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10 things you should know about the Competition Commission's strategy document – Competition in the Digital Economy

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During the second week of September 2020, the Competition Commission of South Africa ("Commission") published its strategy document entitled "Competition in the Digital Economy". This 68 page strategy document looks at the digital economy, the move to which has arguably been accelerated by COVID-19. In particular, the Commission's strategy document looks at the features of the regulatory environment required in order to extract maximum benefit from the digital economy. The Commission goes on to state that an enabling regulatory environment, together with sound competition policy, and an informed consumer base, innovative business culture and willing commercial partners can ensure that the digital economy realises the promise of inclusive economic growth. Accordingly, it is unsurprising that the Commission intends prioritising digital markets for merger control purposes for the next 5 years, i.e. between 2020 and 2025.

Whilst it's not entirely clear at this stage what the legal nature and status of the Commission's strategy document is, the following are 10 things you should know about the Commission's strategy document on competition in the digital economy:

1. The digital economy impacts all markets in which goods or services use the internet for production, distribution, trade and consumption by different persons, firms or agents[1]. Thus, the Commission does not see the digital economy as a single market (such as banking or e-commerce) but rather a number of different markets and sub-markets;
2. The digital economy requires competition regulators to adopt a different approach and mind set as a result of a number of novel features of the digital economy. According to the Commission, these features include rapid and responsive innovation, the tendency towards concentration arising from first-mover advantage, data accumulation and network effects, and the rapid pace of change[2];
3. The Commission's view is that digital markets tend to be "*tipping markets*" in that there is a likelihood for the rapid expansion of one large dominant platform in a particular market[3]. The examples cited by the Commission are Amazon.com in the USA and Alibaba in China;
4. The Commission intends issuing a guidance note which clarifies the valuation of assets for digital companies in respect of merger thresholds[4]. The Commission also intends:
    a. issuing a practice note on the assessment of merger creep and when such mergers would warrant intervention[5]. It is notable that the Competition Amendment Act, 2018 introduced a provision into the Competition Act, 1998 which empowers the competition authorities to consider any other mergers engaged in by a party to a merger for such periods as may be stipulated by the Commission[6];
    b. developing a practice note on the assessment of digital market mergers and updating the existing competition toolkits to account for specific features of digital markets;
    c. ensuring that domestically notifiable global tech mergers are concurrently filed in South Africa and other major jurisdictions such that the Commission may benefit from collaboration with other major jurisdictions in the assessment of the merger;
5. The Commission intends to require specific technology companies that "*dominate*" different digital markets in South Africa to inform the Commission of all small domestic acquisitions, including investments in start-ups and global acquisitions of targets with some presence

in South Africa[7]. Presumably, the use of the term "*dominate*" is intended to have the same meaning as the term "*dominant*" which is defined in the Competition Act, 1998;

6. In relation to cartels, the Commission intends to[8]:
    a. develop appropriate tools for detecting digital cartels and assessing the effects of agreements between competitors;
    b. pilot a tender bid-rigging detection programme;
    c. build and staff a cartels forensic lab which will provide the computing infrastructure for large scale data analysis and scrapping pricing data from the Internet. The Commission explains that the forensic lab will be staffed by data scientists with the skill set to undertake the analysis but informed by economic principles[9];
    d. develop guidelines for establishing the Commission's jurisdiction in cases of digital collusion that have an effect in South Africa.
7. The Commission commented in the strategy document on the advantages of big data[10] to vertically integrated firms who own a digital platform and who simultaneously compete with other sellers on that platform. According to the Commission, the online digital platform owner has access to information it collects from other sellers and can use that information to its advantage[11]. The Commission's view is that vertical integration also incentivises *self-preferencing*, which the Commission explains is the act by which digital platforms give preferential treatment to their services over the services of other companies, and which ultimately may entrench their positions of dominance[12];
8. The Commission intends instituting a scoping study, impact study or market inquiry into digital markets and intends conducting proactive investigations against conduct, by dominant online firms, that may be excluding rivals and entrenching dominance. In this regard, and to assist with providing clarity to firms of the type of conduct which the Commission deems likely to contravene the Competition Act, 1998, the Commission intends issuing guidelines which will provide such guidance[13];
9. The Commission recognizes the importance of global cooperation and coordination with other international competition agencies in respect of addressing market conduct of firms such as Google, Facebook and Apple which also have a large presence in South Africa, and potentially second-tier globally important digital firms such as Uber, Airbnb and Bookings.com[14];
10. The Commission is of the view that personal information has become the currency with which consumers purchase products that are "free" and which, therefore, makes the protection of personal information an issue that extends beyond consumer protection laws. In this regard, the Commission recommends strong cooperation and close dialogue between the South African regulators on competition, consumer protection and privacy[15].

The Commission has called for comments on its strategy document pertaining to competition in the digital economy. Parties who might be interested in commenting on the Commission's strategy document include Fintech companies[16], mobile money operators, mobile network operators, tech start-up companies, private equity firms, crowdfunding platforms and online retail stores. The deadline for comment is 5 October 2020 and it is unclear whether the Commission will extend that deadline.

It is possible that the Commission's stated intentions may change after receiving comments from the public but this seems unlikely given the global awareness and scrutiny of big tech companies around the world and the competition law concerns around geo-blocking, the use of algorithms and online digital platforms. It will, thus, be critical for firms who participate at all levels of the value chain in the digital economy to prepare for the expected scrutiny of the South African (and international) competition authorities including the scrutiny of other domestic regulators such as the National Consumer Commission and the Information Regulator.

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[1] Page 4 of the Commission's strategy document entitled "*Competition in the Digital Economy*".

[2] Page 5 of the Commission's strategy document entitled "*Competition in the Digital Economy*".

[3] Pages 6 and 7 of the Commission's strategy document entitled "*Competition in the Digital Economy*".

[4] Page 6 of the Commission's strategy document entitled "*Competition in the Digital Economy*".

[5] Page 6 of the Commission's strategy document entitled "*Competition in the Digital Economy*".

[6] Section 12A(2)(k) of the Competition Act, 1998.

[7] Page 6 of the Commission's strategy document entitled "*Competition in the Digital Economy*".

[8] Page 6 of the Commission's strategy document entitled "*Competition in the Digital Economy*".

[9] Page 37 of the Commission's strategy document entitled "*Competition in the Digital Economy*".

[10] According to the Commission, big data refers to the use of predictive analytics, user behaviour analytics or other advanced data analytics methods to extract value from a large data set. The Commission explains that the advanced analysis of large data sets can find new correlations to spot business trends, prevent disease, combat crime and the like.

[11] Page 7 of the Commission's strategy document entitled "*Competition in the Digital Economy*".

[12] Page 7 of the Commission's strategy document entitled "*Competition in the Digital Economy*".

[13] Page 7 of the Commission's strategy document entitled "*Competition in the Digital Economy*".

[14] Page 7 of the Commission's strategy document entitled "*Competition in the Digital Economy*".

[15] Page 8 of the Commission's strategy document entitled "*Competition in the Digital Economy*".

[16] Fintech companies include banks and firms who offer financial services.



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