Recent Competition Policy Considerations in Emerging Markets: Will Enforcement in Digital Markets Represent a Convergence or Divergence with International Competition Law Policy?

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I. INTRODUCTION

While the United States and Europe—as well as several other jurisdictions in developed economies—are currently debating competition policy in digital markets, policymakers in emerging markets, like that in South Africa, have also turned their attention to the digital sector. The South African Competition Commission (Competition Commission), for example, has adopted a proactive approach to digital markets, while simultaneously pursuing several non-competition objectives. Experience shows that the Competition Commission has been the lodestar for competition enforcement in Africa. As such, a

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study of the Competition Commission's latest efforts in relation to the enforcement of especially non-traditional competition factors will provide valuable inputs for the global debate.

Part II of this Essay sets out the role that public interest factors such as employment, equality, and the protection of designated groups of competitors have played in South African competition policy and the extent to which political interventionism has influenced competition enforcement. While some of the examples discussed in this Essay are not directly related to digital markets, they nevertheless offer helpful insight into how the South African authorities are likely to approach digital markets. In this regard, there are striking similarities between the inclusion of public interest considerations in South African competition law and that of other "non-traditional" policy objectives, such as privacy, which are at the center of the debates around digital markets internationally.

Building on the issue of public interest in South African competition law, Part III of this Essay discusses some of the recent developments in the regulation of digital markets in South Africa, including the Competition Commission policy paper entitled *Competition in the Digital Economy* (Policy Paper),[1] the drafting of small merger guidelines (Merger Guidelines),[2] and initiating the market inquiry entitled *Online Intermediation Platforms Market Inquiry Terms of Reference* (Market Inquiry).[3] In particular, this Essay will discuss how public interest will impact regulation and enforcement in digital markets in South Africa.

Finally, this Essay considers the risks that the focus on public interest considerations may pose for the maintenance of objective standards and evidence-based decision making in South Africa and elsewhere. In this context, the need and basis for changes to

1. COMPETITION COMM'N S. AFR., COMPETITION IN THE DIGITAL ECONOMY (2020), http://www.compcom.co.za/wp-content/uploads/2020/09/Competition-in-the-digital-economy_7-September-2020.pdf.

2. *Draft Guidelines on Small Merger Notification*, COMPETITION COMM'N S. AFR., https://www.compcom.co.za/wp-content/uploads/2021/05/Draft-Guideline-on-small-merger-notification.pdf (last visited Sept. 24, 2022).

3. Competition Comm'n S. Afr., *Online Intermediation Platforms Market Inquiry Terms of Reference*, GOV'T GAZETTE REPUBLIC OF S. AFR., Apr. 9, 2021, at 3, https://www.compcom.co.za/wp-content/uploads/2021/04/44432_09-04_EconomicDevDepartment.pdf.

competition laws, with particular regard to the importance of so-called potential competition in digital markets, will be considered. We conclude that deviations from established practice, with specific emphasis on non-competition factors, create the possibility for unintended consequences.

II. PUBLIC INTEREST AND COMPETITION IN SOUTH AFRICA

South Africa is a developing country. Developing countries are characterized by: (1) comparatively low levels of economic development; (2) high levels of unemployment; (3) significant political instability and government involvement in the economy; and (4) extreme inequality.[4] These characteristics have shaped the aims and aspirations of South Africa's post-apartheid competition legislation, namely the Competition Act 89 of 1998 (Competition Act).

While the concept of public interest has long been a part of South African competition law, prior to 2017, public interest considerations arose only in the context of merger control. Even then, the only real public interest concern related to employment.[5] In most cases, employment concerns were addressed by the merging parties agreeing to not affect any merger-specific job cuts for a specific period of time. That accords with the approach in a number of other jurisdictions.[6] More recently, however—particularly from 2017 onwards—there has been a significant increase in the number of cases involving other public interest concerns with the Competition Commission recommending and imposing conditions on thirty-four mergers.[7] The varying areas in which public interest conditions have been imposed include, among

4. Therese F. Azeng & Thierry U. Yogo, *Youth Unemployment and Political Instability in Selected Developing Countries* 1, 12 (Afr. Dev. Bank Grp., Working Paper No. 171, 2013), https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Working_Paper_171_-_Youth_Unemployment_and_Political_Instability_in_Selected_Developing_Countries.pdf.

5. Prince M. Changole & Willem H. Boshoff, *Non-Competition Goals and Their Impact on South African Merger Control: An Empirical Analysis*, 60 REVIEW INDUS. ORG. 361 (2022).

6. For example: France, Botswana, Kenya, Namibia, and Zambia.

7. COMPETITION COMM'N S. AFR., ANNUAL REPORT 2020–21 (2021), https://www.compcom.co.za/wp-content/uploads/2021/12/Competition-Commission-2020_21-Final-Annual-Report.pdf.

other things: the setting up of employment share schemes,[8] the maintenance and improvement of local sourcing requirements from suppliers,[9] and an increase in ownership of historically disadvantaged persons (HDPs).[10] This change reflects a shift in government policy as the government is increasingly leveraging the Competition Act as a means to achieve broader industrial policy objectives.

This shift in policy focus resulted in a push for legislative change. The Competition Amendment Act 18 of 2018 was signed by President Cyril Ramaphosa on February 13, 2019 (Amendment Act), with the aim of codifying and further strengthening the role of public interest in competition law. Although the Preamble of the Competition Act already generally provides for the consideration of public interest criteria, the Amendment Act has elevated the role of public interest considerations both in merger control and in respect of unilateral conduct, most notably the amendment's emphasis on the promotion of Small, Medium, and Micro-sized enterprises (SMMEs) and HDPs.

The Amendment Act not only elevated public interest considerations in merger control, but it introduced public interest provisions into the abuse of dominance analysis. The Amendment Act now expressly requires South Africa's competition agencies to account for the impact that certain conduct might have on small, designated classes of competitors, such as excessive pricing and price discrimination.[11] Most notably, prior to the Amendment Act, price discrimination was only prohibited if it gave rise to a "substantial lessening of competition." The Amendment Act expands the law to prohibit price discrimination if it has the effect of "impeding the ability of small and medium businesses or firms controlled by historically disadvantaged persons" to

8. *In re* Dotsure LTD & Hollard Holdings (Pty.) Ltd. 2021 No. LM156Nov20 (Competition Trib. of S. Afr.).

9. *In re* Mr. Price Grp. Ltd. & Otto Bros. Distribs. (Pty.) Ltd. 2021 No. LM180Jan21 (Competition Trib. of S. Afr.).

10. *In re* 4 Racing (Pty.) Ltd. & Phumelela Gaming and Leisure Ltd. 2021 No. 2021Jan0038 (Competition Trib. of S. Afr.).

11. Small, designated classes of competitors include small and medium sized firms and firms controlled by previously disadvantaged persons. Katherine Woodhouse, *The Competition Act: Buyer Power*, ANDERSON, https://za.andersen.com/news/2019/12/the-competition-act-buyer-power (last visited Sept. 24, 2022).

participate effectively in the economy.[12] There is, however, an inherent tension between conduct that enhances consumer welfare and the impact of such conduct on these designated firms. Although the issue of enforcement falls beyond the scope of this Essay, the tension and trade-off between competition on the one hand and public interest on the other forms an important part of our assessment, which will be discussed further in the context of merger control and the regulation of digital markets.

Turning back to public interest in merger control, the Amendment Act now obliges the competition authorities to consider the likely effect of any merger on competition as well as the public interest. These appear to be equally weighted—a proposed merger that is likely to enhance consumer welfare may nevertheless be prohibited on public interest grounds. Moreover, the Amendment Act expanded the list of public interest considerations to include: "(a) a particular industrial sector or region; (b) *employment*; (c) the ability of *small businesses, or firms controlled or owned by historically disadvantaged persons*, to become competitive; and (d) the ability of national industries to compete in international markets."[13]

Prior to the Amendment Act, a key criticism was that public interest had principally developed through "soft precedent," without clear and objective standards either in terms of the Competition Act, or in terms of the decision of the competition authorities. In this regard, prior to the Amendment Act, the increasing list of public interest conditions imposed, particularly in large mergers, were developed through back-room agreements between merging parties and the Minister of the Department of Trade Industry and Competition (Minister). This had the effect of merging parties often being required to negotiate in the context of undefined standards in an environment constrained by time. The inevitable result of this combination of factors meant that the merger control landscape of South Africa had become unpredictable.

This lack of predictability and certainty discouraged foreign investment and undermined the objectives set out in the Competition Act. The delays which parties incur in having to rationalize their mergers on grounds of public interest pose problems, and it is common for external

12. Competition Amendment Act 18 of 2018 § 9(1) (S. Afr.).

13. *Id.* at § 12A(3) (emphasis added).

parties to intervene in the merger process. This delays things further in what is an inherently time-sensitive area. Moreover, this complexity is compounded when more than one jurisdiction and, therefore, more than one competition authority, is involved in assessing a transaction.[14]

Accordingly, although concerns remained about the appropriateness of addressing "public interest" through competition law, there was a perceived benefit that the Amendment Act would "formalize" public interest and thereby reduce uncertainty. While it may be argued that the Amendment Act has gone some way in achieving this objective by at least highlighting the need for merging parties to provide an up-front assessment of public interest in the merger filing, key areas of uncertainty remain. In particular, there remains uncertainty in how one best balances the sometimes-competing interests of competition and public interest considerations and how to ensure interventionist strategies are not abused.

On the issue of intervention, a problematic feature of the Amendment Act has been to also promote political involvement in merger proceedings. Ministerial intervention is provided for by Section 18(1), which states that "to make representations on any public interest ground referred to in Section 12A(3), the Minister may participate as a party in any merger proceedings before the Competition Commission, Competition Tribunal or the Competition Appeal Court, in the prescribed manner."[15] This significantly increases the potential risk of government intervention in otherwise pro-competitive mergers.

A practical example of the concerns relating to the assessment of public interest in merger control and the dangers of political intervention came to the fore in the recent case involving a US-based firm, Emerging Capital Partners, that proposed the acquisition of Burger King and Grand Foods Meat Plant (Burger King Transaction). The Competition Commission took issue with the Proposed Transaction because it would result in the entity changing from 68% HDP shareholding, to 0% HDP shareholding upon the conclusion of the Burger King Transaction. The Competition Commission prohibited the Burger

14. John Oxenham & Patrick Smith, *What Is Competition Good for – Weighing the Wider Benefits of Competition and Costs of Pursuing Non-competition Objectives*, at 6, https://africanantitrust.files.wordpress.com/2014/09/140822-what-is-competition-good-for-final.pdf (last visited Sept. 24, 2022).

15. Competition Amendment Act 18 of 2018 § 18(1) (S. Afr.).

King Transaction, on the sole basis that the transaction would result in the reduction of the shareholding of HDP's in the target firm, Grand Parade Investments.[16]

The Burger King Transaction highlights the importance of articulating criteria to balance the competing interests of traditional competition considerations and non-competition objectives, as captured by the various public interest considerations defined in the Competition Act. The Competition Commission's prohibition created the impression that "harm," in relation to any one of the public interest factors listed in the Competition Act, is sufficient to justify a prohibition of a transaction without any assessment, based on facts or economic evidence, of public interest enhancing effects, such as increased investment and/or employment. Such a finding in the context of competition law, even on a broader interpretation which includes non-traditional factors such as public interest, is particularly problematic as, in our view, competition law, at its essence, requires the quantification and qualification of effects to avoid absurd outcomes.

Following outcry from all areas of society, The Burger King Transaction was "re-assessed," through a request for consideration, and approved subject to a number of public interest conditions related to investment of ZAR500 million in capital expenditure,[17] increased employees employed in Burger King outlets, increased employment of HDPs, increased payroll and employee benefits (increased by a minimum of ZAR120 million),[18] committing to local procurement, and the creation of an employee share ownership program.[19]

16. Media Statement, Competition Comm'n S. Afr., Commission Prohibits Acquisition Between ECP Africa Fund, Burger King South Africa and Grand Foods, (June 1, 2021), https://www.compcom.co.za/wp-content/uploads/2021/06/COMMISSION-PROHIBITS-ACQUISITION-BETWEEN-ECP-AFRICA-FUND-BURGER-KING-SOUTH-AFRICA-AND-GRAND-FOODS-.pdf.

17. 500 million South African Rand converts to approximately 32,405,000 U.S. dollars as of January 17, 2022.

18. 120 million South African Rand converts to approximately 7,779,600 U.S. dollars as of January 17, 2022.

19. *Tribunal Released Public Version of Conditions Imposed on Sale of Burger King SA*, COMPETITION TRIB. OF S. AFR. (Oct. 1, 2021), https://www.comptrib.co.za/info-library/case-press-releases/tribunal-releases-public-version-of-conditions-imposed-on-sale-of-burger-king-sa.

While, on the face of it, the ultimate decision of the Competition Tribunal appears favorable in that it provides precedent that it may be preferable to balance several, various public interest considerations—as opposed to fixating on just one—this decision did not come about because of any qualitative assessment on the part of the Tribunal. Instead, it was the result of a behind-closed-doors agreement between the merging parties on the one hand, and the Competition Commission and the Minister on the other.

While it is not the intention of this Essay to posit on the need and appropriateness of introducing non-competition law considerations into competition law, South Africa's struggle with public interest provides useful guidance to international audiences on the risks and difficulties of doing so. In this regard, introducing such concepts into competition law, thereby moving away from a more formal and qualitative assessment, creates increased uncertainty and scope for political intervention in competition law. Further, introducing such concepts without clear understanding and guidance on the assessment of its effects and, particularly, the assessment of the inherent trade-offs, frustrates the competition process and leads to various unintended consequences, including harm to both competition and the public interest.

III. DIGITAL MARKET COMPETITION POLICY IN SOUTH AFRICA

The significant role assigned to public interest in South African competition enforcement is reflected in the recent policy adopted by the Competition Commission towards digital markets. In September 2020, the Competition Commission released its Policy Paper in which it outlined some concerns related to digital markets in South Africa.[20] Although the Policy Paper is not binding on parties to mergers within the digital market, it gives accurate insight into how the Competition Commission views digital markets, and it is likely a strong indicator of how the Competition Commission will approach digital markets in the future.

In the Policy Paper, the Competition Commission highlighted the areas in which it believes that the orthodox approach to regulating competition law issues in South Africa requires change, including:

20. COMPETITION COMM'N S. AFR., *supra* note 1.

merger control; cartel conduct; abuse of dominance and vertical restraints. From the Policy Paper, the Commission has published the Merger Guidelines and initiated the Market Inquiry. Each of these is likely to have significant consequences for the regulation and enforcement of competition law in digital markets in South Africa. While the Commission in its Policy Paper recognizes that amendments to our existing competition law is not required to address competition issues within digital markets (at least not at this stage), this recognition must be considered in light of the broad and subjective powers, inherent in the Amendment Act's public interest criteria, that the Commission has in terms of the Act. This is evident as the Commission in its Policy Paper recognizes the importance of promoting a designated class of competitors in the digital market.

A. Merger Guidelines

Although still in draft form, the Competition Commission published the Merger Guidelines to counter the perceived harm of "killer acquisitions" in South Africa by requiring that parties to small mergers in digital markets (i.e., mergers that do not meet the defined statutory thresholds for notification) inform the Competition Commission of the transaction. The Merger Guidelines require the notification of small mergers where parties to a transaction "operate in one or more digital market(s)" and any one of the following thresholds is met:

- The purchase consideration exceeds ZAR190 million,[21] provided the target has activities in South Africa;
- The purchase consideration is less than ZAR190 million,[22] but the total value of the target firm exceeds ZAR190 million,[23] provided the target has activities in South Africa and the acquisition amounts to a merger (change of control);

21. 190 million Rand converts to approximately 12,334,778.72 U.S. dollars as of January 17, 2022.

22. *Id.*

23. *Id.*

- At least one of the parties to the transaction has a market share of 35% or more in at least one digital market; or
- The merger results in the merged entity being "dominant" in the market (as defined in the Competition Act).[24]

Measures to address small mergers are not unique, particularly in the context of the acquisition of nascent competitors. In fact, the International Competition Network's (ICN) Recommended Practices recognize the role and importance of "residual jurisdiction" subject to the requisite safeguards, such as a period of limitation.[25] Whether the introduction of sector specific thresholds is necessary or appropriate is perhaps more contentious. The Competition Act, in terms of its regulation of small mergers, is consistent with best practice. First, it allows parties to voluntarily file small mergers which may be considered problematic. Second, it provides for a six-month period within which the Competition Commission may require the merging parties to notify a merger which does not meet the specific thresholds. This is because the notification of small mergers is not mandatory and, as such, the Merger Guidelines are not binding thresholds for notification, but rather guidelines.

Interestingly, the thresholds set out in the Merger Guidelines are broad and are similar to the measures introduced in other jurisdictions in that they consider either transaction value or share of supply. While these "thresholds" are not formal thresholds, the Merger Guidelines nevertheless pose a risk to merging parties. They create a framework for filing transactions based on transaction value and/or share of supply, without providing further guidance or clarity on limitations in terms of "effects," which may cause significant uncertainty. For example, international best practice dictates that any transaction value threshold must be linked to some form of quantifiable local nexus

24. *Draft Guidelines on Small Merger Notification*, *supra* note 2.

25. INT'L COMPETITION NETWORK, ICN RECOMMENDED PRACTICES FOR MERGER NOTIFICATION AND REVIEW PROCEDURES 3 (2018), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf.

measure, as transaction value alone cannot measure the impact of a transaction on competition.[26]

The issue of jurisdiction has, for some time, been contentious in South Africa, particularly in the area of enforcement. Accordingly, the Competition Commission has developed considerable experience in dealing with this issue. It is helpful to consider that the Competition Commission must show direct, foreseeable, and substantial effects in South Africa to trigger the application of the Competition Act.[27] Accordingly, even if non-binding, the Merger Guidelines create significant uncertainty for firms operating in digital markets, particularly when considering that mergers filed on this basis would be assessed like any other merger. This introduces the risk that public interest may also play a central role in these mergers. In this regard, the Competition Commission in the Policy Paper expressly states that, when assessing mergers in digital markets, firms ought to consider:

> (1) the extent to which a proposed merger promotes a greater spread of ownership amongst historically disadvantaged persons and workers; and (2) the extent to which a merger enables small, medium and historically disadvantaged firms and workers to effectively enter into and participate in a market when considering the effect of a merger on the public interest.[28]

Again, like what was seen in the Burger King Transaction, it is the conflation of competition and public interest considerations that may be problematic. In other words, the Merger Guidelines were enacted to address killer acquisitions. It is unclear, however, whether the Merger Guidelines will achieve that stated objective. In contrast, a more interventionist approach to the regulation of small mergers in digital markets may give rise to unintended consequences, including the increased utilisation of public interest to overcome the difficulties

26. *Id.*

27. *Competition Comm'n v. Bank of Am. Merrill Lynch Int'l Ltd.* 2020 (4) SA 105 (CAC) at 129 para. 58 (S. Afr.); s*ee also Am. Nat. Soda Ash Corp. v. Competition Comm'n of South Africa* 2005 (3) SA 1 (SCA) at 20–24 paras. 24–29 (S. Afr.).

28. COMPETITION COMM'N S. AFR., *supra* note 1, at 34.

associated with quantifying the effects on "potential competition" in terms of existing laws and economics.

The effective prohibition of "killer acquisitions" requires a consideration of "potential competition," which, in turn, must be illustrated by the Competition Commission to be likely through actual and qualitative evidence. The concept of potential competition is not new to South African competition law. In this regard, the seminal case for "potential competition," which the Competition Commission cites in its Policy Paper, is that of MIH eCommerce Holdings (Pty) Ltd, at the time trading as OLX South Africa, and WeBuyCars (Pty) Ltd (WBC Transaction).[29] The proposed merger of OLX South Africa and WBC was prohibited based on potential competition.[30] The merger assessment revealed that the acquiring firm had separately considered entry in the market where the target was present and had existing operations in the relevant product market in other jurisdictions.[31] Despite the merging parties coming forward with certain conditions, the Competition Commission remained steadfast that this would not remedy the competition concerns.

The WBC Transaction shows that legislative changes are not required to address the issue of potential competition. It also demonstrates that where evidence of potential competition exists, the existing legal framework is sufficient to address the potential harm. The difficulty with this precedent and the regulation of potential competition is that it requires that the Competition Commission identify, with reasonable certainty, whether the acquired start-up would have become a significant competitor to the incumbent absent the merger. The Competition Commission must also determine with sufficient certainty that there exists market features to prevent other start-ups from entering the market segment, and thus restoring any lost competitive pressure on the incumbent. Should public interest be utilised to circumvent this

29. *Competition Commission v. MIH Ecommerce Holdings (Pty) Ltd* 2019 No. LM183Sep18/DSC065Jul19 (Competition Trib. of S. Afr.).

30. Media Statement, Competition Comm'n S. Afr., Competition Tribunal Confirms the Prohibition of Naspers Purchase of WeBuyCars (Mar. 27, 2020), http://www.compcom.co.za/wp-content/uploads/2020/03/COMPETITION-TRIBUNAL-CONFIRMS-THE-PROHIBITION-OF-NASPERS-PURCHASE-OF-WEBUYCARS.pdf.

31. COMPETITION COMM'N S. AFR., *supra* note 1, at 30.

analysis, this would result in severely prejudicial consequences, harm to competition, and harm to the Competition Commission's broader public interest objective of increasing entry and expansion of small firms in digital markets. Absent assessments based on market features, unintended prejudicial consequences arise through focusing on short term gains through, for example, employment conditions, which distort the potential growth for long term employment and expansion through thorough market assessments.

B. Market Inquiry

The Amendment Act altered South Africa's market inquiry regime by introducing a lower standard of assessment and by introducing a duty to act on the part of the Competition Commission. It also provided the Competition Commission with broad remedial powers to address identified harm to competition based on this reduced standard of assessment. In terms of Section 43B of the Competition Act, the Competition Commission may initiate a market inquiry in any market where it has reason to believe that there are features in the market which may have an "adverse effect" on competition, even if that "effect" is not substantial. Further, the Amendment Act introduced a new Section 43D titled "Duty to Remedy Adverse Effects on Competition," which provided that, should the Competition Commission find that there are features which have an adverse effect on competition, with particular regard to the "impact of the adverse effect on competition on small and medium businesses, or firms controlled or owned by historically disadvantaged persons," the Competition Commission may "take action to remedy, mitigate or prevent the adverse effect on competition," which notably includes a recommendation to the Competition Tribunal for a divestiture in terms of Section 60 of the Competition Act.[32]

The Market Inquiry was initiated by the Competition Commission in the first quarter of 2021. The scope of the Market Inquiry includes a two-sided platform that facilitates transactions between business users and consumers—or so-called "B2C" platforms—for the sale of goods, services, and software regardless of whether the transactions are concluded on the platform itself, on the online site of the business

32. Competition Act 89 of 1957 § 43(D)(2) (S. Afr.).

user, or offline. Much of the current South Africa policy efforts directed at digital markets, including the Market Inquiry, are motivated by public interest concerns. The Competition Commission's Policy Paper highlights the importance of policy tools in facilitating access for entities who wish to enter the digital market, as well as the value of market inquiries as tools for the promotion and retention of competition in certain digital markets.

The Policy Paper as well as in the Market Inquiry identified digital markets as "future markets" distinct from the "traditional economy," which is widely considered to be unequal as a result of South Africa's political history. To this end, the Market Inquiry has been hailed by the Competition Commission as a proactive measure and intervention to ensure that "future" online markets are more inclusive, clearly linking the Market Inquiry to South Africa's transformation goals, which came to the forefront in the Amendment Act.

This focus of the Market Inquiry on inclusivity and fairness is further advanced in the Further Statement of Issues (FSOI) published on August 12, 2021.[33] A significant focus in the FSOI is the relationships between online intermediation platforms and the small businesses that utilize them to access consumers. The FSOI raises concerns regarding small businesses' potential "dependency" on a limited number of established platforms, and whether this provides platforms with the ability to impose unfair and/or discriminatory prices and trading conditions on small business users. The FSOI also raises a concern that platforms' search ranking algorithms and the "pay-for-position" promotional opportunities offered by platforms may disadvantage small business users vis-à-vis their larger rivals.

The focus of the Market Inquiry on these public interest considerations has already signaled a clear intent to center the regulation of digital markets around the seemingly less complex objective of creating more opportunity for small businesses to enter and operate in such markets. The Competition Commission may seek to use its expanded public interest mandate to avoid engaging in some of the complexities

33. COMPETITION COMM'N S. AFR., ONLINE INTERMEDIATION PLATFORMS MARKET INQUIRY FURTHER STATEMENT OF ISSUES (Aug. 17, 2021) https://www.compcom.co.za/wp-content/uploads/2021/08/OIPMI-Further-Statement-of-Issues_August-2021.pdf.

inherent in the regulation of digital markets from a pure competition perspective that traditionally emphasizes the protection of consumer welfare and the competitive process.

The pursuit of public interest objectives over competition and consumer welfare concerns is unlikely, in our view, to fully obviate the need for the Competition Commission to engage in the complexities associated with the regulation of digital markets. In relation to public interest in merger control, effective regulation aimed at creating increased opportunities for small firms to enter and operate in digital markets will still require the Competition Commission to engage in the ambiguities and uncertainties associated with a robust counterfactual analysis to assess the effectiveness of its proposed interventions. For example, intervention that results in smaller, more numerous intermediation platforms may create more opportunities for smaller platforms. At the same time, intervention may be detrimental to the small business users that utilize those platforms, by increasing transaction costs and reducing and fragmenting the customer bases that can be accessed through online intermediation platforms.

Accordingly, given the complexities of digital markets, a key concern in relation to the Market Inquiry presents itself. Namely, outside of public interest, the Competition Commission may seek to regulate these complex issues unilaterally and on a lower standard of assessment through the imposition of behavioral remedies and, if required, structural remedies by way of referral to the Competition Tribunal for approval. Some of these behavioral remedies have been alluded to earlier in this Essay. For example, the Competition Commission suggests giving group discounts for "platforms [that] are linked to media companies," which would enable competition to depend on other elements such as pricing and reliability. These kinds of behavioral remedies are also not uncommon and have been the subject of much criticism in the fast-moving consumer goods and automotive sectors.

IV. CONCLUSION

Competition policy in emerging markets has traditionally deviated from that of more developed jurisdictions due to the inherent socio-economic differences between emerging and developed markets. Even so, this Essay argues that, in the policy debate relating to digital markets, a thorough understanding of different trade-offs remains

essential. This is particularly important when non-competition factors are considered. Absent a credible understanding of such trade-offs, outcomes are inherently unpredictable when it comes to the weighing of different policy considerations. The willingness of policy makers to openly acknowledge which interests are being placed above others is perhaps the most critical aspect to developing a transparent and effective policy for competition enforcement in digital markets. A failure to do so is not only likely to have an adverse effect on investment and pro-consumer behavior but it fundamentally risks undermining principles of legality.