

CHALLENGES IN THE ASSESSMENT OF MARKET POWER IN DIGITAL MARKETS

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Abstract:

In recent years, regulators have become increasingly concerned about large digital platforms' market power and their growing influence within and beyond the respective markets.¹ Large platforms' continuous accumulation and combination of users' data, together with the well-known features of digital markets, has allowed them to strengthen their market power and leverage their position into other markets, thus expanding and entrenching their ecosystems over time.² This paper aims to explore the challenges faced by regulators in the assessment of market power in the digital markets. It has been suggested that the assessment of dominance in digital markets may need to focus less on market shares and more on other factors such as the control or ownership of key inputs such as data, barriers to entry, the degree of innovation, and the strength of network effects.³ Competition authorities will, therefore, need to consider the important role that data plays in establishing or entrenching market power in digital (and other) markets – something our laws do not currently address.⁴ Consumer welfare remains crucial thus necessitating the need to develop our laws in line with the emerging digital markets.

¹ The organisation for Economic co-operation and Development ("OECD") 2024:3.

² The organisation for Economic co-operation and Development ("OECD") 2024:7.

³ De Beer Jeremy, 'Digital markets, big data, data privacy and competition: Where crossroads Meet' (2020): 16.

⁴ De Beer Jeremy, 'Digital markets, big data, data privacy and competition: Where crossroads Meet' (2020): 16.

INTRODUCTION:

There are growing concerns, both globally and in South Africa, regarding the challenges posed by digital transformation and the appropriateness of the existing enforcement tools to regulate digital markets. Digital markets are defined as digital platforms or digital ecosystems that enable the buying and selling of physical or digital goods and services over the internet.⁵ This paper explores how the concept of market power has evolved and is being applied and adapted to digital markets, as well as the implications for competition policy.

Based on competition authority decisions and academic literature, it identifies the main contributors to market power in digital markets, including the role of network effects, economies of scale and scope, data, multi-homing and switching costs.⁶ Assessing the degree of market power in digital markets can present a range of challenges for authorities.⁷ They must carefully scrutinise claims about the importance of data access and network effects as entry barriers, and thus sources of market power.⁸ Further, authorities must grapple with multi-sidedness and the need to incorporate the relationship between demand and competitive constraints in multiple markets.⁹

Digital markets are important to the economy. It is therefore of key significance for competition policy to ensure that competition is not distorted by dominant undertakings in these markets. There are several competition policy challenges related to market

⁵ Peterson K Ozili, 'Digital markets: Formative components, regulation, challenges and insights From the European Union Digital Markets Act' (2025): Page 3.

⁶ OECD (2022), The Evolving Concept of Market Power in the Digital Economy, OECD Competition Policy Roundtable Background Note, www.oecd.org/daf/competition/the-evolving-concept-of-market-power-in-the-digital-economy-2022.pdf. PAGE 3.

⁷ OECD (2022), The Evolving Concept of Market Power in the Digital Economy, OECD Competition Policy Roundtable Background Note, www.oecd.org/daf/competition/the-evolving-concept-of-market-power-in-the-digital-economy-2022.pdf. PAGE 5

⁸ OECD (2022), The Evolving Concept of Market Power in the Digital Economy, OECD Competition Policy Roundtable Background Note, www.oecd.org/daf/competition/the-evolving-concept-of-market-power-in-the-digital-economy-2022.pdf. PAGE 5.

⁹ OECD (2022), The Evolving Concept of Market Power in the Digital Economy, OECD Competition Policy Roundtable Background Note, www.oecd.org/daf/competition/the-evolving-concept-of-market-power-in-the-digital-economy-2022.pdf. PAGE 3.

power in the digital era, including questions about the relationship between new regulatory concepts related to market power and established enforcement concepts.

WHAT IS THE CONCEPT OF MARKET POWER/DOMINANCE?

In South Africa, dominance is assessed by section 7 of the Competition act (89 of 19988) as amended, which reads as follows:

“A firm is dominant in a market if¹⁰

(a) it has at least 45% of that market;

(b) it has at least 35%, but less than 45%, of that market, unless it can show that it does not have market power;

(c) or it has less than 35% of that market, but has market power.”

Dominance can be assessed using the firm’s market shares or based on the concept of market power, or both. Section 1(xiv) of the Act defines market power as the ability/ power of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers.¹¹ In other words, a firm has market power if its behaviour in the market cannot be constrained by competitors, its customers or suppliers of its input.

The core economic foundations of market power assessments have remained consistent in digital cases, namely a focus on barriers to entry and substitutability.¹² Barriers to entry or expansion are an integral part of the assessment of dominance/substantial market power. Barriers to entry are factors that prevent or make it hard for new firms to enter the market e.g. high start-up costs, patent protections, government regulations, strong brand identity etc.¹³ Moreover, barriers to entry can reinforce market power by creating

¹⁰ Section 7 of the Competition act (89 of 19988) as amended.

¹¹ Section 1(xiv) of the Competition act (89 of 19988) as amended.

¹² OECD (2022), The Evolving Concept of Market Power in the Digital Economy, OECD Competition Policy Roundtable Background Note, www.oecd.org/daf/competition/the-evolving-concept-of-market-power-in-the-digital-economy-2022.pdf. PAGE 7.

¹³ United Nations Conference on Trade and Development (2019), “Competition issues in the Digital Economy”: Page 4.

monopolies. Economies of scale and scope, data-driven network effects and control of data create high barriers to entry.¹⁴

Australian Competition and Consumer Commission's (ACCC): The ACCC has found in its inquiries that many digital platform markets are prone to the accumulation of substantial market power, which, once attained, can readily become entrenched.¹⁵ First, digital platform markets have a number of characteristics that make them prone to high degrees of market concentration and significant barriers to entry. These characteristics include:¹⁶

- extreme economies of scale and sunk costs,
- network effects (direct and indirect),
- expansive ecosystems and advantages of scope,
- consumer inertia, switching costs and defaults; and
- access to, and use of, vast amounts of individual-level and other high-quality data.

DEVELOPMENTS AND NEW CONCEPTS OF MARKET POWER IN DIGITAL MARKETS:

The nature of fast-moving digital markets has a significant impact on the methods used to assess dominance. Antitrust analysis should consider characteristics of digital platforms, such as network effects, economies of scale, multi-homing, control or ownership of key inputs such as data, barriers to entry, degree of innovation etc.¹⁷ The application of traditional tools used by the Commission to find market power in digital markets may lead to misconceptions and errors.

¹⁴ United Nations Conference on Trade and Development (2019), “Competition issues in the Digital Economy”: Page 4.

¹⁵ Organisation for Economic Co-operation and Development (2022), “The Evolving concept of market power in the Digital Economy – Note by Australia”: Page 4.

¹⁶ Organisation for Economic Co-operation and Development (2022), “The Evolving concept of market power in the Digital Economy – Note by Australia”: Page 4.

¹⁷ Hlina E, ‘Dominant undertakings in the Digital Era: A call for Evolution of the Competition Policy Towards Article 102 TFEU?’ (2016): PAGE 23.

Network effects:

Network effects, which have traditionally been considered in the context of physical infrastructure and capacity limitations, have taken on a wholly new dynamic in dematerialised digital markets.¹⁸ Network effects is a phenomenon whereby the higher the number of users or participants using a good or service the higher the value of that good or service.¹⁹ In turn, network effects can give rise to specific and complex pricing dynamics, including providing free services to one or more user groups.²⁰ With experience, authorities have begun to identify the situations in which they contribute to market power, and those in which their effects on market structure are minimal.²¹ Specifically, network effects have been assessed as a contributor to market power both in reducing substitution by consumers and creating barriers to entry that limit competitive constraints.²²

When accompanied by high fixed costs relative to marginal production costs, network effects can result in winner-take-most markets.²³ A key factor that affects the importance of network effects for the structure of digital platform markets and barriers to entry is whether users single-home or multi home.²⁴

Economies of scale and sunk costs:

The ACCC has found that once a digital platform reaches a certain size it can be very difficult for smaller platforms or new entrants to effectively challenge them, due in part

¹⁸ OECD (2022), The Evolving Concept of Market Power in the Digital Economy, OECD Competition Policy Roundtable Background Note, www.oecd.org/daf/competition/the-evolving-concept-of-market-power-in-the-digital-economy-2022.pdf. PAGE 7.

¹⁹ Organisation for Economic Co-operation and Development, 'The Evolving concept of market power in the Digital Economy – Note by European Union' (2022): Page 3.

²⁰ Organisation for Economic Co-operation and Development, 'The Evolving concept of market power in the Digital Economy – Note by European Union' (2022): Page 3.

²¹ OECD (2022), The Evolving Concept of Market Power in the Digital Economy, OECD Competition Policy Roundtable Background Note, www.oecd.org/daf/competition/the-evolving-concept-of-market-power-in-the-digital-economy-2022.pdf. PAGE 7.

²² OECD (2022), The Evolving Concept of Market Power in the Digital Economy, OECD Competition Policy Roundtable Background Note, www.oecd.org/daf/competition/the-evolving-concept-of-market-power-in-the-digital-economy-2022.pdf. PAGE 10.

²³ Mark Jamison, 'Towards a Theory of market power' (2020): Page 14.

²⁴ Organisation for Economic Co-operation and Development (2022), "The Evolving concept of market power in the Digital Economy – Note by Australia": Page 7.

to sunk costs and extreme economies of scale.²⁵ Digital platforms generally incur high upfront or fixed costs in the development and operation of their platforms, but low (and possibly declining) marginal costs in servicing additional users.²⁶

These large economies of scale insulate large digital platforms from competition in two ways. First, it places smaller platforms at a significant cost disadvantage, limiting their ability to compete.²⁷ Second, it makes new entry less likely.²⁸ That is, to the extent that the high fixed costs are ‘sunk’ (i.e. cannot be recouped if the entrant is unsuccessful), they can make entry extremely risky.²⁹

Data:

In digital markets, data is often identified by competition authorities as such an input, and thus a contributor to market power. User data can be obtained in various ways. First, it can be collected directly from users on a voluntary basis. For instance, when signing up or registering for an online service, users are often asked to provide certain information (e.g. age, gender, education, address etc.)³⁰ The second way to obtain data is to observe the user’s behaviour.³¹ Without data, content models will be less accurate and less desirable.

Furthermore, the Australian, Canadian, European Commission, UK and US competition authorities have all indicated in case decisions that the accumulation of data by an incumbent represents a significant barrier to entry, given the associated network effects and economies of scale.³² Access to and control of data is crucial and confers market

²⁵ Organisation for Economic Co-operation and Development (2022), “The Evolving concept of market power in the Digital Economy – Note by Australia”: Page 5.

²⁶ Organisation for Economic Co-operation and Development (2022), “The Evolving concept of market power in the Digital Economy – Note by Australia”: Page 5.

²⁷ Organisation for Economic Co-operation and Development (2022), “The Evolving concept of market power in the Digital Economy – Note by Australia”: Page 5.

²⁸ Organisation for Economic Co-operation and Development (2022), “The Evolving concept of market power in the Digital Economy – Note by Australia”: Page 5.

²⁹ Organisation for Economic Co-operation and Development (2022), “The Evolving concept of market power in the Digital Economy – Note by Australia”: Page 5.

³⁰ John Forbes Nash Jr, ‘How to assess market power in the Digital Economy?’ Radboud University Nijmegen Faculty of Law: Page 15.

³¹ John Forbes Nash Jr, ‘How to assess market power in the Digital Economy?’ Radboud University Nijmegen Faculty of Law: Page 15.

³² Hlina E, ‘Dominant undertakings in the Digital Era: A call for Evolution of the Competition Policy Towards Article 102 TFEU?’ (2016): PAGE 14.

power, and this feature is further reinforced by network effects.³³ Firms therefore “compete for the market instead of competing in the market, leading to ‘winner takes all’ outcomes”.³⁴

Two sidedness and zero-pricing:

Many digital services are offered via platforms linking two or more groups of users (“sides”) together. One critical aspect of two-sidedness is that a supplier can offer digital products, in particular consumer-facing products, for free (or on a freemium basis) on one side, while generating revenues on the other side of the market.³⁵ For example, Meta provides services to both consumers who wish to use social media services, and advertisers who wish to advertise to these consumers while they are doing so. Identifying the competitive rivals to Meta involves assessing the alternatives available to both consumers and advertisers, and the degree to which they are effective substitutes.

Single- and multi-homing:

Multi-homing refers to the same customer using the same type of products (or services), from more than one supplier.³⁶ In digital markets, multi homing generally entails that one user may have access to different software or applications from competing providers.³⁷ For instance, smartphone owners may rely on multiple consumer communication services in parallel, depending on the use cases or the identity of the person they want to communicate with.³⁸

³³ United Nations Conference on Trade and Development (2019), “Competition issues in the Digital Economy”: Page 6.

³⁴ United Nations Conference on Trade and Development (2019), “Competition issues in the Digital Economy”: Page 6.

³⁵ Organisation for Economic Co-operation and Development, ‘The Evolving concept of market power in the Digital Economy – Note by European Union’ (2022): Page 3.

³⁶ Organisation for Economic Co-operation and Development, ‘The Evolving concept of market power in the Digital Economy – Note by European Union’ (2022): Page 3.

³⁷ Organisation for Economic Co-operation and Development, ‘The Evolving concept of market power in the Digital Economy – Note by European Union’ (2022): Page 3.

³⁸ Organisation for Economic Co-operation and Development, ‘The Evolving concept of market power in the Digital Economy – Note by European Union’ (2022): Page 3.

CHALLENGES FACED BY COMPETITION AUTHORITIES:

As a result of these developments, competition authorities have been facing several challenges when undertaking the assessment market power/dominance. Authorities must adapt their assessments of market power to digital markets and consider the precise role of market power when faced with the need to assess and make decisions based on new concepts.³⁹ The latter challenge is especially pronounced given that competition enforcement is being complemented with new regulatory measures in several jurisdictions.⁴⁰

Under the current enforcement standard, Competition authorities around the world put a strong emphasis on market shares to determine market power or dominance. Market shares give an initial picture of the size of the firm relative to its competitors, and the overall structure of the market. However, as well documented elsewhere, the picture provided by static market shares is incomplete, given they can only provide a preliminary indication of limitations to substitution, and do not provide any information on the potential for supply-side substitution or new entry.⁴¹ The limitations of market shares are especially pronounced with respect to digital platforms.⁴²

On their own, market shares have never been a complete proof of market power and may be even more limited in providing a complete picture.⁴³ They fail to capture the potential for rapid tipping of markets into monopoly, accelerated by network effects.⁴⁴ They also risk overemphasising conditions within defined product markets without considering the

³⁹ Hlina E, 'Dominant undertakings in the Digital Era: A call for Evolution of the Competition Policy Towards Article 102 TFEU?' (2016): PAGE 31.

⁴⁰ Hlina E, 'Dominant undertakings in the Digital Era: A call for Evolution of the Competition Policy Towards Article 102 TFEU?' (2016): PAGE 31.

⁴¹ OECD (2022), The Evolving Concept of Market Power in the Digital Economy, OECD Competition Policy Roundtable Background Note, www.oecd.org/daf/competition/the-evolving-concept-of-market-power-in-the-digital-economy-2022.pdf. PAGE 8.

⁴² OECD (2022), The Evolving Concept of Market Power in the Digital Economy, OECD Competition Policy Roundtable Background Note, www.oecd.org/daf/competition/the-evolving-concept-of-market-power-in-the-digital-economy-2022.pdf. PAGE 8.

⁴³ OECD (2022), The Evolving Concept of Market Power in the Digital Economy, OECD Competition Policy Roundtable Background Note, www.oecd.org/daf/competition/the-evolving-concept-of-market-power-in-the-digital-economy-2022.pdf. PAGE 7.

⁴⁴ OECD (2022), The Evolving Concept of Market Power in the Digital Economy, OECD Competition Policy Roundtable Background Note, www.oecd.org/daf/competition/the-evolving-concept-of-market-power-in-the-digital-economy-2022.pdf. PAGE 7.

potential for dynamic competitive pressure, or indeed a lack of potential challengers, in related markets.⁴⁵ Further, when digital markets are multisided, and especially when they feature products provided at a price of zero, no single market share metric can adequately capture the realities in a market.⁴⁶ In zero-price markets, it does not always make sense to calculate market shares, i.e. the ratio of shares of a company compared to sales in the market.⁴⁷ This also entails that the profit margins of a market leader are not necessarily conclusive evidence of power.⁴⁸

The overall issue with data for the dominance evaluation is how data is utilized and its uncertain value, and this challenges the price-based tools in the assessment of dominance.⁴⁹ Data does not have a set value.⁵⁰ On the contrary, it is what can be extracted from the data set that has potential value, and the company must be able to release the potential to extract this value.⁵¹ However, holding or collecting data sets is not enough in the long run because they become outdated. Therefore, continuous data collection and access is necessary.⁵²

Multi-sidedness is a particular challenge – picking one side of the market to measure will give an incomplete picture, especially when one side’s consumption is cross subsidised by another, such as with advertising.⁵³ Further, developing a platform-wide market share may also obscure important details. For instance, a platform-wide market share would

⁴⁵ OECD (2022), The Evolving Concept of Market Power in the Digital Economy, OECD Competition Policy Roundtable Background Note, www.oecd.org/daf/competition/the-evolving-concept-of-market-power-in-the-digital-economy-2022.pdf. PAGE 7.

⁴⁶ OECD (2022), The Evolving Concept of Market Power in the Digital Economy, OECD Competition Policy Roundtable Background Note, www.oecd.org/daf/competition/the-evolving-concept-of-market-power-in-the-digital-economy-2022.pdf. PAGE 7.

⁴⁷ Tone K, ‘Digital dominance: assessing market definition and market power for online platforms Under Article 102 TFEU’ (2023): Page 429.

⁴⁸ Tone K, ‘Digital dominance: assessing market definition and market power for online platforms Under Article 102 TFEU’ (2023): Page 430.

⁴⁹ Tone K, ‘Digital dominance: assessing market definition and market power for online platforms Under Article 102 TFEU’ (2023): Page 415.

⁵⁰ Tone K, ‘Digital dominance: assessing market definition and market power for online platforms Under Article 102 TFEU’ (2023): Page 415.

⁵¹ Tone K, ‘Digital dominance: assessing market definition and market power for online platforms Under Article 102 TFEU’ (2023): Page 415.

⁵² Tone K, ‘Digital dominance: assessing market definition and market power for online platforms Under Article 102 TFEU’ (2023): Page 415.

⁵³ Hlina E, ‘Dominant undertakings in the Digital Era: A call for Evolution of the Competition Policy Towards Article 102 TFEU?’ (2016): PAGE 8.

not capture the competitive dynamics of a market if some firms are not active on all sides.⁵⁴ This could occur if firms are at different levels of maturity or have different business models.⁵⁵

Digital markets are characterised by their fast-moving, innovative and disruptive nature causing a high fluctuation in market shares.⁵⁶ Since a dominant market position may not be held over time, a digital champion would not even be considered market dominant if it cannot maintain its market power.⁵⁷ Digital markets are usually highly dynamic, with short innovation cycles, and market shares can accordingly be ephemeral.⁵⁸ Therefore, market shares, which are a static measurement of power, are not necessarily indicative of competitive strength in fast-growing digital markets.⁵⁹

The dynamics of quickly evolving industries has caused problems in at least two high profile antitrust cases. In 1969, the US Department of Justice filed an antitrust case against IBM, accusing it of illegally monopolizing computers.⁶⁰ IBM was enjoying impressive success in the computer business at the time the case was filed, but the market was changing. The evolution became so substantial that government gave up the case, admitting that it was without merit.⁶¹ Similarly in the Microsoft case filed in 2000, the government missed how computer operating systems were evolving and as a result lost substantial portions of its case.⁶²

Unfortunately for the projection approach to addressing industry change, government/regulator cannot predict industry evolution well.⁶³ If it could, then

⁵⁴ Hlina E, 'Dominant undertakings in the Digital Era: A call for Evolution of the Competition Policy Towards Article 102 TFEU?' (2016): PAGE 8.

⁵⁵ Hlina E, 'Dominant undertakings in the Digital Era: A call for Evolution of the Competition Policy Towards Article 102 TFEU?' (2016): PAGE 8.

⁵⁶ Hlina E, 'Dominant undertakings in the Digital Era: A call for Evolution of the Competition Policy Towards Article 102 TFEU?' (2016): PAGE 24.

⁵⁷ Hlina E, 'Dominant undertakings in the Digital Era: A call for Evolution of the Competition Policy Towards Article 102 TFEU?' (2016): PAGE 24.

⁵⁸ Tone K, 'Digital dominance: assessing market definition and market power for online platforms Under Article 102 TFEU' (2023): Page 429.

⁵⁹ Tone K, 'Digital dominance: assessing market definition and market power for online platforms Under Article 102 TFEU' (2023): Page 429.

⁶⁰ Cass supra note 16, at 178-79.

⁶¹ Cass supra note 16, at 180-81.

⁶² Cass supra note 16, at 184-85.

⁶³ Unilateral Conduct Working Group, 'Report on the results of the ICN Survey on Dominance / Substantial market power in Digital markets' (2020): Page 12.

businesses could also predict the change, and it would not be disruptive.⁶⁴ This inability to predict frustrate regulators' abilities to clearly identify market power and investigate its underlying causes. In failing to adequately recognize industry change, antitrust too often simply hobbles the winner of a round of episodic disruption, making it hard for the accused to leverage its capabilities to bring value in the next disruptive phase.⁶⁵

PROPOSED SOLUTIONS AND RECOMMENDATIONS:

Competition authorities have already acquired significant experience in assessing the market power of digital platforms and addressing certain fundamental questions about the nature of market power in digital markets. However, there has been a range of proposals for authorities to adjust their approach and assessments.

Some authority decisions that discuss market shares go beyond observations about the level of market shares. Given the concerns about durability of market power in digital markets, some authority decisions consider not just the level of a firm's market share, but also its stability over time.⁶⁶ Market share stability can help establish a lack of dynamic competition.⁶⁷ The need to consider several different metrics is also frequently recognised. Specifically, market shares calculated on the basis of revenue may need to be considered in context with other indicators, such as the share of users, share of transactions, and usage or installation statistics that cover all sides of the platform.⁶⁸

Proposals have also been made to adjust the way authorities approach market power in digital markets, namely addressing tipping risks in markets that do not yet feature a dominant player, and considering the risk of market power being leveraged into other

⁶⁴ Unilateral Conduct Working Group, 'Report on the results of the ICN Survey on Dominance / Substantial market power in Digital markets' (2020): Page 12.

⁶⁵ Unilateral Conduct Working Group, 'Report on the results of the ICN Survey on Dominance / Substantial market power in Digital markets' (2020): Page 12.

⁶⁶ Hlina E, 'Dominant undertakings in the Digital Era: A call for Evolution of the Competition Policy Towards Article 102 TFEU?' (2016): PAGE 8.

⁶⁷ Hlina E, 'Dominant undertakings in the Digital Era: A call for Evolution of the Competition Policy Towards Article 102 TFEU?' (2016): PAGE 8.

⁶⁸ Hlina E, 'Dominant undertakings in the Digital Era: A call for Evolution of the Competition Policy Towards Article 102 TFEU?' (2016): PAGE 9.

markets.⁶⁹ At the same time, there are questions about whether the concept of market power itself needs to be adapted to digitalisation. A range of concepts have been introduced to capture particular forms of, or alternative concepts to, market power, specifically the power held by digital platforms as intermediaries between firms and end consumers.⁷⁰ They include terms such as gatekeepers, bottleneck power, platform power, intermediation power and strategic market status, among others.⁷¹

A report from the policy department of the European Parliament made the following suggestions that competition authorities can employ: Firstly, adopt a more forward-looking attitude by taking potential competition into account.⁷² This means the practices adopted must be more prudent, at the same time, rely on the capability of the market to correct itself without causing too much permanent damages. Secondly, seek help from external specialists to gain a more comprehensive understanding of business models and future tendencies and lastly strengthen cooperation with the competition authorities of other countries as it is a characteristic in globalization of digital economy.⁷³

Another area of focus is the relationship between market power and dominance or monopoly positions.⁷⁴ Competition law provisions regarding abusive conduct focus on firms with either a dominant position, or monopoly position, and these provisions are often defined by explicitly referencing a given amount of market power.⁷⁵ The core idea is that certain types of conduct are only harmful for competition when firms have sufficient market power to engage in exclusionary or exploitative conduct.⁷⁶

⁶⁹ Hlina E, 'Dominant undertakings in the Digital Era: A call for Evolution of the Competition Policy Towards Article 102 TFEU?' (2016): PAGE 5.

⁷⁰ Hlina E, 'Dominant undertakings in the Digital Era: A call for Evolution of the Competition Policy Towards Article 102 TFEU?' (2016): PAGE 5.

⁷¹ Hlina E, 'Dominant undertakings in the Digital Era: A call for Evolution of the Competition Policy Towards Article 102 TFEU?' (2016): PAGE 5.

⁷² <https://www.apeccp.org.tw/htdocs/doc/Taipei/Publication/1080325-6.pdf>.

⁷³ <https://www.apeccp.org.tw/htdocs/doc/Taipei/Publication/1080325-6.pdf>.

⁷⁴ Hlina E, 'Dominant undertakings in the Digital Era: A call for Evolution of the Competition Policy Towards Article 102 TFEU?' (2016): PAGE 31.

⁷⁵ Hlina E, 'Dominant undertakings in the Digital Era: A call for Evolution of the Competition Policy Towards Article 102 TFEU?' (2016): PAGE 31.

⁷⁶ Hlina E, 'Dominant undertakings in the Digital Era: A call for Evolution of the Competition Policy Towards Article 102 TFEU?' (2016): PAGE 31.

However, the pace of evolution of digital markets, the nature of the contributors to market power in these markets (such as network effects), and the potential for market power to become entrenched have all led to some proposals to adjust this approach.⁷⁷ In particular, some have suggested that conduct by firms that are not yet dominant may need to be prevented given the risk of tipping into monopoly.⁷⁸ The question, then, is what limiting factor should be applied, since it is clear that not all firms with market power that stops short of dominance are capable of abusive conduct.⁷⁹

CONCLUSION:

A shared threat faced by competition authorities in developing countries is that of the appropriateness of current competition legislation and regulation to address the challenges of the digital economy.⁸⁰ South Africa shares these concerns as our own legislative and regulatory systems have often been modelled on those in more mature jurisdictions which are currently facing challenges in regulating digital markets.⁸¹

Traditional competition tools, which have been successfully applied to prevent elevated levels of concentration and the establishment of monopolies within the traditional economy, have come under great scrutiny given the potential difference in the dynamics of digital markets.⁸² These tools appear to have fallen short in some respects, given the high concentration levels in digital markets, leading to calls for differences in approach when regulating certain elements of competition in the digital economy.⁸³

Market power can be complex to determine in digital platform markets. A combination of rapidly evolving consumer trends, strong network effects and large up-front costs for

⁷⁷ Hlina E, 'Dominant undertakings in the Digital Era: A call for Evolution of the Competition Policy Towards Article 102 TFEU?' (2016): PAGE 31.

⁷⁸ Hlina E, 'Dominant undertakings in the Digital Era: A call for Evolution of the Competition Policy Towards Article 102 TFEU?' (2016): PAGE 31.

⁷⁹ Hlina E, 'Dominant undertakings in the Digital Era: A call for Evolution of the Competition Policy Towards Article 102 TFEU?' (2016): PAGE 31.

⁸⁰ Competition Commission South Africa, 'Competition in the Digital Economy' (2021): Page 36.

⁸¹ Competition Commission South Africa, 'Competition in the Digital Economy' (2021): Page 36.

⁸² Simphiwe G and Manenzhe P 'Competition regulation for Digital markets: The South African Experience' (2023): Page 2.

⁸³ Simphiwe G and Manenzhe P 'Competition regulation for Digital markets: The South African Experience' (2023): Page 2.

digital platforms mean that traditional metrics—such as market shares and operating margins—may not provide the full picture. Market shares in digital markets should be handled with caution because digital markets are dynamic and market shares may fail to reflect the actual market development, including the possible attractiveness of new products.

It is well-recognised that digital markets, like other dynamic markets, feature rapid changes in terms of the introduction of new or improved products, and that innovation plays a central role. In particular, the threat of potential entry, and the existence of competitive pressure to innovate from rivals outside of product markets, could ensure that market power is temporary. As such, market shares may be volatile and may fail to reflect the competitive constraint exercised by a company at the time of the assessment.

Given the specificities of digital products and services, authorities have used different methodologies and metrics to calculate shares, adapted to the specificities of the relevant market(s). The characteristics of these multisided markets where platforms operate, such as strong network effects and economies of scale, lead to competition instead being focused on other parameters like innovation, quality, privacy and sustainability. In brief, many competition authorities around the world are adopting their tools to adequately deal with the challenges brought by digital markets in line with the above proposed solutions.

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