

7 April 2025

Competition Commission

Per email: mdpmi@compcom.co.za

To whom it may concern

MEDIA AND DIGITAL PLATFORMS MARKET INQUIRY PROVISIONAL REPORT

1. The Internet Service Providers' Association (ISPA) has noted the publication of the Provisional Report of the Competition Commission in its Media and Digital Platforms Market Inquiry (MDPMI).

2. ISPA sets out below submissions relating to the recommendations set out in paragraph 233.6 of the Provisional Report:

233.6. A recommendation to the Department of Communications and Digital Technology (DCDT) to amend the ECTA to introduce liability for online platforms where they allow harmful content and amplify misleading content through their algorithms, or where misinformation reaches a certain threshold of users through follower accounts (e.g. over 10,000 followers). Additionally, for the ECTA to be amended to introduce a provision requiring platforms to adopt a policy of proactively removing harmful content, and not providing an algorithmic boost to misinformation, including a prohibition on promoted posts or ads that contain misinformation.

3. ISPA understands the rationale for this recommendation and that this recommendation is adjacent to the main thrust of the Inquiry. Further, regulation of online harms such as misinformation is not directly a competition law matter.

4. Notwithstanding which, ISPA wishes to raise the points of concern below.

Why is ISPA writing to the Commission?

5. ISPA was recognised as an Industry Representative Body (IRB) for the purposes of Chapter 11 of the ECT Act by the Minister of Communications and Digital Technologies in May 2009.

6. As such, ISPA has extensive experience in the implementation of Chapter 11 through, *inter alia*, its management of a take-down notice process on behalf of its members.

7. Information – including detailed statistics – on the ISPA take-down notice process is available from www.ispa.org.za/tdn.

8. In ISPA's view the current take-down notice framework – while not perfect – is effective at removing harmful content and websites from the internet where these are hosted by an ISPA member. This works directly to the benefit of local internet users.

9. Section 78 of the ECT Act sets out an important principle of SA law:

78. No general obligation to monitor

- (1) *When providing the services contemplated in this Chapter there is no general obligation on a service provider to—*
 - (a) *monitor the data which it transmits or stores; or*
 - (b) *actively seek facts or circumstances indicating an unlawful activity.*
- (2) *The Minister may, subject to section 14 of the Constitution, prescribe procedures for service providers to—*
 - (a) *inform the competent public authorities of alleged illegal activities under taken or information provided by recipients of their service; and*
 - (b) *to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service.*

10. This provision recognises the reality of the position of ISPs with regard to the huge volume of content accessed over their networks and entrenches a form of neutrality which ISPA strongly believes underpins the functioning of the internet in South Africa.

11. The legislative principle was more recently affirmed and repeated in section 54 of the Cybercrimes Act of 2020.

Unpacking the recommendations

12. The recommendations encompass the following:

12.1. Introducing liability for online platforms which:

12.1.1. Allow harmful content.

12.1.2. Amplify misleading content through their algorithms.

12.1.3. Allow distribution of misinformation to user follower accounts above a specified follower threshold.

12.2. Requiring online platforms to:

12.2.1. proactively remove harmful content

12.2.2. not provide an algorithmic boost to misinformation, including a prohibition on promoted posts or ads that contain misinformation.

13. While there is a focus on misinformation, the recommendations relate to “harmful content” which is a broad category covering child sexual abuse material (CSAM), non-consensual intimate images (NCII), hate speech, defamation, cyberbullying, adult material and more.

14. The complexity involved in implementing these recommendations cannot be overstated, particularly in the current global geo-political context.

15. Who decides on what constitutes misinformation? Who decides on what constitutes harmful content? Is “misleading content” the same as “misinformation”? How do these recommendations interact with

the Bill of Rights and particularly freedom of expression? How is South African law enforced against an online platform run by a US or multi-national company?

16. The Commission is referred to the disastrous attempts of the Film and Publication Board (FPB) to regulate misinformation in the run-up to the 2024 national elections and the resulting court case.¹

The difference between ISPs and platforms

17. The Commission is well aware of the differences between internet service providers (ISPs) and online platforms, but it bears emphasising in the current context that there are a variety of entities broadly referred to as “internet intermediaries”.

17.1. **ISPs** are entities with the principal function of enabling access to the internet on behalf of their subscribers.

17.2. **Hosting companies** offer customers the ability to make content available on the internet without owning or managing servers or infrastructure. Where an ISP sells a service that connects that customer to the internet, a hosting company sells a service that connects all internet users to that customer’s information.

17.3. **Social media and messaging service providers** provide a communication service to an end-user via the internet access service that the end-user obtains from an ISP. This includes both social media companies, who host content uploaded to their platform by its users, and messaging service providers who provide an end-to-end communications platform or software but do not necessarily host any end-user content. Some social media platforms also offer end-to-end messaging services.

17.3.1. Examples of social media companies are Meta Platforms (Facebook, Instagram), ByteDance (TikTok) and Twitter.

17.3.2. Examples of messaging service providers are Microsoft (Teams, Skype), Telegram Messenger (Telegram), Signal Technology Foundation (Signal), and Meta Platforms (WhatsApp).

18. ISPA is concerned about these different entities being conflated for the purpose of implementing the recommendations.

Enforcement and jurisdiction

19. The ECT Act 2002 is South African legislation which creates limited jurisdiction for South African courts in respect of offences committed.²

¹ See [Media Monitoring Africa Trust and Others v Film and Publication Board and Others \(2024/037092\)](https://www.ellipsis.co.za/the-film-publication-board-and-online-content-regulation/) and <https://www.ellipsis.co.za/the-film-publication-board-and-online-content-regulation/>

² Section 90 of the ECT Act: **90. Jurisdiction of courts**

A court in the Republic trying an offence in terms of this Act has jurisdiction where—

- (a) the offence was committed in the Republic;
- (b) any act of preparation towards the offence or any part of the offence was committed in the Republic, or where any result of the offence has had an effect in the Republic;
- (c) the offence was committed by a South African citizen or a person with permanent residence in the Republic or by a person carrying on business in the Republic; or

20. It is not clear to ISPA how amendments to the ECT Act would create an effective mechanism for controlling disinformation and other harmful content published or distributed on the major online platforms which are used by South Africans.
21. These platforms currently do not require any local licensing or even a local representative. “X” – probably the most problematic platform from a misinformation perspective – has made its non-cooperative position abundantly clear.
22. At the core of the ECT Act take-down notice process is a recognition that this process only works where the take-down notice targets a service provider that has control over the content which is the subject of the notice.

A comprehensive approach to online harms is required

23. ISPA submits that the recommendation would be better directed towards the process to develop new national policy on audio and audio-visual content services being undertaken by the Department of Communications and Digital Technologies (DCDT).
24. The DCDT published a draft “White Paper on Audio and Audiovisual Media Services and Online Content Safety: A New Vision for South Africa” in July 2023³. As indicated by its title, this draft White Paper includes a section on online content safety.
25. The main objective of this process is to update the licensing framework for the provision of audio and audiovisual services. In the last draft, the DCDT proposed licensing of video-on-demand (VOD) and internet protocol television (IPTV) alongside traditional broadcasting services as well as a requirement for video-sharing platforms such as YouTube to hold a licence exemption.
26. The DCDT has noted that the draft remains under review and indicates in its latest Annual Performance Plan that the White Paper will be finalized by the end of March 2026.
27. ISPA is following developments in other jurisdictions which are developing comprehensive approaches to mitigating online harms and regulating platforms. The Commission’s recommendation – where it references user thresholds - appears to be based on measures adopted under the UK Online Safety Act.
28. ISPA submits that misinformation is an online harm. It should be dealt with in all its complexity within the scope of a full policy review leading to online harms legislation and an appropriate related institutional framework.
29. This framework should take into consideration existing legislation dealing with harmful content, including:
 - 29.1. The Cybercrimes Act 2020 which criminalises malicious communications and unlawful sharing of intimate images.
 - 29.2. The Films and Publications Act 1996, which creates statutory offences in respect of “prohibited content”, distribution of CSAM, cyberbullying, hate speech, adult content and distribution of private sexual photographs and films. The Act also provides the FPB with take-down powers.

(d) the offence was committed on board any ship or aircraft registered in the Republic or on a voyage or flight to or from the Republic at the time that the offence was committed.

³ See <https://www.ellipsis.co.za/audio-and-audiovisual-content-policy/> for draft policy and related documents

29.3. The Prevention and Combating of Hate Crimes and Hate Speech Act 2023.

29.4. The Criminal Law (Sexual Offences and Related Matters) Amendment Act 2021 which criminalises distribution of CSAM.

29.5. The Domestic Violence Act, which provides for a court to order the take-down of content alleged to constitute an element of domestic violence.

Conclusion

30. For the reasons set out above ISPA is deeply concerned about the potential consequences of the recommendations made and the way they may shape future amendments to the ECT Act and the take-down and limited liability frameworks which it creates.

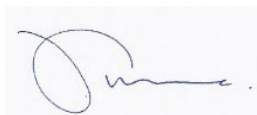
31. ISPA requests that the Commission consider the following reformulation of the recommendations:

233.6. A recommendation to the Department of Communications and Digital Technology (DCDT) to develop a comprehensive policy and legislative framework for addressing online harms and including a specific focus on the role of online platforms in creating and mitigating against online harms such as misinformation.

It is recommended that this framework incorporates an enforceable liability regime for online platforms which allow, promote or amplify harmful content and that it requires online platforms to have measures in place to mitigate the risks of online harms created, including proactive monitoring and expeditious take-down of harmful content.

32. ISPA congratulates the Commission on its progress to date and wishes the Commission all the best in concluding this process.

Regards



ISPA