



## **POLICY BRIEF 5: POLICY PROPOSALS FOR SOUTH AFRICA ON THE DIGITAL ECONOMY**

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**Dr Thando Vilakazi**

**Industrial Development Think Tank<sup>1</sup>**

### **1. Introduction**

In March 2020, the Industrial Development Think Tank (IDTT), housed at CCRED at the University of Johannesburg, convened a second meeting of South African policy makers and local and international experts on digital platforms and economic development. The focus was to identify concrete policy options for South Africa in order to benefit from the rise of digital platforms.

A key implication of digitalisation is that value increasingly resides in data, which necessitates a different approach to regulation for digital markets. We note that the COVID-19 pandemic makes online, virtual and delivery platforms even more important, along with the appropriate policy framework. It also presents opportunities to rapidly shape the evolution of digital markets now for more inclusive outcomes in future.

This policy brief presents the key insights and policy proposals which are summarised below.<sup>2</sup> It aims to inform the Government's consideration of the implications of the 4IR and regulatory approaches for South Africa through the Presidential 4IR Commission, the ongoing data policy and digital economy sector masterplan processes of the Department of Communication and Digital Technologies (DCDT), and the work of the Department of Trade, Industry and Competition (DTIC), and regulators.

#### **Key proposals for South Africa:**

- South Africa's policy approach must preserve policy space internationally, ensure participation of SMEs throughout the value chain, and position South Africa as a regional hub for data governance and infrastructure by building domestic capabilities and advocating its policy approach in the region
- Advocate for suspension of the moratorium on customs duties on electronic transmissions, despite increased pressure to extend in light of the COVID-19 pandemic
- Ensure sovereignty over data on South African citizens or residents

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<sup>1</sup> The Industrial Development Think Tank, hosted at CCRED at the University of Johannesburg, is supported by the Department of Trade, Industry and Competition. The views expressed, and any errors and omissions, are solely the responsibility of the CCRED authors.

<sup>2</sup> Research and analysis which informs these proposals is set out in the accompanying [research papers and briefs](#).

- Localisation of data should only be enforced on a case-by-case basis for strategic sectors
- Develop data governance regime, which must prioritise interoperability and portability of data, and privacy protections. Prioritise data governance regulations for consumer data in healthcare, telecommunications; online search and location data; and financial and transactions data
- Rapidly digitise public service data, and use existing data to solve public policy challenges
- Develop data markets capacity, and prioritise competition interventions with the most domestic impact

## **2. South African context**

South Africa's policy position with respect to the digital economy is unavoidably shaped by key developments globally in the regulation of platforms, including ongoing debates on the electronic transmissions moratorium at the World Trade Organisation (WTO) and other international fora. The panel recognised that while there are key international factors that will shape South Africa's policy space, issues to do with digital platforms, privacy and competition need to be dealt with using a country specific approach. To begin with, we set out the cross-cutting principles identified in the discussions which inform the policy proposals and choices for South Africa:

- South Africa needs to be unwavering in preserving its policy space in international negotiations and domestically in order to allow it to shape policies which align with its own developmental priorities of economic inclusion while also allowing new markets and new investments to grow.
- Any policy approach that is adopted by South Africa needs to prioritise international competitiveness and the participation of entrants, small and medium enterprises (SMEs) and Historically Disadvantaged South Africans (HDSAs) in the development process. It also needs to take into account the digital divide and substantial digital inequalities between groups in our society, and the absence of digital rights in South Africa. Digital inequalities, as in other areas of our society, are underpinned by differences in skills, education, access rights and costs, wealth and income, and location, amongst other factors.
- While smart device, mobile and fixed telecommunication penetration rates are comparatively high in South Africa, the ability of South Africans to benefit from the digitalisation of the economy will depend on improving access to the internet and related services in terms of costs, choice and the quality of access. There is a corresponding need to prioritise ensuring consumer protection and welfare for those citizens that can participate.

Failure to address these issues together will mean it becomes even more expensive to be poor in South Africa and the digital era will further heighten existing inequalities. In recognising the present realities, the panel concurred that South Africa has the potential to position itself as a locus of investment and knowledge in the digital economy in the Southern Africa Development Community (SADC) region and the continent as a whole. It is evident that South Africa is best positioned in terms of telecommunications infrastructure, connectivity and skills to play a lead role in shaping digital markets for development in Southern Africa, and it is likely that many countries in the region will follow South Africa's lead in terms of regulating digital platforms, competition and data policies. Indeed, South Africa should advocate its policy position in the region towards mutually beneficial outcomes.

To harness the opportunities that exist domestically, and in the region, South Africa needs to have clarity on both its defensive and offensive interests with respect to big data, ecommerce, and digital platforms. In this regard, there is strong agreement that South Africa must preserve its policy space at the WTO with respect to the moratorium on customs duties on ecommerce transactions, as set out below. Secondly, South Africa needs to take a clear position on competition issues and the approach that will be followed by authorities in considering matters to do with market power in digital markets and preservation of competition amongst local and international (actual and potential) rivals. In this regard, the panel engaged favourably with the approach proposed by the Competition Commission in its draft strategy for digital markets as set out further below.

Two significant opportunities exist for South Africa:

- Build domestic digital infrastructure, skills and capabilities, including identifying key areas where digital platforms and services can improve South Africa's competitiveness in manufacturing.<sup>3</sup>
- Position South Africa as a regional hub for digital services and infrastructure, data centres, digital technologies and equipment, digital services exports, and a locus of knowledge for data governance and the digital economy.

In order to take advantage of the opportunities, there are two key requirements:

- Prioritise local skills development and resources (including funding) for data collection, analysis and accumulation of local knowledge on the digital economy.
- Rapidly put in place an appropriate policy and regulatory environment, and a data governance framework. Such a framework needs to ensure inclusive development of digital markets, and meaningful participation by entrants, local entrepreneurs and vulnerable groups including youth.

A key issue arising from the assessment of priorities is defining what information, mapping and studies are required to identify further opportunities for South Africa. This includes gaining an understanding of the current and potential use of local and international platforms as a route-to-market for [SMEs](#); and, from a governance perspective, determining what sort of trust and identification systems need to be in place in South Africa, as well as in the region, to enable markets to evolve towards more sophisticated service offerings (e.g. software as a service).

The panel discussed international and local perspectives, and identified policy proposals for South Africa in the following three thematic areas. Some of the research and analysis which informs these proposals is set out in the accompanying research papers and briefs.

### **3. Digital rules and policy options for South Africa**

#### ***WTO Moratorium***

The WTO moratorium on customs duties on electronic transmissions (ET) has been in place since 1998, and rolled over several times since then. A decision on expiry or extension of the

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<sup>3</sup> Priority areas for South Africa's manufacturing sector are set out in the IDTT's Digital Industrial Policy Issues Paper, along with related sectoral policy briefs, available here: <https://www.competition.org.za/idtt/digital-industrial-policy>.

moratorium is expected to be taken in June 2020 at the next WTO Ministerial Conference. This means that it is time for South Africa to take a clear decision on the moratorium.

South Africa is a net importer of goods and services under ET, and the ongoing global discussions on renewal of the moratorium also takes place at a time when the definition of ET is changing to potentially encompass a wider range of products. The significance of the growth of ET for South Africa is the substantial negative effect it has on physical trade which competes with ET, the potential losses in tax revenue, and the increasing presence in South Africa of products embodying digital value which are largely imported.

The panel agreed that South Africa should push for **suspension of the moratorium** on customs duties on ET. The moratorium is not justified when considered in light of the revenue raising role of duties and the role of tariffs in influencing the relative prices of imports and local production, and thus incentivising investment in local economic activity.

If the Moratorium is to be renewed then it is imperative that South Africa pushes for clarification on the scope of 'electronic transmissions', and that ET is defined very narrowly.

### ***Data sovereignty and localisation***

Two key priorities emerged from the panel's discussions: first, clarifying the position on sovereignty and localisation of South African data, and, second, the urgency of developing a data governance framework.

Data sovereignty refers to the legal rights stipulating that records or data about a nation's citizens will be governed under the national laws of that country, regardless of where the data is housed or processed. Localisation refers to whether or not the initial collection, processing and storage of data is required to occur within national boundaries.

It is proposed that there should be **sovereignty over data** on South African citizens or residents. In addition, **localisation of data** should only be enforced on a case-by-case basis for strategic sectors.

This approach strikes a necessary balance between maintaining openness and protection of national citizens' data, and is consistent with the approach adopted in many other developing countries. On the one hand, it recognises that data and its analysis and application has become a key source of competitive advantage for countries and companies such that there is a strong case for maintaining influence and control over how and where it is used. It is especially relevant that developing countries like South Africa retain the rights to utilise the data of citizens and residents domestically towards solving various developmental challenges. At the same time, it is important to recognise that South Africa cannot position itself as a regional hub and destination for investments and innovation in the digital economy if it maintains rules over data which are too restrictive in terms of the flow of data into and out of the country. Data finds its most profitable and productive use when it can be shared and used repeatedly, or for multiple purposes. Therefore, ensuring interoperability and portability of data, with appropriate rules and limits, is critical.

The question of the use of data generated about South Africans for developmental purposes is a critical one. It has become increasingly evident that data held by private companies, and government institutions in different forms, can be used to analyse and solve public transport constraints, develop smart cities, or inform investments in health systems and basic services. This

often involves the combined use of private and publicly held data, and collaboration between social partners.

The **digitalisation of public service data** should be a national priority, to enable the development and integration of local public sector data resources. The choices over which strategic sectors would be subject to strategic data localisation requirements can be informed also by the goals of government to improve development outcomes in particular sectors – for example, it is evident from the recent healthcare sector market inquiry and the push towards establishing the National Health Insurance that healthcare has been prioritised by the Government. The COVID-19 pandemic has further highlighted the importance of improving capabilities in the healthcare sector. Similar to mapping data, there is also a critical issue of maintaining access to healthcare data that is held privately for public health research and planning, and the terms of that access. It is also a sector in which there are already good data resources through the Government Employees Medical Scheme, and the private sector through both medical insurance and providers.

Other important areas where there is already good data, technical expertise and potential for extensive public benefit include public transport where there is strong data gathered by Google and ride-sharing platform providers (as evidenced during the COVID-19 lockdown period), and in banking where there is a shift in countries such as the UK towards open banking to allow for increased competition and inclusion.

### ***Data centres and digital economy capabilities and infrastructure***

There is substantial potential to position South Africa as a regional hub for investment, and knowledge on governance and innovation aspects of the digital economy. South Africa's robust and independent regulatory framework is a comparative advantage. The development of data centre capabilities is a particular area where there would be economic value for South Africa. There is already growth in this area, with several data centres established by a handful of companies which confirms the potential which exists and the attractiveness of South Africa as a destination for similar investments in infrastructure.

The panel recommended analysis of market potential in South Africa for investments in digital economy infrastructure including data centres, *as part of* a broader strategy for building domestic capabilities in data analysis and digitalisation. The scope of this assessment should include analysis of factors and barriers that are hindering further investments by internationalised South African firms domestically or for servicing the regional market; and whether there is in fact a larger regional or continental market that could be serviced by South African firms in light of the coming into force of the African Continental Free Trade Agreement.

## **4. Data privacy, portability and interoperability**

South Africa needs to put in place an effective data governance regime that enables interoperability and portability (and thus competition and collaboration), while protecting the privacy of consumers and citizens. Such a framework would balance the incentives to invest in data gathering, with access to ensure that markets remain contestable. Importantly, there is already substantial harvesting and use of data about South Africa citizens and residents by domestic and foreign private sector companies, however the rules of the game have not been defined.

Below we set out important principles emerging from the underlying research and discussions of the panel in this regard, noting that there are various aspects of data governance policy that require further research:

- In order to enable the development of local markets and capabilities in data analysis and the digital economy, it is essential that regulations do not remove the economic incentive for data to be used by firms, otherwise required investments in this sector may not arise. South Africa's POPI Act, which has been analysed in underlying papers, is comparatively well equipped within its current framing to encompass various aspects of regulation required to protect citizens and enable the development of local capabilities in data collection and use. However, the legislation can be bolstered in key respects including requiring privacy by design and default, conferring greater control over data for consumers, introducing data intermediaries and tools to protect consumers, and ensuring use for consumer benefit.
- Consumer consent is not necessarily an effective tool for ensuring protection of consumers, as the implications and legal aspects of data security and privacy are often not well understood by most consumers. It should also not be assumed that poorer consumers do not care about data protections and privacy, nor should it be neglected that privacy is and will become an increasingly important parameter of competition and consumer choices.
- It is critical that the information regulator is fully capacitated and involved in the development of South Africa's data governance policy framework.
- Data portability and interoperability must be prioritised to ensure competition between players, consistent with developing practice in other jurisdictions. In this regard, a sector-by-sector approach to regulations for data sharing may be the most cautious and practical, as the uses and types of data, and risks with respect to sharing and privacy may differ. Blanket protections for accessing and using consumer data would still exist across sectors through the POPI Act and data governance framework.
- Prioritise regulations for the following sectors in which there is already substantial collection of consumer data: Healthcare, telecommunications; online search and location data; and financial and transactions data.
- Consideration should be given to the development of 'data trusts' as a mechanism for effective data sharing in key sectors, which would ensure that an independent trust oversees the joint usage of data and public-private partnerships, that such collaboration does not violate competition laws in terms of coordination between rival firms, and that consumer data is protected and used in the interests of users.

## **5. Digital competition policy and platform market power in South Africa**

The Competition Commission in its draft digital markets strategy has set out key priorities for intervention, research and advocacy. The key issues identified by the panel that should inform a national policy approach across sector regulators and departments are summarised here.

- Competition policy will not be the answer to all challenges which involve entry, participation and market power in the digital economy. Corresponding industrial policies, and pro-

competitive sector regulation will be required to make sure that emerging digital markets remain open for contestation by entrants, HDSAs and SMEs in particular.

- Given the dynamic and complex nature of digital markets, several other jurisdictions are putting in place specialised digital markets units, and assigning 'strategic market' status to digital markets. Such provisions are necessary in South Africa, although they would cover a different set of firms and markets where there is potential for market tipping and use of data gathered to create or reinforce dominance. To do this, South Africa can use the existing tools within the Competition Act, which is well equipped in this regard, with particular emphasis on the amended market inquiry and buyer power provisions.
  - While there may not be a strong case for the establishment of a separate digital markets 'super-regulator', analysis of digital platforms requires dedicated resources within the competition authorities to monitor mergers, industry practices, market structure, standards, and regulation.
  - Put in place an intra-governmental platform to share information and respond dynamically to changes and issues arising in these markets, perhaps anchored by the Presidential 4IR Commission. Digital markets blur the traditional lines between sectors, and so the platform should at least include regulators in telecommunications, competition, information, consumer protection and financial markets.
  - Making access easier for SME hotels to market on Booking.com, for example, will likely have a greater, more immediate impact than taking on abuse of dominance cases against the major platforms. There is evidence that there is application of most favoured nation provisions in these sectors in South Africa.
  - A key lesson from recent market inquiries is that the ability of the competition authorities to intervene and design remedies to support micro-enterprises, local SMEs, and consumers in less formalised markets or local economies is significantly constrained by the lack of data about these markets, and a lack of digitalisation within these market segments.
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