

## Using market inquiries: A sharper tool for competition authorities?

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### Abstract

The emergence of new markets, especially in the digital sector where business models are complex and innovation is constantly changing the competition landscape, has brought about new regulatory challenges for competition agencies across the world. These challenges may require a departure from the traditional tools of enforcement and the development of a somewhat new regulatory approach. In middle-income countries, the need for the adjustment of enforcement tools is further necessitated by persistent and stubbornly high levels of concentration in key sectors that have a potential to contribute to the realisation of an inclusive and growing economy. For example, in South Africa, the Competition Commission of South Africa (CCSA) has recorded unquestionable successes in cartel enforcement in the past two decades, with hefty fines imposed against those found to have participated in cartel conduct. However, the application of traditional tools of enforcement in abuse of dominance cases has borne little success and, as a result, key industries such as steel and agriculture remain highly concentrated. This has prompted government, through the Department of Trade, Industry and Competition, to strength the powers of the CCSA by, among other things, adding in its toolbox the power to conduct market inquiries. This paper examines whether market inquiries are best suited in emerging and new markets, and whether they can be used as an alternative tool in concentrated markets. The paper draws from market inquiries conducted by the CCSA in banking, data and digital sectors.

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The views expressed and any possible errors are those of the authors and are not the views of the Competition Commission SA.

## I. INTRODUCTION

Concerns regarding excessively high levels of concentration in South African markets are not new. These concerns, together with other considerations, were the reason for the enactment and promulgation of the Competition Act 89 of 1998 (the Act) and subsequent amendments to this Act.<sup>3</sup> In its preamble, the Act recognises that apartheid and other discriminatory laws resulted in excessive concentrations of ownership and control within the South African economy. The Act further recognises the need for credible competition law and effective structures to administer this law as crucial components to the attainment of an efficient functioning economy, which presumably is an economy characterised by lower levels of concentration and equal opportunities for all to participate in the economy.

The Competition Commission of South Africa's (CCSA) 2021 Concentration Tracker Report (Concentration Tracker) provides insights on the current levels of concentration in South Africa.<sup>4</sup> Like other previous studies<sup>5</sup>, the concentration Tracker concludes that most of the key industries remain highly concentrated more than 20 years of the enactment of the Act. Among other things, the Concentration Tracker makes the worrying observation that some of the industries are likely to experience increasing instead of decreasing levels of concentration. In the main, these are industries with firms that are presumed to be dominant<sup>6</sup> and are capable of reinforcing their dominance by raising barriers to entry.<sup>7</sup>

As early as 2006 there was acknowledgement by government that there may be obstacles that hinder the ability of competition authorities to address certain anti-competitive practices and outcomes mostly found in highly concentrated markets.<sup>8</sup> Consequently, over the years, lawmakers have sought to strengthen the powers vested in competition authorities to enable them to respond effectively to competition distortions arising because of, among other things, concentration in markets. In 2016, the Minister of Trade, Industry and Competition (the Minister) noted that:

‘Broadening economic participation hinges on addressing high concentration levels and combating the barriers to entry that dominant firms create to keep out new entrants.... I am pleased to note progress made in addressing cartel activity and the extent to which public interest consideration(sic) are incorporated into merger regulations. *However, I remain concerned about*

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<sup>3</sup> Lesofe & Nontombana, ‘A review of abuse of dominance provisions of the Competition Act – is it necessary?’ (2016), available at <http://www.compcom.co.za/wp-content/uploads/2016/07/1.-Review-of-Abuse-of-Dominance-Provisions-of-the-Competition-Act-%E2%80%93-Is-it-Necessary.pdf>, accessed on 29 April 2023. See also Roberts, ‘Effects-based tests for abuse of dominance in practice: the case of South Africa (2012) Centre for Competition Economics, available at <https://static1.squarespace.com/static/52246331e4b0a46e5f1b8ce5/t/52d8eec7e4b0de281e23a8e4/1389948615191/EFFECTS-BASED+TESTS+FOR+ABUSE+OF+DOMINANCE+IN+PRACTICE+THE+CASE+OF+SOUTH+AFRICA.pdf>, accessed on 29 April 2023.

<sup>4</sup> Competition Commission SA, ‘Measuring concentration and participation in the South African economy: levels and trends’ (2021), available at <https://www.compcom.co.za/wp-content/uploads/2021/12/Concentration-Tracker-Main-Report-1.pdf>, accessed on 29 April 2023.

<sup>5</sup> For example, see Buthelezi, Mtani & Mncube, ‘The extent of market concentration in South Africa’s product markets’ (2018), available at [https://www.compcom.co.za/wp-content/uploads/2020/03/Working-paper\\_The-extent-of-South-Africas-concentration-problem-13082018.pdf](https://www.compcom.co.za/wp-content/uploads/2020/03/Working-paper_The-extent-of-South-Africas-concentration-problem-13082018.pdf), accessed on 29 April 2023.

<sup>6</sup> A firm is presumed to be dominant if it holds a market share of 45% or more. See section 7 of the Act.

<sup>7</sup> The sectors that fall under this category include healthcare, agro-processing, communications (fibre), steel (iron and ferrochrome mining) and financial services (insurance). See the Summary Report of the Concentration Tracker Report at 9.

<sup>8</sup> Competition Commission SA, ‘Annual Report 2006/07’ at 5, available at <http://www.compcom.co.za/wp-content/uploads/2014/09/annual-report-2006-2007.pdf>, accessed on 29 April 2023.

*the difficulties in enforcing abuse of dominance provisions and recognise the need to strengthen provisions in the Competition Act related hereto*'.<sup>9</sup>

Indeed, as observed by the Minister, the CCSA has recorded unquestionable successes in cartel enforcement in the past two decades, with hefty fines imposed against those found to have participated in cartel conduct. The CCSA's notable achievements in this area of enforcement include the imposition of fines totalling approximately R1.5 billion through the Fast Track Construction Settlement Project<sup>10</sup>, and the dismantling of longstanding cartels that operated in key industries such as steel<sup>11</sup>, cement<sup>12</sup>, bread and milling<sup>13</sup>, and the markets for the provision of precast concrete products.<sup>14</sup>

In contrast, the CCSA has achieved little success in the investigation and prosecution of abuse of dominance cases. As a result, essential industries, including those with the potential to contribute to the development and growth of the South African economy, remain highly concentrated. This not-so-great record has turned the spotlight on the effectiveness of the traditional tools of enforcement in addressing abuse of dominance and concentration concerns in South Africa. The debate on the need for the adoption of alternative tools by competition agencies is elevated by the emergency of new markets, especially in the digital sector, that seem to present new regulatory challenges that may not be overcome by simply applying the traditional tools of enforcement. All in all, there appears to be a good case for the adjustment of enforcement tools by competition agencies in order to respond effectively to these challenges.

Between 2008 and 2023, the CCSA completed seven market inquiries and has recently announced that it will be undertaking three more inquiries. It would seem the agency considers market inquiries as another tool that could possibly be used in competition law enforcement in South Africa. In this paper, the authors track the evolution of market inquiries in South Africa and determine whether they can be used as an alternative tool for addressing concentration concerns, and whether they are best suited in emerging and new markets. To aid the assessment, the paper evaluates the impact of market inquiries conducted by the CCSA in banking and data

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<sup>9</sup> Competition Commission SA, 'Annual Report 2015/16' at 12, available at <https://www.compcom.co.za/wp-content/uploads/2019/10/annual-report-2015-2016.pdf>, accessed on 03 May 2023.

<sup>10</sup> This project was initiated by the CCSA in 2011 and it sought to fast track the investigation of collusive practices in the construction sector. The implicated firms were encouraged and incentivised to voluntarily disclose the construction projects that they were involved in which were subjected to collusive tendering. Through this process, the Competition Tribunal issued about 250 section 65 certificate to enable both the public and private sectors to pursue civil claims. See Competition Commission presentation to the Portfolio Committee on Public Works, available at [https://static.pmg.org.za/160315Competition\\_Commission.pdf](https://static.pmg.org.za/160315Competition_Commission.pdf), accessed on 03 May 2023.

<sup>11</sup> Competition Commission, 'Competition Commission requests fines for steel companies and initiates construction sector investigation' (2009), available at <https://www.compcom.co.za/2009-media-releases/>, accessed on 3 May 2023.

<sup>12</sup> Boshoff & van Jaarsveld, 'Recurrent collusion: Cartel episodes and overcharges in the South African cement market' (2019) *Review of Industrial Organization* 54. See also Govinda, Khumalo & Mkhwanazi, 'On measuring the economic impact: Savings to the consumer post cement cartel burst' (2014), available at <http://compcom.co.za/www15.cpt4.host-h.net/wp-content/uploads/2014/09/On-measuring-the-economic-impact-savings-to-the-consumer-post-cement-cartel-burst-CC-15-Year-Conference.pdf>, accessed on 3 May 2023.

<sup>13</sup> Competition Commission, 'Tiger Brands admits to participation in bread and milling cartels and settles with Competition Commission' (2007), available at <https://www.compcom.co.za/2007-media-releases/>, accessed on 3 May 2023.

<sup>14</sup> Khumalo, Mashiane & Roberts, 'Harm and overcharge in the South African precast concrete products cartel' (2012) *Centre for Competition Economics University of Johannesburg, Working Paper 6/2012*. It is estimated that this cartel resulted in overcharges of about 16.5 per cent to 28 per cent in Gauteng and 51 per cent to 57 per cent in KwaZulu-Natal.

sectors, and the potential impact of the online intermediation platforms market inquiry given the binding remedial actions imposed by the CCSA in this market inquiry.

## II. DEFINING A MARKET INQUIRY

Market inquiries, also commonly known as market studies or market investigations, are increasingly undertaken by various competition agencies across the world. There is no common definition ascribed to market inquiries and this is partly because of the differences on their conception, outcomes and the legal framework applicable in different jurisdictions.<sup>15</sup> In South Africa, a market inquiry denotes a formal inquiry into the general state of competition, the levels of concentration in and structure of a market for particular goods or services.<sup>16</sup>

Market inquiries are distinguishable from traditional investigations in that in a market inquiry the focus is not necessarily on a specific anti-competitive conduct perpetrated by a single firm or a group of firms within a specific market. Rather, the focus in market inquiries is broadly on a feature or a combination of features of a market which impede, restrict or distort competition.<sup>17</sup> The feature of a market contemplated in this regard includes structural features (such as levels and trends of concentration), the outcomes observed in that market (including prices, customer choice, the quality of goods or services and innovation), conduct by any firm that supplies goods or services or customers of such firms, or a co-ordinated conduct by firms in a concentrated market even if it does not constitute collusion.<sup>18</sup>

### *(a) Primary reasons for conducting market inquiries*

Market inquiries can serve a variety of purposes depending on the needs of a jurisdiction. However, there appears to be a convergence of views among competition agencies on the primary reasons for undertaking market inquiries. In a survey conducted by the Organisation for Economic Co-operation and Development (OECD), more than 70% of the agencies surveyed indicated that they undertake market inquiries when there are indications that there may be market failures or competition concerns in a particular sector, but there is no suspicion of a violation of competition law.<sup>19</sup> Most of the agencies also carry out market inquiries to gain an in-depth understanding of how markets work and have evolved over time which then assists in policy and legislative reforms.<sup>20</sup>

Apart from common objectives, there are other goals that competition agencies strive to achieve through market inquiries. For example, the experience in South Africa has been to use market inquiries as a tool to tackle competition problems in highly concentrated markets and to eradicate barriers that inhibit meaningful and effective participation by small and medium businesses. In Kenya, market inquiries have been conducted to understand competitive dynamics in emerging and new markets, such as digital markets, and to increase

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<sup>15</sup> OECD 'The role of market studies as a tool to promote competition' (2016) DAF/COMP/GF (2016)4, available at [https://one.oecd.org/document/DAF/COMP/GF\(2016\)4/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2016)4/en/pdf), accessed on 5 September 2023.

<sup>16</sup> Section 43.A(1) of the Competition Act 89 of 1998, as amended.

<sup>17</sup> Background note on Competition Amendment Bill (2017), available at [https://www.gov.za/sites/default/files/gcis\\_document/201712/41294gon1345.pdf](https://www.gov.za/sites/default/files/gcis_document/201712/41294gon1345.pdf), accessed on 4 September 2023.

<sup>18</sup> Section 43.A(3) of the Competition Act 89 of 1998, as amended.

<sup>19</sup> OECD 'The role of market studies as a tool to promote competition' (2016) DAF/COMP/GF (2016)4, available at [https://one.oecd.org/document/DAF/COMP/GF\(2016\)4/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2016)4/en/pdf), accessed on 5 September 2023.

<sup>20</sup> *Ibid.*

comprehensiveness of product information.<sup>21</sup> The Competition Commission of India has used market inquiries to assess levels of concentration and the strength of competition in different sectors.<sup>22</sup>

*(b) Pros and cons of market inquiries*

Market inquiries are generally considered to be resource and time intensive.<sup>23</sup> For instance, the CCSA required a budget of about R196 million to conduct the Private Healthcare Market Inquiry. Of this, about R117 million (i.e., 60% of the budget) was utilised to procure external services and expertise, including the services of the five panel members; legal, economic and healthcare sector experts; data warehousing and actuarial services; and data de-identification and security services.<sup>24</sup>

To mitigate this challenge, some of the competition agencies now resort to using their internal staff for the bulk of the work undertaken by the market inquiry and only rely on external resources when it is extremely necessary and on an ad-hoc basis. This approach has proven to not only save costs but also the time taken to conclude the market inquiry. For example, in the Online Intermediation Platforms Market Inquiry, the CCSA used largely its staff. The only notable external resources used were the services of one external panel member<sup>25</sup> and an independent company that conducted the business user survey relied upon in the final report.<sup>26</sup> Similarly, the Data Market Inquiry which also relied on the CCSA's internal staff, took shorter time to complete.<sup>27</sup>

Undertaking a market inquiry whose scope and objective is clearer and more focused also assists in keeping the duration shorter and less costly. This method seems to have worked well in jurisdictions like the United Kingdom and German . Conversely, South Africa's experiences in the Banking and Private Healthcare market inquiries illustrate how the broad framing of the

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<sup>21</sup> Competition Authority of Kenya, 'Report on the Competition Authority of Kenya Digital Credit Market Inquiry' (2001), available at [https://www.cak.go.ke/sites/default/files/Digital\\_Credit\\_Market\\_Inquiry\\_Report\\_2021.pdf](https://www.cak.go.ke/sites/default/files/Digital_Credit_Market_Inquiry_Report_2021.pdf), accessed on 5 September 2023. See also OECD 'Using market studies to tackle emerging competition issues' (2020) DAF/COMP/GF/WD(2020)57, contribution from Kenya, available at [https://one.oecd.org/document/DAF/COMP/GF/WD\(2020\)57/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2020)57/en/pdf), accessed on 5 September 2023.

<sup>22</sup> For example, see Competition Commission of India, 'Market study on the telecom sector in India', (2021), available at <https://www.cci.gov.in/economics-research/market-studies/details/20/1>, accessed on 5 September 2023.

<sup>23</sup> OECD 'Using market studies to tackle emerging competition issues' (2020) DAF/COMP/GF/WD(2020)57, contributions from Austria and Latvia, available at [https://one.oecd.org/document/DAF/COMP/GF/WD\(2020\)57/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2020)57/en/pdf), accessed on 5 September 2023.

<sup>24</sup> Omarjee 'Private healthcare market inquiry cost R196m – Patel' *The Mail & Guardian* 2 January 2019, available at <https://mg.co.za/article/2019-01-02-private-healthcare-market-inquiry-has-cost-r196m-patel/>, accessed on 5 September 2023. See also OECD 'Using market studies to tackle emerging competition issues' (2020) DAF/COMP/GF/WD (2020)34, contribution from South Africa, available at [https://one.oecd.org/document/DAF/COMP/GF/WD\(2020\)34/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2020)34/en/pdf), accessed on 5 September 2023.

<sup>25</sup> This market inquiry was chaired by the CCSA Chief Economist and Deputy Commissioner, Mr James Hodge. He was assisted by Ms Doris Tshepe who, for the greater part of the market inquiry, was an external independent panel member. Ms Tshepe was subsequently appointed as the Commissioner of the CCSA but this did not have any major impact on the work of the market inquiry. See Competition Commission SA, 'New Competition Commissioner Dorise Tshepe says she is ready to push boundaries and be innovative' 1 September 2022, available at [https://www.compcom.co.za/wp-content/uploads/2022/09/Media-Statement-on-the-final-day-of-the-competition-conference-1-September-2022\\_.pdf](https://www.compcom.co.za/wp-content/uploads/2022/09/Media-Statement-on-the-final-day-of-the-competition-conference-1-September-2022_.pdf), accessed on 5 September 2023.

<sup>26</sup> Competition Commission SA, 'Online intermediation platforms market inquiry final decision' (2023), available at [https://www.compcom.co.za/wp-content/uploads/2023/07/CC\\_OIPMI-Final-Report.pdf](https://www.compcom.co.za/wp-content/uploads/2023/07/CC_OIPMI-Final-Report.pdf), accessed on 5 September 2023.

<sup>27</sup> This market inquiry was initiated on August 2017 and completed in December 2019.

terms of reference can lead to high costs and delays in the finalisation of market inquiries. It took the CCSA seven years to complete the Private Healthcare Market Inquiry.<sup>28</sup> The Data Market Inquiry took just over two years to complete, and this is largely because of its narrow scope.<sup>29</sup> The CCSA is set to launch a new market inquiry in October 2023, the Media and Digital Platforms Market Inquiry, and anticipates completing this market inquiry in less than two years.<sup>30</sup> While this sounds ambitious given the agency's track record, the target should be achievable since inquiry's scope is fairly narrow.<sup>31</sup>

In several jurisdictions, the outcomes of market inquiries do not have a binding effect. This is problematic because competition agencies are reluctant to spend extensive resources and time in a process whose outcomes are dependent on voluntary implementation. In South Africa, all the market inquiries initiated before July 2019 produced non-binding recommendations. To date, key recommendations made in some of these market inquiries have not been implemented and, as a result, the affected markets remain unchanged. A case in point is the Public Passenger Transport Market Inquiry whose recommendations could have improved the state of public transport in South Africa had such recommendations been adequately implemented.<sup>32</sup> Legislative changes introduced by the South African government, discussed below, appear to mitigate this risk.

Despite the challenges associated with market inquiries, there are clear benefits which, in our view, outweigh the disadvantages. As observed by Bonakele, Das Nair & Roberts, market inquiries appear to be more effective in addressing exploitative and exclusionary practices than enforcement actions. They often produce tangible benefits for consumers and, at least in jurisdictions like South Africa, can also be used to attain public interest objectives.<sup>33</sup> A market inquiry process also enables a competition agency to take a more holistic and ecological approach than a typical enforcement investigation whose focus may be limited to conduct by a single firm. Our discussion under the section VI below provides examples of other benefits attainable through a market inquiry process.

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<sup>28</sup> According to its Terms of Reference, the Private Healthcare Market Inquiry sought to cover healthcare financing, comprising, among others, various markets for health insurance products, and broader healthcare services encompassing health professionals, hospital-based services and non-hospital-based services. See Competition Commission of SA, Terms of Reference for Market Inquiry into the Private Healthcare Sector. See also Bonakele, Das Nair & Roberts, 'Market inquiries in South Africa meeting big expectations?', in Motta, Peitz & Schweitze (eds), *Market investigations: a new competition tool for Europe?* (Cambridge University Press 2022) 296.

<sup>29</sup> Motta, Peitz & Schweitze (Cambridge University Press 2022) 304.

<sup>30</sup> Competition Commission SA Media and Digital Platforms Market Inquiry, Administrative Timetable, available at [https://www.compcom.co.za/wp-content/uploads/2023/09/MDPMI\\_Administrative-timetable\\_final22.pdf](https://www.compcom.co.za/wp-content/uploads/2023/09/MDPMI_Administrative-timetable_final22.pdf), accessed on 16 September 2023.

<sup>31</sup> Competition Commission SA Media and Digital Platforms Market Inquiry, Terms of Reference (15 September 2023), available at [https://www.compcom.co.za/wp-content/uploads/2023/09/Media-and-Digital-Platforms-Market-Inquiry\\_FinalTOR\\_Sep2023.pdf](https://www.compcom.co.za/wp-content/uploads/2023/09/Media-and-Digital-Platforms-Market-Inquiry_FinalTOR_Sep2023.pdf), accessed on 16 September 2023.

<sup>32</sup> A number of the recommendations made by this market inquiry required implementation by, among others, the Department of Transport. However, it does not look like there has been any significant progress in this regard. See Competition Commission SA, 'Market inquiry into the land based public passenger transport sector' 2021, available at <https://www.compcom.co.za/wp-content/uploads/2021/04/PTMI-Non-Confidential-14-April-2021-FINAL.pdf>, accessed on 6 September 2023.

<sup>33</sup> Pg 316, 314.

### III. LEGAL FRAMEWORK FOR CONDUCTING MARKET INQUIRIES IN SOUTH AFRICA

#### *(a) The evolution of the market inquiry process*

The CCSA commenced undertaking market inquiries as early as 2006 when it conducted the Banking Inquiry. Then, the agency had no powers designed specifically for market inquiries; it relied on its general powers contained in section 21 of the Act.<sup>34</sup> A closer examination of the processes followed by this market inquiry shows that its success was largely dependent on collaborative and extensive engagements with stakeholders in the banking sector, notably local and international banks, industry associations, regulatory bodies and civil society organisations.

The Competition Amendment Act 1 of 2009 (the 2009 amendments) formally introduced the market inquiries function in South Africa and conferred on the CCSA the first set of powers dedicated to the conducting of market inquiries.<sup>35</sup> These amendments included jurisdictional requirements to be met by the CCSA before initiating a market inquiry. In this regard, a market inquiry can only be initiated in South Africa if the CCSA has reason to believe that there are feature or a combination of features of a market which impedes, distorts or restricts competition within that market, or that the market inquiry is necessary to achieve the purposes of the Act.<sup>36</sup>

The 2009 amendments create an obligation for the CCSA to publish in the government gazette a notice announcing the establishment of the market inquiry, setting out its terms of reference,<sup>37</sup> and to also publish a report on the outcomes of the market inquiry.<sup>38</sup> However, these amendments did not set any timeframes for completion of market inquiries, other than requiring the CCSA to conduct market inquiries within the time set out in the terms of reference, which could be extended by the CCSA itself.<sup>39</sup> It is also clear from the 2009 amendments that the CCSA could only make recommendations and was not empowered to take any binding or coercive actions in a market inquiry.

Though the market inquiry process has evolved over years, the CCSA still follows largely the same methods of investigation when conducting market inquiries. These include the issuing of statement of issues and guidelines for participation in the market inquiry, issuing questionnaires and requests for information to solicit input and submissions from stakeholders, holding public hearings, and inviting comments on provisional findings and proposed remedies.<sup>40</sup>

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<sup>34</sup> Competition Commission SA, 'Banking Enquiry Report to the Competition Commissioner' (2009) at 2, available at [https://www.compcom.co.za/wp-content/uploads/2017/11/1-Enquiry-Process\\_non-confidential1.pdf](https://www.compcom.co.za/wp-content/uploads/2017/11/1-Enquiry-Process_non-confidential1.pdf), accessed on 7 September 2023.

<sup>35</sup> These powers came into effect in April 2013. See Sutherland, 'Inquiries into market inquiries' (2018), available at [https://static1.squarespace.com/static/52246331e4b0a46e5f1b8ce5/t/5b90fef1562fa7cd9912fb54/1536229109841/Sutherland\\_Inquiries+about+market+inquiries.pdf](https://static1.squarespace.com/static/52246331e4b0a46e5f1b8ce5/t/5b90fef1562fa7cd9912fb54/1536229109841/Sutherland_Inquiries+about+market+inquiries.pdf), accessed on 12 September 2023.

<sup>36</sup> Section 43B (1).

<sup>37</sup> Section 43B (2).

<sup>38</sup> Section 43C (1).

<sup>39</sup> Section 43B (4) and (6).

<sup>40</sup> For example, see the administrative timetable for the Online Intermediation Platforms Market Inquiry setting out in detail the activities undertaken by the CCSA in a market inquiry, available at [https://www.compcom.co.za/wp-content/uploads/2021/05/OIPMI\\_Administrative-timetable\\_Final.pdf](https://www.compcom.co.za/wp-content/uploads/2021/05/OIPMI_Administrative-timetable_Final.pdf), accessed on 13 September 2023.

*(b) Market inquiries under the 2018 amendments*

Another set of amendments was introduced through the Competition Amendment Act 18 of 2018 (the 2018 amendments). These amendments have elevated the status of market inquiries in South Africa.<sup>41</sup> In addition to conferring jurisdiction to the CCSA, section 43B now empowers the Minister to require the CCSA to undertake a market inquiry, subject to the same jurisdictional factors that apply to the CCSA. These amendments also prescribe that a market inquiry is to be concluded within 18 months. It is noteworthy that the power to extend the market inquiry period now resides with the Minister and not the CCSA.<sup>42</sup> These restrictions have presumably been included to address the concern discussed above regarding market inquiries generally taking too long to complete.

Section 43C outlines matters that can be decided by a market inquiry and introduces the ‘adverse effect’ test. In terms of section 43A (2), an adverse effect on competition would be established if a feature or combination of features of a market impedes, restricts or distorts competition in that market. It is clear from this definition and the Background Note on Competition Amendment Bill (the Background Note) that the legislator sought to establish a different test for market inquiries. In this regard, the Background Note states that the ‘new “adverse effect” test is designed as a lower threshold to enable intervention by the competition authorities in circumstances where features of a market, or conduct in a market, impair competition’.<sup>43</sup> The creation of a lesser standard for market inquiries in circumstances where the outcomes have a binding effect makes the process susceptible to criticism. As observed by Boshoff, Sutherland & Theron, ‘Chapter 4A allows the Commission to take drastic steps to intervene in the economy and they should be triggered only once a decent threshold is met.’<sup>44</sup>

Public interest issues can also be considered by the CCSA in a market inquiry. In this regard, section 43C obligates the CCSA to have regard to the impact of the adverse effect on competition on small and medium businesses and those owned or controlled by historically disadvantaged persons, when deciding whether any feature of a market impedes, restricts or distorts competition.<sup>45</sup> In essence, the CCSA is empowered to use the market inquiry process to address specifically the challenges faced by small businesses, provided there is evidence of a market feature that adversely affect their effective participation within the market. The remedial actions imposed by the CCSA in the Online Intermediation Platforms Market Inquiry (discussed below), which are largely for the benefit of small businesses, illustrate the significance of section 43C.

Importantly, section 43D, which appears to be the most contentious section in the 2018 amendments, empowers the CCSA to ‘take action’ to remedy, mitigate or prevent an adverse effect on competition identified by the agency during the market inquiry process, subject to the provisions of any law. It is not clear though why this qualification was included in section 43D. The remedial action taken by the CCSA must be consistent with the decisions (findings) of the agency as contained in its final report and must be both reasonable and practicable. In determining what is reasonable and practicable, the CCSA is required to take into account the nature and extent of the adverse effect on competition, the nature and extent of the remedial action itself, the relation between the adverse effect on competition and the remedial action,

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<sup>41</sup> These amendments came into effect in February 2019.

<sup>42</sup> Section 43B(4).

<sup>43</sup> Background Note on Competition Amendment Bill (2017) at 20.

<sup>44</sup> Boshoff, Sutherland & Theron, ‘Competition Amendment Bill (2017): comments’ (2018), available at [https://blogs.sun.ac.za/ccle/files/2017/11/CCLC-Comments-on-Competition-Amendment-Act-300118\\_final.pdf](https://blogs.sun.ac.za/ccle/files/2017/11/CCLC-Comments-on-Competition-Amendment-Act-300118_final.pdf), accessed on 16 September 2023.

<sup>45</sup> See also Motta, Peitz & Schweitze (Cambridge University Press 2022) 314.



the likely impact of the remedial action on competition in the affected market or any other markets, and any other factors that may arise from information obtained by the CCSA during the market inquiry.

There is an ongoing debate on the ambit of the powers conferred to the CCSA by the 2018 amendments. This debate extends to the status and legal effect of the remedial actions that CCSA can now impose. In this regard, some have argued that parties against whom remedial actions are imposed have no legal obligation to abide by such remedial actions. To support this proposition, reference is made to the fact that the Act does not make it an offense to not comply with the remedial actions and, furthermore, no penalties can be imposed for non-compliance with the remedial actions.<sup>46</sup> Conversely, others have expressed the view that the CCSA is now empowered to make findings and remedial actions that are binding.<sup>47</sup>

It is not uncommon for competition agencies to be bestowed with powers to impose binding remedies in a market inquiry. For example, in the United Kingdom (where the market inquiry regime closely resembles that of South Africa), the Competition and Markets Authority is obligated to impose remedies where a finding of adverse effects on competition has been made.<sup>48</sup> While we do not intend to contribute extensively to the debate in South Africa, we make the following observations. The Background Note provides useful insights on what parliament sought to achieve through the 2018 amendments.<sup>49</sup> The note states specifically that the amendments seek to enhance and strengthen the CCSA's market inquiry powers and to permit the agency to 'undertake far-reaching and targeted interventions to address concentration'.<sup>50</sup> The note further states:

'As with the merger control regime, *the Commission's potential findings and actions following a market inquiry will be binding, unless challenged in the Tribunal...*The exception to this approach is divestiture, which is only competently imposed by the Tribunal on the recommendation of the Commission. Given the far-reaching nature of this remedy, this is appropriate.'<sup>51</sup>

The proposition that the legislator sought to introduce remedial actions that are binding in nature also finds support from the construction of some of the provisions of the 2018 amendments themselves. For example, sections 43C and 43D identify clearly instances when the CCSA can only make recommendations.<sup>52</sup> Section 43E (4) and (5) enjoins the CCSA to observe the principles of natural justice during the market inquiry process. It does so by

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<sup>46</sup> For example, see Dey-van Heerden and Aukema, 'Crouching dragon, paper tiger? Casting on the powers of the Competition Commission in market inquiries' (2023), available at <https://www.cliffedekkerhofmeyr.com/news/publications/2023/Practice/Competition/competition-law-alert-2-august-crouching-dragon-paper-tiger->, accessed on 5 September 2023. See also Laurence, 'Warning that commission could stifle online growth in South Africa' TechCentral 3 August 2023, available at <https://techcentral.co.za/commission-could-stifle-online-growth/229337/#:~:text=The%20Competition%20Commission%27s%20report%20on,interventionist%E2%80%9D%20and%20could%20stifle%20growth.&text=The%20Competition%20Commission%27s%20final%20report,leading%20competition%20lawyers%20have%20warned>, accessed on 5 September 2023.

<sup>47</sup> For example, this view has been expressed by Bonakele, Das Nair & Roberts. See Motta, Peitz & Schweitze (Cambridge University Press 2022) 293.

<sup>48</sup> Whish, 'Market investigations in the UK and beyond', in Motta, Peitz & Schweitze (eds), *Market investigations: a new competition tool for Europe?* (Cambridge University Press 2022) 258.

<sup>49</sup> Background Note on Competition Amendment Bill (2017).

<sup>50</sup> Background Note on Competition Amendment Bill (2017) at 7.

<sup>51</sup> Background Note on Competition Amendment Bill (2017) at 20.

<sup>52</sup> For example, section 43D(2) states that if the CCSA finds that there is an adverse effect on competition in a market, it may recommend to the Competition Tribunal divestiture in terms of section 60(2)(c) and the latter may make an appropriate order in this regard. Section 43D(2) is framed in this manner because the CCSA does not have the power to impose divestiture orders, even under merger control.

requiring the CCSA to take appropriate steps to communicate with any party that is materially affected by the decisions and remedial actions of the market inquiry. The CCSA is further obligated to have regard to any submissions received from materially affected parties pursuant to this engagement. The legislator did not impose these obligations prior to the 2018 amendments when the outcomes of market inquiries were recommendatory in nature. It is interesting to note that section 43E is framed similar to section 7(9)(a) of the Public Protector Act 23 of 1994.<sup>53</sup> It is common knowledge that the remedial actions imposed by the Public Protector of South Africa have a binding effect.<sup>54</sup> In *Public Protector and Others v President of the Republic of South Africa and Others*, the Constitutional Court summarised the obligations arising from section 7(9) as follows:

‘For all these reasons, I conclude that when the Public Protector contemplates taking remedial action against the subject of an investigation, that subject is entitled to an opportunity to make representations on the envisaged remedial action. For a proper opportunity to be given, the Public Protector must sufficiently describe the remedial action in question to enable the affected person to make meaningful representation’.<sup>55</sup>

It can also be seen from the heading of section 43D (i.e., *Duty to remedy* adverse effects on competition) that the legislator’s intention was to create a positive duty for the CCSA to proactively take action where adverse effects on competition have been established. It is doubtful that this obligation can be fulfilled without the power to imposed binding remedies. We have already mentioned above that, in fulfilment of the duty to remedy adverse effects, section 43D requires the CCSA to take remedial actions that are reasonable and practicable, taking into account all the factors listed in section 43D(4), including the availability of *less restrictive means* to remedy, mitigate or prevent the adverse effect on competition. The significance of this section is that it sets a standard that must be met when the CCAS exercises the drastic powers conferred to it by the 2018 amendments.

Further to the section 43D standard that must be upheld, section 43F introduces an appeal process for decisions and determinations made by the CCSA in a market inquiry, including the remedial actions imposed by the agency. The right to appeal is only available to a person materially and adversely affected by the remedial actions taken by the CCSA under section 43D. This too is an indication that the remedial actions taken by the CCSA give rise to legal consequences. It is inconceivable that a party can assert the right to appeal contemplated in section 43F on basis of recommendations made by the CCSA. In fact, the market inquiries undertaken by the CCSA prior to the 2018 amendments are illustrative that recommendations that flow from a market inquiry have no legal consequences and cannot be enforced; they are incapable of materially and adversely affecting any party’s rights.

In contrast, the obligations created for the CCSA under the market inquiry provisions of the Act do not arise when the agency exercises its complaint investigation powers under Chapter 2. For example, courts have previously held that a respondent firm in complaint proceedings cannot invoke the *audi alteram partem* principle during an investigation by the CCSA; this principle can only be invoked once the complaint has been referred and proceedings are before the Competition Tribunal. This is because the investigative function performed by the CCSA

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<sup>53</sup> Section 7(9)(a) of the Public Protector Act states: ‘If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances’.

<sup>54</sup> *Economic Freedom Fighters v Speaker of the National Assembly & Others* 2016 (3) SA 580 (CC).

<sup>55</sup> *Public Protector & Others v President of the Republic of South Africa and Others* 2021 (6) SA 37 (CC), para 126.

under Chapter 2 is not one that can be characterised as determinative action. By way of example, in *Norvatis v Competition Commission*<sup>56</sup>, a ruling endorsed by the Supreme Court of Appeal in *Simelane v Seven-Eleven*<sup>57</sup>, the Competition Tribunal held:

‘Moreover, there is no express provision in the Act requiring or *compelling the Commission to furnish reasons or to afford the applicant the opportunity to be heard prior to the Commission referring the restrictive practice complaint to the Tribunal*. It would have to be inferred, and it seems to be difficult to read into the Act a necessary inference with compels the Commissioner to afford the applicant the right to be heard.’<sup>58</sup>

It bears mention that before the 2018 amendments, the market inquiry function was not characterised as determinative action as well. In *Shoprite Checkers v Massmart*<sup>59</sup>, the Competition Tribunal explained this position as follows:

‘Market inquiries are not adjudicative processes nor are they in any way determinative of issues or rights of parties. The outcome of a market inquiry is recommendatory in nature’<sup>60</sup>

This makes sense because at the time of the *Shoprite Checkers* ruling,<sup>61</sup> the CCSA could only make mere recommendations in market inquiries; the implementation of those recommendations depended on voluntary participation by affected parties. However, as correctly pointed out by Sutherland, this position has been altered by the 2018 amendments and market inquiries are now determinative of issues or rights of parties.<sup>62</sup> This explains why the audi alteram partem principle must be observed in a market inquiry, but the same principle may not be applied in traditional investigations carried out by the CCSA. For example, the CCSA can initiate and investigate a cartel without notifying cartel members of such an investigation, especially if it has a whistle blower providing evidence. Cartel members may first learn about the investigation after the CCSA has taken a decision to prosecute, but this, as *Norvatis* holds, would not amount to a violation of their right to be heard. On the contrary, the CCSA cannot complete a market inquiry investigation without allowing the affected parties the opportunity to be heard. This clear distinction between market inquiries and tradition investigations conducted by the CCSA is further proof that the legislator sought to use the 2018 amendments to elevate the status of market inquiries.

Ideally, the Act should contain enforcement mechanisms designed for market inquiries. However, the enforceability of the outcomes of a market inquiry is not dependent on expressed provisions in the Act. If the CCSA has been conferred with the power to impose binding remedial actions, it follows that it is also empowered to enforce compliance, whether this power is clearly expressed or not. The Constitutional Court’s ruling in *Competition Commission v Beefcor*<sup>63</sup> affirms this proposition, though the matter related to the powers of the Competition Tribunal. In this case Jafta J stated:

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<sup>56</sup> *Norvatis SA (Pty) & Other v The Competition Commission & Other* (CT 22/CR/B/Jun 01,2.7.2001).

<sup>57</sup> *Simelane NO & Others v Seven-Eleven Corporation SA (Pty) Ltd & Another* (480/01) [2002] ZASCA 141; [2001-2002] CPLR 13 (SCA); [2003] 1 All SA 82 (SCA).

<sup>58</sup> *Norvatis*, para 50.

<sup>59</sup> *Shoprite Checkers Proprietary Limited and Others v Massmart Holdings Limited* (CRP034Jun15, EXC088Jul15, EXC107AUG15, EXC109AUG15, STA204DEC15) [2016] ZACT 74.

<sup>60</sup> *Shoprite Checkers*, para 20.

<sup>61</sup> The ruling was made on 1 September 2016.

<sup>62</sup> Sutherland, ‘Inquiries into market inquiries’ (2018), available at [https://static1.squarespace.com/static/52246331e4b0a46e5f1b8ce5/t/5b90fef1562fa7cd9912fb54/1536229109841/Sutherland\\_Inquiries+about+market+inquiries.pdf](https://static1.squarespace.com/static/52246331e4b0a46e5f1b8ce5/t/5b90fef1562fa7cd9912fb54/1536229109841/Sutherland_Inquiries+about+market+inquiries.pdf), accessed on 12 September 2023.

<sup>63</sup> *Competition Commission v Beefcor Proprietary Ltd & Another* 2021 (4) SA 408.

‘The question whether the Tribunal has the power to reinstate has little bearing on the correct meaning of section 67(2). While it is true that the rules of the Tribunal do not grant it the power to reinstate withdrawn complaints, the Act does albeit impliedly. *A power is taken to have been impliedly conferred in our law if it is a logical or necessary consequence of the expressly conferred power. A power is implied if it is necessary for the proper exercise of the expressly conferred power.* This principle was affirmed by this Court in a number of decisions. In *Matatiele Municipality*, this Court stated: “It is trite that the power to do that which is expressly authorised includes the power to do that which is necessary to give effect to the power expressly given.”’

In the final report of the Online Intermediation Platforms Market Inquiry, the CCSA states that it will seek an appropriate order from the Competition Tribunal in case of non-compliance with the remedial actions.<sup>64</sup> It is important to note that section 27(1)(d) empowers the Competition Tribunal to make any ruling or order necessary or incidental to the performance of its functions in terms of the Act. It may be argued that the wide scope of this section permits the inclusion of orders that seek to enforce the remedial actions of a market inquiry. The CCSA can also follow the process contemplated in section 49D(1), read with section 58 (1)(b) of the Act, to give effect to the outcomes of its market inquiries.

Despite the legislator’s efforts to strengthen and enhance the market inquiry provisions, more work still needs to be done to bring legal certainty, especially when one considers the vast scope of the powers accorded to the CCSA. We propose some of the legislative changes needed in the conclusion section of this paper.

## VI. A REVIEW OF THE EFFECTIVENESS OF MARKET INQUIRIES IN SOUTH AFRICA

As indicated above, over the years the CCSA has concluded seven market inquiries in different sectors and is currently conducting three more market inquiries. For purposes of this paper, we sampled three concluded market inquiries in the banking, mobile data and online platforms sectors to evaluate the impact of the CCSA’s remedies on competition in those sectors. The sampled market inquiries were conducted in highly concentrated and uniquely structured sectors, with no more than 4 leading players in each sector making more than 50% combined market share.<sup>65</sup> The CCSA’s intervention was therefore expected to bring about massive and tangible results that would propel transformation in those sectors. The remedies of the sampled market inquiries were also relatively more practicable and did not require elaborate regulatory amendments to be implemented. It is therefore relatively more practicable to assess the impact of such remedies compared to those that had more intricate remedies. This paper also explores the potential impact of the online intermediation platforms market inquiry as the first market inquiry conducted under the 2018 Amendments.

According to the OECD, consumer benefits is the most appropriate measure in impact assessments following a competition regulators’ intervention in a particular market.<sup>66</sup> This is because competition enforcement is guided by the consumer welfare standard. Typically, consumer benefits are quantified using indicators such as reduced prices and consumer surplus.<sup>67</sup> The OECD acknowledges that dynamic dimensions such as innovation are rarely

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<sup>64</sup> Competition Commission SA, ‘Online intermediation platforms market inquiry final decision’ (2023), annexure 10, available at [https://www.compcom.co.za/wp-content/uploads/2023/07/CC\\_OIPMI-Final-Report\\_Proof8\\_Annexure10.pdf](https://www.compcom.co.za/wp-content/uploads/2023/07/CC_OIPMI-Final-Report_Proof8_Annexure10.pdf), accessed on 05 September 2023.

<sup>65</sup> Competition Commission SA, ‘Measuring concentration and participation in the South African economy: levels and trends’ (2021), available at <https://www.compcom.co.za/wp-content/uploads/2021/12/Concentration-Tracker-Main-Report-1.pdf>, accessed on 29 April 2023

<sup>66</sup> OECD ‘Assessment of the impact of competition authorities’ activities’ 2013 available at [https://one.oecd.org/document/DAF/COMP/WP2\(2013\)1/En/pdf](https://one.oecd.org/document/DAF/COMP/WP2(2013)1/En/pdf) accessed on 19 September 2023.

<sup>67</sup> Ibid.

quantifiable. In line with the OECD standards, this paper measures the benefits derived by the consumers following the CCSA's interventions through the sampled market inquiries, using prices and access to markets as indicators of welfare changes.

### **a) Banking Market Inquiry**

The South African banking sector has been characterised as one of the most sophisticated, highly concentrated<sup>68</sup>, and yet the largest banking sector in the African continent.<sup>69</sup> The sector is also important for the South African economy, with its total assets accounting for more than 80% of the GDP in 2020.<sup>70</sup> The persistently high levels of concentration, especially in commercial banking, have been a serious cause for concern for policy makers over the years. In its market concentration study, the CCSA noted that the South African banking sector had the highest levels of concentration compared to seven other countries, including Turkey, Russia, Nigeria, Australia, Vietnam, Brazil and Spain, using concentration ratios from 2002 till 2019.<sup>71</sup> The South African concentration ratio was above 85% throughout the study period. In 2022 there were 18 commercial banks in South Africa and the four largest banks (The Standard Bank of South Africa Limited, FirstRand Bank Limited, Absa Bank Limited and Nedbank Limited) accounted for more than 80% of the banking sector deposits in the country.<sup>72</sup>

In 2006 the CCSA initiated a market inquiry in this sector in another attempt to shift the structure of the industry. The Banking Enquiry, as it was termed, followed alarms of high barriers to entry observed in the sector by researchers<sup>73</sup> and what the Commission termed "popular suspicions" that the banking sector operated in a cartel.<sup>74</sup> The Banking Enquiry sought to assess the following:

- (i) the feasibility of improving access by non-banks and would-be banks to the national payment system infrastructure, so that they can compete more effectively in providing payment services to consumers;
- (ii) the level and structure of charges made by banks, as well as by other providers of payment services; and
- (iii) any other aspect relating to the payment system or the abovementioned charges which could be regarded as anticompetitive.

The Banking Enquiry concluded that South African banks generally operate as an oligopoly, maximising their profits by avoiding outright price competition and by taking advantage of the

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<sup>68</sup> Mishi, Sibanda and Tsegaye 'Industry concentration and risk taking: Evidence from the South African banking sector' (2016), available at <https://www.ajol.info/index.php/aref/article/view/162158> on 19 June 2023.

<sup>69</sup> Galal 'Banking industry in South Africa - statistics & facts' (2023), available at <https://www.statista.com/topics/10261/banking-industry-in-south-africa/#topicOverview> on 08 July 2023.

<sup>70</sup> Statista Research Department 'Total assets of the banking sector as percentage of gross domestic product (GDP) in South Africa from 2013 to 2020' (2023), available at <https://www.statista.com/statistics/1349337/bank-assets-as-share-of-gdp-in-south-africa/> on 08 July 2023.

<sup>71</sup> Competition Commission SA, 'Measuring concentration and participation in the South African economy: levels and trends' (2021), available at <https://www.compcom.co.za/wp-content/uploads/2021/12/Concentration-Tracker-Main-Report-1.pdf>, accessed on 29 April 2023

<sup>72</sup> Financial Sector Conduct Authority 'Financial Sector Outlook Study' (2022), available at <https://www.fsca.co.za/Documents/FSCA%20Financial%20Sector%20Outlook%20Study%202022.pdf>, accessed on 09 June 2023.

<sup>73</sup> Makhaya 'Competition, Barriers to Entry and Inclusive Growth in Retail Banking: Capitec Case Study' (2016), available at <https://journals.co.za/doi/pdf/10.10520/EJC-7cbb09466>, accessed on 05 June 2023.

<sup>74</sup> Competition Commission SA 'The Banking Enquiry' (2008), available at [https://www.compcom.co.za/wp-content/uploads/2017/11/2-Market-power\\_non-confidential1.pdf](https://www.compcom.co.za/wp-content/uploads/2017/11/2-Market-power_non-confidential1.pdf) accessed on 09 June 2023.

degree to which customers, once recruited, become locked into a particular bank.<sup>75</sup> The assessment of the Banking Enquiry is in line with the widely established facts that network industries are characterised by high barriers to entry and lock-in features, as customers tend to avoid switching between providers due to the associated inconveniences.<sup>76</sup> The Banking Enquiry's findings and recommendations were categorised into three segments, namely those that related to consumer protection; interchange setting; and access into the payment system.<sup>77</sup>

*(a) Consumer protection*

The Banking Enquiry received more than 260 submissions from individual consumers, the banking services and consumer groups.<sup>78</sup> The common theme in the consumer submissions was the high costs of banking for consumers and lack of transparency by the banks in their penalties.<sup>79</sup> In this regard, the market inquiry was presented with evidence on how the banks charged their customers unjustifiably high fees and how in some instances the banks would not adequately disclose their charges to their customers in advance. The fees that consumers considered to be unjustifiably high include the fees for cash deposits, off-us ATM transactions and penalty fees.<sup>80</sup> The Banking Enquiry observed that the burden of the high banking costs was largely felt by those consumers in poor communities with limited access to adequate banking facilities. For instance, consumers from poor communities had to endure additional costs for transportation to access banking services outside their communities – often for relatively simple and inexpensive payment transactions. The Banking Enquiry further observed that even those products offered by the banks, supposedly offering the cheapest options for consumers, did not always prove to be so.<sup>81</sup>

*(b) Interchange setting*

In South Africa every other mode of payment rather than cash requires the involvement of one bank or more.<sup>82</sup> Interchange comes into play when a payer pays a payee (the beneficiary) and the banks, as the intermediators, impose levies on their customers for the service.<sup>83</sup> When a customer pays a customer of another bank, one of the two banks contributes a part of its revenue to the other bank and this is referred to as the interchange. The South African Reserve Bank (the Reserve Bank) defines interchange in the context of payment systems to be 'the process whereby banks, through their devices, systems and procedures, facilitate the acceptance,

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<sup>75</sup> Ibid.

<sup>76</sup> Makhaya 'Competition, Barriers to Entry and Inclusive Growth in Retail Banking: Capitec Case Study' (2016), available at <https://journals.co.za/doi/pdf/10.10520/EJC-7cbb09466> accessed on 05 June 2023.

<sup>77</sup> Competition Commission SA '15 YEARS OF COMPETITION ENFORCEMENT -a people's account' (2017), available at <https://www.compcom.co.za/wp-content/uploads/2017/11/15-Years-of-Competition-Enforcement.pdf>, accessed on 12 April 2023.

<sup>78</sup> Competition Commission SA 'Banking Enquiry Report to the Competition Commissioner by the Enquiry Panel' (2008) available at <https://www.southafrica.to/Banks/news/2008/competition-commission-banking-enquiry.pdf> accessed on 12 July 2023.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

<sup>82</sup> Competition Commission SA 'The Banking Enquiry' (2008), available at [https://www.compcom.co.za/wp-content/uploads/2017/11/2-Market-power\\_non-confidential1.pdf](https://www.compcom.co.za/wp-content/uploads/2017/11/2-Market-power_non-confidential1.pdf) accessed on 09 June 2023.

<sup>83</sup> Competition Commission SA 'The Banking Enquiry' (2008), available at [https://www.compcom.co.za/wp-content/uploads/2017/11/2-Market-power\\_non-confidential1.pdf](https://www.compcom.co.za/wp-content/uploads/2017/11/2-Market-power_non-confidential1.pdf) accessed on 09 June 2023.

collection, exchange, clearance and settlement of payment instruments utilised by their customers within the National Payment System’.<sup>84</sup>

The Banking Enquiry focused on two types of interchange, namely, ATM interchange and Card interchange. The ATM interchange refers to the fee charged by an acquirer to the issuers as a result of off-us transactions.<sup>85</sup> The fee is then recovered from the cardholder together with the issuer’s own fees. The card interchange arises when a cardholder makes a card payment for goods and services. When a cardholder makes a card payment, the acquirer alerts the issuer, then the issuer pays the purchase price minus the interchange fee via a switch, the switch charges its own fee and the net purchase price reflects in the acquirer’s bank account the acquirer then pays this amount into the merchant’s bank account minus its own fees.

The Banking Enquiry noted that interchange fees are, in principle, reasonably necessary to facilitate the transactions from different banks. The inquiry viewed the true nature of interchange as a means of revenue allocation between financial institutions participating in a card scheme, rather than as a price for a service by one such participant to another. However, the inquiry found issues with the way in which the interchange fees are levied by the banks. Banks levy the interchange fees together with the merchant service charges and cannot be competed away. Ultimately these costs are invisibly entered into consumer prices. The Banking Enquiry concluded that interchange fees were set by the schemes at the maximum possible levels to the disadvantage of merchants and card users.

### *(c) Access into the payment system*

In South Africa prospective entrants to the payment system are required to meet some technical requirements and to also make commercial arrangements for participation. During the time of the Banking Enquiry, participation in any “payment clearing house” such as through the use of ATMs or cards, required written permission from all the incumbent competitors, confirming that the potential entrant has met the necessary technical requirements. The Banking Enquiry found that the incumbents would often prolong the process and delay even after having tested the interoperability of the potential entrant’s systems. This presented a barrier for new entrants. The Banking Enquiry also found competition issues in the issuing and acquiring of branded payment cards by small banks. It was observed that Visa and MasterCard had strict rules regarding the eligibility and participation of institutions as issuers and acquires in their card schemes. These restrictions were applied even more strictly to small banks.

Over and above the barriers to commercial banks, the Banking Enquiry considered the barriers for the non-bank stakeholders in the payment system. These include a diverse group of institutions such as retailers, micro-lenders, bureaux and system operators that provide services in relation to the processing of payments. For the retailers the main concern was the costs of the payment industry, such as the interchange fee, and how those costs were passed on to consumers. The retailers called for what they termed “sorting at source”; for retailers to have

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<sup>84</sup> South African Reserve Bank ‘Regulation, Oversight And Supervision’ (2023), available at <https://www.resbank.co.za/en/home/what-we-do/payments-and-settlements/regulation-oversight-and-supervision#:~:text=What%20is%20interchange%3F,their%20customers%20within%20the%20NPS> accessed on 17 July 2023.

<sup>85</sup> The payer is defined as the cardholder, the payer’s bank is defined as the issuer, the facilitator that makes payments interoperable between banks is known as the switch (which is Bankserv in South Africa), the recipient of the payment is known as the merchant, the recipients bank is known as the acquirer, transactions done at the cardholders own bank is known as on-us transactions, transactions done by a cardholder at other banks is known as off-us transactions, card present transactions refer to whether the payment card is present for a transaction such as at a point of sale transaction, and card not present transactions refer to when a payment card is not present for the transaction as in the case of online payments

direct relations with the issuing banks to eliminate the need for switching through Bankserv for all card payments. Sorting at source would have allowed non-banks greater negotiating power with regard to bank processing fees. The Banking Enquiry was persuaded that there was merit in calling for “sorting at source” from a competition policy perspective.

For the other non-banks stakeholders such as non-bank credit providers, bureaux and system operators, the main concerns related to their inferior status in payment system and their high dependency on their competitors, the banks, for certain services that they provide, such as extending credit and providing certain payment collection services to businesses. This dependency rendered the non-banks stakeholders at the mercy of the pricing decisions made by their competitors – the banks. As a result, the non-bank stakeholders called for improved access to payment entities such as Bankserv for qualified non-banks. The non-banks stakeholders also raised issues with how they were not recognised as potentially innovative participants nor having adequate representation at decision-making structures in the industry.

### The recommendations of the Banking Enquiry

The Banking Enquiry made total of 28 recommendations, and these are summarised in the Table 1 below.

**Table 1: Banking Enquiry recommendations**

<i>Consumer protection recommendations</i>	
<b>Number</b>	<b>Recommendation</b>
1	Reduce penalty fees on rejected debit orders. Cap the penalty fee at R5.
2	Consumers should be able to cancel debit orders at any time.
11	The honour all products rule requiring merchants to accept debit and credit cards, for example, should be abolished but the no surcharging and honour all cards (issued by all banks) rules should be left in place
20	Minimum standards for disclosure of product and price information should be included in the code of banking practice
21	The Banking Association should encourage lower prices for banking services to be applied particularly to low-income consumers
22	Customer profiles should be developed to facilitate comparative shopping
23	A centralised fee calculator should be put in place
24	The Competition Commission should advocate with the Department of Trade and Industry to allow for comparative advertising
25	If recommendations regarding improving comparisons are not put in place within 2-3 years, the Competition Commissioner should consider obliging the banks to put in place a “basic banking product”
26	A switching code should be developed to ease account switching
27	A Financial Intelligence Centre Act (FICA) information hub should be developed and put in place by Treasury to ease account switching
28	The Banking Ombud’s role should be expanded to include overseeing rules on information disclosure and account switching
<i>Interchange setting recommendations</i>	
3	Direct charging should replace interchange for Automated Teller Machines (ATMs)
4	Issuers of ATM cards should charge consumers directly for off-us transactions under ATM direct charging
5	Banks should not be allowed to discriminate in their direct ATM charges between issuers of ATM cards
6	If direct charging is not implemented within a reasonable period the Commission should initiate a section 4 investigation into carriage fees
7	Further research is required to assess whether direct charging should be implemented for mini-ATMs and cash back at point of sale (POS)
8	An independent, transparent process should be implemented for determining interchange rates
10	Card schemes should abolish the rule preventing cash back at point of sale (POS)
12	The Commission should consider initiating a complaint into the charging of interchange for Electronic Fund Transfer (EFT) transactions
13	If interchange for EFT transactions is necessary, it should be included in the transparent process set out in recommendation 8



14	Interchange for Early Debit Order (EDO) transactions should also be brought into the transparent process set out in recommendation 8
<b><i>Access to national payment system</i></b>	
9a	The Visa requirement to restrict acquirers to deposit taking (settlement) institutions should be abolished.
9b	The rule or practice restricting acquiring to institutions that issue card schemes on a significant basis should be abolished.
15	An access regime for non-banks should be put in place to allow them to participate in both clearing and settlement activities for low-value or retail payment streams.
16	National Payments System (NPS) Act should be revised to allow for non-bank clearing and settlement participants, and this should be followed by a revision of the Banks Model position paper and the e-money, system operator and third-party payment provider directives.
17	Membership and governance of the Payments Association of South Africa (PASA) should be revised to include qualified non-bank participants.
18	The CEO of PASA, rather than incumbent members of individual payments clearing houses (PCHs) should make decisions about entry.
19	A payments system Ombudsman should be established to adjudicate on disputes regarding access to the payments system.

We have already explained that when the Banking Inquiry was undertaken, there was no legislative framework on how market inquiries should be conducted. As a result, upon publication of the final report with recommendations, there was uncertainty amongst the industry players in regard to the institutional framework for the implementation of the recommendations and, in particular, which regulatory body or government department would take the lead and overall accountability.<sup>86</sup> Eventually, a steering committee was formed, comprising of representatives from the CCSA, the Department of Trade and Industry, the Reserve Bank and led by the National Treasury.

The steering committee scrutinised the recommendations of the Banking Enquiry and decided to either endorse, reject or modify some of the recommendations. Table 2 below gives a summary of the decision of the steering committee on the recommendations.

**Table 2: Steering committee decision on the enquiry recommendations**

<b><i>Number</i></b>	<b><i>Decision of the steering committee on the recommendation</i></b>
1	Recommendation rejected. The National Treasury held that the penalty fees should decline through downward competition pressure instead of being capped.
2	Recommendation endorsed but modified to include improved debit order management within Payments Association of South Africa
3,4,5,6 & 7	Recommendation rejected. The steering committee held that the benefits of the direct charging model versus interchange are not clear. Experience from other jurisdictions suggests that the direct charging model increased costs to consumers and the benefit to consumers (of a hybrid model) are not clear.
8	Recommendation endorsed. The steering committee decided that the Reserve Bank should facilitate and oversee a revision of interchange rates for all payment streams.
9, 10 & 11	Recommendations endorsed.
12 & 14	Recommendations endorsed. The steering committee decided that the Reserve Bank should be the responsible entity to take these recommendations forward.
13, 15, 16 & 17	Recommendations partially rejected. In relation to non-bank access to the settlement system the NPS Act was not revised to allow for non-banks to become settling participants. The National Treasury noted the amendments already passed by the Reserve Bank on access to clearing
18	Recommendation endorsed.
19	Recommendation rejected.

<sup>86</sup> Griffiths and Gumbie ‘Probing the value of market inquiries from the perspective of the Banking Enquiry’ (2014). Available at <http://www.compcom.co.za/wp-content/uploads/2014/09/Banking-Enquiry-Griffiths-Gumbie.pdf> Accessed on 05 June 2023.

20, 21, 26 & 28	Recommendations endorsed.
22, 23, 24 & 27	Recommendations rejected. The National Treasury held that processes that facilitate public comparison between bank offerings and prices could facilitate collusion. However, banks were encouraged to individually provide a fee calculator in their branches and via other channels to reduce costs.
25	Recommendation rejected. The National Treasury mandated banks to individually develop their own low-income products.

As shown in Table 2 above, out of the 28 recommendations the steering committee approved 12, partially rejected 4 and entirely rejected 12. In 2010 the National Treasury held a meeting with the industry players to get their buy-in for the implementation of the approved recommendations.<sup>87</sup> In the meeting the leading banks confirmed their willingness to implement the recommendations. The leading banks further indicated their willingness to reduce the penalty fees for dishonoured penalty fees from R80 to below R15 for their low-income customers.<sup>88</sup> This was despite the rejection of recommendation 1 by the steering committee. In relation to recommendations 3-7 that were also rejected by the steering committee, the banks committed to instead make accessible to all their customers a detailed statement of accounts, detailing all the different fees and charges levied to promote greater transparency.<sup>89</sup> The banks also committed to displaying a message, either on a screen or by other means in the case of mini-ATMs, indicating to the customer that an additional fee may be charged by the customer's bank for the use of the ATM. The banks further committed to reviewing their policies for cash withdrawals at Point of Sale machines. With regard to the recommendations that were entrusted to the Reserve Bank, the entity committed to taking formal ownership of the review of interchange fees.<sup>90</sup>

### **The impact of the Banking Enquiry on banking fees, access to bank accounts and interchange fees**

In the following years after the commitments were made there was no medium set by the steering committee to measure the progress on implementation of the recommendations for the banks. However, in 2012 the National Treasury noted that whilst some progress had been made in meeting some of the recommendations, more still needed to be done.<sup>91</sup> This can be identified to be amongst the risks of conducting market inquiries without an appropriate legislative framework. With the recent amendments of the Act, there is clarity on the CCSA being the responsible body for the remedial actions of market inquiries. In relation to the recommendations that were to be implemented by the industry and regulatory bodies, including

<sup>87</sup> The National Treasury 'National Treasury: Facilitating the implementation of the Recommendations of the Banking Enquiry Panel' (2010). Available at [https://www.treasury.gov.za/comm\\_media/press/2010/2010060102.pdf](https://www.treasury.gov.za/comm_media/press/2010/2010060102.pdf) accessed on 04 August 2023.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

<sup>90</sup> Griffiths and Gumbie 'Probing the value of market inquiries from the perspective of the Banking Enquiry' (2014). Available at <http://www.compcom.co.za/wp-content/uploads/2014/09/Banking-Enquiry-Griffiths-Gumbie.pdf> Accessed on 05 June 2023.

<sup>91</sup> The National Treasury 'Media Statement on Finance Minister's meeting with the banking industry' (2012). Available at [https://www.treasury.gov.za/comm\\_media/press/2012/2012082702.pdf](https://www.treasury.gov.za/comm_media/press/2012/2012082702.pdf) Accessed on 04 August 2023.

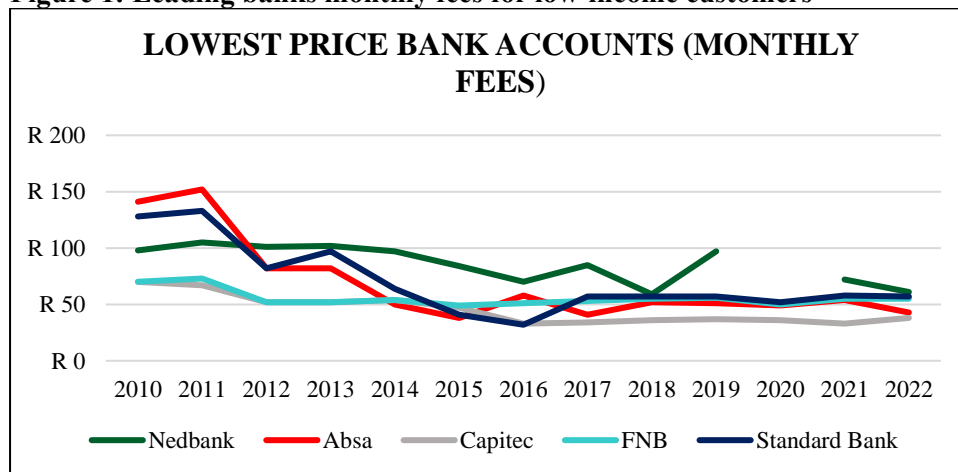
the Payments Association of South Africa, the Banking Association of South Africa and the Reserve Bank, by 2014 they had all been implemented.<sup>92</sup>

Despite the lack of clarity on the level of implementation by the banks, there are several benefits that have been realised in the banking sector which can be directly or indirectly linked to the recommendations of the Banking Enquiry. In this paper we use bank fees, access to bank accounts and use of payment systems as indicators of the progress made.

*(a) Banking fees*

Since 2010 the largest banks have significantly reduced their banking fees, especially for their entry packages dedicated to low-income customers with fairly basic banking needs. Before 2011, Capitec and FNB were the only banks that charged their low-income customers less than R100 per month in banking fees. By 2022 all the leading banks charged their low-income customers less than R70 per month. In 2010 Absa was the most expensive bank for the poor with monthly fees of R152. In 2022 Absa was the second cheapest bank after Capitec, charging R43 per month. Figure 1 below shows the leading banks' monthly fees for their low-income customers from 2010 till 2022.

**Figure 1: Leading banks monthly fees for low-income customers**



Source: Solidarity Annual Reports (2009-2023)

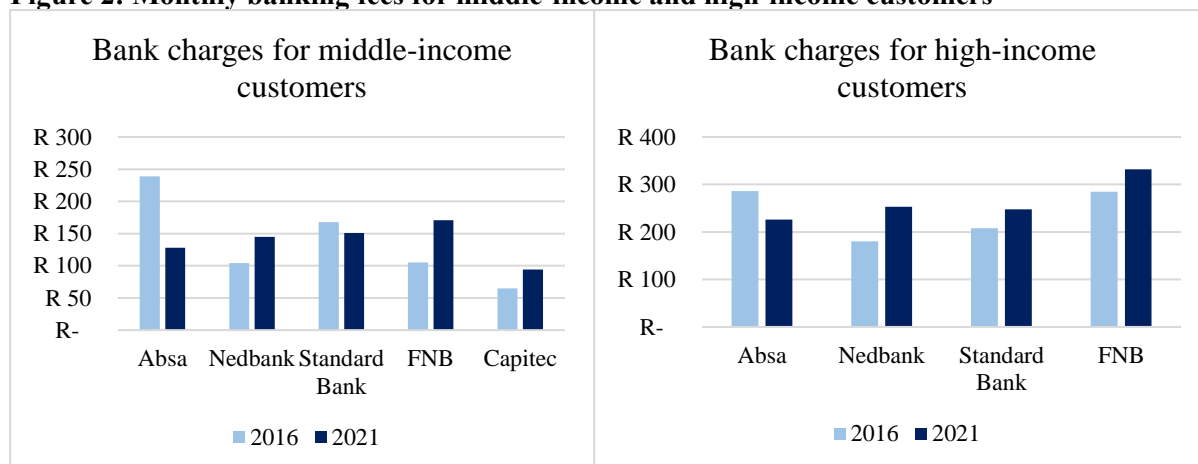
\*The data for Nedbank fees for 2020 is missing

In regard to other customer segments, middle-income and high-income customers, not all the banks have sought to decrease their fees. Between 2016 and 2021 only Absa and Standard bank decreased their monthly fees for their middle-income customers and only Absa decreased its monthly fees for its high-income customers. In 2016 Absa charged the highest fees and has significantly dropped to bring them closer the fees charged by its competitors. The other banks have increased the fees over the years but still compete closely with each other. For these segments the banks also compete through their service offerings. The banks offer more sophisticated packages the middle-income and high-income customers to best cater to their specific needs. The leading banks' monthly fees for middle-income and high-income customers for 2016 and 2021 are shown in Figure 2 below. The heightened price competition and service

<sup>92</sup> Griffiths and Gumbie 'Probing the value of market inquiries from the perspective of the Banking Enquiry' (2014). Available at <http://www.compcom.co.za/wp-content/uploads/2014/09/Banking-Enquiry-Griffiths-Gumbie.pdf> Accessed on 05 June 2023.

offering competition can be attributed to the Banking Enquiry’s recommendations as they relate to greater transparency in banking fees and services.

**Figure 2: Monthly banking fees for middle-income and high-income customers**

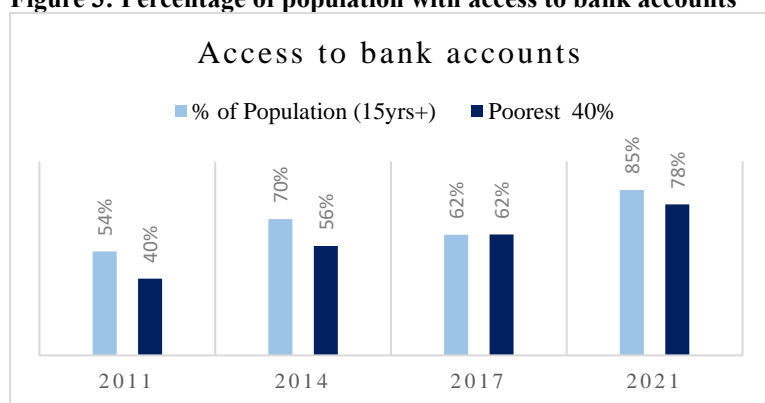


Source: Solidarity Annual Report 2016 and 2021

*(b) Access to banking services*

The decrease in banking fees has facilitated wider access to banking services for the South African population, especially the poor. In 2011 only 40% of the poor population above the age of 15 years had access to bank accounts. In half a decade, the percentage of the poor population with access to bank accounts almost doubled to 78%. Access to bank accounts by the general population has also spread, increasing by 30% between 2011 and 2016. This is shown in Figure 3 below. Remarkably, with the increase in access to bank accounts, from 2019 the largest banks have seen a decrease in the number of clients.<sup>93</sup> This showcases the ability of the new entrants to compete with the largest banks and penetrate the market by incentivising customers to switch.

**Figure 3: Percentage of population with access to bank accounts**



Source: World Bank Data

Another point worth noting is the role of Capitec as the bank that essentially competes with the 4 largest banks for middle-income and low-income customers. The bank has grown to become the largest bank in terms of the overall number of customers in 2021, surpassing all the other

<sup>93</sup> Financial Sector Conduct Authority ‘Financial Sector Outlook Study’ (2022). Accessed at <https://www.fsca.co.za/Documents/FSCA%20Financial%20Sector%20Outlook%20Study%202022.pdf> on 13 May 2023.

banks in the country.<sup>94</sup> However, in terms of deposits Capitec still lags behind significantly compared to the largest banks. In 2021 Capitec only held 2% of the total deposits, whilst the largest 4 banks held more than 80%.<sup>95</sup> According to the Financial Sector Conduct Authority, the entry and expansion of smaller banks, such as Capitec, is forcing the incumbent banks to place increasing emphasis on growing their customer numbers by offering more innovative products to attract lower-income earners.<sup>96</sup>

The banking sector has also seen more new entrants in the recent years in Tyme Bank, Discovery Bank and Bank Zero. The new entrants have also made significant strides in penetrating the market. In 2021 Tyme Bank had onboarded 3 million customers since its entrance in 2019.<sup>97</sup> Most of Tyme Bank's customers are individuals who have bank accounts with the largest banks and use Tyme Bank as their secondary account. Discovery Bank has also made significant inroads, acquiring almost 300 000 customers in 2022.<sup>98</sup> Its target market is predominantly the high-income customers and competes with the large banks at that level.

### *(c) Interchange services*

With the wide access to banking services the interchange fees have become even more important. More customers rely on bank cards for payments and cash withdrawals. Between 2017 and 2022, the use of cash for payment in retail decreased by 22% whilst the use of debit cards and credit cards increased.<sup>99</sup> There has also been a wide increase in the use of ATMs and EFT payments by the banked population.<sup>100</sup> With these developments the role of the Reserve Bank in determining and regulating the interchange fees, as recommended by the Banking Enquiry, has become pivotal. The Reserve Bank first set the interchange fees in 2012 and the new fees represented a decrease from what the banks had set before.<sup>101</sup> Since then, the Reserve bank determines the fees annually. A study conducted by Rahulani (2022) did not find any conclusive evidence on any negative nor positive impact of interchange determination on the payment industry. The financial institutions still generate the same levels of returns as they did before the Reserve Bank's intervention.<sup>102</sup> Rahulani also argues that the increase in use of ATMs and card payments by customers cannot be directly linked to the intervention of the

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<sup>94</sup> Financial Sector Conduct Authority 'Financial Sector Outlook Study' (2022). Accessed at <https://www.fsca.co.za/Documents/FSCA%20Financial%20Sector%20Outlook%20Study%202022.pdf> on 13 May 2023.

<sup>95</sup> Ibid.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

<sup>99</sup> Statista data 'Market share of cash, credit cards, and other payment methods at point of sale (POS) in South Africa in 2017, 2019, 2020, 2021, and 2022'. Accessed at <https://www.statista.com/statistics/1296913/preferred-payment-methods-south-africa/> on 07 July 2023.

<sup>100</sup> Rahulani, 'The impact of interchange determination on the payment industry in South Africa' (2022). Accessed at <https://ujcontent.uj.ac.za/esploro/outputs/graduate/The-impact-of-interchange-determination-on/9921906307691> on 09 August 2023.

<sup>101</sup> Competition Commission SA '15 YEARS OF COMPETITION ENFORCEMENT -a people's account' (2017), available at <https://www.compcom.co.za/wp-content/uploads/2017/11/15-Years-of-Competition-Enforcement.pdf>, accessed on 12 April 2023.

<sup>102</sup> Rahulani 'The impact of interchange determination on the payment industry in South Africa' (2022). Accessed at <https://ujcontent.uj.ac.za/esploro/outputs/graduate/The-impact-of-interchange-determination-on/9921906307691> on 09 August 2023.

Reserve Bank. However, it is also acknowledged in the study that interchange determination might have positive impact on adoption.<sup>103</sup>

Overall, the Banking Enquiry has been successful in creating an inductive environment for competition in the banking sector. Its recommendations have led to access to banking services for all, lower banking services for the poor and expansion of the market through the entrance of new players. The role of the Banking Enquiry in changing the banking landscape and enhancing competition is also acknowledged by one of the smaller banks. According to Capitec's executives, the formalisation of the National Credit Act has been a significant breakthrough that created certainty in the unsecured lending segment, allowing the bank to operate effectively in that space.<sup>104</sup> It should be acknowledged that the above changes and improvements observed in the banking sector since the Banking Enquiry cannot be attributed exclusively to the CCSA's intervention through this market inquiry. There are other important factors that have positively contributed to this success.

### **b) The Data Market Inquiry**

In South Africa the mobile data services market consists of four large players, namely Vodacom, MTN, Cell C and Telkom, commanding a significant proportion of the market.<sup>105</sup> The market has seen stubbornly high levels of concentration since it was first established in 1994.<sup>106</sup> Vodacom and MTN were the first players to enter the market in the same year. Cell C entered the market almost a decade later in 2001, followed by Telkom in 2010. Unsurprisingly, Vodacom and MTN are the largest players in the market with 40.56% and 31.98% market share, whilst Cell C and Telkom hold 11.42% and 16.06%, respectively.<sup>107</sup> In 2018 the market witnessed another entry in Rain, a fixed-LTE provider and data-only mobile network. In 2019 the CCSA estimated Rain's market share to be 0.1%.<sup>108</sup>

In the advent of wide internet penetration and online services adoption in South Africa there were growing concerns over the high costs of mobile data in the country. The concerns were escalated to calls for government's intervention to halt the mobile operators from 'exploiting the customers'.<sup>109</sup> In 2017 the CCSA launched a market Inquiry into mobile data services '*to understand what factors or features of the market(s) and value chain may cause or lead to high prices for data services, and to make recommendations that would result in lower prices for*

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<sup>103</sup> Rahulani 'The impact of interchange determination on the payment industry in South Africa' (2022). Accessed at <https://ujcontent.uj.ac.za/esploro/outputs/graduate/The-impact-of-interchange-determination-on/9921906307691> on 09 August 2023.

<sup>104</sup> Makhaya 'Competition, Barriers to Entry and Inclusive Growth in Retail Banking: Capitec Case Study' (2016), available at <https://journals.co.za/doi/pdf/10.10520/EJC-7cbb09466>, accessed on 05 June 2023.

<sup>105</sup> Competition Commission SA, 'Measuring concentration and participation in the South African economy: levels and trends' (2021), available at <https://www.compcom.co.za/wp-content/uploads/2021/12/Concentration-Tracker-Main-Report-1.pdf>, accessed on 29 April 2023

<sup>106</sup> Ibid

<sup>107</sup> Labuschagne 'Vodacom vs MTN vs Telkom vs Cell C — biggest mobile network battle' (2023), available at <https://mybroadband.co.za/news/cellular/473539-vodacom-vs-mtn-vs-telkom-vs-cell-c-biggest-mobile-network-battle.html>, accessed on 08 August 2023.

<sup>108</sup> Competition Commission SA, 'Measuring concentration and participation in the South African economy: levels and trends' (2021), available at <https://www.compcom.co.za/wp-content/uploads/2021/12/Concentration-Tracker-Main-Report-1.pdf>, accessed on 29 April 2023

<sup>109</sup> Amandla.mobi 'Data Must Fall timeline' (2021), available at <https://amandla.mobi/data-must-fall-timeline/>, accessed on 08 August 2023. Also see Mathe 'From data must fall to data for all' 2019, available at <https://mg.co.za/article/2019-12-06-00-from-data-must-fall-to-data-for-all/>, accessed on 08 August 2023

*data services.*<sup>110</sup> The Inquiry was initiated at the request of the Minister, following the public outcries.

### **Data market Inquiry findings**

The Data Market Inquiry was mandated to conduct benchmarking studies, to compare the mobile data prices in South Africa to other jurisdictions as a first point of call.<sup>111</sup> These studies confirmed that indeed South African prices for mobile data services were generally on the more expensive end.<sup>112</sup> The same results were also observed in a similar study conducted by the industry regulator, Independent Communications Authority of South Africa ('ICASA').<sup>113</sup> The comparisons varied by countries and included BRICS, SADC, Asia and European Countries. The study by ICASA further revealed that the leading mobile operators, Vodacom and MTN, charged their South African customers more in comparison to their customers from other regions.

The benchmarking studies also revealed that mobile data prices in South Africa were anti-poor.<sup>114</sup> Low-income consumers were exploited far more than the high-income consumers. The CCSA found that South Africa performed better on the same international benchmarks for mobile post-paid data prices relative to the pre-paid data prices, although South Africa was still considerably more expensive. It is largely the poor consumers that rely on pre-paid mobile data than post-paid data. In further assessments the CCSA noted that the usage amongst post-paid subscribers was materially growing whilst the usage for pre-paid was relatively flat by comparison. This led the CCSA to the conclusion that the pricing by the leading mobile operators was limiting the ability of lower income subscribers to make greater use of data services.

In the pre-paid data prices assessment, the CCSA found that all the mobile data service providers charged consumers of small data bundles more on a on a per MB/GB basis. The CCSA further found that punitive out-of-bundle rates were more frequently imposed on purchasers of small data bundles or those that did not commit to a bundle at all. These are generally the lower income consumers.

The CCSA also raised concerns in relation to lack of transparency over the effective rates that consumers paid for data across the different mobile data service providers even to consumers themselves. The expiration of mobile data, out-of-bundle charges and occasional data promotions are the mechanisms identified by the CCSA to blindsides the consumers from the true costs of mobile data. This lack of transparency hindered the ability of consumers to compare prices between the service providers, limiting price competition between the network providers.

The CCSA also sought to identify the potential costs drivers to South Africa's high data costs and found that the failure by government to release high demand spectrum<sup>115</sup> due to delays in digital migration had left mobile operators with both insufficient spectrum and a lack of access

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<sup>110</sup> Competition Commission SA 'Data Services Market Inquiry Final Report' (2019), available at <https://www.compcom.co.za/wp-content/uploads/2019/12/DSMI-Non-Confidential-Report-002.pdf>, accessed on 08 August 2023.

<sup>111</sup> Ibid.

<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

<sup>114</sup> Competition Commission SA 'Data Services Market Inquiry Final Report' (2019), available at <https://www.compcom.co.za/wp-content/uploads/2019/12/DSMI-Non-Confidential-Report-002.pdf>, accessed on 08 August 2023.

<sup>115</sup> In mobile communication spectrum relates to the radio frequencies that are used to transmit signals between base stations and mobile handsets.

to favourable low frequency bands, raising their capital and operational costs unnecessarily. The lack of spectrum forced the mobile operators to compensate by increasing the volume of base stations which then drove their costs. The CCSA further noted that different frequency bands have different propagation qualities and that low frequency bands are more favourable for less populated areas as fewer base stations are required to achieve coverage. As a result, the CCSA found that the actual assignment of spectrum, both in terms of volume and frequency bands, itself had an impact on the extent of competition in the market.

The CCSA further identified bottlenecks to competition in the wholesale market. In this regard it was noted that MTN and Vodacom are the only networks with national coverage and the later entrants rely on the two players for access to wholesale supply of infrastructure. The CCSA observed that whilst this grants MTN's and Vodacom's challengers access to the same benefits acquired by the larger networks, it is almost never in their interest to provide their challengers access to their infrastructure or even do so in fair and reasonable terms. The CCSA found that the historical contracts between the challenger platforms and the larger platforms were riddled with unfavourable terms, including high minimum payments required, high marginal rates, poor roaming quality through lack of seamless handover and denial of roaming for new data service lines. This further raised costs for the challenger platforms and dampened aggressive pricing strategies by the challenger mobile network providers. The CCSA noted that although the contract terms between the challenger mobile network providers and their respective suppliers (MTN and Vodacom) had improved by the time the market inquiry report was released, it was still not sufficient to bring enough scope for price competition.

Another area of focus for the CCSA was the fixed line supply of data services. Fixed line supply is crucial in the supply of Wi-Fi services for households, businesses and also public Wi-Fi or community networks. The CCSA noted that access to fixed line supply infrastructure is important to bring about competitive pressure on mobile data services to bring prices down. The CCSA further noted that Telkom (Openserve) is the largest provider of last mile fixed line broadband services nationally, built on its historic position as the monopoly provider prior to 2005. It was found that Telkom charged unreasonably high prices for IP Connect service and this established a prima facie case of excessive pricing. However, the CCSA also noted that Telkom's price of IP Connect had been on a downward trajectory and thus opted not to refer the case to the Competition Tribunal for prosecution but made recommendations to Telkom through the market inquiry process.

### **Data Market Inquiry recommendations**

To address the concerns identified in the market inquiry, the CCSA made a total of seven recommendations to mobile data operators to decrease mobile data costs within specific timeframes, and also pointed to the industry regulator, ICASA, to legislate some of the recommendations. The CCSA's recommendations are as follows:

- (i) Vodacom and MTN should independently reach agreement with the CCSA on substantial and immediate reductions on tariff levels, especially prepaid monthly bundles, in the region of 30% to 50%, within two months of the release of the report.
- (ii) Vodacom and MTN should independently reach agreement with the CCSA within two months on a reduction in the headline prices of all sub-500MB 30-day prepaid data bundles to reflect the same cost per MB as the 500MB 30-day bundle, or cost-based differences where such cost differences have been quantified, as well as the cessation of partitioning strategies that contribute to anti-poor pricing and/or inferior service outcomes.



- (iii) Vodacom and MTN should independently reach agreement with the CCSA to cease ongoing partitioning and price discrimination strategies that may facilitate greater exploitation of market power and anti-poor pricing.
- (iv) All mobile operators should reach agreement with the CCSA within three months to offer all prepaid subscribers a lifeline package of daily free data to ensure all citizens have data access on a continual basis, regardless of income levels. This agreement should then be given formal legislative or regulatory effect within six months. This may include the ICASA End-User and Subscriber Charter Regulations, spectrum licensing conditions or planned amendments to the ECA. The precise level of lifeline data and any annual adjustments should be determined in consultation with industry, ICASA and relevant experts.
- (v) All mobile operators should reach agreement with the CCSA within three months on a consistent industry-wide approach to the zero rating of content from public benefit organisations and educational institutions to ensure broad application. This agreement should then be given formal regulatory status through the ICASA End-User and Subscriber Service Charter within six months of the report.
- (vi) All mobile operators should reach agreement with the CCSA within three months to inform each subscriber, on a monthly basis, of the effective price for all data consumed by the customer. This agreement should be given formal regulatory status in the ICASA End-User and Subscriber Service Charter within six months of this report.
- (vii) Telkom Openserve should reach agreement with the CCSA on substantial reductions in the price of IP Connect to remove excessive pricing concerns within two months.

In relation to the assignment of high demand spectrum, the CCSA made a provisional recommendation for the National Department Telecommunications and Postal Services to accelerate the process, focusing on affordable access rather than revenue generation. The CCSA also made submissions to ICASA on how to approach assignment in the context of the policy directive. Both the department and ICASA acted upon the CCSA's provisional recommendations and submissions and reflected them in the Information Memorandum before the release of the market inquiry final report.

### **The Impact of the Data Market Inquiry on data prices**

Following the release of the market inquiry final report in December 2019, all the four leading mobile network providers independently reached agreement with the CCSA in April 2020. MTN and Vodacom agreed to decrease their prices for mobile data to a maximum of R100.<sup>116</sup> MTN also agreed to offer all its customers a daily free data bundle to use on product called Ayoba, which was to be capped at 20MB per day. All the mobile network providers also entered into independent agreements with the CCSA to provide zero-rated access for their customers to certain government websites, focussing on education, healthcare and job recruitment.<sup>117</sup> The

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<sup>116</sup> Competition Commission SA 'Commission reaches agreement with MTN on reduction of data prices' (2020). Available at <https://www.compcom.co.za/wp-content/uploads/2020/05/COMMISSION-REACHES-AGREEMENT-WITH-MTN-ON-REDUCTION-OF-DATA-PRICES.pdf> accessed on 11 September 2023.

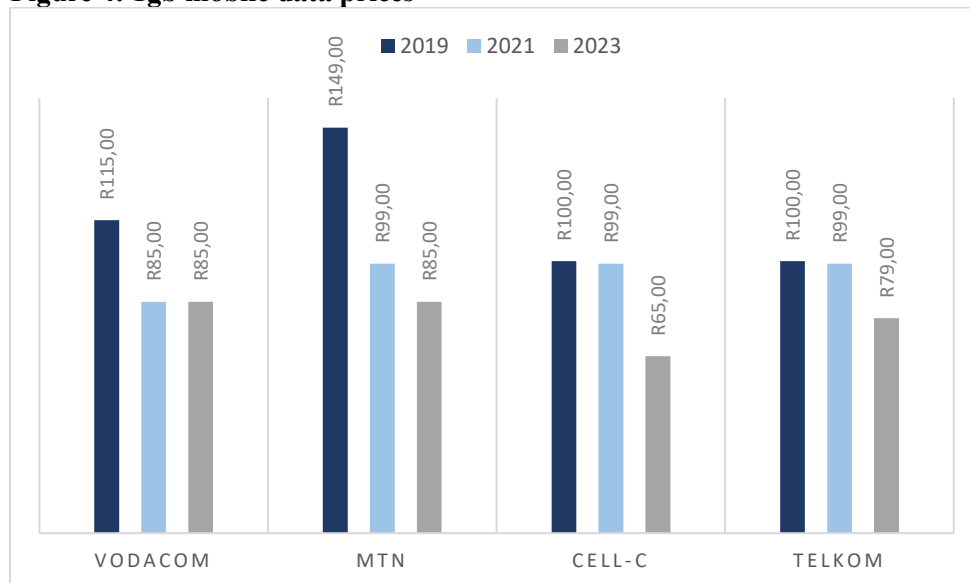
CCSA 'Vodacom consent agreement press conf Speaking notes for Commissioner' (2020). Available at <https://www.compcom.co.za/wp-content/uploads/2020/03/Vodacom-consent-agreement-press-conf-Speaking-notes-for-Commissioner-.pdf> accessed on 11 September 2023.

<sup>117</sup> Competition Commission SA 'Commission reaches agreement with MTN on reduction of data prices' (2020). Available at <https://www.compcom.co.za/wp-content/uploads/2020/05/COMMISSION-REACHES-AGREEMENT-WITH-MTN-ON-REDUCTION-OF-DATA-PRICES.pdf> accessed on 11 September 2023.

mobile network providers also agreed to price transparency recommendations and committed to regularly inform their customers of their data usage and prices. Telkom Openserve also agreed to cut the costs of wholesale broadband access in order to address the excessive pricing concerns by the CCSA and offered to promote greater pricing transparency in the wholesale broadband market too.<sup>118</sup> Telkom Openserve offered to add a functionality on their system that would allow customers to manage their costs and compare the Openserve fixed broadband prices with the prices of other wholesale broadband providers more easily.<sup>119</sup>

Since the release of the market inquiry final report, the price of one gigabyte data for pre-paid users by all the mobile network providers has decreased from a maximum of R149 to a maximum of R85. Notably, these prices decreased even below the prices that were charged by the smaller operators that did not enter into agreements with the CCSA to decrease their prices. This is in line with the objectives of the CCSA for seeking greater transparency in pricing to promote price competition. The price of one gigabyte pre-paid data by each mobile operator from 2019 to 2023 is shown in Figure 4 below. MTN had the most expensive one gigabyte pre-paid data for R149.00 and has since decreased it by 43% to R85.00. Vodacom was the second most expensive, charging R115.00 and has since decreased by 26% to R85.00.

**Figure 4: 1gb mobile data prices**



Source: Own compilation based on MyBroadband data

Competition Commission SA ‘Vodacom consent agreement press conf Speaking notes for Commissioner’ (2020). Available at <https://www.compcom.co.za/wp-content/uploads/2020/03/Vodacom-consent-agreement-press-conf-Speaking-notes-for-Commissioner-.pdf> accessed on 11 September 2023.

Competition Commission SA ‘Telkom and the Competition Commission reach agreement on removal of ip connect pricing concerns’ 2020. Available at <https://www.compcom.co.za/wp-content/uploads/2020/04/TELKOM-AND-THE-COMPETITION-COMMISSION-REACH-AGREEMENT-002-002.pdf> accessed on 11 September 2023.

Competition Commission SA ‘Cell C signs a data prices agreement with the commission’ (2020). Available at [https://www.compcom.co.za/wp-content/uploads/2020/04/Cell-C-statement\\_ATMCELLC-Final-14-April.pdf](https://www.compcom.co.za/wp-content/uploads/2020/04/Cell-C-statement_ATMCELLC-Final-14-April.pdf) accessed on 11 September 2023.

<sup>118</sup> Competition Commission SA ‘Telkom and the Competition Commission reach agreement on removal of ip connect pricing concerns’ (2020). Available at <https://www.compcom.co.za/wp-content/uploads/2020/04/TELKOM-AND-THE-COMPETITION-COMMISSION-REACH-AGREEMENT-002-002.pdf> accessed on 11 September 2023.

<sup>119</sup> Ibid.

In its 2022/23 financial year, Vodacom reported an increase in data traffic with two million new data customers. In total Vodacom has 25.5 million data customers.<sup>120</sup> The mobile operator also reported an increase in the average data usage per smart device to three gigabyte per month. The CCSA's intervention saved Vodacom's customers an average of R1 080.00 per customer in 2022/2023 financial year. The average data usage by Vodacom's customers per smart device has been continuously increasing from less than one gigabyte in 2019 to three gigabyte in 2023.<sup>121</sup> The average data consumption by Vodacom's customers per month is shown in Table 3 below.

**Table 3: Average data consumption of smart device on Vodacom's network in South Africa**

Year	Average data consumed per smart device monthly	Average saving per customer Per year
2018/2019	966mb	
2019/2020	1.5gb	R 288.00 (R99 per 1gb)
2020/2021	2.1gb	R 756.00 (R85 per 1gb)
2021/2022	2.4gb	R 900.00 (R85 per 1gb)
2022/2023	3.0gb	R1 080.00 (R85 per 1gb)

Source: Own compilation based on MyBroadband data

Similarly, MTN has also seen a continuous increase in data usage by its customers between 2018 and 2022.<sup>122</sup> Notably, MTN's customers use fairly more data than Vodacom's customers. In its 2018/19 financial year, MTN reported an average monthly data usage of 1.9 gigabyte per user per month and this increased to 6.4 gigabyte in 2022.<sup>123</sup> The CCSA's intervention led to an average saving of R4915.02 for MTN data customers per customer in 2021/2022 financial year. The average data consumption by MTN's customers per month is shown in Table 4 below.

**Table 4: Average data consumption of smart device on MTN's network in South Africa**

Year	Average data consumed per smart device monthly	Average saving per customer per year
2018/2019	1.9gb	
2019/2020	2.8gb	R1 680.00 (R99 per 1gb)
2020/2021	4.4gb	R2 640.00 (R99 per 1gb)
2021/2022	6.4gb	R4 915.20 (R85 per 1gb)

Source: Own compilation based on MyBroadband data

In terms of the zero-rated government websites agreements, the general public derived great benefit during the peak of Covid-19 pandemic. During lock-down the South African government partnered with the four mobile networks and even expanded the zero-rated websites from those that had been identified with CCSA, to disseminate information to the

<sup>120</sup> Labuschagne 'How much data Vodacom smartphone users consume' (2023) available at <https://mybroadband.co.za/news/cellular/491781-how-much-data-vodacom-smartphone-users-consume.html> accessed on 15 September 2023.

<sup>121</sup> Ibid.

<sup>122</sup> Illidge 'How much data Vodacom and MTN subscribers use' (2022) available at <https://mybroadband.co.za/news/cellular/453142-how-much-data-vodacom-and-mtn-subscribers-use.html#:~:text=Data%20usage%20on%20MTN's%20network,the%20year%20was%206.4GB> accessed on 15 September 2023.

<sup>123</sup> Ibid.

general public about the pandemic.<sup>124</sup> The Departments of Basic Education and Higher Education, Science and Technology were also the leading departments in the partnerships as mobile network providers also gave room to students across the educational divide to access teaching materials through zero-rated educational and informational websites.<sup>125</sup> In 2020, the Internet Service Providers' Association of South Africa indicated that there were approximately 1000 local websites that had been zero-rated or in the process of being zero-rated for all the mobile network providers.<sup>126</sup>

In relation to high demand spectrum, the government, through ICASA, released spectrum and allocated it in an auction process that was concluded in March 2022. All the mobile network providers, including Rain, participated in the process and secured their spectrum bands accordingly.<sup>127</sup> Government hopes the release of spectrum will pave way for the network providers to build next the generation 5G networks. This is expected to result in robust telecommunications with better penetration and reach to achieve inclusive access to internet by all South African.<sup>128</sup>

All in all, The Data Services Market Inquiry has been successful in decreasing the prices of mobile data in South Africa and promoting competition between the mobile network providers. Transparency in pricing has also achieved the outcome intended by the CCSA in promoting price competition. The customers have benefited from the CCSA's intervention and the market inquiry approach allowed for even wider impact than otherwise would have been realised. For instance, the benefits of zero-rated government websites as a result of the CCSA recommendations ensured access to essential information by many customers in all the network providers.

### **c) The Online Intermediation Platforms Market Inquiry**

In 2019 the CCSA launched a market inquiry into the online intermediation platforms ('OIPMI') operating in South Africa. These are the online platforms that facilitate transactions between businesses and their customers. The CCSA launched the OIPMI because it had reason to believe that there are market features of online intermediation platforms that may impede, distort or restrict competition; and in order to achieve the purposes of the Act including the participation of small and medium enterprises (SMEs) and historically disadvantaged persons (HDPs) in these markets.<sup>129</sup> The scope of the OIPMI was limited to those platform categories that have an effect on real business activity across a wide range of the economy. These include eCommerce, online travel agencies, food delivery, app stores and property/automotive

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<sup>124</sup> Mhlanga 'COVID-19 and the Digital Transformation of Education: What Are We Learning on 4IR in South Africa?' (2020), available at [https://www.researchgate.net/publication/342804369\\_COVID-19\\_and\\_the\\_Digital\\_Transformation\\_of\\_Education\\_What\\_Are\\_We\\_Learning\\_on\\_4IR\\_in\\_South\\_Africa](https://www.researchgate.net/publication/342804369_COVID-19_and_the_Digital_Transformation_of_Education_What_Are_We_Learning_on_4IR_in_South_Africa) accessed on 16 September 2023.

<sup>125</sup> Ibid.

<sup>126</sup> McKane 'Here is the full list of zero-rated websites in South Africa' (2020) available at <https://mybroadband.co.za/news/internet/356371-here-is-the-full-list-of-zero-rated-websites-in-south-africa.html> accessed on 16 September 2023.

<sup>127</sup> Vermeulen 'Spectrum auction winners announced — Vodacom and MTN to spend R5 billion each' 2022 available at <https://mybroadband.co.za/news/telecoms/437868-spectrum-auction-winners-announced-vodacom-and-mtn-to-spend-r5-billion-each.html> accessed on 16 September 2023.

<sup>128</sup> South African Government 'Press Release- Department of Communications and Digital Technologies' available at <https://www.gov.za/about-sa/communications-1#:~:text=The%20release%20of%20the%20high,to%20the%20internet%20by%202024>, accessed on 16 September 2023.

<sup>129</sup> Competition Commission SA 'Online Intermediation Platforms Market Inquiry Terms of Reference' (2021) available at [https://www.compcom.co.za/wp-content/uploads/2021/04/44432\\_09-04\\_EconomicDevDepartment.pdf](https://www.compcom.co.za/wp-content/uploads/2021/04/44432_09-04_EconomicDevDepartment.pdf) accessed on 19 September 2023.

classifieds, along with the role of Google Search in shaping business to consumer platform competition.<sup>130</sup>

According to the CCSA, the selection of online platforms for the first market inquiry under the 2018 amendments was based on, among other considerations, the growing importance of the digital economy in South Africa, and the concern globally that digital platforms markets are already concentrated or prone to tipping in that direction. In South Africa, digital markets are less matured and, according to the CCSA, early and proactive interventions in these markets provide an opportunity to ensure sustained competition as they mature. The CCSA also sought to ensure that the many South Africans who were excluded from the traditional economy because of historic factors are not left out in the digital economy.<sup>131</sup> It is for this reason that the scope of this market inquiry extended to SMEs and HDPs. As explained above, section 43C(2) of the Act requires the CCSA to consider the impact of the adverse effect on competition on SMEs and HDPs.

The CCSA identified one or two leading platforms in each category, whose conduct restrict, distorts or impedes competition. These include the following platforms:

- (i) Takealot in e-commerce.
- (ii) Booking.com in online travel agencies.
- (iii) Uber Eats and Mr D Food in food delivery.
- (iv) Apple App Store and Google Play in app stores
- (v) (Property24 and Private Property, AutoTrader, and Cars.co.za. in the property and automotive segments of online classifieds platforms, respectively.
- (vi) Google Search in general search engines.

The CCSA noted that there is high level of dependency by businesses in the respective markets on the platforms for customer reach. As a result, the identified platforms have some level of autonomy. The CCSA identified features of the respective markets that adversely affect competition, including those practices by the leading platforms that hinder the ability of their small rivals to compete. The CCSA noted that some of the identified outcomes stemmed from the business models utilised by digital platforms, rather than necessarily deliberate efforts to stifle competition. The CCSA also considered features that hindered the ability of those small businesses that are dependent on the platforms to compete with their rivals of the leading platforms.

### OIPMI Findings

The CCSA’s findings in the OIPMI for each platform category are summarised in Table 5 below.

**Table 5: OIPMI Findings**

Category	OIPMI findings
<b>E-commerce</b>	- Takealot engages in self-preferencing conduct by promoting its own retail division which competes with other businesses on their platform.

<sup>130</sup> Competition Commission SA, ‘Online intermediation platforms market inquiry final decision’ (2023), available at [https://www.compcom.co.za/wp-content/uploads/2023/07/CC\\_OIPMI-Final-Report.pdf](https://www.compcom.co.za/wp-content/uploads/2023/07/CC_OIPMI-Final-Report.pdf), accessed on 5 September 2023.

<sup>131</sup> Competition Commission SA, ‘Remarks by the Commissioner of the Competition Commission Doris Tshepe, on the occasion of the launch of the final Online Intermediation Platforms Market Inquiry report’ (31 July 2023), available at <https://www.compcom.co.za/wp-content/uploads/2023/07/Commissioner-Doris-Tshepes-remarks-at-the-launch-of-the-final-OIPMI-report-31-July-2023.pdf>, accessed on 16 September 2023.

<b>Online Travel Agencies</b>	<ul style="list-style-type: none"> <li>- Booking.com imposes wide and narrow price parity conditions on hotels and other accommodation providers, which impede price competition between Booking.com and other OTAs and further entrenches its market position.</li> </ul>
<b>Food Delivery</b>	<ul style="list-style-type: none"> <li>- The lack of transparency by Uber Eats and Mr D Food to consumers that platforms charge restaurants a commission fee and that this is typically passed onto consumers through a menu surcharge limits platform competition.</li> <li>- Many restaurant chains prohibit their franchisees from contracting with local or national delivery services that are not approved by the head office. This restricts the ability of small platforms to compete with the established platforms.</li> <li>- Independent restaurants lack negotiating power with Uber Eats and Mr D Food resulting in higher commission fees than the restaurant chains, forcing them to push up prices to consumers, and less choice in trading off service levels for fees.</li> </ul>
<b>Online classifieds (Property and Auto)</b>	<ul style="list-style-type: none"> <li>- Property24, Private Property and PropData<sup>132</sup> refuse for estate agents to use their listing engine software to feed their listings to other small competing platforms. This limits the flow of listings to small platforms, hindering platform competition.</li> <li>- Property24 and Private Property charge estate agents R500 to feed in listings to their platforms using third-party software providers. This practice entrenches the leading platforms positions and impedes platform competition.</li> <li>- Property24 has sought to lock-in estate agents spend through multi-year contracts, limiting opportunities for competing platforms to contest the estate agents spend.</li> <li>- Private Property has sought to lock-in large estate agents spend by offering the shares in their portal in exchange for their listings, limiting opportunities for competing platforms to contest those estate agents spend.</li> <li>- The leading platforms in both property and automotive classifieds exercise extensive price discrimination, of up to 300%, based on the volume of listings that an agency or dealer brings. This practice affects the ability of small estate agents and dealerships to compete with their rivals with more stock.</li> </ul>
<b>App Stores</b>	<ul style="list-style-type: none"> <li>- Google Play and Apple App Store are unconstrained in the commission fees they charge paid app developers and the anti-steering rule limits competition.</li> <li>- Google Play's and Apple App Store's global business models limit the curation and visibility of local SA paid app developers</li> </ul>
<b>Search</b>	<ul style="list-style-type: none"> <li>- Google as a de facto monopoly, is a critical gateway to consumers for all platform categories, and its business model of paid search alongside free results favours large established platforms.</li> <li>- Google engages in self-preferencing conduct by placing Google Travel and Google Shopping more prominently in the search results, limiting platform competition.</li> </ul>
<b>Cross-cutting</b>	<ul style="list-style-type: none"> <li>- There is a general lack of transparency in the labelling of advertised listings from businesses that pay to appear at the top or get a boost in their ranking on the search results. this practice does not only harms consumers but also those SMEs and black businesses that cannot afford to pay for prime position.</li> </ul>

<sup>132</sup> PropData is not a property portal, but the largest independent supplier of the listing engine software.

	<ul style="list-style-type: none"> <li>- There is a distinct lack of participation by black South Africans both at the platform level and amongst the businesses that list on the platforms in all the categories. Black entrepreneurs do not have ready access to venture capital domestically to launch alternative platforms.</li> </ul>
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## OIPMI remedial actions

To remedy the competition distortions identified in the OIPMI, the CCSA made a number of remedial actions applicable to each leading platform. The CCSA's remedial actions per platform are summarized in Table 6 below.

**Table 6: OIPMI Remedial Actions<sup>133</sup>**

Category	OIPMI remedial action
<b>Takealot</b>	<ul style="list-style-type: none"> <li>- Takealot must segregate its Retail division from its Marketplace operations and to prevent its retail services from accessing seller data and unilaterally stopping sellers from competing for certain brands.</li> <li>- Takealot must introduce a rapid dispute resolution mechanism and to extend the employee code of conduct and independent complaints channel to make unfairly harming marketplace sellers a conduct offence</li> </ul>
<b>Online Travel Agencies</b>	<ul style="list-style-type: none"> <li>- Booking.com must remove the restrictive pricing clauses from its contracts, allowing hotels and other establishments to price as they wish across different online channels, including their own</li> </ul>
<b>Food Delivery</b>	<ul style="list-style-type: none"> <li>- Uber Eats and Mr D Food must offer lower commission fees and improved value for independent restaurants. Uber Eats must implement a standardised tiered commission fee structure for independent restaurants, providing a choice of different, and lower, commission fees associated with different levels of service and ongoing costs. Mr D Food must achieve the same outcome through implementing a promotional rebate on the commission fee which can be used for discounts and promotions on Mr D Food, along with advertising credits.</li> <li>- Uber Eats and Mr D Food must inform consumers periodically that pricing may differ from in-restaurant menus due to their commission fees, to promote price transparency.</li> <li>- Restaurant chains are prohibited from restricting or dictating the choice of food delivery platform by its franchisees.</li> </ul>
<b>Online classifieds (Property and Auto)</b>	<ul style="list-style-type: none"> <li>- Property24, Private Property and PropData must allow estate agents to list on all property classifieds platforms using their listing engine software at no fee and stop charging the R500 fee for incoming listings either.</li> <li>- Property24 must immediately terminate its multi-year contracts with estate agent.</li> <li>- The CCSA made a recommendation to the Competition Tribunal for the national agencies to divest their shareholding in Private Property</li> <li>- All the leading property and automotive platforms must substantially reduce their prices to small estate agents and dealerships to a level within 10-15% of that of larger rivals.</li> </ul>
<b>App Stores</b>	<ul style="list-style-type: none"> <li>- Google Play and Apple App stores must stop preventing apps from directing consumers to pay on the app's own website, and to ensure continued free use by consumers of content purchased from app's own website.</li> </ul>

<sup>133</sup> The remedial orders for all platforms are available at [https://www.compcom.co.za/wp-content/uploads/2023/07/CC\\_OIPMI-Final-Report\\_Proof8\\_Annexure10.pdf](https://www.compcom.co.za/wp-content/uploads/2023/07/CC_OIPMI-Final-Report_Proof8_Annexure10.pdf)

	<ul style="list-style-type: none"> <li>- Google and Apple must also provide a South African curation of apps on their app stores and advertising credits to South African app developers.</li> <li>- Google and Apple must implement in South Africa the measures taken in Europe to comply with similar provisions in the Digital Markets Act, including fair and reasonable pricing, will constitute compliance.</li> </ul>
<b>Search</b>	<ul style="list-style-type: none"> <li>- Google Search must provide more free and paid result exposure for smaller SA platforms, including introducing a new platform sites unit to display smaller SA platforms relevant to the search, and R180m in advertising credits.</li> <li>- Google Search must provide a further R150m in training, product support, and other measures for SME and black-owned online firms, along with an SA flag identifier and search filter to aid consumers to identify and support local platforms.</li> <li>- Google must implement in South Africa measures taken in Europe to comply with similar provisions in the Digital Markets Act to address self-preferencing.</li> </ul>
<b>Cross-cutting</b>	<ul style="list-style-type: none"> <li>- All the leading platforms must introduce an HDP programme that provides black-owned businesses a package of assistance to onboard and promote visibility on their platforms. This varies across platforms but typically includes free and personalised onboard assistance, a fee waiver for a period to lower onboarding costs, and either a reduced price for promotion or advertising credits to use in promoting themselves on the platform.</li> <li>- South African platforms must label all listings that have paid for a position or boost in ranking position as ‘promoted’, ‘sponsored’ or ‘Ad’, in line with the Advertising Regulatory Board’s Code of Advertising Practice.</li> </ul>

### The potential benefits of the OIPMI for participation of SMEs and HDPs

The OIPMI resulted in a set of 12 remedial actions, including remedial actions for PropData and restaurant chains. The CCSA has through the OIPMI managed to address a wide variety of issues and to take actions that will ensure contestability of the identified platform categories. With its remedial actions, the CCSA aims to achieve a more inclusive digital economy, by ensuring that small businesses and those owned by the historically disadvantaged persons are not hindered from full participation in the respective markets.<sup>134</sup>

The CCSA’s approach of paying more attention to SMEs and HDPs has drawn criticism, with some questioning its powers in making what they refer to as ‘public interest’ or ‘interventionist’ remedies through a market inquiry.<sup>135</sup> It has been argued that remedial actions that seek to protect these groups could possibly stifle competition and repel investments.<sup>136</sup>

<sup>134</sup> Competition Commission SA, ‘Online intermediation platforms market inquiry final decision’ (2023), available at [https://www.compcom.co.za/wp-content/uploads/2023/07/CC\\_OIPMI-Final-Report.pdf](https://www.compcom.co.za/wp-content/uploads/2023/07/CC_OIPMI-Final-Report.pdf), accessed on 5 September 2023.

<sup>135</sup> Wagner and Upfold ‘Broad public interest remedies in market inquiries’ (2023) available at <https://www.financialinstitutionslegalsnapshot.com/2023/08/broad-public-interest-remedies-in-market-inquiries/> accessed on 17 September 2023.

Laurence ‘Warning that commission could stifle online growth in South Africa’ (2023) available at <https://techcentral.co.za/commission-could-stifle-online-growth/229337/> accessed on 19 September 2023,

<sup>136</sup> Wagner and Upfold ‘Broad public interest remedies in market inquiries’ (2023) available at <https://www.financialinstitutionslegalsnapshot.com/2023/08/broad-public-interest-remedies-in-market-inquiries/> accessed on 17 September 2023.



According to the critiques, the CCSA ignored the costs of its remedial actions and severity of the likely impact, as they seek to change the business models for larger platforms.<sup>137</sup>

In our view, this criticism is misplaced. The CCSA cannot be faulted for taking into account the impact of an adverse effect on competition on SMEs and HDPs, and for formulating remedial actions that eliminate or mitigate such an impact. The CCSA is a creature of statute and is therefore bound by what the Act prescribes. In this regard, we have already explained that section 43C obligates the CCSA to consider the interest of SMEs and HDPs in a market inquiry. Section 2 also makes it clear that one of the purposes of the Act is to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy.

Furthermore, it is important to note that some of the issues that the CCSA sought to address in this market inquiry were identified by the small businesses themselves and in some instances confirmed by the larger players.<sup>138</sup> For instance, there was consensus amongst all players in all platform categories that Google is a critical gateway to consumers and absent adequate financial resources to spend on Google advertising, it is almost impossible to generate enough traffic flow. As a result of the CCSA remedial actions, South African platforms will get to benefit from enhanced visibility on Google Search without being hindered by lack of financial strength, resulting in positive competition outcomes for both businesses that rely on platforms and consumers. The remedial actions will simply level out the playing field.

Given the ‘winner takes all’ and ‘tipping’ characteristics of digital platforms, the need for ensuring contestability in these markets cannot be moderated. The CCSA has indicated that its intention for digital platforms is ‘to harness the promised benefits of the digital economy and achieve what the industrial economy has, as yet, failed to do: greater levels of equality, shared prosperity and improved levels of employment.’<sup>139</sup> According to the United Nations Conference on Trade and Development (UNCTAD), harnessing the potential for the many, and not just the few from the digital economy requires an aggressive policy approach.<sup>140</sup> Given the intended goal, the CCSA’s remedial actions are befitting and are likely to yield more positive results than negative. For instance, (i) greater visibility of South African platforms on Google Search will ensure their sustainability in the respective platform categories, (ii) removing barriers to entry and expansion faced by small platforms will safeguard the respective markets from tipping towards a single player, allowing for more vibrant competition. (iii) competitive platform markets will provide businesses that depend on them and consumers with more choices and (iv) creating a conducive environment for businesses owned by the historically disadvantaged to meaningfully compete with their relatively large rivals on the platforms on which they depend will deepen competition and ensure their sustainability.

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<sup>137</sup> Bizcommunity, ‘Competition Commission remedial actions for Google: Good for small brands, not so much for big brands’ (2023) accessed at <https://www.bizcommunity.com/Article/196/16/240884.html> accessed on 19 September 2023. Wagner and Upfold ‘Broad public interest remedies in market inquiries’ 2023 available at <https://www.financialinstitutionslegalsnapshot.com/2023/08/broad-public-interest-remedies-in-market-inquiries/> accessed on 17 September 2023.

<sup>138</sup> Competition Commission SA, ‘Online intermediation platforms market inquiry final decision’ (2023), available at [https://www.compcom.co.za/wp-content/uploads/2023/07/CC\\_OIPMI-Final-Report.pdf](https://www.compcom.co.za/wp-content/uploads/2023/07/CC_OIPMI-Final-Report.pdf), accessed on 5 September 2023. Also see the OIPMI Public Hearings available at <https://www.youtube.com/watch?v=B1OgRlKw-BQ&list=PL0Q6cDxcMKqm59icfCXfKpoFhxE2k51pK>

<sup>139</sup> Competition Commission SA, ‘Competition in the digital economy’ (2020) available at [http://www.compcom.co.za/wp-content/uploads/2020/09/Competition-in-the-digital-economy\\_7-September-2020.pdf](http://www.compcom.co.za/wp-content/uploads/2020/09/Competition-in-the-digital-economy_7-September-2020.pdf) accessed on 19 September 2023.

<sup>140</sup> UNCTAD, ‘Digital economy report’ (2019) available at [https://unctad.org/system/files/official-document/der2019\\_overview\\_en.pdf](https://unctad.org/system/files/official-document/der2019_overview_en.pdf) accessed on 19 September 2023.

According to the CCSA, it engaged extensively with the industry regarding the final remedial actions, especially the affected parties.<sup>141</sup> In media interviews the CCSA also indicated that some of these parties gave an indication that they would not exercise their right to appeal upon the release of the final report but will implement the remedial actions. At the time of writing this paper, the CCSA had not received notices of appeal from most of the affected parties and the 25 days prescribed for the lodging of appeals had already lapsed. This is an indication that at least most of the affected parties will be implementing the remedial actions. What can be learnt from this approach is that the participation of affected parties throughout the market inquiry process, and even at the stage of determining appropriate remedies is important. This helps to mitigate the risk of protracted litigation which may not be beneficial and may defeat the whole of using market inquiries as an alternative tool. While competition agencies may have powers to impose binding remedies, the success of any market inquiry depends on the collaboration and participation of the affected industry, including those required to implement remedial actions.

## VII. CONCLUSION

In this paper, we have demonstrated that market inquiries are a useful tool and have an important role to play in the enforcement of competition law. While developed countries also see value in market inquiries and encourage their use, there is a greater need in middle-income countries where barriers to entry and market concentration problems are deeply rooted. The CCSA's experience illustrates that market inquiries can also play an important role in emerging and new markets, especially digital markets, where the traditional tools of enforcement may not be so useful. This tool allows competition agencies to intervene proactively in markets and to impose remedial actions that address competition concerns holistically, as opposed to the piecemeal approach normally followed through the traditional investigations. Proactive interventions are even more important in new and emerging markets for ensuring that these markets, which are prone to tipping towards a monopoly or oligopoly, do not follow the pattern of traditional markets.

The experience in South Africa further shows that the success of a market inquiry requires competition agencies to proactively engage industry, including parties that may be adversely affected by the outcomes of the market inquiry. Such engagements should extend to the formulation of appropriate remedies. This is the case even when a competition agency enjoys legislative powers to impose binding remedies. A collaborative approach eliminates unnecessary tensions and ensures that remedies are implemented without undue delays. The risk of delays in the implementation of remedial actions is even higher in developing countries where market inquiry laws are fairly new and susceptible to legal challenges.

While acknowledging the usefulness of the amendments made to the Act in enhancing and strengthening the CCSA's market inquiry powers, we argue that more work still needs to be done in this area. In this regard, further amendments are required to close some of the gaps in

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<sup>141</sup> Competition Commission SA, 'Online Intermediation Platforms Market Inquiry extended to permit extensive consultation on additional recommendations' (2023) available at <https://www.compcom.co.za/wp-content/uploads/2023/02/OIPMI-Notice-of-Extension-and-Call-for-Comments-on-Proposed-Regulations-20-February-2023.pdf> accessed on 19 September 2023.

the current Act. The proposed amendments include adding an explicit provision that the remedial actions imposed by the CCSA have a binding effect. This is necessary for certainty.

There is also a need to incorporate into the Act provisions that clearly set out the enforcement mechanism to be followed where remedial actions are deliberately ignored. Such a mechanism should make it an offence to not comply with the CCSA's remedial actions. There should also be a provision that explicitly empowers the Competition Tribunal to impose an administrative penalty for failure to implement remedial actions imposed by the CCSA. To avoid reliance on the general powers of the Competition Tribunal, which may be the subject of litigation, there should be an express provision that allows the CCSA to approach the Competition Tribunal for an appropriate order where its remedial actions have been deliberately ignored. Lastly, it may be advisable for the CCSA and other agencies to establish a separate division that handles market inquiries. This will ensure uniformity and consistency in its market inquiries, and that the agency does not lose focus on its other legislative mandate.