COMPETITION AND REGULATION OF ONLINE SHOPPING PLATFORMS IN KENYA

John THOMI[1]

Competition Authority of Kenya

ABSTRACT

In 2021, digital marketplaces accounted for 75% of online purchases worldwide, while in Kenya the digital service market achieved a 12% growth in revenue, that is, from US$ 3,233 in the year 2020 to US$ 3,630 in the year 2021[2]. Despite the success, possible regulatory challenges relating to data privacy, monitoring transactions, cross-border transactions, economies of scale and algorithmic selection may arise in the digital market, specifically relating to competition law. These challenges are more likely to manifest the traits of the harm that the competition law was set up to prevent. It is in this regard that some stakeholders have voiced the need to have more regulation of this market. These calls have however been countered by the view that the analysis of regulatory challenges in the digital market can be very complex and therefore, attract a high risk of error due to the fact that it may end up either under regulating or over regulating the market. This, therefore, demands that enforcement should be founded on the economic theory of harm to avoid missing the expected purpose of its intention.

This paper reviews the competition and regulation of digital markets in Kenya, with a particular focus on online shopping platforms. The paper reveals that the digital market space in Kenya is not regulated under any one particular piece of legislation or set of guidelines. However, a variety of laws touch on various aspects of the digital market such as data protection, intellectual property, finance, transport and other sectors. Additionally, Kenya's competition law has prioritized enforcement and research to inform the best regulatory regime to support disruptive technology. Further, the digital platforms were characterized by features that could be prone to regulatory challenges due to their dynamic nature. The paper offers some alternatives on how the fair competitiveness of digital markets can be safeguarded.

Keywords: Competition, regulation, digital market, online platform

---

[1] Young Professional in the Competition Authority of Kenya's Policy and Research Department.

[2] E-commerce DB (2021). The eCommerce market in Kenya. Available at <https://ecommercedb.com/en/markets/ke/all> Accessed on 5th August 2022.

1.0 INTRODUCTION

The aptitude to communicate and organize seamlessly without distance being a constraint has redefined the business environment. At different levels and fronts, our politics, economy, culture, businesses and social life are progressively being intertwined with communities around the world. All these transformations and changes are pegged on the immense transformation resulting from the integration of technology into our day-to-day operations.

There has been an increase in the acquisition of goods and services without necessarily moving around shopping marketplaces. This has been abridged by the fact that most sellers of goods and services no longer need a physical distribution channel, but lend themselves through direct online purchases through a variety of online platforms. In what may be perceived as a simple yet complicated platform, the transaction can be done by opening a website or creating an app. Several digital companies with a global presence such as Uber[3], Jumia[4] and Airbnb[5] have leveraged these models by creating platforms that can provide large numbers of service providers and goods in one digital location.

The uptake and incorporation of digital markets into many economies have been on an upward trajectory. However, the disruption in the world economy that resulted from the COVID-19 pandemic altered the mode of transactions worldwide. The stepping up towards a more digital society could be credited to the pandemic. In Kenya, the digital markets are experiencing a booming business as more individuals observed the health protocols set by the government and the new norm of working remotely encouraged. For Instance, the digital service market achieved a 12% growth in revenue; from US$ 3,233 in the year 2020 to US$ 3,630 in the year 2021[6]. The pandemic disruption also affected the mode of operation in retail markets as they shifted to a hybrid model, where they operate both on an online platform and maintained their bricks and mortar stores.

The observed growth of the digital markets is a clear indication of a well-performing market. Additionally, digital markets are easily accessed and therefore many players can easily enter and exit the market. This underlines the need for current policies and laws to be reexamined to find if they can safeguard competition from digital error and realize the competition agency's objective of providing and maintaining a path that assures contestability in new and emerging markets[7].

[3] Uber Website (2022). Available at <https://www.uber.com/global/en/cities/>. Accessed on 5th August 2022.
[4] Jumia Website (2022). Available at <https://group.jumia.com/about/locations.> Accessed on 5th August 2022.
[5] Airbnb Website (2022). Available at <https://news.airbnb.com/about-us/>. Accessed on 5th August 2022.
[6] E-commerce DB (2021). The eCommerce market in Kenya. Available at <https://ecommercedb.com/en/markets/ke/all> Accessed on 5th August 2022.

[7] A Frost & Sullivan White Paper (2018). Digital Market Overview FCO Kenya

This paper discusses challenges that competition agencies face when evaluating the digital market's competitiveness to stir debate on whether or not there is a need to change existing laws to regulate the digital markets further.

1.1 Digital Markets Defined

The digital markets promote brands to connect with potential customers using the internet and other forms of digital communication. These markets involve the use of websites, mobile devices, social media, search engines, and other similar channels which are specifically designed to receive and place orders. The goods or services are ordered by those methods, but the payment and the ultimate delivery of the goods or services is not necessarily conducted online[8].

Digital markets possess distinct features when compared with the traditional market. Unlike traditional markets, the cost of running digital markets is lower since one might not necessarily need physical locations to operate. The model allows one to interact with the consumers virtually and therefore able to cut costs that may be attributed to operations. Moreover, measurability of the business performance is easy and to some extent, real-time as technology allows retrieval of data needed and hence decisions regarding the business can easily be made. The engagement in the digital platforms mainly targets a global audience due to its two-way real-time communication, online interaction and comparatively high engagement which makes it more different from the traditional market.

1.2 Participants in the digital market

In the digital market, several players may be considered when analyzing the competitiveness of this market. These players can be categorized into four groups that include[9];

- **Incumbent firms:** these are firms that are well established and would often compete to increase their market share and profits.

- **Startup challengers**: these are new firms that enter the market aiming at challenging the incumbent ones, they try to take up market share from the incumbent. In some cases, if they are innovative enough, they can force incumbent firms to improve on their business or risk closure.

[8] OECD (2013). Electronic Commerce. Available at <https://stats.oecd.org/glossary/detail.asp?ID=4721> Accessed on 14th August 2022

[9] Bipartisan Policy Center (2021). Digital platforms and Competition. Available at <https://bipartisanpolicy.org/explainer/digital-platforms-primer-digital-platforms-and-competition-part-3/>. Accessed on 7th August 2022.

- **Non-startup challengers**: these are firms that enter a market from a different industry intending to challenge the incumbent firms.

- **Potential challengers**: these are firms that are yet to enter the market but have the potential of emerging and challenging the incumbent. In markets where competition is inhibited, incumbents might not feel the possible threat of these firms.

Identification of these players makes it easy to analyze the market as each of the four categories portray unique characteristics in terms of market share, financial and technological resources. Conversely, other factors that may be of concern include consumer behavior and government policy as they too affect market dynamics. In addition to that, understanding the operation of platforms may be of benefit as it plays the role of aggregating the consumers by organizing products, services content or other commercial or non-commercial offers to enhance the search process through better matching and allocation of products.

1.3 Worldwide Outlook of the Digital Markets

With the advent of the web in the 1990s and later digitization of operations, many industries across the economies have undergone a transformation to match the current trend that has almost fully shifted to online transactions. Digital marketing became popular with the dawn of the internet in the 1990s[10]. Since then, adoption has further been accelerated by the ease of internet access. For instance; in 2020, more than two billion people worldwide purchased goods or and services online, and during the same year, e-retail sales surpassed 4.2 trillion U.S. dollars[11], while 9% of Kenyans were regular users of online markets[12]. Digital possibilities have made it conceivable for consumers to be able to choose from various online platforms.

Mobile devices have as well contributed immensely to the surge in the number of visits to digital market platforms. In 2021 alone, smartphones accounted for almost 70% of all retail website visits globally, although desktop and tablet visits generated higher conversion rates in 2020[13],visits to these markets through mobile devices remain the most preferred channels. The uptake of mobile devices is mainly noted in Central and West Asia where digital infrastructure has been improved

---

[10] Investopedia (2022). Digital Markets. Available at <https://www.investopedia.com/terms/d/digital-marketing.asp.> Accessed on 5th August 2022

[11] Statista (2022). E-commerce worldwide. Available at <https://www.statista.com/topics/871/online-shopping/#editorialPicks.> Accessed on 5th August 2022

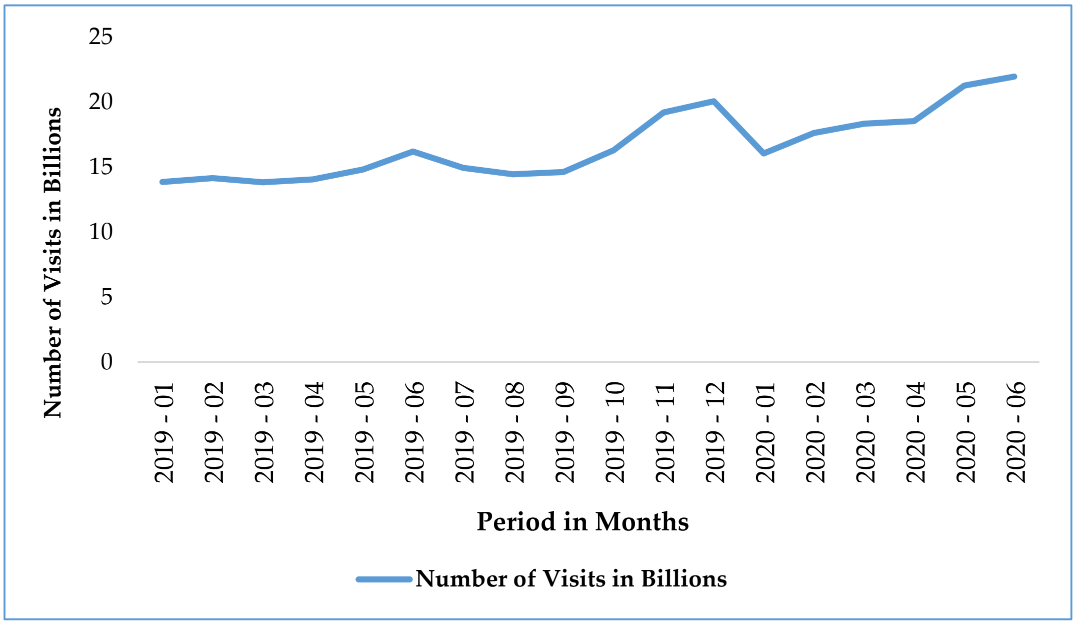
[12] 2020 UNCTAD B2C Commerce Index. Available at <https://unctad.org/system/files/official-document/tn_unctad_ict4d17_en.pdf > Accessed on 14th August 2022

[13] Statista (2022). E-commerce worldwide. Available at <https://www.statista.com/topics/871/online-shopping/#editorialPicks.> Accessed on 5th August 2022

to ease access to information and communication technology and so it influences the shopping experience and pattern[14].

The economic shock as a result of COVID-19 significantly tilted the digital market performance and also accelerated digital alteration globally[15] as shown in Figure 1. Kenya's retail platforms, just like the rest of the world, experienced increased visits during the pandemic as well due to the health protocols issued by the government[16].

Figure 1: Retail Platform Visits, January 2019 – June 2020



Source: *Statista, 2021*

Digital channels have become more popular as they provide an alternative to the traditional markets and complement the option for remote working. In June 2020, global retail e-commerce traffic stood at a record 22 billion monthly visits, with demand being outstandingly high for daily items like clothing, groceries and retail tech items[17]. It is worth noting that in the digital markets, benefits accrued from the pandemic were biased towards digital platforms that were dominant in

[14] Embracing the E-Commerce Revolution in Asia and the Pacific (2018) Available at <https://www.adb.org/publications/ecommerce-revolution-asia-pacific>. Accessed on 5th August 2022

[15] UNACTAD (2021). COVID-19 and e-commerce: a global review. Available at <https://unctad.org/webflyer/covid-19-and-e-commerce-global-review> Accessed on 7th August 2022

[16] Interim Guidance for Health and Safety in Workplace. Available at <https://www.health.go.ke/wp-content/upload>. Accessed on 13th August 2022.

[17] Statista (2021). Digital buyers worldwide 2021. Available at < https://www.statista.com/statistics/251666/number-of-digital-buyers-worldwide/> Accessed on 14th August 2022.

the market, as they could entrench their predominant role during the pandemic[18]. The response from most governments targeted both short and long-term solutions; for example, Costa Rica initiated a platform for businesses without an online presence, and a smartphone app and texting service to facilitate trade. Senegal ran an information, education and awareness campaign on the benefits of e-commerce while Indonesia launched a capacity-building programme to expedite digitization and digitalization among micro, small, and medium enterprises[19]. Further, Kenya offered additional spectrum to the mobile operators and service providers to enable industry players match the increased demand for data and internet services[20]. Overall, the potential for revenue growth from digital markets in Africa is on the rise as depicted by Accenture's[21] analysis of Africa's Internet Economy. Based on the year 2020 performance, Africa's iGDP growth projections are on an incremental projection[22]. Table 1 below shows projections of the expected performance of the top ten African countries up to 2025 in terms of growth projections;

Table 1: iGDP Revenue Growth Projections

Country	2020 ($B)	2020 (%)	2025 ($B)	2025 (%)
Kenya	7.42	7.7	12.84	9.24
Morocco	7.8	6.82	12.09	7.84
South Africa	21.55	6.51	31.45	7.86
Senegal	1.51	6.22	2.92	7.11
Nigeria	24.59	5.68	36.53	6.86
Algeria	9.02	5.6	11.92	6.16
Cameroon	2.06	5.39	3.27	6.19
Cote d'Ivoire	3.18	5.27	5.53	6.04
Egypt	15.41	4.98	25.97	5.99
Rwanda	0.52	4.98	0.97	5.96

Source: *Accenture, Africa iGDP Forecast, Africa. September 2020*

1.4 Competition in the Digital Markets

The growing concern on competition in digital markets can no longer go unnoticed, as interests that are biased towards this market have manifested in the competition policy community with

[18] UNACTAD (2021). COVID-19 and e-commerce: a global review | UNCTAD. Available at https://unctad.org/webflyer/covid-19-and-e-commerce-global-review. Accessed on 7th August 2022

[19] High-level Thematic Debate on Digital Cooperation and Connectivity (27 April 2021) | General Assembly of the United Nations

[20] <https://www.ca.go.ke/leveraging-icts-in-the-fight-against-covid-19-pandemic/>. Accessed on 5th August 2022

[21] https://www.accenture.com/us-en/about/company-index. Accessed on 5th August 2022

[22] e-Conomy Africa (2020). Africa's $180 billion Internet economy future

spillover from the media, political class and the public at large. The role and size of digital firms in the economy have attracted significant attention. Even though the size of these firms may be attributed to innovation, unique business model, government regulation or even efficiency in operation, the idea that "big is not bad" that has been widely accepted in competition policy remains a principle of contention. On the other hand, this can be perceived as the benefits of aggressive competition which can bring immense gain to consumers.

There is a possibility of the existence of dominant firms in this market to engage in strategies that could help in protecting their market power. These acts can inhibit progress made, restrict competition, harm consumers and eventually bring about economic damage. With this in mind, many agencies have been investigating the concerns raised by the digital markets. For instance, in a survey conducted by the International Competition Network (ICN), it was reported that 30 out of 39 respondents opened abuse of dominance investigations in digital markets, with 17 of these led to enforcement action[23].

In jurisdictions that have competition agencies, such as Kenya, there exist legal and economic frameworks that check the challenges posed in the digital markets. These frameworks have however not been able to address every policy concern raised by the digital markets. Though alternative competition tools like merger controls have been adopted and proven to be effective, they too have not been a fit for all solutions. The concern about abusive conduct by dominant digital firms can consequently be perceived as the tip of the broader conversation that should take place concerning competition in digital markets.

The possible challenges that may arise in the digital market, specifically relating to competition law, are more likely to manifest the traits of the harm that the competition law was set up to prevent. Should there be a lapse or failure of the competition agency to prohibit these challenges in the digital markets, then the relevance of having competition agencies as promoters of consumer welfare and the creation of a fair competition platform. With this in mind, some stakeholders have voiced the need to have more regulation of this market. These calls have however been countered with those of the view that the analysis of challenges in this market can be very complex and as a result, attract a high risk of error due to ending up either under or over regulating the market. Subsequently, this demands that enforcement should be founded on the economic theory of harm to avoid missing the expected purpose of its intention.

---

[23] ICN (2020). Unilateral Conduct Working Group. Report on the Results of the ICN Survey On Dominance/Substantial Market Power in Digital Markets. Available on < https://www.internationalcompetitionnetwork.org/wp-content/uploads/2020/07/UCWG-Report-on-dominance-in-digital-markets.pdf>. Accessed on 14th August 2022

Having the consumers' concerns in mind, agencies in different jurisdictions have always made independent assessments on how to balance enforcement risks. In valuation, the agencies put high consideration on the fundamental legislative, historical, and philosophical framework of competition law in each jurisdiction. Additionally, consideration for early interventions and leanings in market power can also be considered. Besides this valuation, the necessity to avoid activities that may hinder innovation is as well a consideration that is given enough weight. Competition agencies that aim at checking into challenges in the digital market will have to create a strong international collaboration with other agencies due to the international network of digital firms.

1.5 How have digital platforms changed competition?

The growing influence of the large digital platforms in and outside the marketplace has become a matter of concern amongst regulators. The unease range from economic aspects to data privacy issues. Firstly, the digital platforms that continuously receive data from transactions mediated by them stand at a vantage position when innovations that may require data are pursued. This infers that contestability will be inhibited when access to market data is hindered as feedback from consumers may never reach the sellers as well as the development of personalized offers and products for the consumers may be prevented. This case has created the risk of players relying on large data and utilizing data to sustain market power. Competition agencies have to give competitors and possible new entrants access to such data while at the same time offering the incumbent firms innovation incentives and protecting consumers' privacy.

Secondly, the platform offers dynamic products and services out of which some fall outside the regulatory framework that limits competition to incumbents. For instance, services or goods are transferred from enterprises or individuals via a platform despite their location as the major players have been able to build networks and delivery channels beyond their borders. This has in turn led to challenges amongst many competition regulators. This is because both the services and goods sold on these platforms are not easy to monitor due to the cross-border transaction or the products falling outside the mandate of these agencies.

The digital platforms that have been able to bring an onboard range of products and services that complement each other on one platform could attract more vendors and purchasers. As a result of a high number of vendors and the complementing products and services, the users have found it hard to switch from one platform to the other due to inconveniencies. In addition, having many players that include service and product vendors, marketers and consumers on one platform has made it possible for the digital markets to be multi-sided.

With regard to economies of scale, the fixed costs are significantly high as compared to the variable costs. The incumbent and non-startup firms thus can expand their operations faster at a lower cost due to the costs being proportional to the number of customers served. This is also informed by the fact that these firms are advantaged by the fact that they are well developed as compared to other entrants.

Personal information has become currency for transactions in the digital markets. Goods and services are purchased from online markets for "free" in exchange for personal data. Whereas the consumer protection law is the main legislation to protect consumers against potential big data harm, personal information has remained at risk due to issues that extend beyond consumer protection laws.

1.6 Regulatory Framework

The digital market space in Kenya is not regulated under any one particular piece of legislation or set of guidelines. A variety of laws touch on various aspects or sectors of digital markets including aspects such as data protection, intellectual property, finance, transport and other sectors. This section of the paper is limited to the regulatory framework that concerns competition regulation in the digital space.

In Kenya, the Data Protection Act (DPA)[24] regulates data protection. Particularly, for the commercial use of data, a person shall not use personal data obtained unless the person has sought and obtained the express consent from a data subject; or is authorized to do so under any written law and the data subject has been informed of such use when collecting the data from the data subject. A data controller or data processor that uses personal data for commercial purposes shall anonymize the data, where possible, in such a manner as to ensure that the data subject is no longer identifiable. As relates to competition, the dominant firms in the digital service or product market must not abuse the access to data they have by virtue of their market strength. They ought to adhere to the principles of data protection thereby protecting consumers in the process. Even with this provision on commercial use of data, the DPA falls short with no mention of competition issues within the data sector. It does not mention any obligations for market leaders with the use of data in the digital space especially as relates to restricted trade practices or abuse of dominance.

[24] Data Protection Act No. 24 of 2019. Available at http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2024%20of%202019> Accessed on 6th August 2022.

The Kenya Information and Communications Act (KICA)[25] provides for the establishment of the Communications Authority of Kenya[26] (CA), to facilitate the development of the information and communications sector (including broadcasting, multimedia, telecommunications and postal services) and electronic commerce. However, due to the online markets and trading platforms constituting electronic services, then KICA falls short of regulating this market as envisaged earlier under KICA. What this means is that consumers are not able to benefit from Consumer Protection Regulations, 2010, which preferably should come into effect in cases where the relevant authorizing licensees offer services.

Unlike in Kenya, the United Kingdom operationalized regulations that protect online transactions, specifically focusing on consumer contracts. Regarding capacity building, efforts are being channeled to funding broadband connectivity to public secondary schools to improve the literacy levels of the population and exposure to the concept of digital markets.

Conversely, the Competition Authority of Kenya (CAK) is mandated to promote and safeguard competition in the national economy. CAK receives complaints and investigates conduct that may hinder competition in the market. Recently, CAK has received and investigated seven cases that relate to digital markets. The cases involved mergers, restricted trade practices and consumer protection concerns.

CAK has been at the forefront in working together with agencies in other jurisdictions to combat fraudulent, deceptive and unfair trading practices. It has ensured consistent enhancement of technical skills for its staff on issues regarding online investigations and unfavorable terms and conditions in the digital economy. This has been realized through a partnership with global organizations like International Consumer Protection and Enforcement Network (ICPEN).[27] Through similar collaborations, CAK has also been able to incorporate international best practices in its operations. In addition, CAK holds an Annual Symposium on Competition Law and Policy which brings together stakeholders with the objective of deepening the understanding of the competition law. In such platforms, CAK has been able to identify the disruption in the digital market as an agenda about competition.

In its current Strategic Plan, CAK (or the Authority) has prioritized enforcement and research to inform the best regulatory regime to support disruptive technology. Towards this, CAK already reviewed its Market Definition Guidelines, taking into account the challenges faced when regulating the digital sector in light of advancements in competition law enforcement. The

[25] Act No. 2 of 1998, available at <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%202%20of%201998> Accessed on 5 August 2022.

[26] CA Website (2020). Available at <https://www.ca.go.ke/>. Accessed on 5th August 2022

[27] ICPEN Website (2020). Available at. < https://icpen.org/who-we-are> Accessed on 5th August 2022

Guidelines introduce globally mainstreamed concepts like Big Data, multisided markets and digital markets. They also provide transparency and clarity to the stakeholders about why the market definition is a critical process during merger analysis and how the CAK carries out the merger process.

1.7 Competition dynamics of Digital Ecosystems

Competition agencies have been able to legally and economically define dominance. In these definitions, both size and presence have not been the only metrics put into consideration in establishing dominance in the market. In the case of online platforms, the economies of scale and winner take all outcome have resulted in most of these platforms experiencing faster growth and expansion to other markets. The market dynamics have constrained these platforms from working independently. Based on these, it is possible for competition issues to arise and the expectation is those competition agencies, who are enforcers of these laws, will swing into action and arrest the case.

However, the shortcoming that may fail successful investigation and provision of much-expected guidance from competition agencies is pegged on the failure of traditional instruments in defining relevant markets when it comes to digital markets. It is not clear how many markets should be defined due to their interrelationship with several interdependent markets with some being non-transactional, provision of zero-priced services, constant disruption resulting from the intensity of innovation which sometimes results in new markets being created, and constant redefinition of market borders making it more difficult to precisely delineate the relevant market.

Currently, it is a general practice in competition law analysis that a market should be defined before delving into the analysis of a case. If the need to maintain this practice is outstanding, then in digital markets we should be forward-looking and try to define the relevant markets of tomorrow since it is not a static market. In itself, the digital market is very dynamic in relation to the target consumers, services and goods offered, performance in terms of turnover and the market structure as well. This necessitates a different approach when investigating this market, agencies can choose to look into the competitors first and then work backwards to the definition of the relevant market.

Secondly, the role of dynamic competition is not properly integrated into current methodologies used for establishing dominance. Undertakings possess market power which enables them to have an operating edge against the others. Typically, determining dominance requires that sufficient evidence is gathered to prove that it can hinder competition in the market. This analysis is often done using static indicators like price levels, concentration levels and market shares. However, in digital markets, the static indicators are less effective in determining the market power of online platforms. In analyzing market power, other indicators including entry barriers and contestability constraints can be adopted.

With digital markets, using automated systems to not only organize but also select relevant information, then this market stands prone to collusion through "algorithmic selection"[28]. In particular, if the predictions and decisions from the algorithms performed have an error that is directly linked to the automated systems leading to some policy concerns. For instance, the risk that can arise from such actions include censorship, abuse of market power and manipulation that may result from search engines filtering critical information and hence disadvantage the competitors. The algorithm may as well be used to fix prices in the digital markets.

It has become increasingly difficult to make a distinction between abusive behavior from legitimate business strategies. The high degree and fast rate of innovation make it difficult to filter through and identify instances of anticompetitive behavior and legitimate conduct of a platform. For instance, a purchase of a startup by a digital giant might be perceived as either mutilation of competition or may stir more innovation in the industry as the startup may have access to sufficient financing. In such a case, the powerful player may foreclose the future market and inhibit innovation and as a result competition by merit will not be possible.

Lastly, it is also possible to be locked in one platform due to high switching costs and interoperability and the existence of rating systems. This case is common in the taxi industry, where the drivers might not be able to move with their ratings to other platforms as bottlenecks within the value web exist.

1.8 Do we need to prioritize the digital sector?

It is widely agreed that digital platforms can create new opportunities for companies of all sizes to engage in trade, but the gains are not automatic and economic policies and regulations will need to maximize the benefits while minimizing the risks. Concerns have been raised by different governments and many other organizations. In a policy brief by UNCTAD[29], one of the highlighted concerns was the rising market power of certain platforms and the related implications for competition. In the UK, the dominance of two major platforms, and the

---

[28] OECD (2017). Algorithms and collusion: Competition Policy in the Digital Age. Available at <https://www.oecd.org/daf/competition/algorithms-and-collusion.htm>. Accessed on 5th August 2022.

[29] UNCTAD (2020). Policy Brief (No. 73). Available at < https://www.un.org/development/desa/dpad/publication/un-desa-policy-brief-73-.> Accessed on 14th August 2022.

supremacy of Google and Facebook in terms of online advertising created potential harm to both businesses and consumers. Specifically on stifling market competition[30].

Being cognizant of the current advanced technologies being adopted in our markets, where more and more information is being generated, kept and transmitted through electronic means, then the competition agencies have to as well increase the use of digital evidence. Investigation techniques have to be amenable to matching the current shift in technology. Further, the agencies can build in–house capacities and capabilities as well as cooperate with other specialized agencies within and outside their jurisdictions[31].

The evidence of a consistent increase in the number of internet users and users of digital platforms means that more economic activities have shifted online. This calls for regulatory frameworks to support the gains so far made in the development of online markets. CAK reviewed its Market Definition Guidelines to capture emerging trends and to more broadly support the growth of Kenya's digital economy. In the same breath, the agency supports consumer's rights are enforced to help create safe, secure and trustworthy digital markets.

2.0 ONLINE SHOPPING PLATFORMS IN KENYA

Kenya's online shopping platforms have been perceived to be one of the most complex yet very understandable markets. This perception is built from the wealth of user knowledge that makes it a complex market. With 9% of Kenyans being regular users of e-commerce, 2020 UNCTAD's Business-to-customer (B2C) Commerce Index ranked Kenya at position 88th among the fastest growing e-commerce economies worldwide and ranked 4th in Sub-Saharan Africa behind Mauritius, South Africa and Nigeria[32]. This growth is based on the number of new players in the market who target low-income consumers as well as growth in the hospitality industry. Further to this, the growth has also been stimulated by strong growth in social media adoption as well as increased diversification of marketing channels. According to Data Report 2021, there were 11 million social media users in Kenya in January 2021, which presents an increase of 2.2 million from 2020[33].

---

[30] Retailers' Experience of Using Digital Platforms (2021). BEIS Research Paper Number: 2021/039. Available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1003984/retailers-experience-using-digital-platforms_1. pdf.> Accessed on 14th August 2022

[31] OECD Policy Round Tables (2011). Crisis Cartels 2011. Available at < https://www.oecd.org/competition/cartels/48948847.pdf >Accessed on 14th August 2022.

[32] https://www.trade.gov/country-commercial-guides/kenya-ecommerce. Accessed on 5th August 2022

[33] Datareportal (2021). Digital 2021 Global Digital Overview. Available at < https://datareportal.com/reports/digital-2021-global-overview-report > Accessed on 14th August 2022.

Online shopping platforms have developed over years, particularly among small and medium enterprises. Usage of apps has made it easy to advance online shopping. The Kenyan market has embraced locally created platforms that have managed to secure a stable foothold. Besides that, the affluence of Kenyans and well-spread practices of using online shopping make it a sophisticated market[34]. Conversely, a big percentage of Kenyans do not prefer shopping online, making the penetration rate of credit cards remain low, as most transactions are carried out in cash or M-Pesa[35], which is a Fintech platform.

The digital markets have provided direct engagement between the players in this market as noted from the over 75% of website traffic generated from smartphones being to the digital markets, meaning there is a direct engagement between consumers and the online platform. These retailers have a model of delivery whereby they either deliver to the shopper's home, office or a nearby store location which in this case operates as an agent of the retailer. Some retail companies operate online only with no physical shops for they, in fact, only sell online. They have no physical shop for potential consumers to visit. These shopping platforms have enabled consumers to shop for nearly all products online, ranging from outfits, electronics, food and drinks, vehicle, and even real estate. The drive could be attributed to the convenience and satisfaction that come with the online shopping experience, as time and money can easily be saved. In addition, a stress-free shopping experience, privacy and plenty of options are availed to the consumer[36].

The growth has attracted an influx of cons who create fake platforms, making the experience fulfilling only when the genuine platforms are engaged. It has also become difficult to find the precise online store as some have the habit of delivering what was not ordered while others promise what they are unable supply. Other factors that are perceived to influence the engagement of the majority of Kenyans in the online markets include purchasing power, availability of suitable products online, awareness of available opportunities, levels of literacy and degree of confidence in online trade platforms. Some of the online shopping platforms operating in Kenya are listed in Table 2;

[34] https://www.creative.co.ke/top-10-e-commerce-platforms-in-kenya/. Accessed on 5th August 2022

[35] Vodafone website (2022). Available at <https://www.vodafone.com/about-vodafone/.> Accessed on 13th August 2022

[36] Akus Digital Solution (2022). Available at <https://www.akus.co.ke/top-10-online-shopping-sites-in-kenya-with-great-experience/.>. Accessed on 5th August 2022.

Table 2: Shopping Platforms in Kenya

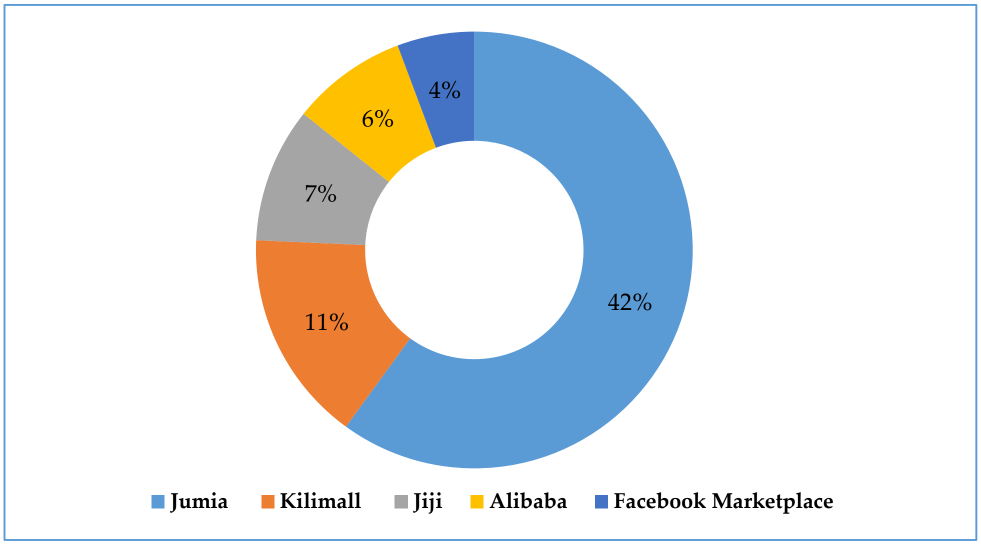
No.	Online Shopping Platforms	
1.	Jumia	Users have the option of paying after delivery has been done and are enabled to shop for a variety of items.
2.	Kilimall	Payment for the item is made before delivery. It offers promotional deals like flash sales and Black Friday sales.
3.	Jiji	Sellers can advertise without being charged on the platform with the option of a premium advertising package if they want to be prioritized on the platform.
4.	Pigiame	It provides other online channels like WhatsApp groups, which are used as channels for buying and selling of products.
5.	Naivas Online	Apart from its physical outlets, the supermarket provides functional online platforms where shoppers can order from their listed items.
6.	Quick Mart	Provides functional online platforms which is an alternative to their physical outlets where shoppers can order.
7.	Skygarden	Vender without e-commerce websites is provided with a platform to sell their products.
8.	Shopit	Is technically a one-stop computer shop with a few home appliances and office equipment.
9.	Carrefour	Aims at making shopping more convenient for buyers who do not have time to line in the physical outlets, shoppers can order items and pick them at any of their branches.
10.	Copia	Customers from the distant parts of the country can order items in bulk and have them transported within an agreed time.
11.	Auto Check	Deals with both new and used cars, auto-spare parts on the platform, and can link the customers with creditors.
12.	Alibaba	Provides a wide selection of products and services for consumers from verified merchants.
13.	Facebook Marketplace	Offers to buy and selling of both new and used items both locally or shipped through listing on the platform.
14.	Glovo	Offers on-demand courier service; purchases pick up and delivers orders placed on the app
15.	Yaga	Provides for the selling and buying of second-hand items.

Source: *Author's Compilation, 2022*

Regarding preference, a Survey by Statista in 2021 reported that the top five preferred online platforms as in the Figure 2. The ranking was based on usage of the platforms for the sale or purchase of products through the platforms in Kenya[37] in 2021;

[37] Statista (2021). Favourite or most often used online shopping platforms in Kenya as of 2021. Available at <https://www.statista.com/statistics/1268712/most-used-online-shopping-platforms-in-kenya.>. Accessed on 5th August 2022

Figure 2: Most Preferred Online Shopping Platforms in Kenya, 2021



Source: *Statista, 2021*

2.1 Characteristics of online shopping platforms in Kenya

Across the globe, most successful online shopping platforms have been structuring their commerce model around complementing products and services. This is no different from Kenya's market where online shopping platforms have also integrated a wide range of products and services, for that reason, delivering efficiency and reduced prices. Consumer experience is also enhanced as these models appear as a reflection of a one-stop shop through availing a variety of products on one platform. The digital market in Kenya can be stratified into e-commerce, digital health, app, digital media, digital advertising, e-services, smart home and FinTech.

The online shopping platforms in Kenya are characterized by various factors which include; shopping platforms competing directly with other shopping platforms in the same business. For instance, Jumia[38] and Kilimall[39] compete directly in the online shopping space. Online shopping platforms can also enter new markets to compete directly with other digital platforms. A case example is that Jumia has given its customer network and expertise to include food order business on the platform, which has increased the number of products available on its shopping platforms. It is now able to compete directly with digital platforms like Glovo[40]. In such cases of direct and indirect competition, factors that affect direct competition include how easy is it for users to switch between platforms and what barriers to entry exist for startups and other firms trying to challenge incumbents. Indirect competition effects on the market can be complicated

[38] Jumia Website (2022). Available at <https://www.jumia.co.ke/.> Accessed on 5th August 2022
[39] Kilimall Website (2022). Available at <https://www.kilimall.co.ke/.> Accessed on 5th August 2022
[40] Glovo Website (2022). Available at <https://glovoapp.com/.> Accessed on 5th August 2022

and less apparent than those of direct competition. Nevertheless, correctly assessing these competitive effects on mergers, acquisitions, and other practices in digital markets is imperative.

Regarding contracts, the platform users are engaged in a contract which outlines the mode of payment between the marketer and the platform users. The price paid to the platform owner is in form of commission fees from the sales made through the platform, for example, Yaga a clothing fashion platform charges a commission fee of 9% on clothes sold[41]. Similarly, Jumia has specific commission bands for each category of items. The commission is a percentage of the price displayed on the website and is only deductible when the order is successfully delivered to the customer. The agreements also outline the terms of engagement in relation to the marketing of both the products and the platform being used, complaint lodging and resolution and how payments are to be made once goods or services are purchased.

The retail markets have been changed by online developments and to some extent disengaged sales from geographic presence. As observed in South Africa where the increases in the size and market power of large online retailers who operate globally combined with technology changes in areas as disparate as inventory, payments and media meant that a sophisticated online presence was becoming increasingly important in some market segments[42]. The same is taking shape in Kenya, where most retailers like Naivas and Carrefour have partnered with Glovo for delivery services. This combination of online sales offerings and delivery with existing business models enables the tapping of revenue from e-commerce. For instance, Naivas[43] competes with products from other companies on its shopping platforms.

Digital platforms and their products often contest with other external parties on their platform. In this case, the external party is made to compete for a portion of the revenue made on the platform. For example, a best-selling vendor on an e-commerce platform can leave the platform together with other vendors and create their platform in order to compete with the incumbent. On the other hand, as a result of vertical integration, the firm owning a platform can end up having its products trading at a lower price than the rest of the products on the same platform.

In evaluation of digital platforms interaction and external parties, factors to be considered include the gatekeeping powers that an online shopping platform has over the external parties, whether these powers are used in perpetuating anti-competitive behavior, and to what extent each party has given the overall competitive landscape. Additional, interrogations about what data a digital platform accumulates from external sellers that might be contending directly with their in-house

---

[41] Yaga Website (2022). Available at <https://shop.yaga.co.ke/.> Accessed on 5th August 2022

[42] Strategies for Adapting to Online Entry: The Case of Retailers in South Africa (2019). Available at < https://www.researchgate.net/publication/333080209> Accessed on 14th August 2022.

[43] Naivas Website (2022). Available at <https://www.naivas.co.ke/.> Accessed on 5th August 2022

products and what rules govern their use of this data are also key in competition assessment. Certain interrogations must be done to aid evaluate the attractiveness of these markets and whether competition regulation and laws as crafted today are adequate for the digital era.

2.2 Enforcement of the Digital Markets conduct in Kenya

In line with its mandate, CAK has handled cases and issued advisory opinions on anti-competitive conduct that include price fixing; territorial allocation and also Abuse of Dominance, to other government agencies. Specifically, in one of the Petitions by the Transport Operators Workers' Union of Kenya on the Creation of Regulation of Digital Taxi/Cab Operators (E-Hailing Apps) in Kenya[44], CAK advised that pricing is the most important and fundamental benefit resulting from market competition. Any attempt to harmonize rates will extinguish this benefit, to the detriment of consumers' welfare. In addition, there exists free entry and minimal switching costs by drivers, among the apps-based taxis, and also between the traditional and app-based taxis. This ensures that platform providers do not possess market power. The threat of entry (by new competitors) and exit (by partners), ensures constant innovation and introduction of new products.

CAK also handled a case where allegations of unfair Commission Charges by application based courier platforms were made[45]. CAK received a complaint from ChrispWings against Glovo App, Jumia Kenya and UberEats on allegations that the accused were offering unfair and discriminative trading conditions amongst different players in the market. The complainant supposed that the platforms were taking advantage of their positioning by charging exorbitant commissions based on the size of one's business; restaurants with more outlets were charged lower commission than those with few outlets. At the same time, these platforms significantly underpriced the normal rates for delivery to the consumer. The complainant further indicated that the market is a double-edged sword in that, one is doomed if they sign up for the delivery services, doomed if they do not sign up since the uptake of these platform services by customers has almost made it necessary for restaurants to sign up.

In analyzing evidence and conducting investigation, CAK considered market definition, price discrimination, predatory pricing, coordination on terms of trade and information sharing as possible theories of harm. In defining the market, it considered that the relevant product market is that market for provision of online food retail services through platforms. This market is a multisided one that encompasses services to consumers, food outlets and courier service providers.

---

[44] CAK (2019). Annual Report and Financial Statements, 2018/19. Available at < https://www.cak.go.ke/ >. Accessed on 14th August 2022.

[45] CAK Annual Report (2020/2021). Available at <https://www.cak.go.ke/> Accessed on 25th August 2022

After considering submissions from the parties, the determination was that neither of the three parties complained against were dominant, nor did they have market power. Further, the investigations revealed that there are substitutes to the services rendered by the three parties in the market, which were open to ChrispWings. As a result of the investigation, exclusive clauses in agreements between the outlets and the application were expunged.

The case highlighted on the possible competition challenges that online shopping markets face. Ranging from contract terms, algorithmic determination of the prices, marketing and the commission charged on the services offered by the platform. The case also signals on the need for constant surveillance of digital market to ensure that fair competition, the need to review the market definition guidelines and to develop tools to monitor algorithmic selections.

2.3 Creating a Regulatory Framework for Digital Markets

The digital market is quickly transforming the Kenyan economy as seen in the online shopping platforms through its disruption of the traditional market. It presents notable regulatory challenges that need to be uniquely handled using a different approach. The competition-related concerns that pose risk to the operation of this market include; data access and privacy, vertical integration, economies of scale, algorithmic selection, contracts of engagement and jurisdiction of these online shopping platforms have to be well described to enhance the efficient operation of this market.

In addition, competition agencies in the leading economies have been reviewing their approach to regulation and enforcement in digital markets in order to adequately address these competition issues. This means that the regulatory concern at hand is not unique to specific jurisdictions, but cuts across the globe.

In coming up with a sound digital regulatory policy, the consideration for the development of enterprising investments, product innovation and new data-based services have to be secured. The envisioned framework should also accommodate issues relating to liability regulations and fair competition. The digital business models should be part of an open innovation competition[46]. For that reason, the need to eliminate isolated solutions, privileges, discrimination and "lock-in" practices have to be considered as well.

---

[46] Republic of Kenya (2019). Digital Economy Blueprint: Powering Kenya's Transformation. Available at <www.ict.go.ke/wp-content/uploads/2019/05/Kenya-Digital-Economy-2019.pdf>. Accessed on 5th August 2022

3.0 CONCLUSION AND RECOMMENDATIONS

Competition laws and policies in most developing countries have been a pillar supporting the economy. Improvement of effective enforcement of competition law has become essential for law development. To address the highlighted challenges of digital markets, relevant regulations, policies and guidelines may need to be enacted.

There is a need for policymakers to start from a broad point of view by undertaking market surveillance and inquiries to further inform if the dominant players engage in unfair competition practices. This would help in mitigating the risks as it will give a current overview of competition status in the digital market. From the surveillance, the competition agency would also be able to determine if there is a need for the development of guidelines for the regulation of gatekeepers or amend existing guidelines for the respective market.

Additionally, the available statistics that may be used in the categorization of the online transaction are not sufficient. It is even more challenging when the transaction is done at a cross-border level, as, a transfer of ownership can be done by a simple mouse click but the capturing of the transaction is rarely accurately reported. This competition concern can be mitigated by improving the collaboration and engagement between competition agencies of a different jurisdictions. Such engagement would ease sharing of information that may be critical for investigation, policy reviews and predictable decision-making.

The dynamism of the digital economy demands the reinvention of the strategies and tools used to enforce competition law. Its characteristics have disrupted the normal operation of the market and ultimately defy the sector-specific rules in respective markets. This means that the policymakers would have to be keen not to respond to the disruption while focusing on the public interest and the source of the disruption. With this in mind, the competition agencies should come up with public policies, and train their staff on new methodologies and tools that will effectively handle the ever-evolving digital markets. The competition agencies can also consider setting up special units within their structures to specifically focus on digital markets to ensure that competition concerns within this market are well handled effectively.