

ANNEXURE 9

REGULATIONS AND GUIDELINES

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[1. Introduction]

1. The Inquiry's Provisional Report recognised that our investigation happens at a point in time, when certain decisions on specific platform categories and conduct are based on current market features and landscape. The report recognised that conduct that has not yet emerged in some of the categories may do so in future, other intermediation categories will gain traction in the market exhibiting similar market features and, if the remedial action is effective, new leading platforms may emerge.
2. In addition, in undertaking a Market Inquiry that does provide in-depth insights and understanding of particular markets, the Inquiry is obliged to consider whether the tools at the disposal of the Commission are able to adequately address these issues going forward and whether there should be recommendations to the Minister on new or amended policy, legislation or regulations in line with section 43E(1) of the Competition Act 89 of 1998, as Amended ("the Act").
3. The Provisional Report recommended Commission Guidelines or Section 78 Regulations in terms of the Act, or new regulations in terms of other enabling legislation, which sought to prohibit certain conduct of leading platforms, and permit the identification and review of such platforms. This was proposed to complement the immediate remedial actions by providing better long-term oversight and was generally aligned with the European approach through the Digital Markets Act¹ (DMA).
4. The Inquiry has considered that if there was to be an outright prohibition of certain conduct then regulations in terms of other enabling legislation would be required. However, this is not necessarily desirable as this would be neither timely nor cost-effective for South Africa. New empowering legislation is likely to take years to enact and it would be costly to the fiscus for a new regulatory body to be established in implementing that legislation. Moreover, an outright prohibition may not be appropriate in all cases, as this may depend on the market circumstances.
5. If regulations are not to prohibit outright but rather enforce, then use of the Act strengthened by section 78 Regulations and Guidelines then offer a practical alternative using existing legislation and oversight agency. The Inquiry's view is that the provisions within chapter 2 of our Act are capable of addressing a broad range of conduct that is the subject of market power or horizontal and vertical agreement. Whilst the Inquiry has focused on what it terms leading platforms to accommodate both the lower liability standard within a Market Inquiry and the focus on features beyond single firm dominant conduct, the fact is that almost all the leading platforms fall within the dominance provision in any event. In addition, where there are parallel networks of vertical contracts such as in the case of wide price parity, these are capable of being addressed through section 5(1) of the Act absence dominance.
6. However, the Covid-19 pandemic demonstrated the value of regulations in guiding the Courts in interpreting the existing empowering provision in the Act within specific contexts, by providing a list of factors that are relevant to the assessment of existing provisions in the Act in that specific context. This is also the case where the context differs

1 Regulation (EU) 2022/1925

to those in past case law, warranting different factors to be relevant in the assessment of both dominance and the anti-competitive nature of certain conduct. Digital markets represent a specific context that warrants such additional guidance, as is acknowledged globally through numerous jurisdictional reports on such markets, academic articles and judgements where there has been enforcement. Many of these have been referenced within this Inquiry's work and analysis. Moreover, alongside international jurisprudence and insights, the knowledge gained in the Inquiry can inform those factors that are relevant to the assessment of online intermediation markets.

7. For these reasons, the Inquiry reached the view that Section 78 Regulations are desirable as they can strengthen enforcement going forward and provide for greater legal certainty, without the potential problems that the alternatives options faced. The Act empowers the Minister to make regulations to give effect to the purposes of the Act under section 78(1). The Inquiry envisages that the regulations will assist in identifying factors relevant to the assessment of market power and conduct subject to existing provisions in the Act in the context of online intermediation platforms as guidance to the Commission and the Courts. For instance, factors such as the extent of business user dependency and the scale and network effects the platform enjoys, are factors relevant to the determination of market power in intermediation markets, or the importance of ranking position in driving customer traffic is a relevant factor in determining whether any self-preferencing is exclusionary. The regulations would also set out the factors relevant to establishing a case within the named conduct of section 8(1)(d) of the Act such that the onus shifts to the respondent to provide technological, efficiency and pro-competitive gains, or

a *prima facie* case under sections 8(1)(a), 8(4) and 9(1)(a)(ii) of the Act. These may be complemented by Commission Guidelines to provide greater business certainty on the enforcement approach.

8. The Inquiry informed stakeholders of its thinking to focus purely on Commission Guidelines and Section 78 Regulations which formed part of the Provisional Report proposals, rather than new regulations under other enabling legislation which was proposed in the alternative. Submissions were received from a number of leading platforms as identified by the Inquiry. We set out the main points raised across those submissions and our response to those points.

[2. Submissions on section 78 Regulations and Guidelines]

9. The Inquiry received comments from [6] leading platforms and 2 regulatory and relevant government departments on the Provisional Report proposal for regulations. The submissions include the following major points:

2.1. Section 78 empowers regulations on limited empowering provisions

10. Essentially, stakeholders agree with the Inquiry's direction to seeking additional regulations, with reservations from certain stakeholders that caution against over-regulation of nascent markets.² Some stakeholders submit that the scope of potential section 78 Regulation is limited to the empowering provisions under section 4, 5, 8(3)(f), 8(4)(d) and 9(4) of the Act, and that power is not given to the Minister for the regulation of market power section 7, dealing with dominance or market power.^{3,4,5} Submissions also questioned the relevance to the assessment of anti-competitive conduct under section 5 of the Act.⁶

11. Stakeholders' views are that Sections 7, 43A-43G, or 78 do not suggest that the

Commission or the Minister is entitled to stipulate "factors" that should be taken into account in assessing whether or not a firm is dominant or has market power. To seek to do so would be *ultra vires*.^{7,8,9,10} These submissions are based on their own interpretation of the legislation by the stakeholders.

12. In addition to the above, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. Amazon also cautions on shifting evidentiary burden in drafting new regulations, their views is that shifting the evidentiary burden onto a respondent in the context of a complaint is only appropriate where the conduct in question can, by its very nature be assumed to be anticompetitive, or otherwise harmful to consumers or firms (such as, for example excessive pricing) and where there is established jurisprudence to suggest that such conclusions can reasonably be drawn. This is however not the case for "exclusionary acts" by dominant firms, which concern agreements or business practices, which can potentially legitimately be employed in

2 Apple Inc., Comments on OIPMI Proposed Section 78 Regulation Notice, Judd Lurie, 17 March 2023, para 2.5 and 2.8, [REDACTED]; Google, CPR78, 28 Feb 2023, page 1; Amazon.com Inc. CPR78, 23 March 2023 para 4.4.

3 Google, Comment on OIPMI Proposed Section 78 Regulations Notice, Oliver Bethell, 28 February 2023, page 2 ("Google, CPR78, 28 Feb 2023").

4 Private Property, Comment on OIPMI Proposed Section 78 Regulations Notice, Anthony Nortons, Anton Rotes and Avias Ngwenya, 28 February 2023, page 4 ("PP, CPR78, 28 Feb 2023").

5 Apple Inc., CPR78., para 4.17.

6 Naspers Ltd and its operating companies (Takealot.com. Mr. D Food, Autotrader and Property24), Nick Altini and Leana Engelbrecht, Comment on OIPMI Proposed Section 78 Regulations Notice, 28 Feb 2023, page 4 ("Naspers, CPR78, 28 Feb 2023").

7 PP, CPR78, 28 Feb 2023, page 3.

8 Naspers Ltd, CPR78, 28 Feb 2023, page 4.

9 PP, CPR78, 28 Feb 2023, page 3.

10 Amazon.com Inc. Response to OIPMI notice to publish s78 Regulations (CPR78), Heather Irvine, 23 March 2023, page 3, para-4.3.

a manner which benefits consumers.¹¹ The Commission is mindful of this dynamic and, seeks that the regulations complement both the Act and remedial action in the final report.¹²

[REDACTED]
[REDACTED]
[REDACTED].¹⁷

2.2. Caution on over-regulating dynamic markets

13. Stakeholders have cautioned the Inquiry in regulating digital markets that are a rapidly evolving and are dynamic in nature.^{13,14} They caution that regulations and guidelines in a fluid and dynamic market as those relevant to online intermediation platforms may likely give rise to unintended consequences. This is particularly the case where the Inquiry acknowledges that the investigation is happening at a “point in time” and remedial action is made on current market features and landscape.¹⁵ For this reason, they caution on making forward-looking regulations and guidelines premised on the current inquiry.¹⁶

2.4. Regulatory Process

15. Other factors that stakeholders have advised regarding the introduction of new regulations for digital platforms is that the process must be fair.¹⁸ They advise that more time should be taken to consider the intended purpose of the proposed regulations specifically in terms of section 5, 7, 8 and 9 of the Act and should not be far reaching or go beyond the scope of these sections.¹⁹ Furthermore, stakeholders have urged that the Inquiry should make available the insights they have gained in assessing online markets before proposing or drafting the intended regulations as this will provide affected stakeholders chance for substantive and meaningful commentary on the proposed recommendations.²⁰

2.3. Caution on regulating a nascent South African Digital Economy

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[REDACTED].²¹

11 Amazon.com Inc. Response to OIPMI notice to publish s78 Regulations (CPR78), Heather Irvine, 23 March 2023, page 3, para-4.3
12 Amazon.com Inc. CPR78, 23 March 2023 para 4.4.
13 UberEats SA, Comment on OIPMI Proposed Section 78 Regulations Notice, Stewart Payne, 28 Feb 2023, page 1.a (“UE, CPR78, 28 Feb 2023”).
14 Amazon.com Inc. CPR78, Heather Irvine, 23 March 2023, para 6.3.
15 [REDACTED]
16 PP, CPR78, 28 Feb 2023, page 5..
17 [REDACTED]
18 PP, CPR78, 28 Feb 2023, page 2
19 PP, CPR78, 28 Feb 2023, page 3.
20 [REDACTED]
21 [REDACTED]

17. Private Property submitted that the period for comment was too short and that the direction from the Inquiry too vague in order to comment meaningfully.²² However, most other stakeholders appreciated that the process of regulation-making, and that of Guidelines, involves a period for public comment and that they will engage at that point with the content.²³

2.5. Regulatory content

18. Not all stakeholders opposed the idea of section 78 Regulations and rather engaged on the content thereof, and its relationship to the remedies arising from the Inquiry along with a robust process. Google submits²⁴ that:

- 18.1. the regulations should complement or be consistent with the Inquiry's final remedial action;
- 18.2. a consumer-focused approach must be taken in drafting the regulations to not reduce innovation in a nascent digital economy;
- 18.3. a robust approach must be taken in terms of evidence and information gathering and must explain how the Commission seeks to do a holistic assessment of the conduct investigated and weigh those responses against counterevidence;
- 18.4. the regulations must guide in an assessment of pro-competitive gains and technological efficiencies as stipulated in the Act²⁵; and
- 18.5. the regulations should be within the scope of the Inquiry.

19. UberEats and Google support the Inquiry's expressed notion that it will not issue regulations that purport to prohibit certain but rather ones that serve as a guiding principle for emerging platform behaviour.²⁶ It also supports the view that Chapter 2 of the Act is capable of addressing broader anticompetitive conduct.

2.6. Guidelines

20. Whilst most stakeholders focused exclusively on the section 78 Regulations, Uber Eats welcomed the issuing of Guidelines by the Commission, submitting that this can promote certainty on the enforcement approach, and this was more appropriate than regulations. No other stakeholder opposed the issuing of Guidelines.²⁷

22 PP, CPR78, 28 Feb 2023, page 2

23 Amazon Inc. CPR78, 23 March, para 3.2 and 3.3

24 Google, CPR78, 28 Feb 2023, page 2

25 Google, CPR78, 28 Feb 2023, page 1

26 UE, CPR78, 28 Feb 2023, page 1

27 UE, CPR78, 28 Feb 2023, page 2

[3. Response to submissions]

21. Majority of the submissions put forward legal arguments as to the permissible scope of section 78 regulations. Whilst the Inquiry disagrees with the conclusions drawn, such submissions are more appropriately made at the point of any regulation-making process of the Minister, were the Ministers to act within the recommendation of the Inquiry. The same applies to submission for factors that may be taken into account in determining the contents of such regulations as well as consultations with other departments. Regulation-making processes by their very nature involve public consultation, where all these issues may be aired by stakeholders.
22. On the appropriateness of section 78 Regulations in the context of a dynamic digital economy, the Inquiry considers that regulations which merely set out relevant factors provide ample flexibility to deal with dynamic markets. This is recognised by the shift away from prescriptive rules that would prohibit particular conduct as set out in the provisional report proposal as a more flexible approach. Globally, it has been largely accepted that digital markets have unique features that require an analytical approach that differs to traditional markets in numerous ways, even if the general categories of conduct used to capture anti-competitive outcomes are unchanged, many jurisdictions are introducing regulations or changes to their legislation in order to account for these differences, some of which are less flexible than that which is being proposed.
23. The Inquiry also disagrees that lessons at a point in time on framing factors are likely irrelevant going forward. Online intermediation platform markets do have particular economic features and business models that have commonalities across the

different platform categories as the provisional and final reports have identified. These too were identified in other jurisdictions and the academic literature which led to the call for a different analytical approach to digital platforms from the traditional analysis. The platform categories dealt with in this Inquiry are also not nascent but are well developed both globally and domestically. Whilst there are some nascent platform areas, such as insurance comparator sites, these would not necessarily be candidates for enforcement until there is greater levels of adoption as has been recommended by this Inquiry. However, having in place regulations not only provides certainty to leading platforms in those categories but also the appropriate enforcement tools to address potential competition issues.

[4. Appendix A: List of submissions]

Submission made by	Stakeholder type	Submission full name	Date	Submission made by	Report shorthand reference
██████████ ██████████	Platforms	Comments on OIPMI Proposed Section 78 Regulation Notice	28 February 2023	Nick Altini, Leana Engelbrecht, Daryl Dingley	Naspers, CPR78, 28 Feb 2023
Takealot.com					
Mr. D Food					
Autotrader					
Property24					
Google LLC	Platform	Comments on OIPMI Proposed Section 78 Regulation Notice	28 February 2023	Oliver Bethell	Google, CPR78, 28 Feb 2023
UberEats South Africa	Platform	Comments on OIPMI Proposed Section 78 Regulation Notice	28 February 2023	Stewart Payne	UE, CPR78, 28 Feb 2023
Private Property	Platform	Comments on OIPMI Proposed Section 78 Regulation Notice	28 February 2023	Anthony Norton, Anton Roets, Avias Ngwenya	PP, CPR78, 28 Feb 2023
Amazon.com Inc	Platform	Comments on OIPMI Proposed Section 78 Regulation Notice	23 March 2023	Heather Irvine and Disebo Leokaoke	Amazon.com Inc., 23 March 2023
Apple Inc.	Platform	Comments on OIPMI Proposed Section 78 Regulation Notice	17 March 2023	Heather Irvine and Judd Lurie	Apple, 17 March 2023
B-BBEE Commission	Government Department	Comment on Provisional Report	19 June 2023	Tshediso Matona	
Department of Trade, Industry and Competition	Government Department	Meeting for Comments on Provisional Report	8 June 2023	Tanya van Meelis	