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Assessing the state of play of digital markets within the African context

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I. INTRODUCTION

Competition agencies across the world are increasingly focused on identifying and developing an appropriate competition law framework to regulate technology and digital markets. Due to specific features of many of these markets, policy considerations beyond traditional competition principles have featured prominently in the policy debate.

The 'digital market policy debate' also typically questions whether standards and economic benchmarks ought to be changed and lowered. For example, changes to merger control thresholds to address perceived under-enforcement of mergers in the digital market, exploration of alternative theories of harm (beyond pricing) and even presumptions of harm in certain circumstances.

South Africa has long been the African lodestar in conducting market inquiries and assessing the state of competition across a number of markets. As Africa's most developed competition law agency, it is not surprising that consistent with international trends, the South African Competition Commission ("**SACC**") has signalled its intention to increase regulatory scrutiny of technology and digital markets.

The SACC published a report in November 2020 titled "Competition in the Digital Economy" ("**Report**").[1] The Report provides a roadmap for how, in response to perceived "under enforcement" of competition laws in digital markets over the past decade, the SACC aims to implement South Africa's competition laws in such markets going forward in order to achieve the objectives of the South African Competition Act 89 of 1998, as amended ("**Competition Act**").[2]

The Report identifies several "pro-active" regulatory interventions aimed at preventing "a new era of global concentration" and ensuring the achievement of "*equitable outcomes in the digital*

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[1] "Competition in the Digital Economy Version 2" (2020): http://www.compcom.co.za/wp-content/uploads/2021/03/Digital-Markets-Paper-2021-002-1.pdf at 6, hereafter '**Report**'.

[2] Report, pages 6 and 7.

economy".[3] The Report places a particular emphasis on pro-active regulation to ensure "fairness" and "avoid outcomes [in digital markets] that could harm small businesses", which is underpinned by the SACC's concern that "*digital markets tend to be 'tipping markets' … which means that that there is likelihood for rapid expansion of one large dominant platform*".[4] The Report further proposes pre-emptive intervention to prevent potential harm to competition and the exclusion of small firms, and suggests that this can be achieved by intervening to prohibit conduct "considered anti-competitive in other jurisdictions".

Since the publication of the Report, the SACC has taken various steps in terms of the Competition Act to implement the regulatory objectives illustrated in the Report. Most notable, in April 2021, the SACC initiated a market inquiry into "online intermediation platform services" ("**OIPMI**") and which was recently concluded on 31 July 2023 by the publishing of the final report ("**Final Report**"). Additionally, the SACC revised its Small Merger Guidelines in order to address concerns that "potentially anti-competitive" small mergers in digital markets "*are escaping regulatory scrutiny*".[5]

This paper provides an overview and analysis of the South African legal framework and the SACC's regulatory agenda as it relates to digital markets and in particular the role that non-competition law considerations play in the context of South Africa's competition policy in digital markets.

While primarily focused on South Africa, this paper also briefly considers the African Union's recent passing of the Protocol on Competition Policy to the Agreement establishing the African Continental Free Trade Area as a means to provide a pan-African competition regime, also encapsulating the regulation of digital markets.

Digital Markets in South Africa

The SACC broadly defines "digital markets" as those existing in tandem with the industrial economy.[6] In other words, the digital economy is one that is present amongst all goods and services which require the internet and has the potential to overtake the industrial economy as the main source of economic activity.[7] The SACC's 'definition' of the digital economy is,

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3 Report, pages 6 and 7.
4 Report, pages 6, 8 and 65.
5 Revised Small Merger Guideline: https://www.compcom.co.za/wp-content/uploads/2022/09/FINAL-GUIDELINES-ON-SMALL-MERGER-NOTIFICATION_.pdf"
6 "Competition in the Digital Economy Version 2" (2020): http://www.compcom.co.za/wp-content/uploads/2021/03/Digital-Markets-Paper-2021-002-1.pdf at 13, hereafter 'Digital Markets Paper' (Accessed: 22 July 2021).
7 *Supra* n1 above at 14.

therefore, broad and includes all markets in which goods and services utilise an internet base for production, distribution, trade and consumption by different agents.[8]

While the emergence of digital markets is welcomed in the fact that they bring with them a wealth of new opportunities to "*reverse the pervasive, triple scourge of unemployment, inequality and poverty*", the Report notes that this can only be done a commercial and regulatory environment must be created to extract these benefits.[9] For competition authorities to create regulation in a manner so as to maximise the benefits of digital markets to the local economy, they must first have a deeper understanding of these markets and their nuances. While there are a variety of tools that a competition authority may seek to use to gain a better understanding of a particular market, market inquiries (especially within a South African context) grant competition authorities the power to conduct thorough investigations into a market, assess whether any aspect of that market which have a substantial lessening of competition as well as to remedy any adverse findings that it may find. Accordingly, we discuss the use of market inquiries in South Africa as well as their recent use by the SACC to investigate digital markets in South Africa below.

Market Inquiries

i. Legal Overview

Market inquiries can be a useful tool to proactively gain a better understanding or market dynamics in a particular sector or industry. Following amendments to the Act, the SACC may initiate a market inquiry in any market where it has reason to believe that there are features or a combination of features in the market which may have an "adverse effect" on competition - as opposed to the "substantial lessening of competition test" which is the benchmark for assessing "rule of reason" infringements in terms of the Act. In other words, a lower standard for assessing harm to competition is used in market inquiries.

Under the previous market inquiry regime, the SACC's powers were limited to simply making recommendations to Parliament as to what remedial measures should be pursued to remedy anti-competitive features in the market. This has fundamentally changed under the new regime. In particular, the SACC now has a "*Duty to remedy adverse effects on competition*" and must consider in particular the "*impact of the adverse effect on competition on small and medium businesses, or firms controlled or owned by historically disadvantaged persons".* The SACC's powers in this regard are broad and may include both behavioural and structural

8 Report, page 4
9 Report, page 6.

remedies. Even though structural remedies must be confirmed by the Tribunal, the test against which the Tribunal ought to assess the reasonableness of the Commission's decision is watered down. The net sum is that even if there is no substantial lessoning of competition, if there are features in the market which have an adverse effect on competition and may impede the designated class, structural remedies such as divestitures may be appropriate remedies following a market inquiry. There is a material risk that these market inquiry provisions could be abused and lead to unintended consequences. Most notably in this regard, is that the SACC is at theoretically able to circumvent the tests and thresholds that must be met in terms of the Act before the Tribunal will consider making any anti-competitive determinations (let alone ordering draconian steps such as divestitures which should be used as a last resort). Instead, as the test is much lower in market inquiries and the SACC is able to investigate and make determinations, the SACC is effectively the judge, jury and executioner subject to very limited judicial oversight by the Tribunal.

This is particularly relevant in the context of digital markets as the Report expressly states that the SACC views market inquiries as an effective way to address perceived market failures in digital contexts "*given the binding nature of market inquiry outcomes*".[10] The fact the SACC launched a market inquiry into the Online Intermediation Platform, which is discussed in the next section, is clear affirmation that the SACC very much intends using market inquiries as a key investigative tool in digital markets. This is further emphasised by the launching of an additional market inquiry into the distribution of media content on digital platforms, including search, social media and news aggregation platforms – in this respect, the SACC recently published the Final Terms of Reference for the Media and Digital Platforms Market Inquiry ("**MDPMI**") on 15 September 2023.[11]

On the one hand, this is sensible as digital markets are complex and before prosecuting conduct and developing enforcement policies in digital markets, competition agencies and the legislature must have a thorough understanding of how these markets work and what really are the key impediments to competition which have an adverse effect on consumers. The far-reaching powers that the SACC, however, has following the conclusion of the market inquiry is cause for concern as it could potentially be abused. The more complex the market is, the greater the risk in this regard.

ii. Online Intermediation Platforms Market Inquiry

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[10] Report, page 43.

[11] MDPMI Final Terms of Reference: https://www.compcom.co.za/wp-content/uploads/2023/09/Media-and-Digital-Platforms-Market-Inquiry_FinalTOR_Sep2023.pdf

In April 2021, the SACC initiated the OIPMI. [12] These are defined as two-sided platforms that facilitate transactions between business users and consumers (or so-called "B2C" platforms) for the sale of goods, services and software, regardless of whether the transactions are concluded on the platform itself, on the online site of the business user or offline. These include eCommerce marketplaces, food delivery platforms, software application stores, online classifieds and online accommodation and travel platforms.

The ToR of the OIPMI was split between a combination of competition and public interest considerations. The salient features from the ToR, which we discuss separately below were:

- market features which hinder competition amongst platforms, and which may give rise to exploitative behaviour (competition); [13] and
- participation of small and medium sized enterprises and to promote employment and advance the social and economic welfare of South Africans (public interest).[14]

A) Competition

Subsequent to the ToR, a "Further Statement of Issues" ("**FSOI**") was published by the SACC in August 2021[15] which, in respect of competition issues, the FSOI highlighted two primary areas of interest.

Firstly, the FSOI noted the level of concentration in intermediation platform services, and highlighted preliminary concerns that such services are primarily supplied by a limited number of large, established platforms while smaller, newer entrants have "*failed to scale in line with overall online market growth*".[16] Importantly, from a reading of the FSOI, it appears that the SACC has prioritised its focus on the ability of new entrants and smaller rivals to compete effectively in respect of online platform services, rather than on the overall nature of existing competition in the relevant markets and current consumer welfare. This is consistent with the SACC's aim to ensure that South African regulators understand the factors that may

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12 The first draft terms of reference were published on 19 February 2021 and, following the process of public participation, the final draft terms of reference were published in the Government Gazette on 9 April 2021 ("**ToR**"). See Notice no 330, Government Gazette no 44432 of 9 April 2021.

13 Para 1.1 of the ToR provides that the SACC has reason to believe that there exist market features which impede, distort or restrict competition amongst the platforms themselves, and which undermine the purposes of the Act.

14 According to the Competition Commission Online Intermediation Platforms Market Inquiry Statement of Issues (2021) available at https://www.compcom.co.za/wp-content/uploads/2021/05/OIPMI-Statement-of-Issues_May-2021.pdf at para 96, "*the Inquiry has a special duty to consider the adverse effects on SMEs and HDP-owned firms…Aside from the promotion of competition, the participation of SMEs and the transformation of ownership, the purposes also include the development of the economy, advancing the economic and social welfare of all South Africans, expanding opportunities for participation in world markets and providing consumers with competitive prices and product choices*".

15 Competition Commission Online Intermediation Platforms Market Inquiry Further Statement of Issues (2021) available at https://www.compcom.co.za/wp-content/uploads/2021/08/OIPMI-Further-Statement-of-Issues_August-2021.pdf.

16 FSOI, para13.

undermine "*inclusive competition [to ensure that] markets remain contestable and competitive, which is in the long-term benefit of consumers*".[17]

Secondly, the FSOI identifies a number of so called "incumbency advantages" for established firms, due to their relative scale, which:

- render them more efficient and/or effective competitors than more recent entrants and smaller rivals; or
- enables these established platforms to engage in conduct that may limit user switching across platforms to the detriment of newer entrants.

These two outcomes of course point in opposite directions. More efficient and effective competitors (even if they are large firms or active in concentrated markets) is inherently consumer welfare enhancing.

Turning then to whether the incumbency of established players may harm competition or consumers, the SACC raises concerns that are not necessarily novel and have been subject to judicial scrutiny in other jurisdictions.

For example, the European Union's ("**EU**") Digital Markets Act ("**DMA**")[18], which, applies to EU Member States. In this regard, Article 3 of the DMA defines "gatekeepers" of large online platforms as a company who "*has a significant impact on the internal market, operates a core platform service which serves as an important gateway for business users to reach end users; and enjoys an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future*." Once an online platform has been established as a "gate-keeper", Article 5 and 6 of the DMA places obligations on gatekeepers through a list of "do's" and "do not's" for those companies. According to the European Commission and Article 10 of the DMA, the DMA will update the obligations on "gatekeepers" to keep up with the ever-evolving digital economy. Article 3 additionally provides that "gatekeepers" are those companies that:

> "*achieves an annual Union turnover equal to or above EUR 7,5 billion in each of the last three financial years, or where its average market capitalisation or its equivalent*

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[17] Competition Commission South Africa Media Statement 'Launch of the Online Intermediation Platforms Market Inquiry (17 May 2021) available at http://www.compcom.co.za/wp-content/uploads/2021/05/LAUNCH-OF-THE-ONLINE-INTERMEDIATION-PLATFORMS-MARKET-INQUIRY-1.pdf at 1.

[18] European Commission: The Digital Markets Act: ensuring fair and open digital markets. Accessible at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R1925

fair market value amounted to at least EUR 75 billion in the last financial year and also provides the same core platform service in at least three member states"; and

"*provides a core platform service that in the last financial year has at least 45 million monthly active end users established or located in the Union and at least 10 000 yearly active business users established in the Union*."

Further, Germany was the first jurisdiction in the EU to specifically enact legislation that regulates market power in the digital economy as it approved a reform of national competition law by entering into force the "*Act Amending the Act against Restraints of Competition for a focused, proactive and digital competition law 4.0 and amending other competition law provision*" on 19 January 2021[19], which prohibits platforms from gaining a competitive advantage through leverage of their resources. Germany introduced these laws in recognition of the so called "winner takes all" phenomenon within big tech companies which are "so-called gatekeeper platforms exerting outsized influence". The regulations introduced by Germany have set limitations on digital markets and, amongst others, include "rules on self-preferencing and the use of data and interoperability". The German *ex-ante* legislation puts the German Federal Cartel Office in a position to prevent an abuse of dominance from tech companies before they become dominant, as opposed to traditional competition law which addresses companies which have already abused the alleged dominance. Importantly, Section 19a now provides that the German Federal Cartel Office can intervene "*at an early stage in cases where competition is threatened by certain large digital companies*".[20] Further, the amendments will allow the German Federal Cartel Office to require merger notification even where the turnover thresholds are not met when they are active in a concerned sector.

Thereafter, on 26 March 2021, the European Commission ("**EC**") published guidance on Article 22 of the European Union Merger Regulation ("**EUMR**").[21] The guidance is aimed at assessing the impact of the current merger procedures and explores alternative policy options. It is noted by the executive Vice-President of competition policy that "*a number of transactions involving companies with low turnover, but high competitive potential in the internal market are not reviewed by either the Commission or the Member States. A more frequent use of the existing tool of referrals under Article 22 of the Merger Regulation can help us capture*

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19 Bundeskartellamt; Amendment of the German Act against the Restraints of Competition; available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB%20Novelle.html

20 Bundeskartellamt press release dated 19 January 2021, accessible at: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2021/19_01_2021_GWB_Novelle.pdf?__blob=publicationFile&v=3

21 European Commission press release dated 26 March 2021: Mergers: Commission announces evaluation results and follow-up measures on jurisdictional and procedural aspects of EU merger control; accessible at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1384.

concentrations which may have a significant impact on competition in the internal market".[22] The guidance is based on the opinion that firms that fall below the threshold may develop into significant competitors. Accordingly, the guidance is premised on the "*potential competitive significance*" of a firm, rather than the significance which a small firm currently plays in the market. Under certain circumstances transactions that fall short of the filing thresholds at both EU and Member States level may require a notification to the EC upon an Article 22 ECMR referral request of a Member State. These smaller mergers that would fall below the filing threshold may be "invited" by the EC to do so, if for example the value of the start-up does not currently reflect its potential to be competitive in the future while the EC mainly seems to aim at having a fallback option particularly for killer acquisitions in the digital economy or in industries where innovation plays a key role (in particular in the pharmaceutical and biotech industry), the EC may expand this to other sectors. This *ex-ante* type regulation creates some legal uncertainty for dealmakers and increases risks with respect to gun jumping rules. Further concerns were raised in the FSOI regarding the use of most favoured nation or price parity clauses (particularly in relation to online travel agents – similar to the issues investigated by various national competition authorities in Europe[23]).

Where the SACC intervene on the basis of competition concerns of this type, it will likely be required to grapple with a complex set of trade-offs in order to arrive at effective remedies. As noted internationally, intervention on the basis of certain firms being particularly efficient and/or effective competitors requires a tricky balancing act since such intervention will typically result in the loss of existing efficiencies in an attempt to achieve uncertain benefits in the future – which may be amplified by the consideration of policy issues outside of traditional competition law (such a privacy or public interest). Depending on specific nature of the remedies imposed, such intervention may also have the unintended consequence of adversely affecting

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[22] European Commission press release dated 26 March 2021: Mergers: Commission announces evaluation results and follow-up measures on jurisdictional and procedural aspects of EU merger control; accessible at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1384.

[23] The validity of 'most favoured nations' clauses has been questioned with differing conclusions among various European competition authorities.
According to para 4.3(b) of the CMA's Digital Markets Strategy (February 2021) available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/959399/Digital_Markets_Strategy.pdf, the UK Competition & Market Authority notes its "Compare the market" finding that the use of wide 'most favoured nation' clauses in contracts results in an infringement of competition law.
In November 2020, the UK Competition & Market Authority issued a hefty fine against Comparethemarket.com for its use of wide 'most favoured nations' clauses due to the clauses anti-competitive effects. Judgement available at https://assets.publishing.service.gov.uk/media/60218a9dd3bf7f70bc2e1f73/Non-confidential_infringement_decision_09.02.2021.pdf.
According to para 1.150-152 of the Jason Furman report titled Unlocking digital competition (March 2019) available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf, most-favoured nations clauses have been investigated in relation to conduct by Amazon throughout the EU, UK and German competition authorities. In this regard, the EU accepted commitments by amazon to bring these practices to an end.
While many EU competition authorities generally allow narrow 'most favoured nation' clauses, the German Federal Supreme Court has confirmed that these narrow clauses – as applied by Booking.com – violate competition law and as such prohibited the use of both wide and narrow price parity clauses. Press release issued by Bundesgerichtshof available at https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2021/2021099.html.

investment incentives for new entrants and smaller rivals. Likewise, many forms of conduct that may limit users switching across platforms can also give rise to efficiencies that benefit consumers and the small businesses that utilise those platforms. The SACC has, however, already signalled a willingness to engage with such trade-offs in the Report, noting that intervention will have to "*balance the need for inclusivity [public interest] with the desire to maintain innovation [competition]*".[24]

While the SACC imposed a number of remedial actions on various firms, to date the most controversial has been the remedial action imposed against Takealot.

In this regard, the Final Report concluded that Takealot was a clear market leader and has a dominant share of overall online sales in South Africa, including other eCommerce platforms and direct retailer or manufacturer sales channels.[25] As an online marketplace, Takealot also imposes a narrow price parity clause, preventing sellers from selling their products on their own, direct, websites at a price less than the one advertised on Takealot.[26] Particularly in light of its finding that there were few alternatives to Takealot, the SACC imposed that that Takealot remove all narrow price parity clauses from its contracts with sellers as a means to reduce their dependency on Takealot as an online marketplace, providing a degree of countervailing power to these sellers.[27]

Additionally, the SACC also found that Takealot's hybrid business model (i.e., in that it is has both a marketplace and retail business) may result in Takealot's retail division competing with sellers on its marketplace division, increasing the likelihood of conflict of interests and instances of self-preferencing.[28] To remedy this potential conflict of interest, the SACC found that there had to be, *inter alia*, a segregation of Takealot marketplace from Takealot retail, and for there to be separate divisional managers reporting to the Chief Executive Officer.[29]

Digital markets are incredibly dynamic with eCommerce platforms (such as Takealot) facing competition, or potential competition, from conventional brick-and-mortar market players who have, or may, develop their own eCommerce platforms. In addition to local competition, the global nature of digital markets introduces a global aspect of competition considering that consumers may purchase or access products and services online. [30] When assessing the state of competition within a particular market or the conduct of a particular firm, competition

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24 Report, page 7.
25 Final Report at page 7.
26 Final Report at paragraph 129.
27 Final Report at paragraph 139.1
28 Final Report at paragraph 142.
29 Final Report at paragraph 152.2.
30 OECD 'Abuse of Dominance in Digital Markets' (2021) at page 14.

authorities should have due regard to both of these considerations to ensure that the firm on which a remedy is imposed is onerously prejudiced.

Unsurprisingly, Takealot has not taken well to either of the above remedial actions. In this respect, Takelot has publicly refuted that it has a dominant position, comprising approximately 2% of the retail market in South Africa and argues that it competes with conventional brick-and-mortar establishments which also have an online presence as well as foreign competitors who do not have to comply with local consumer protection laws, such as: Shein, Wish and AliExpress.[31]

For an eCommerce platform, such as Takealot, to expand and compete on a global scale, significant capital is required. Remedies which undermine a good business case makes it increasingly challenging to secure the level of investment needed for these firms to expand and grow and will likely prejudice a firm's ability to recoup its research and developments costs and to financially benefit from its innovation– emphasising the potential prejudice and stifling of local firm's where they are sanctioned as a result of their innovation.

While at the time of this paper the authors are unsure whether Takealot intends on challenging the findings and remedial actions imposed by the SACC in its Final Report, the SACC needs to ensure that it does not undermine those market participants who are growing and providing significant investment into the digital marketplace, a highly competitive market where firms are competing not only with established traditional retailers but also large international players. This may have the further unintended consequence of indicating to both local and international players that their business models will be substantively undermined once they establish themselves in South Africa and render them liable to sanction by the SACC.

B) Public Interest

In the ToR, it was expressly acknowledged by the SACC that 'public interest' considerations would play a key role in the OIPMI.

From its inception, the focus of the OIPMI was on inclusivity and fairness. In particular, the FSOI focused on the relationships between online intermediation platforms and the small businesses that utilise them to access consumers.

In light of the above, when the SACC published its Final Report in respect of the OMI, it found that there was a "distinct lack of participation by HDPs in online platform markets and even

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31 Georgina Crouth 'Competition Commission missed the point; there are much larger competitors, says Takealot' *Daily Maverick*: https://www.dailymaverick.co.za/article/2023-08-03-competition-commission-missed-the-point-there-are-much-larger-competitors-says-takealot/#:~:text=On%20Thursday%2C%20Takealot%20told%20Daily,be%20fairly%20reviewed%20to%20further

low representation amongst the business users on the intermediation platforms".[32] The SACC went further as to conclude:[33]

> *"This outcome and feature of the markets indicates that HDP entrepreneurs face even greater barriers to participation and competition than your typical SME. These include greater challenges in providing or securing startup financing (given a lack of wealth accumulation and assets for security), business networks for inputs and services, and the fact that much of the market for consumers with discretionary income that intermediation platforms target lies in formerly white middle-class suburbs."*

In respect of the eCommerce market, the SACC found that the eCommerce business model favours established firms (along with other market features) and was also characterised by additional restrictions to the participation of HDP firms.[34] Consequently, the SACC ordered that Takealot (who was found to be dominant in the eCommerce market) implement:

> *"an HDP Programme that provides (i) personalised onboarding, the waiver of subscription fees for the first three months and at least R2000 advertising credit for use in the first three months, (ii) offering promotional rebates and the inclusion of HDPs in HDP-specific campaigns on the platform, and (iii) a programme to specifically support targeted groups within HDPs such as female, youth and rural enterprises with business mentoring and funding support."*

In respect of the Online Classifieds market, the SACC found that there were a number of market features which impede competition but specifically found that discrimination on listing and promotion fees have a particular prejudice on SME and HDP firms. To remedy the particular prejudice to HDPs, the SACC imposed the remedial action that:[35]

> *"…all the leading platforms except Private Property must introduce an HDP Programme. For Property24, that programme must at no cost provide personalised training including site design and support, branded listings, 5 value-added services per month, access to the market intelligence report, and for new HDP agents, 12 months free standard listing subscription. Autotrader must at no cost provide at no cost personalised workshops with experts and events, assistance with the initial upload and photography, a 50% discount on the Instant Offer, free standard listings for 12 months or premium at the cost of standard, and for existing HDP dealers a free upgrade to Premium and/or Featured Dealer. Cars.co.za to provide for free enrolment in the*

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32 Online Intermediation Platforms Market Inquiry at paragraph 33. Available at: https://www.compcom.co.za/wp-content/uploads/2023/07/CC_OIPMI-Final-Report.pdf

33 *Supra* note 1 above at paragraph 33.

34 *Supra* note 1 above at page 8.

35 *Supra* note 1 above at page 11.

Cars.co.za dealership training programme, a mentorship and training programme, guidance on creating a professional 'About Us' page, an upgrade to the premium package at no additional cost for 12 months, a rebate amounting to two months of the user's base package." (our emphasis)

In respect to the Travel and Accommodation market, the SACC made a number of HDP related remedial actions, including *inter alia*:[36]

> Firstly, substantial funding of programmes to identify, onboard, promote and grow accommodation establishments, activities and experiences provided by SMEs that are HDP-owned and HDP communities over a period of three years; and
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> Secondly, that online travel agents similarly put in place measures to identify, develop and grow accommodation, activities and experiences provided by HDPs and HDP communities in the SA tourism sector through their respective platforms.

In respect to Platforms and Developers, the SACC imposed the remedial action that Google must, *inter alia*: invest R330 million to support SME or HDP-owned and controlled platforms and must further determine a number of support activities to promote and maximise the participation of SME and/or HDP-owned firms including, *inter alia*, training and mentoring and advertising support.

Similarly, the SACC imposed the remedial action that Apple Inc establish "*advertisement credit programme for South African Developers, providing substantial credits and support for HDP South African Developers over three years on the South African storefronts*."[37]

In respect of Online Classifieds, the SACC directed that, *inter alia,* Property 24, Autotrader and Cars.co.za establish an HDP programme with the principle aim of "*[offsetting] some of the disadvantages faced by HDP agents and dealers in achieving visibility and leads on the online classified platforms and in so doing address the finding that HDP agents and dealers face greater impediments to participation and competition on these platforms."*[38]

Generally, the SACC also directed that government funds be allocated towards supporting HDP startups in the digital economy through the Department of Trade, Industry and Commerce or the Department of Small Business Development and that the HDP Fund is actively administered by an agency of government.

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[36] *Supra* note 1 above at paragraphs 115-117.
[37] Annexure 10 to Final Report, at paragraph 3.4.2. Available at: https://www.compcom.co.za/wp-content/uploads/2023/07/CC_OIPMIFinal-Report_Proof8_Annexure10.pdf
[38] *Supra* note 1 above at paragraph 242.

Evidently, the remedial actions recommended by the SACC in the Travel and Accommodation, eCommerce, Software Application Store and Online Classified markets all contain an SME and/or HDP related remedy to assist in the participation of SMEs and HDP-owned firms.

The focus of the OIPMI on public interest considerations has signalled an intent to centre the regulation of digital markets around the seemingly less complex objective of creating more opportunity for small businesses to enter and operate in such markets.

Given the inherent tensions between competition and public interest, there is a risk that the SACC may seek to use its expanded public interest mandate at the expense of engaging in some of the complexities inherent in the regulation of digital markets in so far as pure competition and consumer welfare objectives are concerned.

While it is too early to predict the likely consequences of the Final Report, there is a material risk that the enhanced focus on inclusion of smaller platforms would result in a trade-off between the interest of consumers and that of competitors. In this respect, the pursuit of public interest objectives over competition and consumer welfare concerns should therefore not obviate the need for the SACC to engage in the complexities associated with the regulation of digital markets.

In light of the above, effective regulation aimed at creating increased opportunities for small firms to enter and operate in digital markets will still require the SACC to engage in the uncertainties associated with counterfactual analysis in order to assess the effectiveness of its proposed interventions. For example, intervention that results in smaller, more numerous intermediation platforms may create more opportunities for smaller platforms, but at the same time may be detrimental to the small business users that utilise those platforms by increasing transaction costs and reducing and fragmenting the customer bases that can be accessed through online intermediation platforms – particularly where the costs associated with the SACC's public interest related remedial actions are passed down to customers and end-users.

Additionally, it does not appear to the authors that the OIPMI made substantive competition findings or that it critically assessed conventional and novel theories of harm associated with digital markets. Rather, it appears that the majority of the remedial actions imposed by the SACC were largely in the public interest and to increase the participation of SMEs and HDPs within online intermediation platforms. In this regard, the authors echo the sentiment by the OECD that:[39]

> *"Aggressive enforcement that is not founded in economic theories of harm, or which does not address the risk of over-enforcement, may end up harming the consumers it*

[39] OECD 'Abuse of Dominance in Digital Markets' (2021) at page 3.

was meant to protect, and undermine support for competition enforcement more generally."

While the transformational objective of the Act and the public interest related remedial actions imposed by the SACC are laudable, these remedies inherently increase the cost of doing business in South Africa and may result in a stifle of innovation for fear of further remedial action, which both may have an adverse effect on consumer welfare.

Regulating digital markets in the African context

While South Africa's competition commission has certainly been the continent's lodestar in respect of investigating competition in digital markets, to effectively regulate digital markets will require a large degree of cooperation amongst Africa's competition agencies. This is particularly emphasised by the fact that despite there being notable developments over recent years, the majority of Africa is still characterised by "*dismal state of regulatory frameworks and enforcement*".[40]

In this regard, it is fitting that the African Union recently passed the Protocol on Competition Policy to the Agreement establishing the African Continental Free Trade Area ("**AfCFTA**") (the "**Protocol**") on 19 February 2023.[41] The aim of the Protocol is to provide for an integrated and unified African continental competition regime, which appears to encapsulate similar language to the EU's DMA, such as 'gatekeepers' and 'core platforms'.[42] While welcomed, the effective transplantation of the wording of the DMA to the Protocol may be problematic in several respects:[43]

Firstly, Article 11 of the Protocol prohibits the abuse of economic dependence by an undertaking(s) or gatekeeper(s). Article 11(1) additionally provides that 'economic dependence' is deemed to exist where:

"where undertakings as suppliers or purchasers of a certain type of goods or services are dependent on another undertaking or a group of undertakings in such a way that sufficient and reasonable possibilities for switching to third parties do not exist and

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40 Idris Ademuyiwa and Adedeji Adeniran Making Competition and Antitrust Regulations Work for Africa (2020) JSTOR at page 9.

41 United Nations Economic Commission for Africa, "Deepening the AfCFTA: Celebrating the Adoption of NewProtocols on Investment, Intellectual Property Rights and Competition Policy" (*UNECA*, 2023)**https://uneca.org/stories/%28blog%29-deepening-the-afcfta-celebrating-the-adoption-of-new-protocols-on-investment%2C**

42 The Protocol at Article 2(a).

43 Folakunmi Pinheiro 'Regulating Africa's Digitla Markets: What to Do, and What Not to Do' Competition Policy International. Available at: https://www.pymnts.com/cpi_posts/regulating-africas-digital-markets-what-to-do-and-what-not-to-do/

there is a significant imbalance between the power of such undertakings or group of undertakings and the countervailing power of other undertakings."

As Pinheiro identifies, the above test for economic dependence creates a significant imbalance between the powers of an undertaking on the one hand and the countervailing power of dependent undertakings in the other.[44]

Secondly, in considering whether an instance of economic dependence arises, Article 11(2) of the Protocol provides that such determination will be premised on: (i) the market share of the undertaking; the relative strength of the undertaking; the existence or not of alternative solutions; and the factors that led to the situation of dependence. Interestingly, the factors provided for by Article 11(2) presuppose that an undertaking's position in a market result in the presence of economic dependence,[45] placing a particular burden on the undertaking.

Furter to the abuse of economic dependence provision, the Protocol also appears to create a *per se* prohibition of the following conduct of gatekeepers or core platforms:[46]

a) *imposing price or service parity clauses on business users;*

b) *imposing anti-steering provisions, or otherwise preventing business users from engaging consumers directly outside of a core platform;*

c) *using business user data to compete against the business user;*

d) *self-preferencing of services or products offered by the gatekeeper on a core platform;*

e) *differentiation in fees or treatment against small and medium enterprises;*

f) *placing restrictions on the portability of data or other actions that inhibit switching platforms for business and end-users;*

g) *failing to identify paid ranking as advertising in search results and to allow paid results to exceed organic results on the first results page;*

h) *combining personal data sourced from different services offered by the gatekeeper; or*

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44 Folakunmi Pinheiro 'Regulating Africa's Digitla Markets: What to Do, and What Not to Do' Competition Policy International. Available at: https://www.pymnts.com/cpi_posts/regulating-africas-digital-markets-what-to-do-and-what-not-to-do/

45 Folakunmi Pinheiro 'Regulating Africa's Digitla Markets: What to Do, and What Not to Do' Competition Policy International. Available at: https://www.pymnts.com/cpi_posts/regulating-africas-digital-markets-what-to-do-and-what-not-to-do/

46 Protocol at Article 11(4).

i) requiring the pre-installation of gatekeeper applications or services on devices.

The fact that the Protocol appears to create a *per se* prohibition should be a cause for concern, as several of the listed practices may well be justified on technological, efficiency or pro-competitive gains. For instance, a gatekeeper or core platform may have legitimate justifications to "*[prevent] business users from engaging consumers directly outside of a core platform",* including security reasons.[47]

Additionally, it is not apparent what competitive harm may come as a result where a gatekeeper or core platform "*[fail] to identify paid ranking as advertising in search results and to allow paid results to exceed organic results on the first results page*". Moreover, Germany's Bundeskartellamt found that combining data from different sources is not *per se* harmful and may result in several benefits to end-users.[48]

The Protocol's inclusion of Article 11, specifically aimed at the *ex ante* regulation of gatekeepers and core platforms is welcomed. What is evident, however, is that there have been several oversights which may result in unintended consequences as a result of the prejudice of those gatekeepers and core platforms.

Conclusion

As is evident from the SACC's recent conclusion of the OIPMI and the African Union's recent passing of the Protocol on Competition Policy, there is a clear shift towards the pro-active regulation of digital markets, both on a national and continental level.

While the SACC's pro-active approach to enforcement in digital markets is welcomed, the SACC carries with it the responsibility to balance competing interests in an objective, transparent and quantifiable manner. Particularly as the SACC recognises the global nature of digital markets. [49]

The inherent trade-offs between efficient competitors and seeking to protect and promote a class of designated firms is a key challenge facing the South African authorities. The broad remedial powers and watered-down tests in relation to market inquiries poses a material risk

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47 Folakunmi Pinheiro 'Regulating Africa's Digitla Markets: What to Do, and What Not to Do' Competition Policy International. Available at: https://www.pymnts.com/cpi_posts/regulating-africas-digital-markets-what-to-do-and-what-not-to-do/

48 "Bundeskartellamt Prohibits Facebook from Combining User Data from Different Sources" (*Federal Cartel Office*,2019)**https://bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html**.

49 The Report proposes pre-emptive intervention can be achieved by intervening to prohibit conduct "*considered anti-competitive in other jurisdictions*". The SACC also expresses the interest to assess transaction which are significant in other jurisdictions, but which do not meet the thresholds in South Africa.

that the South African agencies don't fully grapple with the complexities of digital markets including the many pro-competitive outcomes even in concentrated markets.

Principles of fairness, legal certainty and predictability are pivotal to the business sector.[50] The pursuance of industrial policy objectives through competition enforcement is likely to conflict with these principles which could have a chilling effect on investment and innovation as a result of the undermining of free trade and fair competition and which is likely to harm consumers.[51]

Where national competition agencies and/or legislatures seek to publish their own set of *ex ante* regulations for digital markets, these regulations should be guided by the principles of clarity and objectivity.[52] In this regard, when prescriptive regulations are clear and objective, they allow for the facilitation of legal certainty and predictability, ease compliance by regulators, mitigate the risk of differing interpretations and protracted litigation and allow firm's to effectively self-regulate their conduct.[53]

Lastly, proscriptive rules should not be applied where their terms or scope are still subject to debate or where they are still associated with legal uncertainty, such as is the case with self-preferencing.[54]

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50 OECD 'Competition enforcement and regulatory alternatives – Summaries of contributions' (2021) at page 4. Available at: https://one.oecd.org/document/DAF/COMP/WP2/WD(2021)23/en/pdf

51 Ex-Ante Regulation and Competition in Digital Markets – Note by BIAC (2021). Available at: https://one.oecd.org/document/DAF/COMP/WD(2021)79/en/pdf

52 Ex-Ante Regulation and Competition in Digital Markets – Note by BIAC (2021). Available at: https://one.oecd.org/document/DAF/COMP/WD(2021)79/en/pdf

53 Louis Kaplow 'Rules Versus Standards: An Economic Analysis' 42 DUKE L. J. 557-629 (1992).

54 Fabiana Di Porto, Tatjana Grote, Gabriele Volpi & Riccardo Invernizzi, "I See Something You Don't See": A Computational Analysis of The Digital Services Act And The Digital Markets Act', 1 STANFORD COMPUTATIONAL ANTITRUST 84 (2021).