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GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

DEPARTMENT OF TRADE, INDUSTRY AND COMPETITION

NO. 3171

20 March 2023

*competitioncommission*
south africa

MEDIA AND DIGITAL PLATFORMS MARKET INQUIRY TERMS OF REFERENCE 20 MARCH 2023

1. INITIATION OF A MARKET INQUIRY

- 1.1. The Competition Commission ("Commission") will conduct a market inquiry into the distribution of media content on digital platforms, including search, social media and news aggregation platforms, the "Media and Digital Platforms Market Inquiry" (or "MDPMI"). Search and social media platforms primarily fund themselves through advertising and drive consumer traffic, engagement and data collection to support that revenue stream. New media content is made available to drive traffic and engagement and where the digital platform market features will influence the bargaining over the use of that content and referral traffic to news media websites. News aggregation services curate content from various news sources to offer consumer convenience in digital news consumption, and market features will influence the bargaining over the use of news content.
- 1.2. The MDPMI will be initiated in terms of section 43B(1)(a) of the Competition Act 89 of 1998 (as amended) given that the Commission has reason to believe that there exist market features in digital platforms that distribute news media content which impede, distort or restrict competition, or undermine the purposes of the Act, and which have material implications for the news media sector of South Africa. These reasons are set

out below along with the draft scope of the inquiry. Public comments are invited on the scope of the inquiry before 16h00 on 20 April 2023.

2. BACKGROUND TO THE CONCERNS ON DIGITAL PLATFORMS AND THE IMPACT ON NEWS MEDIA COMPANIES

Digital platform concerns and the use of a market inquiry

- 2.1. On 28 February 2022, the Online Intermediation Platforms Market Inquiry (“OIPMI”) received written and oral submissions, in-camera, from the Publishers Support Services (“PSS”) representing the largest news publishers in the country with collectively 256 titles and over 4000 employees. The PSS submitted that the transition to digital news consumption and advertising had resulted in all publishers seeing a massive decline in advertising revenue, and an increase in costs as newsrooms needed to devote resources to their digital presence. This transition leaves the publishers in a precarious financial position despite cutting costs. In addition, independent journalism in the country is under threat as a result given that independent public interest journalism is one of the cornerstones of a healthy democracy.
- 2.2. The PSS submissions covered a range of issues that impact negatively on competition, public interest, and their ability to fully enjoy the revenue benefits of their content in the news publishing sector, namely:
 - 2.2.1. Google and Meta (formerly known as Facebook), through their digital platforms, are dominant gateways to consumers and news publishers are, in part, dependent on referral traffic from these platforms. However, these platforms use their dominance to effectively extract copyright news snippet content for free by demoting news articles that lack a snippet on the search engine results page (“SERP”) or exclude them from the social media feed. This effectively, denies the publishers referral traffic that would allow them to earn display advertising revenue. The practice of offering news snippets also denies the publishers referral traffic as news consumption has shifted to many consumers simply browsing news snippets. This change in news consumption adds value to the search and social media platforms, allowing them to monetise data or advertising, and in so doing extract the benefits of copyright content from the publishers.

2.2.2. The dominance also enables the search and social media platforms to act as a gatekeeper on consumer data, denying publishers full access to that data which prevents them from better understanding and serving the South African consumer. In addition, the dominance has imposed costs on the publishers as changes in algorithms impact on publisher visibility and referral traffic and require ongoing investments in news site optimisation for search and social media. This situation is worsened by the lack of engagement by these companies.

2.3. Globally, there have been several inquiries and investigations led by competition authorities on the impact of digital platforms (e.g., Google and Meta) concerning, amongst others, news media businesses that use these platforms to distribute their content digitally as well as the impact on their generation of revenue.¹ Due to the prominence of some of these digital platforms, players such as Google and Meta, act as gateways to reaching consumers, especially for businesses in the news media sector.

News media business's relationship with digital platforms and the implications on competition

2.4. News media businesses² rely on Google and Meta's user-facing services to host content or to drive traffic to their websites or apps. The Competition and Markets Authority ("CMA") identifies three broad types of digital business model strategies adopted by publishers of online content:³

2.4.1. Subscription based, where the publishers focus on turning the user into a paying subscriber;

¹ Many competition authorities have undertaken market inquiries into various aspects of digital markets including a focus on digital advertising and digital platforms. In these types of inquiries, many aspects of the impact of digital platforms have been assessed which include the impact of digital platforms on: consumers, businesses using platforms to advertise to and reach customers, and more specifically news media businesses such as publishers and news aggregators using these platforms to disseminate their content. See Australian Competition & Consumer Commission ("ACCC"), June 2019, "Digital Platforms Inquiry – Final Report". Available at: <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>; Competition & Markets Authority ("CMA"), 1 July 2020, "Online platforms and digital advertising – Market Study Final Report". Available at: https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf

² News media businesses refers to a company that produces and publishes news content which include news publishers, news agencies, and any other business that provides news media sources.

³ See CMA (2020), "Annexure S: the relationship between large digital platforms and publishers". Available at: <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study#final-report>

2.4.2. Traffic and digital advertising based, where the primary focus is to drive traffic to the publisher's webpages and monetise their content in the form of targeted digital advertising that is displayed to the visitor; and

2.4.3. Monetisation of content on third-party platforms, where publishers post content on third-party digital platforms (e.g., social media sites or news aggregator services) and use monetisation tools made available by those platforms (e.g., sharing of advertising revenues) to generate revenue.

2.5. The Australian Competition and Consumer Commission ("ACCC") identified that there is increasingly an overlap between the functions of news media businesses and digital platforms with respect to the selecting and curating of content, evaluation of content, and the ranking and arranging of content online.⁴ For instance, the ACCC found that many digital platforms utilise complex algorithms that select relevant content, extract titles and links, and group or rank the content in order of relevance to its users sourced from available online news content.⁵ Digital platform users may access online news content through search queries on search engines (e.g., Google Search or Microsoft's Bing),⁶ through social media sites (e.g., Facebook under its News Feed),⁷ or through news aggregator sites/apps (e.g., Google News and Apple News).⁸

⁴ See ACCC (2019). "Digital Platforms Inquiry – Final Report". Available at: <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>

⁵ Ibid.

⁶ Search engines such as Google Search produces a set of hyperlinks that its algorithm considers to be relevant to the search term inputted by a user where the search query is displayed as organic search results. The algorithm also considers what type of results to display, for instance, if it determines that the search term is relevant to a current news item (i.e. has 'news intent'), the search results display a 'Top Stories' carousel on the results page. The Google algorithm uses algorithms to rank and determine the news articles that are displayed within 'Top Stories' as well as the placement of the article on the search page. Bing also provides the same service that provides news content relevant to the search query. See ACCC (2019). "Digital Platforms Inquiry – Final Report". Available at: <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>

⁷ Meta displays and ranks the most relevant content on its Facebook News Feed using algorithms that are based on predictions on how likely a user is to comment on a story or share it with friends. The ACCC has found that social media platforms are a vital gateway for news dissemination to consumers, where the highest consumption of news via these platforms emanates from Facebook. See ACCC (2019). "Digital Platforms Inquiry – Final Report". Available at: <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>

⁸ News aggregator sites or apps such as the services offered by Google in its Google News services and Apple in its Apple News app collect and curate headlines and news articles from a wide range of sources including news outlets, blogs and other websites. Users of these digital platforms are often able to personalise the type of content that the digital platform algorithm will select for them based on the type of preferences on topics and sources that they are interested in. Content curated from the algorithm is also personalised to the user according to the user's reading history.

2.6. Digital platforms are critical channels through which news businesses reach consumers and provide them with vital referral traffic. The members of the PSS estimate that a substantial amount of online news publishers' referral traffic emanates from digital platforms.⁹ Several market studies have found that this direct access that digital platforms have to consumers makes the use of these platforms by businesses, such as those in news media, critical and unavoidable.¹⁰ As such, there are several potential competition and public interest implications that may stifle the business activities of news media businesses due to their dependency on digital platforms:

2.6.1. The dependency of news media businesses on the digital platforms for referral traffic means that the platforms may enjoy significant bargaining power both in terms of the intermediary relationship they have as gatekeepers but also the asymmetric nature of the relationship between these parties. This dependency can further entrench these platforms as intermediaries between news media businesses and consumers and exacerbate the imbalance in bargaining power held by those digital platforms.¹¹ For instance, in the United Kingdom, the CMA found that Google Search is the most important interaction between users and publishers as it is significant referrer of traffic to the websites of news publishers.¹² Meta is also an important source to drive customer traffic to publishers' websites. However, publishers generally have little to no ability to directly monetise their content through digital advertising on Meta's platforms such as Facebook.¹³

2.6.2. Digital platforms may also have an incentive to use news content to draw users and keep them engaged on these platforms without establishing fair payment terms with the original news content providers. This is achieved by controlling the news content made available by news businesses on the platform by using complex algorithms, providing snippets of news content and selecting what content consumers interact with. In this instance, consumers may simply benefit from reading headline snippets on these digital platforms without being directed

⁹ See submissions from the PSS to the OIPMI.

¹⁰ See ACCC (2019). "Digital Platforms Inquiry – Final Report". Available at: <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>; CMA (2020), "Annexure S: the relationship between large digital platforms and publishers". Available at: <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study#final-report>

¹¹ Ibid.

¹² See CMA (2020), "Annexure S: the relationship between large digital platforms and publishers". Available at: <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study#final-report>

¹³ Ibid.

to the publishers' web pages or apps. Thus, publishers do not derive the benefit of monetising this content through the display of their own adverts on their websites or apps.

2.6.3. The lack of transparency on how algorithms employed by these digital platforms operate may also make it difficult for news media businesses to monitor the quality and effectiveness of their news content and their advertising endeavours to fully extract monetisation opportunities in displaying and providing online news content. In addition, the lack of transparency on algorithms and any changes to the algorithms relating to display and referral links of news content may significantly impact on news business' ability to operate.

2.6.4. Increasingly, digital platforms are performing the same (or substantively the same) services as traditional publishers (as mentioned above). However, there are laws and regulations that are applicable to news media businesses which are not or disproportionately applied to digital platforms when performing the same functions.¹⁴ On the other hand, protection over copyrighted content may be harder to enforce once this content is distributed and displayed online. Even where the digital platforms pay for such news services, the unequal bargaining power typically results in the platforms extracting most of the value from the trading relationship.

2.7. Loss of advertising revenue for publishers means that they cannot make the necessary investments which in turn may potentially reduce the quality and diversity of news content that is available to consumers. A smooth transition into digital distribution requires considerable investment in technology and highly skilled developers which comes at a high cost. This effectively means that competition on quality in the news publishing sector is diminished. The PSS argues that its members have been hesitant to invest in sourcing additional referrals from digital platforms, due to the lack of digital revenue sharing and the unsustainability of this approach. While members of the PSS are investing heavily to adapt to operating in the digital space, digital platforms are hampering the financial sustainability of such adaptation.

Recent trends in new technologies

¹⁴ See Australian Competition and Consumer Commission (2019). "Digital Platforms Inquiry". Available at [Digital platforms inquiry - final report.pdf \(accc.gov.au\)](https://www.accc.gov.au/system/uploads/attachment_data/file/431111/digital-platforms-inquiry-final-report.pdf)

- 2.8. Recently, there has been development of opensource artificial intelligence (AI) applications developed as a language model to interact conversationally to user questions. This type of AI machine learning falls under generative AI,¹⁵ which describes algorithms that can be used to create new content, including audio, code, images, text, simulations and videos.¹⁶
- 2.9. In late November 2022, Open AI launched a chatbot model, ChatGPT which uses generative AI machine learning to provide answers to any questions posed by users.¹⁷ In February 2023, Microsoft announced that it had partnered with OpenAI to utilise the ChatGPT chatbot model in its Bing search engine. Around the same time, Google announced it had launched its own chatbot model, Bard, that would be integrated with its search engine. The integration of these generative AI based chatbots into search engines would allow users to obtain direct answers to questions or queries posed in the search results page without the need to necessarily obtain it through accessing publisher webpages.
- 2.10. This poses a potential threat to user traffic being driven to online content publishers' webpages such as news publishers, resulting in a further threat to monetisation of their content through adverts. Furthermore, South African news publishers' content may also be used to train these AI systems without authorisation or compensation. This was confirmed by ChatGPT itself in response to that query.
- 2.11. Currently, the integration of these generative AI systems into search engines and greater online usage are still in the early stages of adoption and the true effects of this integration may not yet be known. For instance, as at the time of writing, ChatGPT's knowledge-based responses are based on information it learned prior to September 2021. It is unclear the extent to which these systems may pose a threat to online content publishers, especially news publishers, in the form of significant competition and public interest concerns in South Africa. However, this should be investigated in these early stages such that appropriate remedies can be implemented to reduce or eradicate future competition and public interest harm to news media businesses.

¹⁵ Generative AI systems have a constantly adapting machine learning algorithm which creates its output from content (or information) that is already widely available over the internet. This machine learning aspect of the algorithm allows these AI systems to learn from data patterns without human direction using data already publicly available for it to assess.

¹⁶ See McKinsey & Company, 19 January 2023, "What is generative AI?". Available at: <https://www.mckinsey.com/featured-insights/mckinsey-explainers/what-is-generative-ai>

¹⁷ See Open AI website. Available at: <https://openai.com/blog/chatgpt/> [Accessed on: 24 February 2023]

3. SCOPE OF INQUIRY

3.1. Consistent with section 43B of the Act, the MDPMI will focus on whether there are any market features in digital platforms that distribute news media content which impede, distort or restrict competition, or undermine the purposes of the Act, and which have material implications for the news media sector of South Africa. The news media sector includes news publishers and broadcasters given the integration of video into search and social media, and the news publisher moves into video content. These include the following relevant digital platforms:

3.1.1. Search engines (e.g. Google Search and Microsoft Bing);

3.1.2. Social media sites (e.g. Meta);

3.1.3. News aggregator sites and/or apps (e.g. Google News and Apple News);

3.1.4. Video sharing platforms (e.g. YouTube and Tiktok);

3.1.5. Generative AI services whether integrated into the above platforms or not (e.g. ChatGPT alone or integrated with Bing); and

3.1.6. Other platforms identified in the course of the inquiry.

3.2. The scope of the inquiry will exclude non-news publisher content such as magazines, and broadcast content such as entertainment and sports. The scope of the inquiry will specifically exclude app store commission fees and terms & conditions for South African news media own apps which were the subject of the OIPMI. The scope of the inquiry will exclude Adtech Supply Side Platforms (SSPs), Demand Side Platforms (DSPs) and intermediary Ad Exchanges (AdEx) used to surface digital advertising on the South African news media websites or apps. Whilst the Adtech stack as it is known is concentrated and contain market features which impede competition to the potential detriment of news media companies, such potential detriment is not limited to news media companies alone and therefore is best approached on a holistic basis either through investigation or another inquiry such that any remedial action has a market-wide impact.

- 3.3. The MDPMI is broadly focused on (i) the interaction and dependency of South African news media businesses on relevant digital platforms as an intermediary, distributor and link to online users for the dissemination of news content online; and (ii) the impact, thereof, on news media businesses to aggregate, display, create and monetise their news content online.
- 3.4. The main objectives of the inquiry into Media and Digital Platforms are to:
- 3.4.1. Evaluate trends, adoption and use of the relevant digital platforms identified in 3.1 above to aggregate and display news content online and the importance of digital revenue sources for news media companies;
 - 3.4.2. Evaluate whether market features distort competition for advertising revenue, consumer data and subscription fees between news media companies and the relevant digital platforms that display and distribute news media content as intermediaries to consumers, including news aggregators;
 - 3.4.3. Evaluate whether the commercial relationship between news media businesses and relevant digital platforms is characterised by imbalances in bargaining power and the impact of such imbalances on competitive outcomes affecting the news media industry, including pricing and non-price outcomes;
 - 3.4.4. Evaluate whether competition for the distribution, display and monetisation of news content online between news media businesses through relevant digital platforms is distorted by market features including, but not limited to, ranking algorithms, paid results, search engine optimisation, consumer and social network preferences and commercial relationships with news media companies;
 - 3.4.5. Evaluate whether the current and future integration of generative AI systems in relevant digital platforms, including the AI review and assimilation of news media content, will impact on the adoption and competition considerations in 3.4.1 to 3.4.4;
 - 3.4.6. Evaluate the impact of 3.4.1 to 3.4.5 on the quality and consumer choice of South African news media, as well as the impact on news media companies that are small and medium-size enterprises (“SMEs”) and/or businesses owned by historically disadvantaged persons (“HDPs”);

3.4.7. Determine appropriate remedies where an adverse effect on competition or the purposes of the Act are found as set out in section 43C(3) of the Act.

4. MARKET INQUIRY TIMELINES AND PROCESS

- 4.1. The public is invited to submit comments on these draft Terms of Reference by 16h00 on 20 April 2023. Written submissions can be sent to mdpmi@compcom.co.za for attention of Ms Noluthando Jokazi. All submissions will be reviewed and a final Terms of Reference published by the Commission.
- 4.2. The MDPMI will commence 20 business days after the publication of the final Terms of Reference and the final report will be completed within 18 months, as per the statutory requirements of sections 43B(2) and 43B(4)(a) of the Act respectively. Details on the administrative phases of the inquiry along with Guidelines for Participation will be made available on the Commission's website once the final Terms of Reference are published. At that point, members of the public and businesses will be invited to provide written representations and information to the inquiry.

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