



*competition*commission
south africa

OIPMI PROVISIONAL REPORT
CHAPTER 9
SUMMARY OF PROVISIONAL FINDINGS
AND PROVISIONAL RECOMMENDATIONS

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1. Introduction

1. The Inquiry has been tasked with identifying market features that may impede, restrict or distort competition at an intermediation platform level and amongst business users on the platforms, including where a lack of competition may result in exploitation. The Inquiry is also tasked with including a particular focus on SMEs and HDP participation. The analysis summarized above and outlined in more detail in the Provisional Main Report has informed the provisional findings of the Inquiry. These findings are generally in respect of the leading platforms in each intermediation platform category, as it is typically leading platforms that are in a position to shape platform competition or which matter most for business user competition, or participation opportunities.
2. In setting out these findings, the Inquiry notes that the relevant test in an Inquiry is simply whether a market feature has an adverse effect on competition, including a regard for the impact on SMEs or HDPs, not that there is a substantial prevention or lessening of competition. The findings contain market features with varying effects on competition or the purposes of the Act, some small and others substantial. Ultimately that differentiation is reflected in the types of remedial action proposed where a feature which has a more limited adverse effect may attract more limited remedial action, relative to a feature with a more substantial effect that may require more substantial remedial action.
3. These findings are provisional based on the evidence collected and analysed to date by the Inquiry, including the oral evidence in the public and in-camera hearings. In setting out the provisional findings, the Inquiry calls for comments and any further evidence by all parties affected by the findings, as well as those affected by the adverse effects on competition and participation. Such comments and evidence may be in dispute or support of the finding, including the effect of the conduct or market feature. The Inquiry will make any final findings only after reviewing the further comments and evidence put forward in the next phase of the Inquiry.
4. The legal framework for the Commission to act in respect of any findings of the market inquiry are set out in sections 43C, 43D and 43E of the Act. More specifically:
 - 4.1. Section 43C of the Act (Matters to be decided at a market inquiry) subsection 3 states that where an adverse effect on competition is decided, then the Commission must determine the remedial action to take in terms of section 43D and whether to make recommendations to the Minister, regulatory authority or affected firm to take remedial action to remedy, mitigate

or prevent the adverse effect. Subsection 4 requires that the Commission should seek to achieve as comprehensive a solution as reasonably practical.

4.2. Section 43D of the Act (Duty to remedy adverse effects on competition) subsection 1 states that the Commission may take remedial action to remedy, mitigate or prevent the adverse effect on competition, which may include a divestiture subject to a Tribunal order as per subsection (2). Subsection (3) requires that the decision on remedy must be consistent with the findings of the report and subsection (4) requires that any remedial action must be reasonable and practical taking into account relevant factors listed under the subsection. These include the nature and extent of the adverse effect on competition, the remedial action and the relation between the two, the likely effect of the remedial action on competition and the availability of a less restrictive means to remedy the adverse effect on competition. In addition, the typical standards for competition law remedies are that they should have the ability to be monitored and enforced.

4.3. Section 43E of the Act (Outcomes of market inquiry) subsection 1 further states that report may include recommendations to the Minister for new or amended policy, legislation or regulations, as well as recommendations to other regulatory authorities. Subsection (3) further states that based on information obtained in an inquiry, the Commission may initiate a complaint against a respondent.

4.4. Section 43E(4) requires that before the completion of the inquiry, the Commission informs any person materially affected by any provisional finding, decision, remedial action or recommendation of the market inquiry and calls for comments from them.

5. The Inquiry sets out below the provisional findings, remedial actions and recommendations to address the provisional findings, in line with the legal framework. These remedial actions and recommendations only apply in respect of South African operations for global platforms and domestic platforms. This includes the platform use by South African consumers and the contracts and treatment of business users on the platform,

6. In considering the proportionality of the interventions, the Inquiry has considered not only the degree of impact on competition and participation, but also the extent to which the relevant leading platforms are entrenched. In addition, the Inquiry has also considered the approach and efficacy of remedial action imposed by other jurisdictions for similar findings and sometimes in respect of the same platforms. In many cases the Inquiry has set out a range of options that may achieve the purpose of ameliorating the feature that has an adverse effect on competition or SME/HDP participation.

7. In setting out the provisional remedial actions and recommendations, the Inquiry calls for comments by all parties affected by the proposals, as well as those affected by the adverse effects on competition and participation. Such comments may include perspectives on the need for remedial action at all, the proportionality of the proposed remedy to the identified market feature, the efficacy of the remedy proposed including the potential for bypass, the likelihood of unintended consequences and most importantly, alternative proposals for remedies to achieve the same purpose that may be evaluated by the Inquiry.

2. Provisional Leading platforms findings

8. *The Inquiry has identified the following platforms as leading platforms in their respective platform categories.*
 - 8.1. *Apple App store and Google Play store in software app stores;*
 - 8.2. *Takealot in eCommerce;*
 - 8.3. *Property24 and Private Property in property classifieds, and Autotrader and Cars.co.za in automotive classifieds;*
 - 8.4. *Booking.com & Airbnb in travel & accommodation;*
 - 8.5. *Mr Delivery and UberEats in food delivery, and*
 - 8.6. *Google search in general search (as an input to platform competition)*
9. In each platform category, leading platforms will be subject to remedial action or the subject of recommendations. As noted above, whilst we have not used the term 'dominance' as that is unnecessary to establish under an inquiry, the leading platforms have the features of dominance given their position in their markets. The main distinction from other platform categories is that other categories are too immature to warrant remedial action yet against firms holding a lead. The Inquiry invites submissions on the identification of leading platforms, and whether leading platforms should be identified in other platform categories.

3. Provisional platform competition findings and recommendations

10. The Inquiry makes the following provisional findings in respect of features which impede, restrict or distort online intermediation platform competition in South Africa, and remedial actions to remedy these.

3.1. Google Search

11. The Inquiry makes the following provisional findings in respect of Google Search as an input to platform competition and its intermediation services that compete with intermediation platforms (in particular, findings from travel and accommodation platforms, eCommerce, online classifieds and food delivery).

11.1. *Google Search is a de facto monopolist in general search in SA;*

11.2. *The default arrangements of Google Search on both Android and iOS mobile devices has materially contributed to entrenching its status as a de facto monopoly;*

11.3. *The prominence of paid results (i.e. results based on payments or advertising results) at the top of the Google search results page (SERP) and their lack of sufficient distinction from organic results (i.e. natural search results based on relevance alone), along with its monopoly status, materially restricts intermediation platform competition across most categories as it elevates payment for customer acquisition which strongly favours leading platforms with deep pockets from capital-backing and established revenue streams;*

11.4. *Intermediation platform competition is further impeded by Google Search self-preferencing its own specialist search intermediation platforms in shopping, travel and local search, which impedes competition from metasearch, comparator sites and online travel agencies;*

11.5. *The prominence of paid results and their lack of distinction to organic results, also permits Google to profiteer excessively from general search, which raises the costs of customer acquisition by intermediation platforms to the ultimate detriment of business users and consumers;*

11.6. *The Google Search SERP has incrementally become more of Google's own product and diminished variety of third-party results on the SERP, which has also pushed down organic results.*

12. The Inquiry is of the view that the problem of paid results on Google both raising platform marketing costs and distorting competition can be addressed by improving ad identification and/or elevating organic (or natural) search results. The question for the Inquiry is whether prominent ad identification alone will achieve this outcome as it may reduce the optimal number of ads and could change consumer click through behaviour to more favour organic results. However, the volume of google own content is another factor pushing down organic results. For this reason the

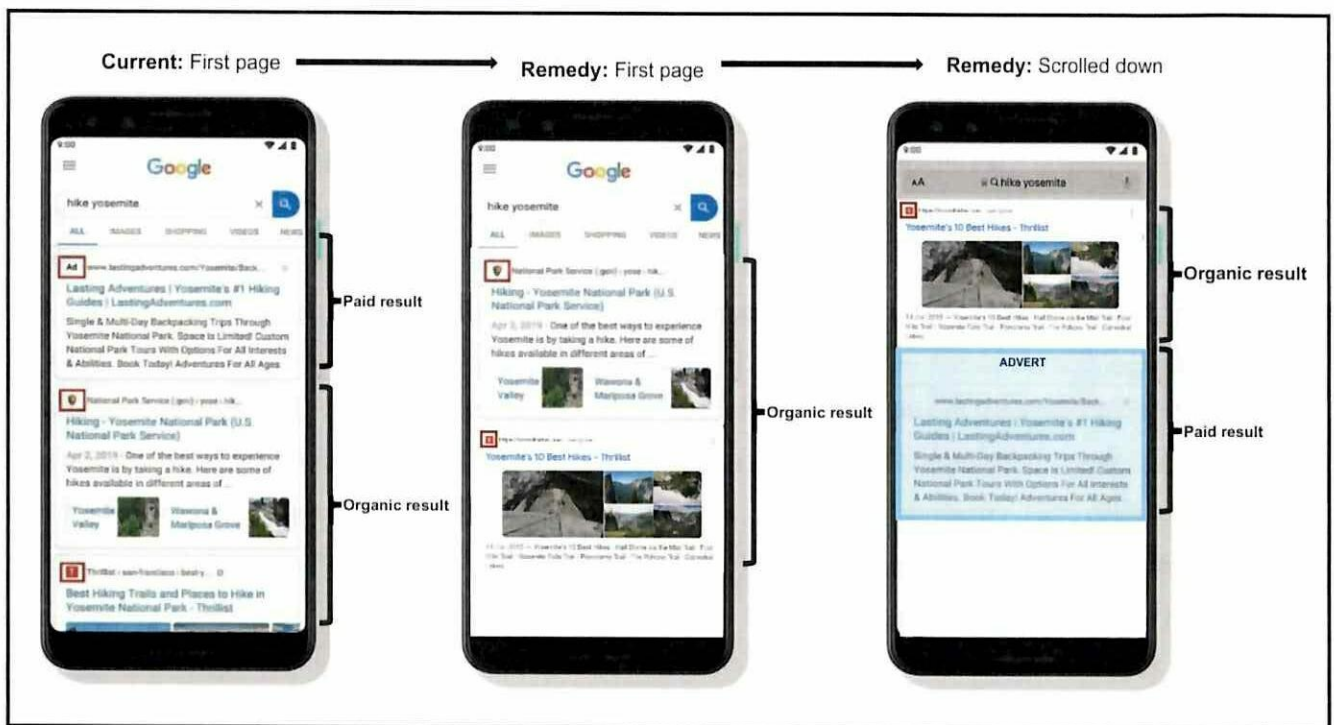
Inquiry is of the provisional view that both may be required but welcome submissions on this issue. These remedial actions are likely to aid in reducing the efficacy and price of ads, lowering costs to platforms and aiding smaller platforms which benefit from elevating organic results too. Demotion though may also address the oddity of bidding on your own and other platform names to appear first, which also raises costs. The Inquiry is of the view that this remedial action would also need to be applied to the Google specialist search properties which the consumer clicks through from the specialist search unit on the general search results page.

13. On self-preferencing, the Inquiry does not believe the EU Google Shopping remedy has been effective, nor does it address high marketing costs as there is still payment to appear at the top even if it now comes from other platforms rather than directly from businesses. For this reason, the Inquiry is inclined to recommend that competing platforms are allowed to replicate the units that Google creates, and then compete on the merits in organic search for ranking position rather than have it guaranteed for Google units. This is in line with some of the submissions from global OTAs. If there is to be a potential reduction in the efficacy and hence price of paid search, then the Inquiry believes the removal of minimum bids is also necessary to allow the other measures to see meaningful drops in bid prices and address costs where there are few bids.
14. The Inquiry is also considering recommendations on search engine choice which may seek to address the market power of Google search at source and give some chance to other search engines to grow and improve. The typical remedy proposed in other jurisdictions in this regard is that Google cannot pay for default on iOS devices, nor require default status through the MADA or RSAs. This does have implication for device manufacturers as it may require the introduction of a search engine choice screen on setup. The Inquiry would like to engage device manufacturers to find out the implications of such an actionable remedy and if alternative remedies exist that may be equally effective.
15. The Inquiry therefore calls for input in respect of the following provisional remedies against Google Search within South Africa:
 - 15.1. *Paid results (i.e. results in whole or part based on payments) integrated into the search results (including the general search page and specialist search properties) are required to*

- be clearly distinguishable as advertising including (i) both prominent shading and border, (ii) a large, bold and unambiguous 'ADVERT' label in the middle above the impression;¹ and/or*
- 15.2. *The first (or top) search results screen (including for the general search page and specialist search properties) may only have organic (or natural) search results and any paid results can only appear once the consumer has scrolled down (i.e. paid results may not appear until after the 'fold' on a desktop and the scroll point on a mobile search results page);*
- 15.3. *Google may not place its specialist search units in a guaranteed position on the search results page, nor favour them in any way in organic search results through intended or unintended algorithm bias;*
- 15.4. *Google must afford competing metasearch or specialist search (including travel, local and other), comparator sites (shopping or other) and online travel agents the same opportunity to provide content and visual rich impressions or units that it affords its own specialist shopping, travel and local search units;*
- 15.5. *Google may no longer impose minimum bid thresholds for paid results; and*
- 15.6. *An end to default arrangements for Google Search on iOS and Android devices sold in South Africa.*

¹ This is in line with previous guidance provided by the US Federal Trade Commission. See 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-industryon-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.”

Figure: Illustration of proposed Google search remedy on a mobile device



3.2. Online Classifieds

16. The Inquiry makes the following provisional findings in respect of online classified platforms:

- 16.1. *The lack of interoperability of the listing engine software of the leading property classifieds with third party platforms denies these platforms property listings, and in so doing impedes platform competition;*
- 16.2. *The levy of a R500 fee on listings sourced from third party listing engines, which may be the product of collusive conduct, inhibits estate agents switching, strengthening the harm from a lack of interoperability and impeding entry of listing engine providers into property classifieds;*
- 16.3. *The shareholding of large estate agents in Private Property through the EAPPC, and the partnership with Rebosa, incentivises continued use of Private Property and impedes third party platforms from securing support and listings from the large agents;*
- 16.4. *Multi-year contracts concluded by Property24 incentivise continued use of Property24 and crowd out support for competing platforms.*

17. The Inquiry is of the view that the ensuring interoperability is essential to ensure new platforms get access to listings and is achievable since other listing engines have achieved the same. It should not be costly to implement and could be provided with a short period to make the required changes. The fact that one of the platforms has already indicated it is dropping the R500 fee for incoming listing feeds reflects an acknowledgement that this must go. In terms of the conflicts of interest, the Inquiry is of the provisional view that divestiture of the EAPPC seems necessary to remove the lock in and incentives to locate support in Private Property by the large agencies. The Inquiry does not believe that simply removing directors would achieve that purpose as it still does not change incentives but welcomes submissions in this regard. The Inquiry is also of the view that Rebosa's actions in driving support for a single platform constitutes a prohibited practice under section 4 and should be prosecuted should it not put in place guarantees that provide comfort that such conduct will cease. Prosecution and an administrative penalty on all its members collective revenue would otherwise create the correct incentives not to engage in the conduct.

18. The Inquiry therefore calls for inputs on the following provisional remedies in respect of leading online classified platforms (i.e. Property24, Private Property, Autotrader and Cars.co.za):

18.1. *The removal and prohibition on leading classified platforms charging a fee for an incoming listing feed from agents or dealers using third party listing engines, alternatively the Commission to investigate for potential collusive conduct;*

18.2. *Leading listing engine suppliers (i.e. including Propdata) or vertically integrated platforms (e.g. Property24 and Private Property) must interoperate with third party platforms to supply listings on request by business users for no fee;*

18.3. *Contracts with business users should permit termination on one month's notice and may not incentivise or bind the business user to contract for a multi-year period, including through the provision of additional benefits;*

18.4. *The divestiture of the large estate agents through the Estate Agents Property Portal Company from Private Property; and*

18.5. *Industry organisations such as Rebosa should refrain from coordinating commercial conduct by its members, such as the investment and/or partnering with particular intermediation platforms, which is likely to constitute prohibited conduct under section 4 of the Act, or alternatively the Commission to investigate such conduct in relation to the Rebosa partnership with Private Property under section 4.*

3.3. Food Delivery

19. The Inquiry makes the following provisional findings in respect of food delivery platforms:

- 19.1. *The contracting of restaurant chains by the leading platforms incentivises the chains to focus their support on these platforms, and to bring in their franchisee restaurants, by rewarding restaurant numbers and volumes. This results in a lack of support for competing national and local food delivery platforms by restaurant chains, impeding their ability to enter, expand and compete;*
- 19.2. *Either as a result of the contract incentives, or otherwise, numerous national restaurant chains actively prevent franchisees from contracting with competing national or local delivery platforms that are not approved, limiting them to the leading platforms only;*
- 19.3. *Price parity clauses in the existing contracts of UberEats may result in self-enforcement by restaurants which impede competition from other platforms on the basis of commission fees and lower menu prices.*
- 19.4. *Predatory conduct as a result of an aggressive promotion and delivery subsidisation strategy has driven out local delivery platforms in areas where they compete. This is in part due to predatory conduct by leading platforms, whereby they fail to recoup their variable costs (including delivery, transactional, platform funded discounts and food losses) in respect of local area markets or specific restaurant chains, has materially contributed to the exit of competitors and inhibits new entry and expansion. However, it is also a direct result of extracting more from business users to subsidise consumers.*

20. Whilst the Inquiry cannot force restaurant chains to deal with specific challenger delivery platforms, one can at least remove the barriers to do so. The first is the contracting and commission negotiation incentives which see chains trying to channel volumes through the main two platforms, starving even Bolt Food of support. The real difficulty it seems is that there may be no explicit contractual provision on volumes but these discussions enter into negotiations, making this extremely difficult to monitor and enforce. One alternative may be that food delivery platforms need to contract each franchisee store separately, but this may also lead to inefficiencies. The Inquiry would welcome suggestions as to alternatives that are more enforceable. One additional remedy, as well as an alternative, is to remove restrictions on the choice of platform for franchisees which is unlikely to degrade the brand as some national chains already allow this,

and ultimately the franchisee has the most stake in protecting the brand in their local area. This would be imposing on business users rather than the platform directly, which is to be considered.

21. In terms of price parity, the Inquiry is of the view that even if this is not enforced, it needs to be expressly removed from contracts to prevent self-enforcement and should not form part of leading platform contracts in the future. Where predation exists, it seems that the main option is to engage in prosecution unless there are remedial actions that can guarantee that it does not occur in future. Prosecution would result in an administrative penalty that would discourage future predation, especially as a repeat offence may be subject to a maximum penalty of 25%.
22. Finally in respect of the business model competition with local delivery, the Inquiry believes the root problem is the lack of transparency to consumers around the surcharges on the menu pricing and the share that delivery platforms take. This is because the national platforms rely on a consumer framing bias whereby promotions are considered to hold more value and the consumer is ignorant to the fact that the menu surcharge is ultimately paying for that, and hence they should be considering the total cost including menu surcharge. If consumers did so, they may find that local delivery platforms are equally cost-effective. Consumers may also be less inclined to support a delivery platform which is exploiting their favourite local restaurant with high commission fees if they were aware, which would provide a basis for local delivery platforms to compete where they charge lower commissions. Hence some transparency on the split that the platform takes from the meal price would be beneficial to competition.
23. For these reasons, the Inquiry calls for submissions on the following provisional remedial action to address food delivery platform competition issues by leading platforms (i.e. Mr Delivery and Uber Eats):
 - 23.1. *Leading food delivery platforms may not contract with national restaurant chains in a manner that incentivises them to limit multi-homing and direct restaurant numbers and volumes to the leading delivery platforms only;*
 - 23.2. *International and national restaurant chains may not restrict their franchisees' choice of local food delivery platform, and must communicate the lack of restrictions to franchisees;*
 - 23.3. *Removal of price parity clauses from contracts and communication to all restaurants that they are free to price their menu differently across delivery platforms and their own direct channels;*

- 23.4. *Remedial action to end predatory conduct at a local / regional area level or individual restaurant chain on a temporary or ongoing basis, or alternative the Commission to consider investigation and prosecution of predatory conduct as a suitable deterrent; and*
- 23.5. *Greater transparency to the consumer of either the menu surcharge for each restaurant on the platform relative to their take-away or dine-in menu, and/or the share of meal payment accruing to the delivery platform as opposed to the restaurant.*

3.4. Travel and Accommodation

24. The Inquiry makes the following provisional findings in respect of leading travel & accommodation platforms (i.e. Booking.com):

- 24.1. *Wide price parity clauses, including narrow parity provisions, applied by leading platforms impede platform competition through lower commissions and prices, and impedes potential competition from accommodation and travel provider's own direct online booking channels on price, increasing dependency too;*
- 24.2. *Loyalty schemes of leading platforms leverage important visibility on their platforms to extract discounts from accommodation and travel providers to fund the loyalty scheme, impeding competition from smaller platforms that cannot replicate the same leverage;*

25. The obvious remedy to parity clauses is simply to require their removal but also to ensure that the removal occurs in the contract and that this is clearly communicated to all business users. The latter seems essential as many hotels in the UK were not aware of the change as no communication took place, resulting in continued self-enforcement. Similarly, it seems the obvious remedy to loyalty schemes is to prevent the exclusivity in respect of certain business users as this removes the ability to drive funding from the business users based on preferential visibility, rather than the platform itself. The question for the Inquiry is whether some self-funding restrictions are also required to be certain, and how that may be monitored if it was imposed.

26. For this reason, the Inquiry calls for submissions in respect of the following provisional remedies and recommendations for travel and accommodation platforms:

- 26.1. *The removal and prohibition on price parity clauses, both wide (as applied to competing platforms) and narrow (as applied to the business user's own direct online channel) from contracts with business users, and communication to that effect; and*
- 26.2. *Prohibition on exclusionary loyalty scheme design, including schemes that include only a subset of business users, and which are part or whole funded by business user funded discounts. Loyalty schemes must include all business users and be fully funded by the platform;*

3.5. eCommerce

27. The Inquiry makes the following provisional findings in respect of eCommerce platforms:

- 27.1. *Narrow price parity clauses by the leading platform impedes potential competition from the marketplace seller's own direct channel on price, increasing dependency too, and disincentivises sellers from price differentiation across eCommerce platforms to the detriment of platform competition;*
- 27.2. *The widespread but declining subsidisation of products through pricing below variable costs has distorted competition with more capital-constrained platforms and is no longer justified for start-up reasons.*

28. As outlined above, the obvious remedy in respect of price parity clauses is to remove them from contracts and communicate that to business users. The Inquiry also considers that the ongoing predatory conduct on certain product lines does need to stop and would recommend prosecution if no remedial actions are identified that can guarantee the end to such conduct, as an administrative penalty would otherwise create the correct incentives not to engage in future.

29. For this reason, the Inquiry calls for submissions on the following provisional remedies and recommendations in respect of leading eCommerce platforms (i.e. Takealot):

- 29.1. *The removal and prohibition on price parity clauses, both wide (as applied to competing platforms) and narrow (as applied to the business user's own direct online channel) from contracts with business users, and communication to that effect;*

- 29.2. *Remedial action to end predatory conduct at a product level on a temporary or ongoing basis, or alternatively the Commission to consider investigation and prosecution of predatory conduct as a suitable deterrent.*

3.6. Software application stores

30. The Inquiry makes the following provisional findings in respect of software app store platforms:

- 30.1. *Complete exclusion of competing software app stores and side-loading by Apple impedes effective competition for commission fees;*
- 30.2. *The default arrangements of Google Play on Android devices have impeded competition from other android software app stores, and entrenched Google Play as the near monopoly on android devices;*
- 30.3. *The recently introduced Google Play Points loyalty scheme leverages visibility and customer acquisition on the Google Play store to extract discounts from app developers to fund the loyalty scheme, which cannot be matched by competing stores lacking the leverage of Google Play;*
- 30.4. *A lack of competition has resulted in excessive commission fees to the detriment of South African app developers, publishers and consumers of apps acquired through the SA storefront requiring in-app payments.*

31. The Inquiry has observed that providing for competing in-app payment mechanisms will not solve the essential concern of high commission fees as other fees are levied. Furthermore, given that Apple will not allow competition and refuses to compromise on security, and Google Play has become entrenched, there needs to be a remedy that either regulates these platforms or successfully takes transactions off the stores altogether so they cannot be monitored and taxed. For this reason, the Inquiry is of the view that either there is price regulation or a complete end to anti-steering provisions which were recommended by the court in the *Epic-Apple* case. The Inquiry invites submissions as to whether anti-steering provisions are adequate as a competition measure to address high commission fees, or whether the regulation of fees is also necessary. The possibility of regulated commission fees is included in the proposed remedial actions for business user exploitation in the next sub-section.

32. In terms of an end to anti-steering provisions, the Inquiry expects that this would involve the ability for apps to communicate an alternative external payment mechanism and provide a clickable link to make a payment. In essence this is not dissimilar to providing reader apps with the ability to take consumers to their website to subscribe which has been announced by Apple following remedial action in Japan and so should be possible for Apple to extend and Google to follow. This is different to in-app payment mechanisms as the software application stores are unable to monitor transactions concluded outside of the application store and hence will be unable to tax revenue derived in this manner. The Inquiry would still expect the software application stores to generate revenues as there will be a greater ease of transacting through the in-app payment mechanism of the store which will remain attractive to some consumers who perceive the real value offered.
33. In terms of anti-steering, this would provide consumers with an alternative that may involve a lower price but more hassle nonetheless, and therefore may still see some consumers transacting through the software application store in-app payment mechanism where they perceive real additional value. Apps may also not discount fully the commission fee in the alternative website price, as the in-app payment ease also assists in consumer acquisition.
34. The Inquiry would like to hear the views of different stakeholders on this conclusion and if alternatives are proposed, how they will actually work effectively given the conduct of by-passing attempts to bring in in-app payment competition elsewhere.
35. The Inquiry is also considering whether the additional measure of removing the default status of Google Play on Android phones sold into South Africa may be considered a step in the right direction to start breaking the entrenched position. However, the Inquiry needs to get input on whether it is both feasible and desirable for the Android device manufacturers given the capabilities that may need to be replaced. Choice by the device manufacturer may count less than consumer choice, but that may be no choice at all if Google Play is required for the device to operate.
36. The Inquiry therefore calls for submissions in respect of the following provisional remedies for leading software application stores:

- 36.1. *An end to anti-steering provisions for all apps, enabling them to communicate an alternative external payment mechanism along with a clickable link to that external payment option;*
- 36.2. *Prohibition on exclusionary loyalty scheme design, including schemes that include only a subset of business users, and which are part or whole funded by business user funded discounts. Loyalty schemes should include all business users and be fully funded by the platform; and*
- 36.3. *An end to default arrangements for Google Play on Android devices.*

4. Provisional business user competition findings and recommendations

37. The Inquiry makes the following findings in respect of features which impede, restrict or distort business user competition on online intermediation platform competition in South Africa, including the participation of SMEs or HDPs, or where the lack of sufficient platform competition enables the leading platforms to exploit those business users.

4.1. Cross-cutting finding

38. The Inquiry makes the following cross-cutting finding in respect of leading platforms in all categories:

- 38.1. *The lack of transparency over pay-for-position or sponsored ranking distorts consumer choice and ultimately promotes excessive pricing and sale of sponsored ranking, which in turn distorts business user competition as larger users outspend smaller ones. The lack of transparency includes the lack of adequate distinction such as a small 'Ad' in the corner, or the use of terms that consumers would not associate with adverts (such as 'featured', 'premium', 'preferred') and which may actively mislead consumers.*

The Inquiry is of the view that the same remedial considerations that applied to Google Search should also be considered at a leading intermediation platform level. In essence, the prominent labelling of adverts, including an end to misleading labels, is probably essential and the question is whether that alone will solve the problem of both misleading practices but also the incentive to excessively sell visibility. This is applicable to all leading platforms as those that currently do not exploit visibility to an excessive extent would likely do so in future. In addition, the Inquiry believes

it is an imperative that the online intermediation platform industry becomes a voluntary member of the Advertising Code of Conduct with an appendix dedicated to its practices in order to draw in all platforms to good practices and provide the basis for an ongoing review of advertising practices as they evolve.

39. The Inquiry therefore calls for input in respect of the following provisional remedies against all leading intermediation platforms (i.e. Apple App store, Google Play store, Takealot, Property24, Private Property, Autotrader, Cars.co.za, Booking.com, Airbnb, Mr Delivery and Uber Eats):

39.1. *Paid results (i.e. results in whole or part based on payments including increased commission fees) integrated into the search results are required to be clearly distinguishable as advertising including (i) both prominent shading and border, (ii) a large, bold and unambiguous 'ADVERT' label in the middle above the impression; and/or*

39.2. *The top (or first) search results screen may only have organic (or natural) search results and any paid results can only appear once the consumer has scrolled down (i.e. paid results may not appear until after the 'fold' on a desktop and the scroll point on a mobile search results page); and*

39.3. *Register with the Advertising Regulatory Board (ARB) to subject their practices to the current Code of Advertising and develop an online intermediation platform specific Annexure of good practices.*

4.2. Online Classifieds

40. The Inquiry makes the following finding in respect of online classified platforms:

40.1. *Extreme listing and promotional fee discrimination of up to 300% results in excessive prices and which impedes effective participation by SMEs and HDPs on the platform, restricts them from affording equal visibility on the platform, and more generally impedes participation in the industry through artificially increasing their marketing costs relative to larger rivals.*

40.2. *Excessive pricing and sale of sponsored ranking which distorts business user competition as larger agents or dealers outspend smaller ones.*

41. The Inquiry is of the provisional view that the cross-cutting remedy proposed in respect of the sale of visibility is considered as addressing the second issue, and is not repeated here. In terms of the extreme price discrimination, the Inquiry has considered whether to prevent discrimination

altogether and is currently of the view that this may be disproportionate. However, we welcome inputs in this respect. Rather, the Inquiry is currently of the view that the extent of discrimination needs to be limited and the provisional view is that a limit within the range of 10-15% would allow for differences in relative value whilst not harming SMEs and HDPs, and is more in the range of some travel & accommodation platforms and traditional industries. The Inquiry is also currently minded to consider measuring differences based on the average business user in the lowest and highest volume categories such that there is also some scope to differentiate at both ends. The Inquiry is also of the view that the platforms should implement and stick to a standard rate card rather than engage in bespoke negotiations with large business users as those bespoke negotiations not only exacerbate the extent of discrimination, but also reduce the ability to monitor and enforce remedial actions. However, the Inquiry welcomes submissions on the extent of discrimination that would not result in harm to SMEs and HDPs, and how any use of the average would be desirable, measurable and enforceable. Any discrimination limits would apply to both listing and promotional fees.

42. The Inquiry therefore calls on submissions in respect of the following provisional remedy on leading online classified platforms (i.e. Propert24, Private Property, Autotrader and Cars.co.za):

42.1. *Implement a standardised rate card that complies with a maximum cap on fee differentiation between the average low volume user category and the average high volume user categories, including both listing and promotional fees.*

4.3. Food delivery

43. The Inquiry makes the following finding in respect of food delivery platforms:

43.1. *Extreme commission fee discrimination of up to 60% higher for independent restaurants distorts relative pricing and restaurant competition on food delivery platforms as restaurants seek to pass on commission fees in whole or part to consumers through higher menu prices;*

43.2. *Greater platform promotional spend on restaurant chains relative to independent restaurants, and the ability to reduce commission fees in exchange for marketing commitments, similarly distorts competition on the platform through distorting relative pricing and visibility.*

44. The Inquiry has the same view on potential remedies to discrimination in food delivery as in online classifieds, namely a maximum cap on the extent of average discrimination between the smallest independent restaurants and largest restaurant chains. As with online classified platforms, the Inquiry is of the view that this needs to be implemented through a standardised rate card in order to limit bespoke deals that exacerbate discrimination, and which make monitoring and enforcement difficult. In respect of promotional spend, the Inquiry would like to ensure a more equitable spend across the board but realises this may be difficult to actually achieve as it partly depends on consumer takeup of promotions, and even more difficult to monitor and enforce. The Inquiry is therefore inclined to focus on the main source of differentiation, namely that restaurant chains are given the opportunity to exchange commission fees for marketing commitments. This is the source of much of those restaurant chain's promotional spend and so addressing this imbalance may be the most viable approach. However, the Inquiry is interested to hear from stakeholders whether this is sufficient to address the imbalance.

45. The Inquiry calls for submissions in respect of the following proposed remedies for leading food delivery platforms (Mr Delivery and UberEats):

45.1. *Implement a standardised rate card that complies with a maximum cap on fee differentiation between the average low volume user category and the average high volume user categories, including both listing and promotional fees; and*

45.2. *A standardised and equitable rate card offer on the exchange of commission fees for marketing commitments across all restaurants on the platform.*

4.4. Travel and accommodation

46. The Inquiry makes the following finding in respect of travel and accommodation platforms:

46.1. *Excessive pricing and sale of sponsored ranking which distorts business user competition as larger accommodation or travel providers outspend smaller ones to achieve more prominent visibility and sales.*

46.2. *Discrimination on commission fees in favour of large hotel chains distorts competition by enabling the large chains to effectively get enhanced visibility for the same standard commission rate paid by smaller hotel groups and individual hotels.*

- 46.3. *The contractual clause in car rental platforms which allows it or the rental car company to increase prices for last minute bookings may promote collusive outcomes;*
- 46.4. *Asymmetric payment terms that require the platform to be paid quicker than the business user.*
- 46.5. *The highest bidder (not necessarily the cheapest) gets the most visible display on MSE's for a given room.*

47. There is a general remedy to address the excessive sale of visibility outlined above and that would seem sufficient to address the issue in travel and accommodation too. Similarly, the proposal on a maximum cap on discrimination outlined above for food delivery and classifieds would apply in this case too. In respect of the remaining issues, it seems that adjusting or removing any offending clauses from contracts is the only effective remedy. This includes instances where there is claimed non-enforcement which is impossible to monitor and does not address self-compliance by car rental companies or enforcement in future. The car rental platform clause is included despite not identifying them as leading platforms given that it may constitute collusive conduct. Similarly, for metasearch engines the issue of not displaying the cheapest prominently is an important issue and therefore warrants being addressed even if there is no clear leading platform currently but rather a number of platforms that collectively are important to consumers given the level of adoption of metasearch sites.

48. The Inquiry calls for submissions in respect of the following provisional remedies in respect of leading travel and accommodation platforms (Booking.com):

- 48.1. *Implement a standardised rate card that complies with a maximum cap on fee differentiation between the average low volume user category and the average high volume user categories, including both listing and promotional fees;*
- 48.2. *The removal of the offending clause on higher last minute prices from contracts with car rental companies, alternatively the Commission to investigate for potential collusive conduct;*
- 48.3. *Symmetric payment terms for bookings where the option exists for payment through the platform or the hotel; and*
- 48.4. *Travel metasearch engines should highlight prominently the cheapest option to consumers even if it does not appear first on the ranking.*

4.5. eCommerce

49. The Inquiry makes the following finding in respect of eCommerce platforms:

49.1. *A range of conduct by Takealot which distorts competition on the marketplace in favour of Takealot Retail, including:*

49.1.1. *Product gating by Takealot which is not at the supplier's behest, which removes direct sellers on the platform, enabling potentially higher prices or fewer, less generous, promotions to the detriment of sellers and consumers;*

49.1.2. *The use of seller data by Takealot buyers to inform their own retail offering on the marketplace, expropriates and undermines innovation and risk-taking by marketplace sellers to the detriment of competition and consumer welfare.*

49.1.3. *The pressuring of suppliers where Takealot is outcompeted, resulting in the raising of price by suppliers or by sellers threatened with non-supply, which distorts competition and raises prices to consumers.*

49.1.4. *Takealot retail benefits from the use of unsold promotional display inventory, and has a higher acceptance rate for applications to run promotions on the platform;*

49.1.5. *The Buy Box algorithm favours Takealot as it displays the cheapest in-stock, not cheapest overall, and almost all Takealot Retail is in its warehouse and therefore in-stock, unlike marketplace sellers that have more restricted warehouse space.*

49.1.6. *Marketplace sellers are not permitted to offer 'unboxed deals' which permit Takealot Retail to clear returned stock and recoup a higher portion of the value.*

49.2. *Takealot raises marketplace seller rival's costs through the lack of a speedy dispute resolution process in cases where sellers incur the ongoing costs from a lack of resolution.*

50. On the issue of product gating, the Inquiry accepts that some suppliers may have good reason to restrict the seller channels but this should be at their request, and not a unilateral decision by the platform which is unlikely to have the same efficiency rationale. The main issue for the Inquiry is how to monitor this, and currently we believe a reporting requirement to the Commission where this is concluded with a letter from the supplier may be one means to overcome the enforcement problem.

51. On the remaining issues of retail buyer conduct and self-preferencing, the Inquiry is currently of the view that an internal organizational separation is important if self-preferencing and the worst

excesses of retail buyers is to be reined in. Internal separation enables the development of a standard interface with retail and marketplace sellers without favouring one by blurring the lines. The list of remedial actions for that separated marketplace operation are small individually and not complex to implement, but collectively should reduce the distortion to competition without prejudicing the platform itself and permit the development of operating procedures to ensure this happens. Similarly, rather than necessarily interfering with the specific terms & conditions, a speedy dispute resolution process is considered important to ensure sellers are not left bearing costs. Where the platform is unable to resolve the dispute timeously, then marketplace sellers should not be left bearing the costs and should be compensated in the interim until there is resolution. The requirement to make the marketplace seller neutral on costs if it is not resolved within the timeframes provides the necessary incentives to undertake a speedy resolution. On retail buyer access to marketplace seller data, an alternative to prohibiting such access is to ensure that any data which is shared, is equally shared with all marketplace participants (including then data on the own retail product performance).

52. The Inquiry calls for submissions in respect of the following provisional remedies in respect of leading eCommerce platforms (Takealot):

52.1. *Prohibition on product gating except at the behest of the supplier, which must not be actively solicited, with reporting requirements to the Commission where exclusivity occurs;*

52.2. *Internal separation of the retail division from the operation of the marketplace, with own retail treated on an arms-length basis including in respect of the following;*

52.2.1. *A prohibition on retail buyers accessing marketplace seller data, or alternatively providing equal access to data for marketplace sellers;*

52.2.2. *Fair and non-discriminatory treatment in promotion applications;*

52.2.3. *Equality in the treatment of returns and any resale of returns on the marketplace (e.g. through unboxed deals);*

52.2.4. *Removal of algorithm biases, including that of the Buy Box (i.e. to also highlight the cheapest option overall where it is not the Buy Box option);*

52.2.5. *Investigation of complaints in respect of own retail buyer conduct including that in respect of common suppliers;*

52.2.6. *No preferential access to unsold display advertising inventory;*

52.2.7. *Implement a speedy dispute resolution process including a provision to compensate marketplace sellers in the interim where the dispute is not resolved within the timeframes.*

4.6. Software application stores

53. The Inquiry makes the following finding in respect of software application platforms:

- 53.1. *Inadequate software app store competition results in excessive commission fees, reducing domestic app developer incentives and higher pricing of global apps to South African consumers.*
- 53.2. *Side-loading warnings or restrictions, anti-steering provisions and the lack of in-app payment alternatives prevent business users from bypassing the excessive fees.*
- 53.3. *A lack of SA-specific curation and the sale of visibility hinders the discoverability of SA apps on the software app stores*

54. The issue of commission fees is potentially addressed by the proposal to prohibit anti-steering provisions on the platforms if this is effective in bringing competition to bear on commission fees, resulting in their reduction to competitive levels. However, the Inquiry is uncertain at this stage if those will be sufficient, and therefore has made a provisional proposal to remedy the high commission fees through a maximum cap. In the event that a regulated commission fee is required, the Inquiry would like to hear what may be considered reasonable within the context of excessive pricing provisions. The Inquiry's preliminary view is that it would be at least as low as 10% which reflects a fee that Google is willing to accept as fair value for ebooks and music streaming to recover its costs over and above transaction processing. The Inquiry is of the view that the remedy in respect of prohibiting anti-steering would also address the side-loading issue and so we do not take that further in the proposed remedial action.

55. The remaining issue is the lack of SA-specific curation and the difficulties of SA apps getting visibility on the SA storefront. The Inquiry is of the view that in addition to SA-specific curation, promotional credits (applicable on any storefront) are low cost but likely effective interventions to improve the discoverability of SA apps on the local storefront and improve the ability to compete with global developers locally and globally on other storefronts. The precise level of credits needs to be determined such that it is not trivial, and the Inquiry welcomes submissions in this regard as to what is meaningful to ensure discoverability. Investments in local curation and promotional credits are also proportionate to the value that these software app stores derive from the SA market.

56. The Inquiry welcomes stakeholder submissions on the following proposed remedial action for software application stores:

- 56.1. *The regulation of software app store commission fees for the South African storefront sales at some prescribed maximum;*
- 56.2. *A requirement to provide SA-specific curation of local apps and discoverability on that basis; and*
- 56.3. *Free promotional credits for SA apps to be spent on local or foreign storefronts.*

5. Provisional findings and recommendations to government

5.1. Regulatory oversight of future conduct

57. The Inquiry recognises that three areas of change may necessitate applying certain of the rules above to platforms in the future that they are not applied to now. This includes a) platform categories which the conduct has not emerged to a critical extent currently, such as visibility sales or price discrimination, but may potentially emerge in future, b) albeit unlikely given the competitive dynamics, it is possible that in one or more of the current platform categories a new leading platform may emerge especially if the remedial action is effective, and c) the platform categories identified as immature currently may develop in importance and there may be a need for the leading platforms in those categories to be prevented from engaging in similar conduct.

58. For these reasons, the Inquiry is considering whether some form of guidelines or regulations are required to ensure consistency in remedial action amongst leading platforms, and to prevent the redundancy of repeating this type of inquiry in the future. If there were to be any such guidance or regulations, it would have to focus on the conduct that is most common across the leading intermediation platforms that mature, and which is on balance of probabilities to be harmful to competition at either level given the lessons from this Inquiry. The Inquiry recognises that the problem with guidelines is that it may not be easy to enforce in the event of non-compliance as it may require prosecution under the abuse of dominance provisions rather than the test utilised in an inquiry. However, the potential challenge with regulations may be under which legislation they fall. The Inquiry is also aware of the issues being raised in respect of the Digital Markets Act in

the EU, and so some of the guidance or regulations would have to be at a principle level rather than platform-specific.

59. The Inquiry therefore welcomes submissions in respect of the following proposed recommendation in respect of capturing future conduct in online intermediation platforms:

59.1. *The issuing of Guidelines by the Commission or Section 78 regulations by the Minister or new regulations in terms of other enabling legislation to prohibit certain conduct by leading platforms in online intermediation platform markets, and to permit the ongoing identification and review of leading platforms. In particular, those guidelines or regulations should cover the following aspects:*

59.1.1. *A process for the identification and review of leading platform status*

59.1.2. *Prohibition of the following conduct which has an adverse effect on intermediation platform competition*

59.1.2.1. *The use of price parity clauses (wide or narrow) or achievement of the same outcome through price quality factors in the SERP ranking algorithm;*

59.1.2.2. *Restrictions or frictions on multi-homing by business users including exclusivity arrangements, interoperability limitations and multi-year contracting;*

59.1.2.3. *Loyalty schemes that leverage the leading position of the platform, including visibility on the platform, to get business users to fund the scheme in whole or part.*

59.1.3. *Prohibition of the following conduct which distorts competition amongst business users and/or results in their exploitation*

59.1.3.1. *Self-preferencing conduct of any sort;*

59.1.3.2. *Discrimination in listing, commission or promotional fees against SMEs/HDPs beyond a maximum cap;*

59.1.3.3. *A lack of adequate transparency over promoted listings as advertising;*

59.1.3.4. *The excessive sale of visibility through demoting organic results;*

59.1.3.5. *Permitting algorithm biases that favour one group or another.*

5.2. Competitive distortions from tax differentials

60. The Inquiry makes the following finding in respect of corporate tax differentials:

60.1. Substantially lower corporate tax rates for global platforms distorts competition and disadvantages South African platforms where they compete with global platforms.

61. The Inquiry has identified specifically in the context of travel and accommodation that differences in corporate tax rates, and the fact that commission income may be taxed abroad, is capable of distorting competition amongst platforms, and in particular disadvantages South African platforms. There are global initiatives considering how to more equitably tax global technology firms based on income source, which therefore may also reduce the inequality of treatment and the potential for differences to distort competition. However, taxation policy is the preserve of National Treasury and in exercising its decisions on policy will also consider other factors in its design and not just competition issues. For this reason, the Inquiry is of the view that it is appropriate to request that National Treasury consider the competition aspect in examining digital market taxation policies, but not to recommend that changes need to happen.

62. For this reason, the Inquiry calls for submissions in respect of the following provisional recommendation on digital taxation distortions:

62.1. National Treasury to consider the competition distorting effects on digital markets of differing tax rates as one factor in determining how to tax digital content and firms, along with options for more equitable treatment such as a withholding tax.

6. Provisional HDP platform and business user findings and recommendations

63. The Inquiry makes the following provisional findings in respect of market features which impede the participation of HDPs at the online platform and business user levels.

6.1. Platform level

64. The Inquiry makes the following finding in respect of HDP platforms:

- 64.1. *The lack of wealth and asset accumulation, along with exclusion from business networks, places HDP entrepreneurs in a materially disadvantaged position to raise pre-seed and seed funding for their startups.*
- 64.2. *A lack of transformation of the SA Venture Capital industry alongside the lack of mandates to support HDP startups, leaves the HDP entrepreneurs largely excluded from available post-revenue series A, B, C funding.*
- 64.3. *Government funding aside from that arranged as part of the SA SME Fund, is not focused on digital markets or startups.*

65. Digital markets are the fastest growing segment of economy, and there is a real risk that a failure to ensure greater participation by HDPs will result in growing inequality in future. It is therefore imperative that remedial action is taken now to address the funding gaps that exist for HDPs. The Inquiry is of the view that government should make HDP entrepreneurial funding available that is ring-fenced for digital markets, even if this is a portion of current entrepreneurial funding, as the digital market area is already identified as a priority for government. For the funding allocated, the Inquiry is of the provisional view that the mandate model is preferred because not only does government lack the VC skills, but using a mandate model will actually assist in developing the VC industry domestically which may crowd in other private funding, resulting in spillover effects. The mandate may also be a means to incentivise the transformation of the VC industry which is likely to benefit the discovery and funding of HDP entrepreneurs outside of the mandated funds. The Inquiry is of the view that this should not be the role of government alone, and large institutional investors, including pension funds and Development Funding Institutions (DFIs), have a societal obligation to do the same given the accumulated disadvantages faced by HDP entrepreneurs and the potential for greater growth if this talent can be harnessed. The question is how this obligation should be translated into tangible commitments that do not undermine other objectives and the Inquiry welcomes submissions in this regard.

66. As such, the Inquiry makes the following provisional recommendations in respect of HDP platform support:

- 66.1. *Government to make funding available to support HDP entrepreneurs in digital markets, either directly or through DFIs, using the fund mandate model whereby venture capital firms are given a mandate to disburse the funds only to HDP entrepreneurs and with*

a proportion allocated to seed funding (or incubators and accelerators), and to achieve certain transformation targets of their own.

- 66.2. *Commitments from large financial institutions, including DFIs, and large tech companies and corporates to support HDP intermediation platforms either directly or through VC firms with the imposition of mandates on a portion of venture capital funding and demand transformation of the VC funds.*

6.2. Business user level

67. The Inquiry makes the following finding in respect of HDP business users:

- 67.1. *HDP business users are typically SMEs too as newer entrants, and so factors which inhibit SME participation similarly impede HDPs;*
- 67.2. *The spatial location of discretionary income and tourism facilities in historically white middle class areas itself excludes HDPs from vast parts of the online marketplaces as business users*
- 67.3. *A lack of any specific support for HDP business users to overcome the disadvantages faced on the majority of platforms, with only some isolated instance of limited support.*

68. Leading platforms are effectively gatekeepers to most online consumers in each intermediation category, and therefore the Inquiry believes that they attract some obligation to off-set the cumulative disadvantages faced by HDP businesses. The remedial action taken by global platforms in similar contexts that aim to reduce the costs of getting on the platform and marketing their presence in a manner that imposes limited costs on the platforms provides a possible template for SA obligations. Within those remedial actions, the option of identification and discoverability as HDP businesses enables consumers wanting to support HDP firms to do so, but authorisation in cases where business users fear adverse discrimination.

69. As such, the Inquiry makes the following provisional recommendations in respect of HDP business user support:

- 69.1. *Leading platforms across all categories are required to institute an HDP programme targeted at overcoming barriers to participation, that should include the following minimum components:*

- 69.1.1. Personalised assistance with platform onboarding;*
- 69.1.2. Waiver of onboarding costs or fees;*
- 69.1.3. Fees that are no higher than the best placed business users;*
- 69.1.4. Credits for platform promotional activity; and*
- 69.1.5. Identification and discoverability on the platform by HDP designation if authorised by the HDP business user.*