

ONLINE INTERMEDIATION PLATFORMS MARKET INQUIRY



competition commission
south africa

FINAL REPORT AND DECISION

JULY 2023



a growing, deconcentrated and inclusive economy

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[GLOSSARY OF TERMS]

4IR	4th Industrial Revolution	IDC	Industrial Development Corporation
Ad	Advertisement/ Advert	IP-based Product	Internet Protocol based Product
AEC	Adverse Effect on Competition	JFTC	Japan Fair Trade Commission
API	Application Programming Interface	MADA	Mobile Application Distribution Agreement
ARB	Advertising Regulatory Board	MSE	Meta Search Engine
ADR	Average Daily Rate	NEF	National Empowerment Fund
B2B	Business to Business	OEM	Original Equipment Manufacturer
B2C	Business to Consumer	OIPMI	Online Intermediation Platform Market Inquiry
BRN	Booked Room Nights	OS	Operating System
B&M	Brick & Mortar	OTA	Online Travel Agent
C2C	Consumer to Consumer	PC	Personal Computer
CAC	Competition Appeal Court	PFR	Provisional Findings and Recommendations
CLA	Comparison Listing Ad	PIC	Public Investment Corporation
Commission	Competition Commission of South Africa	PLA	Product Listing Ad
Competition Act	Competition Act 89 of 1998	PPA	Property Promotion Ad
CPC	Cost-per-click	PR	Provisional Report
CPI	Cost-per-impression	REBOSA	Real Estate Business Owners of South Africa
CSS	Comparator Shopping Sites	RFI	Request for Information
CTR	Click-through-rate	RMS	Revenue Management Systems
DMA	Digital Market Act (Regulation 2022/1925)	SAVCA	Southern African Venture Capital Association
DSBD	Department of Small Business Development	SEO	Search Engine Optimisation
DTIC	Department of Trade, Industry and Competition	SERP	Search Engine Results Page
EAPPC	Estate Agent Property Portal Company	SME	Small and Medium Enterprises
EC	European Commission	SOI	Statement of Issues
EU	European Union	SPLC	Substantial Prevention or Lessening of Competition
FRAND	Fair, Reasonable and Non-Discriminatory	SSNDQ	Small but Significant Non-Transitory Decrease in Quality
FSOI	Further Statement of Issues	SSNIP	Small but Significant Non-Transitory Increase in Price
FTC	Federal Trade Commission	TOR	Terms of Reference
GBV	Gross Booking Value	TTV	Total Transaction Value
GDS	Global Distribution System	VC	Venture Capital
HDP	Historically Disadvantaged Person	VCC	Virtual Credit Card
IAP	In-App Payment		

[EXECUTIVE SUMMARY]

The Competition Commission formally initiated the Online Intermediation Platforms Market Inquiry (“Inquiry” or “OIPMI”) on 19 May 2021 in terms of section 43B(1)(a) of the Competition Act 89 of 1998 (as amended) (“the Act”). An Inquiry was initiated because the Commission has reason to believe that there are market features of online intermediation platforms that may impede, distort or restrict competition; and in order to achieve the purposes of the Act including the participation of small and medium enterprises (“SMEs”) and historically disadvantaged persons (“HDPs”) in these markets. Those intermediation platforms include eCommerce, online travel agencies, food delivery, app stores and property/automotive classifieds, along with the role of Google Search in shaping B2C platform competition. The choice of this area for the online inquiry was that these platforms affect real business activity across a wide range of the economy.

All Inquiry documents and public submissions are available on the Inquiry website.¹ Since initiation, the key Inquiry processes and proceedings to date have been as follows:

- Release of the Statement of Issues (“SOI”) for public comment (19 May 2021);
- Issuing a first round of Requests for Information (RFIs) and business user survey (May 2021);
- Release of the Further Statement of Issues (FSOI”) for public comment (17 August 2021);
- Issuing of second round of RFIs and refined business user survey (August 2021);
- Public hearings and follow up RFIs (November 2021);
- Receipt of expert reports and in-camera hearings (February 2022);
- Publication of the Provisional Inquiry Report along with provisional findings and recommendations (13 July 2022);

- Submissions on the Provisional Inquiry Report (August/September 2022);
- Engagements with stakeholders and follow-up RFIs (October/November/December 2022).
- Engagements with stakeholders on final findings and remedial actions / recommendations (January to July 2023).

The Inquiry has continued to engage on the remedial actions required to address any identified harm which are both reasonable and practical, but also comprehensive solutions. The report provides the Inquiry’s final findings on features that adversely affect competition in these markets and includes the decision on the set of remedial actions that platforms, and some other businesses, are required to implement to remedy the adverse effects. This summary sets out the primary findings and remedial actions in each of the platform categories and Google Search.

PLATFORM COMPETITION

Online intermediation platforms may not be the only distribution channel for business users to reach consumers to sell their products or services. However, they have a unique proposition that has driven growing adoption by both consumers and businesses. For the consumer it is the convenience of a single aggregator where the consumer can easily search and compare the product and service offerings of a much wider variety of businesses, along with the convenience of online transacting anytime from anywhere. For business users, the proposition is national (or international) marketing access to consumers and the online sales that these platforms generate, as well as the payments, technical and physical infrastructure to conclude transactions online.

Intermediation platforms are subject to so-called

¹ <http://www.compcom.co.za/online-intermediation-platforms-market-inquiry/>

network effects, where more users on the one side of the platform makes the platform more valuable to the other side. A platform that can deliver the bulk of current online consumer leads and sales will make itself invaluable to business users, enabling that platform to extract more from the business users to fund its lead in platform development and consumer acquisition. This is the virtuous cycle of scaled platforms and the barrier to expansion for entrants.

The importance in online leads or sales and level of dependency by business users means that scaled platforms can influence competition amongst businesses on the platform or exploit the businesses. This may be through, for instance, their fees, fee structure, ranking algorithms or terms and conditions. The platforms may not necessarily set out to influence competition, except in the case of self-preferencing, but it may emerge as a by-product of their monetisation strategy and business model.

These market features result in a bifurcated market with one or two scaled platforms that influence both platform and business user competition. The Inquiry has sought to distinguish the scaled platforms with leading positions in each category from other market participants, terming them leading platforms. It is these leading platforms that are the focus of findings and remedial actions.

GOOGLE SEARCH

Most online search, travel and shopping journeys for goods and services start on general search, the entry point for most consumers to the Internet. General search leads are considered particularly valuable to platforms because they are intent-based. Google Search is a de facto monopoly, accounting for over 90% of all general search across desktop, tablet and mobile devices. Given its importance for customer acquisition, visibility on the Google search is critical and impacts on discoverability and website traffic. On Google Search itself, ranking matters as consumers show a predisposition to click on the first results assuming they are most relevant to the query.

Google Search has evolved over time to provide more prominence to paid results and Google's own properties relative to organic results for commercial search. This is reflected in the large and growing spend on Google paid results by platforms. Whilst paid ads are on a cost-per-click (CPC) auction basis and technically allows any platform to contest for a click, large platforms have considerable advantages, including budget size, contesting more popular commercial search terms given the higher returns on clicks, and the additional quality measures used in determining the outcome all favour established platforms. Those same quality measures influence organic results and similarly favour larger platforms able to invest in search engine optimisation. The fact Google allows duplication where a platform appears in paid and organic results, means large platforms can dominate both the top paid and organic search results. The disadvantage faced by SMEs is compounded in the case of black-owned platforms that lack even venture-capital backing domestically.

The Inquiry finds that the Google Search dominance and business model distorts platform competition as small and new platforms struggle for visibility and customer acquisition. To address this distortion, the remedial actions have focused on improving paid and organic result visibility for smaller SA platforms. On organic results, Google must introduce a new platform sites unit (or carousel) to display smaller SA platforms relevant to the search (e.g travel platforms in a travel search) for free and augment organic results with a content-rich display. Google must also introduce an SA flag identifier and SA platform search filter to aid consumers to easily identify and support local platforms in competition to global ones. On paid results, Google must provide R180m in advertising credits for small platforms to use in customer acquisition along with free training to optimise advertising campaigns. Google must also provide a further R150m in training, product support and other measures for SME and black-owned online firms to offset the competitive disadvantages faced on Google Search.

In certain platform categories, such as shopping and travel, there is the additional distortion of Google providing services that compete with its customers for consumer attention. Google has strong incentives to capture this specialist search traffic and has the ability to do so given that the majority of traffic originates on Google search, where it designs the search page and algorithm. In this way it can influence where and how its own Shopping and travel units appear on the search page relative to competitors. Google's Shopping Unit appears at the top of all search results, and its travel units at the top of organic results with a new paid hotel unit now appearing at the top of all search results. The evidence demonstrates these units attract a large growing share of consumer traffic, and for Shopping this has been found to distort competition in the EU.

The Inquiry finds that Google self-preferencing of its own shopping and travel units on its search results page distorts competition. To address this distortion, the remedial actions focus on changes to Google Search to cease self-preferencing its own products. In the interests of both regulatory compliance for Google and oversight by the Commission, Google is required to implement in SA measures taken in Europe to comply with similar provisions in the Digital Markets Act to address self-preferencing.

TRAVEL AND ACCOMMODATION

In travel, Booking.com is the largest online travel agent (OTA) for traditional hotel and accommodation establishments by a huge distance, with Airbnb only being large in alternative accommodation (which typically includes homes, apartments, villas and house shares). With a significant share of bookings, dependency of establishments and strong network effects, Booking.com is the leading platform in travel in South Africa.

Booking.com imposes so-called 'wide price parity' conditions on hotels and other establishments which require them to offer room prices to Booking.com that are no less favourable than the

room price offered to other OTAs. Wide price parity is now generally accepted to be a hardcore restraint of trade and Booking.com has removed these clauses in the EU but persists in applying them in SA. In essence, the clause prevents other platforms competing with Booking.com on price which not only harms consumers but impedes other OTAs from charging a lower booking commission to hotels in exchange for lower prices, hurting competition on platform commissions and prices too.

In addition, Booking.com imposes so-called 'narrow price parity' which prevents hotels and other establishments from pricing lower on their own websites for online bookings. The ability of hotels to price lower on their own direct channel is important to develop the channel and reduce dependency on Booking.com, as it provides a reason for consumers to book direct. Under narrow parity, there is no reason for consumers to book direct as there is no advantage, and potentially a disadvantage where there are loyalty discounts and a generous cancellation policy on Booking.com. This dependency on Booking.com enables it to extract higher commission fees directly or through loyalty programmes and other schemes that provide greater visibility and customer acquisition, or punish hotels that deviate with low ranking.

The Inquiry finds that Booking.com's wide and narrow price parity clauses impede competition. To address this, the remedial action is to remove these obligations and inform all hotels and accommodation providers in South Africa that list on its platform.

Booking.com has increasing influence on bookings by both foreign and domestic travellers, as ranking high on the search results drives bookings. Whilst black communities struggle to compete in the tourism sector due to a historical lack of tourism infrastructure development, the OTAs have predominately focused on established tourism and travel destinations and establishments, reinforcing historical advantage and disadvantage. This is reflected in the small number of listings from

black owned establishments and communities, and the lack of promotion of alternative tourism communities. This market feature impedes the ability of black-owned establishments and communities to compete and sustain themselves in the tourism industry.

The Inquiry finds that Booking.com's lack of diversification distorts competition from black communities. To address this distortion, it is required to put in place substantial programmes to provide funding of initiatives in the identification, onboarding, promotion and growth of SMEs that are black-owned and/or in black communities on the Booking.com platform.

ECOMMERCE

In eCommerce, the clear market leader is Takealot which has a dominant share of even overall online sales in South Africa, including other eCommerce platforms and direct retailer or manufacturer sales channels. Takealot has an even stronger position in providing online marketplace services to sellers. In essence, they allow businesses to trade within the Takealot platform by listing products on their customer website and using their warehouse and logistics services to fulfil orders for a fee. Smaller businesses wishing to trade on online marketplaces in SA are highly dependent on Takealot.

As with Booking.com, Takealot does impose on sellers 'narrow price parity', preventing them from pricing lower on their own websites, and in the same way prevents them from reducing their dependency on Takealot by developing this alternative online channel. The Inquiry similarly finds that Takealot's narrow price parity clause distorts competition and requires Takealot to remove this clause and inform all marketplace sellers on its platform.

Whilst Takealot opens its online marketplace to third party sellers, it also trades extensively itself through the Takealot Retail division. This creates a conflict of interest in the same manner as Google, namely it sets the rules for the marketplace and at the same time competes with the marketplace

sellers. Takealot too has incentives to favour itself, and at the very least its retail buyers on sales commission have strong incentives to tilt the balance in their favour.

The Inquiry investigated numerous complaints from marketplace sellers on Takealot around self-preferencing or other conduct which distorts competition with marketplace sellers. Positive findings were made by the Inquiry in respect of the following:

- Unilateral product gating not at the supplier's request which prevents marketplace sellers from selling certain brands on Takealot in competition with its own retail.
- The use of seller data by Takealot buyers to inform their own retail offering on the marketplace and Takealot private label team to develop their own private label lines. This unfairly free-rides on sellers that have invested in developing or identifying products that may appeal to SA consumers, take risk on trialing those products on the marketplace and invest in promoting those products to build awareness and popularity, both on and off the platform.
- The pressuring of suppliers by Takealot retail buyers where they are outcompeted on the platform by marketplace sellers selling the same product, resulting in the suppliers either raising their price to the marketplace sellers or threatening sellers with non-supply if they do not soften competition.
- The Takealot 'Buy Box' for branded items with multiple sellers selects the cheapest price of those in-stock in the warehouse, rather than the cheapest price regardless of lead time. As consumers mostly select the Buy Box item, this favours Takealot retail as their products are generally in the warehouse.
- Marketplace seller applications for promotional participation are materially less likely to be successful than Takealot's own retail buyers.
- The failure to resolve numerous disputes within a reasonable time frame where the marketplace seller is left bearing the cost of the dispute in the interim.

To address these distortions arising from the conflict of interest, Takealot is required to segregate its Retail division from its Marketplace operations and to prevent its retail services from accessing seller data and unilaterally stopping sellers from competing for certain brands. Further measures required to contain the incentives by its own retail buyers and staff include extending the employee code of conduct and independent complaints channel to include contraventions based on unfairly harming marketplace sellers that may result in disciplinary action. In addition, Takealot must introduce a 60 day dispute resolution process for marketplace sellers complaints on returns and stock loss which will be deemed resolved in favour of the seller if not resolved within 60 days. Finally the Buy Box must be re-engineered to reflect the cheapest (regardless of delivery time) and fastest options for the consumer.

The Inquiry also finds that the business model in eCommerce currently provides additional restrictions to the participation of historically disadvantaged businesses, amongst them that onboarding favours established businesses along with other promotional features. To address this distortion, Takealot is to implement an HDP Programme that provides (i) personalised onboarding, the waiver of subscription fees for the first three months and at least R2000 advertising credit for use in the first three months, (ii) offering promotional rebates and the inclusion of HDPs in HDP-specific campaigns on the platform, and (iii) a programme to specifically support targeted groups within HDPs such as female, youth and rural enterprises with business mentoring and funding support.

During the Inquiry rumours have persisted about the entry of Amazon. Whilst it has not entered South Africa, were it or any other large eCommerce player to do so, they will similarly be expected to comply with similar provisions as set out for Takealot.

SOFTWARE APPLICATION STORES

In SA, mobile devices are the primary means through which the majority of people engage

the digital economy. On the devices, it is through apps, distributed through software application stores, that digital content and services are provided. For businesses and app developers that wish to be part of this lucrative and growing software economy, it is also through the app stores that they access consumers. The Apple App Store and Google Play Store collectively account for the vast majority of mobile users, app downloads and revenues earned in SA. Google Play is the default on Android devices which account for the overall majority of devices, in particular lower end priced smartphones, and hence users. Whilst Apple accounts for fewer smartphone devices, it accounts for a much higher share of app downloads and app store revenue due to the high-end target market. Both are essential for local app developers accessing the global app market.

The revenue model is to charge a commission on sales only where the app generates revenue through the delivery of digital content. This is because stores do not want to discourage free apps that add value to their devices, and revenue from digital content delivered through the store is measurable by the store whereas apps used to sell physical services are not. To measure those transactions and ensure they are able charge the apps their commission, the stores do not permit alternative payment processing services on their stores for all in-app payments (IAPs). The exclusion of alternative payment processing methods not only ensures that the commission fees cannot be bypassed by design, but also that the application store owns the customer relationship unless additional logins are required.

For apps that provide digital content through other channels, such as websites, PCs or consoles, there are typically means for consumers to pay for the content through these channels. Application stores permit consumers to access that content or credits through the applications where there is a login on the app, referred to as the App Store Multiplatform rule and the Play Store's Payments Policy. However, the stores have imposed anti-steering rules to prevent app developers from circumventing their IAP by steering consumers

to these outside options. This means that where discovery of the app takes place through the application store, consumers will be ignorant of alternative payment options, limiting their discovery and use. In this manner, the anti-steering rules restrict competition from alternative payment methods for the app available through other channels. The result is high commission fees that are either likely to raise the pricing of apps to the detriment of consumers or reduce the earnings of app developers which impedes investment and innovation.

For apps whose primary functionality is the distribution of digital newspaper, magazines, books, audio, music or video, these have the option to be pure reader or consumption apps but must then forego the option of the IAP enabled to do one-click purchases, and still require consumers to discover their website for subscription or content purchases. There have been adjustments to the anti-steering rules following litigation. Both Apple and Google now allow app developers to communicate with consumers through means other than the app itself. Apple now permits a narrow group of reader apps globally to provide an external link to their website for the purpose of subscribing or purchasing content but Google does not.

The Inquiry finds that Google Play and Apple App Store are unconstrained in the commission fees they charge paid app developers and the anti-steering rule limits competition. To address this distortion, the remedial actions require Google Play and Apple App stores to stop preventing apps from directing consumers to pay on the app's own website, and to ensure continued free use by consumers of content purchased from that website. Implementation in South Africa of measures taken in Europe to comply with similar provisions in the Digital Markets Act, including fair and reasonable pricing, will be considered as compliance with the remedial actions.

Given the market feature of millions of apps overall, and thousands in any single category, being sold through monopoly application stores on different

device OSs, discoverability and visibility on those application stores is essential for apps to compete effectively. The application stores provide for discoverability through two main features, namely curation and search. Curation is where store editors identify quality apps and promote them through a wide variety of means such as featured apps, category recommendations, new apps, classics, apps of the day, etc. Given the importance of search for discoverability and the volume of apps in any search results, developers have made increasing use of ads which appear on the search page itself as suggestions and at the top of search results.

Neither the Apple App Store nor the Google Play Store has local curation of apps despite the hundreds of millions in revenue generated from South Africa each year, other than automated curations based on sales or downloads for the SA storefronts, and some geo-relevance criteria applied to certain search terms. Local apps may have particular relevance for domestic consumers but the lack of local curation means this would not be a factor in the editorial process, with global apps served up instead. The result is that competition from domestic apps is impeded. On search, South African paid and gaming app developers have highlighted the challenge of competing against well resourced global competitors.

The Inquiry finds that the global business model of the application stores limit curation and visibility of local SA paid app developers. To address this distortion, Google and Apple must also provide a South African curation of apps on their app stores and advertising credits to SA app developers.

ONLINE CLASSIFIEDS

Classifieds made a rapid transition from print to online from 2010 to 2015 due to rising Internet access along with the unparalleled convenience of online search and comparison tools. Within classified verticals, property and automotive represent the biggest categories. Within the automotive online classifieds, Autotrader and Cars.co.za represent the leading platforms by

some distance with over 80% share between them. Within property online classifieds, Property24 is the dominant platform and Private Property is the second largest. Private Property is uniquely placed in that it is a partnership with the large national estate agencies through the Estate Agency Property Portal Company (EAPPC), facilitated by the industry association, Rebosa. As a result, Private Property has been able to secure, and lock-in, most of the listings.

A vertical classifieds platform needs to have most of the listings as consumers want the convenience of a one-stop-shop for search and comparison. In property classifieds, unlike automotive, there are a raft of features that hinder platforms other than the two leading platforms from securing listings, including:

- Estate agents make use of listing engine software (“syndication software”) to manage their listings and feed them onto their own websites, and those of property classifieds. Property24 and Private Property both provide syndication software to estate agents listing on their platforms. PropData is the largest independent supplier. Whilst smaller syndication software providers feed out to all platforms, this is not the case for the leading platforms and PropData. The implication is that 70% of estate agents wishing to list on alternative classified platforms face considerable practical barriers to doing so, raising the cost of using those platforms that deters use and their development as competing platforms.
- The two leading property classifieds have also reinforced their position in syndication software through charging a monthly R500 for feed in from external syndication software. The fee means for smaller agents especially it will always be cheaper to use the software of the leading platforms, impeding competition at a syndication software level. As these software providers are the most likely competitors in platforms, it has a ripple effect on platform competition.
- Estate agents typically have a budget for

marketing and promotion and look to optimize that budget between different marketing activities including property classified listings. Both Property24 and Private Property have sought to lock-in this spend through multi-year contracts, limiting opportunities for competing platforms to contest this spend. Property24 offered a multi-year subscription package to estate agencies that would limit increases to make it attractive. Private Property has achieved the same outcome contractually with the largest estate agents through the EAPPC shareholding in the platform. Moreover, Rebosa has actively promoted Private Property as a partnership with the industry and which agents should support as a preferred provider, facilitating the share offers to Rebosa members.

The Inquiry finds these features impede competition. To address these distortions, Property24, Private Property and PropData must provide interoperability at no fee for estate agents to feed listings to other platforms. Property24 and Private Property must cease charging for incoming listings and put an end to multi-year contracts with large agencies. The Inquiry has required that Rebosa must cease to support Private Property as the preferred platform for the industry, which has already been communicated to its members. An application will be made to the Tribunal for the national agencies to divest their shareholding in Private Property.

The leading platforms in both property and automotive classifieds exercise extensive price discrimination based on the volume of listings that an agency or dealer brings, both at a group and at an office level. These differences are not based on cost. Rather the claim is that the difference is based on the value provided and that larger agents or dealers bring more listings and hence provide more value to the platform. The primary difficulty for the platforms is explaining why this justifies price differentials in excess of 300% on rate card and none have attempted to do so. There is no objective value-based pricing model at play but rather relative bargaining power that drives price differences.

The effect of the discrimination on smaller agents and dealers, including HDPs, is that the marketing budget does not go as far, forcing SMEs to forego additional marketing activities relative to the national agencies and dealers, resulting in lower visibility to the consumer. Some small agents/dealers list only on one platform due to the higher cost unlike the national agencies, which denies them exposure to a portion of leads, or do not list on platforms at all. Other smaller dealers/agents forego the use of value-added services that provide visibility and brand-building benefits on the classified platforms.

For new estate agency and auto dealer entrants, the high and discriminatory fees pose a barrier to entry as it raises costs during the establishment phase of the business where it needs to market itself more intensely to build visibility and brand equity, whilst lacking the cash flow to fund the high and discriminatory fees of the classified platforms. This will impede competition and participation by black-owned agents and dealers in particular, whose lack of historic wealth accumulation reduces the extent of financial resources at startup. Moreover, the classified platform business model and fee levels are tailored to the more established agencies / dealers operating in historically white middle class areas with higher property and car prices.

The Inquiry finds that the discrimination on listing and promotion fees impede and distort competition in online classifieds, particularly to the detriment of SME and HDP agencies and dealers. To address this distortion, the property and automotive platforms must substantially reduce their prices to SME agents and dealers to a level closer to that of larger agents and dealers. Property24 must introduce a Small Independent Business Package (SIBP) for business users with 30 leads or less priced at an average per lead or listing level within 15% of the average of all other business users, reducing to 10% later. Autotrader must also introduce a SIBP for dealers with 20 listings or less, with the average cost per listing to be priced within 15% of the average for dealers on other rate bands, reducing to 10% later.

Property24 and Autotrader must similarly adjust the pricing of their value added services for SIBP users. Cars.co.za must price its Flexi and Dynamite package at an average cost per listing that is within 15% of the weighted average cost per listing of its other Packages and introduce a premium offer for these packages. These interventions are expected to halve the monthly fees of listing for SME agents and dealers. Private Property already has a Kickstarter package and its lower revenues and market share has precluded it from further action.

To address the distortion to black-owned agencies and dealers in particular, all the leading platforms except Private Property must introduce an HDP Programme. For Property24, that programme must at no cost provide personalised training including site design and support, branded listings, 5 value-added services per month, access to the market intelligence report, and for new HDP agents, 12 months free standard listing subscription. Autotrader must at no cost provide at no cost personalised workshops with experts and events, assistance with the initial upload and photography, a 50% discount on the Instant Offer, free standard listings for 12 months or premium at the cost of standard, and for existing HDP dealers a free upgrade to Premium and/or Featured Dealer. Cars.co.za to provide for free enrolment in the Cars.co.za dealership training programme, a mentorship and training programme, guidance on creating a professional 'About Us' page, an upgrade to the premium package at no additional cost for 12 months, a rebate amounting to two months of the user's base package.

FOOD DELIVERY

The Covid-19 pandemic provided a huge boost to Food Delivery which is now well-established in South Africa. UberEats and Mr D Food are the leading platforms in restaurant food delivery and have all the restaurant chains listed along with thousands of independent restaurants, enabling them to offer consumers a wide choice in any local area and benefit from network effects. Bolt Food is the only other 'national' food delivery company operating a similar business model, with

a small share but global backing. Local delivery services have emerged in areas not serviced by the national delivery platforms, such as townships and small towns. These are typically resident entrepreneurs without substantial capital backing and ability to offer a similar promotion-led model to the national platforms.

Food Delivery, as with all intermediation services, requires platforms to secure a wide range of restaurants to be an attractive proposition to consumers. Bolt Food and the array of local delivery services have been relatively successful in signing up independent restaurants, but far less so with the restaurant chains even where they are individual franchisees. Many, but not all, restaurant chains prohibit their franchisees from contracting with local or national delivery services that are not approved by the head office. The reasons provided by those restricting franchisees are unpersuasive as demonstrated by the fact that some global and national chains do not place such restrictions. The stance adopted by the restaurant chains is in part the result of the two leading platforms incentivising them to bring in more of their restaurants and to drive order volumes through their platforms. This is mostly achieved through commission negotiations, where the delivery platforms reward more restaurants and volumes with lower commissions on orders.

The Inquiry finds these restrictions by national restaurant chains impede competition in food delivery. To address this distortion, national restaurant chains are prohibited from restricting or dictating the choice of food delivery platform by its franchisees. However, this does not preclude the national restaurant chains setting minimum standards or guidance criteria, as long as these do not include terms that are exclusionary of local delivery platforms and new entrants by their very nature. It also does not preclude centralised rate negotiations.

Local delivery platforms operate a different model to the national platforms, charging a lower commission fee to restaurants as they do not

invest significantly in promotions and tend to charge full delivery fees to customers. They also do not discriminate to the same extent against independent restaurants to cross-subsidise the chains. This model provides the basis for potentially competing through lower everyday menu prices on their platforms relative to the national delivery platforms due to the lower commission, even if they cannot match the promotions. This would benefit consumers. One impediment to doing so is the lack of transparency to consumers that platforms charge restaurants a commission fee and that this is typically passed onto consumers through a menu surcharge. A further impediment is wide price parity clauses requiring the same pricing across delivery platforms. Whilst Uber Eats has removed these from their contracts, they have not informed restaurants which means many may still apply the rule. Bolt currently enforces wide parity. The Inquiry finds these clauses to adversely affect competition with local delivery platforms. To address the first distortion on a lack of transparency, UberEats and Mr D Food are required to notify consumers through a pop-up message periodically that they charge restaurants a commission fee for their service, and restaurant in-store pricing may differ from the prices they charge on their service. To address the second distortion, Uber Eats is required to clearly inform restaurants that it has removed this requirement and Bolt Food is to remove this requirement and inform restaurants.

The financials of all three national food delivery companies have shown periods of below variable cost pricing through subsidising delivery charges to the consumer and engaging in substantial promotions, including restaurant funded promotions. This has led to the exit of many local delivery platforms. Regardless of whether this was necessary or not in the past to build scale, that is no longer the case. As the leading platforms move into townships or small towns where local entrepreneurs have established themselves outside of the shadow of their operations, these tactics will decimate local delivery if not kept in check. Local delivery options are important for

competition for consumers, both on service and price, but also for commission fees and orders for the restaurants that list. Local delivery is also important for inclusion and remains a legitimate business model as costs and scale are mostly local, not national. The Commission will need to continually monitor developments in these areas to ensure exclusionary predation does not occur.

The two leading food delivery platforms both offer significantly differentiated terms of service against the independent restaurants by charging a much higher level of commission fees for food orders on their platforms. Their financial reports demonstrate that this difference is not based on cost and nor have they sought to make this claim. Rather, the platforms have sought to justify the differences based on the number of restaurants and orders that the restaurant chains bring to the platforms. Where the leading platforms have had the most difficulty is in justifying the extent of the difference due to the reasons they have put forward, and neither made any attempt to do so. Moreover, independent restaurants collectively bring substantial volumes, offer greater variety in cuisines, and consistently have larger order sizes which benefits the platform. As a result, independent restaurants contribute disproportionately to the profits of delivery platforms.

The extent of differentiation, as a result of the inability of independent restaurants to negotiate terms, does distort competition between restaurants on the platform. Both chain and independent restaurants tend to add a menu surcharge roughly in line with the commission fees, with independent restaurants adding a higher surcharge due to their higher commission fees. This has negatively affected the relative pricing of independent restaurants to chains on the platforms, making their menu relatively less attractive to consumers and impacting on their competitiveness. The difference in commission fees has knock-on effects for platform competition too. The ability to extract higher commission fees from independent restaurants, up to twice that of local delivery platforms, is part of the reason that

the leading platforms can engage in the sustained use of aggressive promotions and subsidized delivery.

The Inquiry finds the price differentiation impedes competition on and between platforms. To address this distortion, Uber Eats must implement the standardized tiered commission fee structure it is currently experimenting with whereby independent restaurants have the option of selecting from a range of commission fees associated with different levels of service and/or monthly/ongoing charges. This currently offers a material reduction in the commission fee for the standard service levels and includes at least one commission fee tier significantly below that. Mr D Food must put in place a promotional rebate for independent restaurants on their gross sales which can be used for discounts or promotions on Mr D Food, along with monthly advertising credits. These effectively reduce the commission fee paid and promote greater sales for the independent restaurants.

TRANSPARENT ADVERTISING

A common feature of intermediation platforms is that they all sell visibility to their business users on their search results page given the large number of relevant listings. Consumer behaviour is biased towards clicking on higher ranked impressions regardless of platform category, driving a willingness amongst business users to pay for specific rank positions or a ranking boost and a revenue source for the platform. The only constraint on the excessive sale of visibility is if consumers are aware that listings have paid for position on the search results. Most domestic intermediation platforms simply do not label those impressions that pay for improved visibility as adverts, whereas most international do so in compliance with consumer protection laws in other countries.

The Inquiry finds that the pervasiveness of unidentified advertising on intermediation platforms distorts consumer choice, and therefore undermines competitive outcomes. Furthermore,

the practice encourages more visibility to be sold than would otherwise be tolerated by consumers, exacerbating the consumer and competitive effect. The practice distorts competition from SMEs which are less likely to be able to purchase visibility, especially where they face price differentiation in listing and promotional fees.

To address this distortion, the Remedial action required is that South African platforms must label all listings that have paid for a position or boost in ranking position as 'promoted', 'sponsored' or 'Ad'. This is in line with the recently changed Advertising Regulatory Board's (ARB) Code of Advertising Practice. They must also commit to a responsible advertising code.

HDP FUNDING

The lack of wealth accumulation by HDPs due to exclusion from the economy under apartheid has created a substantial barrier to HDP tech entrepreneurs accessing pre-revenue funding (pre-seed and seed funding) from a family or associate 'angel investor', unlike their white counterparts. Pre-revenue funding is not supported by the venture capital ("VC") industry, whose support at this stage is often in the form of incubators / accelerators where the founding team receives guidance and access to business development resources. The small size of the VC industry in SA and its lack of transformation is a further barrier to seeking out the talents of a broader base of entrepreneurs. The Inquiry finds that there is an additional funding impediment to HDP inclusion and participation in the platform markets, with particular challenges at the pre-revenue stage. The Inquiry also finds that the VC industry along with the institutional funders requires transformation and a shift in resources to support and develop HDP entrepreneurs.

Globally, governments have sought to support the funding of tech startups given the potential for high growth and employment, known as impact investing for social returns. In the startup space, governments have typically sought to do this through reducing the risk for private

investors and in so doing crowd them in. This means government does not take on all the risk, and it is able to leverage its own funding to grow the pool of funding available for startups. One of the means to do so is through first loss funding, where government assumes the first losses in the portfolio of investments held by a VC fund, and in so doing reduces the risks of other investors by reducing their exposure to the potential downsides. Government funding has also taken the form of convertible loans which means private investors do not see their equity stake diluted unless growth targets are met. The Inquiry finds that these instruments are missing in the current package of funding provided by the SA government.

Whilst the Inquiry has required specific remedial action from all leading platforms to support HDP business users access, afford and attain visibility on those platforms, funding is likely to present another challenge for some businesses in making the necessary investments to achieve and exploit an online presence. An effective online presence provides considerable opportunities for business growth through exposure to a national consumer audience (or global for apps) and reach beyond the physical confines of a retail presence. There are more government programmes to support these types of businesses including on a funding level. However, their skills and focus is not on how to invest in and exploit an online presence, including pure online business ventures.

To address these distortions, the Inquiry recommends that an allocation of government funds is made to supporting HDP digital economy startups through the DTIC or DSBD where the HDP Startup Fund is actively administered by an agency of government. The funds should be mandated for HDP startups only and may be allocated in support of other geographic and sectoral priorities. This should include funds for the operation of incubators and accelerators. Beneficiary VC funds should commit to achieving internal transformation targets set by the agency. In addition, it is recommended that existing government financial support programmes for

SMEs and HDP businesses within the DTIC and DSBD include funding for investments in an online presence and capabilities. The Inquiry expects that institutional and corporate funders will start to consider the importance of mandates going forward as these are lacking currently.

CLOSING OBSERVATION

This Inquiry has proactively engaged with a rapidly emerging digital economy to ensure it is competitive and inclusive. However, it happens at a point in time and in respect of a particular set of digital platforms, namely intermediation platforms. There are growing concerns globally across all digital platforms and not just intermediation platforms, and concern that the enforcement tools are insufficient to ensure competitive outcomes and a cessation to anti-competitive conduct. Within intermediation platforms themselves, conduct that has not yet emerged in some of the categories may do so in future, other intermediation services will gain traction in the market and, if the remedial action is effective, new leading platforms may emerge. In addition, there are continental developments that have implications for South Africa. The African Union has adopted a Competition Policy Protocol for the African Continental Free Trade Area (AfCFTA) which includes digital gatekeeper provisions to which our law should eventually align.

The Inquiry did provisionally recommend potential regulations and/or legislative changes. 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, there is an opportunity to build these into such regulations and/or legislative changes. However, that approach may be piecemeal and fail to systematically address the overarching challenges of digital markets. The Inquiry therefore no longer recommends specific regulations in respect of intermediation platforms. Rather, there should be continued debate about how best to respond to the challenge of digital markets and whether a more comprehensive

solution can be achieved, be it regulations or legislative changes.

CONCLUSION

The remedial actions should provide the following benefits to platforms, businesses listing on the platforms and consumers:

- Greater visibility and opportunity for smaller South African platforms to acquire customers through Google Search, enabling growth and greater platform competition with larger, sometimes global, rivals;
- Enabling more intense platform competition in each of these categories, which in turn will offer businesses that list on the platforms and consumers more choice and innovation. This should result in lower prices for the businesses listing on the platforms, and for consumers too where they currently pay for the service;
- Providing a level playing field for small businesses selling through these platforms, including fairer pricing and opportunities for gaining visibility and customer acquisition relative to the large national businesses they compete with;
- Providing a more inclusive digital economy through overcoming impediments for participation and fair competition by black-owned South African businesses on online platforms and funding opportunities for black entrepreneurs.

[1. INTRODUCTION]

1. The Competition Commission formally initiated the Online Intermediation Platforms Market Inquiry (the “Online Platforms Market Inquiry”, “Inquiry” or “OIPMI”) on 19 May 2021 in terms of section 43B(1)(a) of the Competition Act 89 of 1998 (as amended) (“the Act”). An Inquiry was initiated because the Commission has reason to believe that there are market features of online intermediation platforms that may impede, distort or restrict competition; and in order to achieve the purposes of the Act including the participation of small and medium enterprises (“SMEs”) and historically disadvantaged persons (“HDPs”) in these markets.
2. The scope of the Inquiry is set out in the Terms of Reference (“ToR”) which was published on 9 April 2021. Online intermediation platforms facilitate transactions between business users and consumers (or so-called “B2C” platforms) for the sale of goods, services and software, and the scope includes eCommerce marketplaces, online classifieds and price comparator services, software application stores and intermediated services such as accommodation, travel and food delivery.² The scope includes digital advertising insofar as it may pose a barrier to platform or business user competition, and the extent to which those platforms also offer intermediation services. The scope also includes foreign domiciled platforms that have an economic effect in South Africa.³
3. The Inquiry is broadly focused on four areas of competition and public interest, namely:
 - 3.1. market features that may hinder competition amongst the platforms themselves;
 - 3.2. market features that may hinder competition amongst business users or undermine consumer choice;
 - 3.3. market features that give rise to exploitative treatment of business users; and
 - 3.4. market features that may negatively impact on the participation of SMEs and/or HDP firms.
4. All Inquiry documents and public submissions are available on the Inquiry website.⁴ Since initiation, the key Inquiry processes and proceedings to date have been as follows:
 - 4.1. Release of the Statement of Issues (“SOI”) for public comment (19 May 2021);
 - 4.2. Issuing a first round of Requests for Information (RFIs) and business user survey (May 2021);
 - 4.3. Release of the Further Statement of Issues (FSOI”) for public comment (17 August 2021);
 - 4.4. Issuing of second round of RFIs and refined business user survey (August 2021);
 - 4.5. Public hearings and follow up RFIs (November 2021);
 - 4.6. Receipt of expert reports and in-camera hearings (February 2022);
 - 4.7. Publication of the Provisional Inquiry Report along with provisional findings and recommendations (13 July 2022);
 - 4.8. Submissions on the Provisional Inquiry Report (August/September 2022);
 - 4.9. Engagements with stakeholders and follow-up RFIs (October/November/December 2022).
 - 4.10. Engagements with stakeholders on

² The scope of the Inquiry specifically excludes e-hailing services which were the subject of a previous inquiry and other pure gig economy platforms.

³ See document ‘Clarification on the Inquiry Scope’, August 2021. The document also clarified that metasearch engines (MSEs) fell within the scope.

⁴ <http://www.compcom.co.za/online-intermediation-platforms-market-inquiry/>.

final findings and remedial actions / recommendations (January to July 2023).

5. The Inquiry has benefitted materially from the insights contained in the submissions to the Provisional Report along with the stakeholder engagements. The Inquiry has also engaged in further evidence gathering to supplement the existing record and test some of the claims made in various submissions in respect of both findings and appropriate recommendations. As a result of the submissions and further engagements, the Inquiry has adjusted several of its provisional findings and recommendations in the Final Inquiry Report. The Inquiry particularly commends those platforms willing to engage on remedies even where they contest the findings given the simultaneous process on re-assessing both. The value of the engagement process warranted an extension to the publication of this final report.
6. The Final Report seeks to respond to some of the key common themes emerging from the submissions before setting out the reasoning for any final findings of the Inquiry along with the final decisions on remedial actions or recommendations for each platform category. The Final Summary Report highlights where such findings or recommendations differ to those in the Provisional Report along with the reasons why. The Final Report includes an annexure containing the detailed Remedial Action decisions of the Inquiry in addition to the summarised versions in the main text of the report.
7. The Final Report also includes platform category annexures which are focused on the stakeholder submissions made in respect of the Provisional Report, summarising those submissions along with the views of the

Inquiry on those submissions that take a contrary view to the Provisional Report. As with the Provisional Main Report, the sections are organised by the different intermediation platform categories. Within each platform category, the outline is similar insofar as responding to submissions on each of the main topics including market delineation, market characteristics, platform competition issues and business user competition issues.

8. The Inquiry has dealt with a vast array of issues across many online intermediation platform categories as set out in the original Terms of Reference. During the work of the Inquiry additional issues have arisen that were either out of scope or raised too late in the Inquiry process to be adequately assessed. These include the news publisher's concerns over the use of their copyrighted material by search and social media and concentration within the adtech stack. These will be the subject of another Inquiry, the recently announced Media and Digital Platforms Market Inquiry. Another has been the increasing use of platform price recommender services to the business users listing on platforms, including automated bidding. This is most prevalent in search and travel and accommodation platforms, but pricing tools have already emerged in online classifieds and globally in eCommerce. Academic research is inconclusive on the effects of these recommender services but already there are cases emerging that allege that the form it may take can facilitate higher pricing. Outside of the platforms themselves, revenue management systems for hotels, airlines and car rental have the potential to play a similar role in informing pricing based on the pricing of other clients using the same software. The Inquiry recommends that this be the subject of further research to gain a deeper understanding.

[2. LEGAL AND MARKET CONTEXT]

9. Before setting out the findings and decision on actions for the Inquiry, it is useful to briefly set out the legal and online intermediation market context that informs the Inquiry along with its findings and recommendations.

2.1. Legal Framework to an Inquiry

10. The jurisdiction of the Market Inquiry follows from section 3 of the Act, which applies to “*all economic activity within, or having an effect within, the Republic*”. Digital markets by their nature may implicate global firms, some of which may not have a physical presence in South Africa but whose virtual presence and activities have an effect within the country on domestic customers or businesses listed on their platforms. From a substantiality perspective, the assessment is in respect of effect within the South African market and not within the operations of the global companies. This has been factored in by the Inquiry through limiting its focus to platform categories with material adoption domestically, those global platforms generating a material revenue from our market and which are implicated in features that adversely affect competition domestically.
11. As set out in Section 43C(1)(a), a Market Inquiry is required to decide “*whether any feature, including structure and levels of concentration, of each relevant market for any goods or services impedes, restricts or distorts competition within that market*”. A feature of

a market is broadly construed in s43A(3) to include structural features (concentration, entry barriers etc), the outcomes observed (incl. price, consumer choice, entry/exit and ability to compete in international markets) and conduct (by a firm or firms individually or in a conscious parallel manner). Any one of these features can be assessed to determine if they pass the threshold for liability of having an adverse effect on competition. Furthermore, section 43C(2) also requires a decision on whether that adverse effect, based on the market feature, impacts on SMEs and HDPs. In the context of historic exclusion and concentration of ownership and control of the economy, the Constitutional Court recently affirmed in the *Mediclinic* judgement that this is also a constitutional imperative⁵ which was reaffirmed in the *eMedia* judgement of the CAC⁶.

12. Where an adverse effect on competition is identified, the Commission must determine the action to be taken⁷ “*to remedy, mitigate or prevent the adverse effect on competition*”⁸, recognising “*the need to achieve as comprehensive solution as is reasonable and practical*”⁹. Actions must be reasonable and practicable taking into account the factors listed in s43D(4), including the nature and extent of the adverse effect, the impact on competition and the availability of a less restrictive means. The stakeholder consultation process has specifically sought to solicit views on the reasonable and practicable

5 Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another (CCT 31/20). The Court stated in respect of the purpose of the Act and its interpretation that “*The equalisation and enhancement of opportunities to enter the mainstream economic space, to stay there and operate in an environment that permits the previously excluded as well as small and medium-sized enterprises to survive, succeed and compete freely or favourably must always be allowed to enjoy their pre-ordained and necessary pre-eminence.*”

6 *Emedia Investments Proprietary Limited South Africa v Multichoice Proprietary Limited and Another* (CAC Case no: 201/CAC/JUN22).

7 s43C(3)(a).

8 s43D(1).

9 s43C(4).

nature of potential action, which has informed the choice and framing of Remedial Actions.

13. The Final Report and actions form the outcome of the Inquiry¹⁰ for which there is a right of appeal to the Tribunal¹¹. The Commission is therefore empowered to decide on the remedial action even if an investigation or referral under chapter 2 is one of the potential inquiry outcomes.

2.2. Online Intermediation Markets and Dynamics

14. There are business models and market features common across the online intermediation categories that inform how we understand these markets and how one may identify market features that may impede, restrict or distort competition. Differences in the existence, nature and extent of some of these market features across intermediation categories informs the specific findings and recommendations.

2.2.1. Delineation of Markets

15. The delineation of markets needs to account for differentiation and closeness of competition given that this will determine the extent of constraint and potential for an adverse effect on competition. Moreover, in conduct assessments the market delineation is itself often informed by the nature of the conduct subject to investigation.
16. Online intermediation platforms may not be the only distribution channel for business users to reach consumers for the product or service. However, it has a unique proposition that differentiates the channel from others, and which has driven growing adoption by both consumers and businesses. For the consumer it is the convenience of a single aggregator where the consumer can easily search and

compare the product and service offerings of a much wider variety of businesses, along with the convenience of online transacting anytime from anywhere. For business users, the proposition is national (or international) marketing access to consumers and the online sales that these platforms generate, as well as the payments, technical and physical infrastructure to conclude transactions online. The fact that businesses use the platforms in addition to other channels, is indicative that the intermediation platform's wide and growing consumer sales are not easily substituted.

17. Whilst the direct online channel of businesses may provide for the convenience of online transacting, other limitations make it less attractive to consumers and less effective for businesses which reduces its ability to constrain intermediation platforms. Scale from aggregating many businesses permits larger budgets to (i) direct market to online customers via internet-based search, (ii) invest in better user interfaces for ease of use, and (iii) to reduce the unit costs per transaction. Third-party service providers to support online transactional capability limit some of this disadvantage but they offer little customisation and add margin in the value chain, but also do not solve the marketing constraint. Aggregation also offers consumers easy comparison and discoverability of a wider range of options. Traditional B&M or 'offline' channels are available in certain categories, and may even account for the majority of sales, but the online purchase is typically a different consumer journey to the offline alternative. This is typically where convenience plays a role in the consumer journey and decision-making, as well as offering the benefit of a greater variety of choice.

10 s43E.

11 s43F.

18. Whereas larger businesses may have larger budgets, they still cannot match the aggregated spend of the intermediation platforms and those platforms are usually the only viable online distribution channels for SMEs which lack the scale of dominant firms in their industry. As such, even if constraints on the consumer side exist, such constraints are less prevalent on the business user side where market leadership amongst intermediation platforms may still come with bargaining power in relation to SMEs.
19. For this reason, other intermediation platforms are the closest competitors to each other for consumers and especially for SME business users that often have no or limited direct online channels, and a smaller traditional brick & mortar (“B&M”) customer reach. It is for these reasons that the finding in most jurisdictions globally in recent years is to identify online intermediation platforms as a distinct market. Even where a broader market is identified, the differentiation in distribution channels means that the primary constraint is from other online intermediation platforms and even if constraints exist on the consumer side, this will not be the case on the business user side.
20. The literature on digital markets emphasises that market definition is not necessarily the most useful approach to determining market power and harm to competition. Cremer et al. (2019) argue that in comparison to single-sided markets, there is less emphasis on market definition and more focus on theories of harm and identification of anti-competitive strategies¹². Hovenkamp (2021) notes that the best way to address portfolio markets is to avoid market definition altogether as digital markets are particularly susceptible to direct measurements of market power that do not depend on a market definition.

2.2.2. Platform Competition

21. An important feature of intermediation platforms is that they are two-sided markets, needing to acquire consumers on the one side and business users on the other. Two-sided markets are also subject to network effects, where more users on the one side of the platform makes the platform more valuable to the other side. Network effects can result in virtuous self-reinforcing cycle whereby growing users on one side drives growing users on the other, which repeats itself. But likewise, a failure to generate adequate network effects poses a barrier to expansion for entrants. These market features also create ‘first-mover to scale’ advantages that support the virtuous cycle for the those scaled platforms and exacerbate the difficulties of entrants to replicate that success and expand. This tends to result in a bifurcated intermediation market whereby there are one or two scaled platforms that dominate the online transactions, and a fringe of sub-scale entrants with little competitive relevance. The subsequent conduct of scaled platforms can then also shape these dynamics.
22. Intermediation platform entrants need to sign up businesses to attract consumers and generate sales that will in turn retain those businesses. The level of effort, cost and other frictions from using multiple platforms generally results in business users not supporting more than a few platforms. As business interest is in leads or sales, businesses will first list on the first-mover to scale platform with the most customers and then consider others. That advantage extends to the level of business user engagement through their marketing and promotional efforts on the platform and a willingness to pay higher fees. This provides the scaled platform with wider consumer choice, but also with more revenue to fund (amongst other things)

12 Cremer, de Montjoye & Schweitzer (2019). “Competition Policy for the Digital Era.”: Prepared for the European Commission. p. 3-4.

customer acquisition and the ability to offer consumers better pricing. More generally, business users are less likely to put the same amount of management effort in supporting the smaller platform sales channel because it delivers fewer customer sales or leads¹³. The position of scaled platforms enables them to influence the ability and difficulty of business acquisition, affecting competition.

23. On the consumer side, platforms at least require an intuitive user interface, good service and sufficient business users support to offer consumers a good experience. But expenditure on consumer acquisition is required to drive discoverability, trial and repeat consumer traffic on the platform. One first mover advantage is the relatively lower cost of customer acquisition initially¹⁴ and once a platform has scaled it raises the acquisition costs to all platforms.¹⁵ Moreover, unlike the scaled platform, entrants and small platforms lack the revenue streams to fund large-scale customer acquisition unless they have substantial capital backing and must otherwise temper their ambitions. The high spend on customer acquisition shows that consumers do not extensively research and weigh up all the alternatives, and consumers also increasingly start to limit their selection to one or two trusted platforms as a heuristic to reduce mental effort. The fact that consumers tend to start their online journey on Google Search provides it with undue influence on platform competition. Scaled platforms, particularly those that hold strong positions in customer acquisition channels, can influence the ability and cost of customer acquisition for rivals, including the incentives of consumers to discover and trial other platforms.

24. A platform that can deliver the bulk of current online consumer leads and sales will make itself invaluable to business users, enabling that platform to extract more from the business users to fund its lead in platform development and consumer acquisition. This is the virtuous cycle of scaled platforms and the barrier to expansion for entrants. First to scale platforms have often made use of large capital backing initially to fund growth through customer acquisition and platform infrastructure development whilst revenues from business users are low. Faced with these market features, entrants would need to do more to overcome the expansion barriers, likely limiting potential challengers to global firms with global revenue sources and lower costs due to existing brand equity and technology. The alternative is for platforms to seek a niche area and not compete head-on. The capital challenges faced by smaller platforms in this market context are even greater for HDP platforms given the lack of funding for HDP entrepreneurs.

2.2.3. Business User Competition and Exploitation

25. Intermediation platforms represent an important channel for business users to access and transact with online consumers, particularly SMEs. The market features resulting in a bifurcated market with one or two scaled platforms creates a level of dependency by businesses on those platforms to reach online consumers. The importance of online leads or sales and level of dependency means that scaled platforms can influence competition amongst businesses on the platform or exploit the businesses. This may be through, for instance, their fees, fee structure, ranking algorithms or terms and conditions.

13 This may include the level of engagement with the sales channel, the range of listings, the launch of new products or promotional effort.

14 With few competitors aggressively acquiring customers initially, the costs of search marketing are lower as there are fewer bidders, all with smaller budgets. The same applies to promotional spend which can be less generous when it is not contested.

15 The increased number of competitors and the substantial sums spent by the scaled platform on customer acquisition will raise bid costs on search marketing or create the need to match the higher levels of promotional spend.

26. The platforms may not necessarily set out to influence competition, except in the case of self-preferencing, but it may emerge as a by-product of their monetisation strategy, conduct or outcomes that are features of the market. For instance, in looking to maximise fee revenues, the platform may extract more out of those business users with greater dependency and less bargaining power, resulting in a system of discriminatory pricing. Similarly, in monetising visibility on the platform the intermediation platform may effectively favour those businesses with deep pockets to appear at the top far more often. More cynically, platforms may also transfer risks or costs onto their business users as they continue to drive for greater platform profitability. Another means of impacting business user competition can be through the search results page where ranking parameters that appear to be rational contain an implicit bias towards own products or certain business users.

27. Intermediation platforms argue that they have no incentive to either exploit or discriminate (including self-preference) as otherwise they would simply lose businesses and send the platform into a 'vicious cycle' or potentially even a 'death spiral'. However, where dependency exists to drive online sales, businesses will typically tolerate a fair amount of exploitation and discrimination, as the alternative, which is to forego online sales altogether, is typically far less attractive. This was self-evident from the number of complaints about fees and treatment even by large national business users.

2.2.4. Leading Platforms

28. In the context of these market features and bifurcated market structure, the Inquiry has sought to distinguish the scaled platforms with leading positions in each category from other market participants. These 'leading platforms' generally competitively benefit from the market features (such as network

effects) and whose conduct is capable of influencing platform competition. Moreover, these platforms generally enjoy a degree of business dependency which makes them capable of influencing business user competition or exploitation. The position of scaled leading platforms is contrasted with that of smaller or entrant platforms which are the ones whose expansion is generally adversely affected by the identified market features or conduct, and which lack sufficient customer traction to influence market outcomes, at both a platform and business user level.

29. The identification of leading platforms in each category is therefore based on the following:

- 29.1. The significance within the intermediation market;
- 29.2. The importance for business users to reach consumers;
- 29.3. The ability to benefit from network effects to grow that significance and importance;
- 29.4. The ability to adversely affect rival platforms or business users.

30. In assessing these factors, the Inquiry has had regard to:

- 30.1. The size of the platform overall and in relation to the intermediation market;
- 30.2. The number of business users and number of consumers;
- 30.3. The extent of business user dependency;
- 30.4. The scale and network effects the platform enjoys;
- 30.5. Platform conduct and observed outcomes;
- 30.6. The market structure;
- 30.7. Other relevant features or evidence that may demonstrate the ability to adversely influence rival platforms or business users.

31. This distinction is useful in the Market Inquiry context where the objective is to determine market features which may adversely affect competition and then to determine remedial action. The market features from which these

platforms benefit along with their conduct provide the scope for determining such features and the target for potential remedial actions. 'Leading platforms' may differ in respect of their size, market position and degree of entrenchment, which may impact on the extent of their influence on market outcomes and remedial action. Moreover, the use of the term 'leading platform' does not preclude platforms from also being found dominant (as per section 7 of the Act), or even a gatekeeper (defined as having an entrenched and durable position, or foreseeably so)¹⁶, given there is a range of market structures across platform categories. Indeed, some of the factors outlined above in defining leading platforms are relevant to the assessment of dominance or gatekeepers, but the thresholds are lower to capture a broader set of those platforms capable of benefiting from market features or shaping market outcomes as is appropriate of an AEC liability standard rather than an SPLC standard.

32. Leading global platforms entering and committing to expansion in the South African market can leverage off their global operations to impact on domestic market outcomes even whilst they are building their business. Such platforms typically bring mature and tested business models, proven and more advanced technology, relationships with multinationals operating domestically, brand recognition with customers, a portfolio of products/services that can be leveraged, and the revenue streams / capital backing to sustain losses in the establishment phase. Their size overall and capabilities may provide them with features of leading platforms even early on and may result in greater entrenchment following expansion.

2.3. HDP Participation

33. Whilst the same features that impede competition from new, smaller platform entrants and SME business users will similarly impact on those owned by HDPs, the Inquiry has found a distinct lack of participation by HDPs in online platform markets and even low representation amongst the business users on the intermediation platforms. Whilst in some cases this reflects the lack of transformation of the industries served by the platforms, such as tourism and estate agency, it is striking how even more untransformed the online economy is relative to the traditional economy even in these categories. This outcome and feature of the markets indicates that HDP entrepreneurs face even greater barriers to participation and competition than your typical SME. These include greater challenges in providing or securing startup financing (given a lack of wealth accumulation and assets for security), business networks for inputs and services, and the fact that much of the market for consumers with discretionary income that intermediation platforms target lies in formerly white middle-class suburbs.

34. Given the pace of movement to the online economy, these barriers to participation threaten a new and deeper level of exclusion for South Africa. In this context, there is an imperative for particular focus and remedial actions to address this exclusion beyond simply remedial action targeted at SMEs. The report identifies specific remedial action within each platform category to improve access and competitiveness on the platforms, and in addition funding level interventions for tech entrepreneurs and business users as a distinct overall category.

16 See EU Digital Markets Act Article 3.

[3. Google Search]

35. Most online search, travel and shopping journeys for goods and services start on general search, the entry point for most consumers to the Internet.¹⁷ General search leads are considered particularly valuable to platforms because they are intent-based, i.e. consumers are showing intent to purchase a good or service.¹⁸ Google Search is a *de facto* monopoly, accounting for over 90% of all general search across desktop, tablet and mobile devices¹⁹. It has achieved this largely through its default status on Android and iOS devices. Consumers also do not use multiple search engines.²⁰ This gives it particular importance for consumer acquisition, accounting for c.60% of online traffic²¹ to travel and accommodation platforms in SA and most of their ad expenditure, typically more than 20% of turnover²², with eCommerce being similar. Platforms indicate there are no alternatives to Google. Google's own specialist or vertical search products fulfil intermediation functions and have prominence on its search engine results page (SERP).²³ These market features give Google

Search significant influence over platform competition.²⁴

3.1. Google Search and Platform Competition

3.1.1. Findings

36. Given the importance of Google Search for customer acquisition, visibility on the SERP is a critical component for intermediation platforms as it has an impact on discoverability and website traffic.²⁵ On Google Search itself, ranking matters as consumers show a predisposition to click on the first results assuming they are most relevant to the query.²⁶ Academic research on general search queries indicates that the click through rate ("CTR") on the first result is around 33%, halving for the second result and halving again for the third result.²⁷ Google sample data on some shopping and travel searches shows first-position CTRs at [40-60]% with even bigger drop-offs.²⁸

37. The Google SERP has evolved over time to provide more prominence to paid results and Google's own properties relative to organic

17 Think with Google. Available online: <https://www.thinkwithgoogle.com/marketing-strategies/shopping-insights/> [accessed 13 March 2023].

18 CMA. 2020. Digital Advertising Services: *Qualitative research report*. Section 6.1.

19 See PR chap 3 table 8. Furthermore, according to Statcounter, Google had a mobile, desktop and tablet search engine market share of 92.37% and in South Africa in 2022. (See: <https://gs.statcounter.com/search-engine-market-share/desktop-mobile-tablet/south-africa/#yearly-2022-2022-bar>)

20 Submission by global platform.

21 PR Chap 2. 11. Page 52.

22 Own calculation using data submitted by various platforms.

23 Submission by global platform and Inquiry's own observations.

24 See Expedia On camera session dated 15 November 2021. p.17, 21 & 31; eDreams On camera session dated 18 November 2021, Presentation, slide 6; Tripadvisor SEC 10-K filing for the year ended 31 December 2020, p.11; Booking Holdings SEC 10-K filing for the year ended 31 December 2020, p.15.; Skyscanner submission dated 05 February 2022, para.3; Trivago submission dated 07 October 2021, para. 18. GetYourGuide submission dated 21 January 2022, para. 21; Kayak submission dated 17 September 2021, para. 12.

25 Google submission dated 18 February 2022. Annex 4.3. CTR by position on the SERP.

26 Google submission dated 18 February 2022. Annex 4.3. CTR by position on the SERP.

27 Dean, B. (2019). We analyzed 5 million Google search results. Here's what we learned about organic click through rates. Available online: <https://backlinko.com/google-ctr-stats> (Accessed on 17 April 2022).

28 Google submission dated 18 February 2022. Annex 4.3. CTR by position on the SERP. Also see PR chap 2 section 3.1.2, paragraphs 114 to 120 and section 3.1.3., paragraphs 121 to 131.

results for commercial search.²⁹ Currently a maximum of the top 4 and bottom 3 results on the SERP are allocated to paid search adverts (7 in total) out of the maximum 17 third-party impressions on the SERP.³⁰ Google local area and travel units along with Google's other SERP features such as images, YouTube videos and "People Also Ask" have meant that up to 18% of SERP had fewer than 10 third-party organic results and an overall drop of 5.5% of third-party organic listings in August 2021³¹, with the Shopping and Hotels carousels effectively adding more paid results. Current spot checks of the first SERP confirm this, with less than 10 third-party organic results often displayed where it appears that Google is squeezing out third-party organic results for its own "organic" content such as its specialised units and other SERP features. The combination of consumers click behaviour with paid result placement has resulted in a large proportion of consumer acquisition occurring through paid results, with average CTRs of 17% on paid search and 2% for organic search.³² The design of the SERP drives platforms to invest more in paid results, raising the costs of customer acquisition.

38. The importance of paid results for customer acquisition is reflected in the large and

growing spend on Google paid results overall and for intermediation platforms.³³ Whilst paid results may be 5% of all clicks, they are [30-40]% of all travel and accommodation clicks and [10-20]% of eCommerce as commercial search attracts advertisers.³⁴ Since 2014 cost-per-impression (CPI) has grown 4-5 times and in travel by 2.5 times.³⁵ Google earns well in excess of R1bn on eCommerce and travel alone in SA, and global revenues have doubled since 2017 and profit up 6-fold.³⁶

39. Whilst paid ads are on a cost-per-click (CPC) auction basis that technically allows any platform to contest for a click, large platforms face considerable advantages.³⁷ First, budget size matters in securing traffic which favours larger platforms given their relative size, revenue streams and margins. Second, more popular and contested commercial search terms, such as hotels in popular tourism destinations, are difficult for smaller platforms to compete with.³⁸ Third, the additional quality measures employed in determining the ad auction favour established platforms.³⁹ This is reflected in the outcomes, with the top percentile of platforms securing [70-80]% of paid results in eCommerce and travel in SA.⁴⁰ In terms of actual leading platforms, in travel Booking.com secures >70% of their traffic

29 See PR chap 2 section 3.1.3, para. 121 to 131, where the Inquiry details how Google's SERP has evolved overtime.

30 Google submission dated 17 January 2022. Paragraph 6.

31 Kim, L. 2021. Google SERP Dumps 5.5% of Organic First Page Listings. WordStream. Available at: <https://www.wordstream.com/blog/ws/2012/08/21/new-google-serp#:~:text=You%20may%20have%20noticed%20recently,just%207%20organic%20search%20listings> (Accessed on 28 April 2022).

32 Own calculations using data submitted by 9 travel and accommodation platforms. (See PR chap 2 section 3.1.3). The Inquiry did the same assessment across 46 travel and accommodation platform domains from data submitted by Google for the period September 2020 to June 2021 and found that the average CTR for paid search and organic search was similar. (See Google submission dated 01 October 2021. Annex 5.1. Google submission dated 08 October 2021. Annex 5.1a.).

33 Google submission dated 01 October 2021. Table 9.1; Google submission dated 24 September 2021. Annex 24.1.

34 Submission by Google dated 14 October 2022. Annex 14.1.

35 PR chap 2 section 3.1.5. Table 10.

36 Own calculations based on Google submission dated 01 October 2021. Table 9.1; Google submission dated 24 September 2021. Annex 24.1; Alphabet 10-K SEC Filings for the year ended 31 December 2017 to 2021.

37 Google submission dated 24 September 2021. Paragraph 25.2.

38 Meeting with Afristay. 14 July 2021; Res Africa submission dated 23 September 2021; Meeting with Travelcheck. 26 July 2021; SafariNow, On camera session dated 05 November 2021, p.4; eDreams submission dated 17 January 2022, eDreams submission to CMA, p.3.

39 Higher CTRs and lower bounce rates improve the quality score which is factored into the minimum quality threshold to appear as an ad, and which is combined with the bid value to determine the overall score and bid success.

40 Own calculations from Submission by Google dated 14 October 2022. Annex 14.1 and Submission by Google dated 07 September 2022. figure 1 and 2 to Annex 1.

from paid results and the group accounts for >3% of total travel paid results in SA.⁴¹ This demonstrates the greater ability to source traffic through paid results and in so doing dominate customer acquisition. It also demonstrates the ability of global platforms to use this as an entry strategy to secure a leading position in SA at the expense of domestic platforms⁴². Smaller platforms may get a similar share of their traffic from paid results, but this simply reflects low volumes in both paid and organic, and not that there is equal access to paid results.⁴³

40. In organic results, a range of quality and relevance factors influence the ranking algorithm, which are continually updated.⁴⁴ These factors also favour larger platforms given their ability to continually invest in search engine optimisation (SEO) in response to algorithm changes and higher CTR and lower bounce rates, proxies for quality, given their more established market position.⁴⁵ As appearing in paid results does not exclude appearing in organic results, large platforms can dominate organic as well as paid results. Outcomes reflect this with the top percentile in eCommerce securing [70-80]% of organic results and top 3 percentiles >90%.⁴⁶ In travel, notwithstanding Booking.com's paid results strategy, the top percentile also gets [50-60]% of organic results and the top 3 percentiles get [70-80]%.⁴⁷ Small and new entrant platforms face the dual problem of large platforms performing better on paid and organic search but also having their organic results being reduced and pushed down the SERP.

Performance in organic is at the mercy of the Google algorithm. Duplication of domains in paid and organic results adds to the visibility problem for smaller platforms and is arguably not in the interests of consumers either. Additionally, the Inquiry has not observed duplications in the specialised search engines covered in this Inquiry.

41. Whilst larger businesses spend more on advertising across the economy, the case of Google is different insofar as 70%+ of intent-based marketing occurs on a single platform where large advertisers can dominate visibility to the exclusion of smaller advertisers⁴⁸. Furthermore, large platforms can also dominate the 'free' visibility of organic results on the SERP. Google's SERP is an important channel for customer acquisition for platforms and as such an important driver of discoverability and competition. In conjunction with the concerns around self-preferencing of Google's specialised units, third-party organic results increasingly being crowded out and the duplication of organic and paid search results, the Inquiry finds that for commercial queries the relatively high levels of concentration on the SERP, lack of discoverability options for small or new platforms, and lack of third-party variety impedes and distort platform competition, as well as impede the ability of new and small platforms to compete effectively.
42. The Inquiry was also initially concerned that the minimum CPC thresholds artificially raised ad auction prices and a lack of ad transparency

41 Google submission dated 14 October 2022. Paragraph 14.8.1. and own calculations incorporating this into Submission by Google dated 07 September 2022. Figures 1 & 2 for Annex 1; and Google submission dated 14 October 2022, Annex 14.1.

42 For example, see meeting with Res Africa, 16 November 2021 and the JustGO complaint with respects to the entry of Busbud in South Africa (JustGO email dated 6 March 2023).

43 See Submission by Google dated 7 September 2022. Figure 1 and 2 in Annex 1.

44 Google. 2021. The Keyword: How we update Search to improve your results. Available online: <https://blog.google/products/search/how-we-update-search-improve-results/> [accessed 15 March 2023].

45 Reinforcing higher CTRs and lower bounce rates.

46 Own calculations from data submitted in Submission by Google dated 07 September 2022. Figures 1 & 2 for Annex 1; and Google submission dated 14 October 2022, Annex 14.1.

47 Own calculations from data submitted in Submission by Google dated 07 September 2022. Figures 1 & 2 for Annex 1; and Google submission dated 14 October 2022, Annex 14.1.

48 Own calculations using data submitted by several platforms.

led consumers to click more on paid results, elevating their importance further and raising costs.⁴⁹ Further evidence has removed these concerns. Minimum CPC thresholds can only push up prices if it is a binding constraint, which it is in only [0-5]% of instances in a one-month sample.⁵⁰ On ad transparency, documentation indicates that Google does assess any change with consideration of the US FTC guidance, and in particular the detectability and ease of identification of ads.⁵¹ Google also assesses for 'skippability', which is the extent to which consumers engage ads and seeks to implement changes that result in greater engagement.⁵² As such, Google appears to attempt a balancing act of maintaining detectability while at the same time improving engagement with search ads. Also, the recent change from 'Ad' to 'Sponsored' on mobile and desktop sought to precisely achieve that. The Inquiry does not consider this problematic as long as it is clearly recognised as an ad.

43. For these reasons, the Inquiry finds that the *de facto* monopoly position of Google in search, the substantial importance of general search for online customer acquisition, and the outcomes resulting from the way the SERP is designed and operates, biases customer acquisition in favour of large global and leading platforms and in so doing, constitutes a market feature which impedes and distorts competition from entrants and smaller platforms, as well as SA platforms in competition to global ones. That impediment is greater for HDP platforms given the funding constraints. No finding is made in respect of minimum CPC thresholds and ad transparency.

3.1.2. Remedial Action

44. The Provisional Report identified the removal of ads from above the fold along with an end to default arrangements on mobile devices as potential remedial action.⁵³ The Inquiry no longer considers these appropriate.

44.1. The extraordinary challenge for smaller platforms in organic results means that paid results are seen as an easier opportunity to gain visibility on the SERP. Their removal is likely to harm entrants and smaller platforms rather than benefit them.⁵⁴

44.2. General search competition is not directly within the scope of the Inquiry, and addressing it is only relevant to the extent it remedies issues within scope, namely the effect on platform competition. It is not clear that changing the default status will impact on the use of Google Search as consumers may continue to select Google Search in any event, as is the case on desktops. Lastly, other search engines have similar design features and business models to Google Search even if consumers do choose alternatives. It has also led to license fees being imposed on smartphone manufacturers elsewhere, potentially raising the cost of devices which would hurt digital penetration in South Africa. It is likely to reduce the costs of advertising, which is primarily relevant to a separate inquiry into Adtech as identified in the terms of reference.

45. Given the findings, the Inquiry considered it necessary to improve the visibility and discoverability of smaller platforms within both organic and paid results. If paid search

49 PR Summary Report Section 8.2.1

50 See Submission by Google dated 21 November 2022. Paragraph 18. The Inquiry also did its own calculation using raw data provided by Google by inflating the MinCPC by 100% and found that only [0-5]% of bids were the same or less than the inflated amount, indicating minimal price anchoring or floor effect. (Own calculations from Submission by Google dated 21 November 2022., Annex 18.1.)

51 Submission by Google dated 21 November 2022. Annex 1.1 to Annex 1.22.

52 Google submission dated 14 October 2022.1. Annex 1.9.

53 PR Chap 9. Para 15.

54 Booking.com submission dated 15 September 2022 . Para 3.2.; Submission by Tripco dated 23 August 2022.

is the means for smaller and HDP platforms to improve visibility and discoverability more easily, then any package needs to enable greater levels of participation in ad auctions. This would require reducing the costs of ads to enable a greater spend, or reducing other costs which may enable a greater allocation to ads, and/or improving the efficacy of the spend, which secures more customer acquisition or conversion for the same monies. That package would need to be more generous for HDP platforms given their additional funding disadvantage.

46. Organic search should also not be ignored because paid search has greater costs of customer acquisition and as platforms grow there is a need to support paid activity with organic clicks if such growth is to be financially sustainable. Removing the duplication of paid and organic results would open up more opportunities for organic results from smaller platforms and align to the practice of intermediation platforms where there is no duplication. However, an alternative is to build on remedies being considered to give more visibility to non-Google comparison sites, which is a comparison site unit which provides a content-rich display of alternative sites, and enabling individual listings to also have a more content-rich display. This development can be leveraged to provide a unit that promotes non-leading South African platforms and allows them to offer content-rich individual listings to similarly promote greater visibility of those platforms. This would need to be extended from comparison sites only to intermediation platforms, and to intermediation platform categories where Google does not have its own units. Incremental measures are also required where domestic platforms face global competitors that can better take advantage of the bias in search. One aspect to that would be to ensure consumers wanting to support domestic platforms can identify and filter their search to those platforms.

47. Such remedial actions will alter the outcomes on the SERP and must do if it is to be deemed effective. This is not undesirable as the current outcomes are biased in a manner that adversely affects competition but also consumer choice. This applies equally to changes in the outcomes of ad auctions and positioning in organic results. The remedial actions do not require knowledge and/or changes to the SERP or ad auction algorithms which makes them more practical and reasonable to both implement and monitor. The inclusion of variation clauses reduces the risk of any unintended consequences.

48. The Inquiry has engaged extensively with Google on a range of potential remedial actions including the practicality and potential unintended consequences which informs the decision on appropriate remedial actions.

49. The decision of the Inquiry is that the following remedial actions are required from Google Search as specified in the Google Remedial Actions in Annexure 10.

49.1. Introduce SA platform badges and filtering of the search results for SA platforms within 12 months;

49.2. Introduce a new platform sites unit allowing content-rich display for non-leading South African platforms in travel and shopping within 18 months, and in other intermediation categories within 24 months, along with augmentation of organic results with content-rich display;

49.3. Provide the following support programmes in South Africa to the value of R330m over five years:

49.3.1. R180m in advertising credits for non-leading South African platforms, with a particular focus on SME and HDP platforms;

49.3.2. Free in-depth technical training to maximise the efficacy of ad campaigns and reduce the effective cost of customer acquisition through general search;

49.3.3. Funding support for SME and HDP digital

- platforms, including Google product credits, along with startup training and networking; and
- 49.3.4. Register online profiles for 500,000 SMEs and HDP-owned businesses
50. The remedial actions in paragraph 49.1 and 49.2 improve organic visibility on the SERP and address the findings in respect of a design that impedes non-leading and SA platforms getting visibility. The remedial actions in paragraph 49.3.1 and 49.3.2 improve paid visibility on the SERP to address the findings in respect of paid results favouring leading platforms. Remedial actions in paragraph 49.3.3 and 49.3.4 provide complementary services to improve the online visibility of SME and HDP platforms in particular, addressing the finding that these businesses are particularly harmed given, amongst others, their funding constraint.

3.2. Self-preferencing

3.2.1. Findings

51. Comparator shopping sites (CSSs) and travel metasearch engines (MSEs) sprung up to serve a consumer need to navigate the vast array of online options available through providing aggregated information and reviews to aid decision making. These have value to consumers but also businesses, and particularly eCommerce and OTA platforms, that pay for traffic directed to them in the form of leads on a CPC basis. These intermediation platforms fulfil a similar role to specialist or vertical search and are heavily reliant on Google Search for consumer traffic.⁵⁵
52. Google itself has strong incentives to capture this specialist search traffic given that shopping, travel and local search are

amongst the most lucrative commercial search categories⁵⁶, and it has the ability to do so given that the majority of traffic originates on Google Search. This can be done by influencing where and how its own Shopping and travel units appear on the SERP relative to competitors, given that it impacts on CTRs. The evidence confirms this has been the case. In travel, there is also greater scope and incentive for Google to go down the value chain to incorporate bookings⁵⁷ as this is entirely virtual unlike eCommerce where physical delivery is required. This too has happened and threatens not only to disintermediate MSEs but also OTAs.

Shopping

53. Google distinguishes between the Shopping Unit which is the carousel on the SERP, and the Shopping Property to which consumers can click through to from the Unit which has its own display to enable a refinement in search. The Google Shopping Unit always secures the first position on the SERP with the highest CTRs where it is triggered by Google. Google indicates that the Shopping Unit is only triggered where the product ad is likely to outperform a text ad.⁵⁸ This will be the case where the query is more product specific (more relevant) and where predicted CTRs are based on always securing the first position and a more content rich presentation. The Shopping Unit is a carousel of products with graphics, unlike the text ad format that applies to other paid results including those of CSSs. This draws additional consumer attention, increasing potential CTRs. In practice the Unit is triggered in [40-50]% of shopping-related searches.⁵⁹ This treatment of Google's own Shopping Unit is plainly preferential relative to CSSs which are limited to text ads.

55 This is c.80% for MSEs (Own compilation using Similarweb data depicted in Figure 11, page 52, PR chap 2). Also see Trivago submission dated 07 October 2021 Para 11; Skyscanner submission dated 29 October 2021. Para 8&9; Kayak submission dated 17 September 2021. Para 8.

56 Google submission dated 10 September 2021. Annex 11.1., p.2. slide 5.

57 Such as the "Book on Google" feature. (Booking.com submission dated 06 October 2022)

58 Google's response to the Provisional Report dated 2 September 2022, page 69, para 4.28.2.

59 Google's response to the Provisional Report, page 68, para 4.28.

54. The outcomes are also consistent with the self-preferencing. Shopping Unit ad revenue on the SERP have increased three-fold from 2018 to 2021, relative to shopping-related text ads which increased by only c.85%, accounting for [40-50]% of search spend in the shopping category in 2021.⁶⁰ This reveals a strong shift by advertisers to the Shopping Property based on its efficacy in drawing consumer traffic, confirmed by actual click data for the largest eCommerce platforms where Shopping Unit clicks now exceed text ad clicks. This shows that consumers have shifted to using the Shopping Property. The efficacy of the ad channel in customer acquisition inevitably will affect other customer acquisition channels including CSSs. Whilst there has been considerable debate about the cause of the decline in PriceCheck, the leading SA CSS prior to Google Shopping, the loss of the dominant online store Takealot's business to Google Shopping was surely the death blow. Takealot would only do this if the Shopping Property provided better customer acquisition and return on investment.
55. Whilst Google states that the Shopping Unit is not a CSS,⁶¹ it provides a selection of specific products to the consumer in much the same way as CSSs, and clearly competes with CSSs as a product-focused customer acquisition channel for eCommerce. The fact that it is purely advertising driven makes the conduct more objectionable as it draws traffic from genuine CSSs that may seek to inform consumers of a broader choice. The submission that SA has skipped the CSS phase is also not persuasive. The lack of a vibrant CSS industry in SA cannot be divorced from the conduct itself which impedes competition from a potential CSS, and hence likely to limit their emergence. Moreover, the success of the Shopping Property itself shows the demand for a product-level selection and comparison

service rather than purely a landing page on a website.

56. Finally, Google has already been prosecuted for such conduct in respect of the Shopping Property in the European Union, which was upheld on review. International precedent holds weight where it is the same platform undertaking the same conduct, and where the SA outcomes are consistent. Moreover, Google submits that the redesign of the Shopping Unit in the EU has been effective in growing CSS numbers and clicks on the Property,⁶² indicative that the design still applicable in SA did impede CSS performance and it is possible to design the SERP in a manner that ensures compliance with competition law whilst still delivering a good consumer experience.

Travel

57. The Google Travel Unit (hotels, flights, things to do or holiday rentals) or "travel units" appear at the top of organic search results as the first organic result. Google states that its travel units are only triggered where directly relevant to a query and is subject to its own organic results algorithm, and it's not the case that it is always on the top of organic search results.⁶³ However, the real preference is that the travel units are much larger than text ads, often includes a map, exhibits rich graphics and contains specific travel product results rather than simply a landing page reference for other organic results. All these factors naturally improve the relevance and predicted CTR for the travel units relative to standard organic results including those of MSEs and OTAs. The natural consequence is that it will score higher and appear at the top of the organic results. As with Shopping, this distinct treatment is clearly preferential relative to MSEs and OTAs which are limited

60 Google submission dated 01 October 2021. 2021 data from Google WS3f.

61 Google's response to the Provisional Report dated 2 September 2022, page 67, para 4.22.

62 Google Letter to South African Commission dated 11 October 2022.

63 Submission by Google dated 02 September 2022. Para 3.21.

to text results. Whilst the travel units lie below the text ads, as the first organic result with a prominent, graphic-rich display, it still draws far more CTRs than a normal organic result, in the range of [20-30]% for Google Hotels and [10-20]% for the other travel units.⁶⁴ It also pushes down the organic results of MSEs/OTAs which account for 73% and 65% of total search traffic respectively.⁶⁵ This both reduces organic traffic, diverts traffic to Google's own units, and forces platforms to spend more on paid results to maintain user traffic and secure a position above the travel units. For instance, evidence of this can be seen following the entry of Google Hotels in late 2015 where benchmarked click data shows a divergence in favour of paid search results at the point of Google Hotel's entry⁶⁶.

58. Moreover, Google's travel products are evolving. In October 2022, Google launched 'Property Promotion Ads' (PPA) for hotels which is a carousel featuring at the top of the SERP that contains a selection of specific hotel adverts and is triggered where the consumer makes a query that anticipates a more specific hotel response.⁶⁷ In essence, the PPA is no different to the Shopping Property in its ads position and display, and a focus on more product-level advertising. The only difference is that it does not link through to the Hotels unit, but rather the Hotels unit remains separately and prominently displayed in organic search. Google states that this new ad format is open to hotels, MSEs and OTAs,

presumably to offer assurances that it does not disintermediate.⁶⁸ But the carousel on top of the unit means that Google products now take up even more of the SERP and reduce paid results in the SERP for MSE and OTAs for more generic landing pages (rather than property landing pages) and push organic results further down the SERP. Google has also added a 'book with Google' option in the links from the Flights unit, a likely precursor for other travel areas.

59. The outcomes on the travel units alone are consistent with self-preferencing. As travel has resumed, revenues and traffic for Google's travel units have increased whilst those of other prominent MSEs in SA have continued to decline.⁶⁹ This mirrors a global pattern where the OTAs have continued to grow their spend on Google Hotels, for example, whilst reducing their spend on MSEs. Google Hotels increased its share from [0-5]% in 2018 to [20-30]% in 2020 for metasearch.⁷⁰ This shift in OTA spend is indicative of consumers shifting their search to the Google travel units and away from MSEs, resulting in more customer acquisition options from Google Travel.⁷¹ Prominent MSEs in SA have seen a decline in organic results and have invested more in paid results to prevent a decline in traffic overall, but not kept pace with Google's own products.⁷² The new PPA is likely to sharply accelerate this trend as observed with the Shopping Property.

64 Own calculations from data submitted in Google submission dated 01 October 2021., Annex 5.1. In contrast, the Inquiry calculated that the average third-party organic result had a CTR of between [2-3]% for travel and accommodation platforms (Own calculations based on data provided by third-party travel platforms).

65 See PR Chapter 2, Figure 12 (Own compilation using Similarweb data).

66 See PR Chapter 2, Figure 24. Compiled by benchmarking organic search and paid search click data changes relative to 2012. Data submitted by Google for [5000 to 6000] travel and accommodation domains in Google submission dated 18 February 2022, Annex 4.2 and Google submission dated 04 May 2022, Annex 14.1.

67 Google Ads Help. About Property Promotion Ads. Available online: <https://support.google.com/google-ads/answer/10266883?hl=en> [accessed 16 March 2023].

68 Google submission dated 22 December 2022. Para 8. Google submission dated 22 December 2022. Annex 8.1. Google submission dated 22 December 2022. Annex 8.2. Google submission dated 22 December 2022. Annex 8.3.

69 Trivago submission dated 07 October 2021, para 7.; Kayak submission dated 17 September 2021, para.4; Booking.com submission dated 10 September 2021., para 46 & 47.

70 PR chap 2. Table 5.

71 [REDACTED], para 46 & 47; also PR Chapter 2, Table 5.

72 PR Chap 2. Figure 22. For example, the steady decline of organic search CTRs and increasing paid search CTRs for a prominent MSE over time.

Finding

60. For these reasons, the Inquiry finds that the *de facto* monopoly position of Google in search, the substantial importance of general search for online customer acquisition, and the self-preferencing of Google units in travel and shopping on the SERP constitutes a market feature which impedes and distorts competition from metasearch, comparator sites and OTAs.
61. In impeding and distorting competition, the market feature excludes SA platforms, raises rival costs, and denies South African consumers the benefit of greater choice and innovation.

3.2.2. Remedial Actions

62. The Provisional Report identified a prohibition on Google placing its units in guaranteed positions or favouring them in the organic search algorithm and affording competitors to also provide units.⁷³ This was informed in large part by a concern over the apparent lack of efficacy of the Google Shopping remedy in the EU. However, an alleviation of concerns in respect of the Shopping remedy and a range of other practical difficulties associated with the provisional remedies has directed the Inquiry towards requiring an end to self-preferencing as a broad remedy, which may pave the way for Google to implement similar remedies associated with the Shopping decision and those being considered under compliance with the Digital Markets Act (DMA) in South Africa given those remedies are also associated with a cessation of self-preferencing. Doing so may be more practical and reasonable for a global company such as Google.
63. On the efficacy of the EU remedies, the Inquiry panel has engaged with the EU and

understands that on the shopping remedy, there are ongoing engagements with Google and affected comparator sites on the efficacy resulting in changes to the manner in which it is implemented. Data provided by Google indicates that there are now 400 CSSs with 800 sites active on the Unit, a 10-fold increase from 2017, and CSSs have a 51% impression share and 59% revenue share.⁷⁴ A Comparison Listing Ad (CLA) tab now appears alongside the Product Listing Ad (PLA) tab but it does have limited utility as it is not the default. However, consumers clicking on the CSS name on the PLA ad get directed to their site for free even if clicking on the product takes them to the merchant. There are also proposals to bring about changes to default status from CSSs that are likely to be evaluated by the EU⁷⁵. The Inquiry understands that an iterative process is beneficial as the remedial design must also take into account the interests of consumers and merchants. Moreover, Google Shopping will have to comply with the DMA irrespective of the EC Shopping Decision remedy, and in particular Article 6(5) replicated below. Compliance may be more far reaching and result in changes to both organic and paid results.

"5. The gatekeeper shall not treat more favourably, in ranking and related indexing and crawling, services and products offered by the gatekeeper itself than similar services or products of a third-party. The gatekeeper shall apply transparent, fair and non-discriminatory conditions to such ranking."

64. In respect of the DMA, the EU confirmed that a process of remedial action consultation and evaluation is taking place and will continue to ensure efficacy. This provides comfort that remedies implemented in the EU will be evaluated and designed in a manner to

73 PR chap 9. Para 15.

74 Google Letter to South African Commission dated 11 October 2022.

75 The Kelkoo Group Response to the Provisional Report. Page 12.

ensure efficacy on an ongoing basis.⁷⁶ This provides comfort that should such changes be implemented in South Africa, there will be an effective cessation of self-preferencing and may be considered as complying with any required actions domestically.

65. In terms of the provisional remedies proposed, potential beneficiaries indicated that ensuring there was no organic self-preferencing by Google would be impossible to monitor and enforce, given the 'black box' nature of the search algorithm.⁷⁷ This is more so given the limited resources of the Commission. On the expansion of units to competitors, Google has indicated that cross-platform communication on the search query not only results in a delay but also difficulty in ensuring an appropriate result which harms consumers.⁷⁸ It appears that for similar reason Google preferred to withdraw the Shopping Unit in Turkey rather than implement a similar remedy to remove self-preferencing, resulting in merchants becoming displeased.⁷⁹

66. Imposing a broad principle remedy without determining precisely how it is achieved and allowing for the implementation of changes done in the EU to remedy the same finding is also more practicable and reasonable. It is apparent that the SERP will continually evolve, with the addition of the Hotels carousel simply the latest change that affects competitor visibility, and hence the remedial action would need to be dynamic. The Commission is spared the resource intensive task of continually adjusting the remedial action as the SERP evolves over time, even if it is not spared a degree of monitoring. For Google, it does not have to design and implement alternative remedies for the same concern across multiple jurisdictions. Google also agrees that if remedial actions are necessary then implementation of DMA changes is more

practical and reasonable for them as opposed to completely different technical engineering of their search platform. However, some adaptations may be required for South Africa given the other remedial actions associated with domestic platforms, including SME/HDP platforms.

67. The Inquiry has engaged extensively with Google on a range of potential remedial actions including the practicality and potential unintended consequences which informs the decision on appropriate remedial actions.

68. The decision of the Inquiry is that the following remedial actions are required from Google as specified in the Google Remedial Actions in Annexure 10.

68.1. Google must not treat more favourably, in ranking and related indexing and crawling, services and products offered by Google itself than similar services or products of a third-party. Google shall apply transparent, fair and non-discriminatory conditions to such ranking.

68.2. Google must implement changes undertaken in the EEA to comply with article 6(5) of the DMA and such implementation, with relevant adaptations to South Africa in consultation with the Commission, will be considered in compliance with the remedial action above.

69. The remedial action above ensures that no self-preferencing by Google occurs on the SERP, addressing the finding that this currently happens in travel and shopping categories. Implementation of the changes to the Google SERP undertaken in the EEA to comply with Article 6(5) of the DMA insofar as it applies to the way Google displays Shopping and Travel results on its Search service, will be considered to be in compliance with this remedial action.

76 Meeting with the EU Commission VM. 07 October 2022.

77 An observation made by several online travel intermediation platforms.

78 Submission by Google dated 02 September 2022. Para 3.34.

79 Submission by Google dated 02 September 2022. Para 3.34.

However, this does not remove the right to independently intervene on the basis of this remedial action where there is good cause to do so. Where such changes may undermine other remedial actions to address the adverse effects on competition from smaller platforms, then the Commission can consider waiving or adjusting the implementation thereof.

[4. Travel and Accommodation]

70. The travel and accommodation sector has been at the forefront of online adoption, with travel platforms emerging in the 1990s already to provide the convenience for gathering information, researching alternative options and booking of flights and accommodation by consumers for travel beyond their current location. Whilst the Covid pandemic adversely affected the travel sector⁸⁰, and by implication travel intermediaries, it has reinforced the online trajectory and 2022 revenues for online travel agents (OTAs) are outstripping pre-pandemic levels⁸¹. The global nature of travel has seen the emergence of global travel platforms built on the domestic and international travel needs of travellers in different regions, providing options in all parts of the world. The relationships with airlines and hotels have enabled services to be offered to domestic travel, alongside domestic travel platforms primarily catering to local or regional travel. The market features impacting on competition will also determine the extent to which domestic platforms can compete effectively.

4.1. Market Context

71. There are a number of distribution channels and services for travel and accommodation products, including traditional travel agents,

direct booking channels (walk-ins, call centre and website), the online travel agents (OTAs) and metasearch engines (MSEs)⁸². The mix varies across different categories (accommodation, flights, car rental, activities and buses) and within categories. The primary focus of the Inquiry has been on accommodation OTAs given the importance of intermediation platforms as a distribution channel and the structure of that market. For flights, the small number of airlines means direct channels and traditional GDS systems⁸³ dominate online flight distribution. For car rentals it is a similar context, and with platform's mainly focused on airport rental⁸⁴. For activities, online booking is still in the growth phase. The MSE market has developed substantially but the online booking is still maturing, with no clear leading platform currently. For buses, online booking is in its infancy given the lower incomes of bus travellers.⁸⁵

72. The ease and convenience of online search and booking by individuals has resulted in a decline in traditional travel agents.⁸⁶ ⁸⁷ These agents have shifted focus on corporate/government travel, group travel and package tours, and leisure travellers that want the convenience of an in-person booking experience unlike the individual traveller

80 Department of Tourism. Annual Performance Plan 2020/21 - 2022/23. Page 19. Available at: <https://www.tourism.gov.za/AboutNDT/Publications/Annual%20Performance%20Plan%202020-23.pdf>. [Accessed on 15 March 2023].

81 For example, revenue figures provided by OTAs have shown that their revenues earned in 2022 have already outstripped 2019 revenues.

82 Note Airbnb is not considered a traditional OTA but is still an online accommodation intermediary platform and is relevant to the Inquiry's assessment of online accommodation intermediation.

83 GDS plays a big role in B2B flight distribution, including air tickets sold online.

84 With Rentalcars (also known as Booking.com Transport Limited) being by far the largest platform accounting for [60-70]% of revenues between 2018 to 2020 (See PR Report, Chapter 2, table 6).

85 Intercape oral submission in the Public Hearings, 18 November 2021, p.3, para 19-20.

86 For example, in Europe distribution through OTAs grew by 7.1% while distribution through traditional travel agents and tour operators shrunk by 1.5% and 1% respectively between 2016 and 2019 ((EY Parthenon Report (2021), Online Travel Agencies, p.8 available at: https://assets.ey.com/content/dam/ey-sites/ey-com/en_gl/topics/strategy/pdf/ey-online-travel-agents-helping-european-small-independent-accommodations.pdf [accessed 17 March 2023]).

87 Lift Airlines also submitted the trend towards online booking of flights. (Lift written submission dated 14 December 202, p.2, para.2)

using OTAs.⁸⁸ The access to a broader range of travel products and discounts provides the basis for their strength in these areas.⁸⁹ Aside from appealing to different product and customer segments, these travel agents account for a limited volume of online traffic and, as such, do not apply any meaningful constraints on OTAs.⁹⁰

73. MSEs are specialist travel search verticals that aggregate travel and accommodation inventory to provide a convenient one-stop-shop comparison of options and pricing, along with reviews, to assist travellers planning a trip. Whilst they may compete with OTAs for traffic and at the research and price comparison stage of the consumer journey, they do not compete for actual bookings and are therefore used as a marketing channel for generating leads by the OTAs, seen as complementary and not substitutes.⁹¹ MSEs compete more directly with Google's travel units in the provision of leads.⁹²

74. In comparison to direct online booking channels for individual accommodation establishments, OTAs appeal to consumers through their aggregation of thousands of accommodation providers to provide a convenient means for customers to search, compare and book in a standardised format on one site, rather than searching individual websites of each provider. OTAs also provide information on facilities and services, as well as ratings and written reviews, to help consumers

with those comparisons and to make informed decisions. This is particularly important where the traveller is going to places they are unfamiliar with, such as international travel and more distant local travel, and where expenditure is often large. The aggregation provides OTAs with an advantage in customer acquisition as they have far larger advertising budgets relative to individual establishments, and they are more able to convert the leads to bookings due to the range of alternatives they can offer a consumer that clicks through to their website. Indicative of this, OTAs account for [80-90]% of MSE leads revenue.⁹³ Intermediation platforms are independent of the establishments and seen as an ally to the consumer if things go wrong, for example, cancellation policies are seen as an important form of non-price competition.⁹⁴ Loyalty schemes that operate across all establishments and types of travel bookings reinforce the benefits of booking through the OTAs.

75. For the establishments themselves, OTAs are an important distribution channel for listing inventory due to the large volumes of online consumer traffic and conversion of that traffic to actual bookings. The fact that most establishments distribute through OTAs in addition to their own direct channel demonstrates that OTAs are seen as complementary in bringing additional bookings to the establishment from consumers that book through the OTAs, and may be the predominant or only source

88 Travellers booking through traditional travel agencies put a premium on personal contact and social interaction with an agent. (De Jager, K. 2014. Choosing Between Travel Agencies and the Internet. Dissertation: Faculty of Management, School of Tourism and Hospitality, Department of Tourism Management, University of Johannesburg. Available at: https://www.researchgate.net/publication/277328353_Socio-demographic_variables'_relationships_in_choosing_between_travel_agencies_and_the_Internet_for_leisure_travel_arrangements_the_case_of_South_Africa_African_Journal_of_Hospitality_Tourism_and_Leis/link/557300e608ae7536374e50fa/download. [Accessed on 15 March 2023].

89 De Jager, K. 2014. Choosing Between Travel Agencies and the Internet. Dissertation: Faculty of Management, School of Tourism and Hospitality, Department of Tourism Management, University of Johannesburg. Available at: https://www.researchgate.net/publication/277328353_Socio-demographic_variables'_relationships_in_choosing_between_travel_agencies_and_the_Internet_for_leisure_travel_arrangements_the_case_of_South_Africa_African_Journal_of_Hospitality_Tourism_and_Leis/link/557300e608ae7536374e50fa/download. [Accessed on 15 March 2023].

90 For example, South Africa traffic to the websites of traditional travel agents (e.g. Thompsons, Flightcentre, BCD Travel, Club Travel etc.) accounted for 2% of overall online traffic, a small proportion when one considers OTAs. (Own compilation based on Similarweb data).

91 Agoda written submission dated 20 September 2021, p.20, para.31.; Airbnb written submission dated 01 October 2021, para.25; Booking.com written submission dated 10 September 2021, p.24, para.41.

92 Expedia written submission dated 30 June 2021, para.3.

93 Own calculations from several submissions by metasearch engines.

94 Submission by prominent OTA.

of bookings if they do not have their own website or booking facilities.⁹⁵ In essence, OTAs provide a service to establishments to acquire new clients and are not in competition with them.⁹⁶ This is confirmed by evidence from establishments indicating a high degree of dependency on OTAs for a material proportion of their bookings. For small accommodation establishments with limited budgets for online marketing, OTAs account for a very high share of online bookings.⁹⁷ At the other end of the scale, large hotel chains invest in their own online marketing and benefit from the brand and their own loyalty schemes especially for business travellers, but still generate a material proportion of their bookings through OTAs and still claim to be dependent.⁹⁸ Direct channels are also limited in their competitive constraint due to practices such as narrow price parity which remove any advantage they may have in attracting consumers.

76. Within the travel and accommodation category, Airbnb has innovated to develop a market for 'alternative accommodation' in the form of the short-term letting of rooms and homes of private individuals to travellers.⁹⁹ This has created a substantial ecosystem of alternative accommodation within South Africa, and other OTAs have mimicked Airbnb to introduce 'alternative accommodation' categories on their own platforms.¹⁰⁰ However, Airbnb remains the leading platform for alternative accommodation by some distance and is the market referent in this category for both global and domestic travellers. 'Alternative accommodation' appeals for a variety of reasons including lower pricing and better value (incl. due to the self-catering

nature), whole homes (vs individual rooms for groups or families), unique accommodation (incl. unique locations) and locations suitable for travel unrelated to tourism (e.g. visiting family and friends). This distinguishes it from the standard hotel and guesthouse accommodation, although there will be a group of consumers that select between the two types of accommodation. Regardless of that interface, those selecting alternative accommodation do so predominately through online intermediation platforms.

77. For these reasons, the appropriate relevant market for the purpose of the Inquiry's assessment is the provision of online accommodation platform intermediation services, essentially OTAs. This finding is consistent with that of many other jurisdictions that have considered the OTAs as distinct markets. In addition, there is a market for the sale of intermediation services to short-term letting of private rooms and homes to travellers.

4.2. Platform Competition

4.2.1. Findings

78. Global platforms feature strongly in OTA services in South Africa, accounting for approximately 90% of platform revenue share. These players include Booking.com (and the Booking Holdings portfolio of platforms), Airbnb and Expedia (and its portfolio).¹⁰¹ Domestic online accommodation intermediation platforms include Lekkeslaap and Travelground (belonging to Tripco), SafariNow, Afristay, SA-Venues, and RoomsForAfrica (part of Res Africa).

95 This is likely to be true for small accommodation providers and providers of alternative accommodation (e.g. Bed & Breakfasts, homes, etc.).

96 For instance, price parity arrangements are seen as vertical restraints and not horizontal.

97 Small accommodation establishments indicated that 87% of transactions were done through online intermediary platforms (NightsBridge submission dated 13 July 2021).

98 For example, in highly competitive nodes (e.g. popular tourist cities such as Cape Town) hotels are dependent on platforms for online bookings.

99 Airbnb written submission dated 01 October 2021, para.1

100 For example, hotels, motels, resorts, homes, apartments, bed and breakfasts, hostels and other properties.

101 Expedia's portfolio of platforms include Expedia, Hotels.com, Vrbo, Travelocity, Hotwire, Orbitz, ebookers, CheapTickets, and Wotif.

79. Booking.com is estimated to have over 50% revenue share of OTAs and the largest for traditional accommodation establishments by a huge distance, as the second-largest, Airbnb, is focused on alternative accommodation.¹⁰² Even including a more expansive list of online channels, Booking.com is highly significant as a source of bookings. Other than revenue share, clear indicators of market power include the extent of dependency of establishments and the extent of network effects from which it benefits. Indicative of both, Booking.com has leveraged the importance of visibility on its platform to drive more widespread adoption by accommodation providers of visibility boosters and partner programmes that provide more visibility in exchange for higher commission fees and accommodation funded discounts.¹⁰³ These have enabled a significant increase in average commission fees on the platform, including a steady increase in the adoption of higher commission yielding exclusive programmes by accommodation providers,¹⁰⁴ and in addition have enabled Booking.com to extract accommodation-funded discounts that are more than twice that of competing platforms when measured as a percentage of gross booking value or commission revenue. Behind Booking.com is a long tail of small online accommodation platforms and none nearly as comparable to Booking.com's size and network effects.
80. Booking.com is already entrenched as the leading platform, creating expansion barriers for competing platforms such that even other global platforms are unwilling to invest substantially into the African market

due to this leadership position.¹⁰⁵ Some local platforms have gained traction in niche markets¹⁰⁶, but are constrained in expanding into the major travel nodes.¹⁰⁷ Whilst Booking.com enjoys strong network effects, part of the entrenchment of the platform is reinforced by business practices such as narrow and wide price parity, its ability to attract substantive accommodation funded discounts and aspects of its Genius Loyalty programme.

81. In alternative accommodation, it is Airbnb that attracts the lion's share of travellers within that category, and as a result Airbnb is indispensable to the private individuals listing their rooms on OTAs for short-term let. This does provide Airbnb with market power over those private individuals offering short-term lets. The Inquiry has not identified any market features within alternative accommodation that may have an adverse effect on competition at a platform level. Airbnb does not itself use search advertising much given it is the referent platform, it does not have price parity provisions and it does not seek to solicit exclusionary discounts by short-term letting providers.

Wide price parity

82. Wide price parity conditions require an accommodation provider to offer room prices to Booking.com that are no less favourable than the room price offered to other OTAs, as well as its own direct online channel. Wide price parity within digital platforms is now generally accepted to be a hardcore restraint where the anti-competitive effects outweigh

102 (See PR, Chapter 2, Table 3).

103 See market power discussion in Section 1.2 of Annexure 2 of the Report.

104 These exclusive programmes include Preferred Partner and Preferred Plus, and have grown from [40 to 50]% of total transaction value ("TTV") in 2019 to [70 to 80]% of TTV in 2022 (Own calculation from Booking.com written submission dated 12 January 2023, Annexure 1.)

105 Expedia oral submission in the public hearings, 15 November 2021 .

106 Such platforms include Tripco's Lekkeslaap which differentiates its business by adding a human element such as phone lines that are operated each day, 365 days a year, until midnight. (Tripco oral submission in the public hearings, 04 November 2021, p.18).

107 For example, dominance of Google Search by the leading platform or platforms with deep pockets. (Platforms which have raised this issue include: Afristay VM1. 14 July 2021; SafariNow oral submission in the public hearings, 05 November 2021, p.5-6; Res Africa VM1. 16 November 2021; Res Africa written submission dated 23 September 2021, ; SA-Venues oral submission in the public hearings, 04 November 2021, p.10; ATKV oral submission in the public hearings, 05 November 2021, p.16; Hostelworld submission to the SOI dated 25 June 2021; Travelcheck VM1. 26 July 2021; Bushbreaks VM1. 13 July 2021).

any potential justification and has been specifically excluded from the exemption category in the latest EC Vertical Block Exemptions Regulations.¹⁰⁸

83. Wide parity clauses prevent competition on room price amongst platforms, preventing competing platforms from expanding through securing lower room prices from establishments in exchange for lower commissions, or through targeting different consumers (such as lower prices to local travellers). This further entrenches Booking.com as consumers are conditioned to expect that no other platform is cheaper and Booking.com can leverage its position to extract or fund a superior loyalty discount programme. It forces competition through marketing spend where Booking.com has an advantage. Moreover, there is no justification for the practice. The harm to competition in the specific travel and Booking.com context has been demonstrated in academic studies of how prices responded to the removal of wide parity in Europe.¹⁰⁹ Similarly, the Redflank survey found that a material proportion of accommodation providers indicated a willingness to offer lower prices on other platforms if permitted to do so, to the benefit of consumers.¹¹⁰
84. Booking.com argues that it maintains the one-stop-shop efficiency of travellers knowing that they always get the best price on their platform¹¹¹, but this is false efficiency as travellers are better served by greater

competition and any gain is to Booking.com as it positions itself as the lowest price platform in the market and is further entrenched. Booking.com also states wide parity is required for the business model to recoup investment and marketing costs work¹¹² and yet it removed wide parity in Europe following an investigation over 7 years ago and continues to operate profitably.¹¹³

Narrow price parity

85. Narrow price parity is where the parity only applies to the accommodation provider's own direct online channel. The concerns with narrow parity are twofold, namely that a) it may replicate the effects of wide parity clauses impacting negatively on platform competition, and b) it may restrict competition from the direct online sales channel.¹¹⁴ On the former, accommodation providers are more inclined to protect their own distribution channel where their costs are lowest and not charge higher prices on their own channel relative to third-party platforms where they pay commission fees. Evidence from the removal of wide parity, but not narrow parity, in Europe found that of the 79% that did not price differentiate across platforms, a quarter did not do so for fear of penalisation across OTA platforms.¹¹⁵ Similarly, the Redflank survey found that many accommodation providers would not price differentiate across platforms. The implication is that narrow parity is likely to replicate wide parity provisions for a substantial portion of accommodation

108 Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, Article 5(1)(d).

109 Ennis, S., Ivaldi, M., & Lagos, V. 2020. Price Parity Clauses for Hotel Room Booking: Empirical Evidence from Regulatory Change. Available at: https://www.tse-fr.eu/sites/default/files/TSE/documents/doc/wp/2020/wp_tse_1106.pdf. (Accessed on 31 March 2022).

110 Results from the Redflank Survey (2021) showed that 25% and 50% of large and small metro-based hotels would offer a lower price on another online platform respectively; and 17% and 3% of large and small non-metro-based hotels would lower their prices on another platform respectively.

111 Booking.com written submission dated 26 August 2022, para 9.3 & 9.4.

112 Booking.com written submission dated 26 August 2022, para 9.5.

113 Rival platforms also need to invest in their own marketing but also need to be given the opportunity to engage in price competition to attract consumers.

114 See for instance CMA Vertical Agreements Block Exemption Order. 12 July 2022 Para 10.164-. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1091830/VABEO_Guidance.pdf.

115 Report on the Monitoring Exercise carried out in the online hotel booking sector by EU Competition Authorities in 2016, page 6. Available at: https://ec.europa.eu/competition/ecr/hotel_monitoring_report_en.pdf. (Accessed on 15 March 2023)

providers¹¹⁶, and that the only means to inject price competition is through the direct channel of the provider. Evidence also suggests that Booking.com is able to sponsor its own discounts to match prices across channels including an accommodation providers own direct channel to remain price competitive¹¹⁷, and this is likely to be enhanced by the removal of parity restrictions.

86. On the latter, narrow parity impedes accommodation providers from reducing prices on their own channel to the benefit of consumers. The Redflank survey indicated that at least a third of hotels across size categories would provide lower rates absent the restrictions¹¹⁸, and the Bundeskartellamt found that roughly half of hotels did distribute at lower rates on their own direct channels when the parity restrictions were removed.¹¹⁹ This was confirmed by an academic study that found mid-level price hotel prices dropped in Germany following a move to no parity.¹²⁰ The ability to price lower on their own direct channel is an important tool in developing the direct channel and reducing dependency on Booking.com, as it provides a reason for consumers to book direct. Under narrow parity, there is no reason for consumers to book direct as there is no advantage, and potentially a disadvantage where there are loyalty discounts and a generous cancellation policy on the OTA.¹²¹ This is corroborated by

evidence in other jurisdictions which indicates that consumers may browse on the hotel site and then book on the OTA as frequently as the reverse¹²², and cross-browsing evidence for SA finds similar patterns of online website search.¹²³

87. Reducing dependency is important where there is a dominant platform that can extract higher commission fees directly or through visibility promotion, and where accommodation providers may be punished if they price cheaper on competing OTAs. This has also created an environment where Booking.com can exploit business users dependent on the platform, for example, the increasing value of transactions pertaining to higher commission yielding exclusivity programmes such as Preferred Partner and Preferred Plus where adhering to narrow price parity obligations (or “external prices”) are a precondition to these programmes and are actively monitored. In 2022, these exclusive programmes accounted for over half of booked room nights and total transaction value¹²⁴ on the platform highlighting their importance and the dependency on which to attain visibility. Narrow parity obligations have become a tool to extract higher commissions from establishments while containing any pass-through of distribution costs in the form of higher prices on the platform.

116 Andrea Mantovani, Claudio Piga and Carlo Reggiani. 2019. Much ado about nothing? Online platform price parity clauses and the EU Booking.com case. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3381299. (Accessed on 15 March 2023)

117 See Booking.com written submission dated 10 September 2021, para.34 (PR Chapter 2, Figure 29, Section 3.3).

118 For example, 38% of small metro hotels, 55% of small non-metro hotels, 38% of large metro hotels and 33% of large non-metro hotels indicated that would lower prices on their own website had the main platform they use not restrict different pricing.

119 Bundeskartellamt, 2020. The effects of narrow price parity clauses on online sales - Investigation results from the Bundeskartellamt's Booking proceeding. Competition and Consumer Protection in the Digital Economy. Available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Schriftenreihe_Digitales_VII.pdf?__blob=publication-File&v=3. (Accessed on 15 December 2022).

120 Ennis, S., Ivaldi, M., & Lagos, V. 2020. Price Parity Clauses for Hotel Room Booking: Empirical Evidence from Regulatory Change. Available at: https://www.tse-fr.eu/sites/default/files/TSE/documents/doc/wp/2020/wp_tse_1106.pdf. (Accessed on 04 December 2022)

121 Where cancellation policy is an important form of non-price competition. This is the most important form of competition for some OTAs.

122 Anderson and Han (2017). The Billboard Effect: Still Alive and Well. Cornell Hospitality Report, Vol. 17, No.11. Available at https://ecommons.cornell.edu/bitstream/handle/1813/70982/Anderson_2017_The_billboard_effect.pdf?sequence=1&isAllowed=y. (Accessed on 15 March 2023)

123 Using Similarweb's "Audience Interests" tool (see Table 2 of Annexure 2 of the Report).

124 For example, the exclusive programmes accounted for [40 to 50]% of TTV in 2019 & [70 to 80]% of TTV in 2022. (See Booking.com written submission dated 12 January 2023, Annexure 1).

88. There is no persuasive justification for narrow parity in general, and certainly not one that outweighs the harm it creates. Booking.com argues that it will result in free-riding by accommodation providers and make the business model, of free listing and charging only for bookings, unsustainable.¹²⁵ The natural experiment in Germany following the removal of narrow parity conclusively demonstrates that this is not the case, as Booking.com continues to operate the same model and continues to enjoy high market share.¹²⁶ This is despite many hotels pricing cheaper on the direct channel, as most consumers still browse and book on Booking.com. Booking.com has argued that the free-riding is a learnt consumer experience and will emerge over time, but has failed to put up any evidence from Germany on these claims despite being invited to do so by the Inquiry. Even if Booking.com may have grown slower absent the loss of parity, which is purely speculative, then that still does not justify the conduct as the conduct itself was harmful to competition and consumers. Finally, Booking.com has demonstrated an ability to fund its own extensive discounts on its platform to match prices and compete.

89. As narrow parity is typically encompassed within a wide parity clause, the single small South African OTA and the international ones with a small SA presence will have a narrow parity provision too, whereas all the other South African OTAs do not have any parity obligations.¹²⁷ Once more, the Inquiry has insufficient evidence that the small SA OTA is able to enforce the narrow price parity provisions given the lack of dependency of accommodation providers. Moreover, narrow parity provisions are unlikely to have a

material effect on the competitive landscape when used by small OTAs, given their negligible size and network effects, including global OTAs with limited incoming foreign traveller bookings. This is unlike the effect of such parity obligations with leading platforms on which accommodation providers are dependent and may wish to reduce that dependency. In alternative accommodation markets, Airbnb does not have a price parity provision and therefore does not have narrow parity in place either.

Loyalty schemes and other accommodation funded discounts

90. As the leading platform, Booking.com benefits from strong network effects such that the larger the pool of travellers on the platform, the more indispensable the platform becomes to accommodation providers, and the more dependent they become on the platform to reach travellers. Moreover, discoverability and visibility on the Booking.com platform becomes critically important to securing a share of traveller bookings.¹²⁸ As is the case with leading intermediation platforms in all categories, the sale of visibility is used to extract more revenue from the business users. In the case of Booking.com, visibility has been used to not only extract more commission, but to also extract accommodation-funded discounts that ensure the platform has better pricing than rivals, including through the Genius loyalty programme which entrenches their position with travellers and reinforces the network effects.

91. An indication of the market power of Booking.com is its ability to extract accommodation funded discounts at a level that rival OTAs

125 Booking.com written submission dated 26 August 2022, para 9.3.

126 Bundeskartellamt, 2020. The effects of narrow price parity clauses on online sales - Investigation results from the Bundeskartellamt's Booking proceeding. Competition and Consumer Protection in the Digital Economy. p.3 - 8. Available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Schriftenreihe_Digitales_VII.pdf?__blob=publication-File&v=3. (Accessed on 15 March 2023)

127 There however is no evidence that this small platform can enforce parity.

128 The top 10 results on Booking.com drove between [70 to 90]% of bookings depending on the mode of booking (i.e. desktop web, mobile web, or application). (Booking.com written submission dated 31 January 2021, para .1)

are unable to replicate on relative terms¹²⁹, namely relative to their gross booking value (GBV) or commission fee income.¹³⁰ In comparison to the more successful OTAs, Booking.com can extract around three times more accommodation funded discounts than their total combined commission earned in absolute terms. As a result, Booking.com only funds under 10% of total discounts on the platform itself even though total discounts far exceed competitors in relative terms.¹³¹ The more successful OTAs will invest a higher share of their own commission revenue on discounts, but they cannot replicate the ability to extract more accommodation funded discounts and so fund a significantly higher share of total discounts that Booking.com does. The inability to replicate is evident from the fact that even if these local platforms were to fund the difference in relative discounts themselves to match Booking.com, then they would be substantially loss-making which is unsustainable financially, especially without huge capital backing.¹³²

92. The bulk of the accommodation funded discounts stem from the general discounting on the platform, with Genius accommodation funded discounts currently constituting [20-30]%. However, the Genius accommodation funded discounts are the most rapid growing component given the increased Genius membership after minimum qualification criteria were removed and the increased adoption by accommodation providers.¹³³ As a result, more bookings are being made through Genius, more of those involve a discount and there are increases in the discount provided.¹³⁴ Booking.com extracts roughly twice the accommodation funded

discounts through the Genius programme than the total platform and accommodation funded discounts of the more successful OTAs combined. Currently, it is theoretically possible for these more successful domestic OTAs to fund the difference in discounts (in relation to the Genius programme) themselves in some years, not all, but this would only leave them with a small margin. However, with the Genius growth this may well not be the case in future.

93. There is insufficient evidence that any of the specific design features distinguish the Genius programme from those of other OTAs, except the ability to extract accommodation funded discounts on a large scale and the precondition of narrow parity. Loyalty schemes typically are funded by both the scheme and partners as both extract some value, namely loyalty for the scheme owner and additional business for the partners. Restricting who the partners are to direct some of the benefit is part of most loyalty scheme designs. OTA programmes seek to bring in some accommodation funded discounts as the accommodation providers benefit from being directed more traffic which should convert to more bookings, and some of that value is shared. For instance, Genius claims to bring an increase of 70% more traffic and 45% more revenue. There is lock-in for accommodation providers through the six-month exclusion clause if they drop out which may create a lock-in but also serves to prevent constant entry and exit of partners.
94. It is the market power of Booking.com that means it can extract more of the value from the partnership with accommodation providers, and hence more generous accommodation

129 The Inquiry actually tested this with a rival OTA and found that it would not be able to profitably replicate Booking.com's prices (net accommodation funded discounts). The assessment was done by assessing the impact on operating profits if the OTA in question was to sponsor discounts to match the average price (net accommodation funded discounts) on Booking.com on average. See assessment in Annexure B of Annexure 2 of the Report (data submitted by various rival platforms).

130 For Booking.com accommodation funded discounts in relative terms constituted [60-70]% of commission fees and [10-20]% of gross booking value.

131 Own calculation based on data submitted in Booking.com written submission dated 10 September 2021, para.34.

132 The estimation is a loss of more than 10%.

133 Booking.com. Genius. Available at: <https://www.Booking.com/genius.html> [Accessed on 11 April 2023].

134 See an increasing shift from 10% Genius discounts to 15% and 20% Genius discounts over time in Booking.com (Booking.com written submission dated 02 December 2022, Annex 2).

funded discounts rather than anything in the design. Accommodation providers feel compelled to be on the Genius programme and contribute discounts to ensure they share in the bookings made on the loyalty programme, but it is also the extraction of discounts beyond the loyalty scheme that reveals the extent of market power and that it is not only a loyalty scheme issue. Other practices which reinforce and entrench this market power, namely wide and narrow price parity clauses, therefore have greater anti-competitive effects as they reinforce other outcomes feeding off the beneficial network effects. They do so directly too, by preventing accommodation providers offering higher prices on Booking.com to offset some of the costs of the discounts.

95. For these reasons, the Inquiry finds that the wide and narrow price parity clause imposed by Booking.com has an adverse effect on competition from OTAs and direct channels of accommodation providers, harming consumers and accommodation providers. The Provisional Report finding that extracting funding of discounts from those accommodation providers in the Genius programme results in an adverse effect on competition is not confirmed in this Final Report. However, the Inquiry does find that Booking.com is able to extract accommodation-funded discounts that competitors cannot replicate due to its market power and market features which entrench that market power, namely wide and narrow price parity.

4.2.2. Remedial Action

96. The Provisional Report proposed the removal of the price parity clause for South African accommodation providers, and a requirement that loyalty schemes include all accommodation providers and are fully funded by Booking.com to prevent the exclusionary effect. The provisional finding that supports the loyalty scheme remedy was

not confirmed and so the remedy falls away. The alternative finding of market power to extract accommodation-funded discounts being reinforced by wide and narrow parity simply reinforces the need for a suitable remedy to these clauses.

97. The removal of price parity follows directly from the finding that such clauses adversely affect competition and remains relevant. The Inquiry is aware that adherence to price parity is a precondition for inclusion in the Genius and exclusive programmes (Preferred Partner and Preferred Plus) of Booking.com, which may be used as a means to enforce such provisions outside of the general contracts. The remedial action needs to ensure this backdoor to parity is closed. The complete removal of both wide and narrow parity is reasonable considering the direct effect on pricing and competition, and exploitation of accommodation providers, but also the indirect effect on the use of market power to extract accommodation funded discounts that rivals simply cannot replicate. The removal of price parity clauses then obviates the need for additional remedies on the extraction of accommodation-funded discounts. The Inquiry has engaged Booking.com on these remedies¹³⁵ and as such the Inquiry is obligated to impose them.
98. The decision of the Inquiry is that the following remedial actions are required from Booking.com as specified in the Booking.com Remedial Actions in Annexure 10:
- 98.1. Within 1 month, the removal of wide and narrow price parity terms from all contracts with accommodation providers in South Africa, and that all accommodation providers are clearly and unambiguously informed that they are no longer required to price the same on their direct channel or any other channel as their pricing on Booking.com. This includes its removal as a requirement for participation in the Genius, Preferred Partner or Preferred Plus

135 Booking.com written submission dated 24 October 2022, para 8.

programmes, or any other scheme on the platform.

99. The remedial action above involving the removal of wide and narrow price parity directly addresses the finding in respect of how wide and narrow price parity clauses adversely affect competition.

4.3. Business User Competition

4.3.1. Findings

100. As with all intermediation platforms, visibility is a critical factor for accommodation providers to effectively compete on platforms.¹³⁶ On Booking.com, the leading platform, 70% to 90% of bookings were made on the top ten results.¹³⁷ However, unlike classifieds where a position is simply for sale, on Booking.com it is more complex. There are pure visibility boosters that provide a ranking boost based on paying more commission (rather than a fixed Rand amount), but greater prominence is mainly provided through the Preferred Partner (incl. Preferred Plus) and Genius loyalty programme, or through promotional deals that involve accommodation funded discounts which provide a ranking boost. The Preferred Partner and Genius programmes require a minimum review or performance rating to qualify.¹³⁸ The Preferred Partner programme does come with additional commission fees (18% or 23% for Preferred Partner Plus) and the Genius programme requires discounts on the cheapest and best-selling rooms. The Preferred Partner is advertised to offer qualifying accommodation providers

30% more visibility¹³⁹, the Preferred Plus programme 60% more visibility¹⁴⁰ and the Genius programme 70% more visibility.¹⁴¹ The importance of these programmes is reflected in their share of total transaction value on the Booking.com platform, with Preferred Partner [60-80]% and Genius [20-40]%, leaving only a minority of pure organic result bookings albeit that there may be sizeable overlap in the two programme bookings.¹⁴²

101. The qualification criteria means that accommodation providers cannot simply buy visibility through these programmes, technically providing equal opportunity for independent accommodation providers to qualify and join if they can achieve high traveller review scores. Adoption by eligible accommodation providers will depend on whether they are willing to offer the discounts for the additional visibility on the Genius programme and pay higher commission for the Preferred Partner programmes. The evidence indicates that adoption rates of eligible accommodation providers on the Genius programme is [10-20] percentage points higher for independent establishments than managed hotel chains. However, on the Preferred Partner programme which accounts for the bulk of transaction value, the adoption rate by managed hotel chains is far higher than on Genius, and [0-10]% higher than independent providers whose adoption is slightly higher than that of Genius. Independent accommodation providers account for [70-80]% of total booked rooms on the platform, a high proportion but difficult to determine if this is because of a

136 Results from the Commission's platform business user survey (i.e., accommodation providers and the airline respondent) indicated that the respondents consider a high-ranking position on a platform to be very important.

137 [80 to 90]% of bookings that were made via the web on Booking.com, were on listings that appear on the first page and on mobile apps, approximately [70 to 80]% of app bookings were made on the first batch. (Booking.com written submission dated 31 January 2022, para.1.1.)

138 A minimum rating of 7 is required for Preferred Partner, 7.5 for Genius and 8 for Preferred Plus.

139 See Booking.com Partner Hub. Available at: <https://partner.Booking.com/en-gb/help/growing-your-business/increase-revenue/all-you-need-know-about-preferred-partner-programme>. (Accessed on 15 March 2023)

140 See Booking.com Partner Hub. Available at: <https://partner.Booking.com/en-gb/help/growing-your-business/increase-revenue/all-you-need-know-about-preferred-plus>. (Accessed on 15 March 2023)

141 See Booking.com Partner Hub. Available at: <https://partner.Booking.com/en-gb/help/growing-your-business/increase-revenue/becoming-genius-partner>. (Accessed on 15 March 2023)

142 Booking.com written submission dated 30 September 2021, para.71.

criteria-based eligibility criteria or just the general high share of rooms by independent establishments.

102. For the leading accommodation platform, there is a standard commission fee and negotiations take place with some global hotel chains primarily around a reduction from the standard fee, with some more limited local hotel chains discounts. As a result of this more structured discussion of additional value of the chain warranting a discount, the extent of the differential is not as vast as that of food delivery or classifieds, at roughly [5-20%] discount for local or global chains on Booking.com, and applies to c.[5-10] chains globally and c.[0-5] local hotel chains, representing a small fraction of total managed chains¹⁴³ (albeit some the largest chains), where total chains account for [20-30]% of all bookings. There is no discrimination on the visibility booster as an accommodation establishment determines what additional commission it is willing to pay and the ranking boost is based on that. For accommodation-funded discounts, that too is at the discretion of the accommodation provider with no difference in treatment in the visibility boost from a given discount. For Genius, the discount requirement is also not discriminatory. It is only for the Preferred Provider programme where international and domestic hotel chains can carry through the discount on the standard commission fee, and marginally increase the extent of discrimination to the [5-25]% range between the larger chains and the standard rate, but with domestic chains securing differences on the low end. The overall level of discrimination in travel is therefore limited in size for the standard commission, and within visibility products limited to the exclusive programmes only. However, given the importance of the exclusive programme¹⁴⁴, this still impacts negatively on independent

establishments as reflected in the lower adoption rates than chains for eligible independent establishments.

103. The tourism sector in South Africa is substantially untransformed not only from an ownership perspective but also from a community perspective. The Group Areas Act ensured that prime tourism locations nationally were reserved for whites, who currently benefit from the ownership of accommodation and travel-related services in those areas. Moreover, the allocation of fiscal resources was used to invest in tourism infrastructure in those areas, benefiting the previously advantaged, and excluding HDP communities in benefiting from domestic and inbound tourism. Whilst government has a clear role to play in addressing this historical inequity, and there are initiatives to try build tourism infrastructure in HDP communities, the OTAs now play a material role in shaping the tourism industry in a number of ways. Most directly, the sheer volumes of bookings made through OTAs, and particularly Booking.com, means that simply being on the platform itself is becoming indispensable to the viability of many establishments seeking to make a place for themselves in the tourism industry. OTAs provide information on facilities and services, as well as ratings and written reviews, to help consumers make comparisons and to make informed decisions. This is especially beneficial for establishments that do not have their own websites which is often the case for alternative accommodation. In addition, discoverability and visibility on the platform shapes which establishments attract more volumes of travellers. Finally, OTAs do provide information on particular destinations and seek to promote destinations to travellers. In these ways, the establishments OTAs seek to bring onboard and the tourism communities they seek to

143 There are approximately [100 to 200] managed hotel chains based on data submitted by Booking.com. Therefore, between [5 to 15] large chains account for a small fraction of total managed hotel chains. (See Booking.com written submission dated 23 September 2022 ; Annex 3 & 4).

144 Booking.com's exclusive programmes accounted for over 50% of its TTV and BRNs in 2022, highlighting its importance. (Own calculations based on Booking.com written submission dated 12 January 2023, Annexure 1).

promote will influence the success of those communities and individual establishments.

104. However, the OTAs have predominately focused on established tourism and travel destinations and establishments, reinforcing historical advantage and disadvantage. This is reflected in the small number of listings from HDP owners and communities¹⁴⁵, and the lack of promotion of alternative tourism communities. This market feature impedes the ability of HDP establishments and communities to compete and sustain themselves in the tourism industry. Given the potential of the tourism industry to support economic activity and employment, this market feature contributes to broader inequality within South African society. As the dominant OTA for inbound and domestic travel, Booking.com does most to shape the winners and losers but also benefits most from that tourism activity amongst OTAs. Smaller domestic OTAs and global OTAs with less share in the market similarly have an obligation too but their market position should inform the extent of that obligation.
105. In alternative accommodation Airbnb plays an indispensable role in directing travellers and providing opportunities to private individuals to earn additional revenue on homes. Alternative accommodation, unlike OTAs, naturally provide opportunities for SMEs and independent establishments as these establishments are typically individually owned unlike mainstream accommodation such as large hotels and hotel chains. Airbnb also levies a small fee on hosts but charges the traveller the bulk

of the levy.¹⁴⁶ As a consequence, concerns over potential bias against SMEs are not as prevalent in alternative accommodation.

106. Nonetheless, those opportunities will still be fundamentally skewed against HDPs given their exclusion from various desirable locations for travel and from economic opportunities to build wealth that may enable investment in homes and locations of interest to travellers. However, unlike Booking.com, Airbnb has put in effort and funding to support non-traditional tourism areas including HDP communities, and alternative accommodation by its very nature supports accommodation opportunities outside of the traditional tourism locations and districts within those tourist locations.¹⁴⁷ Hosts on alternative accommodation platforms do not just target tourists or business travellers but a range of people travelling for different reasons. Many of the hosts are located outside of tourist districts as a result. Since 2017 Airbnb has also invested millions of Rands into alternative tourism and established several initiatives including but not limited to the Airbnb Academy, the Academy Fund (a Covid relief fund totaling R2.5m), with a further investment in the Waterberg region, and several other initiatives.¹⁴⁸
107. The Provisional Report raised concerns over asymmetrical payment terms, on the basis that on certain platforms accommodation providers were required to pay the platform its commission within 15 days of an in-person payment, whereas platforms may only pay the accommodation after 30 days of check-in for online payments.¹⁴⁹ On further investigation

145 For example, the Redflank Survey suggests that 8% of large hotels and 5% of small hotels had HDP ownership and a survey run by Genesis Analytics suggested that HDP ownership account for 13% of hosts (11% of the survey did not respond). [Redflank, 2021, slide 29; Genesis and Airbnb (2021). The foundation of inclusive tourism, available at: Genesis-Analytics-Airbnb-The-foundations-of-inclusive-tourism-13-Sept-2021-Final-report.pdf (Accessed on 17 March 2023)].

146 Most hosts are charged 3% of the booking where guests pay up to 14.2% of the booking. (Airbnb service fees. Available at: <https://www.airbnb.co.za/help/article/1857>, (Accessed on 17 March 2023).

147 Airbnb written submission dated 23 June 2021, Airbnb VM1, 23 September 2021.

148 For example, Airbnb invested several million in the Waterberg region in 2022. (Airbnb written submission dated 15 September 2022; Airbnb written submission dated 15 March 2023) Also see the following links covering a broader range of initiatives: <https://news.airbnb.com/supporting-a-diverse-and-inclusive-tourism-economy-in-south-africa/>; <https://news.airbnb.com/an-update-on-our-commitment-to-inclusive-tourism-in-south-africa/>; <https://rlabs.org/>. (Accessed on 17 March 2023).

149 Based on contracts submitted by global OTAs.

it was established that accommodation providers are able to opt out of the facilitated payments through the platform and avoid any differences. Moreover, OTAs now offer a Virtual Credit Card (VCC) which allows accommodation providers to start charging against the card on the day of check-out at the latest, where cancellations are permitted, and earlier for non-refundable or partially non-refundable bookings.¹⁵⁰ In light of this, the Inquiry no longer has concerns pertaining to asymmetric payment terms.

108. The Provisional Report expressed concern with a clause in the standard Rentalcars Retail Agency Agreement insofar as it may facilitate collusion for last-minute car rental bookings on the Rentalcars platform. The submission on the rationale simply confirmed the concerns of the Inquiry which firmly hold that view that if this clause is implemented, then it constitutes collusive conduct in contravention of section 4(1)(b) of the Act.¹⁵¹ However, the Inquiry did not establish that any rental companies operating in South Africa on an agency basis had this clause in their actual signed agreement.
109. The Provisional Report also identified that MSEs do not always provide prominence to the cheapest option for a given room. Upon further investigation, the revenue model of MSEs as a referral platform is based on CPC and so ranking is influenced by auction bids much like Google, and there is no dominant MSE that is influencing traffic currently. In these circumstances the Inquiry no longer has material concerns over the conduct.
110. For these reasons, the Inquiry finds that the dominance of Booking.com and the current operation and design of the platform distorts competition for independent and HDP

establishments and HDP communities, where the HDP category of SMEs are most affected. The Inquiry finds that whilst Airbnb is leading-in intermediation services to private short-term lets of rooms and homes to travellers, alternative accommodation by its very nature supports independent establishments and SMEs. Airbnb currently has programmes in place to support non-traditional tourism and HDP communities which are sufficient to not warrant remedial action.

4.3.2. Remedial Actions

111. The Provisional Report proposed a maximum cap on the commission fee discrimination and the imposition of a generic HDP programme that included personalized onboarding, a waiver of onboarding costs, fees no higher than the best placed business user, promotional credits and identification and search on the basis of HDP status. The other proposed remedies related to findings which are not confirmed in the Final Report and therefore fall away naturally.
112. In the context where the discrimination is in favour of a smaller set of global and national chains, the primary distortion that the Inquiry seeks to remedy is the subset of independent HDP establishments and communities where greater distortions lie. Submissions across all platform categories identified that whilst some features of the generic programme made sense as a means to address the competitive disadvantage of HDP business users, there is definitely scope to tailor programmes to the context of each intermediation category to ensure more effective outcomes. The Inquiry has been inclined to accept good faith efforts to design platform and category-specific HDP programmes if they address

150 Booking.com Partner Hub. Understanding earlier action dates virtual credit cards. Available at: <https://partner.Booking.com/en-us/help/policies-payments/payment-products/understanding-earlier-activation-dates-virtual-credit-cards>. (Accessed on 11 December 2022) and Expedia Group. Expedia Virtual credit card. Available at: https://developers.expediagroup.com/supply/lodging/docs/booking_apis/booking_notification/learn/#expedia-virtual-card. (Accessed on 23 February 2023)

151 The rationale marked as 'confidential' but can be found in Booking.com written submission dated 26 August 2022, para 11.1.3.

the core concerns around inclusion and discoverability / visibility on the platforms, and the level of assistance is meaningful.

113. Booking.com has been engaged on providing such a remedy and it has put forward its 2023 SA tourism investment plans as an indication of the efforts it is making in supporting SME and HDP establishments. Booking.com has indicated that it has invested a material amount in programmes that do support SMEs and HDPs, both directly and indirectly.¹⁵² The Inquiry is not convinced that the majority of spend is in fact directed at SMEs or HDPs, nor does much appear to be aimed at improving visibility and discoverability by HDPs and HDP communities on Booking.com. For this reason, the Inquiry is compelled to still specify the type of measures that Booking.com should undertake to address the competitive harm rather than simply rely on their current spending patterns. The Inquiry notes that to the extent Booking.com can demonstrate that the current spend does in fact fulfil the criteria imposed and is substantial, then that spend would count towards the remedial action. This can be dealt with at the compliance stage and no firm decision is required at this point.
114. Given that there is no agreement from Booking.com, the Inquiry is unable to set a funding value for the programme unlike other platform categories. As a result, the Inquiry is minded only to impose the condition that it is substantial given the impact of the features on SME HDP participation. At the compliance stage this will be assessed, allowing Booking.com to motivate why its spend levels are sufficient to constitute compliance.

115. The decision of the Inquiry is that the following remedial actions are required from Booking.com as specified in the Booking.com Remedial Actions in Annexure 10:

- 115.1. Substantial funding of programmes to identify, onboard, promote and grow accommodation establishments, activities and experiences provided by SMEs that are HDP-owned and HDP communities over three years.
116. The remedial action above enables SMEs that are HDP-owned, especially in HDP communities, to improve their visibility and performance on the Booking.com platform to address the finding that the operation and design of the platform distorts competition from independent and in particular HDP owned establishments.
117. The Inquiry recommends that domestic and other global OTAs with a meaningful presence in South Africa, but which are not leading platforms, similarly put in place measures to identify, develop and grow accommodation, activities and experiences provided by HDPs and HDP communities in the SA tourism sector through their platform. This can be facilitated through the Department of Tourism, Tourism South Africa and the Tourism Sector Charter overseen by the B-BBEE Commission.

¹⁵² Booking.com written submission dated 24 October 2022, para 3; Booking.com written submission dated 08 February 2023, presentation, slide 11; Booking.com email submission dated 24 March 2023. Booking.com submitted a more detailed list of investments into SME development, bursaries and scholarships, and influencing travel to South Africa, however, these values are still trivial relative to Booking.com's earnings in South Africa where the bulk of this expenditure can be categorised as general marketing in any case. See Booking.com's written submission dated 27 June 2023.

[5. eCommerce]

118. Prior to the pandemic, eCommerce had started to already take hold in South Africa with many consumers trialling and developing trust in the channel. The Covid-19 pandemic provided a huge boost to eCommerce as consumers wary of crowds opted to purchase online to remain safe.¹⁵³ This accelerated the plans of many retailers to make their products available for online sales, further cementing online shopping as a mainstream distribution channel for consumers. Online shopping intermediation channels offer many potential opportunities for smaller businesses to get a wider customer reach than a local Brick and Mortar (B&M) store, but the competitiveness of the market will determine whether the gains from trade are evenly distributed and that these SMEs are not exploited or impeded in competing online.

5.1. Market Context

119. The online shopping journey is distinct from the traditional B&M retail channel. Consumers select online for convenience, product range and price. Convenience stems from the ability to shop anytime from anywhere, and for time-constrained consumers to avoid the time and costs of traditional shopping journeys.¹⁵⁴ Online shopping provides a larger range of products as it is not constrained by expensive retail shelf-space and can offer any local product to a national (or international) consumer base. This includes a wider range of options for any specific product or product category which is necessarily limited by B&M retailers. The lower cost of centralised warehousing and scaled last mile distribution without the B&M retail rentals and customer

service staff, means online can provide a cheaper route to market with lower prices for certain products. It is for these reasons that online shopping has grown and continues to grow, offering a complementary rather than substitutable distribution channel to B&M. Product suppliers need to be represented online if they are to share in the consumer purchases through this channel, which is why products are retailed both online and in B&M stores. The closest competitors to online shopping channels are other online channels, warranting a distinct market from B&M retailing.

120. Within the online channel, there are different business models including the online sales sites of B&M retailers and product manufacturers, pure eCommerce retailers (i.e. retailing third-party products on a stock and resale basis with no B&M presence) and intermediation marketplaces (i.e. intermediation of sellers with consumers), including hybrid eCommerce and intermediation marketplace platforms. Traditional B&M online sales replicate their in-store stock selection so simply offering an online alternative to their traditional retail model.¹⁵⁵ These retailers are not optimised for online retail and typically lack the skills for more advanced user interfaces and order fulfilment. There is no incentive to undermine their physical infrastructure as it is a material cost base that must be supported. Pure eCommerce retailers can optimise around online sales logistics and not carry the cost of a physical infrastructure, but the traditional retail model of stock and resale can limit product range and make it capital intensive to operate.

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121. Intermediation marketplaces are distinct from the other online sales channels insofar as they provide an ability to connect a very wide set of individual product sellers and consumers through a single intermediation platform at scale.¹⁵⁶ Consumers benefit from the ability to search and compare a much wider range of products and alternative sellers on a single platform, along with the pricing and customer service benefits that come from scale of intermediation operations, including larger basket sizes that enable free delivery.¹⁵⁷ For sellers, the marketplaces provide a more cost-effective means to acquire customers and fulfil orders than they would on their own due to scale benefits they cannot replicate on their own. That scale provides benefits in user interface, customer acquisition through intent-based marketing on Google search and lower cost warehousing and last mile logistics through aggregation.¹⁵⁸

122. For sellers, especially smaller ones, lack the scale and aggregation benefits of these marketplaces to build a substantial online market presence. They cannot fund the same discoverability and visibility on Google search for customer acquisition. Whilst there are third-party logistics and white label online store software, this is more costly on an individual basis as each third-party adds its own margin and they cannot be customised to the same extent. Online retailing through a B&M retail store is not necessarily an alternative as it requires that the product is listed by the retailer in the first place. It is therefore only leading brands in each category that may have online alternatives to go direct, and trade on their consumer brand recognition, or

through B&M retailer online stores that will stock and promote their products.

123. It is for this reason that numerous jurisdictions have identified a market for the provision of online marketplace services to business users or sellers (as opposed to individuals).¹⁵⁹ The focus on a single side of the two-sided intermediation market is apposite as large intermediation platforms can exercise a degree of market power over the marketplace sellers given their dependency as a route to market. The Inquiry similarly concludes on this narrower market within the broader online eCommerce market.

124. Within intermediation platforms, the hybrid platform model has become the dominant channel for online shopping of goods for several reasons. Hybrid platforms can scale the platform on the back of its own retail products which are in its control rather than purely relying on marketplace sellers and generating network effects. This includes ensuring a credible product offering in each category, especially prominent brands, and control over the customer experience through its own warehouse and logistics. As the platform scales, marketplace sellers can be added through their current infrastructure to ensure a consistent user experience on purchase terms & conditions and delivery, but also a long tail of products providing variety and plugging any product gaps that exist. Pure intermediation platforms that lack their own infrastructure are more likely to have higher cost and inconsistent delivery. Pure eCommerce retailers lack the long tail of products that sellers bring to intermediation platforms.

156 ACCC March 2022. Digital platform services inquiry. Interim report No. 4 - General online retail marketplaces. Available at: <https://www.accc.gov.au/system/files/DPB%20-%20DPSI%20-%20March%202022%20-%20Full%20interim%20report%20-%2031%20March%202022.pdf>. p17.

157 [REDACTED].

158 Johnson, O.J., 2018, "Adoption and use of ECommerce in the Mainstream Retail Grocery Sector in the Western Cape, South Africa, Available: <http://etd.cput.ac.za/bitstream/20.500.11838/2826/1/214323765-Johnson-Olufemi-Jagunmolu-MTech-Information-Technology-FID-2019.pdf> [Accessed 14 February 2022].

159 For example, the ACCC, the ICA, and the Bundeskartellamt.

125. A few B&M online stores have initiated a marketplace as an adjunct to their store's own online offering.¹⁶⁰ These have not seen the success of pure online hybrid marketplaces which are specialist online marketplaces. Rather the B&M retailer still has the physical infrastructure of stores and has incentives not to undermine that, so a marketplace is simply an add-on to a traditional business. The B&M stores tend not to allow replication of their selection, and the brand can limit the range of products it is able to successfully sell given what consumers associate with that brand. For some the marketplaces becomes a means for current suppliers to sell their product range that are not part of the B&M store selection. The infrastructure and systems are not tailored to online marketplace sales and they may favour store fulfilment and pick up over centralised delivery.

126. Within online marketplaces, there are high barriers to expansion and reaching sufficient critical mass to get a virtuous cycle of network effects reinforcing the platform to self-sustaining growth. First there is the capital constraint to making large upfront investments in customer acquisition, through search marketing and offering specials to draw customers to trial their platform, which will draw in business users.¹⁶¹ As hybrid models tend to dominate, working capital is required for its own retail operations and investment capital to build its own lower cost logistics infrastructure. Absent the customer acquisition, there are limits to business user multi-homing as there are costs associated with listing on multiple platforms, but also greater costs to actively supporting the platform through stock in

the warehouse to support rapid delivery and product promotions. This applies to both marketplace sellers, and prominent brands that are unlikely to support small platforms. As one platform reaches scale and market leadership, the barriers to expansion increase as the leading platform receives stronger business user support due to its customer base, is able to extract more fees from business users to support customer acquisition and has a strong revenue base to support infrastructure investment. Consumers also become increasingly more loyal to the leading platform given the better range, pricing and service relative to the startups makes them search and trial alternatives less, requiring greater investments in customer acquisition.

5.2. Platform Competition

5.2.1. Findings

127. The market leader in the online market is Takealot which itself estimates they have a dominant share of overall online sales in South Africa (i.e.>35%), including other intermediation platforms and direct retailer or manufacturer sales channels.¹⁶² The accelerated entry and greater online presence of B&M retailers and manufacturers during Covid has not changed this, and Takealot grew its share in this period given its already established brand and service offering.¹⁶³ Takealot itself periodically refers to itself as the eCommerce referent or the largest eCommerce retailer in the country in marketing materials.¹⁶⁴ It leads in almost all product categories, and all its competitors are a fraction of its size in online sales. Makro and the JD Group, through Everyshop, are

160 For example, Makro and Adeo SA (T/A Leroy Merlin).

161 [REDACTED]

162 [REDACTED]

163 Based on Takealot's estimates, all of Massmart's brands (including Makro, Game, Builders Warehouse) accounted for 6% of total eCommerce GMV in FY2021. While Massmart's share of eCommerce doubled between the year ended October 2017 and the year ended March 2019 (coinciding with the introduction of Makro's marketplace), the combined GMV share of all of Massmart's brands gradually declined since then (8% in FY2019 to 6% in FY2021). Its share declined despite the sharp jump in eCommerce following the start of the Covid-19 pandemic, in sharp contrast to Takealot.

164 [REDACTED]

amongst those that have focused the most on their online retail presence, but they remain tiny in comparison to Takealot.

128. Takealot has an even more dominant position in the narrower market for marketplace services to sellers. Their own internal surveys show high levels of dependency by their business users, despite selling through other channels.¹⁶⁵ This was confirmed by the Inquiry's own survey and business user inputs in public hearings and correspondence.¹⁶⁶ This is a function of the far smaller sales volumes through other intermediation platforms relative to Takealot, even collectively. This means Takealot has market power over such business users and can engage in conduct that potentially harms competition amongst these sellers or exploits them without losing those sellers from its marketplace. This too is confirmed by the number of complaints received around Takealot conduct by marketplace sellers that continued to list on Takealot.

129. Takealot historically applied a wide price parity clause in its marketplace seller agreements but this was changed to a narrow parity clause in 2015.¹⁶⁷ The narrow parity clause prevents a marketplace seller from selling a product on its own direct online channel at a cheaper price to that advertised on Takealot's platform, but technically does not prevent lower pricing on another marketplace platform. This is in addition to sellers being prohibited from communicating with consumers through their Takealot listing to direct them to their own direct channel. The concerns with narrow parity were outlined in the previous section and are twofold, namely that a) it may replicate the effects of wide parity clauses which are now generally considered a hard-

core restriction impacting negatively on platform competition, and b) it may restrict competition from the direct online sales channel of the seller.¹⁶⁸ The latter is wider than the former which only considers competition amongst marketplaces as important.

130. In the context of very weak competition from alternative marketplaces to a dominant marketplace, and dependency by marketplace sellers for reaching online customers, there needs to be greater caution in permitting conduct that may limit whatever competition that exists, be it other marketplaces or direct channels of sellers. The ability of sellers to boost sales on their own direct channel is one means to reduce their dependency on Takealot, and the ability to price in that channel as they wish is in turn an important means to drive sales. This is because there is very little reason for consumers to go direct if there is no difference in the price given the other advantages of the Takealot platform. Takealot offers a generous returns policy and is a trusted eCommerce platform, and a purchase can be bundled with others to get free delivery. The potential for lower prices also benefits consumers and competition, even if the direct channel is currently not a significant source of sales. The point is that where it is not significant, it is likely because of the imposition of the policy itself, offering consumers little reason to go direct but also consumer learning that there is little point checking out the direct channels as it is never cheaper. It is therefore not a reason to permit narrow parity clauses.

131. Reducing dependency also puts in check the potential exploitation of that market power over sellers by offering some degree of countervailing power to sellers. Exploitation

165 TAL, WS1a, Annexure CC5 - 2019 Survey, slide 11 and Romtech Oral Submission, p.27, Elite Shopper, Oral Submission, page 26.

166 Redflank survey, slides 118-119.

167 [REDACTED]

168 See for instance CMA Vertical Agreements Block Exemption Order. 12 July 2022 Para 10.164-. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1091830/VABEO_Guidance.pdf.

can take the form of raising marketplace fees which would pressure sellers to either take less margin or increase prices to the detriment of consumers. That detriment is extended to the seller's own direct channel due to the narrow price parity clause. Removal of the clause and permitting sellers to develop their direct channel either means that they can potentially consider foregoing the Takealot marketplace to resist such a fee increase, or at least not pass that increase through to their own direct channel even if they remain dependent to the benefit of consumers.

132. On the effect on seller pricing on other platforms, it would be highly unusual for a seller to price on their own platform at a higher level than on marketplaces where they are subject to additional commission fees. Such behaviour would undermine the competitiveness of their own direct channel which they need to preserve if they are to reduce their dependency on the intermediation platforms more broadly. Narrow parity will then inevitably produce contagion to other platforms of price changes on Takealot under narrow parity.

133. Takealot has sought to justify the restriction based on concerns over freeriding by sellers on the platform's marketing and the apparent benefit to consumers of being able to compare prices more easily by limiting themselves to the Takealot platform and not worrying whether the direct channels are cheaper.¹⁶⁹ The freeriding concerns are theoretical as Takealot is unable to produce any evidence that potential freeriding will be significant. This is particularly in the context where there is evidence of Amazon forfeiting parity clauses globally with no material free-riding experienced. Moreover, price parity is distinguishable from more classic free-riding

conduct such as 'billboarding, where a seller lists on a platform to market its products but then provides no stock. The removal of price parity clause also does not interfere with clauses limiting direct links to seller websites. These fall outside the specific complaints raised in the Inquiry and were not assessed. In arguing that the competitive effect is unlikely to be significant,¹⁷⁰ Takealot is effectively implying that freeriding is also insignificant. There is also no benefit to consumers because removing a cheaper option may reduce search costs, but it denies them a cheaper alternative. It is also simply a private benefit to Takealot that consumers will not find cheaper prices elsewhere. In short, if Takealot offers sellers a competitive platform service then the sellers are unlikely to freeride, but removing the artificial restraint on competition provides more assurance that Takealot will provide a competitive platform service and not exploit its market power.

134. Takealot has priced below variable costs on substantial volumes of products in each category historically based on the irrefutable evidence provided to the Inquiry.¹⁷¹ The below cost pricing was on a scale that cannot be explained by discounts used to dispose of stock that is not moving. It is apparent that below cost pricing was a deliberate strategy to drive growth in the platform and the level of investment by Naspers in any one year would affect the level of price subsidisation as a customer acquisition strategy. From the same evidence it is apparent that this practice has reduced substantially in the last few years as Covid naturally drove adoption without the need for subsidies and Takealot has sought to turn a profit. Unlike food delivery, there do not appear to be any casualties from this below cost pricing, as many of the early movers remain in business,

169 TAL, Response to the Provisional Report, para 7.8 & 7.9.

170 TAL, Response to the Provisional Report, para 7.3 & 7.4.

171

and it has not prevented recent entry and expansion during Covid. For these reasons, the Inquiry is not inclined to conclude that such conduct necessarily resulted in anti-competitive outcomes. However, this is a strategy that Takealot is willing to employ and going forward the Commission should remain vigilant if there are complaints from competitors.

135. The likely entry of Amazon does not change the view of the Inquiry as currently Takealot remains the dominant marketplace on which sellers are dependent. That dependency could change over time, but that is speculative at this juncture. Moreover, there is no evidence to suggest that narrow parity clauses are required to sustain the hybrid business model and that Takealot would be disadvantaged in marketplace competition given this applies only to a seller's direct channel. The same applies to any large global hybrid eCommerce business that may enter South Africa in future.

136. For these reasons, the Inquiry finds that the narrow price parity clause imposed by Takealot restricts competition, reinforces the existing dependency by sellers and reinforces market power. Whilst the Inquiry finds that there has been pricing below variable costs in the past, the Inquiry makes no finding on whether this constitutes anti-competitive conduct historically. However, the Inquiry does find that moving forward such conduct is likely to be found to be predatory in nature given the scale of Takealot and greater maturity of the eCommerce adoption.

5.2.2. Remedial Action

137. The Provisional Report proposed remedial action in the form of the removal of narrow price parity clauses and a commitment to end predatory conduct. In light of the findings above that the narrow price parity clause impedes competition from marketplace sellers and reinforces Takealot's market power in respect of those sellers, the removal

of the clause remains appropriate. The Inquiry has also observed in the travel and accommodation platforms price parity may be included in requirements for participating in specific programmes or promotions, and may be incentivised through including relative price in the ranking algorithm. These strategies need to be prevented as it provides a workaround to the removal of price parity by achieving it in an indirect manner. In order to ensure that it is effective, their removal must be well publicised to marketplace sellers. On predation, there is no finding on historical anti-competitive conduct and so no remedial action.

138. The Inquiry has engaged with Takealot on remedial action, including the practicality and potential unintended consequences, which informs the decision on appropriate remedial actions. The Inquiry has similarly had engagements with Amazon on both its likely entry and potential compliance were entry to occur.

139. The decision of the Inquiry is that the following remedial actions are required from Takealot as specified in the Takealot Remedial Actions in Annexure 10:

139.1. Within 1 month, the narrow price parity clause (clause 6.7) must be removed from all marketplace seller contracts, with sellers informed that they are no longer required to price the same on their direct channel or any other channel as their pricing on Takealot.

140. The Inquiry recommends that any large global hybrid eCommerce businesses entering South Africa in future should not include any price parity clauses, either wide or narrow, in their contracts.

141. The remedial action of removing narrow price parity directly address the finding that this clause results in an adverse effect on competition. A requirement that any large global eCommerce platform entering South

Africa does the same, ensures no future distortions to competition.

5.3. Business User Competition

5.3.1. Findings

142. Hybrid business models result in the intermediation platform's own retail division competing with marketplace sellers directly on their platform for consumer sales, raising the prospect for conflicts of interest and self-preferencing conduct. Such conduct is both less likely and less likely to distort competition where a hybrid platform is small and sellers are not dependent, as the platform would be less inclined to harm sellers that have the option to leave and will do so if it does. The issue arises with leading hybrid platforms on which sellers are dependent, where the hybrid model is the dominant eCommerce model, as there is more scope to self-preference without losing sellers and more likelihood of impeding competition from sellers and harming consumers.

143. Takealot argues that they have no incentive to self-preference because they earn a higher margin on marketplace transactions relative to retail sales.¹⁷² However, this is a theoretical economic argument that fails to recognize the broader set of incentives and actual conduct by Takealot which reveals not just incentives but actual self-preferencing conduct. On the broader set of incentives, simplistic and static margin analysis at a platform level is not necessarily informative of incentives at a product-specific level, nor does it account for other factors that are important to a company, such as building its own retail lines, security of supply, risk reduction and cost avoidance.

143.1. On risk reduction and cost avoidance, Takealot takes risk on its own retail sales as it

purchases and holds stock in its warehouse until sales take place, incurring working capital and warehouse costs with low stock turns. This is unlike the case of seller stock held on consignment where Takealot charges if it remains in their warehouse too long and there is no cost to Takealot where stock is held in the seller's warehouse.

143.2. Management responsible for the platform also set the incentives of retail buyers within the retail division.¹⁷³ Takealot buyers are strongly incentivised by their own sales performance and they are allocated warehouse space and are rewarded on maximising returns to that space, including with additional space. Retail buyers are not incentivized by margins made on marketplace sellers, and as insiders are able to influence competition with sellers. If there was an incentive to promote sellers over own retail, then either these incentives would change or controls put in place to prevent buyers from adversely distorting competition in their favour.

143.3. Takealot retail accounts for around half of the sales on the platform and the revealed behaviour is that it has strong interests in ensuring it grows with the platform and is not entirely dependent on sellers. For instance, Takealot has priced its own retail products below variable costs to drive growth and interest in the platform, and which may generate additional sales of seller products on which it earns.¹⁷⁴ It does this through adding new product lines, including building its own private label range. It is in their interests to build its product range around more popular products with better margins and higher stock turns, even if currently supplied by sellers, and let the sellers take more cost and risk on the long tail of smaller selling products.

172

173 PR Chap 3, para 223-224. TAL, Oral Submission, page 50 and TAL, Oral Submission, page 46.

174

144. The Inquiry has received numerous complaints from marketplace sellers on Takealot around self-preferencing or other conduct which distorts competition with marketplace sellers, and continues to receive complaints on an ongoing basis. The persistence of complaints is not indicative of temporary service level issues during Covid but rather deeply embedded conflicts of interest. The conduct that has been confirmed by the Inquiry through evidence is as follows:

144.1. Product gating by Takealot which is not at the supplier's behest and which prevents marketplace sellers from selling these products on the platform. Where a brand itself elects to only engage in a retail relationship to manage its brand then there are more likely to be good reasons for doing so. However, where it is unilateral by Takealot then it is more likely aimed at restricting competition from sellers, enabling higher prices or fewer, less generous, promotions to the detriment of customers. Other temporary or limited exclusivity arrangements such as pre-orders and selective distribution arrangements that are mutually agreed fall outside the scope of the complaints and were not assessed.

144.2. The use of seller data by Takealot buyers to inform their own retail offering on the marketplace and Takealot private label team to develop their own private label lines. Sellers on the marketplace do invest in developing or identifying products that may appeal to SA consumers, take risk on trialing those products on the marketplace and invest in promoting those products to build awareness and popularity, both on and off the platform. The use of non-public seller data to select out the successful innovations and compete with the benefits of their own platform, expropriates this investment and undermines the returns to innovation.

144.3. The pressuring of suppliers by Takealot retail buyers where they are outcompeted

on the platform by marketplace sellers selling the same product, resulting in the suppliers either raising their price to the marketplace sellers or threatening sellers with non-supply if they do not soften competition against Takealot retail. Whilst any buyer may push a supplier for a better price for themselves, which may or may not be granted, the observed outcomes are not consistent with that type of pressure as this results in pricing to others increasing to the detriment of competition and consumers.

144.4. The Takealot 'Buy Box' for branded items with multiple sellers. The Buy Box selects the cheapest price of those in-stock in the warehouse, rather than the cheapest price regardless of lead time. The 'Buy Box' accounts for a substantial number of transactions and consumers select the Buy Box option [90-100]% of the time. This favours Takealot retail as their products are generally in the warehouse, whereas this is not the case for sellers. It cannot be inferred that consumers prefer the fastest over the cheapest consumer selection behaviour indicates that they may not select the cheapest overall due to its far less prominent display.

144.5. Marketplace seller applications for promotional participation are materially less likely to be successful than Takealot's own retail buyers. Whilst there may be other reasons that contribute to this difference, it is impossible to rule out more favourable treatment of Takealot retail given the conflict of interests and the lack of controls to manage those conflicts. Takealot retail also benefits from display advertising at no cost.

144.6. The failure to resolve numerous disputes within a reasonable time frame where the marketplace seller is left bearing the cost of the dispute in the interim. There is little incentive for Takealot to resolve disputes quickly where it bears none of the costs, but the delays serve to raise seller costs. This may have a knock-on effect on prices where it becomes sufficiently frequent that

those additional costs are factored into the pricing model of sellers. Marketplace sellers have also claimed that returns are changed from Takealot's issue to that of the seller to shift costs, which if correct makes the dispute resolution problem even greater.

145. The Inquiry has received numerous other complaints which allege deliberate Takealot wrongdoing to the disadvantage of sellers but which are not possible to resolve given disputes of fact and the difficulties in ascribing intent to actions that may plausibly have other causes.¹⁷⁵ However, what these complaints highlight is that there are real conflicts of interest for leading hybrid platforms, and that dependent marketplace sellers are not going to leave even if they suffer mistreatment.

146. Whilst promotional placement has not been a strong feature impacting on competition, Takealot plans to vastly increase revenue from value-added services in the form of display advertising and promotional placement of product listings on the Takealot website and search results.¹⁷⁶ It is therefore likely to be a feature going forward and that potentially favours larger sellers on the marketplace, and of course Takealot retail division. Takealot has proactively labelled its promotional listings but it is likely to continue to innovate with different types of promotional options much like Amazon. If these are not labelled in a similar fashion then that may mislead consumers and distort competition.

147. There is general acceptance that HDPs are under-represented on eCommerce marketplaces and yet neither Takealot nor any other marketplace has programmes in place to promote greater participation. Rather, market features may serve to impede competition from HDPs on these platforms. The conduct identified above will have a disproportionate impact on smaller less established sellers which include HDPs. In addition, Takealot (as with most platforms) currently prioritises the onboarding of larger sellers with a wider product range and their own brands or exclusive rights to brands, or some of these attributes. Only [20-30]% of applicants with none of these attributes end up onboarded given the lack of prioritisation and tailored support.¹⁷⁷ These attributes are likely to be exclusionary of HDPs given that historic exclusion means HDP sellers are more likely to fall into the category without the desired attributes. Subscription fees pose a further barrier in the early stages whilst the seller is building a presence without substantial sales volumes, and increasingly visibility will become an issue as Takealot expand the use of promotional advertising opportunities on the search results.

148. Once more the likely entry of Amazon does not change the view of the Inquiry as currently Takealot remains the dominant marketplace on which sellers are dependent, and any change to that is speculative. Moreover, Amazon faces many similar complaints in other jurisdictions which suggests that the fair treatment of marketplace sellers is unlikely to be a point of competition that removes these

175 [REDACTED]
176 [REDACTED]
177 [REDACTED]

impediments to seller competition.¹⁷⁸ To the contrary, the Commission would enforce the same provisions against Amazon if it elects to enter in a manner contrary to the remedial actions proposed, and the recommendation on section 78 regulations provides one means for that to happen.

149. For these reasons, the Inquiry finds that the conflicts of interest on the Takealot platform results in a range of conduct that distorts competition on the marketplace to the detriment of sellers and consumers. Further, that HDP sellers face greater impediments to competition and participation on the platform.

5.3.2. Remedial Actions

150. The Provisional Report proposed remedial action in the form of internal separation of the retail division from the operation of the retail division with associated commitments to address conduct identified as distorting competition on the platform, along with an end to product gating. Takealot was also implicated in general remedial actions in respect of advertising transparency and HDP support. Following the assessment of submissions on the remedies, the Inquiry finds these proposals to be broadly practicable and reasonable, but some of detailed actions do require some tweaking and a reasonable period for implementation given the technical and organisational design implications for Takealot. In particular:

- 150.1. On the separation, there is also a need for an enforceable code of conduct to make clear that conduct that harms marketplace sellers is not tolerated, reinforce the separation principle given that this is not currently part of the Takealot culture and the incentives will remain unchanged for retail buyers.
- 150.2. On the alternative to a restriction on retail buyers accessing marketplace data, namely providing equal access to data, there is a valid concern that any disaggregated confidential data provided to all sellers will be leaked and is competitively sensitive. There is also a need to extend the remedy to the private label team. That should prevent access to seller-specific data to prevent specific targeting of products and innovations, but can allow aggregated product category data.
- 150.3. On the equal treatment for promotions, and other such practices, the separation should take care of such discriminatory treatment along with the code of conduct for employees.
- 150.4. On the removal of algorithm biases, it is only the 'Buy Box' that has been identified.
- 150.5. On equal treatment of unboxed deals, Takealot has indicated that this is technically challenging and there is little demand from marketplace sellers as it does not appear in the top 10 list of desired additional functionality. The Inquiry also understands that even Takealot is starting to sell used goods by the pallet to third parties and this seems to be the more likely route for marketplace sellers too.
- 150.6. On access to unsold display inventory,

178 PR chap 3, para 227-229.

Mattioli, D, 2020, "Amazon scooped up data from its own sellers to launch competing products", Available :<https://www.wsj.com/articles/amazon-scooped-up-data-from-its-own-sellers-to-launch-competing-products-11587650015> [Accessed 08 April 2022].

EC Press Release, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077 [Accessed 28 April 2022].

Reuters, 2021, Exclusive Amazon seeking to settle antitrust investigation: source says", Available: <https://www.reuters.com/business/retail-consumer/exclusive-amazon-seeking-settle-eu-antitrust-investigations-sources-say-2021-11-09/>. [Accessed 06 April 2022].

Palmer, A, 2020, "What EU's investigation of Amazon means for US probe, Available: <https://www.cnn.com/2020/11/11/eu-investigates-amazon-what-it-means-for-us-antitrust-probes.html>. [Accessed 08 April 2022].

Fung, B, 2022, "Amazon may face criminal liability for lying to Congress, House lawmakers allege", Available: <https://edition.cnn.com/2022/03/09/tech/amazon-house-panel-justice-department/index.html> . [Accessed 06 April 2022].

- Takealot indicates it does not have capabilities to provide mini campaigns for smaller sellers, which itself preferences larger sellers and Takealot retail.
- 150.7. On the speedy dispute resolution, returns and stock complaints account for >70% of the complaints on Takealot and are likely to be amongst the larger dispute costs which means practically a speedy resolution can be focused on these two categories primarily. It is also imperative to be more prescriptive on the timing of when sellers need to be compensated if the dispute is not resolved, with 60 days proposed as reasonable and practicable.
 - 150.8. On the HDP support programme, the Inquiry has engaged Takealot on potential design elements relevant to eCommerce that may be effective.
 151. The Inquiry has engaged with Takealot on remedial action, including the practicality and potential unintended consequences, which informs the decision on appropriate remedial actions. The Inquiry has similarly had engagements with Amazon on both its likely entry and potential compliance were entry to occur.
 152. The decision of the Inquiry is that the following remedial actions are required from Takealot as specified in the Takealot Remedial Actions in Annexure 10:
 - 152.1. To cease unilaterally gating products from marketplace sellers without the consent of the supplier and/or authorised distributor;
 - 152.2. To implement a segregation of Takealot marketplace from Takealot retail, including separate divisional managers reporting to the CEO;
 - 152.3. To restrict access by Takealot retail buyers to all marketplace data, and the Takealot retail private label team to all disaggregated marketplace data;
 - 152.4. To amend the existing employee code of conduct to include rules against conduct that may unfairly harm marketplace sellers with disciplinary consequences for violation, including, but not limited to, accessing marketplace data by restricted employees;
 - 152.5. To amend the current 'Speak Up Policy' for marketplace sellers to report allegations of unethical behaviour by Takealot employees to an independent third-party for investigation, to include conduct that unfairly harms or impedes marketplace sellers on the Takealot platform;
 - 152.6. To implement a 60 day dispute resolution process for marketplace sellers complaints on returns and stock loss whereby the complaint will be deemed resolved in favour of the seller if not resolved within 60 days;
 - 152.7. To implement a redesign of the 'Buy Box' to reflect equally prominent both the cheapest offer in-stock and the cheapest offer on lead time;
 - 152.8. To label all listings where businesses pay for a particular rank position, or a boost in their ranking, on the search results page as 'sponsored', 'promoted' or 'ad';
 - 152.9. To implement an HDP programme that includes at a minimum the following components, but which is subject to periodic review to ensure efficacy:
 - 152.9.1. Processes to identify HDPs amongst new marketplace sellers;
 - 152.9.2. Personalised onboarding, the waiver of subscription fees for the first three months and at least R2000 advertising credit for use in the first three months;
 - 152.9.3. Offering promotional rebates and the inclusion of HDPs in HDP-specific campaigns on the platform;
 - 152.9.4. Launch a programme to specifically support targeted groups within HDPs such as female, youth and rural enterprises with business mentoring and funding support.
 153. The Inquiry recommends that any large global hybrid eCommerce businesses entering South Africa in future comply with the following business model design features:

- 153.1. Organisational segregation of the retail division from the seller marketplace;
 - 153.2. Prevention of retail division employees accessing non-public marketplace seller data;
 - 153.3. An employee code of conduct that includes harm to marketplace sellers as a disciplinary offence;
 - 153.4. Dispute resolution procedures with strict time limits on resolution where marketplace sellers bear material interim costs;
 - 153.5. No self-preferencing of its retail division; and
 - 153.6. An HDP programme that includes onboarding assistance, promotional credits and fee reductions.
154. The remedial actions in paragraph 152.1 to 152.8 collectively seek to address the findings of conflicts of interest on the Takealot platform, individually addressing each of the main mechanisms through which this occurs as identified by the Inquiry. The remedial actions in paragraph 152.9 provide additional support to HDPs in onboarding and promoting themselves on the Takealot platform to address the finding that HDP businesses face greater impediments to competing on the platform. The requirement in paragraph 153 that any large global eCommerce platform entering South Africa is subject to the same principles of operation, ensures no future distortions to competition.

[6. Software Application Stores]

155. In SA, mobile devices are the primary means through which the majority of people engage the digital economy.¹⁷⁹ On the devices, it is through apps, distributed through software application stores, that digital content and services are provided. For businesses and app developers that wish to be part of this lucrative and growing software economy, it is also through the app stores that they access consumers. Penetration of tablets, PCs and game consoles remains low and mobile apps are typically designed around the features of mobile devices and the nature of consumer use, including mobility.¹⁸⁰ This makes mobile distinct. Whilst there are millions of apps, with many alternatives for every conceivable service, there are only a few software application stores through which these are distributed. The terms, policies and fees of these gatekeepers has a material influence on the app industry, and in turn the digital economy.

6.1. Market Context

156. Two dominant operating models for mobile devices exist. One is an integrated device and proprietary operating system (OS) manufacturing which operates a closed system, such as Apple devices operating on iOS. Apple does not permit alternatives to the App Store on its iOS devices, nor does it permit side-loading of apps onto its devices. As such, there is no other means

to load or purchase an app on an Apple device except through the App Store, a device monopoly.¹⁸¹ The other model is for the device manufacturer to license or use an open-source OS produced by a third-party. This is the Android model where Google provides the Android OS on an open-source basis, but also additional mobile applications essential to support the Android OS on devices including the Play Store. In this model alternative software application stores are permitted, and so consumers can technically load or purchase an app through other Android-based application stores, but not the Apple App Store. Side-loading can occur on Android, but there are warnings and obstacles to doing so, and to update any apps. Developers simply do not rely on side-loading as a route to market on Android devices.¹⁸²

157. Apple and Google argue that competition for the market, namely through competition to sell consumers iOS and Android devices, represent strong competitive constraints on their application stores.¹⁸³ There is competition to sell devices between Apple and high-end Android devices, such as Samsung, and this will incentivise improvements in the device hardware as well as the OS and mobile applications, even where licensed through Google given an alignment of incentives to the device

179 Submission made by ICASA dated 02 September 2021, page 2 para 3. Smartphone penetration has doubled over the past 5 years and smartphone subscription exceeded 6 (six) billion in 2020.

180 Meeting with [REDACTED] dated 01 September 2021. Consoles and PCs mainly focus on gaming apps which are non-comparable to mobile game apps. [70-80]% of the total spend by consumers on games in South Africa is on mobile with only [30-40]% spent on consoles and PCs.

181 Apple permits the use of web apps on its smartphones; however, users can only download these apps from the App Store. Submission made by Apple dated 26 August 2022, page 9 paras 2.15 and 2.16.

182 Sideloaded apps can degrade the security of the OS and can encourage piracy of content. The sideloaded app may also be incompatible with the app since it is not vetted. Submission made by [REDACTED] dated 10 September 2021, page 6. Submission made by [REDACTED] dated 10 September 2021, page 5. [REDACTED]

183 Submission made by Apple dated 26 August 2022, page 18 para 4.5.3 and page 19 para 4.5.10. Submission made by Google Play dated 02 September 2022, page 81 para 5.8.

manufacturer. These incentives will feed through to the app ecosystem, including the application programming interfaces (“APIs”) to allow app developers access to those features, enabling a broader range of apps or app features which may appeal to consumers.¹⁸⁴ It will also include the tools provided to app developers to develop for the platform.¹⁸⁵ However, the important question is whether this will bring constraints to the pricing of the software application stores, namely the commission fees charged to app developers. The evidence does not support this proposition.

158. Fees do not play a role in consumer decision-making as they do not pay them, app developers do. Consumer acquisition is based primarily on device features and whilst the general availability of apps form part of the overall decision, there is little to differentiate app numbers across the two largest operating systems. Android and iOS have millions of apps,¹⁸⁶ and the app developers produce for both given their large installed base, even if the app is developed for one OS before the other.¹⁸⁷ Neither the availability of a particular app or app pricing is likely to affect the consumer decision on which device to purchase. There are also a wide variety of apps for every conceivable consumer need, making no single app indispensable, and app developers must produce for both stores in any event lest they miss out on the large installed base.¹⁸⁸ Moreover, app pricing

tends to be uniform across devices and consumers do not necessarily know which apps they may purchase in future making price comparisons futile in any event.¹⁸⁹ The implication is that apps have no bargaining power with the application stores if they wish to access the consumers on each OS device. Rather, the application stores have the power to set the terms of access to their consumers, including commission fees, if developers want to access their vast installed base. This is certainly the case for Google Play Store and Apple App Store which have matured. Huawei which lost access to the Google mobile applications including the Play Store, did initially incentivise app developers to convert their apps to their APIs and related mobile applications, but even this was temporary until it built up a critical mass of apps.¹⁹⁰ Whilst there have been adjustments to commission fees in recent years, this is the largely the result of litigation, or a proactive move based on the threat of litigation, by groups of small developers, large paid app developers, or competition authorities.

159. Whether the ability to purchase a game or credits for a game on a PC or console and then use on the installed app, or to subscribe to a service on the web and then use on the installed app are all functions of the rules imposed by the application stores themselves. It is therefore a question of whether such rules enhance or inhibit this conduct, and hence the extent to which these operate as constraints or not. The market is

184 Submission made by Apple dated 30 June 2021, page 9 para 18. Submission made by Apple dated 26 August 2022, page 7 para 2.11. Submission made by Google Play dated 02 September 2022, page 100 para 5.67.

185 Submission made by Apple dated 26 August 2022, page 17 para 4.5.2. Submission made by Google Play dated 02 September 2022, pages 83 and 84 para 5.14.

186 As of December 2021, the number of apps available in Play Store was approximately 2 605 000. The number of apps available on the App Store in South Africa was between [1 million-1.5 million] in 2020. <https://www.statista.com/statistics/266210/number-of-available-applications-in-the-google-play-store/> [accessed 14 March 2022]. Submission made by Apple dated 30 June 2021, page 8 para 15 and page 7 para 14.10.

187 Submission made by Apple dated 26 August 2022, page 7 para 2.7. Submission made by Google Play dated 02 September 2022, page 81 para 5.8.

188 Submission made by [redacted] dated 10 September 2021, page 9. Meeting with [redacted] dated 23 September 2021. Meeting with [redacted] dated 12 October 2021.

189 Meeting with by [redacted] dated 23 September 2021. Submission made by [redacted] on 14 September 2021 page 5.

190 Submission made by Huawei dated 18 June 2021, Huawei App Gallery Connect Distribution Service Agreement for Paid Apps, Exhibit E. App Gallery also introduced a Promotion Fund Rebate in 2021.

therefore one for mobile application stores on specific operating systems.

6.2. Platform Competition

6.2.1. Findings

160. The Apple App Store and Google Play Store collectively account for the vast majority of mobile users, app downloads and revenues earned in SA.¹⁹¹ Google Play is the default on Android devices which account for the overall majority of devices, in particular lower end priced smartphones, and hence users. Whilst Apple accounts for <15% of smartphone devices, which is substantially more when only the market for premium smartphone devices are considered, it accounts for a much higher share of app downloads and app store revenue [30-40%] due to the high-end target market.¹⁹² Huawei devices no longer have access to Google mobile products, resulting in its own AppGallery store being the default, but it currently accounts for a negligible share of revenues.¹⁹³ The Samsung Galaxy Store, whilst preinstalled on their devices along with the default Play Store, does not compete head-on with Play Store and rather provides a niche offering of Samsung device apps and some exclusive content.¹⁹⁴ Samsung has a negligible share of total app downloads and revenues in SA.¹⁹⁵ Google Play through Android has a far greater consumer reach

especially amongst low-income consumers, which does place it in a different position to Apple. However, Apple remains a leading platform in the sale of apps given its high share of the high-end market.

161. The market position of Apple and Google is a product of certain conduct. Apple does not permit alternatives to the App Store on its iOS devices, nor does it permit side-loading of apps onto its devices. This means that the only means to access Apple device users is to go through the App Store. Apple justifies this position based on the App Store being an integral part of the device offering and the need to ensure a secure user experience.¹⁹⁶ The Inquiry has not sought to challenge the business model, but simply observes that Apple must accept that the App Store has an effective device monopoly by dint of this business model.

162. The market position of the Play Store is a consequence of Google not charging device OEMs for Android OS or its mobile applications on condition that Play Store is the default (amongst other conditions) as set out in the Mobile Application Distribution Agreement (MADA).¹⁹⁷ This reduces device OEM costs, but simultaneously entrenches the Play Store on Android. Whilst other software application stores may be loaded on Android devices, the outcomes reveal that consumers have made use of the default

191 Play Store had [3 - 4] million users in 2020. App Store had [2 - 3] million users in 2020. Submission made by Google Play dated 17 July 2021, page 12, para 16. Submission made by Apple dated 30 June 2021, page 5, para 14.8.

Play Store had [4 - 5] billion app downloads in South Africa in 2020. App Store had [80 - 90] million app downloads in South Africa in 2020. . Submission made by Google Play dated 29 July 2021, para 3. Submission made by Apple dated 30 June 2021, page 4, para 14.7.

Play Store revenue shares was [60-70] %, in 2020. App Store revenue share was [30-40] % in 2020. Submission made by Google Play dated 17 July 2021, page 3 and 4, para 2. Submission made by Apple dated 14 September 2021, page 2, para 4.

192 Submission made by Cell C dated 20 September 2022. Submission made by Vodacom dated 09 September 2022. Submissions made by Telkom dated 20 September 2022 and 03 November 2022. Submission made by MTN dated 01 November 2022. App Store revenue share was [30-40] % in 2020. Submission made by Apple dated 14 September 2021, page 2, para 4.

193 App Gallery revenue share was <1% in 2020. Submission made by Huawei dated 18 June 2021, cell D6.

194 Oral Submission made by Samsung dated 19 November 2021, pages 23 and 24.

195 Galaxy Store app downloads were [10 - 15] million in 2020. Galaxy Store revenue share was <1% in 2020. Submission made by Samsung dated 13 August 2021, page 3, para 4.6. and para 4.5.1.

196 Submission made by Apple dated 26 August 2022, page 8 para 2.13 and 2.14.

197 Submission made by Google Play dated 01 October 2021, Annex 12.5.1.1, page 6 and Annex 12.5.1.2, page 1 para 2.

on the menu screen which has built the user base of the Play Store.¹⁹⁸ Given Play Store is on all Android devices with the largest user base, it makes sense for all developers to list their Android apps on the Play Store, giving it the widest selection. For consumers, there is no reason to use an alternative store with a smaller selection of apps and no difference in app pricing, hence the limited use of alternative stores. This virtuous cycle means Play Store is the effective gatekeeper to Android users for app developers.

163. Software application stores provide a range of services to app developers, including toolkits, APIs to make use of device features, app testing, usage data and payment processing services.¹⁹⁹ They also offer curation and search functionality to allow consumers to navigate and discover apps, along with promotional services for developers to gain visibility.²⁰⁰ The revenue model adopted is to charge a commission on sales only where the app generates revenue through the delivery of digital content.²⁰¹ This is because stores do not want to discourage free apps that add value to their devices, and revenue from digital content delivered through the store is measurable by the store whereas apps used to sell physical services are not. To measure those transactions and ensure they are able charge the apps their commission, the stores do not permit alternative payment processing services on their stores for all in-app payments (IAPs).²⁰² The exclusion of alternative payment processing methods not only ensures that

the commission fees cannot be bypassed by design, but also that the application store owns the customer relationship unless additional logins are required.

164. For apps that provide digital content through other channels, such as websites, PCs or consoles, there are typically means for consumers to pay for the content through these channels. Application stores permit consumers to access that content or credits through the applications where there is a login on the app, referred to as the App Store Multiplatform rule and the Play Store's Payments Policy.²⁰³ However, the stores have imposed anti-steering rules to prevent app developers from circumventing their IAP by steering consumers to these outside options.²⁰⁴ This means that where discovery of the app takes place through the application store, consumers will be ignorant of alternative payment options, limiting their discovery and use. Whilst the apps can market the availability of an alternative payment option outside the app, this cannot be targeted as efficiently as direct marketing to those that downloaded the app. As such it is realistically only open to those few apps with sufficiently broad appeal that they can invest in untargeted advertising, and not to smaller apps that lack those budgets. In this manner, the anti-steering rules restrict competition from alternative payment methods for the app available through other channels.

198 One of the well-studied behaviours in behavioural economics is that consumers generally tend to have default bias and are therefore likely to stick to default settings. Even Google acknowledges that default requirements are essential in having one's app store predominantly utilized.

Kahneman, D., Knetsch, J., & Thaler, R. (1991). Anomalies: The endowment effect, loss aversion, and status quo bias. *Journal of Economic Perspectives*, 5(1), 193-206. Google Android case, page 171, paras 780(1) and 787(2).

199 Meeting with Huawei dated 22 July 2021. Meeting with ██████████ dated 03 September 2021. Oral Submission made by Samsung dated 19 November 2021, page 12.

200 Submission made by Google Play dated 30 June 2021, page 18 para 77. Submission made by Apple dated 30 June 2021, page 13 para 34. Submission made by Huawei dated 18 June 2021, D14.

201 Submission made by Google Play dated 02 September 2022, page 92 para 5.44.3 and page 99 para 5.63.

202 Submission made by Google Play dated 02 September 2022, page 95 paras 5.52 and 5.54. Submission made by Apple dated 26 August 2022, page 13 para 2.34 and page 15 para 2.42.

203 Submission made by Apple dated 26 August 2022, page 10 para 2.22 and footnote 15. Submission made by Google Play dated 02 September 2022, page 97 para 5.59.

204 Submission made by Apple dated 26 August 2022, page 15 para 2.42. Submission made by Google Play dated 02 September 2022, page 97 para 5.59.

165. For apps whose primary functionality is the distribution of digital newspaper, magazines, books, audio, music or video, these have the option to be pure reader or consumption apps but must then forego the option of the IAP enabled to do one-click purchases, and still require consumers to discover their website for subscription or content purchases. As a result, some apps that may qualify still make use of IAPs as it facilitates more transactions given the convenience and ease of completion for consumers.

166. App developers that are subject to the commission fees have complained about their level whilst developers of free apps (including those funded by adverts) have no complaint against the application stores on this score.²⁰⁵ Given the lack of competition from alternative application stores that might otherwise place constraints on commission fees, developers have focused attention on the lack of payment alternatives and the ability to steer consumers to their own cheaper payment options as unduly restrictive of platform competition.²⁰⁶ High commission fees are either likely to raise the pricing of apps to the detriment of consumers or reduce the earnings of app developers which impedes investment and innovation. In some cases there is contagion to the pricing outside of the application stores as developers look to price consistently on all distribution channels.²⁰⁷

167. Historically the stores charged 30% on digital content, which was not based on cost. The explosion of the app economy has seen revenues from these fees grow substantially, likely beyond any expectation when the fees were originally set. Adjustments over time in response to litigation has seen Apple drop its fee to 15% for app developers earning under \$1m per annum, for news and video streaming partners and for the second year of a subscription. Google faces similar litigation risks and has dropped its fees to 15% for subscriptions, 15% for the first \$1m earned and 10% for ebooks and music streaming.²⁰⁸ However, the earnings continue to grow and operating margins of these two application stores remain extremely high at c.70% at a global level.²⁰⁹ This is because the areas of concession have a limited revenue impact on the stores and payment policy clarifications or rules are used to draw in more revenue from other sources. The Inquiry has invited both parties to provide financial analysis supporting their claim that the fees are not excessive, but neither party has put up such analysis. The only reasonable conclusion is that it does not support their claims. Rather, the Inquiry is referred to gaming console and other software store fees,²¹⁰ but gaming consoles have a different business model and are not as prevalent as mobile phones, and other software stores are often gatekeepers to a large customer group too.

205 Submission made by [REDACTED] dated 10 September 2021, page 12. Meeting with [REDACTED] dated 10 September 2021. Meeting with [REDACTED] dated 12 October 2021. Submission made by [REDACTED] dated 18 September 2021, page 13.

206 Submission made by Huawei dated 25 August 2022. Submission made by [REDACTED] dated 24 August 2022, page 3. Submission made by [REDACTED] dated 18 September 2021, page 12 and 13. Submission made by [REDACTED] dated 07 September 2022, page 5 para 15.4. Submission made by [REDACTED] dated 18 August 2022..

207 Submission made by [REDACTED] dated 12 September 2021, page 5 and 6.

208 Submission made by Google Play dated 17 January 2021, page 11, para 7. <https://www.theverge.com/2017/10/19/16502152/google-play-store-android-app-store-subscription-revenue-cut> [Access date: 20 April 2022].

<https://developer.apple.com/programs/video-partner/>; [Access date: 20 April 2022].

<https://developer.apple.com/apple-news/program/>; [Access date: 20 April 2022].

<https://techcrunch.com/2021/10/21/google-lowers-play-store-fees-to-15-on-subscriptions-apps-as-low-as-10-for-media-apps/>; [Access date: 20 April 2022].

[https://developer.apple.com/app-store/small-business-program/#:~:text=It%20features%20a%20reduced%20commission,quality%20apps%20that%20customers%20love](https://developer.apple.com/app-store/small-business-program/#:~:text=It%20features%20a%20reduced%20commission,quality%20apps%20that%20customers%20love;); <https://android-developers.googleblog.com/2021/03/boosting-dev-success.html>. [Access date: 20 April 2022].

209 Apple SEC Form 10-k, 2021, pages 29 and 37. Alphabet Inc, SEC Form 10-k, 2021, page 33. Google RPR1.1(b), annex 42.3.

210 Submission made by Apple dated 26 August 2022, page 11 and 12 para 2.29. Submission made by Google Play dated 02 September 2021, page 96 para 5.58.

168. There have been adjustments to the anti-steering rules. Whereas originally Apple would not permit any communication with consumers on alternative payment options,²¹¹ following a settlement agreement in 2021 it has allowed app developers to communicate with consumers through means other than the app itself about alternative payment options, such as through email communication.²¹² Google has a similar policy in place.²¹³ However, this requires that the apps to have access to the consumer details, which are not provided by the application stores as gatekeeper. Some apps try get such details through asking consumers to set up a free account or login, but there is a delay and additional friction created for consumers relative to the one-click option. This means the current policy is still restrictive of competition from alternative payment options.

169. Following a decision by the Japan Fair Trade Commission (JFTC), Apple now permits reader apps globally to provide an external link to their website for the purpose of subscribing or purchasing content,²¹⁴ but Google does not. The direct link to a payment option has a much higher convenience factor for consumers and so is more likely to be used, even if there is some additional friction of entering banking details which is not required in the IAP. However, it is only for reader or consumption only apps which is defined in the policies of the application stores and subject to discretion,²¹⁵ and

neither Apple nor Google currently permit such links for apps that also make use of their IAP billing.

170. The prohibition on alternative IAP services has been taken up through litigation in some countries, and Google pre-emptively released User Choice Billing in November 2022 for trial by SA developers of non-gaming apps following the publication of the Provisional Report.²¹⁶ However, whereas the objective was to provide competition for the store's IAP billing and reduce the commission fees, the implementation has not realised this objective. This is because the application stores continue to add their own commission fees to those transactions, less the [3-4]% cost saving on transaction processing to third parties. However, it does permit developers to own the customer relationship which may be seen as a partial improvement for some developers. Moreover, investment in those capabilities are likely to be out of reach for small apps.

171. The Provisional Report expressed concern that Google Play Points had design features which may create user loyalty that may not be replicable by other app stores.²¹⁷ Further evidence shows that Play Points has had little traction in the SA market with [0-10]% adoption,²¹⁸ indicative that it is unlikely to impede other app stores from competing at this stage. However, this may change in future and the loyalty programme may be revisited by the Commission at a later date.

211 iPhone Program Licence Agreement (2009), see oral submission by Apple dated 03 March 2022, slide 38. See also Epic Games Inc vs Apple Inc, case no. 4:20-cv-05640-YGR, footnote 189, page 30.

212 Submission made by Apple dated 26 August 2022, page 15 para 2.41. <https://www.cnbc.com/2021/08/26/apple-will-allow-developers-to-email-customers-to-bypass-app-store-billing.html> [Access date: 14 March 2023].

213 <https://support.google.com/googleplay/android-developer/answer/10281818?hl=en#zippy=%2Ccan-i-distribute-my-app-on-other-android-app-stores-or-my-website%2Ccan-i-communicate-with-my-users-about-alternative-ways-to-pay>.

214 Submission made by Apple dated 18 January 2022, page 5. Also available at <https://www.apple.com/newsroom/2021/09/japan-fair-trade-commission-closes-app-store-investigation/> [Access date: 24 March 2023].

215 A South African private educational service providing digital content failed to have its app classified as a reader app on Apple, whereas on Google it has been allowed to be a consumption only app.

216 <https://mobilemarketingreads.com/google-expands-user-choice-billing-to-the-us-brazil-south-africa/> [Access date: 14 March 2023].

217 OIPMI Provisional Report, Chapter 4, page 63 para 161.

218 Submission made by Google Play dated 02 September 2022, page 90 para 5.40.1.

172. For these reasons, the Inquiry finds that anti-steering rules restrict competitive constraints being exercised on the commission fees charged by the Apple App Store and Google Play Store. The Inquiry also finds that the default arrangements for Google Play Store on Android devices has restricted application store competition, and the exclusivity applied to the App Store on iOS devices completely excludes application store competition.

173. In restricting competition for the purchase of digital content or in-app purchases, this market feature permits the application stores to extract high returns to the detriment of consumers of these apps in South Africa, and to local app developers.

6.2.2. Remedial Actions

174. The Provisional Report was cynical of the alternative IAP remedial action due to the inability to prevent the application stores adding their commission to these alternatives. Instead it recommended an end to anti-steering provisions with a clickable link to the external payment option, and price regulation of the IAP commission for those consumers purchasing through the app.²¹⁹ This would apply to both Apple App Store and Google Play Store. On Google Play, it also recommended an end to the Google default arrangements²²⁰ and the prohibition of loyalty scheme design.²²¹

175. The set of remedies proposed were designed to address the lack of competitive constraints on the commission fees, and therefore some may be redundant if others are effective. The EU has pursued the prevention of anti-steering provisions in the Digital Markets Act

(DMA) as their remedial action to the same concern.²²² This is captured in Articles 5(4) and 5(5)²²³, replicated below, with Article 5(4) permitting app developers to communicate offers to consumers via the application stores, and to facilitate purchases outside of the stores. Article 5(5) seeks to ensure that content acquired outside of the application stores by consumers is made available on the apps. Whilst this is currently the case, such as with the multi-platform rule, the provision seeks to avoid those policies changing to bypass Article 5(4).

"4. The gatekeeper shall allow business users, free of charge, to communicate and promote offers, including under different conditions, to end users acquired via its core platform service or through other channels, and to conclude contracts with those end users, regardless of whether, for that purpose, they use the core platform services of the gatekeeper."²²⁴

5. The gatekeeper shall allow end users to access and use, through its core platform services, content, subscriptions, features or other items, by using the software application of a business user, including where those end users acquired such items from the relevant business user without using the core platform services of the gatekeeper."²²⁵ (emphasis added)

176. The DMA provides context to how Article 5(4) should be interpreted through recital paragraph 40 (replicated below). Of relevance to this Inquiry, the recital identifies that promotion of offers includes those done through a software application of the business user, making clear that in-app communication

219 OIPMI Provisional Summary Report page 53 para 147, page 54 para 152.1 and page 60 para 172.1.

220 OIPMI Provisional Summary Report page 54 para 152.3.

221 OIPMI Provisional Summary Report page 54 para 152.2.

222 Regulation of the European Parliament and of the Council of 14 September 2022, Digital Markets Act (DMA).

223 Note that these Articles are not specific to software application stores and find broader application in other gatekeeper core platforms.

224 DMA, L 265/33.

225 DMA, L 265/33.

would be covered by Article 5(4). Recital 40 does clarify that it applies to end users that have already entered a commercial relationship and, where applicable, the gatekeeper has been directly or indirectly remunerated for that initial acquisition. This envisages that some compensation for the platform may occur, but not necessarily in all cases, which is appropriate where services other than payment processing is provided as is the case with software application stores. For instance, the recital proceeds to state that such commercial relationships can be on a paid or free basis, such as free trials or free service tiers, indicating that simply downloading the app would effectively place the end user and app developer in a commercial relationship.

“(40) To prevent further reinforcing their dependence on the core platform services of gatekeepers, and in order to promote multi-homing, the business users of those gatekeepers should be free to promote and choose the distribution channel that they consider most appropriate for the purpose of interacting with any end users that those business users have already acquired through core platform services provided by the gatekeeper or through other channels. This should apply to the promotion of offers, including through a software application of the business user, and any form of communication and conclusion of contracts between business users and end users. An acquired end user is an end user who has already entered into a commercial relationship with the business user and, where applicable, the gatekeeper has been directly or indirectly remunerated by the business user for facilitating the initial acquisition of the end user by the business user. Such commercial relationships can be on either a paid or a free basis, such as free trials or free service tiers, and can have been entered into either on the core platform

service of the gatekeeper or through any other channel. Conversely, end users should also be free to choose offers of such business users and to enter into contracts with them either through core platform services of the gatekeeper, if applicable, or from a direct distribution channel of the business user or another indirect channel that such business user uses.”

177. Similarly, recital (41) provides context to Article 5(5) which focuses on the ability of the consumer to access content that they have purchased elsewhere, preserving the so-called “multi-platform rule”. As set out in the recital below, the purpose of the article is to ensure access is not “undermined or restricted” in any way. As software application stores are not privy to the purchases outside their environment and do not charge consumers directly, preventing restrictions on access is sufficient unlike with app developers where it is also necessary to stipulate that there may not be charges for such permissions.

“The ability of end users to acquire content, subscriptions, features or other items outside the core platform services of the gatekeeper should not be undermined or restricted. In particular, a situation should be avoided whereby gatekeepers restrict end users from access to, and use of, such services via a software application running on their core platform service. For example, subscribers to online content purchased outside a software application, software application store or virtual assistant should not be prevented from accessing such online content on a software application on the core platform service of the gatekeeper simply because it was purchased outside such software application, software application store or virtual assistant.”

178. The removal of the anti-steering provisions was also the remedial action determined

by the judge in the *Epic-Apple* case.²²⁶ This broader support for the removal of anti-steering provisions, not only indicates that they are both practicable and reasonable remedies but also potentially a comprehensive solution on their own. However, given that the DMA envisages the potential for some compensation of the software application store, it does include a 'safety valve' by providing the basis for regulation of the fees charged through the Article 6(12) FRAND provisions (replicated below) where the fees are deemed unfair or unreasonable. Recital 62 of the DMA makes clear that in the context of software application stores which are important gateways for app developers to reach consumers, *"In view of the imbalance in bargaining power between those gatekeepers and business users of their software application stores, those gatekeepers should not be allowed to impose general conditions, including pricing conditions, that would be unfair or lead to unjustified differentiation."*

"12. The gatekeeper shall apply fair, reasonable, and non-discriminatory general conditions of access for business users to its software application stores, online search engines and online social networking services listed in the designation decision pursuant to Article 3(9)."

179. Relying solely on the regulation of commission fees as an alternative to the competition that the removal of anti-steering provisions aims to introduce is probably not warranted at this stage. Price regulation is costly to oversee, complex to determine the correct commission level and potentially subject to bypass as has been the case with alternative IAP billing. However, including the option at the very least is necessary

protection whilst the competitive solution is provided time to prove itself or not. This also provides further necessary protection to ensure new fees are not levied on app categories which are currently exempt from commission fees, or fees are increased for small app developers currently paying 15% commission fees. This is because software application stores may seek to bypass restraints on their revenues from anti-steering through these actions. Software application stores have a history of bypass as was the case with User Choice Billing.

180. The DMA remedy and that of the court in the *Epic Games* case are in response to the same findings as this Inquiry, and both Apple and Google will have to affect design changes to comply with the DMA given their likely gatekeeper status. Allowing for the implementation of the DMA remedy in South Africa to count as compliance with a remedy aimed at ending the anti-steering provisions domestically represents a practicable and reasonable remedy as Apple and Google are spared the costs of engaging in a separate remedial engagement with potentially different design outcomes, and the Commission is spared the resource intensive engagements on the design and implementation of the chosen remedy which is the same as that of the EU. Compliance with the DMA is required by March 2024.

181. Whilst the default status of the Google Play Store has enabled it to become entrenched, the unfortunate reality is that it is now entrenched and altering its default status at this stage is unlikely to see consumers moving away from the Play Store and rather just create inconvenience.²²⁷ There is also no evidence to indicate that other application stores are competing vigorously on commission fees. Removing the default status also comes with

²²⁶ *Epic Games Inc vs Apple Inc*, case no. 4:20-cv-05640-YGR, page 164.

²²⁷ Submission made by Google Play dated 02 September 2021, page 105 para 5.96. Submission made by Samsung dated 24 August 2022, page 2 para 2.1.2. Submission made by [REDACTED] dated 24 August 2022, page 6 para 7.

potential unintended consequences in that Google will then charge a license fee for Android OS, that may impact on the price of low-end Android smartphone devices to the potential detriment of digital access.²²⁸ However, the importance of Android in low-end devices means Google Play policies will impact on poorer consumers unlike Apple, and the pricing of apps will shape digital access. As such, additional obligations on Google in respect of the pricing of apps is appropriate even if changing the default arrangements is not the remedy.

182. Digital content is costless to replicate and should be priced lower in for lower-income countries and consumers, as is the case with software more broadly and other IP-based products. This is typically profit-maximising for the software developers, but also beneficial to improving digital access and inclusion. On the application stores, many of the largest truly global apps practice such positive price discrimination across countries, offering their apps at a lower price where incomes are lower.²²⁹ However, for most apps the application stores offer a simple currency conversion option for pricing across the globe which does not discount in lower income countries.²³⁰ Providing tools for developers to price appropriately in South Africa for lower income consumers and to potentially experiment around what the appropriate discount should be represent meaningful measures to reduce app pricing and improve digital inclusion.

183. The Inquiry has had extensive engagements with Google on remedial action, including the practicality and potential unintended consequences, which informs the decision on appropriate remedial actions. Apple has

been engaged on the remedial action but still contests whether any remedial actions are required in respect of its platform. Google also agrees that if remedial actions are necessary then implementation of DMA changes is more practical and reasonable for them as opposed to completely different technical engineering of their Play Store. Apple has not agreed with that position and so terms expressly recognising automatic compliance of changes aligned with the DMA is not considered in their remedial actions.

184. The decision of the Inquiry is that the following remedial actions are required as specified in the Apple and Google Remedial Actions in Annexure 10:

184.1. Within 12 months, Apple and Google must allow business users, free of charge, to communicate and promote offers, including under different conditions, to end users acquired via their software application stores or through other channels, and to conclude contracts with those end users, regardless of whether, for that purpose, they use their software application stores.

184.2. Within 12 months, Apple and Google must allow end users to access and use free of charge, through their software application stores, content, subscriptions, features or other items, by using the software application of a business user, including where those end users acquired such items from the relevant business user without using their software application stores.

184.3. Within 12 months, Apple and Google shall apply fair, reasonable, and non-discriminatory general conditions of

228 Submission made by Google Play dated 14 December 2022, page 3, para 2.3 and page 4 para 2.5. https://assets.publishing.service.gov.uk/media/61b794d6d3bf7f05545e1416/Appendix_E_-_Google_agreements_with_device_manufacturers_and_app_developers.pdf [Access date: 20 June 2022]. <https://www.theverge.com/2018/10/19/17999366/google-eu-android-licensing-terms> [Access date: 25 May 2022].

229 <https://thenextweb.com/news/googles-lowered-app-prices-in-the-play-store-for-17-countries> [Access date: 15 March 2023].

230 Submission made by Apple dated 26 August 2022, page 14 para 2.39.

- access for business users to their software application stores.
- 184.4. For Google, implementation in South Africa of changes in the EEA to comply with Articles 5(4), 5(5) and 6(12) of the DMA will be automatically considered as compliance with these remedial actions.
- 184.5. Apple and Google to raise awareness of existing tools for all app developers on the South African storefront to utilise lower pricing for lower income consumers.
185. The remedial actions in paragraphs 184.1 and 184.2 address the finding in respect of the harm caused by anti-steering provisions by enabling app developers to communicated offers to consumers, even through the application stores themselves, and in turn ensure that this is not bypassed by changes to the multiplatform rules that allow consumers to use content purchased elsewhere. The remedial action in paragraph 184.3 provides the basis to ensure reasonable pricing of any fees that are levied by the application store, addressing the finding in respect of practices that enable the monopoly of each application store on their operating systems. The remedial action in paragraph 184.5 simply promote awareness of tools that can enable app developers on the South African storefront to reduce their prices to lower income South African users, and in this manner mitigate the finding of high commission fees resulting in higher app prices for consumers, ensuring that app prices may reduce once the other constraints are removed by the other remedial actions.

6.3. Business Users

6.3.1. Findings

186. Given the market feature of millions of apps overall, and thousands in any single category, being sold through monopoly application stores on different device OSs, discoverability and visibility on those application stores is essential for apps to compete effectively.²³¹ The application stores provide for discoverability through two main features, namely curation and search. The curation includes the automated top or trending apps in free or paid, and in different broad categories. In addition, there is edited curation where store editors identify quality apps and promote them through a wide variety of means such as featured apps, category recommendations, new apps, classics, apps of the day, etc.²³² The other means is through categorical or navigational search.²³³
187. Evidence indicates that app discovery through curation may account for [0-10]% of downloads and search for [90-100]% of downloads, of which [40-50]% are through categorical search.²³⁴ Curation has grown in sophistication and the number of sub-categories to accommodate the vast number of apps within the broad categories. Given the importance of search for discoverability and the volume of apps in any search results, developers have made increasing use of ads which appear on the search page itself as suggestions and at the top of search results. For instance, ads make up [20-30]% of Google Plays Store revenue and are the fastest growing revenue segment by some margin.²³⁵ Consumers may also research

231 Meeting with █████ dated 01 September 2021. Meeting with █████ dated 30 August 2021. Meeting with █████ dated 31 August 2021. The ACCC, Digital Platform Services Inquiry, interim report. page 87.

232 Submission made by Google Play dated 30 June 2021, page 18 para 75 to 79. Submission made by Apple dated 30 June 2021, page 13 para 33 to 35.

233 Categorical search is where the search term is for a category of app, and navigational is where the search term is for a specific app name.

234 Submission made by Google Play dated 17 January 2022, page 4 para 2.2.

235 Submission made by Google Play dated 28 October 2023, annexure 39.1.

apps online and many websites offer their views on the best apps in particular categories which can account for some of the navigational search, and large paid apps will also spend on broader marketing campaigns, including text ads on general search.²³⁶

188. Competition on the application stores is global insofar as the South African storefront has apps from across the world alongside local apps, and local app developers can make their apps available on storefronts in every other country.²³⁷ Local app developers must therefore compete through curation and search ads for visibility and discoverability both at home and abroad. South African paid and gaming app developers have highlighted the challenge for the nascent industry in achieving visibility on the application stores, given the lack of local curation and extremely well-resourced global competitors that are able to more profitably market their apps.²³⁸ The identification of only c.500 paid app developers in South Africa by the two leading application stores despite the hundreds of millions spent on apps is reflective of the challenge the domestic industry faces.²³⁹

189. Neither the Apple App Store nor the Google Play Store has local curation of apps despite the hundreds of millions in revenue generated from South Africa each year. There are automated curations based on sales or downloads for the SA storefronts, and some geo-relevance criteria applied to certain search terms (such as local banks or delivery apps).²⁴⁰ Google has continental curation on top of that. Local apps may have particular

relevance for domestic consumers but the lack of local curation means this would not be a factor in the editorial process, with global apps served up instead. The result is that competition from domestic apps is impeded. Local curation would also be a value-added service to SA consumers that software app stores would more likely invest in were they to face more intense competition for SA consumers. Its absence highlights the lack of device-level competition for application stores.

190. As is the case across all intermediation and search platforms, the market feature of dominant or monopoly platforms and the importance of getting visibility on those platforms, has driven the sale and importance of ads in achieving visibility which favours larger well-resourced developers. A more competitive application store market would provide greater opportunities for targeting consumers than the single market channel. The result is that competition from the domestic app industry is impeded.

191. For these reasons, the Inquiry finds that market features in provision of software application stores, including the lack of local curation and an increasing shift to paid results for visibility on the stores, impedes competition from South African paid app developers.

6.3.2. Remedial Actions

192. The Provisional Report identified the provision of an SA specific curation of local apps along with free promotional credits for local apps to improve their discoverability

236 In 2021 alone, Google Advertising accounted for [80-90] % of total revenues.

237 Submission made by Apple dated 26 August 2022, page 14 para 2.39. Submission made by Google Play dated 17 January 2022, pages 6 and 6 para 5.1. Submission made by Google Play dated 02 September 2022, page 93 para 5.45.2.

238 Submission made by [REDACTED] dated 10 September 2021, page 11. Meeting with [REDACTED] dated 23 September 2021. Meeting with [REDACTED] dated 30 August 2021. Submission made by [REDACTED] dated 14 September 2021, page 8. Submission made by [REDACTED] dated 10 September 2021, page 8.

239 Submission made by Google Play dated 17 July 2021, page 17 para 21.

240 Submission made by Google Play dated 30 June 2021 page 18 para 75 to 79. Submission made by Apple dated 30 June 2021, page 13 para 33 to 35.

- and visibility on the applications stores of Apple and Google.²⁴¹
193. Given that the discoverability of apps is through edited curations and search where ads place an increasing role in gaining visibility, the remedial actions of curation and ad credits directly address the findings and should provide improved discoverability and visibility for SA apps. The remedies are also practicable and reasonable for application stores. The remedies make use of existing features of the application stores and are unlikely to be costly to implement, especially relative to the revenues that these stores make in South Africa. They are unlikely to result in material unintended consequences, as any curation will be in addition to existing curation and does not displace it, and ad credits will simply offset existing distortions and are unlikely to have opportunity costs. Ultimately consumers will make informed choices and these measures simply improve their information on domestic choices.
194. The Inquiry has had extensive engagements with Google on remedial action, including the practicality and potential unintended consequences, which informs the decision on appropriate remedial actions. Apple has been engaged on the remedial action but still contests whether any remedial actions are required in respect of its platform. Given the lack of agreement, there is a need to impose remedial actions on Apple but the Inquiry is unable to set out a specific amount for the programme other than to indicate it needs to be substantial. In assessing compliance, Apple will need to motivate that what it has implemented is substantial.
195. The decision of the Inquiry is that the following remedial actions are required of the Google Play and Apple App stores as specified in the Apple and Google Remedial Actions in Annexure 10:
- 195.1. Within 6 months, a local edited curation of SA apps that is prominently displayed on the storefronts; and
- 195.2. A substantial ad credit programme for South African app developers, with additional credits and support for HDP app developers.
196. The remedial actions above improve the organic and paid visibility of South African apps on the leading application stores to address the finding that the lack of curation and increasing shift to paid results hinders competition from South African apps.

241 OIPMI Provisional Summary Report, page 60 para 172.2 and 172.3.

[7. Online Classifieds]

197. Classifieds made a rapid transition from print to online from 2010 to 2015 due to rising Internet access along with the unparalleled convenience of online search and comparison tools.²⁴² Vertical classifieds specialise in a single product category on a B2C basis, distinguishing them from horizontal classifieds that operate across all categories on a C2C basis. Classifieds differ from some of the other intermediation platforms in the Inquiry insofar as their business model is based on payments for displaying listings and generating leads, rather than actual transactions even though leads may result in offline transactions. Classifieds predominate where the items are very large infrequent purchases that consumers prefer to research and inspect first. Within verticals, property and automotive represent the biggest categories.

7.1. Market Context

198. Whilst estate agents and auto dealers may engage in a variety of marketing activity to raise awareness of their current stock offering, given the ubiquitous behaviour of consumers researching these large, infrequent purchases online due to convenience makes it a critical marketing channel to raise awareness and generate

leads. Walk-ins at local auto dealers or estate agents show days are also often informed by prior online research, and therefore a product of that marketing channel rather than a substitute for it.²⁴³

199. Estate agents and auto dealers will have their own online presence in the form of a website that has their current stock listed. However, in comparison to these websites, vertical classifieds appeal to the consumer because of the convenience in browsing a wide range of stock (properties or automobiles) listed by different agents and dealers within a single portal, as opposed to searching their websites individually.²⁴⁴ This improves the consumer's ability to compare a wide range of offerings, aided by standardized information requirements and pictures, along with comparison tools which can sort the listings by multiple factors to narrow the comparator set (e.g. make, model, suburb, price range, bedrooms etc).²⁴⁵ Moreover, the aggregation provides online classifieds with an advantage in consumer acquisition as they have far larger advertising budgets relative to individual agents or dealers, even large national ones, with more ability to hold the interest of consumers clicking through due to their range. The online classifieds are also able to invest more in the user interface

242 Property24 submission dated 15 November 2021- Public Hearing Presentation. Private Property—oral submission from Mr Mwela in the public hearing, 16 November 2021, page 4-5. AutoTrader—oral submission from Mr Mienie in the public hearing, 17 November 2021, page 3. Also see OECD (2020), Competition in digital advertising markets, <http://www.oecd.org/daf/competition/competition-in-digital-advertising-markets-2020.pdf> Accessed on 14 February 2022.

243 REBOSA—oral submission from Mr Le Roux in the public hearing, 29 November 2021, page 5. [REDACTED]

244 REBOSA—oral submission from Mr Le Roux in the public hearing, 29 November 2021, page 5. 0800Properties—oral submission from Mr Manning in the public hearing, 16 November 2021, page 9. Property Central—oral submission from Mr Jhagaroo in the public hearing, 15 November 2021, page 24. Cars.co.za—oral submission from Mr McLlroy's in the public hearing, 17 November 2021, page 5-6. SMH Public Hearings presentation 18 November 2021.

245 0800Properties—oral submission from Mr Manning in the public hearing, 16 November 2021, page 9. Property Central—oral submission from Mr Jhagaroo in the public hearing, 15 November 2021, page 24. Submission by Property24 dated 10 September 2021. Cars.co.za—oral submission from Mr McLlroy's in the public hearing, 17 November 2021, page 5-6. SMH Public Hearings presentation 18 November 2021. Submission by AutoTrader dated 10 September 2021.

- and the development of apps, enhancing their natural advantage over individual websites.²⁴⁶
200. For the agents and dealers, online classifieds platforms are an important distribution channel for listing stock due to the large volumes and broader set of consumers they reach along with the ability to generate substantial leads and consequently sales.²⁴⁷ The fact that agents and dealers pay to list stock on the online classifieds in addition to their own website demonstrates that these are seen as complementary rather than substitutes. Property classifieds offer services in the development and maintenance of websites for estate agents drawing on the same listing software engines they use for their classifieds site, indicative that they do not see websites as competition for their classifieds service. Websites will draw in some leads of their own, and the largest national agents will make some investment in search marketing on Google, but website traffic includes referral traffic from the platforms as consumers research the options.²⁴⁸ Websites therefore play a role in building trust and portraying the brand of the agent or dealer to the consumer researching options through the classifieds. Websites play other roles too, such as securing mandates to sell properties or buy/trade-in vehicles.²⁴⁹
201. Whilst some auto dealers and agents have listed stock on horizontal classifieds focused on C2C listings or on Facebook Marketplace, this is largely due to the low-cost and potential for incremental leads, but it does not replace the sheer volume of leads from online verticals.²⁵⁰ This is in large part because verticals are tailored for category search in their user interface design and the leading ones have most of the listings in the market, making it easier and more convenient for consumers, which in any event do not pay for these services, to navigate and compare listings.²⁵¹
202. Evidence from agents and dealers confirm a high degree of dependency on the online classifieds for leads, making them indispensable for a modern estate agent and auto dealer. Internal documents also confirm that online classifieds are the closest competitors to each other, along with the views of all stakeholders other than the leading platforms themselves. Illustratively, in property it is estimated that [70-80]% of leads are generated from the vertical classifieds, with [10-20]% from agent's own websites and less than 10% from horizontal classifieds.²⁵²
203. For these reasons, the appropriate relevant market for the purpose of the Inquiry's assessment is the provision of online vertical or B2C classifieds, distinguished by product

246 Property24 – oral submission from Mr JP Farinha in the public hearing, 16 November 2021, page 19. Private Property–oral submission from Mr Mwela in the public hearing, 16 November 2021, page 17-18. Property Central–oral submission from Mr Jhagaroo in the public hearing, 15 November 2021, page 24. REBOSA–oral submission from Mr Le Roux in the public hearing, 29 November 2021, page 4.

247 Meeting between the Inquiry and CSI Properties, September 2021: Response to survey questionnaire and questions. Meeting between the Inquiry and 0800 Properties 11 October 2021: Response to survey questionnaire and questions. SMH response to the Survey Questionnaire dated 17 September 2021. Supergroup Dealerships response to the Survey Questionnaire dated 20 September 2021.

248 See Figure 5 on page 16 of the PR, showing the audience overlap between classifieds platforms and estate agencies' own websites.

249 REBOSA–oral submission from Mr Le Roux in the public hearing, 29 November 2021, page 5. 0800Properties–oral submission from Mr Manning in the public hearing, 16 November 2021, page 9.

250 Submission by Naspers dated 06 October 2021- Response to the FSOI. Property Central–oral submission from Mr Jhagaroo in the public hearing, 15 November 2021, page 42. Cars.co.za–oral submission from Mr McLroy's in the public hearing, 17 November 2021, page 39-40.

251 Submission by Property24 dated 14 May 2021. Cars.co.za–oral submission from Mr McLroy's in the public hearing, 17 November 2021, page 39-40.

252 Submission by Property24 dated 10 September 2021. Also see table 1 on page 10 of the PR, showing leads generated from various sales channels.

category (i.e. automotive separate from property). This finding is consistent with that of many other jurisdictions that have considered vertical classifieds as distinct markets from both horizontal classifieds and own websites.²⁵³

7.2. Platform Competition

204. Within the automotive online classifieds, Autotrader and Cars.co.za represent the leading platforms by some distance with over 80% share between them.²⁵⁴ Autotrader is slightly larger at [40-50]% compared to Cars.co.za at [30-40]%, but both pass the dominance threshold. Whilst there is a tail of smaller platforms, these are generally sub-scale and do not benefit from network effects insofar as business users are less willing to pay for listings, and this limits their ability to fund the acquisition of consumer traffic.²⁵⁵ The Inquiry did not identify any market features within automotive online classifieds that had an adverse effect on platform competition aside from Google search outcomes favouring the leading platforms.

205. Within property online classifieds, Property24 is the dominant platform with a share of over 50% and conduct consistent with market power, including sustained above-inflation increases in its fees without the loss of estate agents and excessively high profit levels.²⁵⁶ Private Property is the second largest with a

share ranging between [25-35]% depending on the measure used, with the remaining property classifieds all insignificant in their traffic and revenue. Private Property is uniquely placed in that it is a partnership with the large national agencies through the Estate Agency Property Portal Company, facilitated by the industry association, Rebosa.²⁵⁷ As a result, Private Property has been able to secure, and lock-in, most of the listings with the beneficial network effects that arise from that. Those network effects include the ability to attract consumers because most of the listings are secured, and in turn the ability to draw in the listings of other estate agents given the consumer traffic.²⁵⁸ That lock-in occurs because the shareholding provides beneficial contract rates to all the national agencies, and which cannot be withdrawn unless collectively they fall below a certain proportion of their listings on the platform.²⁵⁹ This incentivises them as a collective to list on Private Property to retain their beneficial rates. As these agencies all list on Property24 as the dominant classified platform, the lock-in limits the ability of other property classifieds to compete for the listings of these national agencies, and to get sufficient critical mass of listings to benefit from network effects.²⁶⁰ That competition is impeded because the largest estate agents have actively sought to support Private Property and locked-in that support as a deliberate strategy. For these reasons, Private Property is also determined as a leading platform in property verticals.

253 See anticipated merger between The Digital Property Group Limited and Zoopla Limited, ME/5233/11. Also see UK Competition and Market Authority, "Acquisition by ZPG Plc of Websky Limited", Full text of the decision published on 24 July 2017.

254 See table 7 on page 39 of the PR, showing online automotive classifieds platforms market shares based on unique users. Also see MIH eCommerce Holding Pty Ltd and WeBuyCars Pty Ltd merger case: Case Number LM183Sep18 -paragraph 308 of the Tribunal Judgement.

255 CarFind—oral submission from Ms Viljoen in the public hearing, 17 November 2021, page 19-21. [REDACTED]

256 Submission by Property24 dated 10 September 2021. Private Property public hearings presentation, 16 November 2021. Also see table 6 on page 38 of the PR, showing online property classifieds platforms market shares based on unique users.

257 REBOSA—Oral submission from Mr Le Roux in the public hearing, 29 November 2021, page 12-14. Private Property—oral submission from Mr Mwela in the public hearing, 16 November 2021, page 24.

258 [REDACTED]

259 See Private Property and EAPPC shareholders contracts in submission by Private Property dated 25 January 2022.

260 [REDACTED]

Moreover, whatever status is afforded Private Property or not, the inescapable fact is that the relationship with the national estate agents does have an effect on competition and is therefore relevant to the findings and remedial actions of the Inquiry. Unlike the automotive classifieds, there are a wide range of practices raising platform competition issues in the property classifieds. Moreover, the absence of these practices in automotive is itself indicative that they are not justifiable.

7.2.1. Findings

206. It is common cause that for a vertical classifieds platform to have any chance of generating a virtuous cycle of network effects, it needs to have most of the listings.²⁶¹ Consumers will not make use of a site that has limited listings as the benefit from vertical classifieds is the convenience of a one-stop-shop for search and comparison. Once it has listings, the next thing it needs is capital to invest in online marketing to drive traffic to the site to trial and engage the platform.²⁶² If the service successfully engages the consumer and there is continued use and growing traffic, the platform may then be able to start extracting some payments from the agents or dealers that can be reinvesting in marketing and building the user interface, and drawing in more agents or dealers.²⁶³ In automotive,

the largest platform offers to feed out listings from dealers on its site to other platforms for free where the dealers authorise it, ensuring no barriers to securing listings once a platform has persuaded dealers to list on their platform (often for free initially).²⁶⁴ In property, the two leading platforms have sought to restrict such interoperability, starving new competitors of listings which significantly impedes competition.²⁶⁵

Interoperability

207. Estate agents make use of listing engine software (“syndication software”) to manage their listings and feed them onto their own websites, and those of property classifieds. Whilst some of the larger estate agents have their own software, the rest of the industry relies on syndication software providers. Property24 and Private Property both provide syndication software to estate agents listing on their platforms (PropCtrl and Fusion respectively), and which feeds the estate agent websites.²⁶⁶ As a result, the two platforms account for an estimated [35-50]% of listing share in the syndication software market. The rest of the market is made up of third parties, with the largest being PropData with an estimated share of [25-35]% followed by Entegral with around [5-10]%.²⁶⁷ Entegral offers its clients the option to feed their listings

261 Property24—oral submission from Mr JP Farinha in the public hearing, 16 November 2021, page 26. AutoTrader—oral submission from Mr Mienie in the public hearing, 25 February 2022, page 41. MyProperty—oral submission from Mr Grové in the public hearing, 16 November 2021, page 9-13. Property Central—oral submission from Mr Jhagaroo in the public hearing, 15 November 2021, page 29-36. 0800Properties—oral submission from Mr Manning in the public hearing, 16 November 2021, page 7-10. Private Property—oral submission from Mr Mwela in the public hearing, 16 November 2021, page 17-79.

262 CarFind—oral submission from Ms Viljoen in the public hearing, 17 November 2021, page 4-5. MyProperty—oral submission from Mr Grové in the public hearing, 16 November 2021, page 33.

263 MyProperty—oral submission from Mr Grové in the public hearing, 16 November 2021, page 33-34. Property Central—oral submission from Mr Jhagaroo in the public hearing, 15 November 2021, page 12.

264 CarFind—oral submission from Ms Viljoen in the public hearing, 17 November 2021, page 14. [REDACTED]

265 MyProperty—oral submission from Mr Grové in the public hearing, 16 November 2021, page 9-13. Property Central—oral submission from Mr Jhagaroo in the public hearing, 15 November 2021, page 29-36. 0800Properties—oral submission from Mr Manning in the public hearing, 16 November 2021, page 7-10.

266 Submission by Property24 dated 10 September 2021. Property24—oral submission by Mr. Farinha in the public hearing, 16 November 2021 page 28. Private Property—oral submission from Mr Van Den Berg in the public hearing, 16 November 2021, page 11.

267 Private Property public hearing presentation dated 16 November 2021. Property24’s public hearing presentation dated 16 November 2021. Also see figure 13 and figure 14 on page 88 of the PR showing Property classifieds syndication software providers market shares.

into a wide range of property classifieds as part of its service.²⁶⁸ However, this is not the case for PropCtrl, which only feeds to Private Property and Property360²⁶⁹, and Fusion, which only feeds to Property24.²⁷⁰ PropData is also more limited in the classifieds that it feeds to.²⁷¹ The implication is that 70% of estate agents wishing to list on alternative classified platforms face considerable practical barriers to doing so, raising the cost of using those platforms that deters use. The alternative classifieds platforms themselves either must live without the listings or try lower that cost. Entegral launched its own platform, MyProperty, using its own client's listings but there has not been investment in customer acquisition given the lack of listings from agents on other syndication software. Property Central resorted to manually capturing listings to eliminate costs for agents, but agents still left the platform as given the problems with continually managing that listing over time (e.g. change in price, under-offer or sold status).²⁷²

208. The dominant property classifieds and PropData have provided no compelling justification for the failure to interoperate with other property classifieds, citing only that this was not the original intention of the syndication software and the development costs of interoperability. In the current digital age, interoperability is facilitated through Application Programming Interfaces (APIs) that can be developed by a syndication software at limited costs and classified platforms must incur their own development costs to interact with that API. The absence of

these barriers in automotive classifieds and travel and accommodation are indicative that such interoperability is the norm and the practice represents a significant and artificial impediment to competition.

209. The two dominant property classifieds have also reinforced their position in syndication software through charging a monthly R500 for feed in from external syndication software.²⁷³ Property24 imposes the fee on any estate agency that switches syndication software, whereas Private Property does so in respect of a feed from PropCtrl, which is passed onto its clients. It appears that Private Property imposed this on PropCtrl in retaliation for its R500 feed, arguing that otherwise it will always be cheaper for agents to use PropCtrl rather than Fusion.²⁷⁴ This insight effectively confirms why the fee does in fact impede competition at a syndication software level, confirmed by submissions from other syndication software providers which noted the particularly large impact on securing the business of small estate agencies. Moreover, it has an indirect effect on property classified competition as it both enables the dominant platforms to prevent competitors from receiving a large share of listings through a lack of interoperability, and impedes syndication software companies from launching their own classified platform on the back of their client listings. As demonstrated by Entegral, syndication software companies are potential entrants into classified platform markets. Once more, there is no compelling justification for the practice. Property24 cites additional costs

268 Entegral website: <https://www.entegral.net/sync/> accessed 10 May 2022.

269 Property24 also own the SA Hometraders platform and its own listings are replicated on SA Hometraders too.

270 Submission by Property24 dated 10 September 2021. Private Property—oral submission from Mr Van Den Berg in the public hearing, 16 November 2021, page 36. [REDACTED]

271 Meeting between the Inquiry and PropData, 02 June 2022. [REDACTED]

272 [REDACTED]

273 MyProperty—oral submission from Mr Grové in the public hearing, 16 November 2021, page 18. [REDACTED]

274 [REDACTED]

but these are once off not monthly, and typically absorbed by all other classified and intermediation platforms.²⁷⁵ Private Property did so in retaliation and has no reason to continue if Property24 waives its fee. Private Property is in the process of phasing out the fee in response to the Provisional Report findings.

Multi-year contracts and shareholdings

210. Estate agents typically have a budget for marketing and promotion and look to optimize that budget between different marketing activities of which property classified listings and in-platform promotion is one component.²⁷⁶ Naturally, there are other additional cost items that agencies must account for, and which limit the extent to which they can expand the marketing budget, or that for property classifieds. As a result, agencies may be limited in the number of platforms they may list on, especially where the fees are high for the dominant platforms that account for the vast majority of leads.²⁷⁷ Whilst classified entrants expect that agencies may be unwilling to pay per listing initially, as they build consumer traffic they will want to start charging. High listing fees on the dominant platform along with lock-in measures through discounted multi-year contracts serve to impede potential switching of budgets by estate agents to alternative platforms.

211. Following a series of fee increases that were far above inflation, Property24 offered a multi-year subscription package to estate

agencies that would limit increases to no more than CPI+5%.²⁷⁸ Whilst agencies technically can give one month's notice on the subscription package once a year, there is little incentive to terminate given that agencies would then lose the fee discount on the platform providing most leads. The contracts are considered multi-year insofar as they provide for annual escalations rather than the normal subscription agreement that has reference to the rate card at the time but also permits one-month notice. The revealed outcome is naturally that there has been a rapid take up by hundreds of the largest agencies which have maintained the subscription. This has effectively locked-in the largest agencies and their listings to Property24 for a multi-year period, making part or whole of that budget uncontested by competing platforms including Private Property.

212. Private Property has achieved the same outcome contractually with the largest estate agents through the EAPPC shareholding in the platform, and through Rebosa as an active lobbyist for the industry to partner with Private Property.²⁷⁹ It bears mention that all the directors sitting on the Rebosa board are representatives of the largest national estate agencies and EAPPC investors, making it hard to distinguish the two.²⁸⁰ The evidence from Rebosa Board Minutes clearly demonstrates the active involvement of Rebosa in facilitating an industry discussion on property portals, determining the need for industry-owned portals, promoting Private Property as a partnership with the

275 Property24—oral submission from Mr JP Farinha in the public hearing, 16 November 2021, page 93-94.

276 REBOSA—oral submission from Mr Le Roux in the public hearing, 29 November 2021, page 27. 0800Properties—oral submission from Mr Manning in the public hearing, 16 November 2021, page 14. Private Property—oral submission from Mr Mwela in the public hearing, 16 November 2021, page 20.

277 0800Properties—oral submission from Mr Manning in the public hearing, 16 November 2021, page 14. MyProperty—oral submission from Mr Grove in the public hearing, 16 November 2021, page 6. Meeting between the Inquiry and MyProperty, 27 September 2021. Meeting between the Inquiry and Property Central, 25 October 2021.

278 Submission by Property24 dated 10 September 2021.

279 REBOSA—Oral submission from Mr Le Roux in the public hearing, 29 November 2021, page 12-14. Private Property—oral submission from Mr Mwela in the public hearing, 16 November 2021, page 24.

280 See the list of REBOSA directors at <https://www.rebosa.co.za/about-us/>, all of which are associated with the major real estate groups.

industry and which agents should support, and facilitating the share offers to Rebosa members.²⁸¹ In so doing, Rebosa has sought to coordinate commercial support for Private Property by the industry to the exclusion of other platforms. This is also in the commercial interests of Rebosa's directors and EAPPC members that had committed investments in Private Property.

213. Whilst Rebosa has sought to influence its members to offer commercial support for Private Property as the 'industry portal', no doubt with some success, for EAPPC members that invested in Private Property there is a harder lock-in device. Private Property initially informed the Inquiry that EAPPC members did not receive preferential treatment or any exclusive benefits / arrangements, but this was proved false once the Inquiry sourced the contracts directly from estate agents.²⁸² Those contracts entered in 2015 included an initiation lock-in period but are evergreen absent termination with built in escalation clauses that reference the initial contracted rates rather than the general rate card applied to all other estate agencies. Moreover, the contracts evidently also lock in Private Property to the terms of the contract if they continue to receive EAPPC support. The Inquiry considers these to be multi-year contracts insofar as they provide for annual escalations rather than referencing a rate card that is changed annually through processes that are not contracted.

214. The contract terms are also very favourable to the EAPPC shareholders. Whilst Private Property normally charges per office with annual decisions on rate escalation, the EAPPC members are charged on different basis with caps on annual increases. The

Inquiry estimates the benefit to be equivalent to a >50% discount to the standard rate card. The structure of the agreement means that the EAPPC members are not just locked in individually but also collectively if they wish to continue receiving these substantial discounts. Private Property is provided with additional support benefits that extend beyond simply the listings.

215. Aside from the contractual basis for the lock-in, the EAPPC members have a shareholder interest in Private Property²⁸³ and a subset of them have their own private shareholding. In addition, a further sub-set of agencies are collective majority shareholders in Ooba²⁸⁴, the home loan aggregation service that has a shareholder in Private Property, which has increased following the recent Cognition exit. Betterhome, the other home loan aggregator, owns shares in RE/MAX, Tyson, Chas Everitt and Realnet, and a substantial but non-controlling stake in Private Property. These shareholdings provide additional commercial incentives for the large national estate agencies, and their home loan aggregator partners, to continue to support Private Property.

216. Rebosa argues that the arrangement was necessary to provide a counterweight to the market power of Property24 and its high fees.²⁸⁵ Whilst this may have been the case when the investment was initially made under threat of acquisition by Property24, the Inquiry considers this is no longer justified as picking a single partner and backing it to the exclusion of all other property classified entrants has demonstrably failed. It has prevented other property classifieds from competing and denied the market their potential innovations that may have provided

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283 Article by Property Professional accessed at <https://propertyprofessional.co.za/2020/08/20/property-portal-shares-available-to-rebosa-members/> accessed 30 May 2022.

284 These include Pam Golding, Seeff, Sotheby's, Harcourts, Wakefields, Jawitz, Maxprop, De Huizenmark and others.

285 REBOSA—Oral submission from Mr Le Roux in the public hearing, 29 November 2021, page 12-14.

that counterweight or will do so in future. As for Private Property, being shielded from those innovations has allowed it to stagnate and the deep discounts it gives to the national estate agencies denied it revenue to contest the market more effectively, through larger spend on consumer acquisition and technological upgrades. The result is that it has continued to lose share. The only winners have been the national estate agencies invested through the EAPPC that received very deep discounts to list through Private Property. Those same agencies, as directors of Rebosa, have sought the support of the rest of the industry to ensure Private Property remains a leading platform, which preserves the value of their private deal.²⁸⁶ However, those agencies have not shared in the deep discounts and simply pay the standard rate which is no better and probably worse than they might get from some of the new entrants, even on a value for lead basis, given the need to plug the revenue gap from the national agencies.

217. In the midst of the Inquiry, an effort was initiated by Betterhome to acquire a controlling stake in Private Property, first through the exit of Cognition, and then through a buyout of the EAPPC shareholders. That acquisition was premised on a negotiated exit from the preferential contracts over time to enable the new majority shareholders to invest in improving the platform and its competitive position. Delays in concluding the Inquiry was cited as the reason for subsequently withdrawing that merger filing. However, the process did reveal that not only is the divestiture of the EAPPC shareholders practical and reasonable, but also likely to be essential if Private Property is to become a more effective competitor itself. However, it also revealed that the preferential contracts are intimately tied into the divestiture process itself, as an orderly exit from those

contracts is considered by Private Property as important to facilitate the investment (both in the share purchase and subsequent competitive improvements), and to allow EAPPC shareholders to realise the value of their investment.

218. For these reasons, the Inquiry finds that the following market features impede, restrict and distort competition in online property classifieds to the detriment of classified entrants, smaller estate agencies and consumers:

- 218.1. The lack of interoperability of PropCtrl, Fusion and PropData;
- 218.2. The imposition of a listing feed-in fee by Property24 and Private Property;
- 218.3. The provision of discounted multi-year contracts by Property24;
- 218.4. The EAPPC shareholding in and contracts with Private Property; and
- 218.5. The interference of Rebosa in industry commercial decisions on property classifieds.

219. In addition, the Inquiry has been afforded insights into the estate agency industry and in particular how the large national agencies operate. These agencies have collaborated in the EAPPC but also in home loan origination to further their commercial interests collectively rather than independently. For instance, a group of national agencies collectively hold a majority stake in home loan originator Ooba, and another originator Betterhome hold shares in a number of national agency franchises. In addition, they meet on the Board of Rebosa as directors. This collaboration extends well beyond the norm and raises legitimate concerns about whether these forums and commercial ventures facilitate collusion or erect barriers to entry and expansion of smaller agencies.

286 Article by Property Professional accessed at <https://propertyprofessional.co.za/2020/08/20/property-portal-shares-available-to-rebosa-members/> accessed on 30 May 2022. Submission by REBOSA dated 17 January 2022.

7.2.2. Remedial Action

220. The Provisional Report proposed remedial action that sought to directly address each of these issues, namely the provision of interoperability, removal of the R500 fee, an end to multi-year contracts, divestiture of the EAPPC and a restraint of Rebosa coordinating the commercial conduct of its members.
221. The provision of interoperability and removal of the R500 feed-in charge directly address the market feature and comprehensively resolve the issue. On interoperability the dominant platforms has proposed minimum requirements for interfacing platforms and potential cost recovery, but these will be used to limit interoperability going forward as they have been in the past. There are no such requirements in other classified markets and the dominant platforms have already profited enormously from their past conduct. On the removal of the R500 feed-in fee, Private Property proposes a phase out over 2023 and has already phased out more than 50% of the charges. Given its smaller share and profits relative to Property24 and the fact it has already started the process, this is reasonable.
222. On multi-year contracts, Property24 contracts come to an end March 2023 and should be immediately terminated and not renewed.
223. Divestiture is typically considered a more interventionist remedy and for this reason it is done on recommendation to the Tribunal in terms of section 60(2) of the Act. In this instance it is warranted. First, it is the divestiture of a minority stake of 12.78% and not the divestiture of an entire business. Second, the EAPPC shareholding is the

vehicle through which the estate agency industry has facilitating a coordinated approach to the use of property classified and partnered with Private Property. If the entrenched support for a single platform is to be addressed, then at least the vehicle for that collaboration must end and members permitted to independently form their views on property classified support. Third, whilst the initial shareholding was a defensive move after Property24 sought to buy out Private Property, the strategy has demonstrably failed due in some part to the highly favourable contracts afforded the EAPPC shareholders that has prevented them from paying market-related rates. Divestiture allows new owners of Private Property to invest in the platform without those shackles in place.

224. The Inquiry has had extensive engagements with the two leading property platforms and PropData on potential remedial action, including the practicality and potential unintended consequences, which informs the decision on appropriate remedial actions. Following engagements with Private Property and the EAPPC members, it is apparent that the issue of the EAPPC contracts is now linked to the divestiture. The EAPPC members' willingness to exit Private Property depends on the length with which they get to enjoy the benefits of the contracts. For Private Property, the willingness for shareholders to fund the buy-back of shares depends on the support they will get from the EAPPC members in the period until they improve the platform. That in turn is linked to the contracts and the benefits enjoyed by EAPPC members.
225. Rebosa has on the basis of the engagements with the Inquiry, informed its members that

it withdraws its endorsement of Private Property²⁸⁷ and is in the process of removing references to its previous endorsement from its website in line with the Provisional Report remedial actions.²⁸⁸ The Inquiry is satisfied that these actions take care of the findings in respect of Rebosa.

226. The decision of the Inquiry is that the following remedial actions are required as specified in the Property24, Private Property, PropData and Rebosa Remedial Actions in Annexure 10:

226.1. Within 12 months, PropCtrl, Fusion and PropData are required to provide interoperability with third party property classifieds via an API on request by client agencies for no fee;

226.2. Property24 must immediately cease to charge a fee for an incoming listing from a third-party syndication software provider or another property classifieds platform, and Private Property to phase such fees out by the end of 2023;

226.3. Property24 to immediately terminate all multi-year subscription packages.

227. The Inquiry recommends the divestiture of the EAPPC from Private Property. The Commission must bring an application to the Tribunal to issue a divestiture order in terms of section 60(2)(c). The issue of the preferential contracts for EAPPC shareholders must be dealt with in the context of the divestiture proceedings. The recommendation is that the application to the Tribunal is suspended for at least a year whilst the voluntary divestiture processes that are already underway are given time to take effect. If

these are abandoned and no other voluntary divestiture processes are undertaken, then the application to the Tribunal may proceed.

228. The remedial action in paragraph 226.1 provides for interoperability to directly address the finding that a lack of interoperability hinders competition from smaller classified platforms. The remedial action in paragraph 226.2 similarly directly addresses the finding that the R500 fee impedes competition for syndication software and classified platforms. The remedial actions in paragraph 226.3 aim to remove the lock-in effect and price discrimination inherent in the multi-year contracts of Property24. The recommendation in paragraph 227 seeks to remove overt estate agent industry support for Private Property as the preferred online property classified platform to address the finding that this support has impeded competition from other third party platforms and has failed to provide the basis for its own competitiveness against Property24.

7.3. Business User Competition

7.3.1. Findings

229. The leading platforms in both property and automotive classifieds exercise extensive price discrimination based on the volume of listings that an agency or dealer brings, both at a group and at an office level.²⁸⁹ This discrimination is reflected in the standard rate card, but the largest national agencies and dealers have bespoke deals that discount deeper than the already discounted high volume fee on the rate card.²⁹⁰ Those discounts are c.[70-80]% in the case of EAPPC members on Private Property, or [20-40]%

287 See the April 2023 newsletter (<https://www.rebosa.co.za/rebosa-3-april-2023-report/>) where it is stated "Some years ago, Rebosa endorsed Private Property as the portal of choice for estate agents and recommended members to support Private Property, albeit not exclusively. It is of the opinion of the Online Intermediation Platforms Market Inquiry of the Competition Commission that this endorsement favoured Private Property to the detriment of other portals and insisted on Rebosa withdrawing this endorsement, which we hereby do."

288 Rebosa letter to the Inquiry, dated 19 June 2023.

289 Submission by Property24 dated 10 September 2021. Private Property presentation in the public hearings, 16 November 2021. Submission by AutoTrader dated 10 September 2021. Submission by Cars.co.za dated 20 September 2021.

290 Submission by AutoTrader dated 10 September 2021. Submission by Cars.co.za dated 20 September 2021.

for the other leading platforms. The extent of discrimination is not uniform across the different classified platforms, itself indicative that the more extreme discrimination is unlikely to be justified.

230. As noted in the Provisional Report, these differences are not based on cost.²⁹¹ Whilst there were some throw away comments that it is more costly to serve lots of little business users compared to dealing with one large group, this was not seriously pursued nor was there any attempt to put up evidence to that effect by all platforms other than Cars.co.za.²⁹² Cars.co.za provided a cost model for all its packages and following criticism around the assumptions used, provided a revised cost model for the flexi package only focusing on direct cost items.²⁹³ Whilst the Inquiry considers the exercise completely driven by the assumptions, and under more realistic assumptions the cost differences almost disappear, what was interesting is that even on the Cars.co.za model the differences in prices cannot be justified by the differences in costs. Calculated cost differences were far smaller than price differences, the reason being that calculated margins were much higher on lower volume packages relative to high volume packages. The calculated flexi package costs were highly sensitive to vehicle listing number assumptions and could be lower cost relative to other packages or higher cost. This exercise and the lack of a cost defence by others indicates that even where there may be some difference in costs, it is likely to be marginal and not the main explanation for the differences in fees. Moreover, if this is assessed against the chapter 2 contraventions, much higher margins for the small volume packages is arguably evidence

of an excessive pricing contravention and cost differences would not factor in any defence to price discrimination against SMEs and HDPs in terms of s9(1)(a)(ii).

231. The other leading platforms don't claim cost differences but rather claim that the difference is based on the value provided and that larger agents or dealers bring more listings and hence provide more value to the platform.²⁹⁴ Even if the Inquiry were to accept this rationale, the primary difficulty for the platforms is explaining why this justifies price differentials in excess of 300% on rate card, and even greater if the bespoke pricing to national dealer groups and agencies is included. None have attempted to do so, and the differences in the level of discrimination suggest that there is no objective value-based pricing model at play. Rather it appears to be relative bargaining power that drives price differences. Collectively the small agents and dealers contribute a substantial proportion of the listings but the fact they are dispersed over many individual businesses, means each one lacks bargaining power. The lack of bargaining power is not just about size but also a product of their high level of dependency with few alternatives. As a result, the classified platforms can extract much higher fees from the smaller agents and dealers. These fees are designed to support excessive levels of profits rather than costs and value. Both Autotrader and Cars.co.za are highly profitable²⁹⁵, whereas Property24 is exceptionally profitable.²⁹⁶ Private Property less so, but this is in part a product of the steep discounts to the EAPPC members, as they still have a steep level of discrimination across their fee categories.²⁹⁷ In short, the discrimination aims to profit platforms at the expense of SMEs and HDPs.

291 See section 332 on page 135 of the PR.

292 Cars.co.za—oral submission from Mr McIlroy in the public hearing, 17 November 2021, page 59.

293 Submission by Cars.co.za dated 08 September 2022.

294 Property24—oral submission from Mr JP Farinha in the public hearing, 16 November 2021, page 70.

295 Submission by AutoTrader dated 21 January 2022. Submission by Cars.co.za dated 21 January 2022.

296 Submission by Property24 dated 21 January 2022.

297 Submission by Private Property dated 26 January 2022.

Once more, if assessed under chapter 2 of the Act, these outcomes would likely result in contraventions of s8(3) and s9(1)(a)(ii).

232. Naturally those agencies/dealers with a low volume of listings will be SMEs although the precise cut-off is difficult to determine. Cars.co.za estimates that dealers with around 30-35 vehicles in stock at any one time and sales of around 250 vehicles per annum would probably be classified as SMEs based on the turnover of vehicle sales.²⁹⁸ For estate agents, those with fewer than 30 listings account for the long tail of c.40% of agencies albeit that those with more listings than this may technically fall within the SME category as their revenue reflects commissions only and not the price of the property. Moreover, both these measures depend on assumptions around the average price of the vehicle or home that are likely to vary.

233. Analysis of the actual pricing across the different classified platforms demonstrates that in Rands per listing there is an exponential relationship with listing volumes, with very high fees to the smallest agents/dealers, a sharp drop off and then a gradual levelling off as one gets amongst the much larger agents/dealers. For instance, on Property24 the average agent in the 1-10 lead category will pay c.R50 more per listing and those in the 50-150 category, who in turn only pay c.R25 more than those in the categories over 1000 listings.²⁹⁹ For Autotrader similarly, the entry category of 1-20 pays c.R280 more per listing to the next category of 20-60 listings, which in turn pays only R50 more per listing to the category after that (60-120).³⁰⁰ Cars.

co.za has less discrimination but there is a c. R130 per listing differential from the Flexi (5-15 vehicles) to the Blue package (40 vehicles) with only a R60 difference to the Red package (100 vehicles).³⁰¹ Private Property has a flat rate per office which means that as listings increase there will be an exponential decline initially, but it has introduced a KickStarter package that brings the entry level price down considerably for those with 20 listings or less.³⁰²

234. The effect of the discrimination on smaller agents and dealers, including HDPs, is self-evident. Higher prices mean that the marketing budget does not go as far, resulting in SMEs foregoing additional marketing activities that the national agencies and dealers can engage in, and which result in lower relative visibility to the consumer. This takes various forms. For instance, some small agents/dealers list only on one platform due to the higher cost unlike the national agencies, which denies them exposure to a portion of leads, or do not list on platforms at all.³⁰³ For instance, following the public hearings Cars.co.za reduced the price of its entry package by 25% and saw the number of dealers on the package increase threefold, indicative that the higher fees were excluding those dealers from the marketing opportunities of an automotive platform.³⁰⁴ Another form is that smaller dealers/agents may forego the use of value-added services that provide visibility and brand-building benefits on the classified platforms. Evidence from both property and automotive classifieds confirms that smaller agents/dealers buy into value-

298 Submission by Cars.co.za dated 20 September 2021.

299 Submission by Property24 dated 10 September 2021. Also see Table 12 and Table 18 on page 111- 117 of the PR (Chapter 5- Online Classifieds Platforms).

300 Submission by AutoTrader dated 10 September 2021. Also see Table 25 and Table 27 on page 125-127 of the PR (Chapter 5- Online Classifieds Platforms).

301 Submission by Cars.co.za dated 20 September 2021.

302 Private Property presentation in the public hearings, 16 November 2021. Also see Table 23 and Table 24 on page 123 and 125 of the PR (Chapter 5- Online Classifieds Platforms).

303 0800Properties—oral submission from Mr Manning in the public hearing, 16 November 2021, page 13- 15.

304 Submission by Cars.co.za dated 08 September 2022.

added services less than national agencies/dealers.³⁰⁵ On automotive classifieds, [35-40]% of dealers with 20 or less listings use premium listings and [25-30]% use featured listings, relative to [45-50]% and [40-45]% respectively for dealers with more than 120 listings. On property classifieds, [10-20]% of agencies with under 30 listings make use of promoted listings compared to more than 60% of agencies with more than 500 listings. As a result, agencies with under 30 listings account for less than 10% of promoted listings despite accounting for c.40% of agencies, whereas those agencies with more than 500 listings account for more than 35% of promoted listings but only account for c.15% of agencies.

235. For new entrants, the high and discriminatory fees pose a barrier to entry as it raises costs during the establishment phase of the business where it needs to market itself more intensely to build visibility and brand equity, whilst lacking the cash flow to fund the high and discriminatory fees of the classified platforms. This will impede competition and participation by HDPs in particular, whose lack of historic wealth accumulation reduces the extent of financial resources at startup. Moreover, the classified platform business model and fee levels are tailored to the more established agencies / dealers operating in historically white middle class areas with higher property and car prices. For instance, whilst properties over R1.2m make up only 20% of the national housing stock, they represent over 80% of the properties listed on the property classifieds. HDP agencies / dealers operating in HDP communities with lower property or vehicle prices will not find the platforms as economic for marketing and their low representation on these platforms is indicative of that.

236. Even mid-sized agencies / dealers will

be disadvantaged relative to the national agencies / dealer groups that achieve the best rates and can market more extensively, including the use of value-added services on classified platforms and on general search for their brands. However, mid-sized agencies/dealers are more established and better resourced if they have reached that scale, and therefore the disadvantage is likely to be more limited. In addition, national agencies and dealers often have individual offices or dealerships that fall into this mid-sized category that may pay less than independent mid-sized offices but which are paying more than the high volume category. The evidence on the use of value-added services still shows a gap in usage between the mid-sized agencies/dealers and the largest, albeit that the gap is smaller than what the SMEs face. For instance, in automotive of the dealers in the category below those with 120+ listings, c.5% fewer use premium listings and c.10% fewer use featured listing relative to those with 120+ listings. In property, of the agencies in the 150-500 listings, c.15% fewer use promoted listings relative to those with 500+ listings but they account for roughly the same share of total promoted listings.

237. For these reasons, the Inquiry finds that the discrimination on listing and promotion fees impede and distort competition in online classifieds, particularly to the detriment of SME and HDP agencies and dealers. The Inquiry finds that HDP agencies and dealers face further impediments to effective participation and competition on the platforms.

7.3.2. Remedial Actions

238. The Provisional Report identified the remedial action of introducing a standardised rate card that complied with a maximum cap on fee differentiation between the average low and high volume user for both listing and

³⁰⁵ Submission by Property24 dated 10 September 2021. Submission by AutoTrader dated 10 September 2021. Also see Table 34 and Table 35 on page 133-134 of the PR. (Chapter 5-Online Classifieds Platforms)

promotional fees. The maximum cap was not specified but left to submissions.

239. The Inquiry has had fruitful engagements with affected platforms since the publication of the draft report around potential remedial action. This has enabled the Inquiry to set out some principles for remedial action as follows:

239.1. First, a primary focus must be on the SME/HDP category as there is excessive pricing and discrimination against lower volume agencies/dealers with clear evidence of material harm to both platform access and the use of value-added products, impeding marketing efforts and visibility, which in turn impedes competition. The Inquiry will also work within the current rate band structure of the classified platforms to fulfil the practical and reasonable aspects of remedies. The Inquiry will use agencies with 30 or fewer leads/listings of for sale properties and 10 or fewer listings for rental properties as the benchmark for SMEs on property classified platforms. For automotive, the Inquiry will use 20 listings. Pricing to SME agencies/dealers on average should transition to being no more than 10% higher than the average for all other agencies/dealers. Additional support measures are required for HDPs given the other impediments faced as a result of the market features and the historic exclusion.

239.2. Second, the Inquiry has given scope for leading platforms to propose meaningful HDP programmes that they believe will best address the impediments to competition and participation on the platforms. This naturally results in some differentiation across platforms, but also allows HDP agents/dealers to benefit from multiple platform support simultaneously. This is also subject to periodic review to ensure it remains relevant and effective.

239.3. Third, the position of Private Property is materially different to Property24

whereas Cars.co.za and Autotrader are more similarly placed. Private Property is differently placed to Property24 insofar as it holds a much smaller share and is far less profitable, which means there is less scope for bolder revenue-impacting remedial action currently. Private Property is also subject to additional remedial action around termination of EAPPC member contracts, that address lock-in but will also reduce discrimination. Private Property already offers a Kickstarter package which reduces the costs of small estate agents with 20 listings or less. For these reasons, no further remedial actions are warranted against Private Property.

240. The Inquiry has had extensive engagements with the leading property and automotive platforms on potential remedial action, including the practicality and potential unintended consequences, which informs the decision on appropriate remedial actions. This has enabled the Inquiry to determine those remedial actions specific to each classified platform in line with the principles above. The Inquiry notes that whilst the remedial actions aim to place a maximum cap of 10% on price differentiation to SMEs, there is definitely scope for the platforms concerned to reduce this further and eliminate any differentiation. Moreover, whilst the Inquiry has accepted the cap of 10% as a practical solution in this particular instance for an initial four year period, this does not in any way create a safe harbour for that level of differentiation going forward.

241. The decision of the Inquiry is that the following remedial actions are required as specified in the Property24, Private Property, Autotrader and Cars.co.za Remedial Actions in Annexure 10:

241.1. Within 6 months, Property24 to introduce a Small Independent Business Package for business users with 30 leads or less which

must be priced on average at a per lead level no higher than 15% above the average of all other business users with more than 30 listings, including value-added services and branded listings. A Small Independent Rental Package must be put in place for rental-only agencies with 10 or fewer listings on the same terms. This difference for both must reduce further to 10% within 18 months.

- 241.2. Within 6 months, Autotrader to introduce a Small Independent Business Package for business users with 20 listings or less which must be priced on average at a per lead or listing level within 15% of the average of all other business users with more than 20 listings, including value-added services and branded/Stand-out listings. This difference must reduce further to 10% within 18 months.
- 241.3. Within 6 months, Cars.co.za to price the Flexi and Dynamite packages at a weighted average cost per listing that is no more than 15% higher than the weighted average for the Blue, Red and Green Packages, reducing to 10% within 18 months.
- 241.4. Property24, Autotrader and Cars.co.za to introduce HDP programmes within three months with at a minimum the following features, reviewable in three years:
 - 241.4.1. Programmes apply to HDP agencies that are not franchisees of national estate agencies or dealer groups. Further restrictions may apply to individual platform programmes.
 - 241.4.2. The HDP programmes must be marketed to ensure awareness amongst existing platform clients and agencies/dealers that do not make use of the platforms currently.
 - 241.4.3. Property24: An HDP programme that includes at no cost personalised training on getting started on Property24, ongoing virtual product training, Site Creator website and mobi-site including design and support, branded listings, 5 each of premium, featured and boosted listing value-added services per month,

Data Bronze level package and access to the market intelligence report. In addition 12 months free standard listing subscription for HDP agencies that do not currently list on Property24.

- 241.4.4. Autotrader: An HDP programme that includes at no cost personalised documented workshops and consultations with experts within Autotrader, invitation to all DMC events, assistance from Autotrader with the initial upload and photography of cars to Autotrader. In addition, a 50% discount on the Instant Offer, free standard listings for 12 months and the option to upgrade to premium at the cost of a standard listing subscription for all HDP dealers new to Autotrader, and for existing HDP dealers on Autotrader a free upgrade to Premium and/or Featured Dealer.
 - 241.4.5. Cars.co.za: An HDP programme for dealers that would fall within the Flexi, Dynamite and Blue package categories. The HDP programme to include free enrolment in the Cars.co.za dealership training programme, a mentorship and training programme, guidance on creating a professional 'About Us' page, an upgrade to the premium package at no additional cost for 12 months, a rebate amounting to two months of the users base package at the end of 12 months for use on any Cars.co.za products for a period of three years.
242. The remedial actions in paragraphs 241.1 to 241.3 provide for improved pricing to SMEs on the different leading online classified platforms to address the findings that current discrimination impedes competition from SMEs on classified platforms. The improvements will enable SMEs to compete more on an equal footing for visibility and leads. The remedial actions in paragraph 241.4 seek to offset some of the disadvantages faced by HDP agents and dealers in achieving visibility and leads on the online classified platforms and in so

doing address the finding that HDP agents and dealers face greater impediments to participation and competition on these platforms.

243. The provisional estimates of the Inquiry is that these remedial actions will have a material benefit for SMEs and HDPs. It is expected that the benefits will accrue to up to 20% of the current customers of the classified platforms, and for these customers the monthly fees will fall by between 40-60% across the different platforms for SMEs. The reductions in monthly fees is expected to make the use of online classifieds more affordable to SMEs and new entrants, expanding access and use. For instance, one platform's reduction of the entry level package by 25% during the inquiry resulted in the customer numbers trebling, highlighting the importance of affordability for access.

[8. Food Delivery]

244. Restaurant food delivery, much like eCommerce, was provided with a huge boost during the Covid-19 pandemic and was essential for many restaurants facing lockdown restrictions. The order numbers have been sustained post-Covid even if growth rates have slowed, demonstrating the continued appetite of consumers for the convenience of delivery. This is partly the result of geographic expansion by national delivery platforms during Covid and that now reach into more metropolitan suburbs and secondary cities.³⁰⁶ Covid also presented opportunities for local delivery services to emerge in areas not serviced by the national delivery platforms, such as townships and small towns, in response to the needs of both restaurants and consumers. These are typically resident entrepreneurs without substantial capital backing.³⁰⁷ The market growth also saw the expansion of Bolt Food out of Cape Town to other metropolises.³⁰⁸ Food delivery is now well established across South Africa. Whilst the leading food delivery platforms do offer grocery delivery as an additional service, this market is dominated by the national grocery retail chains with their own delivery service and has not been the subject of detailed inquiry.

8.1. Market Context

245. Market research by food delivery platforms provides useful insights into the different consumer journeys that drive their choice of when to order food delivery and when they may opt for other restaurant or home cooking options. Takeaways, which might be seen as the closest alternative to food delivery, is only convenient for consumers where they can pick it up on the way home or whilst at a shopping centre. Once a consumer is home or the office then it is no longer convenient and this is what distinguishes food delivery from takeaways. Food delivery provides consumers with the convenience of ordering from their couch or office as it saves time and hassle where consumers are time-poor or tired. Delivery enables them to access food quickly and easily compared to the alternatives, even home cooking.³⁰⁹ Restaurants see delivery as a distinct consumer channel to takeaways and is offered to secure incremental sales rather than displace existing takeaway or dine-out orders.³¹⁰ This is also the prime selling point of delivery platforms, namely that they will bring incremental orders³¹¹ and not cannibalise existing orders. This confirms that they see it as a distinct consumer journey where the lack of a delivery option will not necessarily result in a takeaway being ordered instead.

306 See Uber Eats (Mr Molewa) oral submissions in the public hearing, 11 November 2021 and Uber Eats public hearing presentation dated 11 November 2021 and Mr D Food (Mr Reid) oral submissions in the public hearing, 12 November 2021 and Mr D Food public hearing presentation, 12 November 2021.

307 For instance, see WeDash (Mr Zondi) oral submissions in the public hearing, 12 November 2021.

308 See Bolt Food (Mr Townsend-Rose) oral submissions in the public hearing, 18 November 2021.

309 See various market research from food delivery platforms on customer behaviour and journey. [REDACTED]

310 For instance, see the Inquiry's Business User Survey (restaurants reasons for using food delivery platform). Also submissions from several restaurant chains confirmed that they use food delivery platform to secure incremental sales - e.g., see Famous Brand (Mr Boardman) oral submissions in the public hearing, 15 November 2021 on why the restaurant chain uses national food delivery platforms.

311 See national food delivery platforms presentations to potential business users (i.e., restaurants). [REDACTED]

[REDACTED] One of the main selling point of delivery platforms to restaurants is that they enable restaurants to access more and broader customer base and achieve incremental sale.

246. Most restaurants, particularly independent restaurants, do not have their own delivery service and are therefore entirely dependent on food delivery platforms for that service. This is confirmed by market observations and the Inquiry survey. Not only is operating a delivery service outside the core operations of a restaurant, but it is also not economic for most given order volumes and the inability to easily accommodate peak ordering periods without over-staffing for non-peak. This is especially in comparison to a delivery platform which can benefit from scale and scope in delivery orders across a wide range of restaurants in a particular catchment area.³¹²

247. Those same features also distinguish food delivery platforms from restaurants that do have their own delivery service. A number of the restaurant chains do have their own delivery but this is not universal across all their restaurant locations, and achieving high levels of service is a challenge. For this reason, some have even outsourced their own delivery service through their website to the platforms themselves.³¹³ Moreover, consumers value the variety and choice that a food delivery platform offers, as well as the speed and consistency of service, in comparison to restaurants own delivery.³¹⁴ Food delivery platforms can and do invest in better user interfaces, backend technology and in marketing, including eater promotions that drive trial and frequency of use. As a

result of the large number of consumers and orders generated on the food delivery platforms, even restaurants with their own delivery service list on the platforms and are dependent on them for delivery services. This is confirmed by submissions from the large restaurant chains.³¹⁵ Moreover, their concerns around the escalation of delivery commissions charged by the platforms demonstrates that own delivery is still unable to place constraints on commission fees.³¹⁶

248. Whilst the largest food delivery platforms now also offer grocery delivery, it does not necessarily follow that grocery delivery platforms are potential challengers in restaurant delivery simply because of delivery capabilities. The dominant players in grocery are the national grocery chains that have no interest in restaurant delivery. For independent grocery platforms, restaurant delivery requires contracting with a wide range of restaurants, which is challenging, and huge investments in marketing and promotion to compete on a national scale, which has kept these platforms out of restaurant delivery. For similar specialisation and focus reasons, the food delivery platforms have not scaled in grocery in the same way as their restaurant delivery success.

249. The internal documents of the food delivery platforms clearly demonstrate that they view each other as their closest competitors, as

312 See Provisional Report (Food Delivery, Chapter 6), paragraph 55 - 57. The Provisional Report detailed (i) why some independent restaurants do not have delivery services, (ii) challenges faced by independent restaurants in operating food delivery services and (iii) benefits derived by independent restaurants in using food delivery platforms.

313 For instance, some national restaurant chain [redacted] own online channel is dependent on online food delivery platforms' [redacted] delivery and technology services. [redacted]. These factors explain some of the reasons it would be difficult for [redacted] this restaurant chain to operate the online sale channel without intermediate delivery platforms.

314 See CMA's Final Report on why branded food chains should not be included in the same relevant market as online food delivery platforms such as Uber Eats [Just Eat/Hungryhouse, Final Report, 16 November 2017, paragraph 4.27].

315 See Provisional Report (Food Delivery, Chapter 6), section 1.41. assesses the extent of restaurants dependency on food delivery platforms. The section relies on, inter alia, submissions by several restaurant chains. [redacted]

316 Some restaurant chains raised concerns around escalation of commission fees. These include [redacted]

they primarily reference each other regarding competitive and performance measures.³¹⁷ They also track and respond to each other's promotional effort and changes in customer delivery fees. The determination of food delivery platforms as a market distinct from takeaways and restaurant own delivery has been confirmed in several other jurisdictions for similar reasons.³¹⁸ The Inquiry therefore concludes on a restaurant food delivery platform market.

8.2. Platform Competition

250. UberEats and Mr D Food are the leading platforms in restaurant food delivery with an estimated share of c.[80-90]%, with each one passing the market share threshold for presumed dominance.³¹⁹ These two have all the national restaurant chains listed along with thousands of independent restaurants, enabling them to offer consumers a wide choice in any local area and benefit from network effects.³²⁰ These two primarily consider each other as their primary constraint and competitive threat. Their business model is a classic national intermediation platform one of investing vast amounts of capital on consumer acquisition to build scale quickly. Consumer acquisition involves extensive eater promotions and charging consumers below cost on the delivery service, resulting

in extensive losses for a sustained period. Below cost pricing brings in more consumers and orders, which builds dependency by the restaurants whilst driving out local delivery alternatives that lack the capital to engage in a promotions war. The Inquiry was presented with numerous local platforms that have simply closed once the national platforms entered their areas.³²¹

251. Bolt Food is the only other 'national' food delivery company operating on a business model similar to that of Mr D Food and UberEats. Bolt is not a leading platform in South Africa and has struggled to get the national restaurant chains to support it, limiting its ability to generate network effects that may propel it to grow sustainably with a large customer base. It also only operates in Cape Town and Johannesburg.³²² However, it is part of a global company that has shown its ability and willingness to invest substantial capital in building the business domestically through heavy losses.³²³ Bolt Food also benefits from the brand awareness and customer marketing database built around the e-hailing business, along with opportunities to cross-sell or target promotions. As a result, Bolt Food is a company capable of impacting on competition but only in respect of local delivery platforms that lack the same advantages that it brings.

317 For instance, see internal documents [REDACTED]

318 See CMA Reports in the United Kingdom, namely: (i) Just Eat/Hungryhouse, Final Report, 16 November 2017 and (ii) Amazon/ Deliveroo Final Report, 4 August 2020.

319 See Provisional Report (Food Delivery, Chapter 6), Table 3 provides market share estimates for Uber Eats and Mr D Food - both platforms market share are generally close to each other in excess of 45%. [REDACTED]

320 See Provisional Report (Food Delivery, Chapter 6), Table 2 which provides the total number of restaurants listed on national platforms. The information and actual figures are also contained in (i) Uber Eats submissions dated 30 June 2021 and (ii) Takealot [Mr D Food] submissions dated 3 August 2021.

321 See Provisional Report (Food Delivery, Chapter 6), section 2.1.3. dealing with platforms that exited the market. Also see Dryvar submissions dated 04 October 2021 and Dryvar (Ms Naidoo) oral submissions in the public hearing, 22 November 2021.

322 See Bolt Food (Mr Townsend-Rose) oral submissions in the public hearing, 18 November 2021 and Bolt Food submissions dated 6 September 2022.

323 See Provisional Report (Food Delivery, Chapter 6), section 3.1.6. dealing with profitability of platforms including Bolt Food. [REDACTED]

252. The remaining food delivery platforms are predominately localised delivery services established by local entrepreneurs to service their communities, and the survivors are generally those outside of areas that the national platforms operate. They lack the capital backing and ability to offer a similar promotion-led model to the national platforms.³²⁴ Local delivery is typically as cost-efficient as the large platforms for the actual delivery service and can match service levels as these are determined by scale and scope at a local level. This means they are legitimate alternative business models to the national one and provide opportunities for competition and inclusion of a broader set of entrepreneurs. What local delivery lacks is the scale in marketing and brand building at a national level, and of course the capital to survive if competing head-to-head.³²⁵

8.2.1. Findings

253. Food delivery, as with all intermediation services, requires platforms to secure a wide range of restaurants to be an attractive proposition to consumers. The restaurant industry is characterized by a multitude of national and international fast food and dine-in chains that are often franchised but with some corporate-owned. The two leading national delivery services have used their first-mover advantage and leading status to contract these chains on a national basis, offering them both national coverage and access to a substantial number of orders on their platforms. The order numbers and established brands make it attractive for the large number of independent restaurants too.

254. Bolt Food and the array of local delivery services that were established during Covid have been relatively successful in signing up independent restaurants in areas where they operate, but far less so with the restaurant chains even where they are individual franchisees. Most, but not all, restaurant chains prohibit their franchisees from contracting with local or national delivery services that are not approved by the head office.³²⁶ Local delivery platforms most often cannot even get a response from head office, and if they do it is often a quick dismissal based on not meeting criteria, simply not interested or that they are already contracted with the national leading platforms.³²⁷ Some chains state that they have done some assessments based on certain criteria, but criteria are said to include a national presence.³²⁸ This is evidently exclusionary of purely local platforms by its very nature, but also delivery platforms that aim to build a national presence one city at a time, just like the leading platforms did. They cannot do that without support from restaurant chains so it's a catch-22 situation.

255. The stance adopted by the restaurant chains is in part the result of the two leading platforms incentivising them to bring in more of their restaurants and to drive order volumes through their platforms. This is achieved through commission negotiations, where the delivery platforms reward more restaurants and volumes with lower commissions on orders. This extends to expansion plans and committing those new corporate restaurants

324 For instance, see (i) WeDash (Mr Zondi) oral submissions in the public hearing, 12 November 2021 and (ii) Paarl Eats (Mr Petersen & Ms Erasmus) oral submissions in the public hearings, 22 November 2021.

325 See (i) WeDash (Mr Zondi) oral submissions in the public hearing, 12 November 2021 and Dryvar (Ms Naidoo) oral submissions in the public hearing, 22 November 2021.

326 See submissions from various platforms (i) Dryvar (Ms Naidoo) oral submissions in the public hearing, 22 November 2021, (ii) WeDash (Mr Zondi) oral submissions in the public hearing, 12 November 2021 and (iii) Paarl Eats (Mr Petersen & Ms Erasmus) oral submissions in the public hearings, 22 November 2021. Also see submissions from various restaurant chains

327 [REDACTED]
Also see the Provisional Report (Chapter 6, Food Delivery) – page 73, paragraph 183 which state the smaller platforms evidence (e.g., WeDash, Paarl Eats, Dryvar) on the reasons given by restaurant chains for lack of contracting and/or refusal to onboard.

328 See submissions from one of the restaurant chains [REDACTED].

to list on the delivery platform.³²⁹ However, the Inquiry did not find evidence of specific growth targets being included in contracts and the contracts typically state explicitly that the restaurant chain cannot bind its own franchisees to join. Agreements on marketing commitments are another means to drive volume as chains commit to promotions on the platform and promoting the partnership with the delivery platform in exchange for a lower commission.³³⁰ Spreading orders over more delivery services works counter to the private incentives to get a better deal out of the established leading platforms, hence their reluctance to contract.

256. One platform estimates that over 1000 restaurant stores in areas such as Cape Town and Johannesburg have refused to onboard to their platform.³³¹ Where these delivery platforms compete in the same catchment areas, the limit to restaurant choice is a material disadvantage when competing with platforms that have that choice (e.g., leading platforms), especially if it involves most of the national chains. Consumers would see little reason to use the reduced choice platform unless there were large promotions, which is precisely what this platform has tried³³², but this does not build loyalty. However, this is even the case where the national food delivery services do not operate and local delivery services are the only delivery service in an area. This is still an impediment to platform development as it reduces scale in order volumes³³³ that enables greater

levels of cost and service efficiency and stifles these platforms from strengthening their position to face off against the national delivery platforms when they enter.

257. Whilst the chains may be exercising their own choice for corporate-owned restaurants, with franchisees they are denying them that choice through placing restrictions on which delivery service they may use, and requiring them to use those leading platforms selected by the head office. Aside from the fact that this may be driven to benefit lower commissions for its own corporate stores, the arguments for doing so are unpersuasive as demonstrated by the fact that some global and national chains do not place such restrictions.³³⁴ Franchisees are aligned in their interest to protect the brand they have invested in and to maximise sales and therefore are unlikely to continue using a poor delivery service. Those chains that do permit franchisee choice can still manage menu and pricing strategy alignment for delivery through notification and guidance.³³⁵ Whilst no single restaurant chain may be determinative of the success of a delivery platform, the problem arises where there is a parallel network of restrictions from many restaurant chains that collectively have a substantial impediment to competition from local and smaller national delivery services. Moreover, the conduct perpetuates exclusion from the economy by HDPs as most of the local delivery platforms are HDP entrepreneurs looking to provide a service to their communities which not been

329 See Provisional Report (Food Delivery, Chapter 6), paragraph 171 and 172 dealing with factors considered by national food delivery platforms during contract negotiations with restaurants. The analysis are based on (i) Uber Eats submissions dated 11 December 2020, (ii) Mr D Food submissions dated 25 November 2020.

330 See [REDACTED]

331 [REDACTED]

332 [REDACTED]

333 See WeDash (Mr Zondi) oral submissions in the public hearing, 12 November 2021.

334 Burger King and Nando's allow franchisees to contract with local delivery platforms. This was confirmed during the public hearing by local delivery platforms.

335 See submissions from restaurant chains [REDACTED]

prioritised by the national delivery platforms. The practice also denies those communities the choice of food delivery.

258. Local delivery platforms do operate a different model to the national platforms due to their lack of capital. They charge lower commission fees to restaurants as they do not invest significantly in promotions and tend to charge full delivery fees to customers. They also do not discriminate to the same extent against independent restaurants to cross-subsidise the chains.³³⁶ This model provides the basis for potentially competing through lower everyday menu prices on their platforms relative to the national delivery platforms due to the lower commission, even if they cannot match the promotions. Alternatively, even if menu pricing is the same, to attract consumers which prefer to support the platform sharing more with local independent restaurants. One impediment to competition on this basis is the lack of transparency on the commissions charged and the surcharge on the in-restaurant menu. Whilst the menu surcharge can be calculated with some effort, this is unlikely to be done by most consumers as confirmed by the concern that the proposed remedy calling for transparency will reduce order volumes.

259. Another impediment to this is price parity clauses. Price parity was a feature of UberEats historically but has been phased out since late 2019. The Inquiry is assured that this clause does not feature in any existing contract³³⁷, but is not satisfied that restaurants necessarily understand that there is no

longer such an obligation. UberEats has not made any communication to this effect and simply argues that tangential press reports and the public hearings means restaurants are aware.³³⁸ However, this has focused mostly on differential pricing on the platform compared to the restaurant in-store and where there is probably general awareness. However, an end to the requirement to price the same across platforms does not have the same level of awareness and seems to be a common practice which local delivery platforms face.³³⁹ The fierce resistance to communicating the end clearly to restaurants simply confirms this is the case. Bolt Food has a price parity clause³⁴⁰ which we may be inclined to ignore if it was the only competitor to the leading platforms as it may ensure it is not worse off on menu pricing. However, this has implications for local delivery platforms too which may benefit from lower pricing in exchange for lower commissions given an alternative business model that does not fund the consumer.

260. The final impediment is simply one of the ingrained practices by restaurants to price uniformly across the different delivery platforms. This is no doubt a product of the history of price parity in the industry and similar commissions across the two leading platforms given the same business model. Restaurant chains argue that it is good to have a uniform menu approach to delivery, in terms of items and pricing. However, the restaurant chains themselves distinguish pricing on their own delivery to that of the leading platforms which presumably is due to

336 See public hearing oral submissions of various local delivery platforms explaining their business model with respect to commission fees, promotions, etc. This includes (i) WeDash (Mr Zondi) oral submissions, 12 November 2021, (ii) Paarl Eats (Mr Petersen & Ms Erasmus) oral submissions, 22 November 2021 and (iii) Dryvar (Ms Naidoo) oral submissions, 22 November 2021.

337 See Uber Eats submissions dated 10 September 2022.

338 See Uber Eats submissions dated 10 September 2022 and Uber Eats (Ms Vundla) oral submissions in the public hearing, 11 November 2021.

339 A study analysing the impact of the removal of price parity on Booking.com in Europe found that more than half the hotels were unaware that the restriction had been removed.

340 See Bolt Food (Mr Townsend-Rose) oral submissions in the public hearing, 18 November 2021. Bolt Food initially had narrow parity which has on occasions been amended to wide parity.

the lower costs of their own platform and the desire to drive traffic towards it.³⁴¹ The same should be the case for delivery platforms that are lower cost to the restaurants. This probably does not happen because of the incentives to keep volumes on the leading platforms and not to upset that relationship given the current dependency. This has been found to be the case in travel and accommodation.

261. The financials of all three national food delivery companies have shown periods of below variable cost pricing through subsidising delivery charges to the consumer and engaging in substantial promotions, including restaurant funded promotions.³⁴² This has included below variable cost pricing for strategic corporate restaurant chains which, on their own version, are important drivers of new eaters. It also happens in local geographic areas where they face competitive pressure, through lower delivery fees than average and greater promotional intensity. There have also been casualties in the form of local delivery services, lacking the capital and/or alternative revenue sources, that were simply unable to compete.³⁴³ In the view of the platforms, below cost pricing is a necessary period of investment to build national scale, and more recently, responding to aggressive entry by Bolt Food. This does complicate a predation assessment and the Inquiry does not take a view on the past.

262. However, even if those arguments had merit, scale has now been built and dominant platforms have an obligation not to price below variable costs even if their competitors, desperate to build some market share, resort to this practice temporarily to overcome the other barriers they face as documented in the Provisional Report. The

concern for the Inquiry is the willingness of platforms to engage in this conduct and the effect it has on alternative business models such as local delivery going forward. On the latest financials available to the Inquiry, the leading platforms do not currently price below variable cost at an aggregate level, nor for strategic customers, but it is not possible to assess individual local areas. As the leading platforms move into townships or small towns where local entrepreneurs have established themselves outside of the shadow of their operations, these tactics will decimate local delivery if not kept in check. Local delivery options are important for competition for consumers, both on service and price, but also for commission fees and orders for the restaurants that list. Local delivery is also important for inclusion and remains a legitimate business model as costs and scale are mostly local, not national. For these reasons, such conduct needs to cease moving forward. Given that Bolt Food has shown itself to engage in the same tactics using capital resources from its global parent, it is not excluded from this finding and concern.

263. For these reasons, the Inquiry finds that leading platform incentives to restaurant chains to grow store numbers and order volumes, along with the practice restaurant chains restricting franchisee choice of food delivery platform collectively impedes competition by local food delivery and smaller national platforms. The Inquiry finds that a lack of transparency on commission fees and menu surcharges, along with price parity, further restricts competition from local and smaller national delivery platforms. The practice of consistent menu pricing by restaurants irrespective of commissions contributes to this. Whilst the Inquiry makes

341 See Annexure 6, OIPMI Food Delivery, table analysing restaurants menu pricing for national delivery platforms and restaurants menu pricing for their own platforms.

342 See Provisional Report (Food Delivery, Chapter 6), sections 3.1.6. and 3.1.7. dealing of profitability of national platforms and impact of aggressive growth strategy on profitability. The analysis are based on platforms own financial information submitted to the Inquiry.

343 See Provisional Report (Food Delivery, Chapter 6), sections 3.1.10. dealing with the impact of established platforms business model and below cost pricing on smaller platforms.

no finding on whether historical pricing below variable costs constitutes anti-competitive conduct, it does find that such conduct is likely to impede competition going forward where it occurs in geographic areas where local delivery services operate which are vulnerable to such tactics. This would include below variable cost pricing for large restaurant chains in those delivery areas and temporary periods on entry.

8.2.2. Remedial Action

264. The Provisional Report identified the remedial action of preventing leading platforms from contracting with restaurant chains in a manner that incentivises more stores and volumes, preventing restaurant chains from restricting platform choice by franchisees, removal but also communication of the removal of price parity, and end to predatory pricing and greater transparency to the consumer on the menu surcharge or commission fee charged.³⁴⁴

265. Acting on contractual incentives by delivery platforms faces challenges as the incentives are not captured in a contractual agreement, but rather enter the negotiation phase of contracting. Moreover, it may be hard to differentiate pro-competitive from anti-competitive incentives. For this reason, no direct remedial action is feasible on the delivery platforms themselves. However, were they to introduce explicit targets in future then they could be the subject of enforcement action. The measure of prohibiting restaurant chains from dictating the choice of delivery platform provides the appropriate safeguards in any event. That prohibition is also reasonable and practicable as is evident from some restaurant chains already operating on that basis. It does not force restaurants to list on small and local delivery platforms, but simply removes impediments to exercising that choice by franchisees. There has been some

improvement in access during the course of the Inquiry given the spotlight shone on this issue, but it is insufficient and may not be long-lasting if no remedial action is determined.

266. Whilst there is no longer a finding that some of UberEats contracts contain price parity clauses, the need to actively and clearly communicate their removal and the implications for pricing across platforms remains essential and is a low-cost intervention. For Bolt Food, the removal of price parity is directly related to the finding and should hold little risk of restaurants raising menu prices on its platform relative to the leading platforms, the rationale for its inclusion, given its lower commission fees. No remedy is required against Mr D Food on price parity, but any attempt to introduce it in future should result in enforcement action. The ingrained practice of pricing the same across third-party delivery platforms irrespective of commission fees should be challenged as it can result in the same outcomes as contractual restrictions. However, the Inquiry is not inclined to dictate pricing to restaurants and differentiating should be in their own interests as it entrenches the leading platforms which extract higher commissions. For this reason, a recommendation that restaurants do factor in commission fee differences in menu pricing across platforms is preferred as it seeks change through advocacy by raising awareness of the collective benefits of doing so.

267. On below cost pricing, whilst the rising cost of capital makes these tactics more costly, there have been no adequate assurances from the leading platforms that such conduct will not take place in future and one of the leading platforms continue to operate below variable costs on its strategic clients. The Inquiry considered requiring transparency of prices and costs for local

344 See paragraph 139 of the provisional summary report.

delivery areas where the leading platforms, and Bolt Food, come up against local delivery platforms is an important means to discourage such tactics in future but also enables swift action before local competitors are irreparably harmed. However, this was ultimately deemed impractical and instead the Inquiry recommends that local platforms concerned that they are the subject of such potential conduct rather lay a complaint with the Commission which should investigate speedily, and potentially apply for interim relief.

268. The proposed remedial actions on transparency have generated considerable concerns over unintended consequences. The concern with transparency on commission fees is that this may remove negotiation scope for the restaurants themselves and facilitate an outcome where all platforms charge a restaurant the same, highest commission. The concern with transparency on the menu surcharge is that restaurants have no incentive to accurately report this to consumers as it may reduce their order volumes, and that platforms are unable to confirm the accuracy easily. Even local delivery platforms were concerned that general consumer awareness of menu surcharges would reduce order volumes. The Inquiry accepts that the proposed remedies do hold risks and has sought an alternative that seeks to inform consumers that a commission is charged and menu prices may not be the same, without revealing the extent of each. By raising awareness with consumers this may motivate more to check what that surcharge is.

269. The Inquiry has had engagements with the two leading food delivery platforms and Bolt Food on potential remedial action, including the practicality and potential unintended consequences, which informs the decision on appropriate remedial actions. The Inquiry has also engaged with many restaurant chains on that remedial action, *albeit* that certain chains did not respond to the Inquiry's provisional

report or further requests for submissions. Uber Eats has made undertakings but the Inquiry is compelled to impose binding remedial actions.

270. The decision of the Inquiry is that the following remedial actions are required as specified in the UberEats, Mr D Food, Bolt Food and Restaurant Chain Remedial Actions in Annexure 10:

270.1. All international and national fast food and restaurant chains operating in South Africa are prohibited from restricting or dictating the choice of food delivery platform by its franchisees, including through setting criteria that franchisees must apply in their choice of food delivery platform. Changes to their contracts and/or policies must be done within 2 months and communicated to their franchisees.

270.2. UberEats and Mr D Food are required to notify consumers that they charge restaurants a commission fee for their service, and restaurant in-store pricing may differ from the prices they charge on their service. The notification should be done by way of an in-app billboard / pop up message for all new app users, within three months for existing app users and then annually for all new and existing users.

270.3. Within 1 month, UberEats to communicate to all existing restaurants listed on its platform that there is no requirement to price the same as on other food delivery platforms. Bolt Food to remove its price parity clause and communicate the removal to restaurants.

271. The remedial action in paragraph 270.1 seek to remove the practice of national restaurant chains utilising the two leading delivery platforms exclusively in response to the finding that this outcome hinders competition from other national and local delivery platforms. The remedial action in paragraph 270.2 seeks to create awareness of consumers that restaurant pricing may differ across different platforms due to differences

in commission fees in order to stimulate greater competition on commission fees in food delivery, addressing the finding that the lack of transparency benefits leading platforms and imposes costs on independent restaurants. The remedial action in paragraph 270.3 removes both continued perception of price parity by restaurants on Uber Eats and actual price parity on Bolt in response to the findings of the adverse effects of actual or perceived price parity requirements.

8.3. Business User Competition

8.3.1. Findings

272. The two leading food delivery platforms categorise the restaurants that list on their platform broadly between chain and independent restaurants, with a further split in categories amongst chains based on either international vs local chains, or corporate vs franchise. This categorisation is the basis for operational decisions along with reporting and performance analysis.³⁴⁵ A key operational decision is the level of commission fees charged and both differentiate with significantly higher fees for the independent restaurants. On the reported information from mid-2022, that discrimination sits at between 30-45% based on the average per category, slightly lower than the 30-60% reported previously, but with many independent restaurants still being charged 50-60% higher.³⁴⁶ Those same financial reports, demonstrate that this difference is not based on cost and neither of the leading platforms seriously tried to make this claim. There is no material difference in variable costs (transaction processing,

delivery, and promotional spend) nor on a fully allocated cost basis. The latter includes the allocation of common costs on a per-order basis reflecting the internal belief that the restaurant category do not affect these.

273. Rather, the platforms have sought to justify the differences based on the number of restaurants and orders that the restaurant chains bring to the platforms.³⁴⁷ Whilst securing the restaurant chains for any platform is important as consumers value those platforms with the widest selection of options, as discussed above, for this reason it is equally important to secure the large numbers of independent restaurants. In addition, for the platform itself these independents add scale collectively, a wider variety of cuisines important for consumer choice and a [30-60]% higher food order basket value than restaurant chains which feeds directly into improved profitability for the platform.³⁴⁸ Whilst one platform claimed that basket value was a factor in determining commissions, alongside restaurant numbers, this is not evident from actual practice. One leading platform sought to claim that the strategic restaurant chains served a disproportionate role in driving new eater acquisitions, but this is unpersuasive for all the reasons set out in the Provisional Report. Moreover, the exercise was one-sided as it did not seek to quantify the benefit from independent restaurants that is acknowledged by platforms in their submissions, including for user retention.

274. Where the leading platforms have had the most difficulty is in justifying the extent of the difference due to the reasons they

345 See Uber Eats submissions dated 30 June 2021 and Mr D Food submissions dated 2 July 2021, in particular, information on how they categorise and/or segment business users.

346 See several submissions for specifics and actual figures from (i) Mr D Food dated 10 September 2021, [REDACTED] Uber Eats dated 13 September 2021, [REDACTED] Uber Eats dated 10 September 2022 [REDACTED] Mr D Food dated 30 November 2022 [REDACTED]

347 See Provisional Report (Food Delivery, Chapter 6), paragraph 252 – 254, provide details of the national platforms submissions in justifying price differentials. The platforms have maintained these arguments in their recent submissions, namely, Uber Eats submissions dated 10 September 2022 and Mr D Food submissions dated 16 September 2022.

348 See Provisional Report (Food Delivery, Chapter 6), paragraph 257, 260, 269 and 270, analysing the value that independent restaurants brings to the platform.

have put forward, and neither made any attempt to do so. One attempted to argue that comparisons cannot be made because the contracting differences were such that these are not equivalent transactions, a reference to part of the test under section 9. This too is incorrect and simply an attempt to avoid comparisons altogether due to the inability to justify the differences. Bolt food submitted that its commission fees fall within the [0-15]% range and that such differences are reasonable.³⁴⁹ Some local delivery platforms did not differentiate at all, seeing chains and independents as equally valuable.³⁵⁰ The Bolt Food benchmark is informative as it represents a platform that lacks the bargaining power over independent restaurants, unlike the leading platforms, but which is still pursuing the same business model as the two leading platforms. Equally informative is the fact that the extent of differentiation differs materially between the two leading platforms³⁵¹, indicative that the extent of differentiation is not some objective outcome of the business model. Rather, both benchmarks confirm that the extent of differentiation is a function of relative bargaining power over independent restaurants and the willingness to exercise that bargaining power, not some objective value assessment. Moreover, the more favourable treatment of UberEats of international chains relative to domestic ones³⁵² is likely a reflection of the greater bargaining power those restaurant chains have from multi-market contact.

275. The extent of differentiation does distort competition between restaurants on the platform. The Inquiry business user survey found that around 70% of restaurants surveyed

passed on some or all the commission charged by platforms to consumers in the form of higher menu prices.³⁵³ A sampling of pricing on the platforms relative to in-restaurant menus confirmed that both chain and independent restaurants tend to add a menu surcharge roughly in line with the commission fees. There are some restaurants that adopt different strategies, but this is more often adding an even higher surcharge on low price items, with less incidence of lower surcharges than commission fees. This has negatively affected the relative pricing of independent restaurants to chains on the platforms, making their menu relatively less attractive to consumers and impacting on their competitiveness.

276. The difference in commission fees has knock-on effects for platform competition too. The ability to extract higher commission fees from independent restaurants, up to twice that of local delivery platforms, is part of the reason that the leading platforms can engage in the sustained use of aggressive promotions and subsidized delivery. The Rand profit contribution from the independent restaurants is typically twice their share of orders on the leading platforms, and on one platform the net profit on independent restaurants is larger than the platform overall due to the losses made on the largest chains.³⁵⁴

277. Bolt Food and local delivery platforms have less bargaining power with restaurants, even independent restaurants, and therefore not only charge a lower commission fee but are also far less able to differentiate on commission fees. Moreover, their marginal share of national food delivery services

349 See Bolt Food submissions dated 6 September 2022.

350 See Provisional Report (Food Delivery, Chapter 6), paragraph 229 details different pricing regime by several food delivery platforms.

351 See commission fees charged by Mr D Food and Uber Eats respectively across its customer segments. This information forms part of submissions (i) Mr D Food dated 10 September 2021, [REDACTED], and (ii) Uber Eats dated 13 September 2021, [REDACTED].

352 See Uber Eats financials per customer segment (e.g., 13 September 2021 submissions, financial spreadsheet).

353 See the Inquiry's Business User Survey results conducted in 2021. Available on the website.

354 See Provisional Report (Food Delivery, Chapter 6), paragraph 271 details profitability of platforms across restaurant segment. The analysis are based on platforms own financials.

and representation in only some local areas means they are not in a position to materially influence competition amongst restaurants.

278. Marketing commitments negotiated with the restaurant chains in exchange for lower commission fees will contribute to the distortion of competition identified, as the effect is still to expand commission differentials. Whilst some of that differential is committed to marketing, this still benefits the restaurant chains insofar as boosting orders and competitiveness on the platform, and is the reason they are willing to make that exchange. What this arrangement exposes is that higher commission fees make promotions on the platform more costly and less likely, another manner in which they harm independent restaurants. Promotions already play a material role in driving traffic on the food delivery platforms.

279. Platform funded promotions are used primarily to drive trial by new users, to generate interest by existing users that may have lapsed, and drive volumes more generally. New eater promos typically are not specific to any restaurant category³⁵⁵ and so do not necessarily favour chains over independents. However, as UberEats' default ordering for new eaters is biased towards higher volume restaurant chains, this can create a once off promo bias. For ongoing platform-funded promotions, the evidence does suggest that the Inquiry's criticism in the public hearings and Provisional Report has spurred Mr D Food to focus more than before on independent restaurants, but historically its discounts were not substantially different in any event. UberEats promotes the international restaurant chains more than the domestic chains or independent restaurants, at roughly twice the Rand value on a per order basis.³⁵⁶ This has reduced in absolute terms over the course of the Inquiry

and pressure to break even on this category, as well as the remedial action to price their services above variable costs, is likely to see the gap reduce more.

280. In the established restaurant industry, HDP restaurateurs continue to be under-represented. This is a consequence of the lack of wealth accumulation to fund independently owned restaurants. Delivery platforms do offer an opportunity for HDP restaurants to build additional order volumes, but the upfront costs pose the first barrier to onboarding the restaurant onto the platforms. Once on the platform, the funding constraint will impact on the ability to participate in promotions aimed at driving trial and sustained use by consumers in the catchment area. Funding is more forthcoming for franchise operations given the track record of franchisees, but HDPs remain under-represented even in franchise operations. However, once part of a franchise operation, HDP owners get the lower negotiated commission fees and benefit from franchise-led promotions on the delivery platform. Those franchisees do also benefit from the more general support offered to franchisees that enable their success. For these reasons the Inquiry does not consider a finding is necessary in respect of HDP-owned franchise restaurants.

281. For these reasons, the Inquiry finds that the differentiation on commission fees impedes and distorts competition in food delivery, particularly to the detriment of SME and HDP restaurants. The Inquiry finds that independent HDP restaurants face further impediments to effective participation and competition on the platforms in the form of onboarding costs and promotions. Differences in the offer of marketing commitments for lower commissions contributes to this effect and is not a separate finding. The Inquiry finds

355 See submissions from platforms explaining the different types of promotions, the rationale for using promotions and benefits of promotions - This information forms part of submissions (i) Mr D Food dated 10 September 2021 and (ii) Uber Eats dated 13 September 2021.

356 The analysis are based on these platforms financials (as submitted by the platforms) as referenced in the above footnotes.

that UberEats provides additional marketing benefit to international chains as well as lower commission fees relative to national restaurant chains.

8.3.2. Remedial Actions

282. The Provisional Report identified the remedial action of introducing a standardised rate card that complied with a maximum cap on fee differentiation between the average low and high volume user for both listing and promotional fees. The maximum cap was not specified but left to submissions, although an illustrative [10-15]% range was mentioned to provide a sense of the scale of differentiation the Inquiry would consider for submissions.³⁵⁷

283. Evidence from other platforms (such as Bolt Food and local platforms), suggest that although not subject to the proposed remedial action, they are compliant with those illustrative price differentiation ranges and that a [10-15]% range is reasonable.³⁵⁸ This is at least suggestive that such ranges are consistent with outcomes where the delivery platform lacks market power. However, the Inquiry is also cogniscent that the leading delivery platforms remain loss-making and this means that revenue-impacting remedial actions are more difficult to implement. It is also still preferable to have delivery platforms providing the service to independent restaurants than not given their lack of own delivery service. For this reason, the Inquiry has considered alternatives implemented or proposed by food delivery platforms that may provide options to independent restaurants to reduce their commission fees and/or achieve more value. As long as the proposals contribute meaningfully at this stage to improvements for independent restaurants, and are fairly equivalent in

effect so as not to distort competition, then the Inquiry has been inclined to accept the implementation or proposal. Importantly, this should not be seen as an endorsement of the specific commission fee levels or remaining differences in terms between independent and chain restaurants, especially under a more mature food delivery platform category.

284. UberEats has implemented a pricing trial scheduled to occur over the next six months whereby independent restaurants would be offered a menu of tiered commissions and services from which to choose. If successful, then UberEats indicates that it will be implemented and potentially extended to certain national restaurant chains. The trial offers three tiers of commission fees associated with the middle one aligned to the standard service offering, alongside a cheaper option with service limitations and a more expensive one with premium service additions. The Inquiry notes that the tiered commission fee structure has been implemented by UberEats in the US³⁵⁹, along with its competitors Grubhub³⁶⁰ and DoorDash³⁶¹, apparently in response to the same concerns over high commission fees for independent restaurants and efforts by some cities to cap these as a result. The tiered structure is a definite improvement over the previous regime for independent restaurants and contributes to lower commission fees or more value, and some of the benefits accorded restaurant chains.

284.1. The standardised approach means that independent restaurants with little bargaining power get the same fee as those 'local hero' independents with some, albeit still very limited, ability to negotiate. Standardisation and transparency may also be good for competition between

357 See provisional summary report paragraph 157.

358

359 See <https://www.restaurantdive.com/news/uber-eats-postmates-deploy-tiered-pricing-structures/606427/>

360 See <https://get.grubhub.com/products/marketplace/>

361 See <https://get.doordash.com/en-us/products/marketplace>

- the delivery platforms as this now sets expectations of what value is provided for what fee, and independent restaurants can openly compare offerings and use that to pressure other delivery platforms.
- 284.1. Independent restaurants will now have choice over fee and service levels, which gives some flexibility to accommodate different food delivery strategies for the restaurants. This is a step closer to the situation of national chains with some bargaining ability where they are able to trade off commission fee for their own marketing commitments or negotiate better service in exchange for commission fee increases, albeit not necessarily at the same commission fee level. The Inquiry does note that the average fee across independents will be determined by the selection made.
285. Mr D Food has proposed a promotional rebate on commission fees that allows independent restaurants to reinvest a material portion of their commission fee into discounts and promotions on the Mr D Food platform, along with advertising credits for smaller independent restaurants. This is akin to the exchange of commission fee for marketing commitments that is afforded to national chains which effectively allows for a reduced commission fee for those promoting on the platform as they are spared their own resources to undertake the promotions. For others, there is at least the value of increased promotions and sales for the commission fee.
286. The Inquiry has determined that there is a fair degree of equivalence in the benefit to independent restaurants and cost to the food delivery platforms between these two different paths, which means they are likely to be competitively neutral. Both paths also offer interim benefits to independent restaurants whilst the platform category is maturing. For these reasons, the Inquiry has sought to impose these as remedial actions. The Inquiry notes that UberEats, despite implementing the change, has not made a definite undertaking on the tiered commission structure. In both cases, the Inquiry will provide some flexibility to adjust the programmes without having to seek a variation, in recognition of the operating circumstances.
287. The Inquiry has received proposals from both the leading platforms on meaningful HDP programmes that they believe will best address the impediments to competition and participation on the platforms.³⁶² There is some differentiation in the programmes but both meet the ultimate objective of remedial action.
288. The decision of the Inquiry is that the following remedial actions are required as specified in the UberEats and Mr D Food Remedial Actions in Appendix 10:
- 288.1. Within 12 months, UberEats to implement their current Standard Tiered Commission Fee Rate Card for Independent Restaurants.
- 288.2. Mr D Food to provide a promotional rebate to independent restaurants by reinvesting 1.5% of sales of these independent restaurants into discounts and promotional spend on the Mr D Food platform. In addition, Mr D Food must provide a R500 monthly advertising credit to qualifying independent restaurants for 12 months each.
- 288.3. UberEats and Mr D Food to introduce HDP programmes within three months with the following minimum features, reviewable in three years:
- 288.3.1. Programmes apply to HDP restaurants that are not franchisees of national or international restaurant chains.
- 288.3.2. The HDP programmes must be marketed to ensure awareness amongst existing

362 See Uber Eats submissions dated 9 December 2022 and Takealot [Mr D Food] submissions dated 16 September 2022.

restaurants listed on their delivery platform and restaurants that do not make use of their delivery platform currently.

288.4. Mr D Food: An HDP programme that offers at a minimum a waiver of all sign-up fees, personalised device and portal training, quarterly webinars on optimised use of platform tools and food menus, waiver of the subscription fee for 3 months, R1000 advertising credit for use in the first 3 months and thereafter advertising credit of either 1% of gross merchandise value or R1000 (whichever is lower), monthly HDP merchandising features around themes for qualifying restaurants, 500,000 acquisition coupon codes for use by HDP restaurants to provide to customers if they are new to the Mr D Food platform.

288.5. UberEats: An HDP programme that offers at a minimum personalised assistance with platform onboarding through a dedicated communication line, a 50% reduction in either the monthly subscription fee or once-off activation fee, R500 monthly credit for sponsored listings for 6 months from their first order, an Uber-funded promotion of independent HDP restaurants once a month, the option to identify themselves as HDP on the platform and for consumers to search on that basis.

289. The remedial actions in paragraphs 288.1 to 288.2 seeks to improve the position of independent restaurants with the leading delivery platforms in terms of commission fee or promotional value, and in so doing place them in a position that is at least closer to that of national restaurant chains, albeit still not the same. The remedial actions in paragraph 288.3 seek to provide support to independent HDP restaurants to offset the finding that these restaurants face additional impediments to competition on the food delivery platform.

[9. Insurance Comparator Sites]

290. Insurance comparator sites provide consumers with the ability to compare insurance quotes across insurers and for insurers they provide consumer leads. Typically, a consumer will be required to provide key information deemed relevant to the insurance quote, and the comparator site will feed this to the different insurers participating on their platform through an API, for a quote to be generated and fed back to the consumer.³⁶³ As the quote is based on limited information, where the customer does select a quote and wishes to pursue the option, then typically a further stage follows where the insurer engages the customer for more detail and a binding quotation.³⁶⁴ The revenue model is to charge insurers for the business generated based on a multiple of the premium that is charged to the consumer.³⁶⁵ Whilst insurance comparator sites do often offer a range of other comparisons, short-term insurance is c.80% of the business, and within this motor insurance is the primary product sold, and other services are currently insignificant.³⁶⁶

9.1. Market Context

291. The short-term insurance industry in South Africa is relatively concentrated with Santam, Hollard, Mutual & Federal and OUTsurance

accounting for over 40% of gross written premiums.³⁶⁷ The largest players have all developed strong direct distribution channels to consumers, with extensive investments in marketing, online and call centre support to provide quotations but also claims.³⁶⁸ Some insurers will also provide comparative quotations based on current insurance policies provided by customers.

292. Industry structure is relevant to the development of insurance comparator sites. Typically comparator sites offer the convenience of quotations from numerous insurers through online channels, with the aggregation offering benefits in marketing scale attracting consumers and investments in the user interface.³⁶⁹ The existence of large direct distribution insurers means that the comparator sites do not necessarily have the advantage in either marketing or user interface. Whilst the sites would still have the advantage of convenience, in South Africa the large insurers have generally steered clear of supporting the comparator sites which makes them relatively less useful to consumers wishing to get quotations from the well-known brands. One rationale for not supporting them stems from the view that this creates a consumer market obsessed with price rather than the adequacy of the

363 Submission made by Telesure dated 30 November 2021, page 2 para 9.

364 Meeting with Compare Guru dated 11 November 2021.

365 Meeting with Compare Guru dated 11 November 2021. Meeting with King Price dated 18 February 2022. Meeting with Standard Bank dated 17 February 2022.

366 Submission made by Telesure dated 30 November 2021, Annexure HCS8.12, slide 333.

367 Competition Commission of South Africa. 2021. Measuring concentration and participation in the South African Economy: Levels and Trends, table 233 of the Main Report. Available online: <https://www.compcom.co.za/wp-content/uploads/2021/12/Concentration-Tracker-Main-Report-1.pdf>.

368 Three of the largest short-term insurers in South Africa namely, Santam, OUTsurance and Hollard are not on any comparison platform. Submission made by OUTsurance dated 19 November 2021, page 3. Submission made by Hollard, Bi-Me, dated 26 November 2021, page 1. Submission made by Hollard, Naked Financial Technology, dated 26 November 2021, page 1.

369 Submission made by Telesure dated 30 November 2021, page 9, para 49. Submission made by Dotsure dated 14 January 2022, page 3. Meeting with Dotsure dated 16 February 2022. Meeting with Old Mutual 16 February 2022. Meeting with King Price dated 18 February 2022. Meeting with Old Mutual dated 16 February 2022.

risk coverage suited to the consumer.³⁷⁰ A related reason cited is that due to the poor match, cancellations result in making the distribution channel less profitable.³⁷¹ This is because in South Africa insurance premiums are paid monthly rather than annually. Another reason cited is that the largest comparator site is owned by a competing insurance group.³⁷²

293. The largest comparator site, Hippo, is owned by the Telesure Group which has several insurance brands.³⁷³ This support has enabled it to grow its consumer presence and attract a number of third-party insurers looking to generate business from price-sensitive consumers that they may not necessarily attract through their existing distribution channels. However, even within the Telesure Group, direct and broker distribution models are also used by their brands, reflecting the fact that these channels may not necessarily compete for the same leads.³⁷⁴ Smaller competitors such as Compare Guru and Better Compare have established themselves but collectively account for under 30% of the organic traffic to insurance comparator sites.³⁷⁵

294. The lack of support by the main short-term insurers and the strength of the direct distribution channels are likely holding

back on consumer adoption of insurance comparator sites, which in turn makes them less useful to insurers. At this stage the evidence suggests that there is no dependency by insurers on comparator sites for a meaningful proportion of their consumer leads and sales given the early stage of development.³⁷⁶ Whilst this may change in future, broader adoption is not a certain outcome unlike in other platform categories due to the unique market context. This market context impacts on the Inquiry's assessment of both platform and business user competition issues.

9.2. Platform and Business User Competition

9.2.1. Findings

295. Ownership of the largest comparator site by an insurance group creates the potential for customer foreclosure of competing platforms and for self-preferencing on its own platform. It also raises the question of access to competitor information and consumer transparency.³⁷⁷

296. The Telesure Group does acknowledge that it has an incentive to support its own comparator site and not list on rivals if it comes at Hippo's expense given the investments it has made in the site.³⁷⁸ This

370 Submission made by OUTsure dated 19 November 2021, page 3.

371 Meeting with Compare Guru dated 11 November 2021. Meeting with MiWay dated 23 February 2022.

372 Insurers are concerned that their data and Intellectual Property (IP) may be accessed by competitors (the Telesure Insurers) via the platform. Miway, VM1.

373 Market share based on organic traffic in 2020 was [70-80] %. Submission made by Telesure dated 30 November 2021, page 1 and 2, para 5 and Annexure HCS8.12.

374 For instance, First for Women encourages phone call requests from its website and provide contact details for broker queries. See <https://www.firstforwomen.co.za/contact-us/> [Access date: 15 March 2023].

375 Market share based on organic traffic in 2020 was [15-20] % for Compare Guru and [0-5] % for Better Compare. Submission made by Telesure dated 30 November 2021, Annexure HCS8.12.

376 For instance, Old Mutual made more, in annual turnover, through its direct channel compared to comparison sites. [70-80] % of Dotsure's total premium value of sales in 2020 was generated through its website business and the rest of the sales were generated through comparison sites. Meeting with Old Mutual dated 16 February 2022, pages 4 and 5. Submission made by Dotsure dated 16 February 2022, Annexure A. Meeting with MiWay dated 23 February 2022.

377 Oral Submission made by Telesure dated 02 March 2022, pages 7 and 8. The Group Chief Executive Officer (CEO) is the Chairman of Hippo. He also serves as a Director on the boards of each Telesure Insurer. The independent non-Executive Directors of Telesure Investment Holdings also sit on the boards of each of the Telesure Insurers. The Chief Financial Officer (CFO) is a Director on the board of Telesure Investment Holdings; Telesure Insurers; and he is also the CFO and Director of Hippo. In addition, the Group Company Secretary is also the Company Secretary for Hippo and all Telesure Insurers.

378 Submission made by Telesure dated 24 August 2022, page 2 para 2.3.

highlights the potential conflicts of interest that can occur where an insurer owns a comparative platform. However, it submits that despite this interest its insurance brands do list on other insurance comparator sites as there is still a commercial incentive to do so where it can improve customer volumes.³⁷⁹ In any event, the Telesure Group is not amongst the largest short-term insurers and so withholding its support from other comparator sites would not ordinarily be able to materially hinder competitor site development.³⁸⁰ Were insurer support and consumer adoption to grow, it is still not apparent that this conflict of interest will have negative consequences for platform competition. It is uncertain which incentive, to support Hippo or seek customer leads will predominate, and any potential lack of Telesure Group support may be offset by the support of other insurers unwilling to list on Hippo given its ownership by an insurance competitor. For these reasons the Inquiry is of the view that no finding is warranted in respect of customer foreclosure concerns.

297. Self-preferencing may occur through how the comparator results are presented, but also in the fees charged to its own insurers relative to third-party insurers. Currently there is no evidence that either is occurring. The results are provided on the basis of quotation price levels which does not raise issues.³⁸¹ On fees, there are a range of fees applied by Hippo which are subject to negotiation and therefore whilst differences may exist

between insurers, including amongst third parties, there is no evidence to conclude that any self-preferencing is occurring.³⁸² Moreover, given that no insurer is dependent on Hippo, if there were concerns from an insurer then it could simply withdraw from the platform.³⁸³ As observed in other platform categories, self-preferencing only seems to arise where there is a degree of dependency as the platform will not lose business if it does self-preference. Where there are low levels of adoption, the platforms need the support of third parties and are less likely to risk self-preferencing unless it is not transparent.³⁸⁴

298. On the issues of potential access to confidential information of competing insurers, Hippo does seek to reassure insurers that it has controls in place to prevent access, such as a separate location for the Hippo business from the Telesure Group.³⁸⁵ As Hippo feeds customer information through an API to receive a quotation, it does not have access to the 'quotation engine' of third-party insurers.³⁸⁶ The extent of information would be about performance on the platform itself in terms of leads and sales in absolute but also relative terms, but the strategic value may be limited where this is not an important distribution channel. In any event, currently no insurer is dependent on Hippo or comparator sites more broadly, so to the extent they have concerns, which some do, then they can simply not make use of the platform.

379 Submission made by Telesure dated 24 August 2022, page 3 para 2.4.

380 Submission made by Telesure dated 24 August 2022, page 2 para 2.2. and 2.3.

381 Meeting with Dotsure dated 16 February 2022. Old Mutual, WS1, page 11. Submission made by Standard Bank dated 18 November 2021, pages 9 and 10.

382 The Telesure Insurers, A&G and FFW were charged an initial fee of 0.5xP (for the first 2 months) then 0.8xP from November 2021. Dotsure and One Pet are both charged 1xP. The Telesure Insurers pay either 38% x R2521.50 fee per sale (branded), 29% x R2521.50 fee per sale (unbranded) or 25.5% x R2521.50 fee per sale (unconverted). The sale fulfilment fee for third-party insurers is 3.9xP. The most the Telesure Insurers are charged is R958.17 (at 38%). However, assuming a minimum of R1000 per premium would mean that third parties pay approximately R3900 per sale. Submission made by Telesure dated 30 August 2021, Annexure HCS 11.2, HCS 11.2, and HCS 7.1, page 2. Meeting with Dotsure dated 16 February 2022.

383 Submission made by Standard Bank dated 18 November 2021, page 4. Meeting with Standard Bank dated 17 February 2022.

384 Submission made by Telesure dated 24 August 2022, page 3 para 3.2

385 Submission made by Telesure dated 24 August 2022, page 4 para 4.4.

386 Submission made by Telesure dated 24 August 2022, page 4 para 4.3.

299. On consumer transparency, Hippo was required by the Financial Sector Conduct Authority (FSCA) to disclose to consumers that it was owned by the Telesure Group, particularly when there were no third-party insurers on the service. This is disclosed in the terms and conditions on the website, and Hippo indicates that its call centre also informs consumers of its association.³⁸⁷ The disclosure in the terms and conditions is in respect of the Telesure Group and not the individual insurance brands. The FSCA is clearly aware of the potential issues on consumer transparency and indicated a willingness to regulate disclosure. The current disclosure would seem to then satisfy their requirements.

300. The Inquiry therefore makes no findings in respect of insurance comparator sites, given that there is insufficient evidence to conclude that any current market features have an adverse effect on competition.

9.2.2. Remedial Action

301. In light of the fact that no findings are made in respect of insurance comparator sites, there is no requirement for remedial action. In the event that insurance comparator sites do realise higher levels of adoption, and some of the issues identified above begin to impede or distort competition, then this can be addressed in future. The Inquiry has recommended that section 78 regulations are promulgated outlining the factors relevant to the assessment of dominance and conduct of intermediation platforms within the enabling provisions of chapter 2 of the Act. This should provide a solid foundation for any enforcement in future.

387 Submission made by Telesure dated 24 August 2022, page 5 para 5.7 and page 6 paras 5.8. and 5.9.

[10. Cross-cutting Topics]

10.1. Transparency of Advertising

10.1.1. Finding

302. A common feature of intermediation platforms is that they all sell visibility to their business users on their search results page given the large number of relevant listings. Consumer behaviour is biased towards clicking on higher ranked impressions regardless of platform category, driving a willingness amongst business users to pay for specific rank positions or a ranking boost and a revenue source for the platform. The increasing importance of a platform for sales or leads in a category, the more it can leverage ranking to generate revenue. A constraint of revenue maximisation is 'ad blindness' of consumers and degradation of the consumer experience if too many ads are served. This may provide some constraint on the excessive sale of visibility, but only if consumers are aware that listings have paid for position on the search results page. Most domestic intermediation platforms simply do not label those impressions that pay for improved visibility as adverts, whereas most international platforms do so in compliance with consumer protection laws in other countries.

303. The pervasiveness of unidentified advertising on intermediation platforms distorts consumer choice, and therefore undermines competitive outcomes. Furthermore, the practice encourages more visibility to be sold than would otherwise be tolerated by consumers, exacerbating the consumer and competitive effect. The practice distorts

competition from SMEs which are less likely to be able to purchase visibility, especially where they face price discrimination in listing and promotional fees. Many of the more extreme examples of advertising share of revenue come from online classifieds where there is not only a lack of transparency, but also active misleading of consumers through labelling promoted results as 'premium' or 'featured'. Moreover, there is simply no public welfare justification for the practice, only private gain from removing the constraint of consumers being less inclined to click on ads and being put off platforms that serve too many ads if they are properly labelled.

304. South Africa does have a Code of Advertising Practice administered by the Advertising Regulatory Board ("ARB"), which includes a clause on the identification of advertising (Section II, clause 12) requiring that "*Advertisements should be clearly distinguishable as such whatever their form and whatever the medium used*".³⁸⁸ There are also appendices outlining best practice for specific products (e.g. cosmetics) or medium (e.g. social media).³⁸⁹ However, industries need to opt into the Code voluntarily, after which the ARB rulings are binding, which online intermediation platforms have avoided.³⁹⁰ Moreover, some intermediation platforms have sought to dispute whether payments for rank constitute a form of advertising.

305. For these reasons, the Inquiry finds that the market feature of failure to label paid ranking as advertising distorts competition in online intermediation markets.

388 Advertising Regulatory Board Code of Advertising practice v2021.1 <https://www.arb.org.za/assets/section-ii-general-principles-v2021.1.pdf> - Access 30 March 2023

389 [https://www.arb.org.za/assets/appendix-k-social-media-\(2022\).pdf](https://www.arb.org.za/assets/appendix-k-social-media-(2022).pdf) - Access 30 March 2023

390 ARB Meeting with Gail Schimmel dated 08 December 2021 and 23 September 2022

10.1.2. Remedial Action and Recommendations

306. The Provisional Report proposed remedies for all leading intermediation platforms that mirrored the proposal for Google, namely a prohibition on paid results above the fold and specific labelling for ads.³⁹¹ For the same reasons discussed above, the proposal on no adverts above the fold is likely to result in material unintended consequences and are therefore no longer pursued. This was targeted at general disadvantages faced by SMEs and HDPs in funding paid visibility, but specific interventions around ad credits to level the playing field can use this feature to their advantage. On the lack of transparency specifically, providing for appropriate labelling of ads should be a sufficient and a proportionate remedy.
307. On the labelling itself, the Provisional Report proposed specific labelling based on FTC guidance for search engines and registration with the ARB to be bound to their Code of Advertising and to develop an intermediation platform annexure of good practice.³⁹² Practice and guidance in respect of labelling has evolved and international platforms adhere to regulations that are different. The general consensus appears to be that labelling as 'sponsored', 'promoted' or 'ad' is sufficient. Note that words such as 'featured' do not pass muster as it is ambiguous at best and actively misleading at worst for consumers. The Inquiry's access to platform's ad identification tests indicate that additional requirements for the words to stand out against the background are important for transparency.³⁹³

On joining industry bodies that are registered with the ARB which is voluntary, there seems a willingness to work with the ARB but not necessarily submit to their jurisdiction due to costs and the oversight of other misleading advertising practices that are not in the ambit of this Inquiry. As the ambit of this finding is only on transparency, the Inquiry is willing to accept a voluntary approach to the ARB membership but only if there are remedial actions on transparency stemming from this Inquiry and a commitment to responsible advertising.

308. The focus on leading platforms for such remedial actions remains appropriate given their undue influence on consumers and business users in their platform categories. Our assessment is that international platforms are already compliant and so the remedial actions extend to domestic leading platforms. The Inquiry recommends that all domestic intermediation platforms voluntarily comply.
309. The decision of the Inquiry is that the following remedial actions are required from Takealot, Mr D Food, Property24, Private Property, Autotrader and Cars.co.za as specified in their respective Remedial Actions in Annexure 10.
- 309.1. Where business users pay for a particular rank position, or a boost in their ranking, on the search results page, this constitutes a form of advertising and must be clearly identifiable to the average user through

391 FTC, (2013). Sample Letter to General Purpose Search Engine. Available at: <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-consumer-protection-staff-updates-agencys-guidance-search-engine-industry-on-need-distinguish/130625searchenginegeneralletter.pdf> (Accessed on 26 April 2022). The FTC recommended visual cues that "in distinguishing any top ads or other advertising results integrated into the natural search results, search engines should use: (1) more prominent shading that has a clear outline; (2) a prominent border that distinctly sets off advertising from the natural search results; or (3) both prominent shading and a border". Furthermore, it also recommended that the Text Ads should have a text label that clearly and unambiguously marks paid search as adverts. For example, the text label should "(1) use language that explicitly and unambiguously conveys if a search result is advertising; (2) is large and visible enough for consumers to notice it; and (3) is located near the search result (or group of search results) that it qualifies and where consumers will see it."

The Inquiry recommends that this applies to all leading online intermediation platforms set out in Paragraph 41 and 42 of the provisional report. (of Footnote 389)

392 Ibid.

393 For instance, light grey wording on white background scores poorly in consumer identification tests.

appropriate labels such as 'Sponsored', 'Promoted' or 'Ad'.

309.2. To publicly pledge commitment to a responsible advertising code.

310. The Inquiry has also made a submission to the ARB to alter its Code of Advertising to include the provision for the labelling of paid ranking by intermediation services, search platforms and any similar digital platforms.³⁹⁴ This was adopted by the ARB at its AGM on 9 March 2023³⁹⁵ and it is recommended that all intermediation platforms operating in South Africa voluntarily comply with the amended Code of Advertising. The wording of the new clause 12.5 on the identification of advertising that was adopted is:

"12.5 On intermediation services, search platforms and any similar digital platforms, where businesses pay for a particular rank position, or a boost in their ranking, on the search results page, this constitutes a form of advertising and must be clearly identifiable to the average user through appropriate labels such as:

12.5.1 'Sponsored',

12.5.2 'Promoted' or

12.5.3 'Ad'."

10.2. HDP Funding

311. The Provisional Report identified that the lack of wealth accumulation by HDPs due to exclusion from the economy under apartheid has created a substantial barrier

to HDP tech entrepreneurs accessing pre-revenue funding (pre-seed and seed funding) from a family or associate 'angel investor', unlike their white counterparts.³⁹⁶ Pre-revenue funding is not supported by the venture capital ("VC") industry³⁹⁷, whose support at this stage is often in the form of incubators / accelerators where the founding team receives guidance and access to business development resources.³⁹⁸ The small size of the VC industry in SA³⁹⁹ and its lack of transformation is a further barrier to seeking out the talents of a broader base of entrepreneurs. The submissions received have all concurred with this finding and the provisional recommendations in general terms but have also provided deeper insights that allow the Inquiry to be more specific in its finding and recommendations.⁴⁰⁰

10.2.1. Findings

Venture Capital

312. The VC industry has three main models. The traditional model is where an independent VC fund raises capital from third parties alongside their own capital, to pool this into investments in multiple startups to reduce risks.⁴⁰¹ The funds are often distinct and have a limited life (e.g. 10 years) with the early stage investing in a selection before whittling down to make larger investments into developing the best prospects. VC funds operate on a 2/20 rule, namely a 2% management fee and 20% of fund profits,⁴⁰² known as the 'carry'.⁴⁰³

394 Correspondence dated 14 November 2022.

395 See <https://www.arb.org.za/news%2c-advisories---events.html>.

396 OIPMI Provisional Report dated 13 July 2022, Chapter 8, para 20, para 30 and para 31.

397 SAVCA, Oral submission from Mr Keet van Zyl, Ms Shelley Lotz and Tanya van Lill dated 3 November 2021, page 6 of Public Hearing transcript, SAVCA public hearing presentation slide 3.

398 SAVCA, Oral submission from Mr Keet van Zyl, Ms Shelley Lotz and Tanya van Lill dated 3 November 2021, page 21 of Public Hearing Transcript .

399 SAVCA, Written Submission, by Shelley Lotz dated 23 September 2021, Page 1.

400 The Inquiry engaged with the following stakeholders post the publication of the OIPMI Provisional Report on 13 July 2022: the National Empowerment Fund ("NEF"), Public Investment Corporation ("PIC"), Investment Development Corporation ("IDC") , the Department of Communication and Digital Technologies ("DCDT") the SA SME FUND and the private sector Venture Capital industry, the Southern African Venture Capital Association ("SAVCA") on behalf of its members, Business Partners and 4Di Capital.

401 SAVCA, Meeting with Keet van Zyl, Thiru Pather and Shelley Lotz dated 15 September 2022.

402 SAVCA, Meeting with Keet van Zyl, Thiru Pather and Shelley Lotz dated 15 September 2022.

403 SA SME Fund, meeting with Ketso Gordhan dated 29 September 2022.

The corporate model involves investing their own capital in startups often in their own industry with a clear strategic focus on accessing technology and business ideas.⁴⁰⁴ The SA financial institutions operate such a model in fintech/insuretech which generates the most funding activity.⁴⁰⁵ Lastly networks of investors in risk capital will take sales pitches from individual startups and only then commit capital. The SA SME Fund is a funder of funds, pooling third-party investors to invest in other VC funds.⁴⁰⁶

313. The VC industry identifies two broad phases of funding, namely pre-revenue (pre-seed and seed funding) and post-revenue (Series A, B & C funding rounds).⁴⁰⁷ At the pre-revenue stage entrepreneurs need to bootstrap an idea and find ‘angel investors’ to support them in developing the idea. In SA the VC funds are typically not involved in pre-revenue funding, as it is far riskier. Entrepreneurs rely on relatives and friends to assist at this stage.⁴⁰⁸ In the pre-revenue stage, many VC funds will run incubators and accelerators to build a pipeline of startups for their funds.⁴⁰⁹ Incubators will provide shared office space and services, along with mentorship to a group of 30-40 selected startups for up to a year with the aim of developing the idea, including a revenue

model. Accelerators focus on a more intense 3-month period of support for startups with strong potential before pitching them to potential investors at the end.⁴¹⁰ Corporates, international organisations, and government also provide grant support for independently run incubators.⁴¹¹

314. Not all VC funds will run incubators / accelerators as the costs of doing so, namely people, space and services, need to be recovered from their fees and profits, or through taking a small equity stake. Small funds may lack the management fee base to cover these costs, whilst some funds aim to focus on the post-revenue stage with lower risks.⁴¹² The quality of an incubator / accelerator may be measured by the funding that its graduates secure, and a criticism of many SA incubators is the failure to perform on this score. This may be the quality of the incubator, or an inability to draw in investor interest.⁴¹³ VC Fund incubators may have the advantage of both funding sources and knowledge of what they need post-revenue. Post-revenue is where the VC investors in SA operate as risks have been reduced through the existence of a revenue model demonstrating demand and willingness to pay for the startup product, even if the startup is not profitable.⁴¹⁴ Series A funding

404 SAVCA, Oral submission from Mr Keet van Zyl, Ms Shelley Lotz and Tanya van Lill dated 3 November 2021, page 6 of Public Hearing transcript; Corporate Venturing, <https://corporatefinanceinstitute.com/resources/capital-markets/corporate-venturing-corporate-venture-capital/> accessed 22 February 2023.

405 SAVCA Annual Survey, *Insights into the Southern African Private Equity Industry Survey 2022 - Investments by Sector*, page 23.

406 Home Page - SA SME Fund “Overview of the Fund”.

407 Naspers Foundry, written submission, by Daryl Dingley, dated 10 September 2021.

408 SAVCA, Oral submission from Mr Keet van Zyl, Ms Shelley Lotz and Tanya van Lill dated 3 November 2021, page 6 of Public Hearing transcript.

409 SAVCA, Oral submission from Mr Keet van Zyl, Ms Shelley Lotz and Tanya van Lill dated 3 November 2021, page 21 of Public Hearing transcript.

410 Google, oral submission by Google LLC, Charles Murito, dated 3 November 2021, page 17 “*For small businesses, Google provides free guidance on setting up a Google business profile, we [Google] also have a start-up accelerator program which is a three-month program for tech start-ups across the continent. This scheme provides mentorship, technical project support and workshops focused on a number of issues including product design, customer acquisition as well as leadership development.*”

411 SAVCA, Oral submission from Mr Keet van Zyl, Ms Shelley Lotz and Tanya van Lill dated 3 November 2021, page 24 of Public Hearing transcript.

412 SAVCA, Meeting with Keet van Zyl, Thiru Pather and Shelley Lotz dated 15 September 2022.

413 SA SME Fund meeting with Ketso Gordhan dated, 29 September 2022; National Empowerment Fund, Meeting with Mziwabantu Dayimani, Nhlanhla Nyembe, NM Moleka dated 22 September 2022.

414 SAVCA, Oral submission from Mr Keet van Zyl, Ms Shelley Lotz and Tanya van Lill dated 3 November 2021, page 22 of Public Hearing transcript.

is still considered a start-up phase where the products and markets that have been shown to be capable of revenue generation are developed. Series B is aimed at scaling the product, whilst Series C allows for successful start-ups to enter new markets and develop new products.⁴¹⁵ However, even at the post-revenue stage, the VC industry is very hands on in the support and guidance of the entrepreneur, including providing access to its network and funding tech assistance.

315. The type of funding and support also differs for startups due to the higher risk.⁴¹⁶ Startups require what is called 'patient capital' to provide time for development of the business.⁴¹⁷ There is generally a limited role for traditional debt funding as this demands interest and repayments, which assume an underlying revenue stream and profits. Equity capital is more patient but taken to the extreme it leaves the entrepreneur with little upside in growing the business.⁴¹⁸ Returnable capital allows a business to raise capital without giving up equity or control, such as convertible debt where a loan can be converted to equity at later funding points for an agreed discount.⁴¹⁹ These forms of soft or quasi-equity are less risky than pure equity investments for the investor, but also have some of the benefits of loans for the startup.⁴²⁰ For instance, collateral capital funding may be used but against intellectual property assets rather than physical ones.⁴²¹ However, the extent of startup funding ultimately depends on the appetite of private investors to take on the higher risks, which is why pre-revenue funding is scarce domestically and even post-

revenue funding is often on metrics more akin to private equity.⁴²²

316. Globally, governments have sought to support the funding of tech startups given the potential for high growth and employment. This is known as impact investing where the return may not always be on the capital but on the societal outcomes. For government, there is still an indirect monetary return from more tax revenue and less social expenditure. In the startup space, governments have typically sought to do this through reducing the risk for private investors and in so doing crowding them in. This means government does not take on all the risk, and it is able to leverage its own funding to grow the pool of funding available for startups. One of the means to do so is through first loss funding, where government assumes the first losses in the portfolio of investments held by a VC fund, and in so doing reduces the risks of other investors by reducing their exposure to the potential downsides.⁴²³ Government funding has also taken the form of convertible loans which means private investors do not see their equity stake diluted unless growth targets are met. In some cases that may be converted to equity for the founder if certain targets, including impact targets, are met, providing strong incentives to develop the business and make it succeed.⁴²⁴ In contrast, pure grant funding is not favoured for the business itself as it provides weak incentives to succeed. Instead, government grant funding is used for support services, such as incubators / accelerators, including those within universities to aid commercialization

415 Naspers Foundry, written submission, by Daryl Dingley, dated 10 September 2021, page 3.

416 SA SME Fund, written submission by Ketso Gordhan and Thiru Panther, "discussion paper on Small Enterprise Financing, 08 September 2022 V4.0, page 5.

417 Business Partners meeting with Jeremy Lang dated 13 September 2022.

418 Business Partners meeting with Jeremy Lang dated 13 September 2022.

419 SA SME Fund meeting with Ketso Gordhan dated, 29 September 2022.

420 Business Partners meeting with Jeremy Lang dated 13 September 2022.

421 SA SME Fund meeting with Ketso Gordhan dated, 29 September 2022.

422 SAVCA, Oral submission from Mr Keet van Zyl, Ms Shelley Lotz and Tanya van Lill dated 3 November 2021, page 51 of Public Hearing transcript.

423 SA SME Fund meeting with Ketso Gordhan dated, 29 September 2022.

424 SA SME Fund meeting with Ketso Gordhan dated, 29 September 2022; Business Partners meeting with Jeremy Lang dated 13 September 2022.

of intellectual property, as these have fixed upfront costs and may be under-provided by the market if the probability of recoupment is too low.⁴²⁵ Government funding can also be mandated for a particular sector, or type of business such as SMEs, and in that way unlock greater private investments in those sectors or businesses.

317. It is widely accepted that HDP participation in the tech startup space is extremely limited. Historic exclusion from the economy and wealth accumulation is one barrier to HDP entrepreneurs at the pre-revenue stage. However, the concentration of investor wealth and the lack of transformation of the VC industry is no doubt another reasons.⁴²⁶ The VC industry is one of a selection of ideas, but also selection of the entrepreneur based on their qualities as well as that of their team and support structures. Perceptions therefore play an important role, with some observers noting that within the industry not only is there a perceived higher risk for township businesses but also for HDP entrepreneurs more generally, based on a perception that they are lending to someone with little set of skills, business support or capital for any loss.⁴²⁷ This perception may lie with the investor or the fund manager. The experience of the SA SME Fund is that geographic location also matters, with incubators in the broader Cape Town / Stellenbosch area, the home of a high concentration of the SA VC industry, being far less racially diverse than those located in Johannesburg, which can draw on a much larger black middle class.⁴²⁸

318. The SA SME Fund, which has a mandate of 75% for HDPs, has found that a mandate model in providing funds to the VC industry can be used effectively in supporting HDP entrepreneurs. The mandate provides targets for the funds and the use of penalty clauses on the 'carry' component creates strong incentives to invest in identifying and developing HDP entrepreneurs to meet those targets. The real benefit of the mandate model is that it can leverage the funding it has to crowd in other capital, for the potential benefit of the HDP entrepreneurs. Within a fund context, anchor funding can draw in other investors.⁴²⁹ If funding moves HDP entrepreneurs into a post-revenue position, they are likely to get the support of other investors in series A, B and C rounds. It has provided support for incubators, in the form of grant funds, but requiring a Johannesburg location in one instance.

319. Whilst there are many SME and HDP funding programmes operated by government in South Africa, there is a gap for tech startup risk funding and business incubators are not targeted at the tech space.⁴³⁰ The tech startup industry is far more high risk and specialized, requiring specific skills for mentoring and support, along with networks of funders and technical / business assistance, to get a startup to the point where it realises its full potential. It is also a process where different support is needed at different stages, as reflected in the aims at each funding series stage, and a multi-party approach to bring that funding / expertise. This is why the traditional venture capital model that brings in a range of funders is predominant, rather than one with a single funder. Some

425 SA SME Fund meeting with Ketso Gordhan dated, 29 September 2022.

426 SAVCA, Oral submission from Mr Keet van Zyl, Ms Shelley Lotz and Tanya van Lill dated 3 November 2021, page 2, page 43 and page 45 of Public Hearing transcript.

427 SAVCA, Oral submission from Mr Keet van Zyl, Ms Shelley Lotz and Tanya van Lill dated 3 November 2021, page 41 of Public Hearing transcript.

428 SA SME Fund meeting with Ketso Gordhan dated, 29 September 2022.

429 SA SME Fund meeting with Ketso Gordhan dated, 29 September 2022 and SAVCA, Meeting with Keet van Zyl, Thiru Pather and Shelley Lotz dated 15 September 2022.

430 National Empowerment Fund, Meeting with Mziwabantu Dayimani, Nhlanhla Nyembe, NM Moleka dated 22 September 2022 and Department of Small Business Development, written submission by Mojalefa Mohoto, Development SMME Support Plan 2020-2024, dated 17 August 2021.

of the government institutions, such as the Industrial Development Corporation (IDC)⁴³¹ and National Empowerment Fund (NEF)⁴³², have been involved in some post-revenue funding cycles along with private investors, but this is at a lower risk stage and most funding is not in the tech industry. The Department of Science and Innovation has provided funding to the SA SME Fund, and recently the Gauteng Government provided first loss funding to an SA SME Fund initiative that also drew in the IDC. However, these are not being run in-house but rather leveraging through other funds.⁴³³ The Public Investment Corporation (PIC) indicated to the Inquiry that it was considering operating its own startup fund, but it is a large institutional pension fund investor in a different category to government funding.⁴³⁴

320. The Inquiry finds that there is an additional funding impediment to HDP inclusion and participation in the platform markets, with particular challenges at the pre-revenue stage. At this stage there will be limits to the current VC industry funding in general, and that governments have used a variety of instruments to reduce risk and crowd in private investors, which are missing in the current package of funding provided by the SA government. The Inquiry also finds that the VC industry along with the institutional funders requires transformation and a shift in resources to support and develop HDP entrepreneurs. In the context of the growth and importance of the digital economy, remedying this is a constitutional imperative and aligned to government's emphasis on the digital economy for growth and development.

Business User Funding

321. The Inquiry has required specific remedial action from all leading platforms to support HDP business users' access, afford and attain visibility on those platforms. These remove one set of barriers to exclusion from the digital economy by HDPs.⁴³⁵ However, funding is likely to present another challenge for some businesses in making the necessary investments to achieve and exploit an online presence. An effective online presence provides considerable opportunities for business growth through exposure to a national consumer audience (or global for apps) and reach beyond the physical confines of a retail presence. Creating a more inclusive economy requires that HDP businesses are not excluded from the digital economy.

322. Additional support and cost reductions from the leading platforms themselves can reduce the risk of investing in an online presence, which may itself assist HDP businesses in securing loans or credit. However, this may not be the case initially until these initiatives have shown demonstrable benefits. So ensuring sources of credit to take advantage of the opportunities opened up by the other Inquiry remedial actions appears a necessary addition, such as is the case with Amazon's black business accelerator in the US.⁴³⁶ Moreover, domestic experience of Business Partners that works with HDP entrepreneurs to secure franchising and distribution opportunities, is that commercial funders expect entrepreneurs to bring some of their own capital to have 'skin in the game'.⁴³⁷ The historic exclusion from the economy and inability to accumulate wealth then presents

431 Industrial Development Corporation, written submission by Tshepo Legodi dated 17 September 2021.

432 National Empowerment Fund, written submission by Mziwabantu Dayimani, Nhlanhla Nyembe, NM Moleka dated 27 September 2022, 2022.

433 SAVCA Meeting with Keet van Zyl, Thiru Pather and Shelley Lotz dated 15 September 2022. The Department of Science and Innovation has also allocated about R100 million into the SA SME Fund in 2022 for more direct funding investments into SMEs.

434 Public Investment Corporation, meeting with Kentse Yende dated 22 September 2022.

435 OIPMI Provisional Report dated 13 July 2022, Chapter 9 page 27 para 69.1.

436 Amazon, written submission, by Bowmans, dated 24 September 2021, page 4 para 1.18.

437 Business Partners meeting with Jeremy Lang dated 13 September 2022.

a barrier to HDP entrepreneurs under those conditions.

323. This can be overcome with impact investors and those willing to take additional risks. However, it also requires certain concessionary financing, or the types of soft equity instruments discussed above, including convertible loans (to founder equity too).⁴³⁸ The experience of funding institutions is that the purchase or sourcing of other support services such as technical assistance are still necessary even if not on the same complexity as tech startups. This may include assistance on how to effectively make use of the tools provided by platforms to maximise sales through the platform to the extent their own programmes do not include this.⁴³⁹
324. There are more government programmes to support these types of businesses including on a funding level.⁴⁴⁰ However, their skills and focus is not on how to invest in and exploit an online presence, including pure online business ventures. Some are gaining a little experience as businesses seek support to list on eCommerce sites or set up 'ghost kitchens', but it is limited currently.
325. The Inquiry therefore finds that there is a gap for funding and additional assistance for HDP businesses to build their online presence and take advantage of the other remedial actions determined by this Inquiry.

10.2.2. Recommendations

326. The Provisional Report proposed a recommendation to government to allocate funding to HDP entrepreneurs using the fund mandate model where VC firms are mandated to support HDP entrepreneurs

only through both an incubator and funding programme and transform themselves. The report recommended private sector funders to the VC industry also impose mandates on their funding.⁴⁴¹

327. The rationale for proposing to draw on the VC industry through the fund mandate model was that it would assist in developing and transforming the VC industry and could be leveraged to crowd in private sector funding for HDP entrepreneurs through Series A, B, C funding as the business develops. However, by placing a mandate on those funds ensures it is directed in line with the need identified by the Inquiry, and a transformation mandate ensures that the VC industry gets better at identifying and supporting HDP startups and a broader part of the economy. Large institutional or corporate investors share the obligation to ensure that their capital assists not only those that have always benefited but seeks to harness the talents of the excluded to transform and grow the economy.
328. The government funding required to best support early stage HDP startups is first-loss and/or convertible debt, along with some direct funding support for the fixed costs of incubators and accelerators. This fills a gap left by private funders for higher risk appetite alongside building a pipeline of startups. However, this means that government may not necessarily get a financial return on its capital, but it will get a social impact and indirect financial return. Whilst there are many demands on the fiscus, digital markets are a self-expressed priority with considerable growth potential and other economic benefits. Aside from an HDP mandate, mandates may be directed to particular sectors or geographic areas

438 Business Partners meeting with Jeremy Lang dated 13 September 2022.

439 SAVCA Meeting with Keet van Zyl, Thiru Pather and Shelley Lotz dated 15 September 2022.

440 National Empowerment Fund, written submission by Mziwabantu Dayimani, Nhlanhla Nyembe, NM Moleka dated 27 September 2022, 2022; Department of Small Business Development, written submission by Mojalefa Mohoto, Development SMME Support Plan 2020-2024, dated 17 August 2021 and the Industrial Development Corporation, written submission by Tshepo Legodi dated 17 September 2021.

441 OIPMI Provisional report dated 13 July 2022, Chapter 9, page 21 para 54.

where the social impact may be greater or which are not the focus of private investors. Existing programmes supporting SMEs and HDP businesses should also add to their programmes funding for investments in an online presence and capabilities.

329. For institutional and corporate investors, the Inquiry notes that lack of mandates that are given to VC funds. The lack of mandates will result in lost entrepreneurial opportunities and a perpetuation of inequality into the digital era. The Inquiry is of the view that institutional and corporate investors in VC funds reconsider their position and initiate mandates within their funding.

330. The Inquiry therefore makes the following recommendations:

330.1. An allocation of government funds is made to supporting HDP digital economy startups through the DTIC or DSBD where the HDP Startup Fund is actively administered by an agency of government. The funds should be mandated for HDP startups only and may be allocated in support of other geographic and sectoral priorities. This should include funds for the operation of incubators and accelerators. Beneficiary VC funds should commit to achieving internal transformation targets set by the agency.

330.2. Existing government financial support programmes for SMEs and HDP businesses within the DTIC and DSBD to include funding for investments in an online presence and capabilities.

331. The remedial actions above are aimed to provide VC funding support for HDP entrepreneurs to directly address the finding that HDP entrepreneurs are disadvantaged in securing VC funding.

10.3. Regulations

332. This Inquiry has proactively engaged with a rapidly emerging digital economy to ensure it is competitive and inclusive. However, it happens at a point in time and in respect of a particular set of digital platforms, namely intermediation platforms. There are growing concerns globally across all digital platforms and not just intermediation platforms, and concern that the enforcement tools are insufficient to ensure competitive outcomes and a cessation to anti-competitive conduct. Within intermediation platforms themselves, conduct that has not yet emerged in some of the categories may do so in future, other intermediation services will gain traction in the market and, if the remedial action is effective, new leading platforms may emerge. In addition, there are continental developments that have implications for South Africa. The African Union has adopted a Competition Policy Protocol for the African Continental Free Trade Area (AfCFTA) which includes digital gatekeeper provisions to which our law should eventually align.

333. The Inquiry did provisionally recommend potential regulations and/or legislative changes. 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, there is an opportunity to build these into such regulations and/or legislative changes. However, that approach may be piecemeal and fail to systematically address the overarching challenges of digital markets. The Inquiry therefore no longer recommends specific regulations in respect of intermediation platforms. Rather, there should be continued debate about how best to respond to the challenge of digital markets and whether a more comprehensive solution can be achieved, be it regulations or legislative changes.

10.4. Global Platform Taxation Benefits

334. In a number of platform categories global platforms operate in South Africa and constitute leading platforms in their categories. These platforms typically reflect transaction income in their home countries rather than South Africa where the tax rates of the home country apply. Where such platforms do have a South African legal entity, the Inquiry has observed that this is treated in line with transfer pricing principles where the parent company 'pays a fee' for the services of the local entity, earning a small margin on the operating costs of the local entity in line with similar service companies. This represents an insignificant part of their overall revenue derived in South Africa. The question for the Inquiry is the impact of this market feature on competition in the intermediation markets.

10.4.1. Findings

335. Factually the largest global platforms in the categories considered by this Inquiry pay substantially lower taxes than the corporate tax rate of 28% in South Africa. In software application stores, Apple paid an effective 16.2% income tax in FY2022⁴⁴² and Google an effective 15.9%.⁴⁴³ However, currently in software application stores there are no domestic competitors to these global companies and therefore the low tax rates do not translate into a competitive disadvantage to local platforms. However, the lower tax rate of Google is relevant to comparator shopping sites and MSEs/OTAs where its shopping and travel products compete with domestic platforms that pay an effective 28% tax rate where they are profitable. For OTAs, another global company, Booking.com, is the leading platform and pays an effective tax rate of 21% at the holding company level⁴⁴⁴ but

Booking.com specifically has historically benefited from an Innovation Box Tax break in the Netherlands resulting in an even lower tax rate.

336. This substantial difference in tax rates self-evidently provides an advantage to global platforms in competing with domestic platforms as these firms can compete more aggressively, earning lower margins than domestic rivals whilst still delivering net returns that satisfy shareholders. For instance, such platforms can bid with a lower return on investment on Google Adwords (where Google itself competes in the Shopping Unit) or offer larger own-funded discounts on their platforms (such as for OTAs). The Inquiry received no submission disputing the difference in tax rates or the advantage that it provides. The only submission was on the proposed remedial action.

337. The Inquiry therefore makes a finding that the lower taxation rates of global intermediation platforms does have an adverse effect on competition by South African platforms.

10.4.2. Recommendations

338. The Provisional Report proposed that National Treasury to consider the competition distorting effects of differing taxes in determining how to tax digital content and firms, along with options for more equitable treatment through a withholding tax.

339. The Inquiry engaged with the National Treasury as the department with the mandate on taxation issues in respect of this proposal. The National Treasury indicated that South Africa was an active member of the OECD/G20 initiative⁴⁴⁵ to address the

442 Apple form 10-K SEC Filing for FY2022, pg 29.

443 Alphabet form 10-K SEC Filing for FY2023 pg 48.

444 Booking Holdings Form 10-K SEC Filing FY2022 pg 52.

445 OECD/G20 Base Erosion and Profit Shifting Project.

tax challenges arising from the digitalization of the global economy. This initiative has resulted in a two-pillar solution that aims to subject multinationals to a minimum tax rate of 15% and to re-allocate profits to countries where they generate income and profits.⁴⁴⁶ Implementation is targeted for 2023 and 138 countries have agreed to the two-pillar solution as of the end of 2022. This initiative would cover digital multinationals. Given that South Africa has been an active participant in driving this particular solution and it has broad global acceptance, the view of National Treasury was that this is the preferred route to resolving the digital taxation issue and to adopt an alternative approach would be contradictory to this solution. Google submitted that the multilateral approach to tax policies was preferred to avoid disputes and similarly cited the OECD initiative as the global consensus.⁴⁴⁷

340. For these reasons, the Inquiry does not recommend any further action as National Treasury has considered the taxation issue and elected to support the two-pillar solution emerging from the OECD/G20 initiative.

446 See <https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf>.

447 Submission of Google LLC to the OIPMI in relation to the Provisional Report (2 September 2022) para 6.6-6.8



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