FREE MARKET FOUNDATION

Johannesburg
PO Box 4056 | Cramerview 2060
Tel 011 884 0270
Email FMF@fmfsa.org

24 August 2022

Comments on the

Online Intermediation Platforms

Market Inquiry

To: *oipmi@compcom.co.za*

Introduction

The South African economy is not in a good place. From our unemployment numbers, the numbers of people on social welfare and a tax base that is shrinking thanks to low growth and emigration of high-income earners, one would think the state and regulators would do their best not to exacerbate the situation. Alas, the Competition Commission ("the Commission"), in the Online Intermediation Platform Market Inquiry ("the Market Inquiry" or "the report"), has decided to take one of the few growing industries in the country and make it more difficult for it to function.

As a rule, the Free Market Foundation approaches competition realistically. The FMF believes that the absence of state interference enables competitors to enter a particular market. An example of a market that is not competitive would be the electricity market. Eskom is protected by the state from competition, and as such, it is a monopoly in the common law sense of an exclusive right of operation. Yet, the Commission subscribes to a different version of competition wherein industries that have more than one player, and those players can be subjected to new entrants, are still considered monopolistic and deserving of government sanction.

The online intermediation platform market is not protected by any legislation from competition, like say Eskom is by *inter alia* the Electricity Regulation Act. In the report released by the Commission, multiple companies are mentioned even within certain intermediation platform market segments like search engines and food delivery services. The Commission seems to have the idea that Company A outcompeting Company B in the market by commanding more consumer support, is tantamount to Company A being 'monopolistic'. The Free Market Foundation opposes this stance wholeheartedly.

The desire for regulation in a space wherein competition is possible is the thrust of the FMF opposition to the Market Inquiry's provisional conclusions. The Free Market Foundation finds the conduct of the Commission, in recommending things like the scrapping of certain contractual terms and the regulation of prices through ceilings, to be egregious and harmful to our economy beyond being unwarranted, since competition is possible (and flourishes) in this market.

Instead of seeking to legislate competition, the Free Market Foundation (FMF) urges the Commission to simply allow the market to operate freely. The online intermediation platform market is one of the few bright spots in our economy, that the Commission with this report seeks to harm and further hasten our march to economic ruin.

The Commission's recommendations

The Market Inquiry at paragraph 117 makes an integral conclusion which shows the attitude under which its operations are conducted. It concludes that large businesses are the shapers of competition. This view is contrary to the actual reality wherein governmental policy, instead of businesses, are the shapers of competition. Competition is the absence of state impediments, so it follows that a business by its nature cannot determine the competitiveness of a particular market since it does not control, through forceful means (legislation) who may or may not compete in a particular market.

Google Search

The common law definition of a monopoly is a legal protection or privilege to produce something in a particular jurisdiction.

Google's search engine does not satisfy the definition of a monopoly as per the common law since it holds no exclusive protection from the South African government to operate in the search engine space. There is no law prohibiting any other search engine from competing with Google. Just because Google is the most patronised search engine – a result of consumer choice – does not mean that it is a monopoly.

By the mere existence of search engines like Bing or DuckDuckGo, among others, the *de facto* monopoly position which the Commission charges Google with is incorrect. As the FMF, we object to the classification of an enterprise that is competed against, albeit not always successfully, as a monopoly.

The FMF opposes the recommendation in paragraph 131.3 which bars Google from favouring any of its specialised search units on its own search engine and search results pages. This recommendation violates the right to private property as it seeks to dictate how the rightful creator and owner of a certain piece of intellectual property in this case, should utilise their justly held property.

The competitive harm done by Google preferring its own specialised search units is minimal if any. Other search engines exist or can exist which can structure their business in this way. Google having a large market share with its already existing model which can be adapted by another company, shows us what the consumers prefer. Google should not be punished for being a successful business.

The FMF supports the recommendation in paragraph 131.1. The recommendation states that Google ought to have better distinguishing features to highlight paid results within its search results page. The Commission recommends borders or shading coupled with wording like 'advert' written boldly as a replacement of the current ad distinguishing feature of just a top left icon showing either the word ad or an icon.

This distinguishing between adverts and organic search results is something Google is already doing, albeit according to the Commission not enough. Therefore, simply making what they are already doing, more prominent, ought not to prove too burdensome. The concerns of possible deception on the part of a consumer who is using Google expecting organic search results is another motivation to support this recommendation. It must be noted, however, that since Google is already doing this, and most importantly, its customers have not expressed concerns through simply not using their search engine anymore, then the recommendation seems redundant.

The FMF opposes the recommendation in paragraph 131.2 which seeks to move ads away from the top page of search results, coupled with the borders and/or highlighting of said ads. This will represent a fundamental shift in how Google will have to conduct its operations in selling space for advertisements on its results page. If a business is no longer the first result in a page, then surely the fee they pay for advertising on said results page will decrease. This represents an overreach on the part of the Commission since it will most likely have an impact on Google's revenue. As such, the recommendation in paragraph 131.2 is opposed, with the recommendation in 131.1 being the only one supported, albeit tentatively.

The FMF opposes the recommendation in paragraph 131.4 which instructs Google to give equal treatment to other comparator sites, specialist search engines, and online travel agents as it does to its own specialised search units. This recommendation is opposed, too, because it represents an infringement on the private property of Google. Google's own specialised search units are in competition with these other sites, therefore, Google preferring its own internal site is not detrimental to competition.

The mere fact that there exist other sites than Google's specialised ones undermines the point about Google's preference harming competition. Google does not owe these companies any equality, since if they were being exploited, they would simply create their own search engines, have the userbase that Google has, then do as they please. This recommendation seeks to undermine the very essence of commerce itself, which is, looking out for your own business only and doing everything within the bounds of the law to maximise profits in your commercial endeavours. The comparator sites and online travel agents need Google, they benefit from it, yet they are not it. Google is its own company and if it chooses to favour its own products, it cannot be faulted nor penalised as is being sought.

The FMF opposes the recommendation in paragraph 131.5 which prohibits Google from having minimum bid thresholds for paid results. This is overregulation, and a continued insistence on invalidating the right to property. Additionally, it undermines the right to freely trade.

Entrepreneurs ought to charge whatever price they deem fit in the market. In the case of Google and its minimum bid threshold, there is no way to tell what the ideal price or mechanism ought to be, since there is no such situation existing to draw the 'objective' price or model from. The market will decide if a price is too high by simply no longer purchasing whatever is too high. It cannot be thought that third parties like regulators can determine what the correct price is, since the assumption with minimum bid thresholds being abolished is that they are exploitative or exclude small business. The idea that some businesses are entitled to the services of Google is astounding and simply unjust. Google should price its services how it sees fit and the same goes for any other business.

The FMF also opposes the recommendation at paragraph 131.6 which calls for an end to default arrangements for Google Search on Android (which is a Google operating system) and iOS smartphones sold in South Africa. This recommendation is patently anti-consumer and anti-choice. The consumer has no problem with the current default arrangement of Google Search on Android or iOS smartphones. Consumers are currently buying these devices knowing that Google search is the default search engine. There is a possibility of getting another search engine should one wish to do so. There is the possibility of not buying Android or iOS devices should any consumer not want Google as the default search engine. By recommending that all Android and iOS smartphones be a particular way, the Commission is depriving South African consumers of their ability to freely choose.

The FMF opposes this recommendation on the basis that it is tantamount to the central organisation of an economy. Google Search being the default search engine in smartphones does not inhibit other search engines from existing and competing. Whether they are successful or not at competing is not the concern of any competition authority, rather it is the mere fact of their existence which should be of paramount importance.

Online Classifieds

The FMF disagrees with the remedy proposed in paragraph 134.1, which seeks to remove and prohibit fees charged by leading platforms in this market for incoming listings from agents or dealers who use third party listing engines. This remedy is not concerned with the competitiveness of the market, that is, it is not concerned with whether another potential entrant can enter the market and do what the Commission suggests and prosper if it is what the market wants. Yet it seeks to criminalise an aspect of the business model of these leading platforms in the online classified space by prohibiting certain aspects of their business which consumers have a choice not to associate with.

The fees charged by these businesses for whatever reason are within their prerogative to do so. Those who feel the fees too high or low are free to express their opinion through their actions in the market as consumers. Therefore, the Commission, whenever it prohibits something that consumers show their support for by purchasing, act in opposition to said consumers. Forcing these businesses to act in a way that will benefit other businesses is contrary to commercial logic. If alternative classified sites can enter into the market, then remedies like these which prohibit certain terms in contract of sale or association, constitute an injustice.

The FMF by extension is also opposed to the recommendation in paragraph 134.2 which mandates interoperability between these leading online classifieds with third party listing sites at no fee. This is an extension of the remedy in paragraph 134.1, and as such the same reasoning of invalidating private property and undermining the very rules of commerce applies. With this mandating of interoperation, the freedom to associate, which is linked with the freedom to trade in that whomever you trade with, you associate with in some form or manner even at the level of the meeting of minds in a contract of sale, is also undermined. As such, mandating interoperation when the market clearly has not given rise to it voluntarily, is an unjustified inhibition on these integral rights.

The competitive effect of an absence of interoperation is best seen by the fact that there is nothing prohibiting any other entrepreneur from creating a site that has all these features. If the market truly wants them, then that entrepreneur will be prosperous. By mandating this, the Commission is choosing to use legislative force when it can simply let the market fill the void if it there is one.

The remedy proposed in paragraph 134.3 is also opposed. This remedy is evidence of the charge against Commission that it seeks to criminalise commerce itself. By seeking to prohibit certain contractual terms as is proposed, the result would be an entrepreneur no longer being master of their enterprise since it is now centrally directed from the offices of the Commission.

How lengthy contracts should be and whether they ought to contain incentives or not, is a determination that should be made by the parties entering into the contract themselves. It cannot be said that contractual terms are opposed after the fact of agreeing to them as the business users of these platforms would contend. This undermines the sanctity and strength of contracts, which has a broader negative effect on investment and the economy. This is especially so when regulators will support this activity by simply deeming the terms the parties agreed to, unfair after the fact.

Therefore, the remedy that prohibits long term contracts and the incentivising of signing long term contracts is opposed for the harmful precedent it would set in the economy wherein the regulators can deem contractual terms which the market has no problem with, illegal. Should parties not wish to be bound by a given contract, they are free to not agree to it. The fact that these business users are

dependent on the platforms of these leading online classifieds sites is not reason enough to justify the Commission using state force to bar certain contractual terms.

Regarding the remedies proposed in paragraphs 134.4 and 134.5, the FMF opposes the recommendation of the Commission for the association of estate agents to divest from the platform "Private Property". Nothing bars estate agents or their associations from starting or investing in whatever business they wish to. This is part of every South African's right to pursue trade. The recommendation of industry organisations like Rebosa no longer 'coordinating' commercial conduct by its members seems to be premature for this report. The Commission will need to devote itself to an investigation of such collusion under the correct provisions of the Competition Act and then make such a recommendation therein, where the matter can be argued in court, should Rebosa/Private Property wish to oppose the commission which has pre-emptively concluded that there is collusion that outweighs the pro-competitive gains that could be shown by the parties accused of said collusion.

Therefore, both remedies in paragraphs 134.4 and 134.5 are opposed. on the recommendation in paragraph 134.5, which has the alternative of an investigation under section 4 of the Competition Act and possible prosecution, is opposed in part, with the aspect which calls for an investigation being supported.

Food Delivery

The FMF opposes all the remedies with respect to food delivery platforms like Uber Eats and MrD contained in paragraph 139 and its subparagraphs. The same problems of criminalising commerce persist. The remedy in paragraph 139.1 which will see these companies structure their contracts in a way that will not encourage restaurants to use their business and their business alone, is simply divorced from the realities of running a business. Having customers or clients patronise you alone is the whole point of competition. The Commission seeks to punish the leading food delivery services for competing and succeeding.

The remedy in paragraph 139.2 which will see franchises no longer limiting which delivery service franchisees can use is also opposed. Franchisees bind themselves to certain franchises from the outset, knowing which delivery services they will use and which they cannot. The competition authorities ought not dictate to businesses how their contracts should be structured. This will set a dangerous precedent and possibly give power to competition authorities to centrally direct every business in the country.

The remedy in paragraph 139.3 is also an attempt at centrally organizing business by determining which terms in a contract are 'good' and which 'bad'. Price parity clauses are a part of the of the model of these businesses since they are a part of their contracts. The Commission ought not centrally direct businesses in the country, and as such, both the recommendations in paragraphs 139.2 and 139.3 are opposed by the FMF.

The FMF also opposes the remedy in paragraph 139.5 which will see these businesses run their enterprises and operations how the Commission wants, and not how consumers themselves want. The greater transparency of charges in these platforms is not a concern which consumers have as is

evidenced by their continuing to use these platforms even in a situation of ostensible 'less transparency'. As such, 'greater' transparency not only presumes that transparency is there already as a fact but also that whatever the Commission will decide as being 'greater', ought to be the standard for everyone in the country. Consumers are free to go to the sites of the restaurants who display their prices. These entities should not be forced to run their businesses by diktat from the Commission's offices.

Travel and Accommodation

The remedy in paragraph 142.1 is opposed by the FMF for seeking to dictate operational guidelines for businesses thus undermining the freedom to contract and the right to private property central to commerce. Price parity clauses were included in the contracts with these leading platforms and business users agreed to them. It cannot be that losing in the market (not having as big a share of the market as one enterprise might want) is equated to an inability to compete. If the business users feel that the contractual terms are unfair, then they can simply not agree to them. Making such terms illegal is an overreach and punishes innovative businesses, having a negative effect on the economy.

As such, the remedy that price parity clauses be eliminated from contracts is opposed by the FMF for undermining the freedom to contract and the right to private property.

The proposal about the uniformity of loyalty schemes on these platforms in paragraph 142.2 is also opposed. The Commission seems to have taken the side of business users and essentially used their interests to force these platforms to conform to what they want, when these platforms cannot force these business users to use their services. This represents an overreach by the Commission seeking to dictate how a business should be run. The loyalty schemes do not inhibit any entity from opening their own platform and competing with the leading ones. As such, seeking to bar differing loyalty schemes has no effect on competition but rather invalidates property rights.

eCommerce

The FMF opposes the prohibition of price parity clauses. The reasoning has been explained in the remedies wherein price parity clauses are recommended to be removed. Being effective at competing should not be punished. If sellers do not desire price parity clauses with Takealot, then they can simply not list on Takealot, rather than forcing Takealot through state power to conform to what they want. Therefore, the remedy in paragraph 145.1 is opposed by the FMF.

Software Application Stores

The recommendation of an end to all anti-steering mechanisms as is found in paragraph 152.1 is opposed by the FMF for its attempt to undermine the private intellectual property of app stores and their freedom to draft contractual terms as they deem fit (ones that do not violate rights). The apps that list on these stores agree to be bound by the terms with which the contract to. Seeking to be

released from those terms after the fact has a detrimental effect on the sanctity of contracts in the future, since one party can always run to the regulators and claim unfair play.

If the apps want an alternative payment system, then they must list on their own app stores and where they cannot, create their own phones to have software they choose thus giving them the freedom that they desire. Since the app store is not theirs, they cannot dictate to the owner of the app store, be it Google or Apple, how they should conduct their business. That is an injustice that violates the right to property.

This is not a competition issue, but rather an issue that certain businesses do not like about another business. Since there is nothing being done by Google or Apple to prevent potential competition (having a large market share which you got by being voluntarily patronised is not an inhibition to competition deserving of state interference) by not allowing steering from apps sold on their stores. The remedy in paragraph 152.1 is opposed by the FMF for these reasons.

The opposition to the uniformity of loyalty schemes propagated by these platforms in the app store space as found in paragraph 152.2 has been covered in similar oppositions to such recommendations. Loyalty schemes should not be determined by government authorities. If the running of a business does not violate rights, it should not attract any legal attention. Prohibiting different loyalty schemes is tantamount to running the company, being its executive or shareholder determining the form of operations. This is beyond the scope of the Commission. The loyalty schemes were not inserted after the fact. The business users knew all about them and still bound themselves to the contract that had them. For these reasons, the FMF opposes the recommendation in paragraph 152.2 calling for uniform loyalty schemes.

The FMF opposes the recommendation in paragraph 152.3 which calls for the end of the default status enjoyed by Google Play Store on Google Android devices. This recommendation borders on the absurd in what it requires, and its end is market engineering instead of enabling competition. Google is the creator of the Android operating system. When a consumer purchases an Android device, they expect to find Google services since the operation system itself is by Google. Consumers are not complaining that Android is too Google-centric. Instead, it is the competitors of certain aspects of Google's business which seek to enforce their interests on another company, supported by regulators.

If consumers do not want the default status of the Play Store on Android devices, then they are free to not purchase them. From sales, which are the only scientific way to tell what consumers want, we know that consumers want Android devices with the current default status of the Play Store. There is nothing being done by Google aside from their being preferred by the market (market share) which bars any other app store from existing, or any other operating system from existing with its own default apps.

This remedy will see Google being punished for building a successful operating system which has created multiple opportunities for others and preferring their own software on their own operating system. The remedy is patently punitive towards businesses that managed to capture the market by offering value. For these reasons, the FMF opposes the recommendation in paragraph 152.3.

Provisional business user competition findings and recommendations

Cross Cutting Finding

The Commission seeks to apply the findings it made in respect to Google to all intermediation platforms. The FMF opposes these remedies which are found in paragraphs 155.1 and 155.2 which will see borders and more prominence given to advertisements. For companies that already have distinguishing features for advertisements, it could be deduced that their markets desire that. For companies or platforms that do not have this, their markets are clearly comfortable without such distinguishing features for ads, and imposing them would constitute the Commission deciding for consumers what they ought to consume and how.

The remedies at paragraphs 155.1 and 155.2 are opposed by the FMF insofar as they represent a new feature or process on the part of the platform to adopt it. Businesses in general are different, even ones in the same market doing the same thing, therefore the need for uniformity in the business environment, concerning something critical to operations as the placement of ads and their presentation, should not be standardised. For companies that already have distinguishing features for ads, they should make them more distinguishable as per the spirit of the remedies and for those that do not, which we are sure their customers have no problem with, (customers still patronise them without this remedy being in effect) they should not be forced to change how they conduct their operations premised on the whims of regulators.

The recommendation in paragraph 155.3, which proposes that these platforms which have and run advertisements should join the Advertising Regulatory Board to have their advertising conduct regulated, is opposed. Instead, the FMF recommends that any other enterprises that are required to be members of the Advertising Regulatory Board must be freed of this burden. The state has no mandate to regulate expression in this fashion.

Online Classifieds

The FMF disagrees with the recommendation that a standardised rate card be introduced, with no differentiation in fees and rates between users with high volume and those with low volume as is outlined in paragraph 158.1. These platforms are not inhibiting any other platform from setting up a classifieds site and competing with them, offering a standardised rate card. If the market has an appetite for it, then there is nothing these leading platforms are doing to prevent a potential new entrant.

Standard rates, especially for different categories of consumers, would have a significant impact on the operations of these companies. There must be a reason that there are different rates and that reason, as being part of the running of the business to the point where consumers voluntarily use it, is essential to the efficiency of whatever market the business is operating in. The recommendation shows the singular objective of this inquiry which is to dictate to these platforms how to run their business rather than looking at whether they are doing anything (aside from getting customers) that

prevents new entrants into market. Seeking to dictate how a business should price its products is an overreach on the part of the Commission, one we are of the view is not supported by law.

The ability of anyone else but the business owner having the power to determine prices would send out negative signals to the market about our economy, which is already hobbled by overregulation of prices in areas like fuel.

Food Delivery

The FMF opposes both the remedies found in paragraphs 161.1 and 161.2 which call for the standardisation and homogeneity of rates irrespective of the volume the user generates and a general equality in rates among businesses of differing sizes, thus representing differing value propositions to the platform. The differences in rates is necessitated by conditions which only the business owner is aware of, since economic value is not objective thus cannot be measured against an objective standard. Therefore, the different rates that are currently prevalent are preferred by the market, which is the most important reason for opposing any remedy. If it will override the preferences of the market then it is social engineering that invalidates the innate right to choose and its corollaries of being bound by the choices you freely make, for every market participant in the food delivery sector.

Standard prices being set for businesses presume that the regulators have an idea of what the right price ought to be or the right pricing structure (standardised vs fluctuating or differing). The regulators are simply guessing that the standardised pricing will be better. It's guessing because the only way to tell what is efficient or not in the market, is through allowing commerce to operate unimpeded and whatever prevailing condition, absent state interference, is the efficient state of the market. That is, if we agree that the presumption of perfect knowledge, which is tied to efficiency, is discarded for its absurdity as no single person ever acts with perfect knowledge thus making that assumption in efficiency, a chimera. [1]

Travel and Accommodation

The FMF opposes the recommendation made in paragraph 164.1 for a standardised rate card. The preceding subsections dealt with the reasoning for the opposition of such a recommendation to different businesses as such, rehashing them for travel and accommodation is redundant. The FMF is opposed to any and all standardised rate cards being forced on these platforms.

The recommendation in paragraph 164.2 which has the alternative of an investigation into collusive conduct instead of a directive to remove a certain contractual term is encouraged. Since the FMF is opposed to the dictating of contractual terms to businesses, or the preferencing of one party over another in a contract being reviewed for anti-competitive effects, an investigation into the matter is supported as it will stay the implementation of the removal of the clause and maybe even lead to it

[1] Murray N Rothbard 'The Myth of Efficiency' in The Logic of Action One: Method, Money, and the Austrian School (Cheltenham, UK: Edward Elgar, 1997), pp. 266-273.

being found to have a pro-competitive gain. As such, the remedy in 164.2 is supported insofar as it calls for an investigation into the purported collusive conducted.

The FMF disagrees with the recommendation in paragraph 164.3 which calls for symmetric payment terms. The market chose the currently prevailing terms and conditions, therefore the Commission seeking to direct these businesses to act in one way or the other would represent a misallocation of market resources.

The FMF disagrees with the recommendation in paragraph 164.4 calling for cheaper options in these sites to be highlighted. The points of the prevailing conditions being chosen by the consumer still stands. There are ways to order results in these platforms so that they appear in a manner that will have the cheapest being shown first. Most platforms if not all, can sort results, as such, there is no need to highlight cheaper option specifically when the consumer can find them should they want to look for them.

eCommerce

The recommendation that will see an end to product gating, as stated at paragraph 168.1 is opposed by the FMF. As a matter of just principle, the ecommerce platform has a right to conduct its business as it deems fit. The Commission seems to have concluded that just because other ecommerce sites are not as successful as Takealot, then it means the operations of Takealot have an anti-competitive effect deserving of state regulation. There are other ecommerce sites, which shows that competition is possible. The fact that Takealot has beaten out its competitors should not be construed as a reason for punishment. The fact that they decide to run their business by gating products or in whatever manner should not be penalised since these agreements that give rise to gating are entered into voluntarily. As such, any remedy like the one in paragraph 168.1 is opposed by the FMF.

The remedy in paragraph 168.2 is opposed by the FMF for its clear violation of the property rights of the platform in question to not preference its own retail products on its own platform. The subparagraphs which specify the extent to which Takealot may not preference their own retail division in promotions and the likes, stems from a general prohibition proposed by the Commission against preferencing. This remedy is opposed by the FMF for it ignores the fact that sellers on Takealot's platform benefit from the large customer base that Takealot has, which is why they won't list on other platforms, yet they seek to dictate to Takealot, with the help of the Commission, how it should conduct its business.

Takealot consumers do not have a problem with the preferencing exercised by Takealot. If they did, they would not patronise Takealot. As such, the recommendation that Takealot not preference its own products on its own platform, is tantamount to Takealot being nationalised and receiving its orders from the state rather than the market. If the business users feel disadvantaged by Takealot's practices, they are free and have the latitude to not list on Takealot and rather list on a platform that will cater to their needs. Asking Takealot not to capitalise on its own platform for its own benefit, undermines the very spirit of commerce. As such, the FMF opposes the recommendation in paragraph 168.2 as well as every other recommendation falling under this general prohibition on preferencing.

Software Application Stores

The FMF disagrees with the recommendation in paragraph 172.1 which will see price regulation for the app stores by prescribing a price ceiling. The problems associated with price ceilings and general price regulations by governments are well covered in economic literature and the consensus is clear that price regulations have a negative effect on the economy. Prices ought to be left to the market to determine, as per the prescripts of a market economy. The FMF is therefore opposed to any and all price regulation.

The FMF is also opposed to the insistence on South African app specific curation on app stores and the discoverability of South African apps specifically therein. South African consumers have the wherewithal to decide whether they want such or not and if they did not feel represented by Google or Apple's app store then they would communicate this by no longer patronising these companies. Telling a company how to run its operations is not the job of competition regulators. If there is demand for a South African specific platform or app store then the market will provide it, if it is not then it means there is no demand for it and rather the Commission is again taking a decision on behalf of every consumer. Therefore, the FMF opposes the recommendation in paragraph 172.2.

We also oppose the forced charity which is being recommended by the remedy in paragraph 172.3 which seeks to mandate free promotional credits for South African apps to be used in the local or international storefront of the app stores. Forcing businesses to give away their services for free is not only far removed from the objectives of competition policy but also represents a clear move towards centralisation of business operations which is contrary to a market economy. App stores do not have a duty to support local app developers nor give out their services for free.

Provisional findings and recommendations to government

The FMF opposes the recommendation in paragraph 175.1 which calls for more regulations or the application of even more regulations to intermediation platforms. This includes opposition to all the specific regulatory areas listed from paragraphs 175.1.1 to 175.1.3.5.

Competitive distortions from tax differentials

The FMF is opposed to the recommendation that more taxes be instituted on the economy in general and as such, it would be opposed to any attempt that will see any company, local or foreign, paying more taxes. The recommendation in paragraph 178.1 which posits that Treasury should consider the distortion to competition caused by differing tax rates in the digital sphere ought to be considered only if the outcome will be lower tax rates that will attract these companies to be listed or registered domestically and that will alleviate pressure on domestic ones.

Where there are differences in tax rates between local and international jurisdictions, which see local businesses pay higher taxes, the solution ought to be lowering taxes for local businesses to make them better able to compete. The FMF would support the recommendation if it meant that the end being sought was a lower tax rate for businesses in South Africa which will have a positive impact

on our economy since companies will have more money to spend in the economy instead of it being taxed.

Given that the Commission proposes a new tax, like a withholding tax, it is doubtful that their encouraging Treasury to investigate the matter would have the end of lowering taxes. As such, the FMF is opposed to the remedy in paragraph 178.1.

Provisional HDP platform and business user findings and recommendations

Platform level

The recommendation made in paragraph 182.2 which calls for a commitment from private companies to fund HDPs and set out certain parts of their capital for that reason is opposed by the FMF insofar as it mandates to businesses how they ought to spend their money. Making a demand of every large corporation to essentially fund their competition is unjust in that it would represent a violation of the right to property. The FMF acknowledges the challenges faced by HDPs as outlined in the findings made by the Commission, yet it is of the view that the use of force in the marketplace is not conducive to any good result.

As such, the FMF opposes the recommendation in paragraph 182.2 insofar as it is a directive to companies.

Business user level

The FMF, in its ardent support for personal liberty and determination cannot support the recommendation in paragraph 185.1 which will mandate preferential treatment for HDPs from private businesses. This includes personalised ‘HDP’ assistance or the waiver of onboarding fees and costs for HDPs, among other preferential treatments advocated for in paragraphs 185.1.1 to 185.1.5.

The FMF is firmly opposed to any directive of this kind that will undermine the private property rights of these companies, their freedom of association as well and most importantly, promotes the insidious notion that HDPs cannot succeed without some form of government mandated assistance. In striving for equality, the recommendations from the Commission will see the continuing of preferential treatment premised on some other arbitrary factor and reaffirm the notions that lead to the oppression of HDPs in the past by making it though that their success is not organic but was rather engineered by the state through recommendations like the one in paragraph 185.1.

The FMF is of the view that HDPs are fully capable of succeeding in the market without any assistance. As such, the recommendation in paragraph 185.1 will undermine the cultivating of a consciousness among HDPs that normalises success or failure, without any state involvement.

Conclusion

The FMF opposes the proposed institution of even further regulations to the South African economy. What the economy needs, especially a growing sector like online intermediation, is less regulation to enable innovation and subsequently growth benefitting our economy. The Commission calling for more regulations that will enable it to override even more of the choices of South African consumers is divorced from the economic reality currently facing the country.

Naturally, regulations require compliance, which costs money. These proposed regulations will be a barrier to entry to the intermediation platform market. Therefore, by calling for more regulations, the Commission is calling for a situation wherein it would be harder for potential entrants to enter the market, thus having a negative real effect on competition. The Commission's job as a competition regulator ought to be ensuring that entering markets is made easier. Regulations in a sector that is still in its nascent stages will inhibit its rate of growth, since regulations favour entrenched businesses that have the income for compliance whereas potential new ones must include compliance costs in their startup budgets.

We are of the view that all proposed new regulations that will add more compliance burdens in the intermediation platform market should not be adopted and that the Commission should desists from calling for more regulations.

*****

Prepared by **Zakhele Mthembu**, Legal Researcher, Free Market Foundation