31 August 2022

Attention: Chairperson of the Inquiry
Online Intermediation Platforms Market Inquiry
Postal Address:
The Competition Commission,
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Dear Chairpersons

This document is a written submission in response to the Inquiry's call for submissions in response to its Provisional Summary Report (July 2022). The first section of this submission provides the information requested on Form OIPMI 1 and the second section consists of our written submission itself.

Section One:

This submission is made by:

Prof Jonathan Klaaren, Professor of Law & Society, University of the Witwatersrand (Wits);
Dr Alexander Beyleveld, Senior Researcher, Mandela Institute (Wits);
Prof Firoz Cachalia, Director, Mandela Institute (Wits); and
Dr Harry Dugmore, Rhodes University and Senior Lecturer, University of the Sunshine Coast (Australia)
We may be contacted at Jonathan.klaaren@wits.ac.za with a postal address at the School of Law, University of the Witwatersrand, WITS 2050. Our submission does not adversely affect any firm or other individual and does not contain any confidential information.

The main focus of our submission is to provide the Inquiry with results from a concluded research project on African Digital Competition Research Working Papers & Webinars. This Omidyar-funded research initiative ran from mid-2021 to May 2022 and explored the political and legal landscape surrounding the enforcement of competition (antitrust) laws on the African continent in the digital age. It also investigated strategic options/tactics to address anticompetitive conduct and conduct violating the right to privacy by tech platforms, including the potential for litigation, public awareness, law reform, and campaigns regarding responsible technology.

The working assumption of the research project was that, while different countries vary on the African continent, there are currently more regulatory resources to respond in a competition paradigm than in regime based on the human right of privacy. The project aimed to investigate whether competition authorities possess greater capabilities than data protection authorities and technology/media/telecommunications regulators and, if so, the implications on the regulatory environment. The project thus intended to increase the knowledge base available to educate the public and policy makers on a realistic African

regulatory response to the rise of big tech platforms. More information on this research project is available at: https://wiser.wits.ac.za/page/african-digital-competition-research-working-papers-webinars-13755.

In summary, the issues we raise in this written submission are the following:

(1) That the Inquiry's findings and provisional recommendations with respect to digital taxation are supported

(2) That the Inquiry's finding that there is merit in the competition issues raised by tech companies and platforms with respect to the news media and public interest journalism is supported; and

(3) That the Inquiry's provisional recommendation that there be a separate more narrowly-focused market inquiry into the competition and regulation issues raised by tech companies and platforms with respect to the news media and public interest journalism is supported; and

(4) That the Inquiry's provisional recommendation in respect of future regulatory oversight is broadly supported, with the observation that issues of privacy and data protection in these fields ought not to be and cannot be dealt with on the margins.

Section Two:

In this section of our written submission we overview three contributions made in the course of our research project which are relevant to two discrete areas of the Inquiry's findings and draft recommendations.

Alexander Beyleveld: 'Current Developments and Issues in the Field of African FinTech: Digital Trade Customs Moratoriums and Digital Services Taxes'

Alexander Beyleveld's research note discusses two broad issues that are in our view likely to be robustly contested by tech companies and platforms in the development of the African digital economy: (i) the potential imposition of customs duties on cross-border electronic transmissions; and (ii) the potential imposition of digital services taxes globally. The issues discussed in Beyleveld's research are relevant to the Inquiry's call for submissions in paragraph 123.

With respect to the first issue, Beyleveld notes South Africa's policy position (shared with India) that the continued imposition of the moratorium 'will be equivalent to developing countries giving the digitally advanced countries duty-free access to [their] markets' and that '[a]ll countries trying to catch up need time for their industries to become competitive before full liberalisation can be optimal'. With respect to the second issue, Beyleveld describes some of the likely lines of contestation around the imposition of digital services taxes in the context of international legal developments around these and other taxes relevant to large corporations based in the Global North.

On these issues, Beyleveld has also separately written on international corporate tax competition in his book, which has been published open access and is thus freely available[1], Taking a Common Concern Approach to Economic Inequality: Implications for (Cooperative) Sovereignty over Corporate Taxation (Brill 2022). His arguments in this volume, especially in the fourth chapter, should be read as supporting the Inquiry's finding at paragraph 176.1 of the Provisional Summary Report that "Substantially lower corporate tax rates for global platforms distorts competition and disadvantages South African platforms where they compete with global platforms."'

This research thus also supports the Inquiry's draft recommendation at paragraph 178.1 which is stated in the following terms: "National Treasury to consider the competition distorting effects on digital markets of differing tax rates as one factor in determining how to tax digital content and firms, along with options for more equitable treatment such as a withholding tax."

Harry Dugmore: 'Learning from the approach of the Australian Competition and Consumer Commission and the Australian government to reducing the harmful impact of global digital platform power on local economies and local news ecosystems'

Wendy Trott and Michael Power: 'Competition in the Digital Economy and the Sustainability of Journalism: A Modern Dilemma'

These two separate contributions by Harry Dugmore and by Wendy Trott and Michael Power made in the context of our research project are relevant to the Inquiry's call for submissions in paragraph 123 as they discuss aspects of the issues discussed in Chapter 7 of the Inquiry's Provisional Summary Report (paragraphs 111-116).

In his contribution, Dugmore notes that "Despite the headlines about the code's preventing and stopping the 'stealing' of news content, the ACCC's approach is not about the misuse of propriety content, nor it is about preventing infringements of copyright, as per the strategies of imposing a 'snippet tax' pursued by Spain and France and the by the European Union more generally. Rather the code forces these companies to monetarily (and in other ways) compensate the news industry for the *effect* of the power imbalances that the ACCC found were directly to blame for the steep declines in revenues -- and profits- across the commercial and public news sectors."

Ultimately, Dugmore endorses an earlier recommendation of his that "South Africa considers working 'closely with SADC countries, other regional groupings and the African Union to investigate an African-wide response to multinational platform power and that South Africa (and other countries) change tax laws to enforce a fairer taxation of profits that are clearly made from local advertising in particular, including the possible introduction of special transaction levies.'"

[1] https://library.oapen.org/handle/20.500.12657/54663

Noting the then-imminent submission by the Publisher Support Services (PSS) (discussed in the Inquiry's Provisional Summary Report at paragraphs 111-112), Trott and Power argue first that "While varying definitions of 'journalism' and the types of journalism that need to be protected as a public good have been offered, it is clear that there is widespread agreement over the need to act urgently to protect this fundamental pillar of democracy." Trott and Power then survey "fundamental characteristics of the digital advertising market that lead to structural disadvantages for news publishers and prevent them from competing fairly and earning sufficient revenue from their products and services". [We recognize that, to the extent Trott and Power discuss the digital advertising market), they are discussing a matter which the Inquiry has clearly ruled as beyond its scope (see e.g. paragraph 114 and footnote).] Trott and Power next discuss both the benefits and the weaknesses of adopting what they term "a competition approach to the sustainability of journalism in South Africa". Fourth, arguing that there are "many downsides of pursuing an approach that relies on bargaining between news publishers and technology companies for compensation, or payments for the 'use' of content", Trott and Power survey what they term as "alternative approaches that more directly and effectively target the underlying structural issues may be considered, at least in the longer-term". But see these as "likely to provide little short- to medium-term solace to the ailing news media industry in South Africa" – these include competition enforcement actions such as are occurring in the Global North. Trott and Power thus conclude that "a sustainable solution cannot be found without meaningful competition regulation of the platforms that reshapes the incentives and environment in which news media operate".

The contributions from Dugmore and from Trott & Power both support the apparent finding of the Inquiry in paragraph 115 of the Provisional Summary Report as follows: "There is clearly some merit to the concerns expressed by the news publishers as numerous jurisdictions have not only found the practices of search and social media companies to be harmful, but also against the public interest by undermining local and national news journalism. The importance of these search and social media for referral traffic and news consumption means that there are distinct market power issues. As a result, many countries have sought to introduce remedial action in the form of negotiations over payment to news publishers."

In an apparent provisional way forward, the Inquiry went on in paragraph 116 to express the following view: "Given the lateness with which this issue has been brought before the Inquiry, contestation over whether this lies within scope [of the Inquiry] and the complexity of the issues, the Inquiry is of the view that these issues may best be addressed through a separate process, including potentially a more focused market inquiry. As a result, the Inquiry will not continue to investigate these issues further."

We note some further relevant developments since the publication of the Provisional Summary Report. A number of countries have taken further either enquiries or legislation that are modelled on the 'market power' and harm-to-public goods (journalism) logic of the Australian Competition and Consumer Commission (ACCC) inquiries and the resultant News Media Bargaining Code (NMBC) approach. Many of these initiatives create their own variants of Australia's key corrective mechanism — enforced arbitration or the

threat thereof - to somewhat rebalance the unequal power of the global platforms compared to even large news media companies, in negotiating what are meant to be mutually beneficial compensation packages. In the USA, the Journalism Competition and Preservation Act, and in Canada, the Online News Act, both seek to create pressure mechanisms to facilitate private deals. In the UK, the threat of a possibly similar approach and laws being enacted by the UK government has spurred Google and Facebook to negotiate deals with a range of publishers; Google has already concluded 'licensing deals" with 250 publications, stabled in 20 organisations, as part of what appears to be proactive manoeuvring. These and other legislative actions currently being fashioned in these and other jurisdictions including Indonesia and Brazil argue for the worth of exploring possible avenues to South Africa's development of appropriate local mechanisms to restore equilibrium to relationships between large platforms and news media organisations.

Our view on the position expressed in paragraph 116 is that the Inquiry's provisional recommendation that there be a separate more narrowly-focused market inquiry into the competition and regulation issues raised by tech companies and platforms with respect to the news media and public interest journalism is supported.

Finally, with respect to regulatory oversight of future conduct, this submission is in broad support of the Inquiry proposed recommendation in paragraph 175 in respect of "capturing" future conduct in online intermediation platforms. We note that, while issues of privacy and data protection have been almost entirely ruled outside the scope of the Inquiry, such issues are particularly important for the substance of the Commission's cooperation with other regulators, including the Information Regulator, in these fast-moving and fast-changing fields. We note the positive development of the Commission's incipient relationship with the Information Regulator. It is understandable that the scope of the Inquiry has been circumscribed to contribute to its efficacy and depth and to respect the competence and subject matter of other regulators. However, in these fields, issues of privacy and data protection ought not to be and indeed cannot dealt with only on the margins.

We appreciate the opportunity to bring these views before your Inquiry.

Yours sincerely

Prof Jonathan Klaaren (also on behalf of Dr Beyleveld, Prof Cachalia, and Dr Dugmore)