# Shades of Technology Decentralization: From the EU Digital Markets Act to Substantive Fairness in African Digital Markets

Elettra Bietti[*], Friso Bostoen[†], Jacquelene Mwangi[‡]

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[*] Assistant Professor of Law and Computer Science, Northeastern University. We gratefully acknowledge support for project from the Antimonopoly Fund (Economic Security Project). This paper is a collaborative work of all authors, which can be considered joint first authors.
[†] Assistant Professor of Competition Law & Digital Regulation, Tilburg University.
[‡] SJD Candidate, Harvard Law School.

## 1. Introduction

A variety of antitrust regimes and regulatory schemes shape the structure of digital markets across world regions. Beginning in the 1980s, antitrust law has developed in many African countries in tandem with structural adjustment and trade liberalization measures, prompting African economies to selectively borrow from existing EU and US regimes. Many African antitrust regimes specifically emulate core pillars of EU competition law, with differences reflecting different development needs, local cultural and institutional specificities. With the EU now beginning to implement the Digital Markets Act (DMA), some scholars have suggested that a similar pro-competitive regime, with its emphasis on contestability and fairness, might work for industrializing African nations.[1] Indeed, as we show below, the Protocol on Competition Policy to the Agreement establishing the African Continental Free Trade Area (AfCFTA) significantly borrows from the EU's DMA. A key question that arises is whether such an approach is most appropriate for African nations.[2] In this paper, we analyze local antitrust regimes in Africa, with a special focus on South Africa and Kenya, and begin to articulate a perspective on what a local regulatory regime for tech platform markets could look like, both across the region and at the more granular country-by-country level.

Our analysis leads to the following findings. First, African regulators have historically been reluctant to directly regulate Western multinationals in cross-border markets. A hypothesis is that regulating global players is both politically risky and involves a level of uncertainty. African authorities are however more active in regulating and addressing the power of local and home-grown players as their effects on local markets are more easily identifiable. How proactive African regulators are likely to become in tech markets going forward might depend on how linkages between cross-border and local markets are understood. Second, while the Digital Markets Act emphasizes relatively formal ideals of "contestability" and "fairness", "fairness" acquires a more significant substantive role as a guiding principle for digital competition in African nations. Third, the range of sectors and industries that it is relevant to regulate in African countries differs from the "core platform services" that form the primary object of the Digital Markets Act. These two findings highlight that the AfCFTA framework must not uncritically emulate the European Digital Markets Act.

We proceed as follows. Section 2 maps the African digital economy. Section 3 describes the proliferation of regional and national competition law regimes in Africa and their relation to European competition law. Section 3 also introduces the EU Digital Markets Act (DMA) and discusses its relation to emerging regulatory efforts such as the AfCFTA in Africa. Section 4 discusses the evolution of competition law regimes in South Africa and Kenya, with an emphasis on digital market regulation and emerging DMA-like efforts. Section 5 lays the ground for possible reforms that would go beyond AfCFTA and would provide fairness and other pro-competitive safeguards for the African digital sector at a regional and national level.

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[1] Zlatina Georgieva, *How(Not) to Regulate Digital Markets: Lessons from the EU*, Afronomics, August 26, 2021, https://www.afronomicslaw.org/category/analysis/hownot-regulate-digital-markets-lessons-eu.

[2] Some have cautioned against a blanket adoption of the EU's DMA. See e.g., Folakunmi Pinheiro, *Regulating Africa's Digital Markets: What to Do, and What Not to Do*, Competition Policy International, June 11, 2023 Available at: https://www.pymnts.com/cpi_posts/regulating-africas-digital-markets-what-to-do-and-what-not-to-do/.

## 2. An Introduction to the African Digital Economy

Digitalization is a key priority for African nations. While the continent has the lowest internet penetration rate (40% compared to 89% in Europe, and 83% in the Americas),[3] Africa's digital economy has immense potential and is anticipated to reach a value of $180 billion or 5.2% of GDP by 2025, and $712 billion or 8.5% of GDP by 2050.[4] Presently, this growth is largely concentrated in four markets, Nigeria, Kenya, South Africa, and Egypt, which collectively represent 51% of the continent's GDP, but other nations are also working towards developing their digital economies.

With such growth on the horizon, Africa aspires toward an "integrated and inclusive digital society and economy that improves the quality of life of its citizens, strengthens the existing economic sector, enables its diversification and development, and ensures continental ownership with Africa as a producer and not only a consumer in the global economy."[5] In furtherance of this, different countries are implementing their national digital development strategies while at the regional level, countries are working together within the ambit of the AfCFTA to boost cross-border digital trade, and promote competition, which is itself understood to be a key driver of innovation, industrialization and sustainable development.

Africa's digital economy has traditionally promoted solutions to persisting problems in key sectors such as education, healthcare, logistics, agriculture, and financial services. This is exemplified by tech companies (both local and foreign) such as *Zipline*,[6] a logistics company that started out by using drones to deliver life-saving blood and medicines in Rwanda but has now expanded to other countries and regions. Another example is *Apollo Agriculture*,[7] a Kenyan fintech startup that uses satellite data, machine learning, and mobile money to offer lending products, insurance, and farming inputs to smallholder farmers.[8] The main players in this line of digital products are typically a mix of local and foreign tech companies. It is difficult to trace how many companies operate regionally and in different countries because while new startups are established frequently, their churn rate is also high.

Digital platforms are also on the rise. A recent digital platforms trends report suggests that while there are more homegrown platforms in operation (82% in 2019), foreign platforms have a larger user base and are used more.[9] For instance, in 2019, the average number of users per platform was three times larger on platforms originating from outside of Africa's borders, than on homegrown platforms.[10] Commentators surmise that this could be because foreign platforms began operations significantly earlier than domestic platforms, and obtained first mover advantage.[11] Other reasons could be that local entrepreneurs face challenges raising capital to

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[3] ITU Facts and Figures Report 2022, page 3 https://www.itu.int/hub/publication/d-ind-ict_mdd-2022/
[4] e-Economy Africa 2020 https://www.ifc.org/en/insights-reports/2020/google-e-conomy
[5] AU Digital Transformation Strategy for Africa, at p.2. Available at: https://au.int/sites/default/files/documents/38507-doc-dts-english.pdf
[6] https://time.com/rwanda-drones-zipline/ ;https://www.flyzipline.com/about/
[7] https://www.apolloagriculture.com/
[8] Annie Njanja, *Kenya-based agritech Apollo raises $40 million in Softbank-led round, joined by Chan Zuckerberg Initiative*, CDC, *TechCrunch*, March 21, 2022 https://techcrunch.com/2022/03/21/kenya-based-agritech-apollo-raises-40-million-in-softbank-led-round-joined-by-chan-zuckerberg-initiative-cdc/.
[9] Insight2impact, Africa's Digital Platforms Trends Report (2019), p.5, https://cenfri.org/wp-content/uploads/Africas-digital-platforms-trends-report.pdf
[10] Id
[11] Id

build, advertise, conduct large scale data analytics, and sustain successful businesses that can effectively compete with foreign-backed tech companies with much less funding challenges. In addition, dominant global platforms possess key data infrastructures that enable them to perform market shaping functions that other smaller tech companies rely on.[12] The same is true for local dominant platforms such as M-Pesa.

A variety of global and homegrown digital platforms operate in different markets, concentrated around a few key sectors: online shopping (e.g., Jumia, Takealot, Konga, Kilimall, Alibaba); food delivery services (e.g., UberEats, Glovo, Mr.D, Jumia Food); ride hailing (e.g., Uber, Bolt, Little Cab, SafeBoda); Hotel and accommodation (e.g., Airbnb, Booking.com); Social media (e.g., Facebook, Instagram, Tiktok, Snapchat, Twitter, LinkedIn); Instant messaging (e.g., Whatsapp, mobile text messaging); Search Engines (Google search, Bing); Music streaming (e.g., Spotify Africa, Apple Music, Boomplay, Youtube Music, Mdundo, MusikBi); Movie streaming (e.g., Netflix, Showmax, NollyLand, Canal+, Disney+); e-Logistics (e.g., Lori Systems, Ngamia, Leta, Sendy, Bwala, Kobo360, Truckr). Presently, platforms that have attained considerable cross-border expansion include Jumia (Nigeria), Spotify (US), Alibaba (China), Uber (US), Bolt (Estonia), Youtube Music (US), Airbnb (US), Booking.com (Netherlands), Netflix (US), Showmax (South Africa), and the various US social media platforms.

This analysis shows that while Africa's digital economy is very much locally rooted, it is also shaped by external factors such as unequal ownership of and access to market shaping digital infrastructure. In addition, African countries are economically dependent on big foreign technology companies which are seen as essential partners in enabling digital development projects aimed at increasing internet connectivity. Regulating the digital economy (through competition policy or otherwise) therefore involves a delicate consideration of interests of governments, key international and local tech players, small and medium enterprises (SMEs), and local groups where relevant.

## 3. Antitrust and Political Economy Developments in Africa

### a. The Development of African Competition Law Regimes

Like much of the rest of the world, African nations largely began to enact competition laws in the 1990s.[13] Prior to 1990, only three African countries – Gabon, Kenya, and South Africa – had competition law regimes.[14] Since then, 38 more countries (76% of African nations) have enacted national competition laws and 32 of those have operational competition agencies.[15] Of the remaining nations that don't have them, eleven participate in one of the continent's seven regional competition regimes (RCRs). Only two have no regional or national competition laws.[16]

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[12] Andreoni & Roberts, *Governing Digital Platform Power for Industrial Development*, Cambridge Journal of Economics 2022, 1433-144.
[13] Anu Bradford & Adam S. Chilton, *Competition Law Around the World from 1889 to 2010: The Competition Law Index*, 14 J. of Competition L. & Econ., 393 (2018).
[14] Tim Büthe & Wellah Kedogo Kigwiru, *The Spread of Competition Law and Policy in Africa: A Research Agenda*, 1 Afr. J. of Int'l Econ. L. 41, 46 (2020).
[15] *Id.*
[16] *Id.*

The adoption of competition laws is closely linked to the global move towards trade liberalization beginning in the early 1980s. Conditional loans from international organizations, like the World Bank and International Monetary Fund (IMF), and trade agreements with other countries required many developing nations to adopt a wide range of economic reforms, including competition policy, in exchange for needed loans. Regionalism[17] in Africa has also been a mechanism for the spread of competition laws, including multi-national regimes. At the national level, some of these policies have been at least partially justified by equity and development concerns. There is a research gap on domestic motivations and responses to the adoption of these regimes.[18]

### i. Global Trade Liberalization and Conditional Loans

As most African nations gained independence from European colonial powers in the 1960s, they were left with underdeveloped economies that were built largely to benefit their colonizers.[19] In an effort to industrialize and grow domestic economies quickly, most nations initially utilized significant state intervention and trade protectionist policies.[20] After initial growth, the economic instability and global oil crises in the late 1970s slowed or reversed many post-independence gains.[21] At the same time, international economic policies began to shift in favor of trade liberalization and multinational firms began to expand.[22] By the 1980s, institutions like the World Bank and the IMF began pivoting towards free market policies that emphasized rapid privatization and capital market liberalization to boost development.[23] Structural adjustment programs (SAPs) conditioned loans to nations suffering economically on their enactment of a wide array of economic liberalization policies, often including competition laws.[24] While the specific requirements and implementation strategies varied from nation to nation, around 32% of all conditionalities for World Bank loans in FY 98-00 included reforms relating to competition, up from only 7% in previous years.[25]

This external pressure may be a reason why some nations, like Senegal, still have significant carve-outs for government price setting in their initial competition laws.[26] Some nations were considering competition policies prior to SAPs. By the 1990s, Kenya had for example already assembled government committees proposing competition strategies prior to conditionalities.[27]

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[17] Regionalism refers to the practice of formal institutional building among different nations primarily for trade/economic integration. Regionalism in Africa is reflected by the various Regional Economic Communities (RECs) such as the East African Community, the Economic Community of West African States, the Common Market for Eastern & Western Africa, the Southern African Development Community, and the Intergovernmental Authority on Development.

[18] *Buthe & Kigwiru, supra note 14 at* at 51.

[19] D.I. Ajaegbo, *First Development Decade, 1960-1970: The United Nations and the Economic Development of Africa*, 15 Transafrican J. of Hist. 1, 2 (1986).

[20] ELEANOR M. FOX & MOR BAKHOUM, MAKING MARKETS WORK FOR AFRICA: MARKETS, DEVELOPMENT, AND COMPETITION LAW IN SUB-SAHARAN AFRICA 21 (2020).

[21] KENNETH IVERSEN, UNITED NATIONS DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, REFLECTION OF DEVELOPMENT POLICY IN THE 1970S AND 1980S 1 (July 2017).

[22] Fox, *supra* at 10.

[23] JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 13 (2002).

[24] *See* John Williamson, *The Strange History of the Washington Consensus*, 27 J. of Post Keynesian Econ. 195, 196 (2004) (articulation of the ten points referred to as the "Washington Consensus" that guided policy at the time).

[25] Private Sector Development Strategy – Directions for the World Bank Group, World Bank Group [WBG] (2001).

[26] Fox, *supra* at 30.

[27] Bernadette N. Njoroge, Competition Law and Policy in Economic Restructuring 14 (Feb. 2003) (unpublished Master of Law thesis, University of Nairobi) (on file with University of Nairobi Research Archive).

Parliamentary debate from the passage of Kenya's 1988 Restrictive Trade Practices, Monopolies and Price Control Act has also demonstrated that pre-existing concerns about racism and indigenous control over the industry were, at least rhetorically, compelling motivators for competition law domestically.[28] Competition considerations were often only one part of a broader market liberalization agenda.

Among countries that didn't adopt competition laws because of SAPs, some entered trade deals with other nations that required "harmonization" of competition laws. For example, Egypt pulled out of an IMF conditional loan plan before it would have had to adopt a competition law in the mid-90s,[29] but later adopted competition measures in 2005 in order to enter into trade agreements between North African nations and the EU.[30]

### ii. Regional Bodies and Competition Regimes

Another way that countries adopted competition regimes is through regional integration, especially as a part of common markets. African nations have often turned to regionalism as a way to assert themselves economically and/or politically against larger powers. Africa has had waves of integration, beginning in the early 1900s and peaking in the immediate post-independence period in the 1960s and the 1990s.[31]

Regional competition regimes (RCRs) help address the resource problem that many nations face when it comes to establishing and enforcing competition laws.[32] They also help address cross-border anti-competitive behavior involving multinational firms, which harms a nation's economy while occurring outside their national jurisdiction.[33] There are seven RCRs, five that have regional competition laws and enforcement bodies (WAEMU, COMESA, CEMAC, EAC, and ECOWAS) and two that require members to adopt national competition laws and cooperate with each other in a "confederate model" with no supranational body (SACU and SADC). The Agadir Free Trade Area Agreement (which has several North African nations but also includes Jordan, Palestine, and Lebanon) also requires members to adopt economic policies that ensure objectively fair competition among member states.[34]

Some African nations have no national competition law but participate in RCRs. For example, Uganda's competition law has been introduced and stalled for fifteen years, but Uganda is part of both COMESA and EAC's regional enforcement systems.[35]

Many countries have also been influenced by the regimes developed by their neighbors. Namibia, Botswana, and Eswatini, for instance, all reference South Africa's regime.

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[28] *Id.* at 15.
[29] OPERATIONS EVALUATION DEPARTMENT, AFRICAN DEVELOPMENT BANK GROUP, EGYPT: ECONOMIC REFORM AND STRUCTURAL ADJUSTMENT PROGRAMME 8 (May 15, 2000).
[30] Azza Anwar Ahmed Raslan, The Diffusion of Competition Law in Africa: Theoretical Perspectives on the Policy Transfer Process 122 (Aug.14, 2017) (unpublished Doctoral Thesis, University College London) (on file with University College of London).
[31] TERENCE CORRIGAN, SOUTH AFRICAN INSTITUTE OF INTERNATIONAL AFFAIRS, PUZZLING OVER THE PIECES: REGIONAL INTEGRATION AND THE AFRICAN PEER REVIEW MECHANISM 8 (January 2015).
[32] Fox, *supra* at 123.
[33] Michal S. Gal, *Regional Competition Law Agreements: An Important Step for Antitrust Enforcement*, 60 U. Toronto L. J. 239, 249 (2010).
[34] Agadir Agreement art. 2, Feb. 25, 2004 T4 (WB).
[35] Tim Büthe, *supra* at 66.

### b. Europe's Influence and the Digital Markets Act

As noted, in response to post-colonial and neoliberal trade pressures, competition law regimes in Africa often emulate policy developments in the EU. As the EU prepares to enforce the DMA,[36] a question for African competition law and market regulation experts is whether a regime similar to the DMA should be promoted in African countries.[37] The DMA combines *ex ante* prohibitions on tying, bundling and self-preferencing with access remedies, data disclosures and transparency obligations for digital platform gatekeepers such as Google or Meta. It will act as a substitute for enforcement functions traditionally covered by competition regulators but will also complement antitrust action: it introduces obligations for industry actors that exceed antitrust authorities' routine enforcement powers.[38] For example, under the DMA, a company like Google, even before being investigated from an antitrust perspective, will have *ex ante* obligations not to combine user-data across different product segments like search and YouTube; it will have to make it easy for advertisers to rely on alternative ad-exchanges or alternative payment methods; it will have to provide radical forms of interoperability with competing services; it will also have to allow Android users to use other search engines as their default.[39]

As African countries look to Europe for inspiration when designing competition regimes for their digital markets, the question is how far this legal borrowing should extend. Should there be a pan-African approach or a variety of bottom-up local efforts? The Protocol on Competition Policy to the Agreement Establishing the AfCFTA sets forth specific obligations for "gatekeepers". We now analyze developments at the regional and local level in Africa in view of understanding the suitability of DMA-like regime for the African continent.

#### i. Digital Markets Regulation: From Europe to Africa

In 2023, the Assembly of Heads of State and Government adopted the AfCFTA Protocol on Competition Policy ('the Protocol'), which is the first step towards its ratification and domestication by State Parties.[40] Those State Parties constitute most of the countries on the African continent.[41] The Protocol is meant to promote and harmonize competition laws but also

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[36] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final - 2020/0374 (COD), December 15, 2020, https://ec.europa.eu/info/sites/default/files/proposal-regulation-single-market-digital- services-digital-services-act_en.pdf [hereafter DMA].

[37] Folakunmi Pinheiro, *Regulating Africa's Digital Markets: What to Do, and What Not to Do*, Competition Policy International Columns, June 11, 2023, https://www.pymnts.com/cpi_posts/regulating-africas-digital-markets-what-to-do-and-what-not-to-do/ ; Zlatina Georgieva, *How(Not) to Regulate Digital Markets: Lessons from the EU*, Afronomics, August 26, 2021, https://www.afronomicslaw.org/category/analysis/hownot-regulate-digital-markets-lessons-eu.

[38] Sector-specific regulation is often perceived as different or even as opposed to antitrust and competition law enforcement: the first rigid while the second is flexible; the first interventionist while the second is relatively hands-off. But seeing them as opposites is wrong. See: Elettra Bietti, 'Structuring Digital Platform Markets: Antitrust and Utilities' Convergence' (2024) University of Illinois Law Review (forthcoming).

[39] See Articles 5 and 6 of the DMA.

[40] For an earlier discussion of the Protocol and its ambitions, see Eleanor Fox, 'A Competition Law for Africa: Vision for AfCFTA' (*Competition Policy International*, 13 October 2022) <https://www.pymnts.com/cpi_posts/a-competition-law-for-africa-vision-for-afcfta/>.

[41] See <https://au-afcfta.org/state-parties/>.

contains a number of provisions that impose specific obligations on digital gatekeepers. To understand these provisions, we must take a look at their inspiration: the DMA.[42]

The DMA, adopted in 2022, is part of a larger package of EU digital market reforms. The instrument is aimed at ensuring "fairness" and "contestability" in digital platform markets.[43] The instrument is explicitly aimed at addressing the limits of case-by-case and *ex post* competition law enforcement in digital markets, which is slow and piecemeal and allows emergent forms of digital power to entrench themselves without much scrutiny. The DMA therefore takes an *ex ante* (pre-emptive) rather than *ex post* approach, which allows for timely and cross-sectoral structuring of digital industries. Such structuring is intended to rebalance the relation between dominant platforms and their business users (fairness) and to allow entrants to compete with incumbent platforms (contestability). A similar ethos of fairness and contestability could helpfully re-orient African digital markets toward greater accountability, competition and fairness. Yet the EU regime construes fairness too narrowly for African purposes. The notion of fairness is one that regulators in Africa could push further.

The scope of the DMA is limited to "gatekeepers".[44] To qualify as a gatekeeper, a firm must first provide a "core platform service" (CPS) such as online intermediation, search and social networking. CPS are gateways in the digital economy, but legislators were only concerned with *important* gateways. That is why the CPS provider must fulfill certain qualitative criteria, defined through quantitative thresholds, to be designated as gatekeeper:

a) it has a significant impact on the internal market: this is the case where it achieved an annual EU turnover above €7,5B in each of the last three financial years, or where its average market cap amounted to at least €75B in the last financial year, and it provides the same CPS in at least three Member States;
b) the CPS it provides is an important gateway for business users to reach end-users: this is the case where in the last financial year, the CPS had at least 45M monthly active end-users established or located in the EU and at least 10,000 yearly active business users established in the EU;
c) it enjoys an entrenched and durable position: this is the case where the thresholds of (b) were met in each of the last three financial years.

Based on these criteria, the European Commission (EC) recently identified 22 core platform services offered by six gatekeepers: Alphabet (Google), Amazon, Apple, ByteDance (TikTok), Meta (Facebook) and Microsoft.[45] These six gatekeepers are subject to a list of obligations, many of which are inspired by competition law cases at the EU or at the Member State level.[46] The obligations and their competition law roots are described in the following table:

[42] For a more elaborate discussion, on which this section is based, see Friso Bostoen 'Understanding the Digital Markets Act' (2023) 68 Antitrust Bulletin 263.
[43] Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector [2022] OJ L265/1 (hereafter: DMA), art 1(1).
[44] ibid, arts 2–3.
[45] EC, 'Digital Markets Act: Commission designates six gatekeepers' (press release, 6 September 2023) IP/23/4328.
[46] DMA, arts 5–7.

| Article | Obligation | Competition Law Roots |
|---|---|---|
| 5(2)(a) | not process personal data from 3rd parties | Bundeskartellamt (BKA), *Facebook*[47]<br>Competition and Markets Authority (CMA), Digital advertising market study[48] |
| 5(2)(b), (d) | not combine personal data from CPS with data from 3rd parties & other services gatekeeper | BKA, *Facebook* and *Facebook/Oculus*[49]<br>Autorità Garante della Concorrenza e del Mercato (AGCM), *Facebook*[50]<br>CMA, Digital advertising market study |
| 5(2)(c) | not cross-use personal data from CPS in other services gatekeeper | Belgian Competition Authority, *Nationale Loterij*[51]<br>Autorité de la concurrence (AdlC), *Engie*[52]<br>AGCM, *Enel*[53] |
| 5(3) | not impose narrow & wide most favored nation clauses (MFNs) | EC, *E-books [Apple]*[54] and *E-book MFNs (Amazon)* [55]<br>CMA, *Amazon*[56]<br>BKA, *Amazon*,[57] *HRS*,[58] *Booking*,[59] *Verivox*[60] and *Amazon*[61]<br>AdlC, AGCM and Konkurrensverket, *Booking*[62]<br>Paris Commercial Court, *Amazon*[63] |
| 5(4), 5(5) | not impose anti-steering & supporting measures | EC, *Apple App Store Practices*[64]<br>Dutch Competition Authority (ACM), *Apple*[65] |

[47] Bundeskartellamt, Case B6-22/16, *Facebook*, 7 February 2019.
[48] CMA, 'Online platforms and digital advertising' (Market Study) July 2020.
[49] Bundeskartellamt, Case B6-55/20, *Linkage of Meta Quest (formerly Oculus) with the Facebook network*, 23 November 2022 (Case Summary).
[50] AGCM, 'WhatsApp fined for 3 million euro for having forced its users to share their personal data with Facebook' (press release, 12 May 2017) <https://en.agcm.it/en/media/detail?id=a6c51399-33ee-45c2-9019-8f4a3ae09aa1>.
[51] Belgian Competition Authority, Decision BMA-2015-P/K-27-AUD, *Stanleybet et al./Nationale Loterij*, 22 September 2015.
[52] AdlC, Decision 17-D-06, *Engie*, 21 March 2017.
[53] AGCM, Case A511, *Enel*, 8 January 2019.
[54] *E-books* (Case COMP/AT.39847) Commission Decision of 12 December 2012.
[55] *E-book MFNs and related matters (Amazon)* (Case AT.40153) Commission Decision of 4 May 2017.
[56] Competition and Markets Authority, 'OFT welcomes Amazon's decision to end price parity policy' (press release, 29 August 2013).
[57] Bundeskartellamt, Case B6-46/12, *Amazon removes price parity obligation for retailers on its Marketplace platform* (Case Report), 9 December 2013.
[58] Bundeskartellamt, Case B9-66/10, *HRS-Hotel Reservation Service*, 20 December 2013.
[59] Bundeskartellamt, Case B 9-121/13, *Booking.com*, 23 December 2015.
[60] Bundeskartellamt, 'Verivox vows to stop using "best price" clauses' (press release, 3 June 2015) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/03_06_2015_Verivox.html>.
[61] Bundeskartellamt, Case B2-88/18, *Amazon*, 17 July 2019.
[62] AdlC, Decision 15-D-06, *Booking.com*, 21 April 2015; AGCM, 'Commitments offered by Booking.com: closed the investigation in Italy, France and Sweden' (press release, 21 April 2015) <https://en.agcm.it/en/media/detail?id=42f88c3c-d668-409f-b604-40581a05c97b>.
[63] Tribunal de commerce de Paris, Case 2017050625, *Ministre de L'Economie et des Finances v Amazon*, 2 September 2019 (one of the seven clauses found illegal relates to parity).
[64] EC, 'Commission sends Statement of Objections to Apple on App Store rules for music streaming providers' (press release, 30 April 2021) IP/21/2061.
[65] Autoriteit Consument & Markt, Case ACM/19/035630, *Apple*, 24 August 2021 (Summary of Decision).

| | | |
|---|---|---|
| | (cross-platform access to content) | |
| 5(7), 5(8) | not require use of certain secondary services or registration with other CPS | ID service: BKA, *Facebook/Oculus*<br>Web browser: CMA, Mobile ecosystems market study[66] and subsequent Mobile browsers market investigation[67]<br>Payment: EC, *Apple App Store Practices*; ACM, *Apple* and CMA, Mobile ecosystems market study<br>Other CPS: EC, *Google Android*[68] and *Facebook Marketplace*[69] |
| 6(2) | not use business users' data to compete with them | EC, *Amazon Marketplace*[70] and *Facebook Marketplace* |
| 6(5) | not self-preference in ranking | EC, *Google Search (Shopping)*[71] and *Amazon Buy Box*[72]<br>AGCM, *Amazon*[73] |
| 6(6) | not restrict switching between secondary services | None |
| 6(3) | allow un-installation & prompt default selection (search, browser, assistant) | EC, *Microsoft I* (tying abuse),[74] *Microsoft II*[75] and *Google Android*<br>CMA, Mobile ecosystems market study |
| 6(4) | allow installation & default selection of third-party apps, app stores | None |
| 6(7) | allow equal interoperability with hardware & software features | EC, *Microsoft I* (refusal to supply abuse) and *Apple Mobile Payments*[76]<br>ACM, Big Techs in the payment system (report),[77] see also the subsequent investigation[78] |

[66] CMA, 'Mobile ecosystems market study' (Final Report) June 2022.
[67] CMA, 'Mobile browsers and cloud gaming market investigation' (Issues Statement) December 2022.
[68] *Google Android* (Case AT.40099) Commission Decision of 18 July 2018.
[69] EC, 'Commission sends Statement of Objections to Meta over abusive practices benefiting Facebook Marketplace' (press release, 19 December 2022) IP/22/7728.
[70] EC, 'Commission accepts commitments by Amazon barring it from using marketplace seller data, and ensuring equal access to Buy Box and Prime' (press release, 20 December 2022) IP/22/7777.
[71] *Google Search (Shopping)* (Case AT.39740) Commission Decision of 27 June 2017.
[72] EC, 'Commission accepts commitments by Amazon barring it from using marketplace seller data, and ensuring equal access to Buy Box and Prime' (press release, 20 December 2022) IP/22/7777.
[73] AGCM, 'Amazon fined over € 1,128 billion for abusing its dominant position' (press release, 9 December 2021) <https://en.agcm.it/en/media/press-releases/2021/12/A528>.
[74] *Microsoft* (Case COMP/C-3/37.792) Commission Decision of 24 March 2004.
[75] *Microsoft (Tying)* (Case AT.39530) Commission Decision of 16 December 2009.
[76] EC, 'Commission sends Statement of Objections to Apple over practices regarding Apple Pay' (press release, 2 May 2022) IP/22/2764. Near-field-communication (NFC) technology, the subject of the case, is specifically mentioned in DMA, recital 56.
[77] ACM, 'Big Techs in the payment system' (Report) November 2020.
[78] The ACM investigated payment apps' access to NFC but did so based not on competition law but on the Interchange Fee Regulation, which it found lacking, which is why it closed its investigation. See ACM, 'Closure of the investigation

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|---|---|---|
| | | AdlC, *Google (online advertising)*[79]<br>AGCM, *Android Auto*[80]<br>See also the German 'Lex Apple Pay'[81] |
| 6(9) | provide end-users data portability | None, but see GDPR, art 20 |
| 6(10) | provide business users access to self-generated data | None |
| 6(11) | provide FRAND access to search data | None, but see CMA, Retail banking market investigation[82] and PSD2[83] |
| 6(12) | provide FRAND access to app stores, search & social | App stores: Paris Commercial Court, *Google*[84]; ACM, Mobile app stores market study[85] and CMA, Mobile ecosystems market study<br>Search: EC, *Google Search (Shopping)* |
| 6(13) | maintain proportionate CPS termination terms | None |
| 7 | interoperability of NIICS | None, but see Communications Code[86] |

The past decade of competition enforcement in digital platform markets in Europe paved the way for these new regulatory obligations under the DMA. In a similar vein, lawmakers in Africa could now rely on existing competition law and antitrust cases in the region to establish their own local *ex ante* measures against digital actors.

Yet African lawmakers seem to be favoring a different course of action. So far, they have relied on European precedents and immediately enshrined a set of DMA-style obligations in the Protocol. This is not entirely new: decades of EU case law also made it into the South African and Kenyan competition acts as we shall see below. In the Protocol, this new instance of incorporation of EU standards takes the following form.

First, the Protocol defines a gatekeeper as "an undertaking that has a significant impact on the Market, operates a core platform service that serves as an important gateway for business users to reach end-users, enjoys an entrenched and durable position in its operations or it is foreseeable

into payment apps confirms need for new rules' (press release, 2 July 2021) <https://www.acm.nl/en/publications/closure-investigation-payment-apps-confirms-need-new-rules>.

[79] AdlC, Decision 21-D-11, *Publishers v Google (online advertising)*, 7 June 2021.

[80] Autorità Garante della Concorrenza e del Mercato, 'Google fined over 100 million for abuse of dominant position' (press release, 13 May 2021) <https://en.agcm.it/en/media/press-releases/2021/5/a529>.

[81] Gesetz über die Beaufsichtigung von Zahlungsdiensten, §58a, forcing Apple to provide access to its NFC technology to facilitate mobile payments.

[82] CMA, 'Retail banking market investigation' (Order) 2017.

[83] Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market [2015] OJ L337/35, arts 66 *sq*.

[84] Tribunal de commerce de Paris, Case 2018017655, *Ministère de l'économie et des finances v Google*, 28 March 2022. See similarly, but without finding the commission fees themselves unbalanced, Tribunal de commerce de Paris, Case 2017040626, *Ministère de l'économie et des finances v Apple*, 19 December 2022.

[85] ACM, 'Market study into mobile app stores' (Report) ACM/18/032693.

[86] Communications Code, arts 59–61 (before, see Directive 2002/19/EC of the European Parliament and of the Council on access to, and interconnection of, electronic communications networks and associated facilities [2002] OJ L108/7).

that it will enjoy such a position in the near future".[87] While this definition leaves some aspects for further interpretation, including with quantitative thresholds, in its current form it is virtually identical to the DMA's gatekeeper definition.

Second, the Protocol imposes a number of obligations on gatekeepers:

a) imposing price or service parity clauses on business users;

b) imposing anti-steering provisions, or otherwise preventing business users from engaging consumers directly outside of a core platform;

c) using business user data to compete against the business user;

d) self-preferencing of services or products offered by the gatekeeper on a core platform;

e) differentiation in fees or treatment against SMEs;

f) placing restrictions on the portability of data or other actions that inhibit switching platforms for business and end-users;

g) failing to identify paid ranking as advertising in search results and to allow paid results to exceed organic results on the first results page;

h) combining personal data sourced from different services offered by the gatekeeper; or

i) requiring the pre-installation of gatekeeper applications or services on devices.

Again, almost each of these obligations can be found in the DMA. The Protocol formulates some of the obligations more widely than the DMA: for example, it prohibits self-preferencing, while the DMA only prohibits specific forms of self-preferencing. The Protocol also specifically calls out SMEs as the intended beneficiary, e.g., of the prohibition against differentiation in fees. This seems aimed at a known competitive problem, whereby digital platforms (e.g., in food delivery) charge lower fees to large multinational chains (such as MacDonald's) and higher fees to small local businesses.[88] Finally, it includes an obligation to identify paid ranking in search results as advertising, which the EU regulated pre-DMA through the Platform-to-Business Regulation.[89]

Some have argued that a DMA-style regulation is exactly what Africa needs.[90] But transplanting regulation warrants caution. Given the differences in economic characteristics, local needs, and institutional divergences of competition law regimes in Africa, from the EU competition law apparatus, we believe that a granular country-by-country analysis will provide deeper insight into the form a DMA-like reform would take in the continent.

## 4. Two Case Studies

In order to better understand the development of enforcement in digital markets from pure antitrust and competition law enforcement to hybrid pro-competitive regulatory frameworks, we

[87] Protocol to the Agreement Establishing the African Continental Free Trade Area on Competition Policy (Draft), art 1(k).
[88] See, e.g., CCSA, Online Intermediation Platforms Market Inquiry (Final Report, July 2023) 13 ("The two leading food delivery platforms both offer significantly differentiated terms of service against the independent restaurants by charging a much higher level of commission fees for food orders on their platforms").
[89] Regulation (EU) 2019/1150 of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services [2019] OJ L186/57.
[90] Zlatina Georgieva, 'How (Not) to Regulate Digital Markets: Lessons from the EU' (*Afronomics*, 26 August 2021) <https://www.afronomicslaw.org/category/analysis/hownot-regulate-digital-markets-lessons-eu> (perceiving the DMA as an instrument of industrial policy).

now look more closely at the history and recent competition law developments in South Africa and Kenya. We find that both countries' competition regimes aim for more than just market efficiency and consumer protection, and are therefore more ambitious than the US and EU regimes. Competition enforcement in Kenya and South Africa also fulfills other socio-economic goals such as protecting employees, promoting economic empowerment of SMEs and historically marginalized groups. Current trends in technology decentralization also reflect these objectives. We also find that the effects of global digital platforms on these economies are significantly different from the effects in the EU and US, largely due to the different economic make-up of these regions. Such differences therefore demand more contextual approaches to principles such as "fairness" and "contestability", rather than blanket transplantation of the DMA.

### a. South Africa

#### i. A snapshot of South Africa's tech landscape

South Africa arguably has the most developed digital economy in Africa. It has one of the highest internet penetration rates in Africa at 72.3% (43.48 million internet users) and a mobile penetration rate of 187.4% (112.7 million cellular mobile connections).[91] Like other countries on the continent, most people access the internet through their mobile phones. South Africa also has robust digital infrastructure due to early investments made in fiber-optic cables and international submarine cables. International connectivity is set to increase significantly following the launch of Google's Equiano sub-sea cable that connects South Africa to Europe.[92] These trends notwithstanding, the digital divide still persists in South Africa: the cost and quality of access for poorer, more rural consumers is relatively worse than in comparable countries. Thus, improving the costs, choices, and quality of internet services is a priority of the South African government.

South Africa's tech ecosystem is thriving with a variety of startups in sectors such as fintech, e-commerce, e-health, ed-tech, agri-tech, logistics, legal tech etc. Fintech and e-commerce are the most prominent sectors accounting for 30% and 10.2% of startup economic activities respectively.[93] However, the ecosystem is also plagued by inequality in investor opportunities, which limits the growth of startups by historically marginalized groups. Black and/or female entrepreneurs struggle to raise capital compared to their white, male, middle-class counterparts.

Due to its cumulative tech leadership, South Africa serves as a regional hub for global initiatives, including global digital companies wishing to set up regional headquarters or to establish regional cloud hosting services and data centers. For instance, Microsoft, IBM, Amazon Web Services, Teraco, and Dimension Data have all made investments to offer these services from South Africa.[94] For South Africa, attracting such foreign investment is important and from the State's perspective, these developments cannot simply be written off as being equal to what others term "digital colonialism". The development policy position is to identify opportunities for the local economy, and strategically regulate in support of policy goals such as promoting the growth of

[91] https://datareportal.com/reports/digital-2023-south-africa
[92] https://www.datacenterdynamics.com/en/news/google-officially-launches-equiano-subsea-cable/
[93] The South African Startup Ecosystem Report 2022 at p. 12. Available at: https://disrupt-africa.com/south-african-startup-ecosystem-report-2022/
[94] https://www.gov.za/blog/new-investments-propel-our-digital-economy-forward

SMEs and the participation of historically marginalized groups.[95] This seems to be in consonant with the Competition Commission's approach to regulating digital markets, and its particular adoption of the EU's DMA ideals of "fairness" and "contestability" as we shall see below.

### ii. South Africa's antitrust regime and institutions

South-Africa's first competition law, the Regulation of Monopolistic Conditions Act, dates back to 1955. Under this law, the Minister of Trade and Industry could order investigations, which were then carried out by the Board of Trade and Industry. This enforcement structure, combined with a law with a "public interest" standard of analysis, led to a "cautious and permissive" system.[96] In 1979, a new law instituted a Competition Board, which was appointed by the Minister of Trade and Industry but could investigate matters on its own initiative. Real change, however, came after the regime change in 1994, when the first broadly democratic government was elected.

In 1992, the African National Congress (ANC) adopted "policy guidelines for a democratic South Africa".[97] A section on "antitrust, anti-monopoly and mergers policy" read as follows:

> The concentration of economic power in the hands of a few conglomerates has been detrimental to balanced economic development in South Africa. The ANC is not opposed to large firms as such. However, the ANC will introduce anti-monopoly, anti-trust and mergers policies in accordance with international norms and practices, to curb monopolies, continued domination of the economy by a minority within the white minority and promote greater efficiency in the private sector.

The ANC also stressed the "highly concentrated" nature of the domestic market in a white paper, concluding that market forces alone would not be enough to revitalize the economy—more active reforms in favour of small- and medium-sized businesses (SMEs) would be needed.[98]

The South-African economy was indeed concentrated: five investment conglomerates accounted for 84% of the capitalisation of the stock exchange.[99] There are different reasons for this concentration. The conglomerates have their roots in the mining houses of the 19th century, which were historically the dominant economic force. Moreover, South-Africa's economic policy had been protectionist.

After a four-year process, the new competition law was adopted in 1998.[100] The purpose of the Act, found in §2, was – in comparison to those of the U.S. and EU (as interpreted at that point) – ambitious:

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[95] See: Thando Vilakazi, *Policy Proposals for South Africa on the Digital Economy*, CCRED Policy Brief 5, May 2020. Available at: https://www.compcom.co.za/wp-content/uploads/2021/07/CCRED-Policy-Brief_Policy-proposals-for-SA-on-the-digital-economy.pdf

[96] OECD, 'Competition Law and Policy in South Africa' (Peer Review, 2003) 12–13.

[97] African National Congress, 'Ready to Govern: ANC policy guidelines for a democratic South Africa' (31 May 1992), available at <https://www.anc1912.org.za/policy-documents-1992-ready-to-govern-anc-policy-guidelines-for-a-democratic-south-africa/>.

[98] White Paper on Reconstruction and Development, Government Gazette No. 16085, 23 November 1994, para 3.6.7, available at <https://www.gov.za/sites/default/files/governmentgazetteid16085.pdf>.

[99] OECD, 'Competition Law and Policy in South Africa' (Peer Review, 2003) 10 (one of them accounted for 43% of the capitalisation by itself). For an account of South-African conglomerates around this time, see Grietjie Verhoef, 'The globalisation of South African conglomerates, 1990–2009' (2011) 26 Economic History of Developing Regions 83.

[100] Act to provide for the establishment of a Competition Commission responsible for the investigation, control and evaluation of restrictive practices, abuse of dominant position, and mergers; and for the establishment of a Competition Tribunal responsible to adjudicate such matters; and for the establishment of a Competition Appeal

(a) to promote and maintain competition in the Republic in order;
(b) to promote the efficiency, adaptability and development of the economy;
(c) to provide consumers with competitive prices and product choices;
(d) to promote employment and advance the social and economic welfare of South African;
(e) to expand opportunities for South African participation in world market and recognise the role of foreign competition in the Republic;
(f) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
(g) to promote a greater spread of ownership; in particular to increase the ownership stakes of historically disadvantaged persons.

This atypically broad purpose is the main difference with the EU and U.S. competition laws. Goals (d)–(g) in particular have been, apart from limited exceptions, absent from EU–U.S. competition law. While the Act has been amended various times, last in 2018, its purpose remains the same to this day.[101] Apart from its atypically broad purpose, the Act includes competition law's typical three prohibitions, though they are set out in more detail than their U.S. and EU counterparts[102] and contain some idiosyncrasies.

First, the Act prohibits restrictive agreements, horizontal and vertical (§§ 4–5). Particularities include a specific provision aimed at interlocking directorates and shareholders, which is explained by the past experience of closely intertwined conglomerates.

Second, the Act prohibits "abuse of dominance", thus using the EU rather than U.S. ("monopolization") terminology (§§ 6–9). There is a presumption of dominance when a firm holds a market share exceeding 45% (compared to the EU's threshold of 50%).[103] The Act prohibits both exploitative practices (e.g., excessive prices) and exclusionary practices (e.g., refusal to supply).[104] Through active intervention of the competent minister, SMEs and firms controlled by historically disadvantaged persons (HDPs)[105] can benefit from extra protections against dominant firms. It accords special attention to price discrimination, dedicating a separate section to this form of abuse. The U.S. also has a specific statute on price discrimination, which shares a goal of protecting SMEs,[106] to which the South-African Act adds the protection of HDPs. Finally, the Act

Court; and for related matters ('Competition Act No. 89 of 1998'), Government Gazette No. 19412, 30 October 1998, available at <https://www.gov.za/sites/default/files/gcis_document/201409/a89-98.pdf>.
[101] The amendments and current version ('Competition Act') are available at <https://www.comptrib.co.za/legislation-and-forms/competition-act>.
[102] For example, §4(5) spells out the single economic entity doctrine, which in the EU has been developed through case law.
[103] Case C-62/86 *AKZO Chemie v Commission* EU:C:1991:286, para 60 ('the Court has held that very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position, [which] is the situation where there is a market share of 50% such as that found to exist in this case'). In case of a market share between 40–50%, additional factors (such as the strength of competitors) are required to establish a dominant position, see Case 27/76 *United Brands v Commission* EU:C:1978:22, paras 108–10.
[104] It also explicitly prohibits abuses such as margin squeeze, which were developed in the EU through case law. Similarly, the legal test for excessive pricing is set out in detail in the Act, while the legal test was determined in EU judgments rather than the text.
[105] An HDP is defined as 'one of a category of individuals who, before the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), came into operation, were disadvantaged by unfair discrimination on the basis of race', see Competition Act, §3(2)(a). It includes firms that are majority-owned by HDPs.
[106] Anti-Price Discrimination Act ('Robinson–Patman Act'), Pub. L. No. 74-692, 49 Stat. 1526.

includes a prohibition of "complex monopoly conduct", which is in fact aimed at oligopolistic conduct (and in particular the so-called "oligopoly problem").

Exemptions to these rules on restrictive agreements and abuse of dominance are possible, inter alia when they contribute to (i) maintenance or promotion of exports; (ii) expansion by SMEs and firms controlled by HDPs; (iii) economic development and growth of an industry; and (iv) the promotion of employment (§10).

Third, the Act institutes an *ex ante* merger control regime, which prohibits mergers that are likely to 'substantially prevent or lessen competition' (§11–18). As in the prohibitions of restrictive agreements and abuse of dominance, a concern for efficiency is clear: anticompetitive effects can generally be offset by procompetitive gains. More than in those other prohibitions, however, "substantial public interest grounds" are front and center in merger control. Such grounds include employment, SMEs and HDPs, competition in international markets, and the promotion of a greater spread of ownership, all of which can justify an otherwise anticompetitive merger.

Enforcement of competition law is entrusted to the independent Competition Commission of South Africa (CCSA), which investigates potential infringements and authorizes or prohibits mergers (§20–21).[107] In doing so, it benefits from wide investigatory powers and remedial powers (including fines). The CCSA can also conduct market inquiries (§43A–G), in which it takes a deeper look at the structure, outcomes and conduct in a wider market. If the CCSA finds an adverse effect on competition, it can then take reasonable and practicable action to remedy that effect – a power the EC does not have.[108] Appeals are entrusted to the specialized Competition Tribunal, which can also adjudicate matters without previous CCSA decision (§27).[109] In turn, appeals against decisions of the Competition Tribunal are possible before the Competition Appeals Court (§37).

### iii. South African antitrust in tech markets

The CCSA has been concerned about competition issues in the digital economy although, until recently, it had not undertaken decisive enforcement action.[110] The CCSA sees both opportunities and risks, which it set out clearly in its Digital Markets Paper (published in 2020 and updated in 2021):

[107] Further on South-Africa's competition institutions, see Dennis Davis and Lara Granville, 'South Africa: The Competition Law System and the Country's Norms' in Eleanor Fox and Michael Trebilcock (eds), *The Design of Competition Law Institutions: Global Norms, Local Choices* (Oxford University Press 2012), 266–328.
[108] The UK Competition & Markets Authority does, see the Enterprise Act 2002, Part 4. Market Studies and Investigations and further CMA, Guidelines for market investigations: their role, procedures, assessment and remedies (April 2013).
[109] The CC can also refer matters to the Competition Tribunal. For appeals against market inquiries and associated action, see Competition Act, §43F.
[110] To get a sense of CCSA's competition law enforcement in 'traditional' (non-tech) markets, see CCSA, 'Unleashing Rivalry: Ten Years of Enforcement by the South African Competition Authorities' (Report, 2009); D. M. Davis, 'South Africa' in Sanjukta Paul, Shae McCrystal and Ewan McGaughey (eds), Competition Law and Labour Law (Cambridge University Press 2022); David Reader, 'Accommodating Public Interest Considerations in Domestic Merger Control: Empirical Insights' (2016) CCP Working Paper 16-3; OECD, 'Public Interest Considerations in Merger Control' (Note by South Africa) DAF/COMP/WP3/WD(2016)13; Thalalolwazi Msutu, 'From Massmart to Mediclinic (with a Drivethru Burger King): The Development of the Public Interest Standard in Merger Regulation' (2023) ASCOLA Conference Paper ; and landmark cases such as CCSA, Case LM211JAN16*, Anheuser-Busch Inbev/SABMiller*, 30 June 2016. Much of the commentary focuses on South-African Competition Law's atypical focus on employment.

> The arrival and rapid rise of the digital economy presents South Africa with an opportunity to reverse the pervasive, triple scourge of unemployment, inequality and poverty. But in order to harness the promised benefits of digitalisation South Africa must create a commercial and regulatory environment designed to extract those benefits and distribute them in a way that ensures inclusive economic growth, that is 1) greater participation by black and women-owned firms and 2) increased and meaningful employment.[111]

In short, the digital economy promises benefits, but only if it does not further a historical trend towards concentration – and platform markets are especially susceptible to concentration. To counter this trend, competition law enforcement should take a proactive approach, preventing rather than remedying the entrenchment of dominance. Before looking at what this proactive approach looks like, let us look at previous enforcement actions relating to conduct and mergers.

Merger control in the digital economy has been limited. As the CCSA remarked in 2021:

> [T]here may have been under enforcement in this area. This can be seen in the Commission's statistics which show that of the 87 mergers in digital markets notified between 2011 and 2018, 82 were approved without conditions and the remaining 5 were approved with public interest conditions. Notably, no conditions have been imposed to address substantive competition concerns.[112]

These numbers are, however, in line with those of the EU and U.S., which – during that time period – did not prohibit mergers in the digital economy either. In recent years, the CCSA has stepped up its merger enforcement. The CCSA looked at international mergers such as *Microsoft/LinkedIn* (2016), approving it without conditions.[113] In *Google/Fitbit* (2020), by contrast, the CCSA's clearance was conditional.[114] Commitments related to access to the Android OS for manufacturers of competing wearables, data separation between Google And Fitbit, and continued access to Fitbit data by third parties (e.g., app developers).[115] The CCSA also examines domestic tech mergers. *Takealot/Kalahari* (2014) involved two of the largest online retailers in South Africa. Nevertheless, the CCSA had no competition concerns and approved the merger only with conditions related to employment.[116]

The most aggressive stance was taken in *MIH eCommerce/WeBuyCars* (2018). MIH eCommerce is a holding company fully owned by Naspers Group – South Africa's premier tech conglomerate. It operated a classifieds ads platform for new and used vehicles called Autotrader.[117] With the transaction, it was taking a 60% stake in WeBuyCars, which operated an online used car buying service. The merger did not present any *actual* overlap. However, Naspers had already acquired a stake in Frontier Car Group – an acquisition through which it intended to enter the South-African market for online car buying. Based on this *potential* (or planned) competition, combined

[111] Competition Commission of South Africa, 'Competition in the Digital Economy' (Version 2, 2021), 6.
[112] ibid 7 (adding that: 'The history, however, must be seen against a backdrop of low numbers of prohibitions in merger cases generally.').
[113] By contrast, the EC only approved the acquisition with conditions, see *Microsoft/LinkedIn* (Case M.8124) Commmission Decision of 6 December 2016.
[114] As in the EU, see *Google/Fitbit* (Case M.9660) Commission Decision of 17 December 2020.
[115] CCSA, Case 2020SEP0045, *Google/Fitbit*, 1 October 2021. This decision largely mirrors theCo EU decision.
[116] CCSA, Case 20140CT0543, *Takealot Online/Kalahari.com*, 6 March 2015.
[117] Car Trader was acquired earlier by MIH eCommerce—a merger that was unconditionally approved by the CCSA in 2017.

with conglomerate effects (due to the connection with Autotrader), the CCSA recommended the Tribunal prohibit the merger,[118] which it did.[119]

The most recent digital merger scrutinized by the CCSA is *Microsoft/Activision-Blizzard*. It approved the $69B acquisition without conditions,[120] while other major jurisdictions either approved the merger with conditions[121] or tried (unsuccessfully) to block it.[122]

When it comes to anticompetitive conduct, there have been two consequential abuse of dominance proceedings. The first one was the *Metered Taxi Industry v Uber*, in which the former accused the latter of, inter alia, predatory pricing. The CCSA took the view that Uber's conduct did not contravene the Competition Act.[123] Given that the complaint was rejected, the record is short on reasons for the decision but is in line with those of other African competition authorities.

The second proceeding concerned Facebook, and in particular its WhatsApp messaging service. WhatsApp's Business API (application programming interface) allows for mass messaging, advanced automation, eCommerce integration, etc.[124] The South-African government made use of this API to launch its GovChat platform, which enables government–citizen communication on anything from pothole alerts to covid awareness. When Facebook off-boarded GovChat from the WhatsApp Business API, halting communication, the CCSA started an investigation. It sought and received interim relief from the Tribunal, which prevented the off-boarding.[125] Subsequently, it referred the full case to the Tribunal for prosecution, asking for the maximum fine (10% of South African turnover).[126] In terms of abuse, it has identified either a refusal to supply, a refusal of access to an essential facility, or another exclusionary act. The underlying idea is that WhatsApp is the only communication platform with the necessary scale to host an effective government messaging service. The Tribunal has yet to decide on the merits.[127]

### iv. South African regulatory developments in tech markets

The competition law proceedings discussed above have been one-off, conduct-specific and mostly backward-looking. The CCSA pursued a different approach with its *Online Intermediation Platforms Market Inquiry*, of which the final report was published in July 2023.[128] While there is meanwhile a rich set of digital monopolization cases, from the EU but also countries in the Global

[118] CCSA, Case LM183SEP18, *MIH eCommerce/WeBuyCars*, 15 May 2019.
[119] Competition Tribunal of South Africa, Case LM183SEP18, *MIH eCommerce/WeBuyCars*, 26 March 2020.
[120] CCSA, 'Merger Alert: Anchorage Merger Sub. Inc and Activision Blizzard Inc' (press release, 3 July 2023) <https://www.comptrib.co.za/info-library/case-press-releases/merger-alert-anchorage-merger-sub-inc-and-activision-blizzard-inc>.
[121] EC, 'Commission clears acquisition of Activision Blizzard by Microsoft, subject to conditions' (press release, 15 May 2023) IP/23/2705.
[122] *Federal Trade Commission v. Microsoft Corporation* (D.N.D.C. 2023).
[123] See CCSA, *Metered Taxi Industry v Uber* (Statement on the decisions of the Competition Commission), 20 October 2016. For a discussion by a case manager of the Competition Tribunal, see Ndumiso Ndlovu, '*Uber vs. Metered Taxis*: A Competition Issue Or A Regulatory Nightmare', available at <http://www.compcom.co.za/wp-content/uploads/2017/09/Ndumiso-Ndlovu_Uber-v-Metered-Taxis_Final-Paper-as-amended_.pdf>.
[124] See <https://business.whatsapp.com/>.
[125] Competition Tribunal of South Africa, Case IR165Nov20, *GovChat and LetsTalk v Facebook*, 21 January 2021.
[126] CCSA, 'Facebook Prosecuted for Abusing its Dominance' (Media Release, 14 March 2022).
[127] For the latest procedural update, see Competition Tribunal of South Africa, Tribunal Grants GovChat, #Let'stalk Intervention Rights in Upcoming Case Involving Meta, Whatsapp And Facebook' (Press Release, 1 August 2023) <https://www.comptrib.co.za/info-library/case-press-releases/tribunal-grants-govchat-letstalk-intervention-rights-in-upcoming-case-involving-meta-whatsapp-and-facebook-sa>.
[128] CCSA, Online Intermediation Platforms Market Inquiry (Final Report, July 2023).

South (e.g., India and Brazil), the local context matters. Indeed, as the CCSA has recognized before:

> [T]he global reach of digital markets means that conduct found to be anti-competitive in one jurisdiction could easily be considered anti-competitive in other jurisdictions. We note however that each case would need to be assessed on its merits to determine the existence or otherwise of anti-competitive effects in South Africa.[129]

With its Inquiry, the CCSA was meant to get a good overview of the competitive conditions in South Africa's platform economy. It focused on the 'leading platform(s)' in different categories:

- search: Google;
- travel and accommodation: Booking.com;
- eCommerce: Takealot;
- software application stores: App Store (Apple) and Play Store (Google);
- online classifieds: Autotrader and Cars.co.za (automotive), Property24 and Private Property (real estate);
- food delivery: UberEats and Mr D Food.

The CCSA found that these platforms engaged in anticompetitive conduct and ordered remedial action. That remedial action was far-reaching. In the case of Google, for example, the CCSA determined the following:

> On organic results, Google must introduce a new platform sites unit (or carousel) to display smaller SA platforms relevant to the search (e.g travel platforms in a travel search) for free and augment organic results with a content-rich display. Google must also introduce an SA flag identifier and SA platform search filter to aid consumers to easily identify and support local platforms in competition to global ones. On paid results, Google must provide R180m in advertising credits for small platforms to use in customer acquisition along with free training to optimize advertising campaigns. Google must also provide a further R150m in training, product support and other measures for SME and black owned online firms to offset the competitive disadvantages faced on Google Search.[130]

On certain points, the Inquiry is strongly aligned with the EU's DMA, to which it explicitly refers. To prevent Google from preferencing its own specialized search services in its general search results, for example, "Google is required to implement in SA, measures taken in Europe to comply with similar provisions in the Digital Markets Act to address self-preferencing."[131] Especially in view of the above measures, which require Google to actively aid local competitors, critics have described the CCSA Inquiry as "tak[ing] Europe's DMA model to the extreme".[132] Other measures are more traditional: Booking.com, for example, is required to remove parity clauses, which it has already largely done following investigations in the EU.[133]

### b. Kenya

[129] Competition Commission of South Africa, 'Competition in the Digital Economy' (Version 2, 2021), 8.
[130] CCSA, Online Intermediation Platforms Market Inquiry (Final Report, July 2023), 5.
[131] ibid 6.
[132] Lazar Radic and Geoffrey Manne, 'South Africa's Competition Proposal Takes Europe's DMA Model to the Extreme' (Truth on the Market, 15 August 2023)
[133] So-called 'wide' parity clauses have been removed across the EU; 'narrow' parity clauses only in certain Member States following competition law enforcement (Germany) or regulatory action (Belgium). The CCSA requires the removal of both types of parity clauses.

### i. A Snapshot of Kenya's tech landscape

Kenya has one of the biggest digital economies in Africa. The country's internet penetration rate is 32.7% representing 17.86 million internet users, while its mobile penetration rate is 117.2% representing 63.94 million cellular mobile connections.[134] Most Kenyans access the internet through their mobile phones, underscoring the place of mobile network operators in expanding internet connectivity. This notwithstanding, the digital divide persists and is largely due to high cost of data and limited expansion of digital infrastructure beyond major towns.

Bridging the digital divide is one of the goals of the Kenyan government. It does this through national government projects such as the National Optic Fibre Backbone Project and through international submarine cables that are often laid by private sector investments by big tech companies from the US and China. Most recently, Elon Musk's company, SpaceX, launched Starlink, its satellite internet service, which the government hopes will enhance internet speeds in rural areas, schools, and institutions around the country.[135]

The digital economy has stimulated innovation in key sectors of the economy such as education, agriculture, finance, and logistics, which have propelled Kenya forward to the extent of being dubbed "the Silicon Savannah", a moniker that likens it to Silicon Valley. There are a variety of technology hubs, accelerators and incubators which provide business support to startups. Nevertheless, startups face funding challenges.

Kenya's most prominent innovation is the M-Pesa platform which in turn spurred innovations in other digital financial services. While the platform positively transformed the lives of many Kenyans, its dominance, alongside Safaricom's (the mobile network operator which owns the platform), has created a spate of competition challenges for the Competition Authority and the Communications Authority of Kenya.

### ii. Kenya's antitrust regime and institutions

Kenya was one of the earliest African countries to adopt a competition law. The first law, the Restrictive Trade Practices Monopolies and Price Control Act (RTPMPCA), was enacted in 1988 and entered into force in 1989. Its adoption was motivated by World Bank structural adjustment policies of the 80s that were intended to shift the country from a price control regime with significant state intervention towards a market economy.[136] Prior to this, Kenya's economy had a distinctively state-driven nationalistic bend intended to promote the participation of indigenous Kenyans in key sectors. This was largely in reaction to the pre and post independence domination by foreign multinationals and an Asian minority class that controlled the country's middle-range retail commerce. Some of the measures adopted in furtherance of this goal included enactment of the Trade Licensing Act, 1967 which excluded non-citizens from trading in specific commodities/sectors,[137] and the creation of big state corporations to drive industrialization. The

[134] https://datareportal.com/reports/digital-2023-kenya
[135] https://www.citizen.digital/news/ruto-urges-elon-musks-starlink-to-reduce-internet-costs-in-kenya-n327524
[136] Gurushri Swamy, "Kenya:Structural Adjustment in the 1980s," The World Bank, January 1994.
[137] David Himbara, Kenyan Capitalists, the State, and Development, 1994 pp. 59-62. The regulated trades were: wholesale or retail trade; catering; laundering or dry-cleaning; hairdressing; beauty culture; shoe repairing; motor vehicle repairing; cinematograph film exhibition; advertising; or the sale by a manufacturer of goods manufactured by him. See section 2 of the Repealed Trade Licensing Act, 1967, https://knowledge-uclga.org/IMG/pdf/trade_licensingactcap497_1_.pdf

government also passed a Price Control Act in 1956 to control prices and introduce consumer subsidies as a mechanism for redistribution.[138]

It is exactly such state interventionist policies that the RTPMPCA was enacted to reverse. The Monopolies and Prices Commission was also established to enforce the Act. The enactment of a competition law was seen as key in efforts to support growth of private economic activities and to eliminate market distortions such as price controls, subsidies, and other restrictive practices.[139]

Following wide ranging criticisms that the 1988 RTPMPCA was outdated and ineffective,[140] a new competition law was introduced in 2010. The 2010 Competition Act of Kenya is the current legal framework governing competition policy in Kenya, and it was enacted to aid Kenya become a *more* market-oriented economy. The enforcement of the Competition Act in Kenya is undertaken by an independent national competition agency known as the Competition Authority of Kenya (CAK), and a specialized quasi-judicial tribunal known as the Competition Tribunal.

Section 3 of the Competition Act of Kenya provides for the object of the Act as generally being to ensure consumer welfare through promoting and protecting competition in order to attain other market-oriented objectives such as:

(a) increase efficiency in the production, distribution and supply of goods and services;
(b) promote innovation;
(c) maximize the efficient allocation of resources;
(d) protect consumers;
(e) create an environment conducive for investment, both foreign and local;
(f) capture national obligations in competition matters with respect to regional integration initiatives;
(g) bring national competition law, policy and practice in line with best international practices; and
(h) promote the competitiveness of national undertakings in world markets.

While these objectives focus primarily on efficiency and productivity, the Act's provisions on substantive issues such as mergers, and restrictive trade practices reveal other public interest considerations such as employment effects and effects on small businesses. For purposes of this paper, we briefly examine these provisions; other scholars have undertaken extensive reviews of the original Competition Act and the amendments that followed after its enactment.[141]

The Act regulates mergers and acquisitions by mandating the investigation of proposed transactions for anticompetitive effects. The CAK may also consider other contextual factors such as possible effects on job losses, effects for small businesses such as suppliers and distributors, and the effect on the international competitiveness of national industries. For instance, in an

[138] UNCTAD, Voluntary Peer Review on Competition Policy: Kenya (UNCTAD 2005)
[139] UNCTAD, Voluntary Peer Review on Competition Policy: Kenya (UNCTAD 2005)
[140] The RTPMPCA was criticized largely for not creating a favorable environment for investors- its price control provisions created uncertainty for investors, and the lack of transparency in merger reviews discouraged investments. Moreover, the competition commission was prone to political interference as it was not independent. For more on the limitations of the RTPMPCA. See, Robert Mudida et al, *Kenya's new competition policy regime*. World Competition Law & Economics Review, 38(3), 439–441 (2015).
[141] See: Robert Mudida & Thomas Ross, *Kenyan Competition Policy After Ten Years of the Competition Act: A Progress Report*, Review of Industrial Organization, Springer; The Industrial Organization Society, vol. 60(3), 431-462 (2022)

acquisition involving two energy companies, KenolKobil and Gulf Energy Holdings, the CAK approved the transaction on condition that KenolKobil retain all employees of Gulf Energy for 24 months with no remuneration changes during that period. The CAK also required KenolKobil to maintain any existing contracts between Gulf Energy and SMEs for 24 months.[142]

The Act prohibits restrictive trade practices, which include horizontal and vertical anticompetitive agreements such as price fixing agreements. However, the CAK may grant an exemption for certain restrictive practices if there are compelling public policy reasons for doing so.[143] The CAK would consider the extent to which such a practice would contribute to improvements in productivity, export promotion, economic progress in any industry, and an overall benefit to the public which outweighs the effects of the anticompetitive practice.[144]

Abuse of dominance is also prohibited and is deemed to include practices such as unfair pricing, limiting production, abusing an intellectual property right, applying dissimilar conditions to equivalent transactions, and imposing irrelevant conditions to the conclusion of contracts.[145] A firm is dominant if it controls not less than one-half (50%) of the total goods or services produced/rendered in Kenya or a substantial part of Kenya.[146] Dominance can also be found below this threshold. A firm that controls at least 40% but not more than 50% market share is presumed to be dominant unless it can show that it does not have market power. Conversely, a firm with less than 40% market share but that has market power is presumed to be dominant.[147] More generally, the Act defines market power as "the power of a firm to control prices, to exclude competition or to behave to an appreciable extent, independently of its competitors, customers or suppliers."[148] This definition of dominance, as well as the 50% market share threshold, is in line with that of the European Court of Justice.[149]

Abuse of buyer power is also prohibited. The Act has a non-exhaustive list of incidences that constitute abuse of buyer power and these include: delays in payment of suppliers without justifiable reason in breach of agreed terms of payment; unilateral termination or threats of termination of a commercial relationship without notice or on an unreasonably short notice period, and without an objectively justifiable reason; transfer of commercial risks meant to be borne by the buyer to the suppliers; reducing prices by a small but significant amount where there is difficulty in substitutability of alternative buyers or reducing prices below competitive levels etc.[150] The CAK regularly conducts investigations particularly for purposes of small businesses

[142] https://www.cak.go.ke/sites/default/files/2020-02/CAK%20Decision%20on%20Acquisition%20of%20Control%20of%20Gulf%20Energy%20Holdings%20Limited%20by%20KenolKobil%20Plc%20%281%29.pdf Such conditions have been prescribed in many other proposed mergers and acquisitions.
[143] Section 25 of the Competition Act of Kenya
[144] Section 26(3) of the Competition Act of Kenya
[145] Section 26(2) of the Competition Act of Kenya
[146] Section 23(1) of the Competition Act of Kenya
[147] Section 23(2) of the Competition Act of Kenya
[148] Section 2 of the Competition Act of Kenya
[149] Case 27/76 *United Brands v Commission* EU:C:1978:22, para 65 ('a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers'); Case 85/76 *Hoffmann-La Roche v Commission* EU:C:1979:36, para 38.
[150] Section 24(C) of the Competition Act of Kenya.

such as retail suppliers and distributors.[151] The Competition Tribunal also recently rendered its first abuse of buyer decision against the large supermarket chain, Carrefour (*Majid Al Futtaim Hypermarkets Limited)*.[152] The tribunal found that Carrefour abused its buyer power by unilaterally delisting one of its suppliers, requiring listing fees and rebates on annual sales, and returning unsold stock too close to their expiry date.

Lastly, the Act empowers the CAK to investigate and act against "unwarranted concentration of economic power" in any economic sector whose effects on the economy outweigh any efficiency advantages. Unwarranted concentration of economic power exists when there is "cross directorship between two distinct undertakings or companies producing substantially similar goods or services and whose combined market share is more than 40%."[153] In determining whether such effects are detrimental to public interest, the CAK would consider the particular economic conditions of the time, and assess whether the effects unreasonably increase the cost of production, supply or distribution of goods or services; unreasonably increase price of goods or services and the profits derived from their production or distribution; limit competition in their production and distribution; lead to lower quality goods or services or result in a production, supply or distribution shortage.[154]

Since its establishment in 2011, CAK's enforcement trajectory has been informed by a mix of factors including public interest, firms' ability to pay fines, competition culture, and awareness of competition law, emblematic of the socio-economic realities of Kenya as an emerging economy.[155] At the start of its operations, CAK focused on enhancing public awareness and understanding of the competition law regime. As such, the sanctions imposed then were mainly advisory opinions, cease and desist orders, and advocacy initiatives.[156] With growing awareness of competition law, the CAK now imposes administrative fines, which have themselves been increased overtime.[157] The CAK also enters into settlement agreements, and this is seen as an effective way of addressing infringing conduct while also influencing the adoption of internal competition compliance policies.[158] While the CAK has no prosecutorial powers, it may refer potential criminal cases to the Department of Public Prosecution (DPP); however, so far, the DPP has been reluctant to prosecute cases arising from competition matters. Similarly, there has been no civil litigation of competition related cases in Kenya.[159]

### iii. Kenyan antitrust in tech markets

While the CAK has not yet investigated global mergers in tech markets, it has considered a number of interesting matters related to ride hailing services, the online food delivery industry, and the digital financial services sector.

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[151] See e.g., https://www.cliffedekkerhofmeyr.com/en/news/publications/2022/Practice/Competition/competition-alert-24-june-Abuse-of-buyer-power-Kenyan-Competition-Authority-recovers-over-KES-38-million-from-insurance-companies.html
[152] https://kn.co.ke/regulation-of-abuse-of-buyer-power/
[153] Section 2 of the Competition Act of Kenya
[154] Section 50(4) of the Competition Act of Kenya.
[155] Vellah Kigwiru, page 545
[156] Vellah, page 538
[157] E.g., from Kshs. 17.9 million in 2015/2016 to Kshs. 38.6 million in 2016/2017. See Vellah page. 526
[158] Vellah page 537
[159] Vellah, page 534-535

The CAK investigated a complaint on predatory pricing brought by traditional taxi operators against Uber. It found that Uber was a technology company rather than a taxi company and therefore, could not stand the predatory pricing test for the relevant market.[160] It also noted that ride hailing applications enhanced competition and reduced taxi costs for consumers. However, given the pushback by traditional taxi operators, it warned against adopting reactionary regulations and recommended a regulatory impact assessment on the taxi-transport sector prior to introducing new regulations.

In the food retail sector, the CAK investigated an allegation of abuse of dominance against Glovo. The claim was that Glovo imposed exclusive agreements with third party vendors restricting their ability to develop or market similar applications. After investigating the relevant market, the Authority established that Glovo was not dominant by market share and that there were a wide range of substitutable online instant delivery platforms. Nevertheless, it still recommended removal of any clauses that limited vendors' access to other competing platforms. This decision echoed a previous case against Safaricom, the leading mobile network operator in Kenya that owns the M-PESA platform. Safaricom had a practice of entering into restrictive agreements with its M-PESA agents thus restricting their ability to offer money transfer services for competing mobile network operators. Safaricom settled the matter and agreed to remove all restrictive clauses in its agent agreements.[161]

As of now the Competition Act has no specific provisions regarding digital markets, and the CAK has noted that defining markets and establishing market power in the digital economy is a challenge.[162] In furtherance of this, the recently revised Guidelines on Relevant Market Definition recognize the existence of "multi-sided markets" (paras 58–60), "non-price markets" (paras 61–63) and "digital markets" (paras 64–66), and the errors that could result from applying the traditional market definition to such markets. In analyzing such multi-sided digital markets, the CAK shall consider "substitutability at one side of the market in contact with the wider market for the basic products."[163] Precedents from other jurisdictions will also be applied when dealing with cases involving such markets.[164]

### iv. Regulatory developments in Kenya

The Kenyan Competition Authority regularly conducts sector-specific market inquiries, which are seen as an advocacy tool for pro-competitive policies and regulations. Market inquiries often lead to new regulatory developments through the CAK and other government agencies. For instance, following the proliferation of digital credit applications and resulting concerns about predatory lending, the CAK conducted a market inquiry which resulted in the development of Digital Credit Providers Regulations by the Central Bank of Kenya in 2022.[165]

More related to platforms, the CAK conducted a market inquiry into the pricing and conditions of accessing unstructured supplementary service data (USSD) platforms owned by mobile network

[160] https://one.oecd.org/document/DAF/COMP/GF/WD(2020)33/en/pdf- page 5
[161] https://techweez.com/2014/07/28/mpesa-agent-network-airtel/
https://www.mobileworldlive.com/money/news-money/safaricom-opens-m-pesa-rivals/
[162] https://unctad.org/system/files/official-document/ciclpd57_en.pdf page 3
[163] Competition Authority of Kenya Revised Guidelines on Relevant Market Definition Para 66
https://cak.go.ke/sites/default/files/Guidelines%20on%20Relevant%20Market%20Definition%20(1).pdf
[164] Para 60 https://cak.go.ke/sites/default/files/Guidelines%20on%20Relevant%20Market%20Definition%20(1).pdf
[165] https://www.cak.go.ke/sites/default/files/Digital_Credit_Market_Inquiry_Report_2021.pdf

operators (MNOs). The USSD platform is a communications protocol used to send messages between mobile network operators and users. It is also the predominant infrastructure used by banks and fintech applications to offer mobile financial services. The terms of accessing USSD platforms are typically imposed by MNOs and MNOs also compete with banks and fintech apps in offering mobile financial services. The purpose of the inquiry was to determine whether the terms of accessing USSD platforms restricted competition in financial services and whether there was any abuse of dominance by Safaricom, the leading mobile network operator.

The inquiry found that prices charged by MNOs were excessively high, which undermined the ability of smaller firms to offer competitive financial services. In addition, the dominant MNO had engaged in anticompetitive conduct by charging even higher prices to its biggest rivals or outrightly denying access to its network. It recommended the lowering of prices and transparency by requiring the leading MNO to publish on its website the standard prices for USSD services for mobile financial services. The inquiry also found that lack of interoperability between networks of different mobile wallets increased prices of financial transactions; customers were also not aware of transfer charges to other mobile networks. It recommended interoperability of the dominant M-PESA mobile wallet with other mobile money providers.

The approach of the CAK in the USSD market inquiry offers some useful insights into how it could handle digital platforms that present similar abuse of dominance challenges e.g., in e-commerce platforms. It values transparency, and non-discrimination for purposes of supporting smaller firms, and promoting consumer welfare.

It also appears that the CAK is exercising caution to first understand the local effects of the digital economy before introducing any regulations – hence the importance of market inquiries. Notably, the CAK recently announced that it would conduct an inquiry into "online food delivery and groceries platforms" in order to understand the business model and come up with appropriate regulations.[166]

Further, it is clear that the CAK recognizes the importance of inter-agency collaboration for appropriate sectoral regulation. After its decision in the Uber predatory pricing matter discussed above, the CAK recommended a regulatory impact assessment following which an inter-agency committee composed of representatives from the CAK (Lead), the Kenya Revenue Authority, the Nairobi County Government, the National Transport and Safety Authority, and the Kenya Investment Authority was formed.[167] Recently, the National Transport and Safety Authority gazetted the Transport, Network Companies, Owners, Drivers and Passengers Regulations[168] to effectively regulate the ride-hailing industry. Contra to the earlier description of Uber as a "technology" company and not a transportation company, the new regulations describe Uber and other similar taxi apps as "transport network companies"[169] and stipulate that commissions cannot exceed 18% of total earnings of a trip.[170]

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[166] https://twitter.com/CAK_Kenya/status/1632965311723864064
[167] Id
[168] http://www.parliament.go.ke/sites/default/files/2022-10/Legal%20Notice%20No.%20120%20of%202022%20relating%20to%20the%20National%20Transport%20and%20Safety%20Authority%20%28Transport%20Network%20Companies%2C%20Owners%2C%20Drivers%2C%20and%20Passengers%29%20Regulations%2C%202022%20from%20the%20Ministry%20of%20Transpo.pdf
[169] Section 2.
[170] Section 9(2g)

## 5. Steps toward an aspirational pan-African digital regulatory framework

### a. The antitrust starting point

Our analysis of competition enforcement in two jurisdictions, South Africa and Kenya, does not justify broad claims on "African competition enforcement". Nevertheless, the limited survey is more informative than it may seem. First, the competition authorities studied are two of the most active on the continent, at least in digital markets. Second, their focus and approach are consistent with that of other authorities.[171] The shared enforcement attitudes are increasingly leading to continental collaboration on digital competition.[172]

So, what is the "antitrust starting point" in digital markets in Africa? Let us take a look at (i) competition law inspiration; (ii) targeted sectors and conduct; and (iii) preferred enforcement tools.

While the U.S. once provided the dominant model for new competition law regimes, the EU has meanwhile taken over the role of global antitrust leadership.[173] Our analysis above, which pointed out various instances of EU inspiration, showed this certainly applies to competition acts in Africa. An interesting phenomenon is that competition acts in Africa tend to be much more detailed than the EU statute (which consists only of a few articles), as they do not only include the basic laws but also their specification (e.g., the threshold of dominance). In the EU, such specification did not happen through statute but by judges; newer regimes can immediately include those "lessons learned". The EU has been a source of global inspiration especially in the digital economy.[174] In Africa, we observe similar enforcement in some fields. In merger control, alignment is most clear. It appears there is a willingness to impose conditions on the merging parties when this can be done "under the cover of" EU enforcement. In *Google/Fitbit*, for example, the CCSA imposed conditions very similar to an earlier EC decision. The idea might be that, if a firm has to adapt its conduct elsewhere already, there will be less resistance to similar local enforcement. In other cases, however, there has been no enforcement (e.g., *Microsoft/Activision-Blizzard*). Logically, enforcement also has focused on local mergers, which other authorities in no way constrain. African authorities are also happy to take inspiration from other jurisdictions on technical matters, as the CAK made clear in its market definition guidelines, which explicitly refer to foreign precedents in digital markets. When it comes to abuse of dominance investigations, however, African authorities have charted their own course.

Abuse of dominance investigations in the jurisdictions we examined do not mirror enforcement actions in the EU. The main target of such investigations, not only in South Africa and Kenya but also outside of it,[175] has been Uber. In the EU, the European Court of Justice qualified Uber not

[171] Insofar as those authorities have digital markets cases, which is not the case for all of them.
[172] See, in addition to the AfCTA, Annie Njanja, 'Big Tech on notice as regulators in Africa group to investigate their market conduct' (*TechCrunch*, 2 March 2023) <https://techcrunch.com/2023/03/02/big-tech-on-notice-as-regulators-in-africa-group-to-investigate-their-market-conduct/>.
[173] Anu Bradford, Adam S. Chilton, Katerina Linos, Alex Weaver, 'The Global Dominance of European Competition Law Over American Antitrust Law' (2019) 16 Journal of Empirical Legal Studies 731.
[174] See Anu Bradford, 'The Brussels Effect: How the European Union Rules the World (Oxford University Press 2019), chapters 4–5.
[175] See, e.g., Egyptian Authority on the Protection of Competition and the Prohibition of Monopolistic Practices, *Assessment of the Acquisition of Careem, Inc. by Uber Technologies, Inc.*, 19 December 2019, available at

as an "information society service" but as a "transport service", which allowed Member States to regulate ride-hailing as they wished.[176] In other countries in the Global South, such as India[177] and Brazil,[178] competition authorities did investigate Uber. The main allegations were predatory pricing (i.e., below-cost pricing to drive competitors out of the market) and unfair competition due to the circumvention of regulation (e.g., of taxis and employment). However, all authorities came to the same conclusion: Uber's entry and subsequent conduct did not infringe competition law. The underlying idea, voiced to some extent in each of the decisions, is that Uber is a market-liberating rather than market-foreclosing force. Another illustrative case is the CCSA's investigation of Meta. While European authorities have focused on Meta's data collection practices,[179] the CCSA made a case out of Meta's refusal to host the government–citizen communication platform GovChat.

In terms of tools used, it is notable that African authorities have shied away from "hard" enforcement tools, i.e., fines and injunctions to halt specific conduct – or, going a step further, injunctions to adopt specific conduct.[180] In the EU, by comparison, the EC has levied multi-billion fines and prescribed a variety of remedies to be implemented by firms abusing their dominance in the digital economy. Part of the reason for the reluctance to use hard enforcement tools is likely the threat of exit that dominant tech firms hold over the heads of African competition authorities. These authorities have, however, handily made use of "soft" enforcement tools, in particular market investigations. The CAK has, for example, investigated the market of mobile money platforms and digital credit, and is now investigating online food and grocery delivery platforms. The CCSA conducted a wider investigation in its Online Intermediation Platforms Market Inquiry. Market investigations are especially useful to build knowledge and expertise, which can then inform regulation. Specific intervention tends to follow such investigations, and those interventions can be specific: in Kenya, for example, the CAK did not shy away from regulating prices of mobile money platforms. In line with the above, such interventions have been aimed at local digital platforms which cannot (or not as) credibly threaten exit. It is likely that African competition authorities will continue to conduct market inquiries to understand the impact of both global and local platforms on smaller business users and end users alike. Such inquiries also provide an opportunity for authorities to learn from each other.

### b. Toward pro-competitive regulation in African countries

The principles of fairness and contestability embodied in the EU's DMA are compatible with the industrialization goals of many African countries. Many countries' policy goals emphasize the need to promote investment by global firms on one hand, and the need to promote domestic competitiveness by supporting the growth of "local champions" and SMEs, on the other hand. In this sense, a pro-competitive approach would accede to the presence of global tech firms while

<https://www.docdroid.net/Vf4govD/ecas-assessment-of-the-acquisition-of-careem-inc-by-uber-technologies-inc-non-confidential1.pdf>.

[176] Case C–434/15 Asociación Profesional Élite Taxi v Uber Systems Spain EU:C:2017:981.

[177] Competition Commission of India, Case No. 96 of 2015, Meru v Uber, 14 July 2021, available at <http://164.100.58.95/sites/default/files/96-of-2015.pdf>.

[178] Administrative Council for Economic Defense, Preparatory Procedure No. 08700.008318/2016-29, *São Paulo v Uber*, 2018.

[179] Bundeskartellamt, Case B6-22/16, *Facebook*, 7 February 2019.

[180] An exception may be *GovChat and LetsTalk v Facebook*, but the case is ongoing.

also using them to subsidize the growing domestic economy in order to reduce barriers to entry and to generate competition.

Critiques of the DMA have warned that it could create unintended consequences for European businesses and consumers. Its implementation has been equalled to industrial protectionism that could potentially violate WTO principles, especially the principle of most favored nation (a country should treat all its trading partners equally), and the principle of national treatment (a country should not discriminate between its own products or nationals and those of its trading partners).[181]

It is no secret that any adoption of such a regime partly depends on geopolitical power, and this is more so important in the context of the African continent. Although the African digital economy is huge and still growing, global tech firms play key roles in that growth and form part of the political settlement responsible for developing technology policies. In any case this also depends on the political-economic ideology of any nation and the industrialization strategies adopted as a result. For instance, while Kenya is a market-oriented economy that greatly values foreign investment and often makes concessions to secure such investments, another country like Rwanda, with a largely state driven industrialization architecture may very well attempt a strict application of DMA-like regulation. Nonetheless, this is not to say that DMA-like regulation is impossible or will be unsuccessful in African countries. Other scholars have proposed that states position themselves as "entrepreneurial-regulatory states" that combine complementary industrial and competition policies to build dynamic capabilities and generate competition in the digital economy.[182]

It is worth developing a few guiding principles as African countries develop pro-competitive regulation for their digital markets, acknowledging that different nations, and different sectors have their own idiosyncrasies. Our next step shall be to examine how pro-competitive regulation might take shape in the e-commerce sector, especially given the looming expansion of Amazon to South Africa and Nigeria.

[181] https://www.csis.org/analysis/implications-digital-markets-act-transatlantic-cooperation
[182] See generally, Antonio Andreoni & Simon Roberts, *Governing Digital Platform Power for Industrial Development: Towards an Entrepreneurial-Regulatory State*, Cambridge Journal of Economics, 46, 1431-1454, 2022.