

ANNEXURE 3

E-COMMERCE

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[Introduction]

1. The Final Report Annexure 3 of the Online Intermediation Platforms Market Inquiry (OIPMI) takes into consideration all comments made by platforms, business users and other stakeholders in relation to the Inquiry's provisional findings and recommendation with regards to eCommerce. The report provides the Inquiry's response to these and concludes on the Inquiry's final stance on the issues highlighted in the Provisional Report. The report provides the Inquiry's response to stakeholders' comments on the Inquiry's market delineation and market characterization; findings on the structure and competitive dynamics of the market; platform competition findings and recommendations; as well as business user competition findings and recommendations.

[1. Platform market delineation]

1.1. Findings from the Provisional Report

2. The Inquiry acknowledged different scenarios on the customer journey in the eCommerce space. The Inquiry found that for certain customer journeys, there are cross cutting interactions between Brick and Mortar (“B&M”) stores, their online channels, pure online resellers and platforms from a customer perspective but little to no interaction from a seller perspective. There are however consumer journeys for which there is no interaction with B&M retailers, where the competitors’ set is only pure online retailers and/or the online offer of B&M retailers. From a sellers’ perspective, B&M stores, their online channels as well as pure online resellers are unlikely to be alternatives for the majority of sellers.

1.2. Stakeholder submissions: Views on market delineation

3. The Inquiry’s Provisional Report published for public comments attracted various comments from different stakeholders such as participant platforms, business users, academics and other Competition Authorities. While some stakeholders agree with the Inquiry’s approach, findings and recommendations, some of them do not agree. In this section of the report, the Inquiry briefly highlights comments from these market participants and also articulate the Inquiry’s response to those comments.

█ generally agree with market delineation as described in the Provisional Report and are in agreement with the market characterisation, competitive dynamics and market dynamics detailed in

the Provisional Report.¹ █
█
█
█
█
█.²

5. The Inquiry notes that Takealot, one of the leading platforms, disagreed with the market delineation approach and market dynamics as detailed in the Provisional Report. In short, Takealot contends that:
 - 5.1. The Inquiry’s approach of market delineation is incorrect as it is not the traditional way of defining markets which provides a framework in identifying the immediate competitive constraints and provide the extent of market(s) contestability.³
 - 5.2. The Provisional Report discounts the strength of competitive constraints imposed by range of credible alternatives. In addition, the report did not widely assess existing and potential competitive constraints.
 - 5.3. The report considers the extent to which customers and business users are likely to view potential alternatives like B&M retailers as credible substitutes. Since the report considered that only a small proportion of customers view B&M as an effective alternative, the report concluded that B&M is not part of the relevant market as eCommerce marketplaces. The report should have considered the extent of aggregate customer switching, marginal customers and dynamic customer responses.⁴

1 █
2 █
3 TAL RPR, page 22, para 5.2.
4 TAL RPR, page 27, para 2.27.

5.4. The assessment of the Inquiry is not extensive in relation to the assessment of potential entry and finds that eCommerce marketplaces are not constrained by potential entry on the basis that the relevant market is subject to high barriers to entry and expansion.⁵

1.3. Response by the Inquiry to stakeholder submission on market delineation

6. In this section of the report, the Inquiry clarifies some misinterpreted statements, the Inquiry's approach and assessment of market delineation as detailed in the Provisional Report. On the onset, the Inquiry acknowledges that the broader sector on which this market inquiry is conducted upon is the online retail of goods and/or services. There are however subsectors which are occupied by various market participants, and it is important to distinguish these for the purpose of identifying relevant markets. There are various distribution channels or methods in the eCommerce space. These include among others, Omnichannel of B&M, Pure online resellers, and Marketplace Platforms. All these distribution channels have different characteristics. Marketplaces are multi-sided in nature, one side for customers and the other for business users. This is however not the case with pure online retailers. Below is the list of some channel specific characteristics.

- 6.1. B&M Stores. These are physical stores and their focus and reach are limited to certain regional geographic areas. Their product offering is limited by the floor space. They have a rather prohibitive cost structure.⁶
- 6.2. Omnichannel of B&M. Omnichannel usually enable online sales of products that are contained at a floor space of B&M store. Products are picked from store shelves and delivered to customers. In this

respect, Omnichannel are limited to what is contained at the floor of B&M stores.

- 6.3. Pure online retailers. They are sometimes called Pure Play retailers. Their business model generally involves buying inventory from suppliers, stock their own warehouse to sell to end-users using their online distribution channel (website).
- 6.4. Marketplaces. Platforms connect sellers and customers and provide intermediary services on the same platform. They are viewed to have favourable operational cost structure compared to B&M business model and offer a broad product range. They charge commission fees to business users for facilitating sales and other ancillary fees which include among others, delivery, packaging, marketing fees etc.
- 7. The Inquiry's assessment of market delineation takes into account relevant factors that are generally considered in defining the relevant market. Market delineation assessment for example looked at closeness of competition. This is a standard test for identifying primary constraints and the degree of competition between various market participants.
- 8. In differentiated markets, such as eCommerce, the issue of market definition is quite nuanced and narrower markets are typically preferred to broader ones in most cases. The Competition Tribunal, in WBC decision,⁷ confirms that:

"In differentiated markets, such as this one, it is useful to identify those firms and products that place a competitive constraint on the merging parties' products and services and then rank them based on the magnitude of that constraint. In this regard, identifying close competitors allows the Tribunal to assess the likely effects of a merger without having to definitively conclude on the relevant market".

5 TAL RPR, page 35, para 5.65.

6 Bundeskartellamt.B 2- 55/21. Available at: <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2022/B2-55-21.html>. Accessed on [12 December 2022]. Page 38, Para 124 -125.

7 Competition Tribunal, 27 March 2020, *MIH ECommerce HOLDINGS (PTY) LTD AND WE BUY CARS (PTY) LTD*, Case No. LM183Sep18, p.age 38, para 173.

9. The US Horizontal Merger Guidelines provide a useful synopsis of how such differentiation may be treated within market definition and why narrower markets are typically preferred to broader ones in most cases. In differentiated markets, the focus is most often on closeness of competition when assessing competitive dynamics either for merger control or conduct.

“Defining a market broadly to include relatively distant product or geographic substitutes can lead to misleading market shares. This is because the competitive significance of distant substitutes is unlikely to be commensurate with their shares in a broad market. Although excluding more distant substitutes from the market inevitably understates their competitive significance to some degree, doing so often provides a more accurate indicator of the competitive effects of the merger than would the alternative of including them and overstating their competitive significance as proportional to their shares in an expanded market. Market shares of different products in narrowly defined markets are more likely to capture the relative competitive significance of these products, and often more accurately reflect competition between close substitutes. As a result, properly defined antitrust markets often exclude some substitutes to which some customers might turn in the face of a price increase even if such substitutes provide alternatives for those customers.”^{8,9}

10. The Inquiry’s assessment considered whether marketplaces are constrained from both sides of the market (customer and business user) by different distribution channels. Further, demand and supply side factors have been considered. In reaching its conclusion on

whether other channels constrain and/or are considered substitutable platforms, the Inquiry’s Provisional Report considered several factors that would ordinarily be taken into account when defining the relevant market. For example, the Provisional Report assessed the demand and supply side dynamics between marketplaces and other distribution channels.

11. The Provisional Report however did not explicitly mention or term such assessment as demand and supply side analysis. This may have contributed to some of the analysis being misconstrued or giving the impression that such analysis was not conducted. The assertion that the Inquiry “failed to define the relevant market” and did not consider crucial tests of market definition are therefore unwarranted. Below, the Inquiry provides several factors considered in the Provisional Report that are consistent with market definition assessment.¹⁰

1.4. Demand-side (customer and business user side of the market)

12. In terms of the customer side, the Inquiry considered different customer journeys and preference. Before making a decision to buy online or offline, a customer would consider different factors which include, among others, convenience, choice and urgency. The Inquiry noted cross interaction between offline and online channels.¹¹ Customers may find out about a product online and shop in the local close by B&M outlet. In the same light, they may inspect the product at a local B&M store and purchase it online.¹² However, the fact that a customer has various purchase options at their disposal, does not postulate anything

8 US DoJ and FTC.2010. Horizontal Merger Guidelines issued 19 August 2010, page 8.

9 However, a group of products is too narrow to constitute a relevant market if competition from products outside that group is so ample that even the complete elimination of competition within the group would not significantly harm either direct customers or downstream consumers. The hypothetical monopolist test is designed to ensure that candidate markets are not overly narrow in this respect.

10 This section occasionally refers to a full detailed assessment contained in page 2 to 68 of the Provisional Report (PR Chap 3 - eCommerce).

11 This is detailed in Chapter 3, Page 2 - 4 of the Provisional Report.

12 Further detail on different customer journeys in Chapter 3, Page 15 - 23 of the Provisional Report.

about their functional substitutability, competitive constraints, characteristics and functionalities of distribution channels.¹³

- 12.1. Online might be favourable for various reasons, the seller provides free delivery and handling, the product is not urgent and cheaper online, or the customer is looking for a wide product range which are normally offered by marketplace platforms.
 - 12.2. On the other hand, B&M outlet might be favourable if it is close by, if the product in question is a perishable good, the customers prospective basket of goods is available in the same store or in proximity, if the customer is not familiar with the product and wants a sense of touch and feel before purchase.
 - 12.3. The Inquiry acknowledges that after a decision is made to buy online, the customer would still have to decide which online store to buy from. This decision would be based on several factors including the ease of returns, product range, prices, delivery time and delivery fees among others.
13. In terms of the business user side, the Inquiry notes that business users consider platforms as an important additional sales channel that complements its existing channels.¹⁴ Selling on the platform is therefore not a substitute particularly to B&M and their own online website distribution but a complementary channel. There is no evidence of a B&M store or B&M online channel that shut down due to selling on a platform. This is a complementary offering. By way of example, Makro in South Africa is a well-established B&M store with omnichannel offering but also opened its own marketplace offering. Woolworths is

said to be doing the same in Australia.¹⁵ A decision to sell on a platform is for further reach, increased or broad product category offering and to create an additional rather than a substitute stream of revenue.

14. The non-substitutability of marketplace platforms by other channels is also supported by several factors. For instance;
- 14.1. Established B&M stores with omnichannel are also selling on platforms like Pick and Pay which sells its clothing range on Zando marketplace.
 - 14.2. B&M suppliers' sell their additional range on marketplaces which could not be supplied to physical stores because of space limitations.
 - 14.3. Most business users indicate that they have less or no choice but to sell on marketplaces.¹⁶
15. The Inquiry assessed evidence before it, took guidance from case precedence and approaches from other Jurisdictions and made the following observations in relation to platforms and other distribution channels supply and demand side dynamics.

1.5. Factors considered by the Inquiry in market delineation are also taken into account by other international competition authorities when defining the relevant market.

16. The Inquiry's approach of market delineation is not estranged from the process followed by other jurisdictions. The findings of the Market Inquiry on market dynamics are in line with the outcomes of the similar exercise conducted in different jurisdictions. This explains why some of the findings and recommendations

13 Bundeskartellamt.B 2- 55/21. Available at: <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2022/B2-55-21.html> . Accessed on [12 December2022]. Page 35, Para. 116.

14 Platforms normally have large customer base and this in turn allow business users to access new and greater customer base and achieve incremental sales.

15 Everyday market was launched by Woolworths Group in September 2021. The curated marketplace offers customers access to an extended array of everyday items across many different categories in one convenient place while they are shopping online. Available at: <https://www.prnewswire.com/news-releases/everyday-market-from-woolworths-expands-online-marketplace-with-commerchub-301740806.html>. Accessed [15 March 2023].

16

to some degree resonate with other Antitrust Authorities. For example, [REDACTED] appraised the provisional findings and recommendations and indicated that they are largely coherent with findings made in [REDACTED] and in some other parts of Europe.¹⁷

17. The Inquiry reiterates that its considerations under market delineation encompasses similar analysis that would be undertaken on the traditional approach of market definition, save for the terminology used.
18. What is particularly different from the traditional market definition approach is the Inquiry in its assessment did not necessarily take into account the SSNIP test. The Inquiry did so because it is widely accepted that the SSNIP test is not as informative in multi-sided markets. In this regard, The Bundeskartellamt notes that *"in view of the lack of functional substitutability, even a hypothetical monopolist test (or SNNIP test: small but significant non-transitory increase in price) as, however, carried out and submitted by amazon, is fundamentally not capable of justifying a contrary result i.e. a broader market. Notwithstanding this, the information value of SSNIP test is limited in the present case"*.¹⁸ This is because it is difficult for this test to capture the feedback effects resulting from network effects in the case of multi-sided markets.

1.6. No functional substitutability with other forms of distribution from the demand side perspective

19. The Bundeskartellamt states that the market should be limited to online marketplace

services for "professional sellers" and that other services or forms of distribution are not to be included in the relevant market due to lack of substitutable service.¹⁹ This is due to the following reasons.

20. First, there is less or no substitutability with B&M distribution. Even though business user can reach customers through opening a B&M store, but they will have limited reach and this is not a considerable alternative. This is because it is essential for sellers who sell their products online, and in particular via online marketplaces, to be able to reach customers beyond the catchment area of a brick-and-mortar store.²⁰ Through online and marketplace distribution channels, they can offer and sell their products at least nationwide and thus basically reach a very large number of customers.²¹ Brick and mortar stores, on the other hand, are regularly visited by customers only within a limited geographic radius. For sellers, operating B&M outlet and selling on marketplaces draws significantly different cost structures. For B&M, the operator will need significant investment and operating cost than sales on marketplaces. These costs include among others, renting floor space, staffing and other operating costs. On the other hand, marketplace costs include commissions (only when there is a sale), cost of shipping goods sold, other operational costs like stocking at marketplace warehouse. In this view, B&M and marketplace present a completely different business model with significantly different cost structure and financial risks.
21. In view of this, it can be deduced that sellers who already have B&M sales will generally take up or use online marketplace as a supplement in order to increase their customer reach

17 Comments to the Provisional Report. [REDACTED]

18 Bundeskartellamt. B 2 - 55/21. Available at: <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2022/B2-55-21.html>. Accessed on [12 December 2022]. Page 53, Para 159.

19 Bundeskartellamt. B 2 - 55/21. Available at: <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2022/B2-55-21.html>. Accessed on [12 December 2022], Para 117.

20 Bundeskartellamt. B 2 - 55/21. Available at: <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2022/B2-55-21.html>. Accessed on [12 December 2022], Para 124.

21 Brick and mortar stores, on the other hand, are regularly visited by customers only within a limited geographic radius.

and also to reach customers outside the catchment area of their retail store.²² This is evident in South Africa with Pick and Pay, a well-established B&M brand with an online presence is selling on Zando marketplace. It is because of these reasons that marketplaces are instead viewed as complementary to B&M operators rather than a substitute.

22. Second, there is limited substitutability with sales via own online shop. This is largely because of access to a large customer base. A major advantage of selling on marketplace for sellers is the use of the wide and extended reach that marketplaces have.²³ If sellers were to substitute sales on marketplaces with sales in their own website or online shop, they would have to invest heavily on building their customer base, logistics network and incur significant marketing cost which are often prohibitive. After all, customers would still be likely to shop on the platform as they offer one stop shopping with a broad product category.

1.7. No supply-side substitutability

23. Switching to other different modes of distribution within a short period of time is impractical. For example, for an online shop to switch to offering online marketplace services is difficult and unlikely to be achieved within reasonable time.
24. In South Africa, Makro has attempted to extend their offering by opening a marketplace and their growth in this specific distribution channel is still subdued. Even from the marketing perspective, only a handful of customers and business users know that Makro operate a marketplace. Such conversion required significant investment on IT systems, marketing, and other operational requirements.

25. For sellers that are already selling on marketplaces, it is difficult to switch the sales from marketplaces to supplying other distribution modes like B&M. The Provisional Report does highlight differences and some difficulties in supplying B&M store.²⁴ First, they are constrained by the floor space at the store level. This is not the case with online marketplace. With online marketplace, business users have an option to keep their inventory in their warehouse and dispatch when it is ordered. They also have an option to stock the marketplace warehouse.

1.8. The Inquiry's conclusion on relevant market is consistent with findings from other Jurisdictions.

26. The Australian Competition and Consumer Commission ("ACCC") in their Digital platforms services Market Inquiry defined online marketplaces as a distinct market and particularly noted their unique ability of performing an increasingly significant role in connecting Australian consumers and businesses. The ACCC further noted online marketplaces' role in facilitating or intermediating transactions between consumers and sellers, other online sellers are short of this feature.²⁵
27. The Italian Competition Authority ("ICA") in their investigation against Amazon ascertained that Brokerage services on eCommerce platforms (marketplaces) are provided by the owner and operator of the platform to third-party vendors selling their products on the platform. Considering that Amazon is a two-sided transaction platform, the ICA defined the relevant market on each side of the platform using a multi-market approach.

According to the ICA, the market for the supply

22 Bundeskartellamt. B 2 - 55/21. Available at: <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2022/B2-55-21.html>. Accessed on [12 December 2022], Para 126.

23 Bundeskartellamt. B 2 - 55/21. Available at: <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2022/B2-55-21.html>. Accessed on [12 December 2022], Para 127.

24 PR Chap 3, Page 21.

25 ACCC March 2022. Digital platform services inquiry. Interim report No. 4 - General online retail marketplaces. Available at: <https://www.accc.gov.au/system/files/DPB%20-%20DPSI%20-%20March%202022%20-%20Full%20interim%20report%20-%2031%20March%202022.pdf>. Page 17.

of intermediation services on e-marketplaces is characterised by the absence of demand-side substitutability with other retail channels. The ICA further suggested that B&M sales, sales through proprietary websites, and price comparison services are complementary to eCommerce sales rather than substitutes. The authority argued that, for both consumers and sellers, these are “substantially different sales channels, complementary and not alternative to each other”²⁶

28. Thus, eCommerce transaction platforms were considered to be an independent relevant market. The ICA included all eCommerce marketplaces in this category, both hybrid (such as Amazon, selling proprietary products and third-party products simultaneously) and traditional eCommerce platforms selling solely third-party products (such as Ebay).²⁷
29. The Bundeskartellamt preliminary report, in their case against Amazon, indicated that the product market is the market for the provision of online marketplaces services to professional sellers, namely as one side of multi-sided market for intermediation services via online marketplaces.²⁸ The Authority further specified that a hybrid structure, as in the case of the integrated trading platform operated by Amazon does not eliminate the market relationship vis-à-vis third party sellers and their status as an online marketplace service.²⁹ The sale of product by third party sellers to end customers – and Amazon own retail activity – i.e. the sale of products by Amazon to end customers are presented in an

uniformly integrated form, does not change

the integrated marketplace’s character as an intermediary product.³⁰

1.9. What is the Relevant Market?

30. In assessing competitive constraints in differentiated markets, the focus is typically on closeness of competition rather than necessarily delineating hard boundaries. Closer competitors will exert a stronger constraint on prices and quality than more distant ones, which may not permit a sufficient constraint to prevent price increases or quality degradation.
31. On the consumer-side, the degree of competitive interaction between online retailers and B&M stores depends on the particular customer journey they are undertaking. What is apparent is that this will not be the closest competitor to online platforms given it is not even online. On the business user side, there is limited competitive interaction between online marketplaces and B&M retail, because (a) B&M retailers do not typically offer sellers the opportunity to sell their products in-store for a fee, (b) becoming a distributor for B&M retailers is unlikely given that outlets are constrained by shelf space, historical supply arrangements especially for private-label brands, and other onerous supply requirements, and (c) setting up one’s own physical store is infrequently used by sellers potentially because it involves larger upfront investments and a smaller consumer base, a risk that many entrepreneurs may be unwilling to take.

32. The online channel of B&M retailers may

26 CPI Columns Europe. April 2022. The Italian Competition Authority’s Decision in the Amazon Logistics Case: Self-preferencing and Beyond. Available on: <https://www.competitionpolicyinternational.com/the-italian-competition-authoritys-decision-in-the-amazon-logistics-case-self-preferencing-and-beyond/>. Page 3. Accessed on [12 December 2022].

27 CPI Columns Europe. April 2022. The Italian Competition Authority’s Decision in the Amazon Logistics Case: Self-preferencing and Beyond. Available on: <https://www.competitionpolicyinternational.com/the-italian-competition-authoritys-decision-in-the-amazon-logistics-case-self-preferencing-and-beyond/>. Page 3. Accessed on [12 December 2022].

28 Bundeskartellamt. B 2 – 55/21. Available at: <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2022/B2-55-21.html>. Accessed on [12 December 2022]. Page 28, para 95.

29 Bundeskartellamt. B 2 – 55/21. Available at: <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2022/B2-55-21.html>. Accessed on [12 December 2022]. Page 31, para 104.

30 Bundeskartellamt. B 2 – 55/21. Available at: <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2022/B2-55-21.html>. Accessed on [12 December 2022]. Page 31, para 106.

pose a greater constraint on online platforms compared to the B&M arms of those retailers as they too are able to offer many of the benefits that eCommerce is known for. The online channels of B&M offer even more of the same benefits as pure online marketplaces but are currently nowhere near the same scale and range as that of the pure online marketplaces.

33. From a consumer perspective, there are many similarities between the online channels of B&M retailers and pure online platforms. They offer consumers improved search and to an extent, greater convenience. Unlike pure online platforms, most do not collect returns, with consumers being required to return products in-store. The online channels of B&M stores may also not be in the position to offer the same low prices as pure online platforms that have lower operating costs as B&M retailers are constrained by in-store pricing and so too, the costs associated with running physical retail outlets. Most B&M retailers replicate their full in-store product range online and many B&M retailers have house brands while eCommerce retailers stock a wide range of private-label and other brands.
34. Consumers' decisions on whether to use online channels of B&M stores or pure online retailers will to a large degree depend on the full basket of products they require. Purchasing items from several online channels results in multiple delivery fees being incurred while purchasing all items from an online platform is more cost-effective for consumers.
35. Between online resellers and online marketplaces, the Inquiry is of the view that platforms are among their main competitors. From a consumer perspective, consumers may be unaware whether an online retailer is a marketplace or not. On the other hand, consumers may be aware of and be drawn to the wider range of products and brands available on marketplaces, which may differentiate platforms from pure online resellers. From a seller perspective, pure online resellers obviously do not enable sellers to use their platform to sell products for a fee.
36. Most suppliers with online presence typically sell through online eCommerce platforms in addition to their own online presence and therefore must see those channels as reaching additional consumers to their own online store. Furthermore, even for the large global brands, the online eCommerce platforms are likely to be more efficient distribution mechanisms than their own direct store due to scale in infrastructure including last mile delivery. From a seller perspective, supplier sites are not marketplaces. The own websites of sellers are also unlikely to be able to constrain the online channels of suppliers given that they are typically not well known and usually cannot compete for visibility with suppliers' own websites in terms of ad spend.
37. With respect to the extent to which B&M retailers, their online channels and pure online resellers constrain online platforms, the Inquiry's view is that there may be interaction from a consumer perspective but little-to-no interaction from a seller perspective.
38. In this regard, the Inquiry is of the view that there is a broad online eCommerce market which is distinguished from B&M retail. In addition, there is a narrower separate market for the provision of online marketplace services to business users, that includes hybrid as well as pure online marketplaces.

[2. Market structure and competitive dynamics]

2.1. Findings from the Provisional Report

Findings on Market structure

39. The Inquiry considered both the current market structure as well as the likely future structure of the eCommerce segment in South Africa and found that Takealot is a leading and dominant eCommerce retailer in South Africa. The Inquiry arrived at this conclusion after assessing market participants submissions, included Takealot's own submissions.³¹
40. The Inquiry's view is that the current eCommerce market participants are unlikely to gain significant traction in eCommerce. This is because a reasonable number of eCommerce retailers have no aspirations to become large generalist eCommerce retailers with a wide product category that can rival the likes of Takealot. Secondly, most pure eCommerce retailers don't have access to sufficient capital to grow their presence. Lastly, most B&M retailers with an online channel may not have the appetite to sustain losses over a long period and are likely to continue to focus on a narrow range of products and brands that reflect their on-shelf offerings.
41. Most eCommerce market participants are unlikely to provide a one-stop-shop with a broad product range, making them a more distant competitor(s) to the likes of Takealot. In this regard, the Inquiry found that Takealot will continue to dominate eCommerce in South Africa given the large barriers associated with overcoming cross-network effects and scale advantages.

Findings on Market Dynamics

42. The Provisional Report noted submissions from larger platforms that there are low barriers to entry and expansion in the South African eCommerce space. On this front, the Provisional Report agreed and affirmed that there are many ways in which the barriers to entry have been lowered but there are persistent barriers to competitive entry and large barriers to expansion that have prevented other eCommerce firms from significantly penetrating the eCommerce market and becoming effective competitors.³²
43. The Inquiry suggested that these can be explained by features of the South African eCommerce landscape, cross-network effects and high returns to scale - which make it prone to tipping towards one or two eCommerce retailers. There is evidence of capital constraints and limited multihoming by both business users and customers in the eCommerce industry. The Provisional Report also differentiated between general, specialist and niche eCommerce retailers and concluded that there is competition between participants in within one group and it is not effective across groups.

2.2. Stakeholder submissions: Views on structure and competitive dynamics

██████████, one of the business users, has generally agreed with Inquiry's market characterisation, competitive dynamics, market dynamics.³³

45. Takealot noted that there are different strategies available to potential entrants in

31 PR Chap 3, Para 117.

32 PR Chap 3, Para 76.

33 ██████████

the eCommerce sector where firms in the adjacent markets are readily able to utilize and overcome barriers to entry.³⁴ In addition, existing B&M retailers already impose effective constraints on marketplaces by providing credible alternatives to both customers and many business users/suppliers. Takealot is further of the view that B&M retailers are likely to strengthen the competitive constraint as they leverage on existing infrastructure to expand their offering in eCommerce sales channels.³⁵

46. Takealot indicated that some B&M retailers, including Makro and The Foschini Group have also recently launched eCommerce marketplaces of their own in South Africa by following a different entry strategy to that followed by Takealot.com. These firms have strategized operating without having to develop a significant scale and according to Takealot, this is largely because B&M retailers are able to leverage their existing infrastructure and capabilities to begin fulfilling sales on behalf of business users on an effective and efficient basis, whereas Takealot had to develop such infrastructure and capabilities from scratch.^{36,37}

2.3. Response by the Inquiry to stakeholder submissions on structure and competitive dynamics

47. The Inquiry assessed submissions made by stakeholders on market structure and competitive dynamics in the eCommerce industry and made the following observations.

2.3.1. Barriers to entry and expansion

48. The Inquiry agrees with submissions that Barriers to entry have come down overtime.

In fact, there are barriers to entry that were faced by first movers like [REDACTED] and others. These hurdles include among others, low internet penetration at the time and less customer trust and comfort in shopping online. These have been neutralised overtime.

49. The Inquiry however is of the view that there are still some barriers to entry like substantial capital requirement, extensive delivery network and appetite and the ability to fund short to medium term losses particularly because most online retail channels are still not profitable despite a considerable number of years of service. Some market participants that are backed by well-established corporate groups are still unprofitable.

50. The Inquiry strongly holds a view that there are significant barriers to expansion in this industry. One significant barrier to expansion is customer acquisition. On entry, eCommerce firms struggle to get both organic traffic and direct traffic because they are not known. In order to attract customer eyeballs, they have to incur huge marketing costs and be on paid search and consistently enhance their Search Engine Optimisation ("SEO") which has prohibitive costs.

51. Takealot has contended that small eCommerce firms can grow by making use of facilities such as Shopify. The Inquiry is of a view that Shopify in its current form simply assists in setting up an eCommerce platform and cannot assist in overcoming the customer acquisition and logistics elements.

52. There is no doubt that there are considerable hurdles in order to grow and become a comparative or competitive marketplaces service provider. Last mile delivery network

34 TAL RPR, Page 35, Para 5.66.

35 TAL RPR, Page 36, Parag 5.74.

36 TAL RPR, Page 37, Para 5.75.

37 Other example of firms utilizing different entry model include grocery delivery service providers like, Checkers Sixty60, Pick n Pay ASAP and Woolies dash. In addition, Takealot submit that other businesses have the ability to leverage existing infrastructure and capabilities like partnership between Uber Eats and DJ Zinhle for selling Jewellery and have further plans to open a "virtual mall".

has a need for scale and efficiency, and it comes at a heavy cost. Makro to date is still working around the clock to optimise its delivery network, after having been in the market for almost over 8 years.³⁸

53. The Inquiry is of the view that B&M players with an online channel fulfil orders from their shelves and are unlikely to significantly broaden their product ranges or categories that they currently purchase and stock.³⁹ While other market participants including eCommerce service provider can enter the marketplaces service provision market, the Inquiry is of the view that there are considerable barriers to expansion. These include appetite to take losses for a considerable period. Takealot became profitable just recently after having invested significant amount of capital at the back of its parent company, "the Naspers Group". New entrants will also need to scale up both sides of the market and the number of transactions to reach critical mass.
54. The possibility of any new entry to reach a competitive state and critical mass in South Africa is not feasible in the short term, save for the anticipated⁴⁰ entry of Amazon. The likely entry of Amazon does not change the view of the Inquiry as currently Takealot remains the dominant marketplace on which sellers are dependent. That dependency could change over time, but that is speculative at this juncture. Moreover, Amazon faces many similar complaints in other jurisdictions which suggests that the fair treatment of marketplace sellers is unlikely to be a point of

competition that removes these impediments to seller competition if it were to enter.

2.3.2. Limited multi homing as a result of differentiation among eCommerce retailers

55. There is limited multi-homing of business users in the eCommerce industry. The evidence before the Inquiry indicates that some of the large established business users multi-home but are dependent on the Takealot platform.⁴¹ Small and medium sized business however do not multi-home. It is not surprising that a large number of business users do not multi-home. This is because of focus segmentation in the eCommerce industry. The Provisional Report details different kind of eCommerce services in South Africa ranging from generalist, specialist, and niche. Product categories and focus there are not the same and this limit switching opportunities at a business user level.
56. As indicated on market delineation, it is difficult for marketplace business users to supply B&M because of limited floor space. This means there is limited multi-homing between online and physical distribution channels. Makro for instance is a generalist marketplace, however, it has rather specific requirements that may limit business users from selling on their platform. Makro largely allows those that supply their B&M store to extend their products on to the marketplaces, and to qualify as a business user, sellers must also provide a certain number of items on to the marketplace.

38 BUSINESSSTECH 21 June 2022. Makro owner making big grocery delivery push in South Africa - and it has a key advantage. Available at: <https://businesstech.co.za/news/technology/598768/makro-owner-making-big-grocery-delivery-push-in-south-africa-and-it-has-a-key-advantage/>. Accessed [02 March 2023].

39 Massmart, OS. Page 10 and Page 39.

40 Anticipated date of entry of Amazon in South Africa (Amazon plans to expand into South Africa in early 2023 - leaked documents | Business Insider).

41 [REDACTED]

[3. Platform competition issues]

3.1. Findings from the Provisional Report

57. The Inquiry made the following provisional findings in respect of eCommerce platforms;

- 57.1. Narrow price parity clauses by the leading platform impedes potential competition from the marketplace seller's own direct channel on price, increasing dependency, and disincentivises sellers from price differential across eCommerce platforms to the detriment of platform competition.
- 57.2. The widespread but declining subsidisation of products through pricing below variable costs have distorted competition for capital-constrained platforms and more so for start-ups.

3.2. Stakeholder submissions: views on structure and competitive dynamics

Narrow price parity

58. Market participants have argued that the narrow price parity clause has nothing to do with free-riding. There is a suggestion that if Takealot was concerned about free riding, they would simply restrict seller from using their own business name or remove seller website in their platform so that customers cannot reach that site through the platform.⁴² In addition some business users use generic names on the platform and customers cannot use this piece of information to find business user behind the sale on the platform. Any possibilities of redirecting end users from

the platform to "own website" are therefore dubious in this regard.

Takealot submissions

59. **Narrow price parity:** Takealot suggests that since there are only two platforms with price parity clauses in place in South Africa, there is therefore no plausible mechanism through which Takealot's narrow price parity clauses can have an adverse impact on competition between eCommerce marketplace platforms. Consequently, Takealot's parity clauses have no impact on overall price competition, as it is shown in the Provisional Report, the removal of such a clause would only result in a small proportion of the marketplace sellers reducing prices on their own websites.⁴³ Takealot contends that unless marketplace sellers' own website constitute a substantial proportion of the market, narrow price parity clauses do not restrict pricing over a sufficiently large proportion of the market to dampen price competition.⁴⁴

60. Takealot indicated that price parity clauses can also give rise to significant efficiencies that are both pro-competitive and enhance the opportunities available to marketplace sellers relative to the counterfactual, for instance the reduction of customer search costs by allowing customers to compare prices more easily for a product across the market, protection of the credibility of the platform by ensuring that the same product, supplied by the same marketplace seller, cannot be purchased at a lower price on the

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43 In view of this small proportion responding to the removal of a price parity clause by reducing prices on their own websites indicates that it is unlikely that such clauses have a limiting effect on own marketplace seller sales and raise their dependency on platforms.

44 TAL, RPR, Page 44, Para 7.4.

marketplace seller's own website.⁴⁵ Moreover, price parity can potentially prevent free-riding by marketplace sellers on the platform's investment and marketing expenditure and keep continuous investment by platforms going.

61. Takealot further provided that the analysis on the removal of price parity conditions by Amazon in Europe and US using annual growth rates in the platform's sales fails to account for a number of confounding factors that are likely to have affected Amazon's sales absent any changes in its price parity conditions including growth in overall eCommerce sales over the period. This is contextually different in which Takealot operates in South Africa with a different context on consumer behaviour and preference.

62. **Below cost pricing:** On the onset, Takealot recited that *"the Provisional Report found that Takealot has used below variable cost pricing quite extensively in building its platform and that it has now decreased and that this conduct now needs to be considered predatory in nature if it continues to occur"*.⁴⁶

63. The Provisional Report outlines the strategy adopted by Takealot is to foreclose rivals through pricing below costs. Takealot argues that these findings are unsubstantiated and misguided as there is no reliable evidence or robust analysis presented. Takealot further argues that the conduct is consistent with healthy pro-competitive pricing that directly and substantially benefits consumers, and stakeholders, which should be encouraged, not condemned or potentially even prohibited. This is because Takealot holds a view that low-cost pricing is fundamentally pro-competitive and gives rise to the benefits

to consumers and business users and reflects intense competition and should be encouraged as its practice in new industries with evolving business models attempting to grow and drive innovation and investment.⁴⁷ In this regard, Takealot indicated that the conduct is fundamentally pro-competitive.⁴⁸

64. In addition, Takealot argued that the pricing conduct is consistent with a "loss leader" strategy.⁴⁹ This is a global, pro-competitive pricing strategy engaged in by millions of retailers around the world, in terms of which certain key products are sold below cost in order to draw in customers that then go on to purchase a basket of other products from the retailer (or, in this case, the platform).

65. Without admitting the alleged conduct, Takealot submits that even if there was strong evidence that it is sacrificing its profit in the short-term, there is no realistic prospect of the firm being able to recoup losses in future as they will continue to face competition from established rivals as well as new and emerging platforms.

3.3. Response by the Inquiry to stakeholder submissions on structure and competitive dynamics

66. The Inquiry considered submissions in relation to platform competition issues. In the section below, the Inquiry responds to some topics which were discussed at length by various parties.

3.3.1. Narrow price parity

67. There are generally two sets of price parity obligations. These are wide parity obligations and narrow price parity obligations. The

45 TAL, RPR, Page 45, Para 7.7.

46 TAL, RPR, Page 38, Para 6.1.

47 TAL submits that low prices should be considered predatory only when they are so low that they could only be considered rational if they were designed ultimately to eliminate or deter competition, thereby enabling the predator to achieve or maintain some degree of market power, and subsequently raise prices in future, so as to recoup its upfront losses.

48 TAL, RPR, Page 38, Para 6.4.

49 TAL, RPR, Page 41, Para 6.16.2.

Provisional Report indicated that there are no wide price parity obligations in the South African eCommerce industry but for narrow price parity obligations.⁵⁰

68. The CMA Vertical Agreement Block Exemption treats wide parity retail obligation as a hardcore restriction. The CMA further notes that under certain conditions, in particular where competition at the intermediation level is limited, narrow retail parity obligations may harm competition by (i) replicating the effects of wide retail parity obligations or (ii) lessening or eliminating competition from the direct channel.⁵¹ Such conduct may allow intermediaries to maintain a higher price for their services, leading to higher retail prices for the intermediated products on all sales channels.
69. Save for wide parity which the CMA treats as a hardcore restriction, the vertical agreement block exemption applies to all other types of parity obligation in vertical agreements, provided the market shares of the supplier and the buyer do not exceed 30%.⁵² In circumstances where the supplier exceeds the 30% threshold, on individual cases, an assessment would be required to determine relevant factors which include among others, the market position of the intermediary imposing narrow parity, the size of indirect sales channel, the substitutability of the direct channel and intermediaries and whether the restrictions are imposed by multiple intermediaries (cumulative effects).⁵³
70. Takealot in their submission also argue that unless marketplace sellers' own websites constitute a substantial proposition of the

market, narrow price parity clauses do not restrict pricing over a sufficiently large proportion of the market to dampen price overall competition.⁵⁴

71. Takealot seems to be focusing on price competition and distortions between the platform and the business users' own website or distribution channel. The Inquiry's view is that narrow parity distortions not only manifest in price competition limitations but can also negatively affect business user growth on their own online distribution channels. For example, if customers know about the presence of narrow parity obligation between the platform or any other intermediary service provider and a seller, customers will have less incentive to visit the seller's website because they will automatically know that prices are the same. There is no price competition between the platform and seller's online offering as per narrow price parity provisions. The customer will instead have an incentive to shop on the platform to take advantage of wide product range, get a basket of products from different sellers which will get delivered all at once. Sellers's in this regard are deprived of an opportunity to showcase some of their products that are not listed on the platform, because customers will generally lack incentive to visit their website. This on the other hand increases marketplace seller dependency on the platform as it becomes the only viable distribution channel.
72. In addition, narrow price parity obligations can unnecessarily increase the selling price of an item on business user own online distribution channel because of distinct

50 PR Chap 3, Page 83 - 91.

51 CMA Vertical Agreements Block Exemption Order. 12 July 2022. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1091830/VABEO_Guidance.pdf. Para 10.164. Accessed on [20 December 2022].

52 CMA Vertical Agreements Block Exemption Order. 12 July 2022. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1091830/VABEO_Guidance.pdf. Para 10.163. Accessed on [20 December 2022].

53 Where a significant share of sales takes place through the direct channel and, where narrow retail parity obligations are imposed by multiple intermediaries, these clauses are more likely to replicate the effects of wide retail parity obligations.

54 TAL, RPR. Page 44, Para 7.4.

cost drivers between the platforms and own online channel. There are instances where a price can be relatively cheaper on the business users own online distribution channel. The narrow price parity has the effect and the ability of increasing prices on business users own channel as a result of cost drivers that are only applicable for selling on the platform. For example, if the cost of selling product A on the platform increases as a result of transactional costs and inefficiencies which are outside business users control, business users can either respond to this by absorbing costs and forgo its profit or increase the price of product A.

73. In the event the business user opts to increase the price on the platform and adhere to narrow price parity provisions, the business user would have to increase the price of product A in their own online distribution channel even though the transaction cost(s) in their own channel remained the same. In addition, business users normally factor in soft return policy costs in their pricing model for selling on the platform. This will again unnecessarily increase the price in their own distribution channel if they oblige to narrow price parity clauses.
74. Takealot has on many occasions provided that price parity clauses can also prevent potential free-riding⁵⁵ by marketplace sellers on the platform's investments and marketing expenditure to attract consumers, and thereby protect the platform's incentives to continue undertaking such investments to the benefit of all marketplace sellers. The Provisional Report found that the potential for free-riding by marketplace sellers is not significant and cannot be used as a defence or justification of narrow price parity.
75. Business users are of the view that if Takealot was concerned about free-riding as they explain it, then they would easily be able to simply restrict a marketplace seller from using their own business or website name as their display name on the platform.⁵⁶ Business users argued that this is the only piece of information a customer can possibly use to access the website of other business user distribution channels. In addition, a business user submits that in their experience, a big majority of marketplace sellers on the platform do not even use their business name as their display name, and rather use a generic name.⁵⁷ Therefore Takealot's concerns regarding free-riding are not justified. This is consistent with the findings of the Provisional Report that consumers may not even be aware of the seller's own sales channels and that even if customers were aware of these, it would take some effort to first find sellers' websites.
76. Business users argue that Takealot is the one that benefits from free-riding, as customers would often contact sellers to assist with product support, a department where Takealot is said to be severely lacking. Business users provide the requested value-added service free of charge, even when the customer purchased the product from Takealot retail. In this respect, Takealot is in fact the one that is free-riding off of the services of their marketplace sellers.⁵⁸
77. During the Public hearing, Romtech indicated that if a seller has a strong brand, then customers would buy from their site regardless. In addition, they indicated that they often get customers contacting the seller directly to list their product on Takealot so that they can purchase it on the platform.⁵⁹ In this regard, there is no credibility on the

55 TAL, RPR. Page 45, Para 7.8.

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57

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59 Romtech, OS, page 26.

suggestion that there could be any significant free-riding by sellers. [REDACTED]

[REDACTED].⁶⁰ There is little to no-incentives for customers to go direct onto the seller's website especially for small brands or SMME's. [REDACTED] is of the view that customers do not visit or check other websites to compare prices but prefer to buy from the platform.⁶¹

78. In their response to the Provisional Report, Takealot disagreed with the Inquiry's assessment of Amazon performance post the removal of price parity conditions by Amazon in Europe and the US on annual growth rates in the platforms sales and evidence regarding the impact of the price parity provisions on free-riding.⁶² Takealot however did not provide any counter assessment, economic analysis or evidence. Nor has Amazon for that matter. In addition, Takealot has not provided any evidence of free-riding on the platform by marketplace sellers. The Inquiry, hence, views their submission as purely speculative and unfounded.

3.3.2. Below cost- pricing

79. Takealot has submitted that prohibition of low-pricing conduct will not only harm effective competition but consumers and business users as well.⁶³ Takealot holds a view that this conduct is pro-competitive.

80. The Provisional Report found that Takealot used below variable cost pricing quite extensively in building its platform and that this has decreased overtime. Nonetheless,

the Inquiry is of the view that this conduct needs to be considered predatory in nature if it continues to occur.⁶⁴

81. With respect to below cost pricing conduct, Takealot submits that the evidence presented in the Provisional Report shows that the extent of below-variable cost pricing is limited and occurs in respect of only a small sub-set of the products it sells. Takealot further notes two points. First, the extent of below-cost pricing is limited and declining. Second, Takealot's pricing conduct is entirely consistent with a so called "loss leader" strategy.⁶⁵ The Inquiry and Takealot are not far apart in that they both agreed and confirm the existence of below variable cost pricing in some product categories and that the conduct has reduced substantively in scale and scope over time.⁶⁶

82. As a matter of platform competition with cross network effects, aggressive pricing strategy is important for growing the platform in the short to medium term.

83. The Inquiry used Takealot data to assess below cost pricing conduct. The Inquiry's assessment was subsequently shared with Takealot after the publication of the Provisional Report. It is important to note that Takealot has not provided any new evidence or data to object the Inquiry's assessment and finding or to prove their submission on below cost pricing. Takealot in this regard are making assertions without providing any new evidence. The Provisional Report details the Inquiry's assessment and results.

84. The Inquiry is of the view that Takealot has been aggressively pricing in the past and has

60 [REDACTED]

61 [REDACTED]

62 TAL, RPR. Page 38, Para 7.11.

63 TAL RPR, Page 38, Para 6.3.

64 PR Chap 3, Page 93, Para 196.

65 Takealot explains the "loss leader" strategy as a ubiquitous, pro-competitive pricing strategy engaged in by millions of retailers around the world in term of which certain key products are sold below cost in order to draw in customers that then go on to purchase a basket of other products from the retailer.

66 TAL, RPR. Page 40, Para 6.15.

shown positive profits recently. At this stage, there is no casualty that is directly linked to this conduct. The Inquiry in this respect is not inclined to conclude that such conduct resulted in anti-competitive outcomes. However, this conduct has negative impact on entry and expansion of SME platforms and hence the conduct must cease.

3.3.3. Takealot market power is manifested in its behaviour and conduct(s)

85. Takealot argued that the Inquiry overly relied on skewed market share to show its dominance and market power. The Babelegi judgment indicated that market shares assessment is not in itself the only way to determine market power. The Judgement particularly stated that as a matter of economics, the firms actual conduct can be used as a proxy to assess market power.⁶⁷ In particular, the Competition Appeals Court (“CAC”) provided that the test for dominance for a firm that has less than 35% share of the defined market is that it has market power; that is ‘the power to control prices or to exclude competition or to behave in an appreciable extent independently of its competitors, customers and suppliers’.⁶⁸

86. The CAC found that even though Babelegi had less than 35% market shares in their market, the firm had market power given its behaviour and the ability to behave independently of its competitor, customers, and supplier.⁶⁹ Features and elements of market power assessment are evident in how Takealot has conducted itself or behaved in the recent past.

87. A number of new complaints were received by the Inquiry subsequent to the publication of the Provisional Report and during the drafting stages of the final report. Below, we discuss the complaints and some responses received from Takealot were it had an opportunity to provide its views on the allegations made.

87.1. [REDACTED] has alleged trademark infringement against its brands listed on the Takealot platform. The seller submits that Takealot allowed other third-party sellers and possibly its own Retail Division to fulfil orders under its product listings which reflects their pictures and brand description. Most of the “unauthorised” sales were returned by customers as the product delivered did not match the pictures or description on the Takealot website and allegedly of a lower quality.⁷⁰ A complaint was lodged to Takealot’s Seller Compliance Department, in response Takealot stated that it is indemnified and in full ownership of all imagery and product listings on its platform.⁷¹ Following these “unauthorised” sales, the seller observed a significant decline in revenue and is contemplating removing all its listings from Takealot. Furthermore, the seller indicated that it was unable to sell on lead-time or physically replenish any products after it was disabled from the platform.⁷²

87.2. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

67 Babelegi CAC Judgement para 22. Case number: 186/CAC/JUN20. Available at: <http://www.saflii.org/za/cases/ZACAC/2020/7.pdf>. Accessed on [27 February 2023].

68 Babelegi CAC Judgement para 50. Case number: 186/CAC/JUN20. Available at: <http://www.saflii.org/za/cases/ZACAC/2020/7.pdf>. Accessed on [27 February 2023].

69 Babelegi CAC Judgement, para 22. Case number: 186/CAC/JUN20. Available at: <http://www.saflii.org/za/cases/ZACAC/2020/7.pdf>. Accessed on [27 February 2023].

70 [REDACTED]

71 The seller submits that Takealot claimed to have the right to use its listings how it deems appropriate. However, the seller submits that customer terms and conditions state that Takealot is not responsible for the product listings but third-party sellers are. [REDACTED]

72 The seller suspects that unauthorised sales were still ongoing – Takealot potentially creating fake accounts and fulfils orders.

[REDACTED]

87.3. [REDACTED] in its continuous communication with the Inquiry submitted additional complaints on Takealot’s conduct with regards to product gating were Takealot approached a supplier after it had lost the Buy Box for two separate product items.

The supplier was not forthcoming with further information on being approached by Takealot but stated that it received the information from its own internal team in Takealot.⁷⁶ The supplier argued that its query was on whether [REDACTED] was selling products sourced from it on the Takealot platform as this would be in contravention of its terms and conditions. Although [REDACTED] had agreed and adhered with the terms and conditions, it is of the view that they are in fact anti-competitive as the terms do not permit sellers to advertise or sell products on any third-party website or marketplace. Sellers are only allowed to advertise and/or sell products on their own personal website.⁷⁷

87.4. [REDACTED] submits that although the supplier denies this conduct, it has experienced the same conduct from multiple suppliers where they are informed of Takealot displeasure when losing a Buy Box telephonically. Some of the [REDACTED] products were disabled on the Takealot platform since 28 November 2022, around the same time it won the Buy Box.⁷⁸

87.5. Unjustified returns and long resolution times that are burdensome for marketplace sellers continue to be a persisting issue brought forward by marketplace sellers.

[REDACTED]

73 [REDACTED]
74 [REDACTED]
75 [REDACTED]
76 [REDACTED]
77 [REDACTED]
78 [REDACTED]
79 [REDACTED]

[4. Seller Competition and Treatment]

4.1. Findings from the Provisional Report

88. The Inquiry made a range of findings in respect of seller competition and treatment. As detailed in chapter 9⁸⁰ of the Provisional Report, the Inquiry found a range of conduct by Takealot which distorts competition on the marketplace in favour of Takealot Retail side of the business. These include:

- 88.1. Product gating by Takealot which is not at the supplier behest, which removes direct sellers on the platform, enabling potentially higher prices of fewer, less generous, promotions to the detriment of sellers and customers.
- 88.2. The use of seller data by Takealot buyers to inform their own retail offering on the marketplace, expropriates and undermines innovation and risk-taking by marketplace sellers to the detriment of competition and consumer welfare.
- 88.3. The pressuring of suppliers where Takealot is outcompeted, resulting in the raising of price by suppliers or by sellers threatened with non-supply, which distorts competition and raises prices to customers.
- 88.4. Takealot retail benefits from the use of unsold promotional display inventory and has a higher acceptance rate for application to run promotions on the platform.
- 88.5. The Buy Box algorithm favours Takealot as it displays the cheapest in-stock, not cheapest overall, and almost all Takealot retail is in its warehouse and therefore in-stock, unlike marketplace sellers that have more restricted warehouse space.
- 88.6. Marketplaces sellers are not permitted to offer 'unboxed deals' which permits

Takealot Retail to clear returned stock and recoup a higher portion of the value. Takealot raises marketplace seller rival's cost through the lack of a speedy dispute resolution process in case where sellers incur the ongoing costs from lack of resolution.

4.2. Stakeholder submissions: views on seller competition and treatment

The Buy Box

██████████, one of the business users provided the Inquiry with information practically illustrating that Takealot does restrict business users and determine which products may and may not be sent to Takealot distribution centres.⁸¹ The reason provided by Takealot is often classified as "other" which does not provide the exact reason for rejecting replenishment. The illustration provided by the seller was for the item in competition with Takealot Retail.⁸² The marketplace seller submitted that Takealot made changes to the Buy Box algorithm on the 30th of June 2022 that results in Takealot interfering with business user pricing. Market participants also provided those changes reflects "a requirement to have a product in-stock at the cheapest price (as before) or at a 30% discount to the cheapest in-stock item to win the buy box".⁸³

Product gating:

90. Market participants have disputed that Takealot gets into gating arrangement at suppliers' behest. It points out to a previous

80 PR Chap 9, Page 20.

81 ██████████

82 The seller portal error message read "offer blocked for replenishment for the DC due to other".

83 ██████████

incident where one brand was gated on Takealot platform, but supplier of the brand did not request or impose gating arrangement with Takealot for the relevant brand. The brand in question has since been made available to all sellers. In addition, the marketplace seller submits that Takealot assertion that suppliers do not want to commit to a gating arrangement in writing should not be accepted.⁸⁴

Raising costs of sellers:

91. One way, amongst others, in which Takealot raises costs for sellers is inefficiencies around returns, the "soft" return policy, inefficiencies at distribution centres and unresponsive service process. This however does not only increase costs but prices too. Buy Box requirement of stocking at the warehouse can also drive costs up for business users.

Takealot Submissions

92. **Buy Box:** According to Takealot, the Provisional Report incorrectly attributed warehouse storage as costs that marketplace seller bears as it has made an effort to provide marketplace sellers with free warehousing for certain product on a defined basis (i.e., no cost in Takealot warehouse if marketplace sellers maintain stock for over 35 days at the measurement date each month).⁸⁵ Other sellers that apply stock management can stock items in Takealot warehouses at no charge indefinitely if they do not exceed the stock limit, those sellers that do the opposite are charged. Takealot disagrees that the self-preferencing outcomes based on Takealot Retail having access to more warehousing space at a lower cost, as it is also available to marketplace sellers.

93. **Platform specific exclusivities and Product gating:** Takealot highlighted that there could be a misalignment between the Inquiry and itself as to how "gating" is defined and the Inquiry's concern around absolute exclusivities. Takealot Retail confirms that it does not discuss or initiate any discussions with suppliers in this regard. It submits that suppliers are the ones that initiate such discussions.⁸⁶

94. **Raising the cost of sellers:** Takealot states that there is no basis for the Inquiry to suggest that some fees be waived because they are not justifiable. Takealot is of the view that it should be permitted to recover its fixed costs and not doing so might open it up to the accusations of predation. Takealot highlights that it does not fully recover returns from sellers and hence bears the costs.⁸⁷

95. In addition, the choice to leave the Takealot platform cannot be pinned only to high fees as some (minority) sellers may leave due to the inability to offer good products or lack of business skills. Takealot submits that the Inquiry failed to provide substantial evidence to conclude that Takealot fees are exploitative, as such the Inquiry should explicitly state that Takealot is not charging unjustifiable fees.

96. **Imposing costs outside sellers' control and unresponsive service processes:** On this issue, Takealot states that it is a consumer-focused organisation and its lenient returns policy that may be seen to be beyond the basic requirements of the Electronic Communication and Transactions Act ("ECT") and Consumer Protection Act ("CPA") are entirely pro-competitive. Marketplace sellers who are not open to be consumer friendly have other alternatives and those sellers that choose to remain because of the rewards of

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85 TAL, RPR, Page 53, Para 7.47.2.

86 TAL, RPR, Page 58, Para 7.71.

87 TAL, RPR, Page 59, Para 7.77.

the policy show that the platform brings them more benefits than any potential costs.⁸⁸

97. Takealot acknowledges that there is work to be done on its turnaround times in relation to return complaints and there is a need for more work to be done due the unprecedented growth of its marketplace. The Inquiry based its statement that Takealot is unresponsive on a single seller out of a total of [REDACTED]. The small number of complaints represent a small fraction of the total number of returned items.
98. **HDPs:** The Inquiry notes that Takealot did not make substantial comments regarding issues facing SMMES and HDP seller. According to Takealot, this is because the redacted vision of the Provisional Report made it impossible to comment.⁸⁹

4.3. Response by the Inquiry to stakeholder submissions on seller competition and treatment

99. The evidence before the Inquiry indicates and confirms that marketplace sellers are dependent on the Takealot platform although Takealot has repetitively disagreed with the concept of marketplace seller dependency on the platform. Marketplace sellers have indicated that they are dependent on Takealot platform.⁹⁰ In addition, marketplace sellers have firmly stated that sales generated from Takealot platform cannot be substituted by any marketplace and that none of them compare even close to Takealot.⁹¹ These are the submissions from largest sellers on the platform and the Inquiry believes that the dependency for medium and small size sellers is even greater. There are no doubts

that marketplace sellers are dependent on Takealot given their customer base which enables business users to expand their market reach.

100. During public hearings, market participants indicated that Takealot is a dominant player in eCommerce and that they are dependent on the Takealot platform.⁹² Again, these are submissions from large sellers on the platform.

4.3.1. Self-preferencing (buy box, promotions, search algorithm, display advertising and brand stores)

101. With regards to the Buy Box, evidence show that Takealot does not prominently show the cheapest offer. As it stands, the Buy Box prominently displays the cheapest offer in-stock, or the fastest.⁹³ There is no evidence that customers prefer the fastest over cheapest. In addition, Takealot Retail wins the Buy Box more often largely because most of their products are in-stock unlike third party sellers.
102. One business user provided the Inquiry with an illustration where an item/product in competition with Takealot Retail was priced at cost price but still did not win the Buy Box as they were not in-stock. Given the recent changes of pricing at 30% discount to the cheapest in-stock item in order to win the Buy Box, this implies that lead-time sellers could be forced to price below cost in order to win the Buy Box, which is not practical. The illustration indicated that the seller priced this item cheaper than Takealot Retail (cost price plus VAT) but did not win the Buy Box. The Inquiry believes that this is not sustainable

88 TAL, RPR, Page 62, Para 7.93.

89 TAL, RPR, Page 63, Para 7.100.

90 [REDACTED]

91 [REDACTED]

92 Romtech OS, Page 27 and Elite Shopper, OS, Page 26.

93 Where the item is kept in Takealot warehouse which enables fast delivery as opposed to lead-time delivery. With lead-time delivery, the item is kept at sellers' warehouse and it needs to be dispatched to Takealot warehouse after a sale for delivery. In this regard, on lead-time delivery item may be the cheapest but certainly not the fastest delivery.

especially for SMEs and it impedes their ability to compete for the Buy Box unless they agree to incur extra storage costs at distribution centers in order to be eligible to compete for the Buy Box. Factoring in storage cost in their pricing model might practically make them expensive to compete for the same Buy Box. Lead time marketplace sellers are therefore stuck in this 'virtuous' Buy Box predicament.⁹⁴ It is because of such circumstances that the Inquiry believes it is fair to prominently show both cheapest in-stock and lead-time.

103. The Buy Box must be inclusive, business users need this facility because an overwhelming majority of customers click and/or purchase products shown in the Buy Box. The Bundeskartellamt found that the Buy Box has a significant impact on whether the seller is economically successful or not with the sale of the respective product on the Amazon marketplace. This is because 80% of all transactions on the Amazon eCommerce platform are initiated via the Buy Box. Estimation by other market participants were around the figure of 90%.⁹⁵
104. There are no doubts that by deciding which seller offer qualifies for the Buy Box, and placing the Buy Box in a prominent position, can significantly influence the customer buying decision. In the competition for customer's selection decisions, it is therefore crucial for third party seller to fulfil the criteria that are decisive for occupying the Buy Box in the best possible ways.
105. This also means that by virtue of setting the criteria and controlling the ranking and selection process, Takealot can exert considerable influence on the sales activities

of the third-party sellers. This may favour those who are in-stock in various ways. First, it enables them to qualify for the Buy Box because being in-stock is one of the requisites. Second, Takealot require sellers to have a certain number of sales for a specified period in order to qualify for other services like replenishment or discounted storage fees. Marketplace sellers that are on lead-time are not subject to these benefits.

106. Where the price parity obligations are observed, competition for the Buy Box has a potential of influencing prices on other distribution channels. For example, where business users lower their selling prices as they aggressively compete for the Buy Box, the narrow price parity obligations may dictate that the price is also lowered on their own distribution channel.
107. Business users have alleged that through engagements with Takealot, they have agreed that they will not create any duplication of items on marketplace (items that are trading against Takealot Retail) and that the Buy Box must be retained by Takealot Retail. Takealot can block a business user if Takealot is having issues on their Retail side of the platform. There are however no restrictions on listing on marketplace if the Takealot Retail account is no longer active.⁹⁶
108. It is observed that Takealot has power and control over trading activities on the platform. Business users tend to accept this conduct and opt to focus on supplying Takealot's Retail arm of the Takealot business instead. Where there are instances of duplication, it is on business users' interest to price slightly higher on the marketplace so as to not upset Takealot Retail buyers.⁹⁷

94 A virtuous predicament of not stocking the warehouse, charge a lower price and not win the Buy Box because they are not in-stock. They stock at the warehouse and factor in storages fees in their selling price, only for them not to win the Buy Box because of pushed up selling price.

95 Bundeskartellamt.B 2- 55/21. Available at: <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2022/B2-55-21.html> . Accessed on [12 December 2022]. Page 151, Para 450.

96

97

4.3.2. Raising costs of sellers and driving seller price up (previously pricing interference). (more and higher fees, sponsored ranking, Imposing costs (e.g., penalty fees) outside sellers' control, Unresponsive service processes)

109. Market participants suggest that Takealot is more lenient than the Consumer Protection Act ("CPA") in terms of treatment of returns.⁹⁸ A lenient return policy is seen as a mechanism to build trust with customers and that this contributes positively to building the customer side of the market. However, this tends to place risk on the seller and Takealot does not carry any of this risk, as a result, it is only sellers that financially lose the most when items are returned.⁹⁹
110. This tends to increase costs of sellers on the platform. For instance, when a customer returns a product, Takealot would reverse all transactions to the seller except for fulfilment fees. According to marketplace sellers, this means that if the returned product is still in a sellable condition, it will be kept in the warehouse and the seller will be charged another fulfilment fee when it is sold again.¹⁰⁰
111. Marketplace sellers alleged that there are actions that Takealot either directly impose or are caused as a result of the leniency that extends outside of even their own returns policy that places harm on small businesses who have to bear the costs of such actions.¹⁰¹
112. One example in this regard would be fraudulent returns, where a customer purchases a superior product and returns an inferior product or purchasing a new

item and returning an old product that was purchased from a different platform.¹⁰² Certainly this has less to do with the CPA but more with building trust with customers at sellers' expense or inefficiencies within Takealot's returns process.

113. In these circumstances, it is alleged that Takealot most likely provides the customer with a full refund at the expense of the marketplace seller. For business users, attempts that seek to dispute these returns bear very little fruit because of unresponsive services process. In addition, some business users have indicated that because of a lenient returns policy, customers do not even bother to visit websites of other sellers to compare if they can get it cheaper elsewhere.¹⁰³ They would generally purchase from Takealot knowing that they can return the item without any consequence.¹⁰⁴
114. Another major cost driver that increases sellers' cost is alleged inefficiencies at Takealot warehouse. Sellers have voiced the frustrations when it comes to collecting returned goods from the Takealot warehouse. Business users indicated that they would organize and pay all logistics for collecting products at the warehouse only to be told that products are not ready for collection or missing. According to them, this takes prolonged period to resolve adding additional costs.¹⁰⁵
115. Marketplace sellers have alleged that Takealot would return the bulk of stock, both customer returns and new items asserting that stock is of low quality.¹⁰⁶ In this instance, business users would assess the return and

98 [REDACTED]
 99 [REDACTED]
 100 [REDACTED]
 101 [REDACTED]
 102 [REDACTED]
 103 [REDACTED]
 104 [REDACTED]
 105 [REDACTED]
 106 [REDACTED]

determine what needs to be sent back to Takealot warehouse. If the reason of return is disputed, business users would challenge the return. It is further alleged that some products would be claimed as damaged by Takealot, but business users would check and find that they are actually not damaged, but in some instances brand new items.¹⁰⁷

[REDACTED]

117. It is also alleged that a capacity problem for sellers comes from the fact that Takealot sometimes does not send back stock to sellers for months and later sends everything after having delayed the process.¹⁰⁹ These are alleged to be inefficiencies at Takealot distribution centres, which unnecessarily raise costs for sellers.

4.3.3. Data Usage

118. The Inquiry assessment on the Provisional Report indicated that Takealot had an extensive and growing own branded products across a broad range of categories.¹¹⁰ In all of these, there was substantial overlap with the products sold by marketplace sellers. The Inquiry's view is that the strategy of using own branded products rather than simply purchasing the same brand as the marketplace seller means that their own retail division does not need to contest the sale through a Buy Box. This provides Takealot with greater scope on pricing and the ability to promote its brands. The same may be said for marketplace sellers that may avoid the same brand in order to avoid contesting in the Buy Box. Hence the small number of exact product overlaps offered by both retail and marketplace in the past 2 years.¹¹¹

119. Where there is an exact product duplication,
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]¹¹²

120. The conduct or the use of seller data is not unique in South Africa. The EC and US competition authorities also investigated the issue of free riding from seller risk taking in relation to Amazon. In April 2020, based on one current and twenty former employees of Amazon, a Wallstreet Journal article concluded that Amazon is not only able to identify hot trends but it also uses these trends to price their own products

107 [REDACTED]
 108 [REDACTED]
 109 [REDACTED]
 110 [REDACTED]
 111 PR Chap 3. Para 225.
 112 PR Chap 3. Para 225.

competitively. One example identified in this article is where “the maker of a popular car trunk organiser, found that Amazon launched a very similar product as part of its private label offering”.¹¹³ On 10 November 2020, the EC initiated an investigation of this practice, stating that “Amazon systematically relies on non-public business data of independent sellers who sell on its marketplace, to the benefit of Amazon’s own retail business, which directly competes with those third party sellers”.¹¹⁴ The Provisional Report indicated that Amazon engaged in preliminary settlement discussions with the EC, where they offered concessions to address the EC concerns.¹¹⁵

121. The Inquiry raised concerns, especially in respect of products which fall outside of the main branded items in a category that are sold. Marketplace sellers do innovate, invest and bear risk in bringing new products to an eCommerce platform. This would involve research identifying products that may be attractive to South African consumers, sourcing those products, investing in stock and the promotion of the products on the platform (and potentially elsewhere) to build awareness, interest and demand. There is risk that some or many of the products do not gain traction and the seller is left with the sunk investment in bringing the product to the marketplace along with the costs of holding stock for a long period or writing off stock altogether. In the event that the

platform’s own retail division uses seller data to pick off the successful products and then replicate those to compete with the marketplace seller, then the retail division effectively is free-riding off the investment and risk taken by marketplace sellers.

122. The European Commission (“EC”) made a finding regarding data usage against Amazon in their recent investigation. The EC found that Amazon Retail’s business operations access and rely directly on non-publicly available data, provided by or generated from third-party sellers’ listings and transactions on Amazon Marketplace.¹¹⁶ The EC raised concerns that data use serves to influence Amazon’s decisions in relation to start selling a product, its pricing decisions, inventory management and planning, as well as its vendor selection decisions.¹¹⁷ In addition, the EC was concerned that these data-use cases typically generate, on the one hand, a structural competitive advantage for Amazon Retail over third-party sellers competing on its eCommerce platforms, and on the other hand, increased risks and costs to third-party sellers in order to generate transactions on the Amazon eCommerce platforms, in competition with Amazon Retail. As a result, the Commission preliminarily found that the data-use conduct could ultimately lead to largely foreclosing third-party sellers from the sale of the highest demand products where Amazon Retail is typically competing.¹¹⁸

113 Mattioli, D, 2020, “Amazon scooped up data from its own sellers to launch competing products”, Available: <https://www.wsj.com/articles/amazon-scooped-up-data-from-its-own-sellers-to-launch-competing-products-11587650015>. Accessed on [08 April 2022].

114 EC Press Release, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077 [Accessed 28 April 2022].

115 Reuters, 2021, Exclusive Amazon seeking to settle antitrust investigation: source says”, Available: <https://www.reuters.com/business/retail-consumer/exclusive-amazon-seeking-settle-eu-antitrust-investigations-sources-say-2021-11-09/>. [Accessed 06 April 2022].

116 EU CASE AT.40462 – Amazon Marketplace and AT.40703 – Amazon Buy Box. para 121. Available at: https://ec.europa.eu/competition/antitrust/cases1/202310/AT_40462_8990760_8322_4.pdf. Accessed on [17 March 2022].

117 EU CASE AT.40462 – Amazon Marketplace and AT.40703 – Amazon Buy Box. para 183. Available at: https://ec.europa.eu/competition/antitrust/cases1/202310/AT_40462_8990760_8322_4.pdf. Accessed on [17 March 2022].

118 Informing and adjusting Amazon Retail’s offers based on third-party seller data enables Amazon to largely control the outcome of competition on its eCommerce platforms and cap the ability of third-party sellers to become viable competitors of Amazon Retail.

123. Subsequent to the EC preliminary findings, Amazon submitted the initial commitments to remedy the data usage concerns, the “data-silo commitment”.¹¹⁹ Amazon committed “not to use non-public data provided by third-party sellers to Amazon in the context of their use of Amazon’s marketplaces services, or derived through third-party sellers’ use of Amazon marketplace services or related services such as payment and fulfilment services, for the purposes of Amazon’s own retail operations, in competition with those third-party sellers”.¹²⁰

124. During the market test of this specific commitment, a number of respondents submitted that the data-silo commitment would be more efficient if, in addition to Amazon refraining from using non-public third-party seller data, “the commitments also included mechanisms to control access to such data or for a technical separation of the data-sets”.¹²¹ The EC eventually concluded that some comments from market participants raised doubts about the data-silo commitment’s ability to effectively address all the preliminary competition concerns.

125. In this regard, The EC concluded that Amazon should have an obligation to set up technical and/or manual mechanisms designed to monitor access to third-party seller data in order to ensure that Amazon’s obligation not to use non-public data provided by third-party sellers to Amazon can be effectively monitored and is not circumvented.¹²²

4.3.4. Platform specific exclusivities and brand gating

126. At present, there is no evidence which suggests that gating or platform specific exclusivities are at a behest of suppliers, save for Takealot submission which was not accompanied by any evidence. Some suppliers who have their items gated on the Takealot platform were not aware of such agreement. Sellers note that there is an item that was claimed to be gated by Takealot and this item ceased to be gated soon and made available to other sellers soon after public hearings.

127. Sellers have provided evidence which indicates that suppliers of some gated products seem to be not aware of any platform specific agreement that exist between them and Takealot. In additions, evidence before the Inquiry is indicative that market participants are restricted to sell some products on Takealot platform. Sellers for example submitted that they are not allowed to sell products like [REDACTED] on Takealot platform even though they stock such products.¹²³

119 Commitments made on 8 July 2022. See EU CASE AT.40462 - Amazon Marketplace and AT.40703 - Amazon Buy Box, para 231.

120 EU Amazon committed not to use such third-party seller data either via Amazon’s automated systems or via its employees, whether for the purposes of selling branded goods or for the purposes of selling its private label products. The relevant data covers aggregated, individual, anonymised and personal data, whether in raw form or processed.

121 EU CASE AT.40462 - Amazon Marketplace and AT.40703 - Amazon Buy Box. para 240. Available at: https://ec.europa.eu/competition/antitrust/cases1/202310/AT_40462_8990760_8322_4.pdf. Accessed on [17 March 2022].

122 EU CASE AT.40462 - Amazon Marketplace and AT.40703 - Amazon Buy Box. para 255. Available at: https://ec.europa.eu/competition/antitrust/cases1/202310/AT_40462_8990760_8322_4.pdf. Accessed on [17 March 2022].

123 [REDACTED]

[5. Provisional Remedies]

5.1. eCommerce platforms provisional remedies

128. The Inquiry made the following provisional remedies in respect of leading eCommerce platforms:¹²⁴

- 128.1. Prohibition on product gating except at the behest of the supplier, which must not be actively solicited, with reporting requirements to the Commission where exclusivity occurs;
- 128.2. Internal segregation of the retail division from the operation of the marketplace, with own retail treated on an arms-length basis including in respect of the following;
- 128.3. A prohibition on retail buyers accessing marketplace seller data, or alternatively providing equal access to data for marketplace sellers;
- 128.4. Fair and non-discriminatory treatment in promotion applications;
- 128.5. Equality in the treatment of returns and any resale of returns on the marketplace (e.g., through unboxed deals);
- 128.6. Removal of algorithm biases, including that of the Buy Box (i.e. to also highlight the cheapest option overall where it is not the Buy Box option);
- 128.7. Investigation of complaints in respect of own retail buyer conduct including that in respect of common suppliers;
- 128.8. No preferential access to unsold display advertising inventory;
- 128.9. Implement a speedy dispute resolution process including a provision to compensate marketplace sellers in the interim where the dispute is not resolved within the timeframes.

5.2. Stakeholder submissions: Views on provisional remedies

129. Marketplace sellers indicated that they strongly agree that all recommended remedial actions will be sufficient apart from few that needs to be worded differently in order to clarify provisions that may be misconstrued or subject to market participants' own interpretation or understanding.
130. In relation to unboxed deals, sellers are of the view that there is evidence suggesting that Takealot has opted to abandon the option of providing unboxed deals on the platform altogether. This is because of a noticeable significant decline of unboxed deals over the past 9-12 months. It is however not clearly what resulted to such decrease of unboxed deals. The speculation is that Takealot might be moving towards an easy and lucrative method of selling returns through the means of a liquidation sale or auction by pallet(s) and this is not feasible sales method for smaller business users. As such, the goal of the remedial action may have been completely bypassed.¹²⁵
131. The suggestion of market participants is to re-word the above remedial action to state as closely as possible that Takealot must "enable the resale of returns on the marketplace, where such returns were processed on the platform", There are proposals to remove the phrase "equality in the treatment" as this will only serve to ultimately drive Takealot to completely remove the option for both Takealot Retail and marketplace sellers to sell unboxed deals on the platform, thereby

124 PR Summary Report. Page 59, Para 168-168. 2.7.

125 [REDACTED]

defeating the purpose of this remedial action.¹²⁶

132. Marketplace sellers are in agreement with the recommended remedial action in respect to the algorithm and Buy Box biases. The view is that this recommended action should not be considered on its own, rather the biases of stock replenishments should also be considered as this goes hand-in-hand with the Buy Box biases and creates and unfair advantage for Takealot Retail on the platform.
133. The requirement of being in-stock is seen as a strategic provision which aims to increase the overall costs incurred by marketplace sellers by preventing the option to sell in-stock and ultimately at a lower success fee as opposed to lead-time as well as possibly completely preventing a marketplace seller from competing against a Takealot Retail offer.¹²⁷
134. In this regard, the remedial action explicitly restricts a marketplace provider from preventing a marketplace seller to send goods to the relevant DC's where the marketplace seller could take advantage of higher in-stock sales figures and a lower success fee.¹²⁸
135. With regards to speedy dispute resolution process, marketplace sellers have provided that a clear "timeframe" should be put in place to avoid any misunderstanding and shield against the opportunity for any market participant to conduct their own interpretation of what "timeframes" would mean.
136. Other recommendation that can be considered in this regard would be to

have the costs associated with disputes initially (and not only from the point which timeframes are not met) be carried by the marketplace provider until such time that the dispute is resolved in favour of either party, at which point the costs would be carried over to the other party (marketplace seller) if the dispute is resolved in the favour of the marketplace provider.¹²⁹

137. This will incentivize the marketplace provider (Takealot) to conduct timely resolutions and will ensure that proper dispute resolution tools be implemented and improved on by the marketplace provider as opposed to the currently limited-to-no incentive for the marketplace provider to provide timely resolutions. This remedial action should be extended to include the processing of returns and the same restriction as above should apply to marketplace provider, where the cost of a return is initially carried by the marketplace until such time that a marketplace seller takes possession of the return, or the marketplace has made sufficient attempts to get the marketplace seller to take possession of the return. As this would ultimately be in the financial interest of the marketplace to conclude the returns process in a timely manner.¹³⁰

Takealot submissions

138. Takealot has provided that in most cases, it is a supplier that wants a gating arrangement in place. In addition, Takealot has raise two difficulties regarding the Inquiry's recommendations in respect to product gating remedy.
139. First, suppliers who require and initiate product gating arrangements are unlikely to commit in writing and indicate that

126 [REDACTED]
127 [REDACTED]
128 [REDACTED]
129 [REDACTED]
130 [REDACTED]

the arrangement is at their behest, for fear that it may be regarded as unlawful. Second, Takealot provide that it would be inappropriate and unfair for them to be required to obtain this written confirmation when its key rivals, such as Massmart, Amazon, Bob Group and indeed any brick-and-mortar retailers selling exactly the same products, are not required to give such undertakings.¹³¹

140. In response, stakeholders refuted this submission by Takealot and indicated that the claim that suppliers do not want to commit to a gating agreement in writing is irrational. This is seen as another tool Takealot wishes to use to their advantage and blaming it on suppliers when it is not the case. One example is the Xiaomi brand which, was previously gated and has since been opened to all sellers. Sellers sometimes inquire suppliers about the gating agreement on Takealot platform and the response from suppliers would be that they did not request nor impose any gating of the brand on any platform, let alone Takealot. This is confirmation that the decision to gate a brand is at Takealot managements discretion.¹³²

141. Takealot indicated that it has incentives only to promote the wellbeing and success of marketplace sellers. The fact that there is a retail division that exists alongside the marketplace does not change those incentives. Separation of business divisions has only been rarely ordered by the Competition Tribunal after lengthy and detailed abuse of dominance proceedings. There has been no equivalent detailed investigation in the present Inquiry process. The Takealot Group cannot commit to placing the marketplace division in a separate entity

or a separate building. Any such “separation” processes would be extremely costly and would undermine its ability to seek to operate profitably in the ordinary course.¹³³

[REDACTED]

143. Takealot have provided that Retail buyers do not make purchasing decisions solely on marketplace seller data, and that the group is not aware of any credible evidence to the contrary.¹³⁵

144. Takealot’s view is that that there is already fair and non-discriminatory treatment of marketplace sellers in promotion applications. There was no finding by the Inquiry that there is unfair or discriminatory treatment in relation to these applications and thus there ought not to be any recommendation made in this respect.¹³⁶

145. Takealot submits that it is simply not the case that they limit sellers in any way from stocking items which Takealot Retail also stocks within Takealot distribution centres. This is true for all products and sellers, that compete against Takealot Retail for the Buy Box.

146. Sellers decide whether they wish to stock their items in the distribution centres or to sell on lead time. If they choose to stock in the distribution centre, then storage is provided free of charge provided they do not abuse that facility and they stock responsibly. It is

131 TAL, RPR, Page 80, Para 9.36.1 – 9.36.2.

132 [REDACTED]

133 TAL, RPR, Page 80, Para 3.38.

134 [REDACTED]

135 TAL, RPR, Page 80, Para 9.40.

136 TAL, RPR, Page 81, Para 9.41.

only if items are clearly overstocked and/or are simply not moving that they are removed from the distribution centre, but this only occurs where it is clear that there is no case to be made for having the item stocked in the warehouse.¹³⁷

147. Takealot is of the view that showing the cheapest item in stock does not favour the Takealot Retail division. It simply presents the customer with the best offer in relation to a specific item. And that there is no evidence that the current algorithm has any bias at all. Takealot submits that it would be inappropriate and unjustified for the Inquiry to regulate on an *ex ante* basis potential biases which do not currently exist.
148. Submissions by stakeholders in this respect however refute Takealot's claims that it does not limit sellers in any way from stocking items which Takealot Retail also stocks within Takealot distribution centers. This claim has been categorized as inaccurate. Market participants have furnished the Inquiry with an illustration which shows that sometimes they are restricted from stocking the warehouse for unknown reasons Takealot does indeed restrict marketplace sellers and determines which products may and may not be sent to their DC's.¹³⁸ In this respect, seller will get a popup confirming that the item cannot be replenished due to "other".¹³⁹ Sellers view the reason "other" as ambiguous as it does not provide a clear reason as to why they cannot stock distribution centers.
149. Takealot submit that if the remedy in respect of investigation of complaints of own retail buyer conduct is intended to apply to allegations of unethical conduct on the part of any Takealot employee, then this is already dealt with in Takealot.com's Speak Up Policy which is published on the

Takealot.com landing page. The process set out in this policy is designed to provide any person with a mechanism to raise concerns relating to incidents of alleged unethical business conduct or breaches of law. Any such concerns can be raised without fear of retaliation and, if preferred, may be raised anonymously.

5.3. Response by the Inquiry to Stakeholder submissions

150. Following the assessment of submissions from Takealot and business users, the Inquiry is persuaded that it will be difficult to offer unboxed deals to business users and that it might not be their immediate desired functionality on the platform. What seems to be a hurdle is that after a return, business users would still need to test or examine the returned item and decide whether the item is a defect or not. For this to happen, sellers will need to fetch the returned product from DCs at their expense. After having determined that the product is usable, they will then again need to send it back to DCs to sell as an unboxed deal. All this drives up costs on business user side and they are ultimately unable to recover these costs through pricing of the unboxed item.
151. The alternative would be to despatch a technician to assess the returned item at DC and make a determination whether the item is usable and therefore qualifies for unboxed deal. Takealot however does not provide for sellers to inspect returns onsite at present. Sellers submit that Takealot seem to be moving away from this offering in favour of sales through bulk pallets. Takealot submits that unboxed deals do not make top 10 list of seller desired additional functionality.
152. Product Gating. There is no evidence that such agreements are at a behest of sellers.

137 TAL, RPR, Page 81, Paragraph 9.45.

138

139

The incentive is not clear why platform specific exclusivities are implemented on the platform. It is also not clear why other sellers on the platform are deprived an opportunity to sell these products in competition with Takealot Retail. In this regard, the Inquiry is of the view that this conduct is unjustified and therefore not warranted.

153. It is undisputed that an overwhelming number of customers on the platform click on the Buy Box and that has an ability to influence sales on the platform. Evidence before the Inquiry shows a significant activity on the Buy Box selections.

154. There is no evidence which justifies why cheapest on lead-time is not being prominently displayed. In addition, there is no evidence that customers always prefer the cheapest in-stock products. Requirement that sellers must be in-stock before they can qualify for the Buy Box is favouring Takealot Retail as they are likely to be in-stock in most cases. The Inquiry holds a view that prominently showing both cheapest in stock and on lead-time will remedy sellers' concerns in relation to the Buy Box biases.

155. On the speedy dispute resolution, evidence indicate that returns and stock complaints account for >70% of the complaints on Takealot. This is a significant number of complaints and there is certainly a need to craft interventions that will seek to address this problem. In this regard, the Inquiry holds a view that these are likely to result in larger dispute costs which means practically a speedy resolution can be focused on these two categories primarily. Sellers have demonstrated how stock and returns disputes add costs to their operation. Often sellers don't know where their stock is and where sellers try to collect returns, they don't find them at the DC. All these inefficiencies increase costs and hinder the opportunity for sellers, especially small sellers to operate effectively.

[6. Appendix]

Submission made by	Stakeholder type (e.g., platform, pure online reseller, B&M, CSS)	Submission full name	Submission date	Report shorthand Reference
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Kelkoo Group	CSS	Response to Provisional Report	07-Sep-22	Kelkoo Group, RPR
Hausfeld LLP	Law Firm	Response to Provisional Report	24-Aug-23	Hausfeld LLP, RPR
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
CMA	Competition Authority	Response to Provisional Report	29-Sep-22	CAM, RPR
Bundeskartellamt	Competition Authority	Response to Provisional Report	30-Sep-22	Bundeskartellamt, RPR
FAS Russia	Competition Authority	Response to Provisional Report	29-Sep-22	FAS Russia, RPR
Mauritian CA	Competition Authority	Response to Provisional Report	03-Oct-22	Mauritian CA, RPR
Takealot Group	Platform	Engagements on provisional report and proposed remedial actions	15-Aug-22	TAL, Engagements on Remedial Actions, VM1
Takealot Group	Platform	Response to Provisional Report	16-Sep-22	TAL, RPR

Submission made by	Stakeholder type (e.g., platform, pure online reseller, B&M, CSS)	Submission full name	Submission date	Report shorthand Reference
Takealot Group	Platform	Engagements on provisional report and proposed remedial actions	29-Sep-22	TAL, Engagements on Remedial Actions, VM2
Takealot Group	Platform	Engagements on provisional report and proposed remedial actions	30-Sep-22	TAL, Engagements on Remedial actions, WS
Naspers Group	Holding Company	Engagements on provisional report and proposed remedial actions	30-Nov-22	Naspers Group, Engagements on Remedial Actions, VM1
Naspers Group	Holding Company	Engagements on provisional report and proposed remedial actions	15-Dec-22	Naspers Group, Engagements on Remedial Actions, VM2
Naspers Group	Holding Company	Engagements on provisional report and proposed remedial actions	15-Feb-23	Naspers Group, Engagements on Remedial Actions, VM3
Takealot Group	Platform	Response to Remedial Actions	15-Jun-23	TAL, RRA1
Takealot Group	Platform	Response to Remedial Actions	26-Jun-23	TAL, RRA, VM1
Takealot Group	Platform	Response to Remedial Actions	03-Jul-23	TAL, RRA2
Takealot Group	Platform	Response to Remedial actions	10-Jul-23	TAL, RRA3
Amazon	Platform	Response to Provisional Report	29-Aug-22	Amazon, RPR1
Amazon	Platform	Response to further info request	23-Sep-22	Amazon, WS
Amazon	Platform	Response to further info request	28-Oct-22	Amazon, WS
Amazon	Platform	Engagements on provisional report and proposed remedial actions	14-Dec-22	Amazon, Engagements on Remedial Actions, PM1 (In-person meeting)
Amazon	Platform	Engagements on provisional report and proposed remedial actions	18-Jan-23	Amazon, Engagements on Remedial Actions, WS.
Amazon	Platform	Response to Remedial Actions	13-Jun-23	Amazon, RRA