CCLE
Centre for Competition Law and Economics

18 June 2021

Mr James Hodge
Chairperson: OIPMI
The Competition Commission
E-mail: oipmi@compcom.co.za

Re:- Response to request for comments on the Online Intermediation Platform Market Inquiry (OIPMI)

Dear Mr Hodge

Thank you for your letter dated 3 June 2021, and invitation to make a submission on the Statement of Issues associated with the OIPMI. As the CCLE is a non-government agency, rather than a market player, our comments below draw from relevant academic and policy literature and do not necessarily pertain to a particular market or player. Furthermore, given the limited timeframe afforded to us, our comments focus on selected, if cross-cutting, issues.

We wish you well with the investigation.

Respectfully yours

Prof Willem Boshoff
Co-Director

Prof Philip Sutherland
Co-Director

- Questions for stakeholders

1) Name of organisation: *Centre for Competition Law and Economics, Stellenbosch University*;
   Contact person: *Prof Willem Boshoff and Prof Philip Sutherland*;
   Contact details: *Refer to cover page*.

2) Would you like identity to remain confidential? *No*.

3) Brief description of activities: *unit based at higher education institution focused on research and teaching of competition policy*.

4) Submission type: *general, across all platforms*.

Economics comments

- The following comments are made by the economists associated with the CCLE and relate primarily to scope items 2, 3 and 4.

- Understanding demand-side behaviour

- Our principal comment is that the OIPMI should take care in affording demand-side behaviour sufficient attention. New empirical evidence suggests that limited multi-homing and limited customer switching between platforms – which are often cited by policymakers as pervasive in digital markets – may not be as pervasive after all (see Akman, 2021). While one cannot rule out these problems in selected South African markets, it seems clear that empirical evidence will be key. Furthermore, under-appreciated aspects of consumer behaviour and, importantly, digital literacy may well give rise to market failures in the digital sphere that have received less attention from policymakers. For these reasons, competition authorities – especially those in Australia and the UK – have focused part of their digital-market-investigation efforts on collecting empirical evidence on consumer behaviour. While obtaining data on consumer behaviour from individual market participants may offer important insights in this regard, it appears that systematic cross-platform evidence may well be critical. In the CCLE's view, collecting such evidence should be a key focus area of the OIPMI.

- A second point, flowing from the need for a consumer-centric analysis based on data of a sufficient scale, is that any remedies that flow from the OIPMI should also be tailored to the unique aspects of consumer demand in South Africa's digital markets. Behavioural or structural remedies based on general assumptions of multi-homing or platform switching will not be effective. In this regard, there may well be a special place for mandating platforms or large digital players to contribute actively to greater 'digital literacy', i.e. to help users of platforms understand that these platforms are not 'free' and that they have options in terms of managing default settings on information collection and other features when using various platforms. It would appear that even so-called 'tech savvy' consumers are not necessarily digitally literate. Consequently, special policy effort is required to advance digital literacy among the broader South African population, with an increasing number of digital platform users lacking the necessary schooling or literacy to fully understand the nature of their relationships with particular platforms or the terms of use. While these issues may not appear to require competition policy intervention, the absence of a dedicated body for digital policy in South Africa may require the Commission to consider the policy options at its disposal (including, but not limited to, advocacy), as such interventions may enhance competition.

- Defining gatekeeper firms

- In the CCLE's view, a key challenge in digital markets is a persistent information asymmetry between authorities and the platforms. Information asymmetry reduces the efficacy of competition policy enforcement. In competition cases involving digital markets, for example, it is particularly time consuming to consider

substitution patterns and analyse effects. Information gleaned from the OIPMI may allow the Commission to identify players that could be designated as gatekeepers and to explore policy options that would enable the regulation of competition by such gatekeepers on the basis of this designation. This approach would be consistent with the approach championed by several economists in the European Union (see Cabral *et al*, 2021).

- Given the nature of digital competition, a traditional approach to identify a gatekeeper based on market definition may have to be complemented by considering, inter alia, absolute size thresholds. Consequently, the CCLE would suggest that the OIPMI information collection efforts should include an effort to identify the appropriate variables, such as revenue or size of user base, that can be useful in defining gatekeepers. Identifying appropriate variables may require inputs from relevant industry players and it would appear an appropriate time to request such inputs.

- App stores

- Notwithstanding our comments on multi-homing above, it is important to note that multi-homing is of particular importance in relation to app stores. The Statement of Issues recognises the problem of limited 'selfloading' (in §73.3), though the nature of the questions posed under Scope Item 2 and 3 are perhaps too general to allow sufficient information to be obtained from the app store gatekeepers. It is important for the OIPMI to obtain information to consider specifically:

    - The extent to which app suppliers can promote offers to consumers outside of the core platform service;

    - The extent to which consumers can access content, subscriptions and other features through other channels than the core platform services of the particular gatekeeper.

- Data sharing

- While the CCLE recognises that data privacy is not a core concern of the OIPMI, data sharing is a key aspect of competition in digital markets. Even so, to understand digital competition, the OIPMI should attempt to gain information in relation to the ability of and cost to a platform of providing *individual* business users access to their *own* interaction data with end users of a particular platform.

- Such information can be important in developing alternative remedies that preserve the value-creation capacity of platforms. Instead of requiring gatekeeper platforms to transfer individual data to another user, policymakers might consider requiring third party algorithms to be run on the data resident on a gatekeeper's server, even if access to the individual data is not permitted. See Parker *et al* (2021; 2018) on the idea of *in situ* access to platform data. This would be an alternative to data sharing with new players, allowing large platforms to still generate economies of scale and scope using data

- With such remedies in mind, it seems important that the OIPMI is used to gain some level of technical understanding of whether algorithms from outside would be able to run on a particular platform.

References

Akman, P., 2021. *A web of paradoxes: empirical evidence on online platform users and implications for competition and regulation in digital markets*. Available at SSRN: http://dx.doi.org/10.2139/ssrn.3835280

Cabral, L., Haucap, J., Parker, G., Petropoulos, G., Valletti, T., and Van Alstyne, M., 2021. *The EU Digital Markets Act*, Publications Office of the European Union, Luxembourg, ISBN 978-92-76-29788-8, doi:10.2760/139337, JRC122910. https://publications.jrc.ec.europa.eu/repository/handle/JRC122910

Parker, G., Petropoulos, G. and Van Alstyne, M., 2021. *Digital platforms and antitrust*. Available at SSRN: http://dx.doi.org/10.2139/ssrn.3608397

Parker, G. and Van Alstyne, M., 2018. Innovation, Openness, and Platform Control. *Management Science*, Vol. 64, No 7, 2018, pp. 3015-3032.

Legal comments

The following comments are those of the lawyers associated with the CCLE and these mostly refer to particular parts of the Statement of Issues document.

Para 2 (first observation)

"The scope of the inquiry will specifically exclude e-hailing services which were the subject of a previous inquiry, and which intermediate between consumers and gig economy workers rather than business users. Other pure gig economy platforms, intermediating a customer with an individual service provider, are also excluded from the ambit of the inquiry".

This paragraph makes it clear that e-hailing is excluded but does not quite make it clear to what extent "gig economy" related platforms are excluded beyond that. It is suggested that the distinction between "gig economy workers" and "business users" is a very fine one and it is suggested that the Inquiry should rather err on the side of being inclusive. There is also an important gig-economy element to "fast food" and supermarket delivery markets. It is not quite clear to what extent Air BnB will be included within the scope of this Inquiry (it is explicitly mentioned in para 42. Perhaps these platforms should be included on the basis that they are not "pure" gig platforms. However, it is suggested that the "gig economy" and even pure gig platforms may be important in providing access to the economy for small businesses and that they could be a very important engine for greater participation in the economy. It is understandable that e-hailing is excluded but it is difficult to see why other gig economy platforms should not be within the ambit of the Inquiry. It is stated in para 27 that "The primary focus of the Inquiry is on areas of already high usage or growing adoption by South African consumers which may be important areas of online activity in the foreseeable future". These platforms apparently are not used very widely outside of the broader online classified platforms that clearly form part of this Inquiry as long as they concern business users. The concept business user can be used to exclude the type of cases that are called intermediation from "consumer to consumer" (para 36 although this appears to be a problematic way to explain intermediation between two non-business parties).

Para 2 (second observation)

"The inquiry will also not focus on search and social media more broadly, along with the broader digital advertising ecosystem, except insofar as a) such digital advertising may pose a barrier to competing platforms expanding or business users from participating in the online economy, or b) the extent to which those platforms also offer online intermediation services themselves (such as B2C communication services)".

We strongly support the exclusion of broad search and social media platforms, in particular the large behemoths Facebook, Instagram, YouTube and Google. These platforms are studied and addressed by largest and most powerful competition authorities in the world. The more pragmatic initial focus on platforms and aspects of platforms that are not addressed elsewhere is commendable. However, it is suggested that the impact of search engines such as google cannot be ignored. There is an important fluidity between the role and function of a broad search engine such as google and more specific platforms on which more specialised searches are done. Most searches commence with a search engine such as google and results from the more specialised platforms are often aggregated and represented in google itself. (Some attempt to address these issues is made in para 84ff but it is suggested that a more careful analysis is required.)

It would also appear that platforms such as Netflix and Showmax are excluded although they are an important source of platform competition in South Africa. They are not mentioned expressly or by implication. However, the Statement of Issues do not specifically mention if why and on what basis they will be excluded.

Para 4

"4. The inquiry is broadly focused on three areas of competition and public interest, namely
4.1. market features that may hinder competition amongst the platforms themselves,
4.2. market features that may give rise to discriminatory or exploitative treatment of business users, and
4.3. market features that may negatively impact on the participation of SMEs and/or HDP firms".

It seems strange that harm to consumers is not given somewhat greater importance here. Although consumers and consumer choice is of course mentioned throughout the document, the specific nature and extent of consumer harm is not properly highlighted. We understand, and for what it is worth, strongly support, the importance that is attached in South Africa, to the promotion of access to markets by SMEs and firms owned by HDPs but the protection of consumers should not be neglected. We understand that it almost goes without saying that consumers are protected by competition law. But we think that the inquiry should also make it more explicit that it will consider whether the platforms are adequately able to serve consumers in general and marginal and more vulnerable consumers in particular. It may also be useful to consider to what extent business users can indeed be described as "consumers" of the services provided by platforms. We would submit that that they are. The term "consumers" in competition law does not refer merely to ultimate consumers. Business users do not supply to the types of platforms that appear to form the main object of investigation here (that is platforms that merely intermediate transactions between others, without itself bearing the risk of sale), but use or consume their services. One could therefore argue that business users as well as their customers are both consumers of the services of the types of platforms under consideration. If so many of the traditional principles regarding consumer protection in competition law would also apply to them. Indeed SMEs and firms controlled by HDPs would be special kinds of consumers. This would mean that structural and access concerns could be addressed by using traditional and well-worn competition law tools. The complex debates regarding whether competition law should be consumer centric and to what extent it should be consumer centric, can be avoided. This approach would correctly frame the question: to what extent should the interests of different groups of consumers on different sides of multi-sided platforms be balanced? It would make it possible to balance the interests of special business users who have special reasons to have access to the economy, that are consumers on one side of the platform with consumers who are highly cost sensitive and currently at the margins of the digital economy. of their products It would also limit the need for reliance of public interest as a concern outside of consideration of competition issues.

We also believe that public interest cannot be considered in market inquiries in the sense in which it is mentioned in mergers. The legislation does not allow for decisions to be made on the basis of self-standing public interest.
- The definition of a market inquiry accommodates a wide concept of competition but it does not mention public interest;
- In section 43C and 43D it is clear that the Commission must consider whether competition is impeded restricted or distorted and again there is nothing in the Act that allows a separate consideration of public interest;
- The term "feature of a market for goods and services" includes several of the traditional public interest issues that must be considered for the purpose exemptions and mergers (section 43A(3)(b)) it also includes reference to other broader issues regarding structure ownership and participation. However, it is clear that "features of the market" may only be considered in determining whether they impede restrict or distort competition.
- Section 43C(2) states that "(2) In making its decision in terms of subsection (1) (a), the Competition Commission must have regard to the impact of the adverse effect on competition on small and medium businesses, or firms controlled or owned by historically disadvantaged persons". Section 43C(1) concerns the question whether competition is impeded restricted or distorted which again shows that participation of these groups must be considered through the lens of competition.

Para 30 & 31

It is not clear from the analysis whether the Inquiry will focus on online market places that, at least in part, facilitate transactions between business users and ultimate consumers or whether it will also consider online market places where the platform will merely act as an online retailer. It is suggested that the focus should rather be on the former. It is suggested that it will otherwise be very difficult if not impossible to distinguish marketplaces from the online offerings of particular retailers. Para 30 states "These platforms differ from the online offerings of individual suppliers or established brick n mortar retailers insofar as they will typically seek to offer customers a much broader array of products from a large variety of suppliers" but it is suggested that this will not allow for a proper line to be drawn. To be sure platforms should not be excluded simply because they also act as retailers, as long as they at least intermediate transactions between business users and consumers. In fact platforms that follow this mixed model create particularly important competition problems that must be subject of the Inquiry. As mentioned in para 31 the distinction between online retailers and online marketplaces should rather be drawn with reference to the risks which the firms that conducts the platform takes (see also para 43 in the context of OTAs). However, the types of risks that would make the difference perhaps should be more carefully considered (this apparently is what para 33 refers to as the "marketplace option".

Para 36 and onwards

In this part it is stated that "South Africa's online classified platforms may be categorised into (i) market specific classifieds platforms (i.e., real estate, job search and automotive), and (ii) general classifieds. The former tend to be business to consumer platforms (B2C) within the scope of the Inquiry, whilst the latter tend to be primarily consumer to consumer (C2C) platforms outside the scope of the Inquiry". However, it is suggested that considerable business to consumer intermediation takes place on general classified platforms and it is suggested that this question should be more carefully considered.

Para 52.1 and 52.2

The last part of 52.1 refers to "Free apps may also be offered as a form of marketing where a paid premium option is available with more features or no advertising (the 'freemium' business model).
52.2. in turn refers to "Free apps with in-app purchases – these apps are free to download and use, however, to access additional features 'in-app purchases' may be required".

It is not clear how these two situations can be distinguished (see the clearer distinction in para 54).

Para 63 (see also par 24 and 30)

In this paragraph the interaction between sales in brick and mortar stores and online platforms is considered. One aspect that may require analysis, but is not mentioned here is restrictions on online selling whether restrictions for online stores to have their own presence or restrictions that prevent stores from selling on digital platforms. This issue has also received considerable attention in Europe but it is difficult to determine how this learning should apply in South Africa as these cases are often driven by the European imperative of market integration.

Para 67 (and 51)

The Statement of Issues do not pay much attention to the concept multi-sided markets and network effects and it is suggested that perhaps more should be made of this. It is also proposed that the term "double-sided market should rather be replaced by multi-sided platform. Some time should also be devoted to what that means in South Africa and how markets should be determined in this context. For this purpose the literature and case law in other jurisdictions should be evaluated as the issue received relative short shrift in South Africa in the Computicket case.

Paragraph 73.2

This paragraph concerns MFN or price parity clauses. Reference is made to the European law on this issue. It is proposed that the Inquiry should consider whether it would be appropriate to draw a distinction in South Africa, as in Europe, between general clauses and clauses that merely prevent the business that make use of the platform from itself charging lower prices (but see the German Booking,com case).

Para 73.4 and 80

In these paragraphs the possibility of the harm that can be created by tying and self-preferencing is mentioned. This will of course be an important issue in an Inquiry of this kind, but it is proposed that the Inquiry could benefit from considering the somewhat broader concept of "gatekeepers" in the context of platforms. It is briefly mentioned in para 80 but it is considered that the concept will be very useful in understanding the impact of platforms on the businesses that make use of it and also the role that platforms can play in reducing or retarding innovation. This issue of the impact of platforms on innovation incidentally probably also requires greater attention.

Para 76 at the end point 3.4 (but see also para 4, and para 83 point 7, see also on algorithm discrimination point 3.5 at the end of para 83)

In the light of the amendments of the Act in 2018, discriminatory practices by platforms clearly form an important part of the Inquiry. It is suggested that, although this is not specifically mentioned, particular emphasis should be paid to the impact of data collection and the role of algorithms in achieving this price discrimination in general and first and second degree price discrimination in particular.

Formulation error in question 2(a) after para 76

The formulation of this question really needs to be reformulated: "What barriers do new entrants face which the platforms may that launched first may not have did have faced?" (there are also some smaller but important formulation errors in para 38.4 and 38.5)

Para 80 the protection of firms and consumers

Para 80 states that "Differences in treatment may be warranted by the particular circumstances in some cases, but they may also distort competition between the business users on the platform and hinder participation by smaller businesses or new entrants. This may be to the detriment of consumers whose choices could be distorted. It is for this reason that such differential treatment has received some scrutiny globally to determine if it is detrimental or not".

However, it should be accepted that harm to competition can be established in South Africa even if the hindering of participants does not harm consumers or consumer choices and even if intervention may be to the detriment of consumers. (See the more careful formulation in para 83).

Para 80.2 equating self-preferencing and differential treatment

It is stated that "However, differential treatment between classes of business users may also have the same effects as self-preferencing and warrant equal attention".

However, it is suggested that this statement may be too broad. Differential treatment in general may not be as directly harmed at benefiting the platform as is the case with self-preferencing. For this reason it should be approached with greater care.

Para 85-90 and ranking algorithms

The statement correctly devotes considerable attention to ranking algorithms. In particular the possible exclusionary effect of algorithms is considered in the context of SMEs and firms controlled by HDPs. It is true that algorithms may have the effect of excluding firms that do not have a track record, but that may also be driven by the preferences of consumers. Changes may be therefore reduce the utility of these platforms may reduce the utility of consumers. Care must be taken when this issue is considered to ensure a level playing field between South African and other platforms and there may be a need for innovative solutions such as requiring that firms specifically mention that certain firms are given high listings to promote new entrants into a particular market.

General: the impact of data collection on competition

The statement of issues rightly excludes the consideration of privacy issues in the context of data collection by platforms (para 5). However, the collection of data plays a fundamentally important role in competition on an between platforms. It is suggested that this issue, and with it the manner in which data is organised and used, should be given greater attention than is currently the case in the statement of issues (data is mentioned in para 25, 52.1 , 3.3. after para 66 point 9 after para 76 where the role of data in conglomerate leveraging is mentioned where provision of data as reward for allowing consumers to make use of platforms is briefly considered). (See also in this regard the discussion of price discrimination above.)

Para 102: Broadening of the scope

This paragraph invites proposals to broaden the scope of the Inquiry. It will be apparent from the above observations that such proposals are made with regard to:
- consideration of certain gig economy aspects;
- restriction placed by suppliers on online selling;
- a broader consideration of multi-sided markets and network effects;
- a broader analysis of gatekeeping and what this means;
- the impact of the collection of data.

Remedies and proposals

When it comes to remedies it is proposed that the Inquiry should specifically consider making principled distinctions between matters that should be resolved in terms of case-by-case competition law, matters that should be resolved in terms of market inquiry remedies and the need for specific legislation to deal with digital platform issues. The last point in particular has occupied the minds of policy makers in many jurisdictions from India through Europe to the United States.