COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTIONS OF ANTITRUST LAW AND INTERNATIONAL LAW ON THE COMPETITON COMMISSION SOUTH AFRICA'S "ONLINE INTERMEDIATION PLATFORMS MARKET INQUIRY STATEMENT OF ISSUES"

July 15, 2021

The views stated in this submission are presented on behalf of the Antitrust Law and International Law Sections. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore should not be construed as representing the policy of the American Bar Association.

The Antitrust Law Section and the International Law Section of the American Bar Association (the Sections) appreciate the opportunity to provide their comments in response to the "Online Intermediation Platforms Market Inquiry Statement of Issues," published by the Competition Commission South Africa (CCSA) on May 19, 2021 (the OIPMI Statement of Issues).[1] The Sections are available to provide additional comments or assistance in any other way that the CCSA may deem appropriate. These comments are based upon the extensive experience of the Sections' members in competition and consumer protection law around the world.

The Antitrust Law Section (ALS) is the world's largest professional organization for antitrust and competition law, trade regulation, consumer protection and data privacy as well as related aspects of economics. Section members, numbering over 7,600, come from all over the world and include attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, as well as judges, professors, and law students. The Section provides a broad variety of programs and publications concerning all facets of antitrust and the other listed fields. Numerous Section members have extensive experience and expertise regarding similar laws of non-U.S. jurisdictions. For nearly thirty years, the Section has provided input to enforcement agencies around the world conducting consultations on topics within the Section's scope of expertise.[2]

The International Law Section (ILS) is the American Bar Association section that focuses on international legal issues, the promotion of the rule of law, and the provision of legal education, policy, publishing and practical assistance related to cross-border activity. Its members total over 11,000, including private practitioners, in-house counsel, attorneys in governmental and inter-government entities, and legal academics, and represent over 100 countries. The ILS's 56 substantive committees cover competition law, trade law, and data privacy and data security law

[1] Competition Commission South Africa, "Online Intermediation Platforms Market Inquiry Statement of Issues" (May 19, 2021), https://www.compcom.co.za/wp-content/uploads/2021/05/OIPMI-Statement-of-Issues_May-2021.pdf. We are responding specifically to the invitation to "market participants and other interested parties (collectively 'stakeholders') to provide views and information on the operation of online intermediation platforms in South Africa." *Id*. at 4.

[2] Past comments can be accessed on the Antitrust Law Section's website at: https://www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs/.

worldwide as well as areas of law, which often intersect with these areas, such as mergers and acquisitions and joint ventures. Throughout its century of existence, the ILS has provided input to debates relating to international legal policy.[3] With respect to competition law and policy specifically, the ILS has provided input for decades to authorities around the world.[4]

The Sections recognize the increasingly important role that digital platforms (and, in particular, online intermediation platforms) play in commercial activities. Those platforms and the transactions they facilitate are key drivers of digitalization of our economies. The Sections applaud the CCSA for focusing the OIPMI Statement of Issues on whether there are any "market features which may impede, restrict, or distort competition and/or undermine the purposes of the [South African Competition] Act."[5] The Sections also appreciate the OIPMI Statement of Issues' good overview of online intermediation platforms[6] and helpful elucidation of inquiry scope and related issues for submissions by stakeholders.[7]

The OIPMI Statement of Issues appropriately is awaiting the receipt and evaluation of stakeholder input prior to developing proposed guidance on the competition analysis of digital intermediation platforms.[8] At this preliminary stage, the Sections believe that we can provide the greatest assistance to the CCSA by submitting for its review the Antitrust Law Section's 2020 Report on "Common Issues relating to the Digital Economy and Competition" (the Digital Competition Report) (enclosed electronically).[9] This Report, which centers on new digital technologies and digital platforms, has as its goal "providing commentary to foreign antitrust agencies as they seek input on proposals for change and adjustment in their own competition-rule enforcement systems as the digital transformation envelops their own jurisdictions."[10] In particular, the Digital Competition Report discusses, in order, market definition and market power (chapter 1), big data (chapter 2), merger issues (chapter 3), exclusionary conduct (chapter 4), algorithms and artificial intelligence (chapter 5), privacy and data security laws (chapter 6), and a summary of common issues relating to the digital economy (appendix).[11]

While we commend the Digital Competition Report to you in its entirety, we understand that the CCSA may be particularly interested in guidance on market definition and market power (chapter 1), certain merger issues (chapter 3), exclusionary conduct (chapter 4), and algorithms and artificial intelligence (chapter 5). With that in mind, below we highlight key Digital

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[3] American Bar Association, International Law Section Policy, https://www.americanbar.org/groups/international_law/policy/about/.
[4] Past submissions may be accessed at: https://www.americanbar.org/groups/international_law/policy/blanket_authorities_initiatives/.
[5] OIPMI Statement of Issues at 3.
[6] *Id*. at 8-19.
[7] *Id*. at 20-46.
[8] *Id*. at 5-6.
[9] Common Issues Relating to the Digital Economy and Competition, Report of the International Developments and Comments Task Force on Positions Expressed by the ABA Antitrust Law Section between 2017 and 2019 (Feb. 27, 2020), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/april-2020/sal-report-on-common-issues-relating-to-the-digital-economy-and-competition-final-4162020.pdf.
[10] *Id*. at 1.
[11] This detailed discussion should prove directly applicable to specific competition-related questions embodied in scope items 1-8 as set forth in the OIPMI Statement of Issues, at 21-45.

Competition Report findings ("recommended approaches") culled from these chapters as an appendix to this submission.

We hope that the legal and economic analysis embodied in the Digital Competition Report will prove helpful to the CCSA as it evaluates stakeholder input and begins to draft preliminary findings and recommendations. The Sections also would be delighted at any time to engage in discussions with the CCSA regarding any guidance that it may be contemplating in its draft. Finally, the Sections look forward to commenting on the OIPMI preliminary findings and recommendations when they are released.[12]

The Sections appreciate the opportunity to provide these comments and welcome the opportunity to answer any questions or otherwise discuss this subject with the CCSA.

Enclosure:
https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/april-2020/sal-report-on-common-issues-relating-to-the-digital-economy-and-competition-final-4162020.pdf

Appendix: Key Findings of the ABA Report on Common Issues Relating to the Digital Economy

Chapter 1: Market Definition and Market Power (pages 3-12):

Recommended approach (market definition, special challenges): Despite the challenges to market definition and other aspects of analyzing digital platform markets, the Section believes current and developing analytic tools can address these challenges. Accordingly, the Section does not see the need for additional regulations to deal with these challenges, and that competition authorities should assess competitive restraints on a case-by-case basis within the current framework. (Page 5.)

Recommended approach (market power, monopoly power, and market concentration): The Section in general recommends that regulators not rely exclusively on market shares or market concentration when analyzing market and monopoly power. This recommendation is particularly important in platform markets, because some digital platform markets have characteristics that can limit market power, such as the threat of entry by technologically superior platforms, easy demand-side substitution, and multi-homing that lowers barriers to entry. (Pages 6-7.)

Recommended approach (market power and competitive effects): The Section recommends that regulators move away from relying strictly on market definition and market power, and instead look to assess incentives and competitive effects. (Page 10.)

[12] We note that the preliminary findings and recommendations currently are scheduled for release by the first week of May 2022. OIPMI Statement of Issues at 6.

Recommended approach (requisites for finding durable monopoly power): The Section has previously recommended that durable market/monopoly power is a prerequisite to finding a unilateral conduct violation. In this sense, some digital markets may be more susceptible to durable monopoly power than others, including where there are elements such as lock-in effects. (Page 10.)

Recommended approach (combined monopoly power): The Section's view is that reliance on collective market power theories requires concerted action as a joint monopoly, which is the approach generally required by the European Commission. (Page 11.)

Recommended approach (network effects): The Section's view is that regulators should not assume that network effects alone are a guarantor of substantial market power. In this sense, factors to consider include, among others: (i) whether there are low switching costs, (ii) whether there is multi-homing, and (iii) whether platform congestion will lead users to switch to other platforms. (Page 12.)

Recommended approach (monopoly power based on data): The Section's view is that there should be no presumption that "big data" leads to market power. (Page 12.)

Chapter 3: Merger Issues (pages 16-31):

Recommended approach (merger thresholds): The Section (i) supports benchmarking thresholds against international standards; (ii) understands that a transaction value threshold, by itself, is unsuitable to determine whether a transaction will impact a specific jurisdiction; (iii) submits that local nexus tests should be clear, understandable, and based on objectively quantifiable criteria; (iv) encourages that, as an alternative to revising thresholds, the competition agency could be empowered to review proposed mergers of concern that are not subject to notification, for a limited duration after the merger (in this case, a one-year time limit would be appropriate). (Pages 17-18.)

Recommended approach (general merger analysis): Generally speaking, when it appears that a merger is occurring in a multisided market—where there have been significant indirect network effects noted in either one direction or in both directions—the Section's view is that it is important to consider the potential impact of the merger on consumers in light of those network effects. Depending on the structure of the industry, that could mean that the tools used to develop the relevant market need to be slightly different (for example considering the prices in both sides of the market together). Alternatively, it could mean that the tools are the same but that they need to be used from multiple different starting points (for example attempting a SSNIP test in both sides of the market independently). Finally, it is possible that a merger in a multisided industry can be evaluated in the same manner as a merger in a more traditional industry. (Page 20.)

Recommended approach (loss of innovation/potential competition): The Section's view is that (i) the digitization of the economy does not give rise to any new or unique concerns in relation to loss of innovation—nor potential competition-based theories of harm; (ii) sector-specific theories of harm may inadvertently chill competition by deterring procompetitive transactions; (iii) theories of potential competition carry significant evidentiary challenges, particularly in dynamic markets where a new technology has been introduced; (iv) a merger resulting in increasing the scale

required for entry is problematic only if it shields the merging firms from efficient and effective new entry; likewise, a merger involving a potential entrant would only be likely to harm competition in the presence of specific characteristics (including high market concentration). (Pages 22-23.)

Recommended approach (big data): In general, "big data" refers to the collection of large amounts of consumer or other data and the analysis of such data. . . . [T]he Section respectfully submits that there is no need for special rules for mergers involving big data and that, as with mergers and acquisitions in other parts of the economy, a decision to block a transaction involving big data should be grounded in careful economic analysis of the totality of the facts, showing that a transaction is likely to substantially lessen competition in the foreseeable future. (Pages 23, 25-26.)

Recommended approach (vertical mergers): The Section's view is that efficiencies are a common driver of vertical mergers; for instance, combining businesses operating at separate levels can intensify interbrand competition and eliminate double marginalization. Having said that, the Section notes the need to consider the potential risk of foreclosure in vertical mergers. (Page 28.)

Recommended approach (merger remedies): The Section's view is that merger remedies should be proportional and used to effectively restore or preserve competition, protect competition generally rather than to determine market outcomes, and there should be a close nexus between the remedy and the theory of harm in each particular case. (Page 31.)

Chapter 4: Exclusionary Conduct (pages 32-45):

Recommended approach (dominance): The Section recommends that competition law enforcers evaluate whether particular online platforms are dominant in a particular relevant market using the traditional methods of antitrust analysis noted above, under which the firm's market share serves as a useful first step. In the United States, monopolization cases have generally required market share of 65 percent or greater before analyzing other factors to determine monopoly power, with 80-90 percent market share being required to presume monopoly power. The European Commission is unlikely to find dominance in Article 102 TFEU cases if a firm has a market share of less than 40 percent. These percentages are warranted to demonstrate that an allegedly dominant firm might have the capability of exercising power over price, output, or other competitive factors in the market. Analysis of whether an online platform is dominant should also include consideration of factors related to relevant market definition and substitutability that may not be present in other industries, including the following. Competition from online competitors, competition from direct sources, and competition from dissimilar platforms or websites. (Pages 33-34.)

Recommended approach (monopoly leveraging and lock-in): To sum up, in both cases of alleged monopoly leveraging and lock-in, the Section recommends that authorities carefully examine remedies requiring mandatory sharing or access to networks, data, or other valuable competitive resources where, absent exceptional circumstances, the costs involved and risks to innovation may not justify such relief absent unusually strong evidence of pro-competitive benefit. (Page 37.)

Recommended approach (exclusive dealing-style restraints (restraints on using other distribution channels): [T]he Section recommends that (1) competition law enforcers first determine what type of exclusive arrangement is in play before making a recommendation, and (2) any enforcement decision be made only after undertaking an effects-based analysis of the likely competitive impact of the restraint on price, non-price aspects, as well as the arrangement's potential to foreclose or delay beneficial entry. (Page 38.)

Recommended approach (predatory pricing): Generally, the predatory pricing doctrine should apply equally to online platforms as other market participants. Online platforms should be encouraged to lower prices, even when lower prices disrupt the status quo, but they should not be allowed to price below a relevant measure of their costs to obtain monopoly power and then raise prices later to recoup profits. Online platforms, however, do present some particular challenges for appropriately applying the predatory pricing doctrine. (Page 41.)

Recommended approach (promotional pricing): It is well recognized that not all below-cost pricing is predatory. Various forms of promotions, limited in scope, should not be treated as predatory pricing. This is no different in the digital economy than others. In either case, it can be difficult to determine when a price reduction has been in place long enough that it is no longer "promotional" and might be predatory. (Page 41.)

Recommended approach (evaluating the likelihood of long-term consumer harm): Enforcers must examine the alleged predator's market power, its competitors' relative shares, and the conditions of entry to analyze whether low prices in the short term can reasonably be expected to produce high prices in the long term. If, for example, a rival online platform can weather the low prices of an aggressive competitor, then it is unlikely that a predatory pricing strategy would be successful. Similarly, if a new platform enters (or if the threat of entry is sufficient), the alleged predatory platform may not be able to raise prices in the future. (Pages 41-42.)

Recommended approach (defining a market for price-cost tests for online platforms): Proving predatory pricing in a two-sided market may require a showing that the net price for both sides of the market is below the cost of operating both sides of the market and the platform has a dangerous probability of raising the net price above a competitive level in the future to recoup losses. Moreover, any theory of predatory-cost pricing would need to account for potential impacts of a below-cost price would have on the other side of the market in the short term. (Page 43.)

Recommended approach (most-favored-nation-style restraints): The Section agrees with the view of U.S. antitrust regulators that in general, MFNs must be analyzed under the rule of reason on a case-by-case basis, taking into account the specific factors surrounding the firm's conduct and any procompetitive benefits weighed against any anticompetitive effects of the MFN. The Section recommends that this approach remain consistent when the firm at issue is an online platform, but notes the following factors that might distinguish this analysis when one or more online platforms are involved: restraints by an online platform on manufacture-direct pricing and MFN restraints by online platforms on pricing that the manufacturer cannot control. (Pages 44-45.)

Chapter 5: Algorithms and Artificial Intelligence (pages 46-48):

Recommended approach: The Section's view is that existing competition laws provide sufficient tools against the use of algorithms and AI to fix, manipulate or control market prices. The effects of pricing algorithms on consciously parallel pricing may, however, warrant careful attention. The Section recommends that relevant government authorities continue to evaluate such effects closely in order to determine when they may require further scrutiny under existing competition laws. (Page 48.)