Ltd Case No: IR165Nov20. Para 2.

⁸⁸ Section 8(1)(d)(ii) prohibits a dominant firm from "*refusing to supply scarce 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)...*"

⁸⁹ These included SMS, MMS, USSD.

⁹⁰ GovChat (Pty) Ltd, Hashtag Letstalk (Pty) Ltd and Facebook Inc., WhatsApp Inc., Facebook South Africa (Pty) Ltd Case No: IR165Nov20 para 39 and 40.

⁹¹ GovChat (Pty) Ltd, Hashtag Letstalk (Pty) Ltd and Facebook Inc., WhatsApp Inc., Facebook South Africa (Pty) Ltd Case No: IR165Nov20 para 41.

⁹² GovChat (Pty) Ltd, Hashtag Letstalk (Pty) Ltd and Facebook Inc., WhatsApp Inc., Facebook South Africa (Pty) Ltd Case No: IR165Nov20 para 42.

loaded on almost all Android smartphones; and (4) that mobile networks in South Africa offer “WhatsApp data bundles.”⁹³

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.⁹⁴ 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.⁹⁵ 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).⁹⁶

Conclusion on abuse of dominance and prohibited practices

The South African competition framework seems to have found itself capable of being applied to cases which relate to prohibited practices.⁹⁷ The newly amended Act was applied with relative success in the GovChat and Facebook interim application case through the use of familiar economic competition principles and legal tests to allow for GovChat to receive interim relief. What this case further provided clarity on was a clear depiction of how a platform such as WhatsApp can be analysed through the lens of a provision which is used to being applied in markets and to firms which are typically characterised by bricks and mortar. However, this may not always be the case as the challenges highlighted above were not evident in this interim application. A range of changes to current abuse of dominance procedures and legislation have been proposed to address concerns specific to digital markets⁹⁸ and South Africa is yet to grapple

⁹³ GovChat (Pty) Ltd, Hashtag Letstalk (Pty) Ltd and Facebook Inc., WhatsApp Inc., Facebook South Africa (Pty) Ltd Case No: IR165Nov20 para 55.

⁹⁴ GovChat (Pty) Ltd, Hashtag Letstalk (Pty) Ltd and Facebook Inc., WhatsApp Inc., Facebook South Africa (Pty) Ltd Case No: IR165Nov20 para 113.

⁹⁵ GovChat (Pty) Ltd, Hashtag Letstalk (Pty) Ltd and Facebook Inc., WhatsApp Inc., Facebook South Africa (Pty) Ltd Case No: IR165Nov20 para 140 – 141.

⁹⁶ GovChat (Pty) Ltd, Hashtag Letstalk (Pty) Ltd and Facebook Inc., WhatsApp Inc., Facebook South Africa (Pty) Ltd Case No: IR165Nov20 para 152.

⁹⁷ At the time of writing this essay the Competition Tribunal had also heard (but not delivered judgement) argument in the eMedia v Multichoice interim application case (*e-Media Investment (Pty) Ltd v Multichoice (Pty) Ltd and Competition Commission of South Africa IR194Mar22*).

⁹⁸ <https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf>, page 57 [Access date: 28 July 2022]

with these. This includes ensuring the flexibility of the current legislation. For instance, the General Court of the European Union, in its judgement of the Google Shopping Case, considered Google's general results page to have characteristics akin to those of an essential facility given that there is currently no substitute and if any potential substitute would be able to replace it in an economically viable manner on the market.⁹⁹ A robust application of the current law will lay down a good foundation for regulation of enforcement cases in digital markets.

4.3. Cartel Conduct Detection

The use of algorithms has created efficiencies for market players in digital markets, and it has also created modern and advanced ways for market players to collude.¹⁰⁰ Internationally it has been found that big data can be used to facilitate collusion where firms can share identical pricing algorithms and use real-time data analysis to monitor compliance. Traditional methods such as corporate leniency programmes¹⁰¹ may not be an effective way of detecting cartel conduct in digital markets. Different analytical and technical skills may be required to determine the nature of any conduct.¹⁰²

The forex trading cartel case

In February 2017, the CCSA referred a case of price fixing and market allocation in the trading of foreign currency involving the South African Rand against 17 banks based in various jurisdictions.¹⁰³ The investigation of this conduct stemmed from the identification of an agreement between the banks to collude on prices for *“bids, offers and bid-offer spreads for the spot trades in relation to currency trading involving US Dollar / Rand currency pair”* in 2007.¹⁰⁴ The CCSA relied on traditional and more familiar tools of investigation such as the identification of the

⁹⁹ <https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-11/cp210197en.pdf> [Access date: 10 August 2022]

¹⁰⁰ The CCSA, Competition in the Digital Economy, Version 2, 2020, page 33.

¹⁰¹ The CCSA's Corporate Leniency Policy (CLP) offers a cartel member the possibility to disclose information on a cartel to the CCSA in return for immunity from prosecution and fines. Immunity is only available to the first cartel member to approach the CCSA.

¹⁰² The CCSA, Competition in the Digital Economy, Version 2, 2020, page 34.

¹⁰³ Bank of America Merrill Lynch International Limited, BNP Paribas, JP Morgan Chase & Co, JP Morgan Chase Bank N.A, Investec Ltd, Standard New York Securities Inc., HSBC Bank Plc, Standard Chartered Bank, Credit Suisse Group; Standard Bank of South Africa Ltd, Commerzbank AG; Australia and New Zealand Banking Group Limited, Nomura International Plc., Macquarie Bank Limited, ABSA Bank Limited (ABSA), Barclays Capital Inc, Barclays Bank plc – Media Statement from the Competition Commission dated 15 February 2017.

The number of banks against whom charges of price fixing and collusion were brought increased to 28 by June 2020 when the CCSA filed a new referral against banks accused of manipulating the Rand.

¹⁰⁴ Media Statement from the Competition Commission dated 15 February 2017.

agreement and chats which were held in chatrooms and trading platforms when investigating this cartel.¹⁰⁵ This cartel was detected in 2007 and referred to the Tribunal in 2017 after an investigation which started in April 2015, which brings to question whether the lack of requisite skills, technology and/or resources for cartel detection in digital platforms may be the stumbling block for South Africa.

Although the Competition Appeal Court (CAC) ruling in this case found that the South African competition authorities do have jurisdiction where there is a demonstrable effect in South Africa, jurisdiction issues may be prevalent in other cases where digital firms may lack an incorporated entity and presence in South Africa but do deliver products or services to South Africa.¹⁰⁶ In rejecting the respondent banks arguments on jurisdiction the CAC asserted that “...*courts should examine whether the forum which is sought to be employed has a real and substantial connection with the action...*”¹⁰⁷ Furthermore, the Court pointed out that the case turned on “...*whether the law relating to personal jurisdiction can be rendered congruent with the objectives of section 3(1) of the Act and more generally with the overall purposes of the Act...*”¹⁰⁸ (my emphasis)

Conclusion on cartel conduct detection

The case discussed above indicates that the current legal framework is capable of prosecuting cartel activity using more novel means to collude, even by digital firms located globally.¹⁰⁹ Courts also appear to be willing to give a purposive interpretation of the Act to ensure that cartel activity which has an effect in South Africa is prosecuted. Section 4(1)(b) of the Act prohibits restrictive horizontal practices and captures collusion using algorithms to set prices and monitor compliance. However, the challenge faced by the CCSA is the lack of requisite skills for cartel detection using data analytical tools rather than leniency programmes. Traditional tools may be helpful in less sophisticated cartels, however, in more sophisticated cartels where, for example, algorithms are

¹⁰⁵ Media Statement from the Competition Commission dated 15 February 2017.

¹⁰⁶ What appears to have lay at the heart of the CAC founding jurisdiction was that it rejected the respondent banks arguments on the presumption against extra territorial application of the Act and the common law doctrine of personal jurisdiction. In other words, section 3(1) of the Act (which stipulates that “*this Act applies to all economic activity within, or having an effect within, the Republic...*”) did not preclude a party from raising this in assertion of the courts lack of jurisdiction over that specific party.

¹⁰⁷ Competition Commission v Bank of America Merrill Lynch International Ltd & Others 175/CAC/Jul19 para 51.

¹⁰⁸ Competition Commission v Bank of America Merrill Lynch International Ltd & Others 175/CAC/Jul19 para 53.

¹⁰⁹ The CCSA, Competition in the Digital Economy, Version 2, 2020, page 34.

used to implement or achieve a collusive outcome, competition authorities would require more advanced tools of assessment and skills. Traditional tools are unlikely to be adequate.

4.4. South Africa's Digital Markets Inquiry

One of the most effective tools which have been adopted by some jurisdictions in order to understand digital markets has been the use of market inquiries.¹¹⁰ On 13 July 2022, the CCSA published its Provisional Report on the ongoing inquiry into digital markets, i.e., the OIPMI. The OIPMI is broadly focused on four areas of competition and public interest, namely: (1) market features that may hinder competition amongst the platforms themselves; (2) market features that may hinder competition amongst business users or undermine consumer choice; (3) market features that give rise to exploitative treatment of business users; and (4) market features that may negatively impact on the participation of SMEs and/or HDP firms.¹¹¹ The CCSA shared its provisional findings and has made provisional recommendations in this regard. These provisional findings are generally in respect of the leading platforms in each intermediation platform category, as it is typically leading platforms that are in a position to shape platform competition or which matter most for business user competition, or participation opportunities.¹¹² The OIPMI awaits comments and any further evidence by parties affected by the findings, as well as those affected by the adverse effects on competition and participation, before making final findings.

The OIPMI found the following features which impede, restrict, or distort platform competition in South Africa:

- (1) **General Search** – Google is a monopolist in general search. Its dominance was further entrenched by the default arrangements on both Android and iOS mobile devices. Platform competition is impeded by Google Search self-preferencing its own specialist search intermediation platforms in shopping, travel, and local search; and offering

¹¹⁰ The Competition & Markets Authority (CMA) published its final report into “Online Platforms and digital advertising” on 1 July 2020; The Bundeskartellamt (German Competition Authority) has conducted a series of studies within the digital economy which have been reflected in the following studies being published: ‘Competition Law and Data’ published in May 2016, ‘The Market Power of Platforms and Networks’ published in June 2016 and ‘Algorithms and Competition’ in November 2019. The culmination of these studies and publications have led to the 10th Amendment to the German Competition Act in early 2021; the European Union published its final report in its E-Commerce Inquiry on 10 May 2017; the Australian Competition and Consumer Commission published its final report into Digital Platforms in December 2017.

¹¹¹ The CCSA, OIPMI Provisional Summary Report, 2022, page 2.

¹¹² The CCSA, OIPMI Provisional Summary Report, 2022, page 45.

See Table 2 of the research paper for list of leading platforms per platform category.

prominence of paid search results even though there is no perceived distinction from organic results.¹¹³

- (2) **Online classifieds** - the OIPMI found platform competition harm from unfair pricing on listings sourced from third party listing engines; the lack of interoperability of listing engine software of leading property classifieds; long-term contracts; and the shareholding of large estate agents in Private Property through the Estate Agents Property Portal Company (EAPPC) which incentivises continued use of Private Property.¹¹⁴
- (3) **Food delivery** – the OIPMI found platform competition harm from the contracting of restaurant chains by leading platforms; prevention of franchisees to make use of unapproved delivery platforms by numerous national restaurant chains, possibly as a result of contract incentives; price parity clauses in existing contracts; and predatory conduct as a result of aggressive promotion and delivery subsidisation strategy.¹¹⁵
- (4) **Travel and Accommodation** – the OIPMI found that platform competition is impeded by the wide, and narrow, price parity clauses by leading platforms; and loyalty schemes of leading platforms which smaller platforms cannot replicate.¹¹⁶
- (5) **eCommerce** – the OIPMI found narrow price parity clauses by leading platforms and the subsidisation of products through pricing below variable costs to have distorted competition with more capital-constrained platforms.¹¹⁷
- (6) **Software application stores** – competition harm was found in the complete exclusion of competing app stores and side-loading by Apple; the default arrangements of Google Play on Android devices; Google Play Points loyalty scheme; and the lack of competition which has resulted in excessive commission fees.¹¹⁸

With regards to business user exploitation and features that may impede, restrict, or distort business user competition, the OIPMI found the following:

- (1) **Cross-cutting finding** – The lack of transparency over pay-for-position or sponsored ranking, including the prominent labelling of adverts including misleading labels, distorts business user competition as large users outspend smaller ones.¹¹⁹

¹¹³ The CCSA, OIPMI Provisional Summary Report, 2022, page 47.

¹¹⁴ The CCSA, OIPMI Provisional Summary Report, 2022, page 49.

¹¹⁵ The CCSA, OIPMI Provisional Summary Report, 2022, page 50 and 51.

¹¹⁶ The CCSA, OIPMI Provisional Summary Report, 2022, page 52.

¹¹⁷ The CCSA, OIPMI Provisional Summary Report, 2022, page 52 and 53.

¹¹⁸ The CCSA, OIPMI Provisional Summary Report, 2022, page 53.

¹¹⁹ The CCSA, OIPMI Provisional Summary Report, 2022, page 54 and 55.

- (2) **Online classifieds** – The OIPMI found extreme listing and promotional fee discrimination of up to 300% as well as the excessive pricing and sale of sponsored ranking to have distorted business user competition.¹²⁰
- (3) **Food delivery** – features that have distorted business user competition include extreme commission fee discrimination of up to 60% higher for independent restaurants; greater platform promotional spend on restaurant chains relative to independent restaurants; and the ability to reduce commission fees for restaurant chains in exchange for marketing commitments.¹²¹
- (4) **Travel and accommodation** – the OIPMI found business user competition harm from the excessive pricing and sale of sponsored ranking; discrimination on commission fees in favour of large hotel chains; asymmetric payment terms that require the platform to be paid quicker than the business user; and the highest bidder (not necessarily the cheapest) getting the most visibility on MSE's for a given room.¹²²
- (5) **eCommerce** – the OIPMI found competition harm from product gating by Takealot,¹²³ the use of seller data by Takealot buyers to inform their own retail offering on the marketplace, the pressuring of suppliers where Takealot is outcompeted,¹²⁴ and the Buy Box algorithm which favours Takealot as it displays the cheapest in-stock and not overall cheapest.¹²⁵ Takealot Retail benefits from the use of unsold promotional display inventory and has a higher promotions acceptance rate on the platform. Furthermore, sellers are not permitted to offer 'unboxed deals' which permits Takealot Retail to clear returned stock and recoup a higher portion of the value.¹²⁶
- (6) **Software application stores** – the OIPMI found excessive commission fees; side-loading warnings or restrictions; anti-steering provisions; lack of in-app payment alternatives; lack of SA-specific curation; and sale of visibility to impede or distort business user competition in app stores.¹²⁷

¹²⁰ The CCSA, OIPMI Provisional Summary Report, 2022, page 55.

¹²¹ The CCSA, OIPMI Provisional Summary Report, 2022, page 56.

¹²² The CCSA, OIPMI Provisional Summary Report, 2022, page 57.

¹²³ Which is not at the supplier's behest, removes direct sellers on the platform, and enables potentially higher prices or fewer, less generous, promotions to the detriment of sellers and consumers.

¹²⁴ Resulting in the raising of price by suppliers or by sellers threatened with non-supply.

¹²⁵ Almost all Takealot Retail is in its warehouse and therefore in-stock, unlike marketplace sellers that have more restricted warehouse space.

¹²⁶ The CCSA, OIPMI Provisional Summary Report, 2022, page 58.

¹²⁷ The CCSA, OIPMI Provisional Summary Report, 2022, page 59.

The OIPMI considered the features which impede participation by HDPs from both a platform level and business user level. From a platform level, the OIPMI found that the lack of wealth and asset accumulation; lack of the transformation of the SA Venture Capital industry; and lack of sufficient government funding places HDP entrepreneurs in a materially disadvantaged position and largely excludes them from effective participation.¹²⁸ From a business user level, factors which inhibit SME participation similarly impede HDPs.¹²⁹ Furthermore, the spatial location of discretionary income and tourism facilities in historically white middle class areas and the lack of any specific support for HDP business users to overcome the disadvantages faced on platforms affects effective participation by HDPs and SMEs.¹³⁰

The market inquiry proved to be a remarkably effective tool as it helped provide a substantial understanding of digital markets in South Africa and identify market features of online intermediation platforms that impede, distort, and restrict competition in South Africa. The OIPMI was able to make platform specific recommendations, as well as those to government, aimed at addressing the vast number of issues identified through the intensive approach of an inquiry. These recommendations are able to deal with the effects of first-mover advantages, assist in deconcentrating the digital market as well as improve participation of HDPs and SMEs in the markets. The OIPMI was able to identify the shortcomings of remedies applied in other jurisdictions and thus recommend further action that would best address the issues prevailing in global platforms.¹³¹

4.5. South Africa's Flexible Competition Framework

What the cases above clearly indicate is that the South African legislative framework has already begun to grapple with competition issues in the context of digital markets. What is more important is that in grappling with these issues, it has managed to overcome some of the shortcomings which are commonly associated with competition laws in the space of the digital economy.

¹²⁸ The CCSA, OIPMI Provisional Summary Report, 2022, page 62.

¹²⁹ The CCSA, OIPMI Provisional Summary Report, 2022, page 62.

¹³⁰ The CCSA, OIPMI Provisional Summary Report, 2022, page 62 and 63.

¹³¹ The writers of this paper refrain from discussing the provisional recommendations by the OIPMI as it would be premature to highlight any lessons thereof given that the recommendations stand to be interrogated and potentially disputed by affected parties.

5. The Digital Economy on the African Continent

In arguably his most famous and memorable speech (while president) titled 'I am an Africa,'¹³² former South African president Thabo Mbeki described the African continent as one which "...made it possible to trade in the world markets in diamonds, in gold...(and) food..."¹³³ This injunction was a bold assertion of the economic contribution which the African continent had made to the world and the fundamental structure upon which many economies (particularly African economies) are founded. The fourth industrial revolution and the proliferation of the internet throughout the world has brought with it a fundamental shift in the manner in which business is conducted.

5.1. African Continental Free Trade Area Agreement

The development of African markets in the 21st century is going to have to be informed by the continued rise and embrace of the digital economy. At the heart of this will be the way in which the African Continental Free Trade Area ("AFCFTA") agreement is implemented on the continent given that its broader objectives are removing tariffs and various non-trade barriers to essentially create a boarder-less African continent when it comes to trade.¹³⁴ The AFCFTA agreement was "originally signed by 44 countries, with the number growing to 54 by the end of 2019."¹³⁵ This agreement will form an integral part of the growth of the broader African economy, the development of digital markets and the regulation thereof. This, in part, is because one of the resultant effects of the onset of the Covid-19 pandemic has been the increased e-commerce activity which has taken place. This has led to an environment which has enabled for a thriving ecosystem which has seen the development and growth of a plethora of start-ups.¹³⁶ Furthermore, the pandemic has encouraged the rapid development and growth of technical innovations which has made possible the ability for companies in Africa to sell from a distance through ecommerce.¹³⁷

¹³² This was a speech delivered to the Constitutional Assembly of South Africa on 8 May 1996 when the Constitution of South Africa was adopted.

¹³³ Thabo Mbeki – I am an African 8 May 1996 (Accessed on 21 May 2022: The words to President Thabo Mbeki's "I am an African" speech and The winds of change cd (soweto.co.za)).

¹³⁴ Michelle Chivunga And Alistair Tempest *Mapping Innovations for the AfCFTA in Post-COVID Times* (2021) 8.

¹³⁵ e-Conomy Africa 2020 - Africa's \$180 billion Internet economy future: (**e-Conomy-Africa-2020.pdf** – Accessed on 21 May 2022) page 78.

¹³⁶ Michelle Chivunga And Alistair Tempest *Mapping Innovations for the AfCFTA in Post-COVID Times* (2021) 11.

¹³⁷ Michelle Chivunga And Alistair Tempest *Mapping Innovations for the AfCFTA in Post-COVID Times* (2021) 9.

One of the main challenges to the growth in the digital economy in Africa, whether under the auspices of the AfCFTA or not, will undoubtedly be contingent on the continent developing its internet access infrastructure. As of 2019 internet access on the continent is contingent on mobile networks which have 78% penetration rate.¹³⁸ While this is promising, what is more encouraging is that digital companies such as Google and Facebook are investing in the improvement of connectivity on the continent.¹³⁹ Although this may be strategies to entrench their dominance in the market, the role that Google and Facebook are playing may contribute to increased access and usage of the internet in the continent. On the African continent, access to the internet has also led to the entry and growth of a number of entrepreneurs into markets with innovative business models which are able to overcome many of the entry barriers such as scaling, which is a challenge that small businesses tend to face.¹⁴⁰

5.2. Regulatory Requirements

The challenge which this has brought is the ability for African countries to provide suitable and appropriate regulation to meet the needs of a digital economy and digital markets alike. The current state of regulation throughout the continent is considered dismal coupled with a poor state of enforcement.¹⁴¹ The approach therefore to regulation must be a pragmatic one which relies on “cross-country cooperation and collaboration.”¹⁴² The continued successes of entry and the growth¹⁴³ of many businesses in the digital economy (especially during the height of the pandemic), will need appropriate regulation which is paramount in a digital economy and crucial for digital markets. One could consider either regional level regulation or individual jurisdiction regulation of digital markets.

¹³⁸ e-Conomy Africa 2020 - Africa's \$180 billion Internet economy future: ([e-Conomy-Africa-2020.pdf](#) – Accessed on 21 May 2022) page 64

¹³⁹ e-Conomy Africa 2020 - Africa's \$180 billion Internet economy future: ([e-Conomy-Africa-2020.pdf](#) – Accessed on 21 May 2022) For example, the first phase of Google's new submarine cable, Equiano, is expected to be completed by 2022 and will connect Portugal and South Africa, bringing unprecedented bandwidth to the region. Page 62.

¹⁴⁰ Thembalethu Buthelezi and James Hodge “Competition policy in the digital economy: a developing country perspective” *Competition Law International* 15 No.2 (2019) page 203-204.

¹⁴¹ Idris Ademuyiwa and Adedeji Adeniran *Making Competition and Antitrust Regulations Work for Africa* (2020) 9.

¹⁴² Idris Ademuyiwa and Adedeji Adeniran *Making Competition and Antitrust Regulations Work for Africa* (2020) 9.

¹⁴³ This includes companies such as Jumia reported rising sales during March and April 2020 in Tunisia and Morocco, when lockdown measures forced many consumers to turn to online shopping and Twiga Foods (a Kenyan company), which is a marketplace that supplies retailers with fresh produce, partnered with Jumia to widen its reach, allowing households to order fresh foodstuff without having to visit supermarkets. - Michelle Chivunga And Alistair Tempest *Mapping Innovations for the AfCFTA in Post-COVID Times* (2021) page 11.

Foundational to regulation is the creation of a “level playing field *wherein* regulatory authorities must obtain appropriate competition-enhancing commitments from global platforms before allowing them into domestic markets.”¹⁴⁴ This must be at the forefront of any regulatory framework no matter the level at which it takes place at. Buthelezi and Hodge identify three crucial factors which must be born in mind when regulation is being crafted for African markets: firstly, African economies are much smaller with a greater limitation and constraint on enforcement resources; secondly, African markets are highly concentrated; and finally, it is important to realise the African markets are filled with vast inequality and poverty.¹⁴⁵ The existence of big tech companies on the continent or their intended desire to enter various jurisdictions on the continent is inevitable in this globalised world. Given the challenges of African markets identified by Buthelezi and Hodge as well as the expected implementation of the AFCFTA¹⁴⁶ it is submitted that the best mechanism which needs to be adopted is “regional¹⁴⁷ and perhaps even continental coordination.”¹⁴⁸ One of the most important advantages of regional and/or continental coordination is that there would be a lot less resource constraints on individual jurisdictions.¹⁴⁹

5.3. Suggested Regulatory Provisions

These broad-brush strokes when it comes to regional and continental regulation, particularly in light of the imminent implementation of the AFCFTA, could provide an important starting point for regulation. Further to this, it is submitted that the primary role which regional and/or continental coordination could play, is one of providing a broad framework from which individual jurisdictions could then map a specific framework which works and suits their individual needs. The previously discussed flexibility of the South African competition legislative framework provides for the perfect individual jurisdictional legislation from which individual countries on the continent could consider

¹⁴⁴ Idris Ademuyiwa and Adedeji Adeniran *Making Competition and Antitrust Regulations Work for Africa* (2020) Page 10.

¹⁴⁵Thembalethu Buthelezi and James Hodge “Competition policy in the digital economy: a developing country perspective” *Competition Law International* 15 No.2 (2019) Page 201-202.

¹⁴⁶ The African Continental Free Trade Area agreement aims to create a single continental market for goods and services, as well as a customs union facilitating free movement of capital and business. The initiative aims to boost intraregional trade which currently accounts for no more than 15 percent of total trade in Africa. [Annexure C- A Single Digital Market for East Africa: Presenting Vision, Strategic Framework, Implementation Roadmap, and Impact Assessment (A-Single-Digital-Market-for-East-Africa-Presenting-Vision-Strategic-Framework-Implementation-Roadmap-and-Impact-.pdf) (Washington, DC: World Bank, March 8, 2019)- Casey Torgusson and others] page 56.

¹⁴⁷ These could include: Common Market for Eastern and Southern Africa (COMESA) or the Southern African Development Community (SADC).

¹⁴⁸ Thembalethu Buthelezi and James Hodge “Competition policy in the digital economy: a developing country perspective” *Competition Law International* 15 No.2 (2019) Page 203.

¹⁴⁹ Thembalethu Buthelezi and James Hodge “Competition policy in the digital economy: a developing country perspective” *Competition Law International* 15 No.2 (2019) Page 203.

adopting. Specifically, it is submitted that the following key provisions would play a crucial role in providing African countries with the necessary flexibility:

- a) Merger Regulation - The ability for African jurisdictions to adopt a liberal and flexible notification regime which includes both a mandatory notification and a voluntary notification system at the request of the authorities.
- b) Abuse of dominance – The inclusion of provisions such as “*essential facility*” provisions or “*supply of scare goods*” provision. These provisions have an ability to be interpreted with ease when it comes to digital markets especially platform markets which provide a platform for firms to trade and compete for customers.¹⁵⁰
- c) Market Inquiry – The inclusion of Market Inquiry provisions is crucial because of their ability to offer competition authorities with a unique ability to understand and decipher the potential concerns within a market and propose both regulatory interventions by sister regulators within a country or legislative amendments to existing laws. Market Inquiries are capable of being extremely important tools within the arsenal of a regulator especially when it comes to digital markets which are still very much an unknow regulatory terrain. As articulated by the United Nations report on competition and the digital economy, the role of Market Inquiries is capable of providing a much more in-depth understanding of the competition issues which digital markets present.¹⁵¹

6. Conclusion

This paper has discussed the growth of the digital economy and its impact on both the African continent and world at large. This growth has brought with it considerable challenges which have brought into sharp focus the adequacy of traditional competition law tools to handle issues which crop up in various markets within the digital economy. The current South African competition law framework has been thrust into the winds of having to contend with mergers and abuse of dominance cases which have tested its adequacy to contend with transactions in digital markets.

¹⁵⁰ This refers to firms such as: Jumia, Takealot or Amazon and Multichoice's DSTV.

¹⁵¹ Competition issues in the digital economy - United Nations Conference on Trade and Development (2019) [Competition issues in the digital economy (unctad.org)] Accessed on 13 May 2022 Page 14

When it comes to mergers, the South African competition law framework has been flexible enough to allow for it to detect¹⁵² and require that small mergers be notified at the request of the CCSA. Furthermore, the addition of section 12A(2)(k) (i.e., creeping mergers provision) which allows for the competition authorities (in assessing the likelihood of a merger substantially lessening competition in a market) to consider whether there have been any other mergers which have been engaged in by a party to a merger over a period of time may prove to be an important tool for merger regulation in the digital economy. This is due to the preponderance of big data firms to engage in acquisitions of smaller and often start up entities which could potentially pose a competitive threat to them.

Similarly, the ability for the South African competition law framework to allow for what seems to be a flexible interpretation of the concepts of 'essential facility;' and the 'supply of scarce goods' have the ability to be interpreted so as to cater for transactions which occur in the digital economy. Abuse of dominance cases such as the *Facebook/Gov Chat* and the *eMedia v Multichoice*¹⁵³ interim order application have proved to be important cases for the South African competition law provisions and only time will tell the extent to which the current provisions will be able to stand the test of time or whether the enactment of amendments to the competition laws of South Africa will be necessary in order to properly deal with abuse of dominance cases in the digital economy. Pending final findings and recommendations from the OIPMI, the inquiry has massive potential to address major competition issues that have been identified in the relevant platform categories in South Africa.

The introduction of the ACFTA has brought with it a renewed sense of hope and enthusiasm for the growth and development of African economies. The ability for these economies to foster sustainable and consistent growth in the digital age will largely depend on how they contend with the digital economy and big data firms that operate within it. The flexibility of competition laws in South Africa provides an important model which can be adopted by African countries so as to ensure that, while they embrace the growth potential of the continent that, they also confront the issues which the digital economy is likely to throw its way. It is suggested that a flexible approach to the regulation of mergers and a broad interpretation of key concepts such as 'essential

¹⁵² This has been done through the monitoring of important global transactions involving firms in the digital economy such as Google. The Google/Fitbit merger was first notified in... and then subsequently notified in South Africa on...

¹⁵³ IR194Mar22.

infrastructure' and 'scarce goods' will go a long way in fostering a well measured approach to how the African continent can capitalize on the growth opportunity presented by the ACFTA. It is time that Africa takes control of its own growth and not allow for big data firms to be in charge of how opportunities for growth are embraced by African countries.

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