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ONLINE INTERMEDIATION PLATFORMS MARKET INQUIRY

PROPOSED RECOMMENDATION ON REGULATIONS

FOR COMMENT

FEBRUARY 2023

- 1.1. The Provisional Report set out numerous proposed remedial actions for specific platforms to implement based on the provisional findings. These were aimed at current market features that the Inquiry provisionally found had an adverse effect on competition. However, the Provisional Report also recognised that this Inquiry happens at a point in time, and its decisions on specific platform categories are based on the 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. The Provisional Report recommended Commission Guidelines or Section 78 Regulations in terms of the Act, which sought to prohibit certain conduct of leading platforms, and permit the identification and review of such platforms. This was to complement the immediate remedial actions by providing better long-term oversight.

- 1.2. Given the Inquiry has gained material insights into the business models and competitive dynamics amongst intermediation platforms that may entrench an uncompetitive and exclusionary market structure, it is obliged to consider whether the tools at the disposal of the Commission are able to adequately address these future developments, and if not, recommend legislative or regulatory changes. After considering the submissions on the Provisional Report recommendations along with these factors in respect of future enforcement, the Inquiry is currently of the view that section 78 regulations are desirable as they can strengthen enforcement going forward. The Inquiry has dismissed alternative legislation and regulation as this would be neither timely nor cost-effective for South Africa.

- 1.3. Our current view is that the provisions within chapter 2 of the Act are capable of addressing a broad range of conduct that is the subject of market power or horizontal and vertical agreement. However, the Covid-19 pandemic demonstrated the value of regulations in guiding the Courts in interpreting the existing legislation 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. The Inquiry is currently of the view that digital markets represent a specific context that warrants such additional guidance, as is acknowledged globally, and that the knowledge gained in the Inquiry can inform those factors that are relevant to the assessment of online intermediation markets.
 - 1.1. This differs from the Provisional Report proposal insofar as it does not set out to prohibit certain conduct, or make determinations on leading platforms, but rather to identify 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) 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). The regulations would provide the benefit of greater legal and business certainty in the application of the Act to online intermediation services.
 - 1.4. The Inquiry is also of the view that Commission Guidelines can complement the section 78 regulations through providing guidance on best practice by online intermediation platforms such that they remain compliant with the Act. Guidelines are useful in providing business certainty as to the enforcement approach of the Commission, and best practice guidance gives even greater certainty as it informs business that specific business practices will be considered to be in compliance with the Act.
 - 1.5. The Inquiry therefore seeks comment on the following proposed recommendation by 28 February 2023:

- 1.5.1. The publication of section 78 regulations that identify factors relevant to the assessment of online intermediation and search platforms within sections 5, 7, 8 and 9 of the Act, where appropriate, based on the findings of this Inquiry. Such regulations would be subject to public comment.

- 1.5.2. The publication of Commission Guidelines on best practice for leading platforms to remain in compliance with the Competition Act.