



CCIA Comments on the SACC’s Provisional Report on Online Intermediation Platforms Market Inquiry

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The Computer and Communications Industry Association (“CCIA”)¹ welcomes the opportunity to comment on the Provisional Report (hereinafter “Report”) of the South African Competition Commission’s (“SACC”) Online Intermediation Platforms Market Inquiry (hereinafter the “Inquiry”),² released on July 13, 2022.

Online digital services platforms, referred to in the Report as “online intermediation platforms,” offer innovative and popular services to consumers, and have revolutionized the way consumers and businesses interact with each other. However, as the SACC notes, the Report is based on the concern that there are market features of online intermediation platforms that may impede, distort or restrict competition. CCIA believes that for the SACC to determine whether there is a need to address possible competition concerns in this area, it is important to fully and accurately understand the various business models behind the online intermediation platforms and the industries in which they operate.

When conducting this type of inquiry, the SACC should take into account business realities. As such, it is important for the SACC to continue to reexamine its positions detailed in the Report to fully reflect the underlying business models of these complex services and revisit its provisional proposals and recommendations accordingly.

CCIA’s comments focus on the SACC’s findings and recommendations for online intermediation platforms in South Africa. As such, our comments underscore the benefits online intermediation platforms provide for consumers and discuss that there are important considerations the SACC and regulators should take into account when designing any proposed

¹ CCIA is an international, not-for-profit association representing a broad cross section of communications and technology firms. For fifty years, CCIA has promoted open markets, open systems, and open networks. The Association advocates for sound competition policy and antitrust enforcement. CCIA members employ more than 1.6 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. For more, visit www.ccianet.org.

² Provisional Report of the Market Inquiry on Online Intermediation Platforms (July 2022), Competition Commission of South Africa, <https://www.compcom.co.za/wp-content/uploads/2022/07/OIPMI-Provisional-Summary-Report.pdf>.

regulation for online intermediation platforms. Without adopting some basic principles, an *ex ante* regulation for online intermediation platforms would run the risk of harming consumers, competition, and innovation. Therefore, our comments provide some suggested approaches in response to the SACC’s findings and recommendations and express concerns regarding a number of the Report’s conclusions.

I. Key Considerations and Principles to Guide Regulatory Proposals

Online intermediation platforms provide South African consumers and businesses tremendous benefits. Given the dynamic and innovative nature of digital markets, any new regulation for platforms needs to take into account wider potential implications for businesses and consumers. Therefore, we encourage the SACC to thoroughly assess whether the benefits of any proposed digital platform regulation would outweigh its potential negative impact for South African consumers and the economy.

As such, an overly burdensome and heavy-handed regulation could significantly hinder innovation and harm economic growth. In addition, it could undermine intellectual property rights with significant implications for businesses operating in South Africa. Overly complex, intrusive, or broad regulatory regimes are likely to deter entry and investment from innovative companies, which would be a particular loss given South Africa’s critical role as one of Africa’s leading startup ecosystems. In this regard, a key consideration is whether the existing enforcement frameworks, including competition and consumer protection, already provide more proportionate ways to achieve the desired outcomes.³ Therefore, clarifying the expected outcomes of a proposed framework is particularly important for South African consumers and businesses alike.

CCIA also encourages the SACC to review evidence and past experience to focus the proposed framework on the types of conduct that are recognized to be demonstrably harmful, rather than seeking to address theoretical or speculative harm, which would risk overregulation to the detriment of innovation. In addition, it is important to acknowledge that economy-wide harms are better addressed by economy-wide reforms, rather than platform-specific regulation. CCIA’s recommendation is for the SACC to embrace a balanced, evidence-based approach.

In addition, CCIA recommends that prior to proposing a new platform regulation, the SACC and policymakers gather evidence through extensive consultation to confirm and justify

³ The Report suggests that the Commission may already be able to deploy its arsenal of enforcement tools to address many types of conduct. For example, one recommendation is to issue a remedial action to end predatory conduct “or alternatively (...) consider investigation and prosecution of predatory conduct as a suitable deterrent.” Report, Chapter 9: Summary of Provisional Findings and Provisional Recommendations, at 11.

that there is in fact a need for the rules to be changed or for additional rules to be imposed to so-called “leading companies”—whatever these may be. If the need for new rules is identified and confirmed, those new rules should be proportionate to the impact of potential harm and should take into account the chances that such a harm may take place and be based on material evidence of such a harm. New rules should aim to promote competition and enable continuous innovation in the marketplace, while preventing competitive harm and unfettered regulatory discretion.

The integrity of a new regime should also be secured by suitable procedural protections and review mechanisms. In particular, full merits review by a court should be available for decisions that have legal consequences for affected companies.

Additionally, due to the significant economic impacts of regulating online intermediation platforms in South Africa, it is crucial that the SACC and the Government play an active role in engaging with relevant stakeholders and market players in the development of any *ex ante* regime. Introducing new regulation for platforms is not costless, especially given the dynamic and innovative nature of digital markets. As a result, the ultimate objective of any new regime should be to promote competition and innovation.

To ensure that the cost of any new regime does not outweigh its benefits, the rules should allow conduct that is clearly pro-competitive or completely benign and recognize justifications for legitimate protections. Without appropriate safeguards an *ex ante* regime may outlaw legitimate and pro-competitive forms of conduct, to the detriment of consumers and businesses that use these platforms.

Finally, any remedy should endeavor to maintain competitive neutrality.⁴ *Ex ante* regulations that blatantly favor or inhibit particular market participants risk delegitimizing both the regulation and its underlying policy goal and may lead to reduced investment and entry into South African markets.⁵

II. A Number of the Report’s Key Conclusions Run Counter to Established Principles of Competition Law

Competition law requires a robust base of evidentiary support prior to any regulatory or remedial action. This base should include evidence of improper conduct as well as evidence to

⁴ “It is a fundamental principle of competition law and policy that firms should compete on the merits and should not benefit from undue advantages for example due to their ownership or nationality.” OECD, Competitive Neutrality in Competition Policy, <https://www.oecd.org/competition/competitive-neutrality.htm>.

⁵ The Report recommends a number of these, including prohibitions that only apply to specific companies (*e.g.*, Google, Takealot) and benefits, such as lower tax rates, that accrue only to certain categories of companies. Report, Chapter 9: Summary of Provisional Findings and Provisional Recommendations, at 15-23.

support proposed market definitions and assertions about relevant competitive constraints. However, in a number of areas, the Report presents findings that are not supported by evidence.⁶

CCIA suggests that the Final Report exclude recommendations based on mixed evidentiary support in favor of additional inquiry into and monitoring in these areas.⁷

Next, courts and antitrust enforcers have long agreed that competition remedies should be narrowly tailored to address the underlying, demonstrable harm to competition.⁸ As the Report makes clear, the competitive landscape in many of the studied areas continues to change rapidly and the full extent of particular harms (or whether there may be harms at all) is not yet known.⁹

An unnecessary blanket ban would, at best, lead to equally unnecessary implementation and enforcement costs – and, at worst, a loss of incentives to innovate and compete on non-price factors, such as service and quality. As recommended by the International Chamber of Commerce, an appropriate remedy should instead be “justified based on actual, measurable consumer harm and/or a demonstrated need for deterrence.”¹⁰

Finally, in several instances the Report seems to conflate the consumer welfare standard with “low prices” or “the number of options.” The consumer welfare standard is unconcerned with size or industry and instead “refers to the individual benefits derived from the consumption of goods and services.”¹¹ And while price and variety may be relevant aspects of consumer welfare, they are by no means the exclusive unit of measurement.¹²

⁶ For example, the Report dismisses brick-and-mortar retailers as a competitive constraint on online marketplaces, “to such an extent that they are even identified to be in separate markets.” Report, Chapter 3: E-Commerce, at 15.

⁷ The Report considers four “customer journey segments,” two of which do not involve a comparison between online and offline offers, and notes that a subset of the target population for e-commerce “will never make online purchases.” In addition, suppliers are described as similarly open to both online and brick-and-mortar marketplaces. Thus, the conclusion that brick-and-mortar retailers should not be considered part of a relevant market of online marketplaces is disconnected from the cited evidence (as well as the widely held view that market definition “generally includes actual and potential sellers”). This disconnect undermines the relevant and useful observations in the Report and casts doubt on the findings that are used to support the SACC’s recommendations. *Id.* at 16.

⁸ International Competition Network Merger Working Group, Merger Remedies Guide, at 3 (2016) (“To be effective, remedies must resolve the competition concerns the merger gives rise to so that competition can be maintained or restored in the markets affected by the merger.”).

⁹ For example, the Inquiry concludes that “narrow price parity clauses by the leading platform impede [] potential competition” and proposes a provisional remedy that would require “removal and prohibition on price parity clauses, both wide (as applied to competing platforms) and narrow (as applied to the business user’s own direct online channel) from contracts with business users.” Report, Chapter 9: Summary of Provisional Findings and Provisional Recommendations, at 12.

¹⁰ International Chamber of Commerce, Recommended Framework for International Best Practices in Competition Law Enforcement Proceedings (2010), <https://iccwbo.org/content/uploads/sites/3/2017/06/ICC-International-Due-process-08-03-10.pdf>.

¹¹ OECD, Glossary of Statistical Terms: Consumer Welfare, <https://stats.oecd.org/glossary/detail.asp?ID=3177>.

¹² For example, the recommendation that “travel metasearch engines should highlight prominently the cheapest option to consumers” ignores the relevance of quality, convenience, charges for ancillary services, and other metrics

III. Concerns Regarding the Categorization of Leading Online Intermediation Platforms and the Potential Scoping of New Rules to Specific Companies

The Report identifies specific online intermediation platforms as “leading platforms” that the Report classifies based on the “features of dominance given their position in their markets.”¹³ The SACC states that a company is typically a leading platform when it is “in a position to shape platform competition or which matter most for business user competition, or participation opportunities.”¹⁴ However, the SACC notes that it considers “dominance” to be unnecessary for this designation and instead it defines the identification of the leading platforms, and the actions and recommendations applicable to those leading platforms, based on the position that these online platforms have in the market.

CCIA encourages the SACC to avoid arbitrary scoping of new rules to specific online intermediation platforms. Proposed remedial actions and recommendations should be rules of general applicability and not be designed and enforced only against a few companies. CCIA supports the SACC’s general concept of implementing guidance and/or regulations if any at a *principle-level* rather than targeting and scoping particular companies.¹⁵

Given the complexity of the markets that the Report describes, CCIA believes that an exhaustive analysis of each one of the markets, products, and services is needed to determine, based on evidence, which are the online intermediation platforms subject to the prohibitions and recommendations listed in the Report and why these online intermediation platforms should be subject to more regulation than others also participating in the markets.

More importantly, CCIA believes that the SACC should carefully analyze whether categorizing a few companies as leading online intermediation platforms and implementing additional and costly rules to such leading platforms is really the effective way to (i) avoid conducts that may impede, distort or restrict competition; (ii) increase the participation of small and medium enterprises; and (iii) protect historically disadvantaged persons in these markets.

Similarly, the Report assumes that certain companies are likely to become “leading” players upon their entry into the South African market. For example, the Report characterizes Amazon as the example of a company likely to become a “leading” e-commerce player were it to enter the South African market. This assumption is difficult to follow, especially as it runs counter to the finding in the Report that it would take Amazon “a considerable period to build

important to travelers. Report, Chapter 9: Summary of Provisional Findings and Provisional Recommendations, at 19.

¹³ *Id.* at 3.

¹⁴ *Id.* at 45.

¹⁵ *Id.* at 60.

capacity and roll out, and is still unlikely to dislodge the current leader.”¹⁶ This is particularly important as, on the basis of assumed potential “leadership,” the Report then suggests that additional conditions should be imposed on the potential entrant. As currently phrased, the Report provides little guidance for others in the market that may need to discern their own status, and puts into question the Report’s recommendation that such platforms should be subject to *ex ante* regulation to maintain competition.

In conclusion, CCIA cautions against relying on speculation or hypothetical situations to define which online intermediation platforms are considered “leading platforms” that warrant further regulation. As mentioned above, CCIA believes that an exhaustive analysis is crucial and therefore encourages the SACC to gather evidence through extensive consultation to confirm and justify that there is a real need to regulate even potential leading online intermediation platforms.

IV. SACC Should Be Cautious in Relying on Untested International Proposals

The Report examines relevant developments and findings in other major competition jurisdictions, which help to inform some of the conclusions and recommendations. Such developments and findings can be specific to each jurisdiction. While it can be useful to study certain jurisdictions that are leading the charge towards regulation of the digital economy, it is important that the SACC not assume that the example of the first mover or most active jurisdiction would be the best choice for South African consumers who are subject to different competitive parameters.

In this regard, CCIA strongly recommends that the SACC avoid relying on international regulatory experiments in this area. Digital reforms are being considered in various jurisdictions. However, as of today, only one jurisdiction – Germany – has introduced an *ex ante* regulatory framework, and the results of this reform are not yet available. While it is clearly useful to understand international proposals, CCIA is concerned that the context to those reforms is often lost. For example, some proposed reforms are the result of particular political dynamics and there are emerging concerns about the impact of digital-specific reforms. Also, other international reforms are approaching implementation, which will introduce further issues and challenges as those reforms take effect.

For example, the Report characterizes the adoption of the Digital Markets Act (“DMA”) as a “successful” development toward regulation of large online platforms. However, it was only very recently adopted and will not be implemented until the end of next year. As the Report also

¹⁶ In particular, the Report notes that while Amazon “has a strong brand and already features highly on traffic” it will see its share of e-commerce “further decline” as South African consumers “continue to choose e-commerce retailers offering convenience and delivery speed.” It is also notable that the Report suggests that local e-commerce firms will outcompete Amazon, if Amazon remains an international e-commerce player, but assumes leadership if Amazon enters South Africa. *Id.* at 70.

acknowledges, the DMA has been plagued with concerns about implementation, complementarity with existing regulations, proportionality, and competition authority mandates, and reliance on broad and untested new concepts (such as “fairness”). Similarly, the Report cites the U.S. House Subcommittee’s “Big Tech” report as support for several of its conclusions. However, it is worthwhile to note that this report was compiled by the staff of one political party and does not carry the weight or authority of a judicial decision (or in fact even reflect a consensus view of the House Subcommittee). And, to date, most of the legislative proposals designed to address the recommendations in the report have stalled in early development.

The Report marks an important step towards understanding the market features that may impact competition among online intermediation platforms, a number of which are unique to South Africa. However, CCIA urges the SACC to avoid rushing to adopt reforms potentially reflecting international regulatory experiments, without first allowing some time to gauge how those are working or whether the reforms are harming consumers and innovation at a national or local level. Rather than simply following some foreign regulators, the SACC should continue to focus on developing its understanding of the unique dynamics of the South African market and tailoring its proposals accordingly. The SACC and the Government’s role is to ensure that South Africa’s competition regime is fit for purpose and supports the domestic economy, promotes innovation, and delivers benefits to consumers.

V. Online Intermediation Platforms Should Have the Opportunity to Comment on Specific Rules before the SACC Recommends Them to Government

The Report provides a useful starting point for the debate on potential regulation for online intermediation platforms in South Africa. The Report canvasses a wide range of topics with potential competition concerns. CCIA supports the SACC’s open approach to consultation, which allows for genuine debate on issues. Given the significant potential consequences of the introduction of a regulatory regime for leading platforms, we encourage the SACC to consult extensively with relevant stakeholders before publishing its Final Report. CCIA also stresses the importance of the Government ensuring that there is a sufficient consultation process and stakeholder engagement on the SACC’s recommendations, especially in areas in which the regulation can have significant economic impacts.

CCIA is pleased to provide this input on the Report and welcomes any questions from the Commission.