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ONLINE INTERMEDIATION PLATFORMS MARKET INQUIRY CLARIFICATION ON THE INQUIRY SCOPE

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1. INTRODUCTION

- 1.1. The Competition Commission (“Commission”) published the Terms of Reference of the market inquiry into online intermediation platform services in South Africa (the “Online Platforms Market Inquiry”, “the Inquiry” or “OIPMI”) on 9 April 2021¹. The Commission formally initiated the Inquiry on 19 May 2021 in terms of section 43B(1)(a) of the Competition Act 89 of 1998 (as amended) (“the Act”). The initiation was followed by the release of the Statement of Issues (SOI) along with Requests for Information (RFIs) and an online business user survey. Responses to the RFIs and SOIs were due on 18 June 2021 with some extensions granted to the end of June.
- 1.2. Several stakeholder submissions to the RFIs and SOIs have raised questions as to the precise scope of the Inquiry, in terms of which platforms fall within the scope of the Inquiry and those that do not, based on their reading and interpretation of the Terms of Reference. The Inquiry team has reviewed these submissions and based on that review has identified the need to clarify aspects to the scope of the Inquiry in order to provide stakeholders with greater certainty.

2. CLARIFICATIONS ON THE SCOPE OF THE INQUIRY

- 2.1. The scope of the OIPMI is *not* restricted to platforms that have a physical presence in South Africa only. The scope of the OIPMI *includes* foreign-based online intermediation platforms that have an economic effect in South Africa even if such platforms do not have a physical presence in the country

¹ Government Gazette 9 April 2021 No. 44432

- 2.1.1. The Gazetted Terms of Reference sets out the scope of the Inquiry in paragraph 3 (Scope of the Inquiry) and the following sub-paragraphs. The scope set out in these paragraphs does not specifically exclude foreign-based or international platforms. Whilst the background section under paragraph 2 (and sub-paragraphs) makes occasional reference to platforms becoming concentrated domestically, or to domestic contracting and investment, this is not to the exclusion of foreign or international platforms. International platforms are specifically referred to as well in this discussion (see para 2.13.2) and such platforms will contract with South African business users and customers. Furthermore, international platforms may well be market leaders domestically in areas such as app stores and online travel and accommodation platforms, which is why these are referenced in the SOI (sections 2.2(i) and 2.3).
- 2.1.2. Foreign-based or international platforms that lack a physical presence (for instance through an incorporated entity in South Africa) still fall within the jurisdiction of the Act and hence the Inquiry itself. Section 3(1) of the Act determines that the Act applies to all economic activity within, or having an effect within, the Republic and this jurisdiction has been affirmed by the courts. The inquiry is whether the platform has an effect within the Republic, not whether it has a physical presence. Whilst some types of online intermediation platform may require a physical presence, it is apparent from the nature of digital markets that services can still be provided to consumers and business users domestically without a physical presence. Foreign-based platforms contract directly with South African business users to be present on their platforms and facilitate transactions with South African consumers (as well as with foreign consumers using South African business users). Their economic activities therefore have a direct effect on both business users and consumers within South Africa.
- 2.1.3. Whilst some international platforms have raised the issue of whether the economic effect of the platform within the Republic is substantial or not, in reference to specific Competition Appeal Court decisions around referrals specifically², this is a matter for determination by the Inquiry. Substantiality cannot be determined simply by reference to the share of South Africa in the

² *American Natural Soda Corporation v Competition Commission* 2003 (5) SA 633 (CAC) and *Competition Commission v Bank of America Merrill Lynch International Limited and Others* 175/CAC/Jul19.

overall business of the platform or to the number of transactions taking place. The determination needs to be properly assessed within a context which cannot occur if there is no cooperation around information which provides the Inquiry with a better understanding of the context. For this reason, the Inquiry will require that any international platforms which have an economic effect within South Africa respond to information requests and participate in public hearings if requested to do so. The Act also provides the Inquiry with powers to issue summons in the case of non-cooperation.

2.2. Metasearch engines such as those in travel and shopping verticals fall within the scope of the Inquiry, including those operated by general search engines

2.2.1. Metasearch engines are specialist platforms in a particular vertical (e.g. travel, accommodation, travel experiences, comparative shopping) that are curated and marketed to consumers and which charge business users for click-through referrals or sales.

2.2.2. The scope of the inquiry outlined in the Terms of Reference specifically mentions at paragraph 3.2 that B2C online intermediation platforms include those that facilitate transaction leads between businesses and consumers (such as online classifieds and travel aggregators) fall within the scope of the Inquiry, and it is not required that the platform concludes the transaction itself to be considered a B2C platform. Online classifieds and travel aggregators are also discussed in detail within the SOI (see sections 2.1 (ii) and 2.2(i)). Metasearch and classified verticals have become important in directing consumers to business users in particular categories and therefore expressly included within the Inquiry.

2.2.3. Whilst the Terms of Reference indicates in paragraph 3.3 that the Inquiry will not focus specifically on search and social media more broadly, this is not relevant to metasearch engines which were specifically included under paragraph 3.2. Furthermore, even the lack of focus on search and social media platforms more broadly is subject to two exclusions under paragraph 3.3, namely where 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 (for example Google shopping, accommodation, hotel and flights are considered metasearch verticals themselves by the Inquiry). Metasearch engines are not only expressly included under 3.2 but also engage in referrals to online travel agencies (OTA) and eCommerce platforms and therefore may impact on platform competition from a marketing perspective too.

2.3. Individual proprietors offering alternative accommodation fall within the scope of the Inquiry

2.3.1. There are instances where an individual proprietor provides a business listing on a B2C platform but is not incorporated formally as a business. This occurs most frequently in cases such as alternative accommodation rentals (i.e. rooms, homes or other forms of accommodation that is rented out on a platform) and may also occur in areas such as travel experiences or even used car trading. In these instances, the individual proprietor is effectively operating a business and therefore falls within the scope of the Inquiry, even if they are not legally incorporated and/ or formalised. Furthermore, the platforms which provide such ongoing listings fall within the Inquiry's scope as a B2C platform and are not considered C2C platforms.

2.4. A broader engagement of stakeholders and online businesses is required by the Inquiry even if such stakeholders do not fall within the scope of the Inquiry.

2.4.1. The Inquiry is tasked with determining whether there are any market features in respect of online intermediation platforms which impede, distort or restrict competition and which undermine the purposes of the Act. In fulfilling this mandate, the Inquiry may require information from businesses that fall outside of the scope to the extent that the information is relevant to the Inquiry. The Inquiry requests that such businesses continue to cooperate with the Inquiry in the provision of relevant information.

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