

5 October 2020

EFSA Comments on the Competition Commission’s Paper Competition in the Digital Economy.

The Ecommerce Forum of South Africa¹ welcomes the opportunity to respond to the Competition Commission’s discussion Paper (‘the Paper’) dated 7 September 2020 and congratulates the Authority on a proactive, well-researched and comprehensive report.

The digital economy is a combination of interconnectivity and interoperability. Ecommerce is one of the drivers and utilizes most of the aspects of the digital economy – such as fintech, regtech, big data, the internet of things (IoT), rich data, and machine learning. Therefore, almost all the issues covered by the Paper relate in one way or another to ecommerce.

Ecommerce and bricks and mortar retail are complementary and have become an increasing popular combination for both consumers and businesses in South Africa during the COVID lockdown. Business-to-business (B2B) online sale of products is also on the increase. B2B ecommerce is of particular importance for the future of the South African economy, because it will drive industrialisation and allow scalability for SMEs. E-Government also relies on ecommerce mechanisms and skills to deliver paid-for services to both business (manufacturing licences and so on), and to consumers (e.g. travel visas).

We welcome the Paper’s statement on the need for South Africa to “... *invest in digital technology and its infrastructure with a sense of urgency. Access to data services and indeed the digital economy remains highly problematic as there is a real threat of not just economic exclusion, but also exclusion from full participation in society.*” It is one of EFSA’s aims to address the digital divide by encouraging women, youth and rural communities to leverage ecommerce.

¹ The Ecommerce Forum South Africa (EFSA) is a not-for-profit membership driven organisation founded in 2016 and is the national chapter of the pan-African Ecommerce Forum (EFA).

Certainly the COVID lockdown has changed the landscape. Observers believe that ecommerce in SA has leapt forward five years in five months, particularly in relation to consumer use of and trust in online shopping. The lockdown has also encouraged bricks and mortar retailers to develop an online presence where they had not done so previously.

The Dangers of Global Concentration

The Paper makes the argument that *“intentional regulation is required to avoid outcomes that could harm the development of small businesses, consumers and ultimately the economic growth so needed in South Africa’s developing economy”*.

The Ecommerce Forum Africa (EFA) has stressed the need for proactive anti-trust regulation in Africa - “We draw attention to the importance of having strong national competition authorities that can tackle abuses by dominant undertakings, where they occur. Without robust, cutting-edge enforcement, the African ecommerce market is vulnerable to exploitative practices that can harm African businesses and consumers alike. Competition regulators need to have a strong legal mandate and sufficient financial and human resources to invest in the data-intensive investigations that characterize modern digital antitrust enforcement.”²

We also recognise that it is essential to achieve a **balance** in regulation and its application to avoid protectionism, favouritism, or other unintentional restrictions on technical innovation and the development of innovative enterprises. The Paper wisely accepts that in this digital world the traditional mind set to competition policy has to be totally revised, and that competition regulation has to move in concert with consumer and other regulation.

The vast majority of companies in the digital economy are very fast moving – they succeed (or fail) by constantly evolving in their formal and informal relations and structures.³ This is true for all sizes of company, including the Big Tech companies – take for example IBM’s structural changes over the last decade.

² Principles for the Future White Paper for the African Union Commission, March 2019.

³ The Paper stresses this on page 17 “...another characteristic of the digital economy is its rapid rate of change. Developments take place quickly; definitions change, and parameters shift with more speed than the industrial economy is accustomed to.”

An interventionist approach to competition regulation by any country or regional grouping can upset the interoperability and interconnectivity of the digital ecosystem⁴ and thus disrupt or redirect the evolution of innovation.

In particular, we would like to stress that the vast majority of South African companies in the digital economy struggle to achieve investment (a point made below, pages 8-9), and that they face competition from deeply embedded SA and multinational companies operating in the traditional non-digital economy. This is specifically true of many Fintech enterprises.

Is Prioritizing Digital Markets for Merger Control Necessary?

We are concerned that a policy of “*prioritizing digital markets within merger control for the 2020-2025 period*” could take attention from tackling protectionist policies applied by established interests.⁵ As an example, the Paper points out (page 55) that South Africa has missed out on the benefits of mobile money due to rules that favour established interests. Developments in mobile money in other African countries, such as Kenya’s M-Pesa, has had an extremely positive effect on ‘banking the unbanked’ and therefore on Kenya’s economy.

We welcome the Authority’s proposal to map “*...the digital landscape of South Africa in order to inform proactive initiations on market conduct by dominant firms...*”, but we ask that this mapping⁶ covers both established players as well as new players in each marketplace to avoid distortions.

As the Paper stresses a number of times there is a need for a level playing field. However, we believe that digital innovations should not be compared like-for-like with pre-digital technologies, specifically in the communications and entertainment sectors. Regulators elsewhere have attempted to compare apples and pears, and force digital innovations into regulatory molds which were created for analogue technologies.

As the Paper suggests, the Commission should continuously monitor competition policies and anti-trust cases in other countries and regional groups (such as the European Union and the United States) and

⁴ See the Paper page 18, paragraphs 5 & 6.

⁵ For example, see the Paper, page 25, paragraph 3, incumbents using dominance mechanisms. We welcome that “*The Commission advocates for regulatory responses that are geared at levelling the playing field and reducing regulatory barriers to entry and expansion*”.

⁶ The Paper, section 3.3.4, page 42.

consider new tools for identifying market distortions, and to overcome challenges of jurisdictional reach.⁷ Two recent examples are the planned US anti-trust investigation into Google's control of the search engine market, and the EC's case seeking to force Apple to share its NFC technology. Both these cases will allow SA to enjoy the benefits of global anti-trust rulings. This point will become increasingly important in the context of the African Free Trade Area (AfCFTA, covered in section 4.8 of the Paper).

The Benefits and Functioning of Ecommerce

The Paper points out that e-shops benefit from being easy to set up without the overhead rental costs of a bricks and mortar retail outlet, and because of "low-profit expectations".⁸ It is true that ecommerce allows small entrepreneurs to establish quickly and to compete with much larger companies in niche markets. However, the Paper implies that costs of setting up a successful ecommerce shop (e-shop) are minimal. That assumption is not correct: - e-merchants face important overhead costs, including software, cybersecurity, marketing, warehousing/stock inventory, packaging, design and delivery. E-shops find it a major challenge to gain the trust of consumers who cannot 'touch and feel' the product; their customers are confined to those with access to the internet and online payment solutions, and delivery often constrains scalability.

We would argue that in the RSA ecommerce complements bricks and mortar retail and does not compete head to head with it. In many cases ecommerce and bricks and mortar are part of the same value chain, e.g. the on-demand grocery app, Zulzi services many bricks and mortar retailers such as PnP, by offering a shopping and delivery service to the consumer.

It is noted that bricks and mortar retail faces serious economic challenges in the RSA post-COVID, but press articles alleging that shops are closing because of competition from online sales fail to take into account the high concentration of shopping centres in some urban areas, high rental costs of some malls, the availability of stock and managements' inability to adapt to new consumer requirements (for example, in the case of the Stutterfords closure).

The Paper makes the point that *"... there currently exists a more open and contestable digital space in South Africa. This space does provide opportunities for domestic startups and established 'brick 'n mortar'*

⁷ See *inter alia* the Paper section 3.2 pages 34 – 37 and section 3.3 page 38 – 41.

⁸ The Paper, second paragraph, page 39. The point about "low-profit expectations" requires clarity. Business seldom consistently aims for low profits, although it may be forced to by circumstances

firms to open up new digital market products.” But we believe that the Authority should beware of comparing the South African market to the situation in the USA, the UK or other developed markets where, after two decades of development and “penetration pricing”, ecommerce market leaders have normalised the use of ecommerce and in some cases been able to entrench and concentrate.

Further, there is no evidence that ecommerce companies in the developed markets (whether they are entrenched or not) have “lowered consumer welfare”. Consumer welfare in developed countries can be understood to be competitive prices, convenience, quick home delivery at low prices, avoidance of crowded shopping centres and queues (specifically during COVID), and reduced transport costs for the consumer.

Connectivity

The Paper treats with the issue of connectivity, infrastructure and digital penetration in section 4.1, and points out that “...access to data services remains highly problematic as there is a threat of not just economic exclusion, but also exclusion from full participation in society”.⁹ EFSA agrees, however, notes that, despite a reduction in the cost of data recently thanks to the Commission’s actions, the cost of data in South Africa still remains the highest compared to other African countries with active digital economies, such as Mauritius, Rwanda, Kenya, Ghana, Nigeria.¹⁰

South Africa also suffers from unstable mobile network coverage, particularly in the rural areas, and has made no visible effort to find innovative solutions (such as the use of balloons to relay internet coverage¹¹). Perhaps an investment programme aimed at reducing the digital divide, rather than diverting resources to the launch of 5G would be advisable?

Consumer Protection and Data Privacy

In section 4.3 the Paper points out that consumer and privacy regulation play an essential role in the application of competition policies. There needs to be a coordinate approach by the relevant Authorities –

⁹ The Paper, pages 46-47. Note, there is an error in the Paper’s numbering of sections. This is section 4, not section 3.

¹⁰ *Inter alia* the Alliance for Affordable Internet <https://a4ai.org/affordability-report/report/2019/>

¹¹ In July 2020, Alphabet’s Loon project in partnership with Telkom Kenya started providing internet services to a 31,000-square-mile area across central and western Kenya, including the capital, Nairobi, from 35 balloons which are stationed 12 miles up in the stratosphere - well above the range of a commercial airplane.

Competition, the Information Regulator, Communications, the Financial Sector (FSCA) and the Consumer Commission on a number of issues outlined by the Paper, including price gouging, privacy of data.¹²

However, EFSA notes that a productive cooperation between the Authorities will be determined by the effectiveness of each in its own specific sphere. The recent example of the abuse of personal data by Experian, where data was passed to a marketer without the necessary controls or governance, could be considered as much a competitive as a privacy issue.

The EFSA would like to stress that privacy and data protection cannot exist without security - cybersecurity is increasingly important and the RSA must invest in the necessary skills to prevent cybercrime, which is a serious threat to privacy and to the orderly functioning of ICT. The number and seriousness of data breaches as the result of malware, phishing, and viruses in SA and globally should be a major concern to government, business and individual consumers.

Data Sovereignty (the localisation of data)

The Paper raises the issue of “data sovereignty” and data localisation. EFSA would like to point out that POPIA offers SA citizens extra-territorial protection. When a person’s data is exported the law applies no matter who processes that data (including government) or where it is stored (including in the Cloud). The argument that SA data is compromised by being stored in the Cloud or in other countries is therefore spurious.

We note that the storage of data and its security is, as the Paper points out, extremely important particularly for government records (such as defence, medical, tax data, etc)¹³. However, storing in a local server, even with top class security protocols, is much more likely to be compromised than using Cloud infrastructure.

Reputable Cloud service providers offer their customers ownership and control over their content and

¹² See also section 4.5, last paragraph, page 54.

¹³ The Paper, pages 50 -51. The argument put forward against Huawei by the USA is based on the suspicion that Huawei’s 5G mobile solution would remit American personal data to China. If the USA’s narrative concerning Huawei is correct, then we would suggest that there is a disconnect in Government’s approach to data localisation and on the other hand the acceptance of Huawei to provide 5G solutions in the RSA, since, according to the USA, Huawei will be accessing SA data via its systems in China.

should have a local presence in a country with strong data protection laws in order to be in compliance with the law. This affords the customer its own secure data storage environment and removes any potential hurdles to reach foreign entities. Credible Cloud service providers normally provide customers with an advanced set of access, encryption, and log-in features and provide APIs for a customer to configure access control permissions for any of the services a customer develops or deploys in the Cloud environment. The components of the Cloud are operated exclusively by the customer; the virtual machines are owned by the customer, and if the customer lacks the requisite skills to implement such extensive security mechanisms, the Cloud provider assists – thus providing a far wider scope of security than that of a locally based server.

It is important to note that Cloud service providers do not access or use a customer’s content for any purpose without the customer’s express consent, and never use the customer’s content or derive information from it for marketing or advertising. The customer chooses how their content is secured. Strong encryption is provided, and customers are provided with the option to manage their own encryption keys.

Holding periodical audits on data processing, as proposed by the Paper, is a positive move.

Finally, EFSA would like clarity on the sentence at the end of section 4.3, which states “*A national digital strategy should empower the government to review, investigate and take action against any ecommerce activity that threatens data governance and the localisation of national data*” [our underline]. Does this mean that the government has already adopted the principle of data localisation, and if so in which law? As we have pointed out above, we see no persuasive arguments to support this principle – indeed, we believe that it offers serious security dangers for the RSA’s government, consumer and business data.

Industrial Policy in the Digital Economy

EFSA welcomes the Paper’s proposals for a cross-cutting national digital strategy. This strategy needs to be flexible and capable to be updated on a very regular basis as technical innovations and political policies evolve. The RSA urgently needs to “re-industrialise” in order to ensure its global place as an innovative and vibrant economy and to benefit in the future from the African Free Trade Area (AfCFTA).

EFSA is concerned with the Paper’s approach to protectionist measures in section 3.4 of the Paper for a number of reasons – first, the World Trade Organisation (WTO) has been reducing tariff and non-tariff

barriers (NTBs) globally over the last decades while working to ensure that the developing world is on as level a playing field as possible with the developed world; second, it would be unwise to become a target in the present fierce competition between the four main trade powers – the EU, USA, India and China; third, unlike India, SA’s market is not large enough to enjoy economies of scale¹⁴, and, finally, because the RSA has signed up to the AfCFTA, and should be seen as a leader in that initiative.

We therefore suggest that it is not the right moment to impose trade protectionist instruments, which are certain to attract retaliation from our African and global trading partners. However, positive (i.e. non-protectionist) investment is essential both for business and also for government regtech in order to drive the digital economy for the benefit of consumers and businesses.

The Need for Investment in the Digital Economy

EFSA is concerned that the Commission believes that “[s]tate support must be short term”¹⁵. One of the major challenges for ecommerce is the absence of either public or private investment in Africa. Public investment is often short-term which makes it difficult for recipients to develop sufficiently before the funding is cut. As we noted above, ecommerce companies need time to establish and grow trust. They often are forced to survive for years with paper-thin profit margins before they are well enough known and have a sufficient budget to market to their potential customers.

Most e-marketplaces, many of whom carry e-shops, are also in a competitive market. The University of Amsterdam, in its study for the International Trade Centre, reported that the RSA had 106 e-marketplaces at the beginning of 2020¹⁶, and this number is growing - the latest, ShopESpot, a platform designed specifically for SMEs, was launched on 22 September. In another example, the African Union Commission (AUC) in partnership with the Ae-Trade Group announced on 7 July a new pan-African e-marketplace which aims to attract over half a million SMEs to sell across Africa.

EFSA would like to point out that marketplaces often need to provide a wide range of related services in order to be attractive to the e-shops they host. These services include online payment solutions, design, marketing services, and logistics. An e-marketplace that provides these and other related services either by acquisition or by developing its own systems is not creating a cartel. For example, the Paper points out that

¹⁴ See the Paper, 3rd paragraph of section 4.4, page 51

¹⁵ The Paper, top paragraph, page 52

¹⁶ The International Trade Centre - <https://ecomconnect.org/page/african-marketplace-explorer> .

both Amazon and Alibaba have developed their own payment services for their clients. In a similar way, Jumia found that its main cost and impediment was delivery, by investing in logistics it has solved a major challenge.

Promoting Inclusion in Financial Services

EFSA welcomes that the Commission “... favours a regulatory approach that promotes the inclusion of fintech and enables their access to the national payments system, banking platforms and provides for their licensing in a fair regulatory landscape” [our underlining].

Ecommerce depends on online payment systems in order to function effectively. We welcome that “*The current review of the payment system regulation should consider how best barriers to entry can be lowered, whilst continuing to guard against systemic risks*”. The Commission together with the Intergovernmental Fintech Working Group (IFWG)¹⁷ should provide solutions which benefit consumers and business alike and increase the choice of financial services while reducing costs.

The Paper points out that financial technology has been identified in both India and China as providing the most potential for digital economy growth¹⁸. EFA has noted that ‘addressing the unaddressed’ is as important as ‘banking the unbanked’ and in fact both go hand in hand. Consumers and entrepreneurs who enjoy an address with granular post codes are much more likely to use some form of banking and to enjoy benefits such as micro-loans¹⁹.

The Role of the AfCFTA and Regional Coordination

The EFSA fully agrees with the Paper that “... a cooperative approach ... enables common solutions to be found that might result in more consistent regulation ...”. The African Union (AU) has been working on digital innovation and digital trade for a number of years. It has produced conventions on related issues, such as the African Union Convention on Cyber Security and Personal Data Protection (the Malabo Convention of 2014), and policies such as [The Digital Transformation Strategy for Africa \(2020-2030\)](#).

It is our expectation that as the AfCFTA becomes established over the coming years, the member states

¹⁷ Set up by the FCAS, SARB, SARS, Treasury and other key players.

¹⁸ The Paper, page 56, third paragraph.

¹⁹ This is according to studies from Delhi. See p 17 of the SAIIA paper referred to below.

will work increasingly closely to address issues such as competition policy and that this will lead at some point to either the regional economic communities (such as COMESA or SADC), and/or to the AUC itself adopting the required legal instruments to allow for enforcement. Indeed, without an “African Court of Justice”, it is difficult to foresee an effective AfCFTA.

Ecommerce will be the driver for cross-border pan-African trade (which will stimulate industrialisation on the continent), as outlined by a recent SAIIA paper - <https://saiia.org.za/research/the-digital-economy-and-e-commerce-in-africa-drivers-for-the-african-free-trade-area/>. This will allow both ecommerce companies (e-shops and e-marketplaces) and African business to enjoy economies of scale and growth²⁰.

Regulators and competition authorities will need to cooperate and assist this growth. National protectionist measures, as we have pointed out above, have no place in this context, however clever use of investment policies and promotion of African made products will ensure that Africa develops steadily to the benefit of its population. In this scenario, EFSA strongly believes, South Africa has a key role to play as a leader in advanced regulation and governance.

The COVID Effect and Other Issues

So far, the market has not consolidated around a market leader during the COVID lockdown (a scenario suggested in the Paper), however it has provided “*the impetus for retailers to invest in their delivery services*”²¹. Although there is a serious lack of data on ecommerce in the RSA, which we hope government will assist in rectifying, there is evidence that over 8,000 e-shops existed prior to the pandemic, and that there are probably another 30-50,000 businesses, mostly sole proprietors, who sell online through Facebook, Instagram, OLX, Gumtree, WhatsApp and other social media outlets²².

An essential aspect of ecommerce is delivery. Customers (be they consumers, business or government) expect quick, efficient and price-conscious delivery²³. There is also a need for return of goods service,

²⁰ As the Paper points out in Section 4.8, page 58, “*Developing markets are typically small and so cannot build the scale in home markets that the United States and European Union firms can. So, for ease of rollout, a common regulatory approach would enable local African start-ups to meet the global challenges*”.

²¹ Chapter 5, page 61.

²² See <https://builtwith.com>

²³ By price-conscious we recognise that the faster the delivery the more the buyer is likely to expect to pay – although this is not always the case, a person buying meals online would not expect to pay more to avoid delay.

which is regulated under the Consumer Protection Act. In developed countries delivery has become a major selling benefit for ecommerce companies. In the RSA, although more delivery services have been launched, there is a need for the Commission to investigate distortions of trade caused by an ineffective national postal service.

EFSA would also like to point out that innovation in general needs effective intellectual property (IP) protection. The RSA's IP laws are outdated ("pre-digital") and this affects competition, while favouring established entities to the detriment of SMEs and individuals. Innovative individuals and SMEs are therefore encouraged to move to countries with more friendly IP protection.

Conclusions

The EFSA welcomes the opportunity to comment on this extensive and well-informed Paper by the Competition Commission. We believe that a proactive and positive competition approach towards the digital economy, as an integral part of the total economy, is essential. The digital economy does not exist outside other aspects of the economy: however, new digital innovation cannot be treated as an exact reflection of traditional communications. We believe there is no such thing as "technologically neutral". The temptation to reach for protectionist measures must be very carefully assessed and, if at all possible, resisted, particularly with respect to the RSA's obligations under the AfCFTA.

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