

# The Law and Economics of Potential Competition in Digital Markets

## Case Studies in Online Intermediation Platforms

by

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## **Abstract**

This research aims to explore how authorities in different jurisdictions respond to potential competition in the online automotive classifieds platform markets. This is done by means of a review of cases in South Africa, the United Kingdom and Australia. This thesis considers how actual competition should be measured within markets as well as how potential competitors are identified and ranked against one another according to the firm that imposes the largest competitive constraint on its rivals. Previous research and literature have identified the method to be used when defining a relevant potential competitor in a market. This thesis evaluates how potential competition considerations should affect the evaluation of a merger or acquisition, specifically in the online automotive classifieds platform markets. Potential competition issues arising in intermediation platform markets exists as more firms are developing their own intermediation platforms and competition authorities are seeking to regulate these firms that bring about novel competition issues compared to those experienced by a traditional firm. This research seeks to provide an understanding to its readers and authorities on how potential competition concerns should be addressed and handled in platform markets, particularly those including a digital element. This research evaluates the literature surrounding this topic by taking a case studies approach.

**Keywords:** Potential Competition, Merger Control, Digital Markets, Killer Acquisitions, Market Definition, Online Automotive Classifieds, Intermediaries, Platform Market.

## **Opsomming**

Hierdie navorsing beoog om te ondersoek hoe owerhede in verskillende jurisdiksies op potensiële mededinging in aanlyn voertuigadvertensie-platform-markte reageer. Dit word bereik deur middel van 'n oorsig van regsake in Suid-Afrika, die Verenigde Koninkryk en Australië. Die tesis bekyk hoe werklike mededinging gemeet behoort te word sowel as hoe potensiële mededingers geïdentifiseer en georden kan word, gebaseer op watter firma die grootste beperking op mededingers plaas. Vorige navorsing en literatuur het reeds die metodologie, vir die definisie van 'n relevante potensiële mededinging in 'n mark, bepaal. Hierdie tesis evalueer hoe potensiële mededingingsoorwegings die evaluering van 'n samesmelting of oornome in platform-markte behoort te beïnvloed, en bepaald in aanlyn voertuigadvertensie-platform-markte. Potensiële mededingingskwessies kom toenemend in hierdie tipe markte na vore, soos meer firmas hulle eie intermediasie platforms ontwikkel en mededingingsowerhede die regulering van hierdie firmas onder die loep noem. Die navorsing het ten doel om aan lesers en owerhede 'n beter begrip te verskaf van hoe potensiële mededingingsoorwegings in sulke platform-markte behoort te figureer. Die navorsing evalueer die literatuur rondom die onderwerp deur middel van 'n gevallestudie-benadering.

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**Glossary**

<b>Term</b>	<b>Definition</b>
<b>ACCC</b>	Australian Competition and Consumer Commission
<b>CCSA</b>	Competition Commission of South Africa
<b>CMA</b>	Competition and Markets Authority (United Kingdom)
<b>EC</b>	European Commission
<b>EU</b>	European Union
<b>ICN</b>	International Competition Network
<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>UNCTAD</b>	United Nation Conference on Trade and Development

# The Law and Economics of Potential Competition in Digital Markets

## Case Studies in Online Intermediation Platforms

### 1. Introduction

Platforms raise several competition challenges, specifically in merger control. The issues surrounding potential competition concerns have often been cited. For example, when a potential competitor is set to enter a market, but instead is acquired by an incumbent of that market. This reduces the innovation efforts a target firm could have provided the market had that target firm been allowed to successfully enter and compete in the market. This paper seeks to deal with understanding issues of this nature, and the potential competition concerns raised by authorities in varying jurisdictions.

Firms have designed platforms to operate under many different circumstances and form the basis of many different markets. In general, the online intermediation market is broad, ranging from online marketplaces for new goods to second hand / used trading platforms. The market for online intermediation in general is too great to be dealt with in enough detail within this research paper, thus the scope of this paper has been narrowed to focus on the online intermediation classifieds market, specifically the classifieds market for second hand / used cars and other vehicles.

To provide an example of the business model under consideration in this paper, the firms operate in the used-vehicle e-commerce market. The South African example is WeBuyCars, a firm that operates a business model within both an online and a physical space. WeBuyCars has a physical location where the firm takes control and ownership of the stock between transactions, for example, WeBuyCars will purchase a vehicle from a seller and take full ownership before reselling the vehicle on to either private buyers or offloading the vehicle to a dealership.

Competition authorities worldwide have begun dealing with mergers and acquisitions involving platforms. Several have dealt with mergers and acquisitions for the online intermediation platform market specifically. These cases will be explained and dealt with in later sections of this paper. The authorities have found it challenging to define the relevant markets, and how to involve the concept of potential competitors into their definitions. This has recently become of great concern to them as more firms involve a digital element, whether it be data processing or an e-commerce element to their business. It all needs to be accounted for and the repercussions considered when the market is defined for competition assessments.

The central question for authorities dealing with merger control in digital markets has become how to define a relevant market when the firms innovating and acting as potential competitors to the market often hover at the edge of a market and are not accounted for in the narrow definitions of the market. Literature suggests then to define a relevant market based broadly on the need to capture disruptive challenges and not merely on a specific substitutable product or services (Holstrom et al, 2019).

Mergers in which potential competition are a concern are intrinsically linked to industrial concentration. These digital markets are known to be more concentrated in nature, merely for the fact that new entrants are often unable to achieve the necessary scale to enter the market effectively. Firms can struggle to reach the tipping point or critical mass at which enough customers have been onboarded to make their product viable within the market.

The concept of network effects within a digital market are useful to understand, especially within the context of digital markets traditionally being more concentrated. Platform firms operating within the digital space will experience network effects through the buyers and sellers attracted to using the platform. For example, as an online marketing platform, in order to attract buyers to the site, a number

of recognisable sellers should already use the same platform to legitimise it. If a firm fails to achieve traction in attracting either buyers or sellers, the others will leave to use a competitors platform and this firm will be forced to exit the market. If enough newly established online platform firms do not succeed in generating strong enough network effects to successfully enter and remain within that particular segment of the digital market, the result will be highly concentrated digital markets that become even more difficult to enter for new firms.

Competition authorities and legislatures globally are aware that when new rules, regulations, and legislations are instituted, it should not unduly restrict competition within the markets it applies to. There should be an equitable adoption across markets, regardless of operating in a traditional or digital market (International Competition Network, 2019).

Many authorities acknowledge there has been chronic underenforcement in markets involving digital firms undergoing mergers and acquisitions. The reason has often been cited as not meeting the turnover thresholds set by the authorities to trigger mandatory notifications. The authorities have come to realise this is due to the firms designing and operating platforms that are not revenue generating but have the potential to do so. These firms are acquired without any consideration by the local authorities on the potential anti-competitive nature simply as a result of there being no requirement on the firms to notify. In recent years, this notification threshold has been amended for authorities to be notified based on the price paid for the acquisition or considering the share of supply criterion. This allows many more digital mergers to be addressed by the relevant authorities (Motta & Peitz, 2020).

Germany is an example of a country that has made amendments to their legislation with a focus on the increasing digitalisation of firms. This legislation clarifies that a firm providing free services is not precluded from an assessment on defining a relevant market. In this process of defining the market to assess market power the authorities will consider network effects, multi-homing, and access to data

among others (International Competition Network, 2020). There are other international competition authorities looking to do the same (implementing legislation) or implore their legislatures to introduce legislation to solely deal with the digital market and industry concerns.

Throughout this paper, the term ‘traditional firm’ or ‘traditional platform’ will be used to describe how these entities operated before the introduction of the internet into the operational capacity of a firm. It assumes that by using either the internet or technology (or both) in these firms, the firms have become ‘digital’, and their efficiencies enhanced. These firms will have achieved economies of scope and in some cases, scale, due to going digital.

In this paper, first, we refer to well-established theory on platforms. Second, we review the approach of authorities in several jurisdictions regarding potential competition and their reactions to the newly emerging digital markets. Third, we review the literature surrounding potential competition, killer acquisitions and how the platform markets should be defined. After this, the paper goes on to identify gaps in the literature and will attempt to answer them through considering different jurisdictional approaches to very similar competition cases. These cases occur in the jurisdictions of South Africa, Australia, and the United Kingdom. Specifically in the market for online classifieds intermediation platforms. Further, some recommendations are outlined as a means to identify policy areas that competition authorities should be aware of, especially when dealing with matters of this nature.

The gaps identified in the literature reviewed in this paper are the identification of potential competitors in digital markets, as well as how relevant the analysis of actual competition is when potential competition effects are raised in a case. These are the questions this paper seeks to answer through an evaluation of several cases to identify the approaches taken by different jurisdictions on these similar potential competition issues.

## 2. Platforms

The purpose of this section is to introduce basic economic concepts related to platforms, to form a fundamental understanding of what a platform is and how it operates. It further explores the differences that arise when the platform functions within the digital sphere and how this impacts our understanding of the operations of a platform. This section considers the specific market that will be dealt with throughout the remainder of this thesis, the online automotive classifieds intermediation market. It will also consider the competition concerns that arise in this specific type of market.

### 2.1. Defining a platform

The OECD describes an online platform as:

*“A digital service that facilitates interactions between two or more distinct but interdependent set of users (whether firms or individuals) who interact through the service via the internet.”*

(Competition Commission, 2020:14).

The platform model represents a firm connecting two groups without expecting payment in exchange for the service of connecting these groups. The act of connecting buyers and sellers through a platform could be equivalent to the process within a classic production firm that turns raw materials into manufactured products. These classic economic models of firms often do not account for demand of one customer group being determined by the demand of another customer group served by the same firm (Evans & Schmalensee, 2016).

A two-sided market exists when there are two consumer groups, namely a buyer and a seller, who wish to connect or interact with one another but are not aware the other exists. This is when a third party, an intermediary creates a firm with the sole purpose of connecting these consumer groups with one another. Examples of two-sided markets are discussed in more detail below.

Belleflamme & Peitz (2010) offer an extended description, by describing an intermediary that offers access to a platform where buyers and sellers can interact. This is without the risk of an intermediary gaining control of the ‘seller’s’ goods, while in the process of transferring the ownership to the buyer.

Platforms can be classified along similar lines to an intermediary as some platforms act solely as matching devices, allowing each side of the market to find the best agent on the other side. The use of the internet becomes embedded into the inner workings of a specific platform, leading to a significant amount of more information available to facilitate the matching process. The platform provides a mechanism to adjust information asymmetries faced between buyers and sellers. It allows these two groups, the buyers, and the sellers, to overcome issues involving distance, pricing asymmetries and the knowledge that the other exists and can fulfil a need of theirs.

Platforms exist under a set of economic rules separate from those a production or manufacturing firm would follow. Traditional firms are those using a raw material to manufacture a final good or service for an end consumer (Evans & Schmalensee, 2016). Platforms operate differently from a traditional firm in that it exists around the need to resolve a business problem that is not met by what a traditional production firm might be able to offer (Evans et al, 2011:130).

eBay can be an example that best described a space where buyers connect with sellers and vice versa, through a digital intermediary for both new and used goods. eBay, as a platform, makes it easier for someone who has an item and another person who wants that item to find each other. By attracting both a buyer and a seller to the same platform for a specific item, it bulks up both the buyer and seller ends of the platform. An increased number of sellers on a platform will attract an increased number of buyers who are more likely to find what they are looking for. The reverse is also true, more buyers on a platform leads to more sellers being interested in listing their products on that platform. By

operating on a platform popular with both buyers and sellers, the cost of exchange between parties is reduced significantly.

UNCTAD's (2019) report on digital markets highlights how platforms can connect very specific and independent users to each other. Examples of non-digital platforms would be newspapers and magazines that connect advertisers and their content with readers, and credit card facilities connecting establishments with their consumers for a more convenient method of payment than cash. These platforms are distinguished from a digital platform in that there is no involvement of the internet in the intermediation between buyers and sellers (Competition Commission, 2020).

In many instances when interacting with a platform, consumers are offered the ability to multi-home. Multi-homing occurs when a user of a platform has the option to subscribe to use multiple platforms. This in turn results in entry, pricing and merger incentives being established within a market (Anderson, Foros & Kind, 2018). Multi-homing provides consumers with the ability to decide market share to some extent, by voting with their feet to support the firm believed to be the most innovative and providing the best platform compared to other competitors in the market. Consumers that can multi-home among platforms indicates an increased level of competition within the market. As consumers shift their consumption between firms it encourages firms to be more innovative to attract a larger customer base.

A platform exposes a new way of addressing fundamental issues within economic organisations. Specifically, the coordination of supply and demand in the absence of complete information. Online platforms become a digital resource to enable more efficient interactions, while generating value for both buyers and sellers alike. The primary intention of platforms is to create an efficient match between a consumer looking to buy goods and the supplier of those specific goods who otherwise

would not have found it as easy to interact with one another (Parker, Petropoulos & Van Alstyne, 2021).

Platform markets are two-sided in nature and have associated network effects carrying important implications for barriers to entry and expansion within these markets. There are also network effects that exist upon the interaction of different user-groups, namely buyers and sellers through the platform. New entrants to these markets are faced with the difficult task of achieving a ‘critical mass’ of users signing up to their platforms to successfully enter the market (Gumtree and Cox Australia Media Solutions, 2020).

Platforms can differentiate themselves based on the pricing strategy or business model. For example, WeBuyCars offers a service as an online intermediary classifieds marketplace. Their point of difference from competitors is that WeBuyCars also accepts ownership of the stock in the process of acquiring a vehicle and off-loading it to dealerships. In this sense, WeBuyCars have differentiated themselves from the competing platforms that simply offer a matching service between private sellers, private buyers, and dealers.

## 2.2. Key Aspects of a Platform

Multi-sided platforms ultimately fulfil several key functions; first, facilitating exchanges between buyers and sellers, second, creating an audience making easier for one user group to locate a match in another and third, providing a shared resource that reduced the cost of the service to both user groups (Evans & Noel, 2007).

Rochet and Tirole (2003:107) describe the network effects in a market as:

*“A market with network externalities is a two-sided market if platforms can effectively cross-subsidise between different categories of end users that are parties to a transaction. That is, the volume of transactions on and the profit of a platform depend not only on the total price charged to the parties to the transaction, but also on its decomposition”.*

Consumers, either on the buyers' side or sellers' side, can multi-home between platforms. The number of consumers influences the pricing power of a platform that is required to maintain competitive pricing to not lose market share to rival platforms, or start-up firms looking to enter the market and compete with an incumbent. It is not necessary for both sides of the consumer groups to multi-home to impact the pricing power of the platform. Pricing for one customer group can easily be determined by the others ability to multi-home between platforms. This is generally the case when multi-homing amplifies price competition on either side of the platform (Rochet & Tirole, 2003).

Platforms typically charge one side a low fee to encourage users to join, attracting users to the other side of the platform and charging this second group to make up for the revenue 'lost' on the other side. For example, a buyer can experience the platform at zero cost while seller pay a fee to list their articles on the platform, or a buyer would 'pay' the platform with their attention to advertisements or provide data points the platform could monetise and turn into an alternative revenue stream.

Competition and consumer surplus are connected to the intricacies of network effects. One user group may enjoy lower prices, while the other user group interacted with is charged a higher price to be included on the platform. Charging the one group a lower price encourages individuals within that user group to join, making the platform more enticing for the other user group to want to join.

Network effects are defined as the amount of value one customer places on a product or service based on the number of other customers making use of that same product or service. Direct network effects are present when one consumer's demand increases based on other consumers demanding that same product. Whereas indirect network effects occur when a customer's demand for a product increase based on others demands for complementary products is higher (Evans et al, 2011:100). The network effects experienced by a platform pose a significant barrier to entry. This is in cases where a potential entrant will be required to risk developing new infrastructure without knowing if it will induce the demand needed to generate sufficient profits (Kokkoris & Shelanski, 2014).

Incumbent firms enjoy the economies of scale and the deterring effect it imposes on firms attempting to enter the market. Imposing significant cost disadvantage to smaller firms, the economies of scale to be achieved to enter a market are largely dependent on the size of the market as well as which firms that a natural monopoly (Hurdle et al., 1989).

Normally, a firm would not be considered profitable if it sells products to consumers at a price lower than cost price. However, in platform markets it has been found that providing payment to some customers may be profitable both in theory and in practice (Evans & Schmalensee, 2016). One user group of the platform will pay for the service of using the intermediary service, such as listing a car for sale on a platform. While, the other user group will then reap the benefits of non-payment, as this other user group is not required to pay for their use and access to the platform.

Parker & Van Alstyne (2000) explore how the price structure and demand of a product can linearly determine the demand for a different product. This is based on the price structure of these products serving as a network externality coefficient for the demand of other goods.

A platform's pricing becomes decentralised by implementing a taxation on trade, through allowing market participants to determine the pricing among themselves (Belleflamme & Petiz, 2010). Evans & Schmalensee (2016) show one option that firms have is to use various pricing levels and control terms to keep customers using the platform, such as an additional payment to see fewer advertisements on the platform.

There are multiple pricing mechanisms platforms can enforce to receive revenue from customers. It can either charge two different prices to their respective consumers as above. For example, charging one an access fee to sign up to the platform and another a usage or membership fee for using the platform. Alternatively, the platform can capitalise on the attention of their users and sell this on to advertisers by making a portion of the site available to third-party advertisements visible by viewers.

Technology and innovation provide platforms with the easiest opportunity to gain scale. This scale is not in the operational capacity sense, rather the size of each user group that interacts with the platform. The larger each user group is, the more opportunity exists to find what they are searching for on the platform.

Caillaud & Jullien (2003) study competition among intermediaries. Here platforms are determined to operate as matchmakers, using sophisticated pricing, by implementing either a registration fee or a transaction fee upon their final consumers. The paper also endeavours to show how dominant firms benefit by charging per transaction versus charging a once-off fee for registration when attempting to deter entry into their market by start-up firms. Overall, competition between platforms becomes more intense if it becomes impossible to deter multihoming. This leads the market into a race for the first firm to achieve a 'winner-takes-all' market.

### 2.3. Digital Platforms

The OECD describes examples of digital (online) platforms as;

*“Range of services available on the internet including marketplaces, search engines, social media, creative content outlets, app stores, communications services, payment systems, services comprising the so-called “collaborative” or “gig” economy, and much more”*

(Competition Commission, 2020:18).

The UNCTAD’s (2019:3) report reiterates the European Commission’s statement and understanding of an online platform;

*“An undertaking operating in two (or multi) sided markets that uses the internet to enable interactions between two or more distinct but interdependent groups of users so as to generate value for at least one of the groups”*

Put another way, it is platform to intermediate goods and services between business and consumers using the internet. This process is monetised based on a sales or commission-based business model. Examples include eCommerce marketplaces, match-making platforms, and aggregation services (Competition Commission, 2021).

The introduction of technology into the platform model of the firm allows for physical distances between the customers and the firm to be breached. It enables easier connection between the customers themselves and highlights gaps that exists in the market which the platform can fill. A digital platform has a significant amount of scope to create a connection between physically distanced buyers and sellers than a platform that does not exist in the digital realm or does not incorporate technology within their business model.

Digital platforms and firms operating in the digital market are heavily reliant on innovation and research and development to achieve the next best thing to place them ahead of their competition to become market leaders. The economic literature remains at odds on which market structure results in higher levels of innovation within a market. Though the literature does agree that exploiting the network effects tends to yield greater innovation to achieve dominant positions in markets (Yu, 2020).

In any digital market, access to big data presents a significant competitive advantage. It changes opinions on which products and services could be considered close complements. There are newfound network effects and economics of scope that come to light under a digital lens. Platforms in these kinds of markets have managed to insulate themselves from competition by increasing barriers to entry in the other markets they exist in to deter entry. These barriers arise mainly through network effects, big data and economies of scope and scale. In these online platform cases, network effects should be considered a market feature. It can explain how a firm develops into a market leader or becomes the dominant firm when the difference between market leading firm and the competition is incremental (Yu, 2020).

These platforms, especially the digital ones, are designed to collect and process data. This data is then used to inform decision-making at different levels. A firm with control over such data infers a certain amount of market power onto the platform. Newcomers find it difficult to compete, and even enter the market, as the first hurdle is to gain traction in the market and then attract enough traffic onto the site. Digital platforms are often compared to utilities firms, imposing a feeling of largeness upon users as well as feeling as though there are no adequate alternatives available. This may lead users to feel forced to accept the terms and conditions, and potential competitors or entrants to feel as though it is not possible to successfully enter the market (UNCTAD, 2019).

Authorities need to re-evaluate their approach to market definition in these multi-sided markets as it differs substantially from the definition of firms within traditional markets. There are many more smaller firms to consider as buyers or sellers that interact with only the one side of the platform and this should be accounted for accordingly. Further research should be conducted to create models to simulate mergers and acquisitions within the digital space. Some work has been done by Kamepalli et al (2020) in creating a model to simulate competitive marketplace dynamics of the digital and information industries that are driven by incumbent firms, disruptive start-ups, and relative firm-level technological quality. The authors modelled this industry with potential disruptive new entrants based on switching and network effects.

If a merger has been allowed, the incumbents and dominant firms may have access and control of the data providing these firms a significant competitive advantage. This creates economies of scale around data, resulting in a positive feedback loop for the firms that have a large base upon which to amass data, allowing the firm to improve on services. Offered which in turn commands more customers who, again, provide the firm with more data points (Calvano & Polo, 2020).

The developments in digital markets and online platforms occur at such a rapid pace that competition law and authorities struggle to keep up. Often leading to irreversible damage to markets through allowing a false-positive merger, leaving few options remaining to rectify this situation retroactively (Holstrom et al, 2019). Authorities should consider constructing a process of analysis suited specifically to the two-sided market these firms operate in (OECD, 2020).

Often it makes more sense for a large incumbent to acquire a smaller start-up that has invested in the technology and been innovative than for them to invest equivalent capital and risk not achieving the same scale. For online markets the technologically leading firms have greater incentives to purchase

or acquire start-ups to maintain incumbent positions. Continued leadership through acquisition, and not organic growth may not be welfare improving to consumers (Gautier & Lamesch, 2020).

To understand the digital platform, one also needs to know how user-groups and interaction between these groups work to understand the value created for consumers. Platforms need to consider what they value most and decide whether to focus on revenues per interaction or the quantity of interactions. This decision can impact the success of the platform, based on the reception by its consumers.

Multi-homing also impacts success indirectly through competition levels, which has become a standard measurement tool in digital markets. Yu (2020) stated that a platform becomes increasingly more valuable based on *who* is either a buyer or seller on the platform, rather than the number of people using the platform. Of course, if there is an increased number of buyers (sellers), it will attract more sellers (buyers) to the platform. The point Yu (2020) is trying to make is that buyers will consider which other buyers are using the platform to inform their decision on whether to join themselves as it may be indicative of the platform's success, and sellers may do the same.

#### 2.4. Online Advertising Platform

The focus of this thesis is a specified online classifieds platform market, it involves platforms that offer the ability to list certain items for sale to encourage a sale by viewers on the respective platform. Where the individuals or firms looking to list items on the platform make up one user group, and the individuals browsing the platform to find the item they are looking for are the other user group. This thesis narrows the market further by considering automotive classifieds only.

A digital platform involves a range of platforms that provide different offerings and serve consumers in various ways. One of these is an online intermediation platform where the internet is used as an

input to create a platform to facilitate bringing buyers and sellers together within a certain industry. An online classified advertising firm is a platform that joins buyers, sellers, and dealers of vehicles. It is characterised as a multi-sided firm experiencing significant network effects. As this platform becomes larger and more engaged with their audience (buyers), they are more valuable to dealers (sellers) (Gumtree and Cox Australia Media Solutions, 2020).

Advertising of this nature differs in the digital market in that the intermediaries or platforms have a much larger amount of data with which to supply more targeted advertisements to consumers. This helps ensure a more effective distribution of advertisements to the final consumer a specific advertising firm is looking to target. Online advertising methods are arguably leading to significant reductions in transaction costs between merchants and consumers. The methods used enable merchants to deliver information targeted to consumers that value receiving the information (Evans, 2009).

A significant amount of data per online user is available for publishers and advertising networks to exploit and engage with. The advertisers that make use of this data can more accurately determine if their advertisement has been viewed by a specific type of consumer than ever before. Pre-internet, the traditional advertising approach would be included within television and radio shows at specific times, and advertisers had no way to accurately measure the reach of their adverts to consumers (Evans et al, 2011:232).

Today, advertisements are carefully curated and distributed to specific demographics based on data collected from internet histories and an individual's online habits. Advertisers have more confidence in how their audiences can be targeted with tailored advertisements. Platforms have access to vast amounts of data that can ascertain the time of day, location of viewing and possibly various other

traits of their viewers. This information provides a unique ability to advertise in a cost-effective manner that is not possible without the internet. (Evans et al, 2011).

## 2.5. Competition Concerns Arising in Platform Markets

The literature considered in this section reveals the simplicity in extending the traditional platform model into a digital one. From providing a service connecting two distinct user groups seemingly face-to-face to pivoting and using the internet to connect user groups with each other from near and far. The introduction of platforms that use the internet to facilitate transactions aid the reduction of information asymmetries with respect to supply and demand. These platforms differentiate themselves from competitors on pricing structures offered to consumers and based on the business model implemented.

The network effects pose a barrier to entry over the market to new entrants, as has been described above. Another barrier to entry is the technological capital required to simply enter these digital platform markets. There are also some competitive concerns surrounding online classifieds advertising platforms.

The South African Competition Commission has identified the conduct of firms that create barriers to entry into the market or unfair trading conditions to be cause for concern in the online intermediation platform market. These barriers to entry or unfair trading conditions may be identified through self-preferencing by the platform, extraction of business data and potential distortions to the ranking algorithm employed by the firm (Competition Commission, 2021).

The Competition Commission (2021) has identified several issues arising in the online intermediation platform market. Specifically, the creation of barriers to entry and unfair trading conditions imposed onto rivals or potential entrants to the market. These issues have been identified as self-preferencing,

unfair trading terms, extraction of business and consumer data and a potential distortion to the market by using a highly advanced ranking algorithm. Economies of scope and scale are also considered a theory of harm that can entrench a dominant position enjoyed by the incumbent firm to the detriment of rival firms and potential entrants.

Multi-homing is an issue for platforms. It reduces a firm's ability to charge above marginal cost as consumers will then opt for the other cheaper platform available to them. If a firm charges above marginal cost and generates a profit it induces other firms to enter, reducing the market share experienced by the incumbent firm. However, if consumers are unable to multi-home, this reduces their welfare as firms can increase prices while consumers have no recourse to alternative options.

Incumbent platforms also face a competitive threat from potential entrants. To circumvent this, an incumbent can use the consumer data amassed to assist in third-degree price discrimination, through targeted advertisements. This ability to 'divide and conquer' the market over and above the ability of a potential entrant will benefit the incumbent through their ability to maintain market share and drive-up barriers to entry for firms seeking to enter the market (Caillaud & Jullien, 2003).

Another competition issue for platforms stems from a new theory of harm, so-called 'killer acquisitions', where major digital platforms acquire small digital start-ups as a defence strategy. These smaller firms can be in direct competition with the platform or may even be a nascent firm that could develop into a competitor sometime in the future, referred to as potential competitors. These methods of acquisition prevent firms from developing or innovating their product(s) further.

Conducting a competition analysis on a multi-sided digital platform is significantly more complicated than for a production firm. The market definition alone needs to consider which side of the platform needs to be looked at, and often it should involve two or more sides. In this market definition exercise,

a substitute is defined as any product or service that could replace either the customer base or the advertising base of a platform. This can lead to the substitution of an existing platform with a novel one by consumers of the original platform (Kamepalli, Shelanski & Zingales, 2020).

This section highlights the importance of merger control and having a strong competition authority to enforce carefully crafted legislation for digital platforms and their respective markets. Without this protection in place, incumbents seem to be free to acquire or merge with any firm they wish. A strong focus on merger control, especially for digital markets is imperative to ensure false-positives and false-negative results do not slip through in the allowance or blocking of mergers being evaluated. Authorities need to show a clear understanding on how to deal with multi-sided platforms, especially in the digital market going forward as it is becoming increasingly prevalent in the competition sphere.

### 3. International Approaches to Competition Policy in Digital Markets

Many competition authorities worldwide deal with mergers and acquisitions on a regular basis. More recently there has been an increased exposure to platforms and the competition issues that follow, specifically in digital markets. In the past these firms have not needed to notify authorities of intention to merge as the turnover threshold or asset-based threshold within their territory had not been met. Authorities have recently become aware of this and drafted amendments to increase notification of these types of mergers to reduce anticompetitive outcomes. For example, some Member States in the European Union have implemented a transaction-value based approach to merger notifications to tighten the control over mergers that slip through the cracks that authorities are not alerted to (Crémer, de Montjoye & Schweitzer, 2019).

These changes came about as the markets, especially those in the digital industry began appearing too concentrated, with specific firms achieving dominance across several markets and industries. The competition authorities claim that these firms were getting away with false-positive merger results as there was no need to notify authorities if the target firm was small enough. This would mean there would be no reason for authorities to investigate and identify potential competition issues or anticompetitive killer acquisitions if there is no notification to authorities.

There are some differences between a merger involving potential competition concerns and one that will be considered as a killer acquisition. Both the acquisitions of a potential competitor and a killer acquisition often involve a larger firm or incumbent in a market purchasing a start-up in an adjacent or nascent market to the one(s) the incumbent firm currently operates in. What distinguishes these two methods are the motives behind the targeting a specific firm for acquisition. In acquiring a potential competitor, the intent may be to acquire the innovation efforts or newly developed technology to either develop further under the incumbents' name or integrate it into the incumbent's technology to develop their own processes further. In the case of killer acquisitions, the intent is more

malicious. A start-up firm will be acquired with the intent of destroying or halting production or development of their products or technology to prevent it encroaching on the incumbent firms' market share or market power.

The competition policy created for a digital market or economy needs to prevent technology-based firms from acquiring any critical data and the platforms which may allow the establishment of undue market power ultimately creating even more barriers to entry within the market to new entrants (UNCTAD, 2020). Authorities have noted the goals of firms operating in these digital markets want to intentionally hinder their competitors' access to existing products and technology rather than focusing on the development of new goods or services themselves (Da Silva & Núñez, 2021:15).

Correia-da-Silva, Bruno, Lefouili & Pinho (2018) acknowledge that competition authorities are lacking a clear guidance on how mergers between multi-sided platforms should be assessed. In some cases, the nature of the market is crucial to the decision and not in others. Only some jurisdictions have chosen to address the impact of potential competition on merger decisions. There is uncertainty around whether a merger or acquisition for platform firms will be allowed as authorities grapple with understanding the many relevant sides in the market. A legal certainty will emerge once there have been a few more decisions made by the relevant competition authorities on potential competition issues. This will then influence the rule of law to accurately reflect which issues need to be considered by the courts in their decisions to allow or prohibit a merger.

This section aims to summarise the approach taken by various policy makers from different jurisdictions in tackling the issue of potential competition in digital markets. Digital platforms have been attracting much attention from authorities around the world. This section focuses on the key policy developments in this respect. These subsections do not provide a complete overview of developments, but rather help narrow the focus to the approach various authorities follow when

dealing with issues surrounding the relation between potential competition and mergers in digital industries.

### 3.1. Australia

The Digital Platforms Inquiry Final Report by the ACCC considers the threat posed by potential new entrants in search and social media markets. While new entrants into these markets should theoretically provide competitive constraints, it appears the authorities are protecting dynamic competition instead. The ability to acquire potential competitors and economies of scope created through the control of data sets are two primary factors among many that have contributed to the dominant positions held by Google and Facebook in their respective markets (ACCC, 2019).

Australia's competition authority has created a new branch within the ACCC, the Digital Platforms branch. This allows advanced oversight and responsibility over competition concerns involving digital platform markets. This branch or the Australian competition authorities have yet to release specifically tailored guidelines for these markets (Woodward, Avery, Iow & Vanmali, 2021).

The Australian competition authorities have released an additional advisory report to the Digital Platforms Inquiry Final Report, the Digital Platform Advertising Services Inquiry (2020-2021). In addition, the authority is seeking to conduct a Digital Platforms Services Inquiry between 2020 and 2025. Beyond the reports and inquiries, the ACCC is concerned with consumer welfare, particularly regarding the treatment of their data within a digital environment. The current regulations will not hold up to the pace and requirements of the digital markets. Therefore, another role of the Digital Platforms branch will be to scrutinise this sector and enforce decisions and regulations (Woodward et al., 2021).

The ACCC has acknowledged the presence of killer acquisitions within their digital market. With this awareness, the authority has begun proactively conducting reviews and signalling an interventionist approach to these matters. There is specific focus on the digital markets where strategic acquisitions are taking place at an increasingly rapid pace (Woodward et al., 2021).

The term ‘killer acquisition’ has been gaining traction in the pharmaceutical markets but is gradually entering the digital markets too. Referring to cases where an incumbent acquires a smaller, innovative firm with the intention to discontinue the project(s) this target firm has been developing. This strategy eliminates the possibility of the target firm developing into a rival to the incumbent or even just a potential rival (ACCC, 2019).

An example of a killer acquisition is Facebook’s acquisition of Instagram. Instagram was primarily a photo-sharing application that did not generate revenue from distributing advertisements to its users. In the aftermath of the transaction, Facebook has taken the opportunity to develop Instagram to a broader social media platform, with most notably, the ability to sell advertising spaces to business users (ACCC, 2019).

The solution the ACCC is proposing to resolve the issue of barriers to competition in existing markets by opening access to data (ACCC, 2019). This issue of data portability between firms and platforms creates major barriers to entry in these markets in the short term. New or potential entrants simply lack the ability to create the scale these major platforms operate from. Effectively hindering their ability to impose constraining effects on the markets as potential competitors.

The barriers to entry that will be experienced by firms seeking to enter these search and social media markets, are firstly, the same-side network effects that arise from data accumulation. Secondly, cross-

side network effects. Thirdly, customer inertia and the effect of default settings. Fourth, branding and brand recognition, and finally, extreme economies of scale and sunk costs.

The issues considered by the ACCC in this report can easily be translated into the other platform markets being evaluated by other competition authorities. Many of the concerns around network effects, economies of scope and scale and data portability are just as important in these other platform markets as in the social media platform market.

### 3.2. The European Union

During investigations and consideration over cases the European Commission tends not to account for potential competition in their definition of the relevant market. It is only if required that an analysis involving potential competition is carried out at a subsequent stage. Generally, it is only once a position in a market has been ascertained that this competition authority looks to the boundaries and beyond in the relevant market for potential competition concerns (Bandyopadhyay, 1997).

The EU Report, *Digital Report: Competition Policy for the Digital Era*, provides an astute focus to concerns being raised around acquisitions of start-ups which still have very low turnover and may not be picked up by the traditional merger control in place. It highlights the difficulty in distinguishing between a merger that is pro-competitive or neutral in nature and one that is considered anti-competitive. The reason being that potential competition is an inherently difficult thing to prove (Crémer et al., 2019).

The report refers to a few Member States having introduced an alternative threshold assessment to the asset values of the acquiring firm and target firm, rather to consider the value of the transaction between the acquiring firm and the target firm. However, this may not always provide the best proxy for competitive significance due to a multitude of reasons that result in a final transaction value. The

report further highlights that a merger may be considered anti-competitive not only when it eliminates the present constraints, but in cases where there is a significant probability the target can subsequently develop into an effective competitor of an incumbent or acquiring firm (Crémer et al., 2019).

The European Commission has announced in a press release the launching of an investigation into conduct by Facebook that is allegedly in violation of antitrust rules. These allegations consist of Facebook collecting advertising data from their platform to use in their other active markets, to the detriment of their competitors in the secondary market. This secondary market is the classified advertisements market (European Commission, 2021).

The authorities in the EU are taking an approach to use horizontal elements within conglomerate theories of harm. The European Commission asks if the acquirer benefits from barriers to entry linked to any network effects or the use of data. The EC also enquires as to whether the target is a potential or actual competitive constraint within the technological space or ecosystem and if their elimination increases the market power within this space. Finally, if this is the case the EC asks whether the merger can then be justified with an efficiency argument (CCSA, 2020:31).

### 3.3. The United Kingdom

The Furman Report (2019) acknowledges that existing competition tools need to be updated to effectively address the changes within the economy. This may take the form of ex-post antitrust enforcement which is an important backstop for authorities dealing with merger control. Along with these changes, a digital markets unit is in the process of being established. The intention is to put in place specific tools and frameworks that will support greater competition and greater consumer choice within any digital market.

A source of great debate in this report is the question on what the relevant market definition would be for online retail or marketplaces that offer differentiated services. The report suggests the correct definition may even include offline physical stores and other online retailers that offer products or services directly from their own website or online platform (Furman, 2019).

There are many issues surrounding a lack of enforcement in digital markets on competition issues. All mergers in the digital market have been allowed, and through these cases there must be some false positive results. If recently acquired positions in adjacent markets are exploited with the intention to harm either existing or downstream rivals it will result in detrimental patterns emerging (Furman, 2019).

The Furman Report (2019) raises concerns with the mergers occurring in the digital markets that tend to centre around the loss of potential competition issues in the market. This may stem from the target firm in an adjacent market being acquired and losing the competition that can be provided to future markets when they fully develop their services. It is then recommended that governments and competition authorities consider implementing solutions about the competitive markets and the potential social and democratic impacts of changes to the digital advertising market.

The competition authority in the United Kingdom, the CMA, proceeded to release a report, *Online Platforms and Digital Advertising*, with a focus on interactions between online platforms and digital advertising. Digital advertising is primarily based on search advertisements, for example, responses to a users' search queries, it is also based on display advertising, where a video or static content is promoted alongside the content a user is looking at (CMA, 2020).

This report by the CMA (2020) has focused on three high-level issues. The market power enjoyed by Google and Facebook in the search and social media market, second, whether consumers have

adequate control over the use of their data by online platforms and lastly, if a lack of transparency, conflicts of interest and the ability to leverage market power undermine competition in digital advertising.

The report concludes that a reliance on traditional competition law alone would be insufficient when attempting to regulate platforms. Evidence from this report has indicated the need for a pro-competitive ex ante regulatory regime. One which serves to oversee the activities of online platforms funded by digital advertisements. This regime would attempt to take on the market power generated in this industry and promote innovation by other firms. The intention is for this regime to be upheld and enforced by an independent regulatory body. One with the capacity to address a wide range of concerns in a holistic manner (CMA, 2020).

### 3.4. South Africa

The Competition Commission (2020) in South Africa released *Competition in the Digital Economy* ahead of the Online Intermediation Platform Market Inquiry, this report aims to aid the holistic development of a regulatory regime that ensures inclusive economic growth and development in South Africa. The main competition features focused on in this report is the nature of merger control, identification of cartel conduct, identifying abuse of dominance and vertical restraints in addition to forms of abuse identified within digital markets in South Africa.

This report highlights some regulatory issues faced within the digital economy in addition to the competition issues. It speaks to needing urgent investments in digital technology and avoiding the implementation of regulatory responses that serve to distort the markets. It acknowledges the under-enforcement of merger control in South Africa, and the inadequate thresholds for notification of mergers that currently exist.

Most digital mergers do not meet the turnover or asset-based thresholds in South Africa that requires the firms to notify the competition authorities of the merger. This has allowed situations to unfold to reveal a merger creep scenario. The movement of firms into adjacent markets as a result of mergers brings up issues such as the removal of potential competitors, input foreclosure and the combination of datasets. The removal of potential competitors and the combining of different datasets were both concerns raised in the *WeBuyCars* case (CCSA, 2020).

International authorities are starting to make changes to their requirements for merger notification, for example, lowering the merger threshold or introduction of a balance of harms test and being sensitive to needing to make forward-looking decisions based on the ever-changing nature of digital markets (CCSA, 2020).

At the time of writing, the draft guidelines on small merger notifications had been released by the CCSA. Providing for an increased focus on mergers happening in the digital space through scrutinising the transaction values of these mergers or acquisitions. Even though the turnover of the target firm may not be high enough to trigger notification of the merger, using a transaction value-based approach allows competition authorities the opportunity to review these mergers and ensure there is no harm to potential competition or entrenchment of dominance in the market following the merger or acquisition.

The report finishes with a focus on regulatory issues within the digital economy. First considering the promotion of access and connectivity and then the response from regulators to technological disruption in markets. There is also consideration of consumer protection, mainly concerning data privacy. Other regulatory concerns would be the digitalisation of government services and promotion of inclusion in the financial services sector. Lastly, regional regulatory coordination is shared as something that is requiring some attention (CCSA, 2020).

Along with the report, the Competition Commission has launched a market inquiry, the *Online Intermediation Platforms Market Inquiry*. It seeks to address potential concerns regarding the regulation of competition in the new digital economy. The report places significant attention on the features within markets that reduce or prevent competition among platforms. This market inquiry has explicitly included online marketplaces to be within the scope of this market inquiry (Competition Commission, 2021).

The market inquiries within South Africa are recognised as a crucial tool. It can recommend which steps should be taken to open the markets. Alongside the market inquiries, merger control in South Africa provides more insight into the conglomerate effects and the potential to remove disruptors from these markets (Roberts & Vilakazi, 2020).

### 3.5. A Unified International Approach?

The consensus is that there is a worldwide shift towards recognising the false positive mergers that have been allowed with no regard to the loss of potential competition. The various authorities are all in different stages of implementing legislative changes to handle potential competition concerns. The ACCC has put forward their recommended changes to existing merger laws in Australia. The CMA in the United Kingdom has begun to adopt and adapt their proposed theories of harm to align better with the impact of losing potential competition within a market (OECD, 2021).

In addition, the OECD (2021) has defined several parameters with which to identify potential competition. The first is the relevance of barriers to entry to the market or industry, the second is the likelihood of entry and strength the potential competition will impose on the market. Finally, the timeframe within which this potential competition could emerge and have a measurable effect on the market.

The overarching themes present in these reports are the identification of barriers to entry, various weaknesses in merger control regimes, issues surrounding merger notification requirements. On a consumer level, the protection of their data, control of their own data, and the ease at which a consumer locks into using the platform of a specific firm are all being closely monitored by competition authorities. These concerns all stem from involvement within the digital market and the welfare of consumers. The integration of data from consumers into the workings of the platform provides cause for concern as it leads to barriers to entry for firms attempting to enter the same market. It leads to numerous other competition concerns, acquisition of potential competitors, network effects and economies of scope and scale being abused by dominant players in this market.

## 4. Literature Review

As seen in an earlier section, the idea of platforms differs from the operations of traditional firms. With this differentiation between the platforms and the traditional firms, it is required to align the market definition with the types of firms that operate within the market. Given the nature of the digital markets and the mergers and acquisitions that so frequently take place, potential competition within these markets has become a prominent concern of the authorities. These mergers and acquisitions can potentially involve a hostile motive, which led Cunningham et al. (2021) to coin the term *killer acquisitions*. The hostile motivations behind the mergers and acquisitions, could be to acquire a firm to make use of their assets, technology, or innovative capabilities to destroy the product or innovation before the target firm has the chance to develop into an actual competitor and encroach on the market share of the firm trying to acquire them.

This literature review seeks to explore how platform markets are generally defined. It further attempts to explore and understand the literature that surrounds the concepts of potential competition and killer acquisitions, specifically for the digital platform markets. It will identify the gaps in the literature and seek answers for these in the case studies section below.

### 4.1. Defining the Market for Platforms

There are several elements to consider when creating a market definition for a particular firm. First, consider the product, goods or services offered by the firm. Then think about the customer base of the firm. In the case of a multi-sided market or a platform, the authorities need to consider all sides, including the interaction between the different groups of customers or users and the interconnectedness. The authorities would then contemplate which other firms should be considered substitutes to the firm and evaluated accordingly. Lastly, the authorities ask which firms can be classified as potential entrants to the market. These could be any firms with a similar or complementary product to the one on offer by the firm or does the potential entrant firm have the

technological capabilities to expand into this nascent or adjacent market and compete effectively with the firm already operating in this market.

The typical ‘one-sided’ approach to market definition for a platform would exclude the other side of the platform. One needs to be wary of defining a market too broadly or too narrowly in the consideration of a platform market. This speaks to the difficulties faced in practice and how authorities may be subject to greater error compared to a case that deals with a single-sided business (Evans, D.S. et al, 2011).

The traditional tools implemented by competition authorities, such as the hypothetical monopolist and the small but significant non-transitory increase in the price (SSNIP) test do not account for the relationships held between user-groups in their current iteration. To define a multi-sided or platform market in this manner would be to obscure the characteristics of each group and their potentially different experience with competitive conditions (Eben & Robertson, 2021).

The OECD (2012) states the relevant market should be defined according to competitive constraints faced by the firms. For example, demand and supply substitution being captured as accurately as possible. Defining the relevant market aids in the identification of market participants to delineate the boundaries of the market and help determine areas of effective competition.

The competition authorities within the EU have determined the relevant market for competition assessments to encompass both a product dimension and a geographic dimension. These markets should be determined on a case-by-case basis as it is irrelevant to merely describe it in an abstract sense merely in the pursuit of setting precedent. The United States competition authorities believe in conducting both a qualitative and a quantitative analysis of the relevant market, foreshadowing a hypothetical monopolist test (Eben & Robertson, 2021).

In the *Google Android* case, the EC applied a small but significant non-transitory decrease in quality (SSNDQ) test. This decision opens the door to more applications of these type of tests and highlights a willingness to steer away from price-based tests and towards quality-based, quantitative, tests. However, there was little clarification given as to how these kinds of tests would be implemented from a practical point of view in competition assessments (The World Bank, 2020).

The CCSA defines a two-sided market, primarily in the media industry, as a platform that links distinct but interrelated user groups. They assess market power based on if the markets have the power to control prices, exclude competition or behave independently of its customers, competitors, and suppliers. The authorities are very aware that the acquisition of new players by an incumbent may pose the risk of eliminating potential competition, but it could also lead to technology transfer that ultimately leads to an impact on innovation and increased competition (Barreto, Sakowski & Parker, 2019).

Online intermediation platforms and digital platforms in general enjoy economies of scope relating to data. Specifically, when two or more datasets are merged through firms merging or acquiring one another. This mergence allows for significantly more insights and economic value than what would be achievable if the datasets remained separate (Parker, 2021).

Authorities need to also identify which firms are classified as potential entrants to the market, through a market definition exercise. Any firm that produces a similar or complementary product can be considered a potential entrant or competitor if it is not yet operational in the same market as described above. Other firms that can be considered potential entrants are those that have the technology and capital available to expand into this market which is adjacent to their own, or one that is nascent to the market the firm is trying to enter. This becomes a difficult exercise as it is not always possible to

foresee which markets or firms within these markets will successfully be able to enter and compete effectively and efficiently with the dominant or incumbent firm of the market.

The main issues arise in the market definition process through the definitions of the separate sides of the market and in addition, defining the inter-connectedness and network effects that emerge due to a platform operating optimally. Once the market has been accurately defined, it becomes easier to identify the firms that are potential competitors to the market or those that pose a threat to the platform market.

#### 4.2. Potential Competition Literature

A potential competitor is a firm that exists on the boundary of a market but has yet to enter it. By existing on the edge, the firm imposes a constraining effect on firms within that market. Part of the constraining effect is the price charged within the market by existing firms. This same threat of entry then also inspires the firms to keep innovating, deterring entry by other firms into their market.

Recently, the concept of a potential competitor has gained traction in literature and the attention of competition authorities. Incumbent firms are acquiring or merging with potential competitors to adopt new technology, protect their market share or keep innovative ideas out of their competitors' hands. The below paragraph describes an example of the process of a potential competition merger follows.

A classic form of a merger that involved potential competition considerations has an incumbent firm, Firm A, wishing to merge with or acquire Firm B. Firm B is currently outside of the relevant market, but viewed by incumbents as a potential entrant. Their potential entry into the market is viewed as a threat. The elimination of this threat via a merger should relax the constraints imposed on existing firms (Kwoka, 2001).

Bergman (2003) defines potential competition as the competitive pressure exerted on a market by one or several firms that are not presently active in that market. The whole concept of potential competition has been shrouded in confusion and uncertainty. This stems from a lack of understanding by authorities on the reach they have to determine which firms fit the mould of a potential competitor to the market under their merger analysis regimes. This is compounded by few prospective mergers being challenged on potential competition grounds, with the reason being that a lack of direct evidence is available in such cases (Kwoka & Shumilkina, 2010). Other issues arising in merger analysis are predominantly based on the traditional market share calculation that authorities are unsure on how to include potential competitors into (Royall & Di Vincenzo, 2010).

In cases where an actual competitor is eliminated from the market, the result is a weakening of the competitive constraint. This in turn increases prices for consumers. If the same merger were to rather involve a potential competitor it would have an overall similar, but slightly weaker impact on the competitive constraints to the market (Kwoka & Shumilkina, 2010). The impact felt by the market as a result of the loss of a potential competitor is determined by the situation through which a potential competitor emerges. These situations will be discussed in the next section.

#### 4.2.1. Types of Potential Competition

An incumbent firm of a particular market merging with a constraining competitor would relax this effect on both the market and the incumbent firm. The removal of the prospective competitor firm by merger would negate their entry into the market (Kwoka, 2001). The second example of potential competition is seen when two firms existing within the same market wish to merge or acquire one another. The lost potential competition is what each firm might have been able to exert over the market if they continued to compete independently of one another.

The literature suggests that potential competition provides a competitive constraint on incumbent firms, but the impact of this constraint is weaker than the constraint an actual competitor provides (Bergman, 2003). There are differing schools of thought on the effectiveness of the constraint a potential competitor can impose. Gilbert (1989) supports the contestable market hypothesis that suggests potential competition is as effective in constraining the market as what an actual competitor is. It presumes that the mere threat of a firm entering a market and reducing the incumbents' market share is sufficient to ensure a firm holding a dominant position in that market does not abuse their position.

There has been some doubt cast on potential competitors' role in constraining market performance, specifically in markets that view patent creation as a measure of innovation. Yu (1981) discusses two outcomes, the first being that once a patent is obtained the potential competition for achieving the patent becomes non-viable. The second, that if the exclusive granting of a patent is partial, by virtue of an ability to draft alternative patent claims, there may still be a race to invent and innovate.

The above holds true in digital or technological markets. Not necessarily in needing to race to achieve the patent, but for the firm that has a platform, or a digital product being brought to market first. This achievement will allow the firm to capture the first mover advantages in the market. In cases where consumers are unwilling to multi-home, it becomes increasingly difficult for potential competitors to generate and maintain capital requirements to remain in the market with only a hope of achieving a small slice of market share by attracting consumers away from the first-mover or incumbent firm(s).

#### 4.2.2. Potential Competition and Merger Control

Involving potential competition in merger control cases diverts some attention by authorities from the significance of actual competition, and monopoly power (Shepherd, 1990). By allowing a merger between an incumbent and potential entrant to take place, one expects it to contribute to consumer

harm. The potential entrant would no longer imposes a competitive constraint on the incumbent firm and the market. This in turn allows an incumbent firm to approach increasing prices without any constraints (Kwoka & Shumilkina, 2010).

In developing a new approach to merger control dealing with potential competition, the authorities should be reminded to consider non-price effects. These are the quality, variety, and innovation produced within a market, that are at risk of being lost and therefore generating consumer harm. All these elements are at risk of deteriorating if the constraining effect of a potential competition is removed. In addition, the analysis of digital markets should include the exchange or use of data as a non-price effect. The data digital firms have access to have the potential to allow these firms the ability to alter and improve on algorithms without incurring many additional costs. This becomes a pressing concern to competitors, especially if this data is acquired through a merger. The access to this data will allow a firm to tailor customers experiences over and above what the rest of the market could reasonably be expected to provide (UNCTAD, 2020).

Authorities, in analysing markets involving potential competition, will give thought to any substitutability that exists between firms both within and outside of the relevant market. Under a normal analysis, the authority will consider demand-side substitution. The emergence of digital markets has caused the EC, and European authorities to consider supply-side substitution for all firms and potential competitors within the market. This change to supply-side substitution has developed as authorities found it difficult to accurately ascertain demand-side factors and influences to the digital market.

#### 4.2.3. Jurisdictional Approaches to Potential Competition and Merger Control

The South African competition authorities would find a prospective and a perceived potential competitor fall within the description of firms classified as a potential competitor. It is often a firm

which can viably enter the market by having sufficient access to the technological capabilities and the capital requirements needed to enter and develop into an effective competitor to the market.

The approach taken by the EU is to challenge a potential competition merger if it would result in an insufficient number of alternative potential competitors with the ability to exert identical competitive pressure as the merging party (Kwoka, 2008). The recent response from agencies and authorities in dealing with merger control has been to not challenge mergers that raise only potential competition concerns. It is assumed this tactic has been implemented to avoid a quick judicial rejection (Kwoka, 2001). The courts, worldwide, appear hesitant to use potential competition as an argument in their decisions, understanding the role it plays in future decisions. The courts are reluctant to challenge a competitively harmless merger on these same grounds (Kwoka, 2008).

In Germany the competition authorities follow a precise definition on what exactly constitutes a potential competitor. These are firms that either have exhibited a clear intention to enter the market or already produce or purchase the goods or services under investigation for their own needs. These firms can supply geographically close markets pre-merger or have capacity that can be adapted to do so. These firms may also operate in the upstream or downstream markets relative to the market intended to enter (Kwoka, 2008).

The 2010 update to the horizontal merger guidelines of the United States of America broaden the definition of a horizontal merger to include actual or *potential* competitors. This amendment also sets out the circumstances under which a merging party will be seen as a participant within the same relevant market as the other party to the merger.

With this update there are questions one can expect to now arise in merger cases involving a potential competition element, such as;

*“Is entry likely absent the merger? What is the risk that the potential competitor will not actually enter absent a merger? ... When would the potential competitor enter absent the merger? ... Absent the merger, what would the competitive impact of the potential competitor be? ... Is the potential competitor uniquely positioned among other potential entrants or incumbents? ... What is the rationale for the transaction and how does it relate to potential future competition?”*

(Royall & Di Vincenzo, 2010: 36-37).

In the United States of America, the potential competition doctrine describes two different versions of a potential competitor. The first, a perceived potential competitor, where a non-incumbent firm is perceived as a possible entrant that constrain the behaviour of the incumbent firm. The second, an actual potential competitor, a firm likely to enter the market, even if not perceived as doing so by the incumbent firm (Kwoka, 2008).

#### 4.3. Killer Acquisition Literature

The potential competitors to the market are those that exist at the edge of the market, with the intention to soon enter this market. Potential competitor firms are excluded from identification in the market definition process as authorities do not have the resources to investigate the possible future effects further or make an accurate assumption on what the most likely outcome will be in the future. Recently, authorities have become more aware of these types of concerns arising in merger cases within the digital sector.

Investigations into these potential competition merger cases within the digital sector happen when a potential competitor is acquired or merged with to appropriate their technology or innovative efforts. This occurs before the target firm has had the opportunity to develop their products further and enter the market themselves, becoming actual competitors to the incumbent of that market. These types of mergers and acquisitions are coined *killer acquisitions*.

Cunningham, Ederer & Ma (2021) coined the term ‘killer acquisition’ to describe the action of an incumbent firm in one market, acquiring a target firm from the border of that market with the intention of discontinuing the target’s innovative projects and developments. Thus, pre-empting future competition from the target firm within the incumbent’s market.

These acquisitions could be understood from opposing viewpoints, where on the one side a firm aggressively targets acquisitions as a means to protect their own market share from innovative new firms by delaying product launch or closing the target down. While on the other side a firm could also follow the same aggressive strategy with the intention to integrate new technologies that a target firm has invested resources to develop as a means to prevent the target firm expanding into a competitor in the future. This distinction in approaches and motives behind aggressive acquisition strategies will be explored in greater depth below.

This technique of acquiring and dismantling a target firm is especially popular in digital markets as start-up firms develop technologies to be acquired by Big Tech firms. The Big Tech firms want to maintain market shares and incumbency positions, and therefore implement aggressive acquisition strategies to maintain their status quo.

Killer acquisitions take the removal of a potential competitor from a market a step further. This type of acquisition results in the removal of the firm from the market and the destruction of their product

or service being brought to market. This would be done by the acquiring firm to avoid the target firm imposing future competitive constraints or lessening the market share of the acquiring firm (Motta & Peitz, 2020). There is a clear negative effect imposed on markets by the removal of potential competitors. It ultimately creates the incentive to buy-out potential rivals to a market to provide an incumbent the space to protect their position and market share (Bourreau & de Streel, 2020).

#### 4.3.1. Why are these Transactions not Prohibited by Authorities?

There can be many reasons why one firm may acquire another and subsequently diminish or discontinue production of the target firms' product. It may be as simple as the product was not as successful as anticipated by the acquiring firm, or that the intention of the merger was simply to acquire the assets or innovation efforts of the target firm. However, it may also be to discontinue the target firm's products post-merger to protect the acquiring firm's market position (Gautier & Lamesch, 2020). The authorities have noticed an increase of the latter within digital markets.

Authorities should tread lightly, without conducting an over-active effort to enforce protection over the destruction of potential competition. Blocking too many mergers with the reason of impeding future effective competition may inherently involve a cost that some pro-competitive mergers get blocked in the process too (Holstrom et al., 2019).

Online platforms often face a lack of incentives when it comes to addressing concerns their users may have over data misuse and online harm that may occur. The UNCTAD (2019) has recommended special obligations be imposed upon platforms to ensure they act in a fair manner towards their users and in addition to institute a regulator to ensure these obligations are adhered to by the firms within the online market space.

Market analytic techniques are currently very enhanced and can provide larger platforms with a very nuanced understanding of the market and its trends and development going forward. This level of data and analysis is not available to authorities attempting to regulate these markets. This level of information asymmetry makes it increasingly difficult for authorities to recognise killer acquisition motives and reach the correct conclusion to prohibit such a merger from taking place (Parker et al., 2021).

#### 4.3.2. The Role of Merger Control

The overarching goal achieved through merger control should be to alleviate the social harm caused by a single firm holding too much market power and to prevent it happening in future. Through rapid innovation in these digital markets, the possibility of potential and actual entry by another platform into the market might mitigate the social costs of market power (Calvano & Polo, 2020).

Concerning the present thresholds for merger control, for example, the asset-based or turnover approach is not sufficient when assessing a merger with potential competition issues or that is of a killer acquisition nature. Often these target firms do not have sufficient revenue or assets built up to fall within the ambit of the thresholds to notify authorities. Changes are slowly being made to introduce a transaction-value based approach to notification of mergers. These changes will account for the lack of measurement on the value of data these target firms can bring into the merged entity.

Merger control plays an integral part in the debate over competition in digital markets. Authorities are becoming increasingly concerned that these types of acquisitions lean more towards being a systematic market foreclosure strategy which go undetected by authorities, threatening both innovation and potential competition (Holstrom et al, 2019).

### 4.3.3. Competition Policy Response

The policy response to these technological acquisitions has been to shift the burden of proof onto the acquiring firm to prove a merger will not be anticompetitive in nature. It has also involved authorities revising notification thresholds. Opting rather to focus on a transaction-value based threshold which inherently reflects the potential competition a firm may impose on the market (Holstrom et al., 2019).

Authorities often take a one-sided approach in determining the market definition solely for the case in front of them. They should take heed to remember that these digital markets often consist of multi-sided platforms, where a much larger number of potential competitors and actual competitors create a constraining force on incumbent firms and others within the same market, as this may shift their understanding on how these markets should be defined.

Cabral (2020) takes a different approach and states vigorous competition policy enforcement remains a powerful tool with which to serve the interests of both consumers and the economy. Competition policy for digital markets should be based primarily on implementing ex-post remedies versus ex-ante rules and analysis as is traditionally the case. Mainly, as heavy merger control will have a direct impact on the incentives firms have to innovate.

Competition policy, regulators and authorities should be at the forefront of creating an encouraging environment that facilitates technological development within the market while still providing scope with which new entrants may join the market. Allowing new entrants to disrupt incumbents with new technologies will benefit the end consumers of these firms (CCSA, 2020).

However, it needs to be remembered that competition is an entrenched vehicle for South Africa's growth and development. There exist certain features of this new digital economy that encourage

authorities to apply a different attitude and approach compared to what would have been implemented in the industrial economy (CCSA, 2020).

Some policy questions that should be considered in guiding the authorities to a new standard of merger control:

*“What is the source of the incumbency advantage? How and to what extent can such an advantage be exploited to extract supra competitive rents? What are the welfare effects of rent extraction on the different groups of agents? What are the factors that can mitigate the anticompetitive potential of network effects?”*

(Calvano & Polo, 2020:1).

#### 4.3.4. The Impact on the Market

In these acquisition cases the high transaction value is often determined and accepted by the acquiring firm stemming from a desire to preserve monopoly rents and eliminate a key competitor from the market (Holstrom, Padilla, Stizing & Sääskilahti, 2019). There has been empirical research to highlight how willing corporate investors are to acquire a potential horizontal competitor at a much higher cost than a complementary firm to expand their scope within the market (Berre, 2020).

High concentration is a widespread phenomenon in digital markets, with potential competition from outside the market acting as a constraining force on the market. Using traditional measures to measure market power in these new digital platform markets becomes a convoluted and difficult process (Calvano & Polo, 2020). With this new wave of killer acquisitions, especially in digital markets, there is a shift in how the analyses are conducted by competition authorities. Placing more focus on conducting a more dynamic merger analysis than the traditional static analysis of a market (Holstrom et al., 2019).

A killer acquisition raises the concern of a foreclosing strategy that may slow down innovation in the market. It is well known that start-ups may rather sell-out to incumbents before the chance arises to sell to their first customer (Calvano & Polo, 2020).

In some cases, the merger can alter the market dynamic in a positive manner to consumers. Literature suggests that cooperation between a disruptive start-up and an established, large firm has the potential to create substantial added value within a market. This may either occur through diversification and outsourcing of research and development or innovation (Berre, 2020).

#### 4.4. Outcomes of the Literature Review

Acquiring a potential competitor is understood as an opportunity taken by an incumbent to reduce the constraining effect this target firm has on the incumbent and on the market. It is often the case that this target firm is absorbed into the larger firm to use their technology or innovative efforts to be a step ahead of their competitors.

The potential competition theory of harm appears to be less specific than the killer acquisition theory of harm as it simply requires a potential competitive threat such as the target firm to be removed from potentially entering the market while the product itself lives on. A killer acquisition creates the incentive within a merger not just to remove the future competitive pressure from the product to the market, through acquisition, but remove the product or developments in its entirety from entering the market (OECD, 2020).

International authorities recognise potential competition in different ways. Where the United States relies on guidance from their doctrine of potential competition and authorities within the European Union approach the issue with a greater focus on supply-side substitution. It should be noted that

there has been significant hesitancy in dealing with potential competition issues and so it is often overlooked, setting no precedent on the matter.

Literature states that potential competition does have an impact on market performance, it cannot reach consensus on the magnitude of that impact as there are many opposing schools of thought. Other recent literature acknowledges there is uncertainty surrounding the identification of a potential competitor that needs to be unanimously resolved. This is especially in the digital markets where innovation occurs at such a rapid pace, rendering the boundaries of a market unstable.

Given the trajectory of cases evaluated in this paper, discussed in [section 6](#), the authorities appear to be more lenient in allowing mergers or acquisitions of or between firms in position two or three of the same market. With the reason that it allows these firms the opportunity to be a more effective competitor to the market leader, and overall resulting in a more competitive market.

To resolve these issues surrounding market share, market performance and market definition when potential competition is involved will require many international authorities reaching consensus on what constitutes a potential competitor. As mentioned above, Germany has already made some progress by releasing a standardised definition of a potential competitor for the Bundeskartellamt to follow in their future decisions.

## 5. The Research Gap

This section poses the questions that have arisen out of a surveying of the literature and reviewing the approaches taken by various jurisdictions to potential competition issues in digital markets. It seeks to indicate the research questions of this paper, explain why when read against the current literature and policy background from various jurisdictions, there is not much help offered in understanding these questions. These questions will be attempted to be answered in the following section, on a case-by-case basis.

### 5.1. What role does an analysis of actual competition play when potential competition effects are raised as a potential concern?

This research question seeks answers to understand how the traditional assessment for determining actual competition differs for mergers in the digital sector. It considers what the elements are for a firm to be an actual competitor, such as the market share calculations and the switching behaviour of consumers. There are then additional static structural measures for the level of actual competition in a market, the concentration in the market, the barriers to entry and the price charged to consumers. This concept goes hand in hand with understanding the market definition to identify where the firm fits within these digital market. Once this market definition has been delineated, it becomes easier for an authority to identify if there are valid concerns of potential competition effects.

The literature review has uncovered some areas of difficulty in the evaluation of competition in these digital platform markets. It seems there are limitations on how to evaluate competition, especially in the new digital markets. This stems from the courts not having access to adequate resources to conduct the necessary in-depth investigations required in the digital industry.

By understanding the role actual competition plays, the points needed to identify a potential competitor become clearer. A clearly delineated market wherein authorities can accurately determine

which firms are actual competitors to the firm undergoing analysis, and which firms simply have the potential to enter and compete.

The authorities have begun to consider potential competition in addition to actual competition throughout their investigations to merger notifications in digital markets. This is due to the competition metrics that are used to evaluate actual competition often being too limited to provide insight into understanding potential competition.

Competition authorities and regulators have become more aware of the need to consider potential competitors in the analysis of platform firms, especially those operating in the digital markets. This research question seeks to show the limitations encountered when actual competition metrics are the only focus of authorities in an investigation. This question is further discussed in each of the cases below, highlighting how the courts have placed less emphasis on traditional metrics to measure actual competition in their market assessments.

#### 5.1.1. Consideration of Metrics for Actual Competition

The ICN (2020) states that market shares provide the first indication that a firm may have substantial market power. The digital markets are dynamic and require the utmost caution when making these determinations. Considering actual competition metrics in digital platform markets require a slightly different approach to what authorities apply to the traditional firm. The authorities should consider how one side of the market influences the other, and the interconnectedness between the two sides. A simple misunderstanding of the operations of a platform and the network effects that apply could lead authorities to allow an anticompetitive merger through.

The switching behaviour of consumers gives an indication on the level of actual competition within a market. If consumers multi-home between different firms and their platforms, it shows there are

many other competitors present to fulfil the need of the consumer. If a consumer is only able to make use of a single platform at one time, it indicates a low level of actual competition within that market. It may also be that there are not many alternatives in that market for the consumer to choose from.

There then exists some measures which are static and structural in nature. These are measured at a specific time to provide an understanding of the conditions in the market at that point in time. These may be measured at different points over time to gain an understanding of how the levels of actual competition in the market have progressed.

The first of these measures is the level of concentration. If there are high levels of concentration in a market, it indicates there are low levels of actual competition. The second measure are the barriers to entry. It becomes clear when firms construct higher barriers to entry into their market, in an effort to deter other firms from attempting to enter. This ensures the levels of actual competition remain lower within the market, allowing those firms already within the market a higher profit level. Another static measure is the influence a single firm has over the prices within a market. If the firm can exert a large amount of influence and determine the price as it suits them it is indicative of lower levels of actual competition within the market (OECD, 2021b).

The influence of potential competitors is often not accounted for in market share calculations as the firm may not actually operate within the boundaries of the market. Thus, these firms cannot be empirically measured in the same way as a firm that is an actual competitor within a market. These potential competitors could impose a constraining effect on the prices charged within the market. If prices increase, resulting in more economic profit, the potential competitors will be more motivated to enter the market. In the alternative, market share calculations may be possible when the potential competition is what each firm within the market could impose if the merger or acquisitions did not occur.

### 5.1.2. The Resulting Research Question

The research question asks what the role is of an analysis of actual competition when there are other potential competition concerns raised. The consideration of actual competition focuses on the traditional metrics used to assess the levels of competition within a market.

Completing an analysis of actual competition within the market will provide the authorities with a clearly defined idea of which firms operate within the borders of the market. This assessment may also bring to light the firms that reside on the outer edge of the market but have yet to enter. These firms on the edge are most likely considered as the potential competitors, firms that can enter but have chosen not to do so yet. This potential competition may be lost if an incumbent of the market merges with or acquires a firm operating on the edge of the market. Alternatively, loss of potential competition can result from two firms within the market merging, and the potential competition is the influence each firm may have been able to exert individually were they not to merge with one another.

The literature and policies emerging from different jurisdictions do not provide a clear idea of how exactly to identify the potential competitors. The contrastingly clear provisions on identifying actual competitors have left authorities uncertain on how they should uniformly decide which firm constitutes a potential competitor within merger analysis.

The case studies below will analyse the respective markets and reach a decision on how these determine the influence of potential competition on the dynamics of actual competition within an online automotive classifieds platform market. This will provide a clearer image of the differences in the techniques used by authorities to measure actual competition.

5.2. How are potential competitors defined in platform markets for the purposes of merger control? In particular, what is the role of the multi-sided nature of platforms in identifying platform competitors?

The method to measuring levels of actual competition within platform markets is unclear and uninformative. The authorities instead turn to identifying the potential competitors within a market and seek to uncover if there will be a resulting loss of this potential competition post-merger or acquisition.

The question being asked here is how a platform market is defined by authorities. Further, when analysing this market, which firms are considered as potential competitors? Asking how does the fact that you are operating in a multi-sided market change the opinion on which firms are classified as potential competitors. This section highlights how the platform market should be defined and questions which aspects of the market should be given specific attention. It then moves on to discuss the inclusion of potential competition considerations into these market definitions.

#### 5.2.1. Defining the market

The exercise of defining the relevant market and addressing the understanding of market power becomes more intricate for platforms in digital markets. The market definition of a platform requires consideration of whether non-platform entities on either side of the platform itself are thought to compete with a single side of the platform, and by extension, whether these should be included into the same market as the platform (Barreto, Sakowski & Parker, 2019).

The process to defining a market is guided by the application of the SSNIP ('Small but Significant Non-transitory Increase in Price') test, which can be applied provided the market is defined clearly for all sides and is well delineated (Jullien & Sand-Zantman, 2020). Along with market definition,

authorities are expected to determine what the relevant market entails to assist in understanding which other firms are potential competitors to the one under investigation.

Assessments of the market happen differently in the digital platform context. This is mainly due to the involvement of data in the daily operations of digital platforms and firms. The consumer data can provide behavioural insights to firms if it has collected enough data from their customers to infer buying patterns and habits. In addition, consumers may have provided their personal data which needs to be protected in accordance with relevant, local legislation. This may also be the case in traditional firms, but customers are often unaware of the magnitude of personal data they submit for use by firms that operate within the digital space.

Firms have access to data that can inform their decision making. While the data itself may not appear directly relevant to the market the firm is looking to enter, it may provide useful additional insights into consumer behaviour that firms in a target market. Should they attempt to enter the data and insight may become useful. Another firm considering acquiring this firm may find they hold relevant technology or information within the acquiring firms' market. The use of data and access to data is relevant in crafting an understanding of a potential competitor. The potential competitors existing on the boundaries of a market should not have access to vast and intricate amounts of data without at least attempting to enter the market. The following section will help understand how authorities should approach identification of the boundaries of a market, when to draw the line on which firms are included within the market definition or not.

### 5.2.2. Identifying the boundaries of the market

Platform firms within the digital sphere serve distinct groups of consumers in the presence of many indirect network effects. These types of markets, and especially those present in the digital industry are characterised by rapid innovation and developments. Meaning the boundaries of these markets

will not necessarily be stable, resulting in everchanging market definitions and an understanding on which firms are to be included in the market or not (OECD, 2012).

There is no linear process where authorities are expected to evaluate demand and supply-side substitutions on only one side of the market to determine which other firms are competitors for that side alone. Literature has decided it would be best to evaluate supply-side substitutions on both sides of the platform to achieve the most effective definition of the firm within market, and to account for any interconnectedness between the two sides (Jullien & Sand-Zantman, 2020). There remains no guarantee that the authorities would find a suitable supply-side substitute for part of the market as the literature stops short in clearly delineating just how authorities should approach such a task.

Authorities should focus less on demand substitutability and shift focus to supply substitutability and potential competition in the market. The approach taken should be to spend more time focusing on which other firms in the market could be classified as actual or potential competitors based on their substitutability to the firm undergoing analysis. In taking this approach, authorities should consider how a firm with a differentiated business models can compete, either by partaking only in some or all activities (Niels, 2019).

An adjacent market may look slightly different in an online context. Technology in one market can often be easily assimilated or adapted for use in another. This means that with a sufficient capital base, a firm may be able to invest and entering another market successfully and be able to effectively compete with the incumbents of that market. Authorities need to understand and have a clearly defined path showing how to identify which firms can do this to the market(s) they are investigating. These firms could be the first step in identifying the kind of potential competition that originates from outside the boundaries of the market. Authorities' inability to do so is often a reflection of their lack of resources which can be employed to investigate and understand markets of this nature.

Authorities, in trying to recognise the inter-connectedness between markets, should try a cross-market analysis. This is a technique that is more complex than the straightforward market definition of a traditional production firm. It involves identifying the individual parts of the platform market, for example, the buying and the selling sides. Then considering how these user-groups operate both individually and with one another. The analysis is conducted when the authorities would consider how these sides of the market interact with one another. The development and application of these techniques are necessary as the global economy evolves; as firms become more connected across jurisdictional boundaries. It will aid authorities in accounting for network effects present in platform markets.

### 5.2.3. Identifying potential competitors

With each new case, it becomes increasingly difficult to identify which firms could classify as potential competitors to the firm within the market as it can be based on a multitude of factors. A potential competitor may emerge from an adjacent or nascent market. Specifically in the case of digital markets if there has been enough capital invested and technology developed that would allow them to effectively enter in future. It becomes easier to mould a piece of technology to suit the needs of the market rather than attempt to design a product to compete in the market from scratch.

The alternative potential competition scenario occurs when there are two firms that operate within the same market. Independently these firms are seen to compete with the market leader but might not impose such equivocal constraint upon one another. Should these firms decide to merge with each other, the loss of potential competition in this scenario would be what each firm might impose on the market were the merger to never have taken place. If this loss of potential competition to the market is less than the constraint the newly merged entity may impose on the market then the merger should not be prohibited on the basis of potential competition considerations.

It is in this instance where the importance of network effects is highlighted and understood in a digital setting. Gaining access to these network effects can often be the reason why an incumbent firm in one market considers merging with or acquiring a firm operating within another market. The incumbent firm is then not expected to waste time and resources developing network effects of their own in the new market, but rather assume the network effects developed and curated by the firm already existing within the market.

When network effects are present in digital markets, the CCSA highlights that potential competition may come from players operating at the margins of the market. It would be important, in these cases to pay attention to the extent to which incumbents seek to prevent entry from disruptive competitors in the market (Barreto, A., Sakowski, P.A.M. & Parker, C., 2019). For example, attempting to acquire firms prior to its evolution into a disruptive entrant, or acquiring these firms to use the technology developed to remain ahead of the competitors already present in the market.

#### 5.2.4. Effect of potential competitors' presence on the market

A firm threatened by potential competitors is more likely to continuously innovate to remain relevant within their entrenched position in that market. If there is no investment in innovative techniques and staying ahead of the curve, it is likely that a potential competitor will see a gap in the market and decide to enter, reducing the market shares held by the incumbent.

Potential competition within a market appears in various forms, it can take the form of price control, where prices are kept around marginal cost so as not to encourage entry. This includes the threat posed by potential competitors operating just outside the market that can sufficiently impose a constraint on pricing for the firms within the market. There is increased pressure on authorities to consider these non-price controls, for example, the quality and variety of products a platform can introduce to the market. While these cannot be monitored as accurately as price movements by

authorities, the non-price controls may begin to deteriorate post-merger as the constraint this posed on the market is no longer in place.

In the first scenario, the target firm could exist outside the relevant market and be acquired to protect the market share of an incumbent firm within the relevant market, or it will exist in a market apart from the acquiring firms' market, but this market is one the acquiring firm wishes to enter. In the alternative scenario, there are two firms operating within the market, that wish to merge to become more competitive within the market as a whole.

In the latter scenario, there exists the potential competition that could be lost when the two firms merge. This is the constraining effect the firms would impose on the market should the firms continue to operate independently within the market. This is then lost when firms merge, but there exists every possibility the merged entity can impose a greater constraining effect post-merger.

#### 5.2.5. The Resulting Research Question

The authorities need to grapple with these issues and consider in the first case, whether the outside firm really did impose a competitive constraint on the incumbent through the threat of entry, and therefore the acquisition of it by the incumbent is considered anti-competitive or not. For the second approach, would the incumbent have had the means and knowledge to be able to enter the market independently of the acquisition. If this is the case, the acquisition will be considered anti-competitive.

The differences in the situations which involve a potential competitor both require a well-rounded understanding of how the firms in the market operate and what the product on offer is. As these concepts become better understood, it allows authorities to provide better reasons to their decisions

and make better choices on whether certain conduct would be anticompetitive or not. Ultimately, these better-informed decisions result in the courts setting a better precedent

There are unfortunately no set rules each authority can implement at this moment in time. A better understanding, globally, of digital markets, their operations, and their intentions behind acquisitions or mergers will in time lead to fewer mergers being allowed through which in hindsight are viewed as being anticompetitive. The case law below seeks to reflect the decisions made by authorities and achieve a sense of guidance on what the procedures might be like upon integration into formal legal systems.

There remains the need first and foremost to grasp an understanding of which firms can be considered potential competitors. Once authorities understand this, they would be able to move on to identifying how to relate different types of potential competition.

There remains an unanswered question on the exact market definition process to consider and include potential competitors or how a potential competitor should be identified. This is largely based on the nature of the digital markets as dealt with in this paper. These markets adapt and innovate rapidly and do not remain stable long enough for authorities to make a binding decision. The case studies in the following section seek to answer these questions and elaborate on the approach taken by actual authorities in dealing with cases involving these same or otherwise similar issues.

## 6. Case Studies

This paper focuses on issues surrounding potential competition in online classifieds intermediary platform markets. This specific focus is not to discount any other competition issues that may arise in the digital industries, but merely to narrow the focus of this paper. There are many new firms which are designed to mimic a traditional, brick-and-mortar firm, while involving digital elements to expand their reach to new user-groups and customers. As more firms begin to apply elements of digital business to their operations and by doing so enter the digital industries. These firms place themselves at risk of being exposed to further competition concerns.

This section seeks evaluate a merger in South Africa between MIH eCommerce and WeBuyCars, an acquisition in the United Kingdom between eBay and Motors.co.uk and an acquisition in Australia between Gumtree and Cox Media. The research questions as discussed above will be considered in relation to each of the cases mentioned above. The discussion will progress as follows; first by considering how a firms market shares are decided in cases involving platforms, and whether this changes if a potential competitor is considered from outside of the relevant market. Second, it will discuss how the courts identified the potential competition concerns within the platform markets for the purposes of merger control and lastly, it will seek to identify how potential competitors are ranked in platform markets.

The classic economic test for identifying if there is potential competition to a market would be to determine whether the entrant was likely to enter the market, and whether this entry would have improved the levels of competition within the market. This is not the situation in the WeBuyCars decision, as here a potential competitor, Frontier Car Group, was indirectly interested in acquiring the incumbent of the market as a strategy to avoid competing to gain sufficient market share to establish themselves in the market. The finer details and outcomes of this case are discussed further below.

## 6.1. Online Classifieds Intermediation Platforms

The industry of online used-vehicle classifieds intermediation is based on using platforms to trade used vehicles between private sellers and dealers. This market is a multi-sided ‘platform’ market that can be delineated through the selling-side and the purchasing side. On the selling side, it covers private sellers, often looking to sell a singular vehicle versus the dealers on this side of the market looking to list multiple vehicles in the hopes of reaching an interested consumer. On the purchasing side of this intermediary, the dealers often interact here too, searching for specific cars on behalf of their clients, or to stock up on specific cars they know are popular and will sell on easily.

There are also private buyers to this market, who interact with the intermediary on the purchasing side, often using the platform to compare prices across platforms and find themselves the best deals. These buyers often interact with the dealers to fulfil the transaction of purchasing a used vehicle. The user groups on the purchasing side are not expected to provide any form of compensation to using the platform service.

The ACCC (2020) determined that while the buyers and sellers of the classifieds’ services do form part of the same market, the private sellers and the dealers represent distinctive segments within this market. Firms operating solely on the supply-side or the demand-side of the platform could still constrain the existing firms within market, even if only on one side of the market. It should not be the case that another firm should intend to compete fully on both sides of the market to be considered a potential competitor that could constrain the market. This then ignores the cross-market effects a single side of the firm can impose on the other within that same firm.

Most times, these intermediary platforms operate solely as a match-making platform between the sellers and the buyers. However, more recently some firms have started to differentiate themselves

through offering after-sales service and other additional services to consumers as a way to gain more market power, capture more of the market share and potentially overtake their rivals.

There are several pricing strategies and structures employed by platform firms. Some firms may opt to charge dealers a subscription fee to list numerous vehicles on their sites. Others offer a 'per listing' fee, which is aimed at attracting private sellers who tend to only make use of the platform on a single occasion.

On the other side of the platform, for private buyers and dealers who purchase stock held by WeBuyCars, the private buyers will receive a price set by the platform and the dealers may receive this same price as well unless an arrangement for discount is made for a bundle or grouping of vehicles sold together in one transaction. This differentiates platforms from one another as a customer has the choice to list on the platform that best suits their needs. Similarly, this enables a platform to price discriminate and charge better prices to the other consumer, the one purchasing the vehicle.

The pricing mechanism employed by the firms under consideration are very advanced. Having the ability to accurately price a car competitively, and accounting for all the different variables such as make, model, year, added features, colour and transmission type in a car all influence the ultimate asking price for the vehicle. The larger players in these online classifieds intermediation market for vehicles can price with ease based off a pricing model. These models are guided by a vast amount of data collected from transactions in the past and having a good understanding of the market. These pricing mechanisms rely on vast amounts of data to be efficient and generate accurate forecasts on the price the vehicle should be sold for. When two firms in the same market merge, and thus their databases merge, it may have an anticompetitive outcome. In that the other competitors remaining in the market simply do not have access to as much data and will struggle to determine effective prices on which to compete.

In general, these car-buying platforms are considered disruptors to the traditional used car dealership market. It enables owners to use the platform to sell their vehicles at a competitive price, without expending large amounts of effort to find the best deal with an individual dealer. The platform will interact with a dealer and provide an inventory that is readily available either to off-load to the dealers to sell on to the public, or for private buyers to approach the platform to purchase a vehicle directly.

The platforms do not generate revenue solely from listings, there are spaces created on their websites that allow third party advertisers to capture users' attention while users' browse through the listings on the site. To use the space, third party advertisers need to pay the platform for the attention of their customer base. In addition, dealers are known to pay a subscription service to list the available vehicles on the platform, while private sellers can expect to pay a once-off fee to list a vehicle, if the platform allows private sellers.

The central issue within the development of regulation and policy regarding potential competition is the difficulty in outlining the counterfactual scenario. It is not observable, thereby forcing the authorities to speculate as to how the market will likely develop in the future (Yu, 2020b). It appears merger cases are allowed through if the result and impact post-merger does not reduce competition in the relevant market or raise further barriers to entry such that no new entrant will be able to enter or gain the scale needed to enter and effectively compete against the incumbent in this market.

The online automotive classifieds platform industry has been the focal point of this research. This industry has been developed off the model of used car dealerships, a traditional brick-and-mortar firm. While maintaining the relationships and structure these types of firms are based on, it involves a digital element. Creating a platform that does not limit its reach to consumers within a certain geographic radius, but any consumer accessible through a device connected to the internet, provided

some transportation costs for delivery of vehicles are accepted by these consumers and within a national boundary.

In both the Australian and United Kingdom cases, the mergers were allowed as both firms party to the merger were considered competitors of the market leader but did not have sufficient scale to impose a constraining effect individually. Post-merger, it has been noted in both cases, that the newly merged entity has a better chance of being a constraining competitor to the market leader. It also became evident that there was minimal concern of concentration in the markets post-merger, as the merged entity would be afforded an opportunity to enhance competition in the market. The firms in position 2 and 3 in the markets merged to provide the opportunity for the newly merged firm to compete effectively with the firm in the top market position.

The South African case concerns a holding company with ties to an external multinational incumbent attempting to purchase a dominant firm in the market, WeBuyCars. Frontier Car Group desired to enter the market without having to compete to enter and gain market share themselves. The merger was ultimately prohibited as Frontier Car Group, has the means to enter the market themselves and provide effective competition to WeBuyCars. These cases will be discussed below in more detail while attempting to provide context and answers to the research questions identified above.

## 6.2. MIH eCommerce Holdings and We Buy Cars Merger

In this case, MIH eCommerce Holdings intended to subscribe for 60% of the share capital of WeBuyCars. As MIH eCommerce Holdings is controlled by the Naspers Group, bringing other acquisitions and firms within the Naspers portfolio into consideration. For example, AutoTrader and OLX. Frontier Car Group is included in this list but have not yet entered the South African market. Entry by Frontier Car Group did not materialise as a deal through this acquisition rather was a more appealing option than aggressively competing to enter this market.

WeBuyCars operates in the online classifieds market for used cars. Acting as an intermediary between private sellers, dealers, and buyers. WeBuyCars operates a hybrid-model within this market, accepting responsibility and ownership of the vehicles, acting as a warehouse and distribution centre between transactions. For example, a private seller will sell their vehicle to WeBuyCars, that will then store the vehicle at their premises until a dealer or private buyer shows interest in purchasing the vehicle from WeBuyCars. The model is currently optimised to acquire used cars and off-load them to dealers, but there is some progress being made in a direct B2C (business to customer) route to sell directly to the end-consumers.

The markets considered by the Competition Tribunal were those of the

*“used minibus taxis as a whole and specifically in Gauteng province, the market for used light commercial vehicles in South Africa as a whole and in Gauteng province, the market for used vehicle in South Africa as a whole and Gauteng Province and finally, the market that provides for ancillary services; insurance products / services, stolen vehicle recovery services and vehicle finance”*

(Competition Tribunal, 2021).

The Competition Tribunal ultimately decided to prohibit the acquisition on grounds that it would lead to significant unilateral effects through the removal of potential competition and that it would additionally give rise to conglomerate effects. These conglomerate effects would ultimately be able to further entrench WeBuyCars existing dominance. It would raise barriers to entry for any other actual or potential competitors of WeBuyCars and there may be reciprocal benefits flowing between the Naspers Group and WeBuyCars. These will be instrumental in entrenching the dominance experienced by WeBuyCars in the online automotive classifieds platform market.

#### 6.2.1. Actual Competition Considerations for Online Classifieds Intermediation Platforms

As discussed earlier, the review on this case and the ones that will follow will deal with each of the research questions as it pertains to the particular case in question. Given what was discussed in the first research question, this subsection will consider how the CCSA dealt with determining the levels of actual competition in this market and why the competition assessments should be broadened to consider potential competition arguments.

The CCSA, in their decision, indicated that if the market is defined solely as a ‘car-buying service’ then WeBuyCars has a market share above 80%. The CCSA (2020:43) calculated this by “*dividing the number of used cars that WeBuyCars purchases per month by the total number of used cars purchased across a number of competitors*”. The merging parties in turn pushed for a more broadly defined market, that includes all used car dealers, the traditional vehicle dealerships, and the car-buying services. With this broader market definition, it is estimated that WeBuyCars has a market share between 0% and 10%.

James Hodge et al. (2020:106) stated:

*“Going forward WeBuyCars is likely to be challenged by other entrants due to attractive margins associated with the WeBuyCars model. In this way a merger can be viewed as a defensive strategy by WeBuyCars to mitigate against potential new entrants”.*

The CCSA has determined WeBuyCars is dominant in the car-buying services market in South Africa. Cars2cash, cash4vehicles.co.za, CarZar, Sellmycar2day.co.za, Weelee and Youdrivewesell are the market share competitors within the online automotive classifieds platform market in South Africa.

Here the market power can be determined by the number of unique leads generated for a specific platform, and the number of consumers that will multi-home between platforms. If a user is found to multi-home, for example on the AutoTrader and Cars.co.za platforms, it is unlikely that the lead is unique to either platform. This in turn highlights why authorities are reluctant to rely on the metrics for actual competition as they are unable to account for multi-homing by consumers and therefore do not provide an accurate reflection of the levels of competition within the market.

These measures mentioned on the metrics used to indicate levels of actual competition are not useful. The market shares being led by an understanding of the share of audience held or the number of unique visitors to the platform ultimately do not provide an accurate assessment or inform authorities on the state of the market. These measurements are all muddled by a consumers ability to multi-home between platforms, this skews the numbers on the share of audience as a single viewer can be counted multiple times. There is no way that individual users can be identified by the different firms as the firms mainly tend to make use of aggregated data.

As these measures of actual competition are not useful in understanding the levels of competition within the market, the CCSA turns to identifying potential competitors to try gain an understanding of the market. The reason for identifying the potential competitors to these markets is that there are external constraining effects on this market, and the competition authorities need to consider these in delineating the market. The following subsections will evaluate how this authority identified potential competitors and how these potential competitors were ranked.

#### 6.2.2. Identifying potential competitors to this platform

Identifying competitors in this market depends entirely on the model the firm employs to move or keep hold of their stock. Many of these platforms facilitate consumer to business (C2B) transactions, where dealers can simply list their stock on the platform and the platform elects not to hold any stock themselves. These companies continue to compete with WeBuyCars offering private sellers a fast, convenient, and trustworthy sale of their vehicle. In addition, these competitors may follow the same approach as WeBuyCars in adopting a large-scale marketing campaign and making use of indicative pricing in their models. There are evidently many other elements that firms can compete on with WeBuyCars, even though there are no other firms that offer a service identical to that of WeBuyCars.

A critical success factor is based on the ability of a firm to accurately price, which is not easy to achieve as a new firm attempting to enter the market. Weelee, a competitor of WeBuyCars, has asserted that access to data is a very important element of this case. In the modern digital economy, any access to consumer behavioural data is paramount to achieving a competitive edge. It is often used as a tool to exclude competitors who simply do not have the scale to match up to the data WeBuyCars has amassed. A firm of this nature having access to sales data on their products is also important as a more accurate price can allow for a firm to achieve a higher profit margin.

The WeBuyCars model highlights issues around price competition from competing firms, that the existence of direct competitors has a material impact on the spread of buying and selling prices. It is not possible for private sales at small physical dealerships to impose pricing constraints on WeBuyCars as they simply don't have the same scale with which to recoup costs on certain vehicles.

Entrants to the platform market will face costs the first mover never had to experience as well as simultaneously competing with the first mover to achieve their scale or network advantages. These firms can become a severe competitive constraint to WeBuyCars when it gains traction in the market and begins to build scale. Potential entrants at the edge of the market, that have not yet entered, can only provide limited competitive constraints.

Frontier Car Group is a German based firm that has found much success in entering the online automotive classifieds markets in many emerging economies. The model Frontier Car Group implements is to engage with customers on the buy-side of the platform. The firm will inspect the vehicle but will not make a cash offer. It does not run a guaranteed purchase model as WeBuyCars does. It simply matches these inspected vehicles up with dealers looking to expand their range on offer. Frontier Car Group becomes a trusted intermediary that facilitates a transaction between a customer (seller) and the dealer (buyer). This model operates well in emerging market economies as Frontier Car Group can provide financing throughout this process to either party, which is the most complex part in an emerging market economy as often there is limited access to capital to conclude such processes.

It was evident in the WeBuyCars case that Frontier Car Group was willing to enter emerging markets and develop their platform as the firm had done so in several other emerging markets before entering South Africa through a Naspers acquisition. Frontier Car Group has developed the knowledge and expertise on what is required of them when starting to enter other countries, and this knowledge can

be applied when entering South Africa. The Competition Commission decided Frontier Car Group would be able to enter the South African market but have opted to rather buy out the incumbent and withhold their own entry.

The Naspers recommendation committee had evidence showing Frontier Car Group had intended to enter the South African market, with these plans being at an advanced stage. The CCSA refers to media reports referring to FCG's anticipated entry into South Africa. The intention to enter indicates a potential competition concern. The holding firm, MIH eCommerce, decided rather to purchase the incumbent to gain entry into this online automotive classifieds platform market, rather than following through with their own intended entry to compete with WeBuyCars

### 6.2.3. Ranking potential competitors to this platform

To rank potential competitors, it is prudent to understand where WeBuyCars is placed in the market. According to the authorities WeBuyCars is a clear market leader. This has been corroborated by estimates of their margins earned and the scale at which used cars are purchased monthly. These marketplace business models are highly sensitive to the first mover advantage, scale and network effects that can build up once a firm has gained traction within a market. Clarifying this is important as it provides the basis for determining whether Frontier Car Group's alleged planned entry will have a significant impact on the buying side of the market for WeBuyCars. The nature of the online platform significantly increases the geographical reach of the service provided by these platforms.

The possibility that Frontier Car Group could successfully enter the South African market does make them a potential competitor to the market. They have a proven business model and have found ways to succeed in entering emerging markets. Frontier Car Group currently has the necessary technological platform in place to enter South Africa. Their existing ties to the Naspers Group allow

them significant synergies with other business segments over that which an un-associated new entrant may have access to.

The CCSA has stated in their decision that the margins achieved by Frontier Car Group are at the lower end of the spectrum in comparison to WeBuyCars but are still considered as significantly higher than all other competitors present in the market. Frontier Car Group has deliberately targeted entry and acquisition into emerging markets as their trading margins largely depend on the level of price competition with other companies ‘doing the same thing’.

Based on the similarity of the offerings and the proven track record FCG has in entering other emerging market economies, there was no reason for the South African authorities to consider alternative potential competitors. There are currently no other platforms that appear to hold the capacity to challenge this market from the outside to enter it.

#### 6.2.4. Approved Merger between Transaction Capital Motor Holdco (Pty) Ltd and WeBuyCars Holdings (Pty) Ltd

Since the attempted acquisition of WeBuyCars by MIH eCommerce Holdings was prohibited by the South African competition authorities, the Competition Tribunal in South Africa has given unconditional approval for Transaction Capital, through their wholly owned subsidiary, Transaction Capital Motor Holdco to increase their shareholding in WeBuyCars. Transaction Capital Motor Holdco operates as an investor in and operator of credit-orientated-alternative assets. The Competition Tribunal has decided that this transaction is unlikely to substantially prevent or lessen the competition in any market in South Africa in addition to not raising any public interest concerns.

### 6.3. Gumtree and Cox Media Acquisition

This case resulted in the acquisition of Cox Australia Media Solutions by Gumtree AU. Both entities offer online automotive classified advertising to automotive sellers, either dealers or private sellers, and buyers. In addition, offering third party display advertising on their platforms. With the merger completed the firms should be experiencing an increase in sales and attracting more dealers to a unified platform, increasing their available inventory and audience reach.

#### 6.3.1. Actual Competition Considerations for Online Classifieds Intermediation Platforms

The ACCC's assessment has determined there to be a national market for the supply of online display advertising. While it has been concluded that there is no single accepted definition for market share for calculation purposes in these platform markets, it can be decided based on the share of audience held by the firm, the share of inventory held by the firm, or the share of revenue earned by the firm in relation to the relevant market. The decision made by the ACCC stated that this case may result in an increased market concentration and a removal of competition between the parties to this transaction. With the question remaining as to how much of an anticompetitive effect this merger will impose on the whole market.

A metric such as inventory of listings can highlight the success of a classifieds platform to attract sellers to list on their platforms and be representative of market shares. As dealers multi-homing their listings across sites and syndicate arrangements between one platform and another, such as Carsales and Facebook Marketplace, the listings are often duplicated across different platforms. This shows the amount of inventory listed on a platform is not the clearest indicator of the competitive constraint the firm imposes on the market or their position within the relevant market.

Many online classifieds platforms operate different business models with different pricing structures. Thus, the revenue share generated by each firm may underestimate the strength of the firms'

competitiveness. The share of revenue should be indicative of the relative success each platform has in capturing a share of the audience. By having a larger audience attracted onto the platforms it will allow a firm to have an additional, lucrative stream of revenue through paid advertisements.

The share of audience metric might be a better way to determine the market share of each firm than the share of inventory. However, there are issues that arise when trying to factor in the audience can multi-home and make use of several platforms simultaneously. It begs the question of which firm their view should be allocated to in determining the share of the market. There is no way to allocate a single unique view, reflecting that the share of audience is not a good measure of actual competition (ACCC, 2020).

It is confirmed the market leader, Carsales, has significantly more total page views and time spent on their platform by the audience, than Gumtree and Cox Media. Carsales also maintains the largest inventory of total listings and generates significantly more revenue compared to competitors. Recently, Facebook Marketplace has entered the online automotive classifieds advertising market and expanded their reach in a very short space of time. They have become increasingly competitive to the incumbents of the market and gained market share as an effective competitor (ACCC, 2020:24).

Dealers have an incentive to multi-home between these platforms to ensure the widest reach possible to viewers and consumers on the other side of the platform. This creates increased competition, as every platform wants to be the secondary platform for dealers to use alongside the market leader. This acquisition will serve to place the parties in a better position to be the secondary choice to list with, once merged, they will be a more effective competitor to Carsales (ACCC, 2020).

The measures of actual competition evaluated here provide limited insight into how firms are ranked within the market. While there is a clear market leader, the remainder of the market can be

subjectively decided based on which metric is used and it is unclear where firms will place in the market. It is for this reason that the court considers potential competition within the market when assessing this case.

### 6.3.2. Identifying potential competitors to this platform

The ACCC identified two types of online classifieds platforms present in this market. Firstly, a horizontal online advertising site with classified advertising for a broad range of products across various categories. Secondly, a vertical online classified advertising site, more suited to specialised search categories. Gumtree claims the parties to this acquisition are not considered close competitors as Gumtree caters more towards the private sellers, while other platforms such as Carsguide and AutoTrader cater for dealers' listings.

In this case, Cox Media is considered as a vertical online classified advertising site, as it caters to advertisements for various makes and models of cars. It is evident that the focus of this firm is narrower as compared to Gumtree where the focus lies with creating a single platform upon which once can locate a large range of goods and/or services being advertised. It is for this reason that Gumtree is considered a horizontal online advertising platform.

Carsales and Facebook Marketplace both pose as strong competitors post-merger. In addition, the threat of entry remains from other strong competitors operating internationally. The ability of consumers to multi-home on these competing platforms also constrains this market further.

Market participants have indicated apprehension to the of loss of potential competitive from this acquisition and how it might have an impact on online display advertising. Those participants also note the market will continue to be restrained by Facebook and Google post-merger. The cost to

consumer to switch post-acquisition between various platforms will be low, encouraging a more competitive environment.

One can think of potential competition as being the level of competition each firm could impose independently in the market if the firms continue to operate. This potential competition is what is lost when the two firms merge with one another. The authorities need to consider whether the lost potential competition post-merger is greater than the constraint the merged entity could impose on the market. If this is the case, the merger should be prohibited as it would result in a less competitive market, lessening consumer welfare and leading to an anticompetitive outcome. It is difficult for authorities to assess this counterfactual scenario on limited resources and understanding of these platform markets.

The ACCC (2019) determined the proposed acquisition of Cox Media by Gumtree would result in the removal of one of the five main competitors in the market. It would seem that this market is relatively concentrated and that an acquisition of this nature is unlikely to be allowed through. This was not the case here, the ACCC stated the proposed acquisition was likely to go through on the basis that it would not substantially lessen the level of actual competition within this market.

### 6.3.3. Ranking potential competitors to this platform

The platform offered by Gumtree is tailored to focus more on private listings, and the Cox Media Solutions platform is geared towards serving dealers. This distinction in offering from the merging parties should lean towards their individual potential competition constraint by each party on the market being less than what these platforms offer together post-merger.

The ACCC has focused on questions surrounding public benefit in the post-acquisition world. Identifying the classifieds' platform will be well developed for all users and there should be an

increase in the value received by dealers active on the platform. This acquisition is also likely to allow for the development of a better alternative platform for buyers and advertisers to the market leader's platform. The ACCC have noted that the loss of potential competition in the market that Cox Media could bring with expansions and improving their business strategies will be substantial.

Concerns were raised about the possibility of a coordination theory of harm occurring, but the ACCC has determined the risk of this as low. Many of these platforms operate different pricing models, and it is unlikely for any one of them to alter their pricing strategies solely to coordinate with another entity in the market.

Through this evaluation the ACCC has identified and set precedent, on potential competition concerns. It does not ignore the constraining influence larger international players might also impose on the market. Due to the nature of this case, the ACCC proceeded to simply focus on the most pressing competition issues present in this case.

#### 6.4. eBay and Motors.co.uk Acquisition

This case entails an acquisition of Motors.co.uk by eBay Incorporated in the United Kingdom. The CMA notes that these entities will not be distinct from one another post-merger. There was evidence presented in this case that neither firm is the other's closest competitor. There is no appearance that this merger will result in a substantial lessening of competition due to the strong constraints imposed by rivals in the market and the limited increment in market position by the newly merged entity. For these reasons mentioned above, the CMA has approved this acquisition.

##### 6.4.1. Actual Competition Considerations for Online Classifieds Intermediation Platforms

In their evaluation of this merger, the CMA elected to review the service proposition, the perception of lead quality and the customer overlap in determining the closeness of competition for this market. In terms of service proposition, both firms (eBay and Motors) offer relatively similar services with differences in their pricing models. For the perception of lead quality, both firms are highly established and have good brand recognition. When considering customer overlap, the CMA found that each party had a greater overlap with AutoTrader, the market leader, than with each other.

Both parties to this merger have regularly referred to AutoTrader in internal documents as their main rival. It is well understood that AutoTrader is a market leader. The parties state that CarGurus is the next closest competitor after AutoTrader. The market players have noted that CarGurus has been aggressive in their attempts to grow their market share. The CMA's access to AutoTrader's internal documents lead them to understand that AutoTrader considers CarGuru a key threat. The market appears saturated with many firms offering similar services, these firm range from CarWow, AA Cars and Exchange & Mart to Facebook Marketplace alongside some other smaller firms.

<b>Provider</b>	<b>Shares by listing revenue (%)</b>	<b>Shares by number of unique visitors (%)</b>	<b>Shares by number of dealers (%)</b>
Gumtree Motors	[0-5]	[20-30]	[5-10]
eBay Motors	[10-20]	[10-20]	[10-20]
Motors	[0-5]	[5-10]	[10-20]
<b><i>Combined</i></b>	<b><i>[20-30]</i></b>	<b><i>[40-50]</i></b>	<b><i>[30-40]</i></b>
AutoTrader	[70-80]	[30-40]	[30-40]
CarGurus	[0-5]	[5-10]	[20-30]
Pistonheads (now part of CarGurus)	[0-5]	[10-20]	[5-10]

**Table 1: Parties and rivals' estimated shares, 2018**

*Source: CMA, eBay and Motors.co.uk, 2018:10*

Estimates in the table above highlight how difficult it is to discern market shares for any given shares for any given firm in such an intricate and complex market. Only considering the share of listing revenue per firm gives one view of the market, but to consider the share of number of unique visitors of share of number of dealers individually paints different pictures. It is seldom that these measures would concur on the share of the market held by any of the firms. Platforms involve the use the internet to be operational adds to the complexity in determining the amount of market share held by any one firm, especially in cases where consumers to the platform can multi-home.

It becomes evident from reviewing the table above that the merging parties' individual share of listings revenue is moderate in comparison to what is earned by AutoTrader, 70-80% of the market, even after considering the combined share of listings after the acquisition. The CMA does concede the shares by revenue provide a limited amount of insight into the competitive conditions within the market.

These shares do indicate, post-acquisition, the combined entity will enjoy a large proportion of unique visitors and a high number of dealers to their platform relevant to the remainder of the market. One should remain cognisant that figures in this table capture a historical and static view of the competition in the market at a very specific point in time.

#### 6.4.2. Identifying potential competitors to this platform

The CMA acknowledges the parties in this case are differentiated to some extent but are nevertheless competitors to one another pre-merger. The incremental increase in market position resulting from this acquisition will help the parties maintain competitive pressure on market leaders AutoTrader and CarGuru.

It has been said by the user-groups, the buyers, dealers, and sellers, that AutoTrader is expensive to list on. This encourages participants to multi-home between platforms to extend the reach of their advertisements or listings. This highlights that while there may be significant barriers to enter this market as a platform firm, competition in the market is welcomed by consumers. It is likely that a firm with an already established platform would be well placed to enter this market or threaten to enter as a potential competitor from outside the market.

The CMA considers AutoTrader to be the main competitive constraint on these firms based on dealers allocating the main proportion of their spending towards this firm with the remainder being divided among the rest of the market. If the dealers feel those firms in the remainder of the market can generate sufficient leads from consumers, they may be more inclined to portion up spending more evenly among the competing firms.

The parties to this case have submitted they also face competitive constraints from display advertisements, social media such as Facebook and YouTube and Google paid search. However, the

CMA stated it could not find references to these competitors external to the relevant market in this case. It may be prudent to consider these firms in the realm of potential competitors given the rapid pace of development in this type of digital market.

At the end of the analysis, the CMA has determined the loss of the potential competition eBay and Motors.co.uk could impose on the market individually is outweighed by the gain in competitive constraint the new merged entity could impose on the market. This highlights that the loss of potential competition in this case is not significant enough to create an anticompetitive effect on the whole market.

#### 6.4.3. Ranking potential competitors to this platform

Given the nature of the businesses, the parties to the merger do have an overlap in the services their individual businesses offer in vehicle display services, but this overlap is determined to be minimal. The market should rather be segmented by the requirements of customers served. Particularly, the nature of the platform market, dealing with both buyers and sellers, the car dealers, and private consumers.

For eBay, growth via acquisition in the UK is one a standard strategy employed by the firm. It allows for more focused funding for their acquisition of Motors.co.uk. Previously, eBay has attempted to organically grow their platform in this market. Through incremental improvements on their offerings such as call-tracking, vehicle history check display and so forth. However, these improvements do not constitute significant changes that would create enough of an impact within the market to be a sizeable loss as a potential competitor to the market in the pre-merger analysis.

One could consider an alternative constraining potential competitor as an already established platform with an existing current user base that would willingly make use of an alternative service offered by

that platform. For example, an additional platform, leveraged off the original platform where individuals can list cars to sell or view vehicles. Dealers may also be able to use this platform dependent on the configuration. Thus, creating the threat of a platform with the ability to rival incumbents in the relevant market.

The CMA decided, upon reviewing the counterfactual scenarios, that the resulting loss of potential competition would be outweighed by the constraining effect the merged entity could impose. This shows that the potential competition of eBay and Motors.co.uk are the top priority in this market, followed by any potential entrants which were not names in the CMA's decision.

## 6.5. Summary of Case Insights

From the review of these cases there are two different types of cases that emerge. The first is an acquiring firm attempting to purchase the incumbent of the market so as not to exert the effort and capital it would need to enter the same market on competition merits. The second case is where two firms that already exist within the same market merge with one another to provide a greater competitor to the market leader, a combined level of competition they are unable to exert as individual firms.

These cases all provide different insights into the elements that will cause a court to determine whether the loss of potential competition is anticompetitive or not. The first case indicated that a firm attempting to enter a market that it could reasonably enter and compete in by itself should not be allowed to acquire the incumbent of that market. It results in an anticompetitive act that could reduce the constraining effect their potential competition imposes on the market. The other two cases reveal that even though the potential competition each of the firms could impose on the market would be lost, it would not have an anticompetitive result. This is due to the newly merged entity being able to provide a higher constraining effect on the market leaders.

The courts across jurisdictions appear hesitant in allowing a merger as in the first type of case through as it results in an anticompetitive practice. It would encourage unintended consequences where firms with enough capital will be allowed to buy their way into a market they are looking to enter. On the other side, the second type of case is generally allowed through, despite it potentially resulting in a more concentrated market as two firms merge to one. This shows how the effect of an increase in market concentration would be outweighed by a heightened competitive constraint resulting from the merger. Authorities concerns surrounding increased levels of concentration will be subdued in cases where a merged entity will provide a more effective competitor to a dominant market leader.

## 7. Recommendations

Given the rapid increase in interest over digital or technological firms merging or acquiring one another, there are many competition issues that arise. This chapter seeks to outline several recommendations identified within the literature for ways competition authorities can approach dealing with potential competition matters.

Firstly, there should be stricter enforcement of merger control with a specific focus on any foreclosing strategies that may be attempted by some of the larger incumbents over smaller potential competitor firms. Courts need to keep a watchful eye over data mobility, interoperability, open standards, and data openness in these proposed merger transactions (Calvano & Polo, 2020). Authorities are hesitant to over-enforce as it may end up being more harmful to the markets than the current levels of under-enforcement are (Holstrom et al, 2019).

Yu (2020b) then proposes an attempt to shift the economic analysis in merger control to a regime that focuses on the anticompetitive effects that can result from mergers taking place in the digital sphere. His concerns revolve around the decisions on potential competition cases on purely legal standards built for actual competition cases may result in underenforcement to the detriment of consumer welfare and the markets.

In terms of a potential policy response, and response from the courts, Cabral (2020) recommends shifting the burden of proof onto the incumbent to indicate the pro-competitiveness of the merger or acquisition. The reversal of this burden of proof from the authorities onto the merging parties may have the necessary effect of raising the merger-approval bar considerably

Parker (2021) outlines a 4-step proposal that may assist with redefining current merger policy tools to evaluate competition concerns around dominant online platforms. Firstly, to implement a new ex-

ante regulatory framework. Secondly, the conditions under which notification of a merger is compulsory should be updated and the burden of proof in these proceedings should be reversed onto the dominant or merging platform under investigation. Thirdly, the investigations of horizontal and vertical acquisitions should receive different regulatory priorities. Finally, competition enforcement tools require an update to allow for increased visibility into the market data and trends that incumbents in the markets are aware of.

Wu (2010) however acknowledges that antitrust laws should not solely carry the burden of regulation over these information industries. Rather a stricter approach would be better suited to restrict a dominant platform from operating within a specific market where it also provides the infrastructure that other firms depend on while simultaneously competing with these firms.

This chapter identifies that while there is much work to be done by competition authorities to develop their rules and regulations to adapt to the new challenges faced within digital markets and platform markets, it should not solely be their responsibility. It is also dependent on market players being aware of their surroundings, whether in a competitive or concentrated market and acting in accordance with the development of a more perfectly competitive environment.

## 8. Conclusion

The main research concerns dealt with in this paper surrounds the potential competition issues faced by the online automotive classifieds platform market. Authorities have attempted to understand this market which highlights the need for legislators worldwide to recognise competition issues emerging within digital markets. These authorities need to act accordingly through amending legislation to provide sufficient guidance to the authorities in other jurisdictions that need to reach decisions on cases that involve competition concerns.

As globalisation and innovation within markets persists, many more industries will encapsulate a digital element in the services or goods produced. This in turn will inevitably result in more digital competition issues arising. The authorities need to be prepared for this eventuality, and this paper seeks to clearly define how issues surrounding potential competition have been approached in online intermediation platform markets by the authorities.

The specific research problems of this paper deal with how authorities determine actual competition within the platform market, what metrics are generally used and how these are applied to a platform market. It has further considered how potential competitors to these markets are identified and how they are ranked. It determines the firm that would be a more effective potential competitor is evident by the constraints it imposes on other firms operating within the market even if they do not yet operate within that same market themselves. The case studies shed light on how the authorities in the South African, Australian and United Kingdom jurisdictions have applied their legislation to reach a decision on considering which firms are potential competitors within the online automotive classifieds market.

The online platforms considered in this paper typically involve utilising the internet to connect user groups. Some operate without requiring an intermediary to take ownership of the goods at any point

in time, while others do accept this responsibility. These type of platform firms have been able to lift many of the information asymmetries that traditionally occur between the different user groups to the platforms. The consumers of an online platform could encourage competition within a market themselves by multi-homing between different platforms, so as not to allow any single platform to achieve the dominant position. This is not always possible, often platforms will merge with or acquire another platform leading to increased levels of concentration within the market.

There are certain characteristics of the platform market that are used both to describe the operations within the market and are raised as competition concerns. These are firstly network effects, which are fundamental to the creation of a platform, but the establishment of these also serve as a barrier to entry for firms looking to enter the market. Secondly, the economies of scope and scale, whereby platforms are considered successful upon achieving these economies of scale needed to expand their reach to more consumers with less expenditure of their resources and capital. These economies of scope and scale also resemble a barrier to entry as a new firm might not be able to compete effectively unless they have the capital to match the production level of the market they are entering.

There are many jurisdictions which have addressed concerns on potential competition issues that crop up in the cases involving firms operating within digital markets. Specifically, Australia and the United Kingdom, that have both created respective institutions or segments, within their competition authorities, to deal with competition issues specifically arising from the digital markets. This may involve merger control or conducting an ex-post investigation into a decision that has already been handed down. The intention is to have a secondary body that can assist the competition authority in understanding a specific area with very specific points of difference to a traditional market.

The issues these competition authorities deal with in digital markets are important as every decision sets the precedent going forward for similar cases in the future. At the time of these decisions,

authorities did not have a large amount of precedent to rely on, and therefore turned to the literature to help answer their questions. This guided authorities to release reports documenting the processes they wished to implement and points to consider in each new case they should receive. These reports also act as an aid to guide other authorities, around the world, that may not yet have been exposed to such situations themselves.

The literature review conducted within this paper explored an understanding of the market definition for online platforms, it also considered how potential competition and killer acquisitions are understood in the contexts of mergers. It found authorities should be mindful to account for all operational sides of a platform when creating a market definition. This includes considering the interaction user groups have with the platform or intermediary itself and with the other user group. These network effects are an important element in understanding the mechanisms of how the platform functions and creates value in a market. Having a good grasp of these network effects creates a solid foundation on which to understand the intricacies of barriers to entry and the economies of scale that are faced by potential entrants to the market.

If a merger involving an incumbent and a potential competitor is allowed through, it decreases the level of competition within that market. This in turn lessens the constraining effect a potential competitor can impose which is similar to that of an actual competitor from the same market. In line with the concept of potential competition concerns and merger control, there are acquisitions involving different motives. For example, killer acquisitions, firms that acquire a potential competitor firm with the intention to destroy or dismantle their product or innovation to entrench their own market position or maintain their own market share. This compared to an acquisition of a potential competitor of the market in order to protect a firms market share.

Many jurisdictions have attempted to deal with these issues in merger control by instituting a new notification threshold based on the value of the transaction, and others have suggested approaching it through ex-post remedies rather than instituting ex-ante rules. Amending the notification threshold increases the number of mergers that will be brought to the attention of authorities, which may now be able to prevent anticompetitive outcomes arising.

The research questions of this paper revolved around the gaps identified within the literature, specifically around how an actual competition should be determined in a platform market. It further asked questions on how a potential competitor is identified by the relevant investigating authorities. With a lack of literature to answer these questions, the paper considered the approach of authorities in dealing with these potential competition concerns in the merger cases for online automotive classifieds platform market cases.

Ultimately, this paper's review of the cases provides insight into the possible results of proposed mergers and acquisitions of similar nature going forward. For example, a market that comprises of a platform with an alternative offering. This research aids our identification of firms operating within a platform market that involve potential competition considerations. The cases dealt with in this paper focuses on the market surrounding the online automotive classifieds platforms. These kinds of platforms have been known to differentiate themselves on a price structure basis or by offering a wider variety of after sales services than what their competitors do, and therefore can be differentiated from one another but still operate within the same market.

The courts have identified two different scenarios that may involve potential competition concerns. The first arises in the WeBuyCars case, wherein a holding company with ties to a similar international firm had the potential to enter the market themselves. Instead of the firm competing for entry into the South African market, it opted to purchase an incumbent from this market as their form of entry. The

authorities prohibited this move, as it is understood Frontier Car Group has the capacity to enter the market and should not remove the effect of potential competition it can bring to the market. The second scenario happened in the United Kingdom merger between eBay and Motors.co.uk and in Australia's merger of Gumtree and Cox Media, is where competing firms in the market merge to compete with the market leader effectively and efficiently in their respective markets. In these last two cases, the mergers were allowed as none of the firms' party to either merger were considered the market leader by the respective authorities investigating the case.

Firms that may be potential competitors to this market would require a large amount of capital to enter and effectively compete in this market. In the WeBuyCars case, the Commission was aware that Frontier Car Group had successfully entered other emerging markets like South Africa. Proving they have the technological capability and should be able to enter and successfully implement their products into the South African market. Authorities allowing a merger resulting in the loss of potential competition to the market would be anticompetitive.

In the Australian case between Gumtree and Cox Media, the authorities were concerned about the loss of potential competition that each firm individually imposes on the market as in the pre-merger conditions. After some careful analysis it was determined that the constraining effect of these firms on the market would be greater as a merged entity. The case from the United Kingdom between eBay and Motors.co.uk presented two platforms that are slightly differentiated but both were in competition with the market leader. The CMA decided the combination of these two firms in a merged entity would impose a larger constraining effect on the market leader than each firm could individually, thus there is no loss to the potential competition these firms could impose should they obtain a larger market share organically.

The key takeaway from evaluating the literature and case studies is that the questions surrounding potential competition and platforms will become more frequent in competition investigations. The courts deal with these matters on a case-by-case basis and set minimal precedent for future investigations. The competition authorities worldwide are paying more attention to the competition issues that arise from platform markets, especially those with a digital element. The recommendations from section 7 should provide a useful guide to identify what competition authorities should strive to achieve in their policies.

The authorities are starting to implement new legislation or create branches within their governance structures to specifically deal with the complicated issues that emerge from the digital markets. The ACCC has already created a branch to only deal with digital market issues, the Digital Platforms branch. The CMA is also in the process of creating a digital markets unit to update their available enforcement tools. The Competition Commission in South Africa is in the process of conducting a market inquiry that will shed light on how they will decide to approach matters involving online intermediation platforms (Competition Commission, 2021b).

The purpose of this research was to create an understanding on how authorities deal with and identify potential competition issues in platform markets, specifically the online automotive classifieds market. Based on the analysis conveyed, it can be concluded that there are different aspects to potential competition considerations. It can either be that firms merging risk reducing the competitive constraints imposed on the market if the merger fails, and the synergies of the merging firms are not aligned. The alternative is a merger of a firm that operates a platform outside of the relevant market to enter this market without developing the technologies themselves. Allowing the acquiring firm to obtain a share of the market without investing the capital and resources to achieve the equivalent outcome on their own merits.

Future exploration into this topic could be useful to apply across various sectors and alternative platforms to the online automotive classifieds platforms that were considered in this paper. These cases revolving around the online automotive classifieds platform will not be the only type of platform affected by these issues. Authorities need to be cognisant of this and develop their legislation and precedent in a way that will align with the most competitive outcome for their economies.

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