POLICY BRIEF 4: REGULATING DIGITAL PLATFORMS FOR ECONOMIC DEVELOPMENT: CRITICAL PRIORITIES FOR SOUTH AFRICA AND THE LESSONS FROM INTERNATIONAL COMPETITION CASES

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Simon Roberts and Thando Vilakazi

Industrial Development Think Tank[1]

There is a range of changes relating to the digitalization of economic activity and the growing importance of digital platforms (including online platforms) which pose fundamental challenges to the existing set of rules for markets under economic regulation, competition law and industrial policy. The Industrial Development Think Tank, housed at CCRED, UJ, convened the first Expert Panel meeting on 22 July 2019 to assess and prioritise the key issues facing South Africa with regard to regulating digital platforms in the interests of inclusive growth.[2] The deliberations and reports from the panel will feed into the Presidential 4IR Commission's theme on legal and regulatory frameworks, in which competition and data ownership are sub-themes.

Large online platforms cut across search, social media, telecommunications and payments systems, building their offerings on aggregating consumer data. Yet, regulation remains largely unchanged from the end of the 20th century – with separate institutions for different fields (such as telecoms and payments systems), and divides between regulation, competition enforcement and consumer protection.

There is a growing body of research on these issues and extensive international experience from which South Africa can critically draw to inform economic development strategies. This note summarises key aspects of the inputs and debate at the meeting of 22 July 2019.[3] The meeting focused on:

- New forms of market power in the era of big data
- Data ownership, privacy and sharing: issues and possible rules
- Theories of harm to competition from digital platforms and the strengths and weaknesses of competition authorities and economic regulators
- Implications for local businesses in developing countries such as South Africa

[1] The industrial the IDTT is supported by the Department of Trade and Industry (the dti) and is housed in the Centre for Competition, Regulation and Economic Development (CCRED) in partnership with the SARChI Chair in Industrial Development at the University of Johannesburg.
[2] This flowed from the Digital Industrial Policy Issues Paper https://www.competition.org.za/idtt/digital-industrial-policy. The outline for the Expert Panel and presenters is in the Annex.
[3] It is a brief review of key issues raised in presentations and discussions and is not a minute of the meeting.

South Africa state of play

South Africa, as other developing countries, urgently needs to catch-up with the international agenda, define its own priorities and build alliances to promote them. The USA and others have been promoting an international agenda to extend the free flow of data, without duties or restrictions on digital transmission and digital products and services. This follows the initial two-year moratorium on customs duties on digital products in 1999 which has been repeatedly rolled over. The leading digital platforms are concentrated in the USA, while China has developed major domestic platforms by protecting its market and is now also seeking to extend their global reach.

The opposition by South Africa along with other major developing economies to proposals to entrench 'free flow of data with trust' has opened space for a 'data for development' alternative. This alternative urgently needs to be set out. The meeting addressed key options.

The key priorities for South Africa are to:

- enable local businesses and public institutions to access data generated locally; and
- build the capacity for local digital businesses to harness the potential of digitalization.

The global power disparities mean that South Africa needs global rules and an effective multilateral framework that provide a fair basis for local businesses to compete locally and internationally. South Africa needs to lead within Africa, taking advantage of the AfCFTA to ensure maximum leverage in international negotiations for the African development agenda. In a regulatory framework which is 'fit for purpose' we need to draw from jurisdictions such as the EU, while being aware of the different position and priorities of South Africa and the need for the framework to be implementable.

It will be important to:

i) introduce standards and regulations governing data;
ii) establish case precedent in dealing with local and international digital firms;
iii) review legal tests and regulations where there are gaps; and
iv) pursue remedies, especially in markets where large international companies have already agreed to comply with decisions in other jurisdictions.

Initial research indicates the importance of Google and Facebook in South Africa for firms to build their brands and reach consumers. However, e-commerce is little developed with Takealot as the current market leader and 'omni-channel' offerings (with online sales) also being added by bricks and mortar store chains.

The implications of data for market power and the effective participation of smaller local businesses extends beyond Google and the other major platforms which are the focus in Europe. There are very important local platforms which aggregate data across different areas of consumer behaviour, including Discovery's Vitality programme, supermarkets collecting extensive consumer information through loyalty schemes, and commercial banks.

In South Africa market inquiries are a crucial tool as they have the ability to recommend steps to open-up markets. Merger control needs to take greater account of conglomerate effects and the potential for removing disruptors. In the exercise of market power, a reverse onus

should be considered in some situations including to address the practices of self-preferencing which are being tackled in other jurisdictions.

There are very important consumer protection issues which are distinct from competition concerns even while arising from the same sources of market power. Consideration needs to be given to the links of competition and consumer protection.

Policies for infrastructure and the release of spectrum need to be forward-looking to ensure markets are more competitive and innovative. This applies, for example, to 5G.

Competition law enforcement and policy – international developments

Expert reviews and policy reviews in different jurisdictions have identified similar concerns and made a range of recommendations.[4] There is a high degree of consensus across the reports:[5]

- Merger evaluation needs to recognize the competitive value of data, the harm to potential competition and conglomerate effects; a small probability of a large harm to competition could be recognized in the move to a 'balance of harms' test.
- Network effects, especially in multi-sided platforms means markets can easily tip to winner takes all/most, with ability and incentive for abuse of these dominant positions. This requires obligations to be placed on dominant firms not to distort competition and possible designation of companies as having 'strategic market status'.[6]
- Consistency of regulation and enforcement suggests adapted/new institutions such as a 'data unit' with powers to obtain information, and timeously make and enforce orders.
- Data access is a key issue for remedies. Anonymization and privacy issues need to be addressed, possibly in sector specific regulations.

South Africa has a well-established competition regime which is subject to the same challenges. The key insights from the international papers can be adopted, with specific reference to the imperative to open-up markets to smaller local businesses. The recent amendments increase the powers of the authorities in a number of important regards.

Europe has led competition enforcement of digital platforms and the development of remedies. The three European Commission cases with findings made against Google set out important theories of harm to competition on the part of platforms. These are the Google Shopping case where partners were given preference in search results, restricting consumer choices and raising prices paid by consumers, the Google Android case relating to extending and protecting market power through terms applied to Google Playstore, and Google Adsense which relates to extending power over advertising space on 3rd party websites. The development of remedies in Europe lags the decisions, as the remedy design involves engaging with market participants to test their workability in an iterative approach.

Other jurisdictions have taken similar decisions. For example, India has taken a decision regarding Google preferencing searches for flights. India has also placed rules on foreign

[4] See list in the Appendix.
[5] See presentation of Prof Sean Ennis.
[6] The presentation of Dr Gabor Koltay sets out the different abuse of dominance cases addressed by the European Commission on the part of Google.

owned e-commerce platforms with regard to their vertical integration with suppliers affecting, in particular, Amazon and Walmart's Flipkart business.

In addition, issues of data cut across the different areas of competition enforcement and regulation, as we discuss below.

Data ownership, privacy and regulatory provisions

The core challenge is that data and its analysis is an increasing source of value. The data is collected partly in order to provide the service in question and is partly as a by-product of the service. Moreover, the combination of data from different sources enables additional value to be offered. This underpins the substantial network effects where the aggregator of data is able to offer better services by virtue of having more users across the different 'sides' of their platforms (for example, suppliers of goods and consumers). First-movers are therefore able to lock-in their advantages.

Ensuring markets are competitive requires data access and inter-operability for businesses to be able to interface with the dominant platforms on a fair basis, including competing with the integrated platforms' own offerings. This is the primary concern for South Africa as the major global platforms have already attained a utility-type position. South Africa urgently needs to take-up issues of potential self-preferencing by platforms (using suppliers' data) and other restrictive provisions which undermine competition that are already being addressed by other jurisdictions.

The further options set out by the panel and in the discussion range from vertical separation of platforms and asserting data sovereignty, to measures to improve consumer switching between offerings (hence lowering the barriers to smaller businesses attracting users) and sector-specific rules for data portability. These provide an agenda for evaluation and decision.

The emergence of new ways to organize economic activity and provide services raises the same competition issues simultaneously in all countries. It provides a further example of the challenges of globalization to competition enforcement by national authorities of global corporations. Some of the possible interventions require an international coordinated approach, however, there are others which involve steps that can be taken at national level with a particular view to the ability of local businesses to innovate and compete. India's measures requiring vertical separation of e-commerce platforms from suppliers were based on foreign investment rules and aimed at bolstering local businesses.

For South Africa, while participating in the global engagement on data regulations, it is therefore very important to identify practical steps which can be taken to ensure local businesses are able to compete. This requires measures to ensure access to locally generated data. It is proposed that this should start with mandatory obligations to share data required for public purposes, such as metropolitan municipalities accessing data on travel patterns for urban planning purposes and local transport policy.

The next level is what rights to data should exist for smaller local businesses and how should these rights be enforced? At present, as SMMEs are brought into international e-commerce operations and are covered in Google searches they gain access to international markets and improved logistics. The data generated from their business operations is aggregated by the platforms. The platform harvests the data and can better evolve the next generation of services

displacing the smaller firm from the market. This is at the centre of the European Commission's investigation[7] into Amazon's dual role as a platform providing a market place for independent sellers and, at the same time, selling its own products on its website. The standard agreements between Amazon and market place sellers appear to allow Amazon's retailer business to analyse and use the data on third party producers meaning Amazon can favour its own suppliers in various ways.

In the provision of credit, the importance of information on borrowers has long been recognized and legal provisions enacted to compel banks and other lenders to share information with credit reference bureau or agencies. This can be accessed by other prospective borrowers when evaluating loan applications and enables competition between lenders.

This varies by the activity being considered. Data on credit records has long been recognized as essential for rivalry and credit reference bureau or agencies provide access to borrowers' information in order to enable competition between lenders. While this form of data portability may work for vertical services such as in banking, where the consumer puts relevant data in the hands of a service provider which needs to make a decision on e.g. credit worthiness, it is not necessarily the same in other areas.

Data portability rules can be addressed on a sector by sector basis, while at the same time setting out general guiding principles. This is the approach which has been followed by the Australia Productivity Commission in establishing data portability rules by industry.

A second set of issues relates to what powers are required to make regulations regarding the sharing of data by platforms. Demand-side measures can seek to place power in the hands of consumers. However, there is a growing consensus that this is based on an idealistic view of consumers' ability to process and make decisions. In response to the GDPR and other measures we are now routinely faced with requirements to agree to the collection and use of our data which we as consumers comply with, not having read or understood the extensive legal terms. This simply reflects the time and expertise required to do so and the wish to proceed to speedily access the service being offered.

The 'notice and control' solutions have therefore not proved effective. Better regulation and rule-making is required on behalf of citizens. This could distinguish between data that is *required for* the service itself and that which is not. For example, Google has generated substantial data as a by-product of providing search, in what has been termed a 'data exhaust' which has now been monetized. However, now that multi-service platforms exist it may be difficult to draw such distinctions in practice.

Provisions for 'data sovereignty' have been passed by some countries including Rwanda in Africa which mean data generated locally must be stored within the country ensuring that there is jurisdiction. Asserting ownership on behalf of citizens can be required for the necessary powers to be exercised on behalf of the relevant national community.

Others, such as Germany's Bundeskartellamt in its Facebook action, are tackling the aggregation of data by the platforms directly through competition law provisions which are particular to that country. The Bundeskartellamt has found that the aggregation by Facebook

[7] Launched in July 2019, following from an investigation by the Bundeskartellamt.

of data across its Whatsapp and Instagram businesses with Facebook is in itself an abuse of dominance.

The argument for 'data-based structural separation' has been made in the Stigler Centre report. In some sectors, notably e-commerce, countries such as India have acted against platforms having stakes in suppliers (with an incentive to preference their own suppliers over local suppliers). In terms of the main social media and search platforms, some reviews have criticized the approval of mergers which have enabled the platforms' spread across areas and some have recommended considering divestiture. This clearly requires an international approach.

Rights over consumer and user data are closely related to issues of digital identity and privacy. Pentland and Hardjono at MIT observe that this cannot be based on the assertion of the individual themselves in what is 'self-sovereignty' as this invites mistakes, fraud and systemic corruption as seen in fake reviews and identity theft. Instead trustworthiness of digital identities requires community sovereignty frameworks with two key properties: a digital representation of the community interaction network, as people operate in virtual as well as physically co-located communities; and, dense interconnections and trust as this connectivity is the basis for confidence. They also draw a parallel with credit unions which manage identity credentials in the USA and other countries and observe that, in similar ways, co-operatives could negotiate privacy on behalf of their members.[8] This is critical as effective markets require the sharing of data and a focus just on privacy can risk privileging the platforms which are already the effective custodians of personal information.

Whichever particular approach is evolved, there is agreement that we need complementary data policy, competition and regulation provisions, in an institutional framework appropriate to the 21st century digital platforms instead of the 20th century analogue model of regulation we have. Such a digital economy unit requires the necessary powers and capacity to make and enforce rules for economies and societies increasingly driven by digital intelligence.

Roadmap

The panel discussion crystallised three key streams of work required, as set out below. Of course, there is work underway already in many of these. The work required may take different forms, such as research, deliberations by working groups and by different institutions tasked to address the options.

It is critical that the streams work in parallel. Short-term measures need to be taken even while the medium and long-term issues are being worked on. In general, while there is a temptation to try to work out an over-arching framework before moving on any one area, given the fast pace of developments it is important to have an iterative, test-and-learn approach.

Stream I – Research and analysis

- Analysis of implications of growing power of digital platforms for businesses in South Africa at sectoral level (for example, in key sectors such as hotels, finance, logistics, retail, media, communications where digital platforms are becoming particularly significant in differing ways, including online reviews and bookings).

[8] As highlighted by Rory Macmillan's contribution.

- Assessment of the importance of online advertising, branding and sourcing consumer trends and market information as critical barriers to the entry and growth of smaller businesses.
- Consolidation of pros and cons of different approaches internationally for South Africa.
- Evaluation of the extent and value of data being collated by different local and international digital platforms, and the terms on which collated.
- Assessment of the apparent extent of personalization of pricing in South Africa.
- Consider industry advisory panel to guide on priority areas with greatest likely impact and anticipate major developments as early as possible.
- Regulation and competition institutions for the digital era? Comparative assessment of alternative options, including international review.

Stream II – Competition enforcement and regulation

- Enforcement and inquiries agenda of CCSA and regulators
    - Evaluate conduct addressed by EC and other international cases and basis for similar cases to be brought in South Africa
    - Engage on remedies being developed in other jurisdictions, their relevance in South Africa and the basis (such as through inquiries) for their adoption here.[9]
- Review of merger tests to consider the need for revisions in light of concerns about potential competition, the significance of data and conglomerate effects
- Assess the interface of competition and regulation such as in other jurisdictions where findings in competition cases have informed regulation (such as in banking, payments and telecommunications in some jurisdictions as with the UK's Open Banking Order and the EU's Payment Services Directives).

Stream III – Data, regulation, international trade, and laws 'fit for purpose'

- The changing significance of digital services in international trade
- Digitalisation, taxation and transfer pricing
- Evaluation of options:
    - What does 'data sovereignty' mean and will it be effective? Data rights and ownership – the potential for collective/co-operative ownership of data.
    - Alternative possibilities for South Africa to ensure access to data (including locally generated) for public interest, and for local businesses

[9] For example, Amazon enforced expectations that sellers not to offer products cheaper elsewhere (such as, due to a lower retailer commission than Amazon's fee), which was addressed by the EU some years ago and was only extended internationally due to concerns being raised more widely. The remedies developed for Google by the European Commission only apply in the EU.

    - What does data portability mean in practice? Interface with Protection of Personal Information (POPI) Act?
    - Sector specific features of data portability or ‘open data’ in, for example, finance (open banking), health, business processing
- Consideration of changes in legislation
- The interface of consumer protection and competition policy for digital platforms – using tools as effective complements
- What does ‘data for development’ mean? Key planks of an international platform
- Forum to continue to share insights and advance knowledge?