Goals of the AfCFTA Competition Protocol Digital Market Competition Regulations:
Lessons from South Africa's Online Intermediation Platform Market Inquiry (OIPMI), the EU's DMA and the US Experiences with Digital Platform Giants

Vellah Kedogo Kigwiru (Technical University of Munich) and Dr. Zlatina Georgieva (Utrecht University)*

Abstract

The European Union (EU) has continued to be a worldwide leader in setting international norms, particularly in competition law policy, data protection and platform governance. In digital market regulation, after the EU Digital Markets Act (DMA), several countries have adopted or are considering the adoption of digital markets competition regulations (DMCR) similar to the DMA. While some have challenged the notion that the DMA and its goals of ensuring contestability and fairness in the market should not be the blueprint for adopting DMCRs in other countries, at this juncture, it is impossible to overstate the influence of the EU DMA on future DMCRs. We contribute towards this scholarly debate on the influence of DMA beyond the EU by focusing on a region that, despite competition agencies' regulatory enforcement in digital markets, has not received adequate scholarly attention: Africa. Although no African country has considered adopting a DMCR, at the continental level, African countries seek to adopt a DMCR under the AfCFTA Competition Protocol (CP).

In formulating the appropriate goals of the AfCFTA DMCR, we build on African experiences in enforcing competition law, the African market structure, the debate on the goals of competition law in Africa, intellectual thinking on regulation of digital markets and the EU DMA. More specifically, for the African context, we draw on the 2023 Competition Commission South Africa, Online Intermediation Platforms Market Inquiry (OIPMI) findings on business user treatment to further inform the appropriate goals of the AfCFTA DMCR. An analysis of the OIPMI Final Report shows that African markets have high barriers to entry, and digital platforms impose unfair trading conditions on African businesses compared to international businesses. Consequently, like the EU DMA, fairness and contestability are critical for the success of African businesses in the digital markets. While public interest will continue to shape African competition law enforcement in digital markets, African countries can draw from the insights of the EU ordoliberal thinking and the US Neo-Brandeisian movement, which seek to enhance the participation of small businesses in a market characterized by few firms with concentrated economic power. We conclude by recommending that, unlike the DMA, which goals are distinct from competition law, the AfCFTA DMCR should incorporate multiple goals merging regulatory goals with these of competition law enforcement, while prioritizing innovation, inclusivity, fairness, and contestability.

***Vellah Kedogo Kigwiru is a Research Fellow at the Chair for International Relations (Prof. Dr. Tim Büthe), Munich School of Politics and Public Policy (HfP) at the Technical University of Munich (TUM) in association with the TUM School of Social Sciences and Technology and the TUM School of Management, as well as a Friedrich Schiedel Fellow for Technology in Society at the TUM Think Tank at HfP. Dr. Zlatina Georgieva is an Assistant Professor in Competition, Regulation and Governance at the Law School of Utrecht University (International and European Law Department).** **The authors acknowledge the kind support of the Economic Security Project's Antimonopoly Grant.**

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I. INTRODUCTION

The AfCFTA Agreement

In 2018, African countries adopted the African Continental Free Trade Area (AfCFTA) Agreement, establishing a continental market of more than 1.4 billion people.[1] The objective of the AfCFTA Agreement is to boost intra-African trade through the creation of a liberalised market for goods and services, movement of people and capital within the continental market, laying the foundation of the establishment of a Continental Customs Union, and enhance the competitiveness of African States in the international market.[2] The AfCFTA Agreement promotes industrial development through diversification and regional value chain development.[3]

By 2023, 47 African countries had ratified the AfCFTA Agreement. Seven African countries (Benin, Liberia, Libya, Madagascar, Somalia and South Sudan) have deposited their signatures and are yet to ratify the AfCFTA Agreement. [4] Eritrea is the only country that has yet to sign and ratify the AfCFTA Agreement.[5] Trading under the AfCFTA began in 2021. Additionally, the operationalization of the AfCFTA Agreement has begun. Some African countries have adopted the AfCFTA Implementation Strategies to expedite the enforcement of the AfCFTA Agreement at the national level.[6] Comoros, Congo, Kenya, Ghana, Ivory Coast, and Tunisia have set up the AfCFTA National Implementation Committees (NIC).

By 2024, several African countries have started trading under the AfCFTA Guided Trade Initiative (GTI).[7] The GTI is an experimental mechanism that seeks to test the

[1] Generally on the literature on the AfCFTA see. Albert Zeufack, Fulbert Tchana and Aly Sanoh (eds), *Making the African Continental Free Trade Agreement a Success: Pathways and a Call for Action* (Routledge 2024); Kofi Oteng Kufuor, *The African Continental Free Trade Area Agreement: The Development of a Rules-Based Trading Order* (Routledge 2024); David Luke and Jamie Macleod (eds), *Inclusive Trade in Africa: The African Continental Free Trade Area in a Comparative Perspective* (Routledge 2019).

[2] See Article 3 of the AfCFTA Agreement on General Objectives.

[3] Manfred Kouty, *Boosting the Intra-African Digital Trade in the AfCFTA Context: Does Regulatory Framework Matter*, 2(9) Digital Economy and Sustainable Development (2024).

[4] Annabel Nanjira and Nwamaka Okany, 'African Practice in International Economic Law 2022-2023' (2024) 4 African Journal of International Economic Law 105, at 106; Arinze Bryan Okiche and Uchenna Agunwa, 'African Practice in International Economic Law: 2021-2022' (2022) 3 African Journal of International Economic Law 185.

[5] Abdur Rahman Alfa Shaban, 'Eritrea Defends the Decision to Sit Out Africa Free Trade Pact-For Now' (13 August 2018, , AfricaNews). Available at https://www.africanews.com/2020/07/29/eritrea-defends-decision-to-sit-out-africa-free-trade-pact-for-now// accessed on 27 January 2025.

[6] By 2023, Kenya, Namibia and Nigeria had adopted their AfCFTA Implementation Strategies.

[7] These countries are: Algeria, Cameroon, Egypt Ghana, Kenya, Mauritius, Rwanda, Tanzania, Tunisia, South Africa and Nigeria.

operational, institutional and legal framework governing trade under the AfCFTA. Kenya and Ghana were the first countries to trade under the AfCFTA GTI, with the first consignment of tea delivered to Ghana from Kenya.[8] The AfCFTA Secretariat has also concluded the AfCFTA Protocols on Investment,[9] Competition Policy,[10] Intellectual Property,[11] Digital Trade,[12] and Women and Youth in Trade[13] as required under Article 7 of the AfCFTA Agreement. These Protocols are critical in the successful implementation of the AfCFTA Agreement.

The AfCFTA Competition Protocol

This paper focuses on the AfCFTA Competition Protocol (CP) and how it relates to regulating the African digital markets.[14] Article 11 of the AfCFTA CP prohibits undertakings and designated digital gatekeepers from abusing their relative position of economic dependence over a customer or supplier when the conduct affects competition within the continental market.[15] Article 11(1) of the AfCFTA CP deems economic dependence to exist where:

> '… undertakings as suppliers or purchases of certain type of goods and services are dependent on another undertaking or a group of undertakings in such a way that sufficient and reasonable possibilities for switching to third parties do not exist and there is a significant imbalance between the power of such undertakings or group of undertakings and the countervailing power of other undertakings.'[16]

In determining whether economic dependence exists, Article 11(3) of the AfCFTA CP requires the established AfCFTA Competition Authority (CA) to consider the market share of the undertaking in the market, the relative strength of the undertaking, the existence or not of alternative solutions and the factors that led to the situation of dependence.[17] Article 11(4) of the AfCFTA CP prohibits undertakings designated as digital gatekeepers from imposing price

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[8] Konrad Adenauer Stifung, *The Guided Trade Initiative: Documenting and Assessing the Early Experiences of Trading under the AfCFTA* (Konrad Adenauer Stifung 2023).
[9] The AfCFTA Protocol on Investment was adopted in February 2023 in Addis Ababa, Ethiopia.
[10] The AfCFTA Competition Protocol was adopted in February 2023 in Accra, Ghana.
[11] The AfCFTA Protocol on Intellectual Property was adopted in February 2023 in Addis Ababa, Ethiopia.
[12] AfCFTA Secretariat, *Draft Protocol on Digital Trade,* (Adopted in February 2024 in Durban South Africa), available at <https://www.bilaterals.org/IMG/pdf/afcfta_digital_trade_protocol_-_9_february_2024_draft.pdf> accessed 25 January 2025.
[13] AfCFTA Secretariat, *The AfCFTA Draft Protocol on Women and Youth in Trade* (Adopted in February 2024 in Durban, South Africa).
[14] On institutional design of the AfCFTA Competition regime see: Vellah Kedogo Kigwiru, 'Supranational or Cooperative? Rethinking the African Continental Free Trade Area Competition Protocol Institutional Design' (2024) 12(1) Journal of Antitrust Enforcement 98.
[15] AfCFTA CP, Art. 11(3).
[16] In determining whether economic dependence exists, Article 11(3) of the AfCFTA CP required the established AfCFTA Competition Authority to consider the market share of the undertaking in the market, the relative strength of the undertaking, the existence or not of alternative solutions and the factors that led to the situation of dependence.
[17] Folakunhmi Pinheiro, 'Regulating Africa's Digital Markets: What to Do, and What Not to Do' (11 June 2023, Competition Policy International).

or service parity clauses on business users, imposing anti-steering provisions on business users, using business data to compete against business users, combining personal data sourced from different services offered by the gatekeeper, requiring the pre-installation of gatekeeper applications or services on devices, self-preferencing of own services, and unjustified differentiation in fees or treatment against small and medium enterprises, placing restriction on portability of data or other actions that might inhibit switching platforms for business users. The designated digital gatekeepers are also prohibited from failing to identify paid ranking as advertising in search results and allowing paid results to exceed organic results on the first results page.

The AfCFTA Competition Digital Regulations

Article 11(5) of the AfCFTA CP requires the Council of Ministers to adopt Regulations that will designate gatekeepers and core platform services.[18] The AfCFTA DCR will complement the existing national and regional competition law regulating competition in the African digital market. In 2024, the AfCFTA Secretariat drafted the AfCFTA CP Regulations, such as the AfCFTA Regulations Establishing the AfCFTA Competition Network, the AfCFTA Regulation on the Procedures and Powers of the Authority, the AfCFTA Regulations on the Composition and Modalities of the Tribunal; and the Regulations on Thresholds for Mergers and Acquisitions as required under the AfCFTA CP. These draft Regulations are yet to be adopted by the Council of Ministers.

When this paper was written, the AfCFTA CP Regulations were undergoing stakeholder consultations. During the 8th Meeting of the AfCFTA Committee on Competition Policy held virtually on the 18th to 22nd of November 2024, where the draft AfCFTA CP Regulations were discussed during stakeholder capacity building, the AfCFTA Secretariat indicated the AfCFTA CP digital market competition regulations (DMCR) will be drafted after a market study.[19] A market study would enable the AfCFTA Secretariat to understand the evolving landscape within the African digital markets.[20] Although the AfCFTA DMCR will be adopted in the future, Africa is jumping on the bandwagon of many countries adopting DMCRs.[21]

[18] Ibid.
[19] AfCFTA Secretariat, Presentation in Abidjan, where the first author of this paper attended the event as a resource person.
[20] This was mentioned during the 9th AfCFTA Meeting of the Committee on Competition Policy held virtually from 24th to 28th February 2025, where the first author of this paper was in attendance.
[21] Elias Deutscher, 'Reshaping Digital Competition: The New Platform Regulations and the Future of Modern Antitrust' (2022) 67(2) Antitrust Bulletin 302.

Regulating digital market competition under the AfCFTA is a welcome move and a golden opportunity to create a conducive environment for African businesses to participate and compete with global firms in the global digital trade.[22] This will facilitate the creation of a digital single market as anticipated under the AfCFTA Protocol on Digital Trade.[23] In regulating digital markets at the continental level, the AfCFTA Competition Authority is also anticipated to address the challenges that NCAs and regional competition authorities (RCA) face in regulating big tech companies, such as resource constraints and limited jurisdictional reach.[24] As aptly put by Buthelezi and Hodge,[25] in the context of digital markets, 'regional, or even continental coordination in the case of Africa, is imperative as it will provide more leverage dealing with issues that may have a regional or continental dimension'.[26] The AfCFTA DMCR will also give African countries a coordinated voice in regulating big tech companies.[27]

Objective

As the AfCFTA Secretariat conducts a market study in digital markets across Africa to inform the adoption of the AfCFTA DMCR, we seek to contribute towards its goals. As various jurisdictions seek to regulate competition in digital markets, there is an increasing debate on the goals of such regulation.[28] Appropriate DMCR goals inform the why, how, and the extent of government intervention in the digital market.[29] Government intervention in digital markets does not occur in a vacuum. It is informed by the market structure as well as intellectual thinking. For instance, scholars have shown that the ordoliberal thinking has greatly influenced

[22] Franziska Sucker, 'Navigating Economic Inequalities Alongside African Market Digital Integration: The Role of the AfCFTA Competition Protocol' (2025) 52(1) Legal Issues of Economic Integration 5.
[23] María Vàsquez Callo-Müller and Kholofelo Kugler, 'Digital Trade, Development, Inequality' (2023) 117 AJIL Unbound 116.
[24] Vellah Kedogo Kigwiru, 'Why, How and When Do National Competition Agencies Support Supranational Regional Competition Regimes?' A Case of the COMESA Competition Regime' (2025) GRUR Journal of European and International IP Law 1, available here <https://doi.org/10.1093/grurint/ikaf012> last accessed April 2025.
[25] Thembalethu Buthelezi and James Hodge, 'Competition Policy in the Digital Economy: A Developing Country Perspective' (2019) 15(2) Competition Law International 201, 2023.
[26] Government policies can promote or hinder SME's participation in the market.
[27] Eleanor Fox, 'Integrating Africa by Competition and Market Policy' (2022) 60 Review of Industrial Organization 305.
[28] J Cremer et al, 'Competition Policy for the Digital Era ' Publications Office of the European Union; Thomas Tombal, 'Ensuring Contestabilty and Fairness in the Digital Markets through Regulation: A Comparative Analysis of the EU, UK and US Approaches' (2022) 18(3) European Competition Journal.
[29] Alba Ribera Martínez, 'The DMA's Ithaca: Contestable and Fair Markets' 2023 46(4) World Competition 1-30.

the adoption of the EU Digital Markets Act (DMA), [30] which regulates competition in the EU digital markets. At the same time, in the US, the Neo-Brandeisian movement is pushing for government intervention to protect small businesses from Big Tech's anti-competitive conduct that hinders their ability to enter and participate in the market.

DMCRs' goals also determine which conduct should be prohibited and the extent of such prohibition. They legitimize the rules adopted and enhance their acceptance. When DMCR goals are unclear, the DMCR is likelier to be susceptible to contestations that could undermine effective implementation. Thus, from the onset, countries seeking to adopt DMCRs should take DMCRs' goals seriously. National and international experiences, the specific intellectual thinking on government intervention in markets and the goals of competition law in the specific region will inform DMCR's goals.

What should be the appropriate DMCRs' goals? This a normative question that this paper seeks to answer. The EU was the first region to adopt a DMCR. The EU DMA's goal is to enhance fairness and contestability. Critics of the EU DMA's goals argue that they will hinder innovation, which should be the main goal of DMCR, particularly for emerging economies. [31] Some argue that the goals of DMCRs should not diverge from the established principles of competition law, which include protecting competition and not competitors to protect consumers and enhance the effective allocation of resources.[32] Many have noted that stated DMCRs' goals differ from the actual goals. DMCRs also pursue overlapping and multiplicity of goals. According to Manne and others, 'it is not always clear what DMCRs aim to achieve, however. A cursory survey suggests that these rules pursue different goals without immediately unifying them'.[33] Although DMCRs pursue different goals, Manne and others identify three common goals. The first is *redistributing rent* from the gatekeepers to business users and competitors. Second, in a bid to *protect competitors,* i.e. DMCRs pursue contestability. Third, they seek to balance power through *fairness.*[34]

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[30] Regulation (EU) 2022/1925 of the European Parliament and of the Council of September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).
[31] Geoffrey A Manne and Dirk Auer, 'Brussels Effect or Brussels Defect: Digital Market Regulation in Emerging Markets' (20 December 2022, Truth on the Market).
[32] Maureen K Ohlhausen and John M Taladay, 'Are Competition Officials Abandoning Competition Principles' (2022) 13(7) Journal of European Competition Law & Practice 463.
[33] Geoffrey A Manne, Lazar Radic and Dirk Auer, 'Regulate for What? A Closer Look at the Rationale and Goals of Digital Market Regulations' (International Centre for Law & Economics White Paper, Forthcoming Berkely Business Law Journal 22 (1) https://laweconcenter.org/resources/regulate-for-what-a-closer-look-at-the-rationale-and-goals-of-digital-competition-regulations/.
[34] Ibid, at 21.

In this paper, by focusing on Africa's digital markets, we argue that the goals of competition law in Africa, competition agencies' national-level experiences in digital markets, African market structure and the `power bargain of African businesses in digital markets should inform the AfCFTA DMCR's goal. Second, as digital markets are not territorially limited, and the digital gatekeepers that the AfCFTA DMCR seeks to regulate have been investigated in other regions such as EU and US, the goals of the AfCFTA DMCR will also be informed by international experiences. We analyze what informed the EU DMA goals of fairness and contestability. Then, drawing from African countries' experiences in regulating digital markets, particularly the South African Competition Commission (SACC) Online Intermediation Platform Market Inquiry (OIPMI), we examine whether and to what extent the AfCFTA DMCR should also consider contestability and fairness as its goal. Moreover, by analyzing the OIPMI findings, we identify additional goals the AfCFTA DMCR should incorporate. South Africa does not fully represent African countries because the digital markets and infrastructure levels vary considerably across the African continent. Nevertheless, the SACC is the first African competition agency to undertake market inquiries in digital markets and thus provides the starting point in understanding competition in African digital markets.

Contribution

Ultimately, this paper makes several contributions. First, we contribute towards scholarly work on government intervention in platform governance in developing countries. Second, by focusing on the AfCFTA DMCR in a comparative perspective with the EU DMA, we contribute towards scholarly work on the EU's 'Brussels Effect' in digital markets. Third, most of the studies on DMCRs do not focus on their respective goals. Scholarly work that examines what should inform DMCRs' goals is limited. This paper examines how intellectual thinking will inform the AfCFTA DMCR goals.

The rest of the paper proceeds as follows. The second section analyses the goals of DMCRs across the globe. The third section examines what informed the EU DMA's goals and, from a comparative perspective, examines what the AfCFTA can draw as lessons from the EU. To contribute to intellectual thinking and explain the goals of DMCRs in digital markets, the fourth section discusses the potential of Ordoliberal thinking, while the fifth and final section tackles the neo-Brandeisian movement in informing the AfCFTA DMCR goals. The last, sixth section, concludes.

II. DIGITAL MARKET COMPETITION REGULATIONS GOING GLOBAL?

Adoption of DMCRs

Many countries have adopted or are considering adopting digital market competition regulations (DMCR) to complement existing competition legislations and address competition concerns on digital markets.[35] The European Union (EU) was the first region to adopt a DMCR, the EU Digital Markets Act (DMA).[36] Following the DMA, the United Kingdom (UK) adopted the UK Digital Markets Competition and Consumer Act (DMCCA) in May 2024, becoming the second country with a legislative framework to regulate competition in digital markets.[37] In June 2024, Japan adopted the Act on Promotion of Competition for Specified Smartphone Software (Smartphone Act), which applies to software and services for the use of mobile phones.[38]

In the United States (US), four pieces of DMCRs are currently under discussion. They include the American Innovation and Choice Online Act,[39] the Open App Market Act (OAMA),[40] the Ending Platform Monopolies Act,[41] and the Augmenting Compatibility and Competition by Enabling Service Switch Act (Access Act).[42] In the US, adopting the DMCRs may not happen soon, as the US government has taken a less interventionist approach on digital markets.[43] Generally, DMCRs 'are a new form of competition regulation that diverges in subtle but definitive ways from the mainstream notions of competition law'.[44]Most DMCRs are ex-ante regulations which aim to prevent *harm before it occurs*.[45] These DMCRs are also limited

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[35] Kati Suominen, The Spread of DMA-Like Competition Policies Around the World: Current State, Concerning Elements, and Discrimination Against US Businesses (Center for Strategic International Studies 2024), available here < https://www.jstor.org/stable/resrep61520.1?seq=2> last accessed April 2025.

[36] Regulation (EU) 2022/1925 of the European Parliament and of the Council of September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

[37] The Digital Markets Competition and Consumer Act, 2024 c.13 (UK) (*hereinafter* "DMCC"). See Mehmet Bilal Unver, 'Regulation of the Digital Markets in the UK,US and the EU: Context, Criteria, Containment and Beyond' in Kalpana Tyagi and others (eds), *Digital Platforms, Competition Law, and Regulation* (Bloomsbury Publishing 2021) 177-202.

[38]The Smartphone Act is expected to enter into force by end of 2025. See Masako Wakui, 'The Smartphone Act: Japan's New Legislation that Regulates Google and Apple' (2025) Journal of European Competition Law & Practice 1; Alba Ribera Martínez, 'The Japanese Smartphone Act: Teaching Competition Law New Tricks' (2 July 2024, Kluwer Competition Law Blog); Joseph V Coniglio and Lilla Nóra Kiss, '2024 Japan Smartphone Competition' (8 September 2024, ITIF).

[39] American Innovation and Choice Online Act, S. 2992, 117th Cong. (2022) (*hereinafter* "AICOA").

[40] Open App Market Act, S. 2710, 117th Cong. (2022) (*hereinafter* "OAMA").

[41] Ending Platform Monopolies Act, H.R.3825–117th Congress (2021-2022).

[42] ACCESS Act of 2021, H.R. 3849, 117th Cong. (2021) (*hereinafter* "ACCESS Act").

[43] Allen P Grunes and Rosal Baum, 'US Competition Law in Digital Markets' in Kalpana Tyagi and others (eds), *Digital Platforms, Competition Law, and Regulation* (Bloomsbury Publishing 2021) 221-240.

[44] Manne and others (n 33 above), at 16.

[45] In this scenario, rules are formulated indicating the do's and don'ts. It relies on theories of harm.

in scope,[46] are sector-specific, and target specific digital platforms with strategic power, such as 'digital gatekeepers'[47] and 'covered platforms' or digital platforms that have 'strategic market status'.[48]

Australia,[49] Brazil,[50] and India[51] are considering the adoption of DMCRs, similar to the ex-ante DMA. In India, the Standing Committee on Finance released a Report titled Anti-Competitive Practices by Big Tech Companies in 2023.[52] It was followed by the Report of the Committee on Digital Competition Law (CDCL),[53] which recommended the adoption of an ex-ante DMCR in India to supplement the 2002 Indian Competition Act (ICA).[54]

Not all countries have adopted DMCRs. The second category of countries, instead of adopting an ex-ante DMCR, are amending their competition laws to include competition provisions that apply to digital markets. Germany,[55] Turkey,[56] Kenya,[57] and Korea[58] have sought to amend competition laws to address competition issues in digital markets instead of adopting ex-ante DMCRs. In 2021, Germany amended its Competition Act and introduced

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[46] Alba Ribera Martínez, "Asymmetrical Regulation and What Makes or Breaks a Gatekeeper: Lessons for the AfCFTA and COMESA Competition Commission' <https://www.youtube.com/watch?v=IF1ea1ixOZQ&t=711s> accessed 17 December 2024.

[47] The EU DMA and the AfCFTA Competition Protocol apply to digital platforms designated as digital gatekeepers.

[48] See Article 2 of the UK DMCCA.

[49] Australian Government, *A New Digital Competition Regime: Proposal Paper* (Australian Government 2024); Alba Ribera Martínez, 'A Fast Follower Ex-Ante Regime: Australia's Proposed New Digital Competition Regime' (9 December 2024, Kluwer Competition Law Blog).

[50] Dirk Auer, Geoffrey A Manne and Lazar Radic, 'Playing the Imitation Game in Digital Market Regulation–A Cautionary Analysis for Brazil' (Response to Consultation on Bill 2768/22 , 3 December 2023, International Centre for Law and Economics).

[51] India, India Draft Digital Competition Bill (12 March 2024) < https://www.medianama.com/wp-content/uploads/2024/03/DRAFT-DIGITAL-COMPETITION-BILL-2024.pdf> accessed 1 February 2025.

[52] India Standing Committee on Finance, *Anti-Competitive Practices by Big Tech Companies*, (17th LOK SAHBA, India, 2022-2023) <https://eparlib.nic.in/bitstream/123456789/1464505/1/17_Finance_53.pdf> last accessed April 2025.

[53] Report of the Committee on Digital Competition Law, <https://prsindia.org/files/parliamentry-announcement/2024-04-15/CDCL-Report-20240312.pdf> accessed 17 December 2024.

[54] OECD, 'G7 Inventory of New Rules for Digital Markets' (OECD 2024); Giuseppe Nicoletti, Cristiana Vitale and Carolina Abate, 'Competition, Regulation and Growth in a Digitized World: Dealing with Emerging Competition Issues in Digital Markets' Economics Department Working Papers No. 1752, ECO/WKP(2023) 5 (OECD, 2023).

[55] Press Release, *Amendment of the German Act Against Restraints of Competition*, BUNDESKARTELLAMT (Jan. 19, 2021).

[56] Joseph V Coniglio and Lilla Nóra Kiss, 'Squeezing out Innovation: Concerns with Turkey's Proposed Digital Competition Bill' <https://www2.itif.org/2024-turkey-dma.pdf> last accessed April 2025.

[57] Joseph V Coniglio and Lilla Nóra Kiss, 'Comments to Kenya's Competition Authority Regarding the Draft Competition (Amendment) Bill 2024 (11 June 2024, Information Technology & Innovation Foundation).

[58] Initially, Korea had proposed an ex-ante DMA like ex-ante Regulation, the Korea Platform Promotion Act. However, in 2024, it dropped this quest and is seeking to amend its competition law to address competition issues in the digital market. See Sangyun Lee, 'Lessons from Korea's Roller-Coaster Ride Toward Platform (Non) Regulation' (25 September 2024, Truth on the Market); OECD, 'Ex-Ante Regulation and Competition in Digital Markets–Note by Korea' <https://one.oecd.org/document/DAF/COMP/WD(2021)65/en/pdf> last accessed April 2025.

Section 19a, prohibiting undertakings with paramount significance for competition across markets from engaging in anti-competitive conduct.[59] This amendment has enabled the German Bundeskartellamt to assess anti-competitive conduct in digital markets.[60] In 2021, China adopted the 2021 Anti-Monopoly Guidelines for Platform Economy Industries. In 2022, China amended the Anti-Monopoly Law of the People's Republic of China. It updated the Regulations on Abuse of Dominant Market Position. It added a provision prohibiting digital platforms from self-preferencing and using platform users' non-public data.[61]

Most countries have taken a wait-and-see approach before adopting a DMCR. Instead, they have initiated or are initiating market inquiries in the digital markets to inform their decision on adopting an ex-ante DMCR similar to the EU DMA, amending competition laws, or using existing competition legislation to regulate competition in the digital markets. Table 1 below shows the goals of the DMCRs of the EU, India, the UK, the US, Brazil, and Japan.

DMCR	Goals
The EU Digital Markets Act	The purpose of this Regulation is to contribute to the proper functioning of the internal market by laying down harmonized rules ensuring for all businesses, ***contestable and fair markets*** in the digital sector across the Union where gatekeepers are present, to the benefits of business users and end users.
India 2024 Draft Digital Competition Bill	An Act to identify systematically digital enterprises and their associate digital enterprises, and to regulate their practices in the provision of core digital services, keeping in view the principles of ***contestability, fairness*** **and** ***transparency,*** with an objective to foster ***innovation, promote competition, protect the interests of users*** of such services in India.
UK DMCCA	An Act to provide for the ***regulation of competition*** in digital markets…and to make other provision about competition law; to make provision relating to the protection of ***consumer rights*** and confer further such rights; and for connected purposes.

[59] OECD, 'The Evolving Concept of Market Power in the Digital Economy–Note by Germany' (30 May 2022, DAF/COMP/WD (2022) 56, a written contribution from Germany submitted for Item 5 of the 138th OECD Competition Committee meeting on 22-24 June 2022).
[60] See Jens-Uwe Franck and Martin Peitz, 'Digital Platforms and the New 19a Tool in the German Competition Act' (2021) 12(7) Journal of European Competition Law and Practice 513.
[61] Wie Huang, Wendy Zhou, Xiumin Ruan and Xi Zhang, Antitrust Guidelines for the Platform Economy in the Era of Enhanced Antitrust Scrutiny' (CPI Antitrust March 2021).

US Open App Market Act (OAMA)	To ***promote competition*** and ***reduce gatekeeper power*** in the app economy***, increase choice, improve quality and reduce costs for consumers.***
American Innovation and Choice Online Act (AICOA)	A bill to provide that certain ***discriminatory conduct*** by covered platforms shall be unlawful and for other purposes.
Augmenting Compatibility and Competition by Enabling Service Switch Act (ACCESS Act)	To promote ***competition, lower entry barriers, and reduce switching costs*** for consumers and business online.
Ending Platform Monopolies Act	To promote ***competition and economic opportunity*** in digital markets by eliminating the conflicts of interest that arise from dominant online platforms' concurrent ownership or control of an online platform and certain other businesses.
Japan Smartphone Act	The Act aims to ***promote fair ad free competition*** amongst companies that offer smartphone OS and App Stores.
Table 1: Stated goals of DMCRs. Authors' compilation, valid as per April 2025	

From the above table, we can identify three categories of DMCR goals: goals distinct from competition law, goals integrated with traditional goals of competition law, and a mix of competition and non-competition goals.

a. Category 1: DMCR goals that are distinct from competition law

The EU DMA is the only DMCR that adopts this approach. The EU DMA provides that its goals complement competition law but are distinct. In particular, Recital 11 of the DMA reads as follows:

> 'Articles 101 and 102 TFEU and the corresponding national competition rules concerning anticompetitive multilateral and unilateral conduct, as well as merger control, have as their objective the protection of undistorted competition on the market. *This Regulation pursues an objective that is complementary to, but different from that of protecting undistorted competition on any given market, as defined in competition-law terms, which is to ensure that markets where gatekeepers are present are and remain contestable and fair,* independently from the actual, potential or presumed effects of the conduct of a given gatekeeper covered by this Regulation on competition on a given market. This Regulation, therefore, *aims to protect a different legal interest*

> *from that protected by those rules*, and it should apply without prejudice to their application'. (Emphasis added).

This approach raises the question of whether DMCR's goals diverge from the traditional goals of competition law or – conversely – can be integrated.[62] While consumer considerations are central under competition law, they play a marginal role under the DMA.[63] As a result of the DMA's claim that its goals are distinct from competition law, it has become difficult to ascertain the relationship between the DMA and the EU competition law.[64] Moreover, others have noted that the DMA will fragment the EU competition law due to its overlap with competition law.[65] On the question whether DMCR goals should be distinct from competition law, Manne and others provide the following:

> 'this apparent contradiction is salvageable only if one thinks of digital competition regulation neither as competition law, *stricto sensu*, nor as an entirely separate regulation, but rather, as a partially overlapping tool that regulates competition and competition-related conduct in a different –and sometimes *fundamentally* different – manner.'[66]

b. Category 2: DMCR goals combined with competition goals

Unlike the DMA, which claims its goals are distinct from competition law, in other DMCRs, regulating competition in digital markets is not distinct from the overall competition goals, as stated in the specific competition legislation.67 In this case, competition regulation in the digital markets is integrated into existing competition legislation. There is no separate agency to regulate digital markets. The competition agency is granted the power to investigate digital markets. Such is the example of Germany, but with the notable caveat that this jurisdiction is also subject to the DMA by virtue of being a Member State of the EU.

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[62] Belle Beems, The DMA in the Broader Regulatory Landscape of the EU: An Institutional Perspective (2023) 19(1) European Competition Journal 1-29.

[63] On DMA and consumer protection see, Rupprecht Podszun, 'The Digital Markets Act: What's in it for Consumers?' (2022) 11(1) Journal of European Consumer and Market Law 1.

[64] On literature discussing the interplay between the EU DMA and EU Competition Law, see Pinar Akman, 'Regulating Competition in Digital Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act' (2022) 47 European Law Review; Jasper van den Boom, 'What Does the EU Digital Markets Act Harmonize? Exploring Interaction Between the DMA and National Competition Laws' (2023) 19 European Competition Journal; Rianna Andreangeli, 'The Digital Market Act the Enforcement of EU Competition Law: Some Implications for the Application of Articles 101 and 102 TFEU in Digital Markets' (2022) 43 European Competition Law Review 496-504.

[65] Giuseppe Colangelo, 'The Digital Markets Act and the EU Antitrust Enforcement: Double & Triple Jeopardy' <https://laweconcenter.org/wp-content/uploads/2022/03/Giuseppe-Double-triple-jeopardy-final-draft-20220225.pdf accessed 17 December 2024>last accessed April 2025.

[66] Manne and others at note 33.

[67] Viktoria HSE Robertson, 'The Complementary Nature of the Digital Markets Act and the EU Antitrust Rules' (2024) 12 Journal of Antitrust Enforcement 325-330.

c. Category 3: Mix of competition and non-competition goals

Other countries, such as Brazil, have broader goals, integrating a mix of competition and non-competition goals in their digital market enforcement. Article 4 of the Brazil Proposed Law PL 2768/2022, provides that targeted platforms must operate based on the following principles: freedom of initiative, free competition, consumer protection, a reduction in regional and social inequality, combatting the abuse of economic power, and widening social participation in matters of public interest.

Outlook

The above analysis has shown that DMCR's goals will differ from region to region. Thus, the AfCFTA DMCR goals could take any of the three approaches. It is necessary to note that, unlike the DMA, which legal basis is found in Article 114 of the TFEU rather than Article 103 of the TFEU,[68] the legal basis of adopting the AfCFTA DMCR is found in Article 11(5) of the AfCFTA CP. The point is that regulating digital gatekeepers is part of the AfCFTA competition regime. Hence, the AfCFTA goals will be integrated into the AfCFTA CP objectives. The AfCFTA CP is also part of the AfCFTA Agreement, which seeks to promote intra-Africa trade and Africa's participation in global trade. The AfCFTA DMCR, therefore, will enhance the AfCFTA CP objectives as stipulated in its Article 2. In particular, the AfCFTA DMCRs will 'enhance competition within the AfCFTA for improved market efficiency, inclusive growth, and the structural transformation of the African economies'. Secondly, they will seek to ensure that gains from the AfCFTA trade liberalization are not negated or undermined by anticompetitive business practices from digital gatekeepers. Third, they will aim at promoting economic integration and sustainable development in the African digital market. This indicates that the AfCFTA DMCR goals could fall under Category 3 of our analysis. In the next section, we trace what informed the EU DMA goals and how it could inform the AfCFTA DMCR goals.

[68] Article 103 of TFEU is intended to implement the EU competition rules and give effect to Articles 101 and 102 TFEU.

III. THE GOALS OF THE EU DIGITAL MARKET ACT

In this section, we briefly describe the goal of fairness and contestability under the DMA, then discuss what informed the EU in adopting these goals and how these could inform the goals of the AfCFTA DCTR.

The EU DMA and the AfCFTA DMCR

For a long time, the EU has positioned itself as a leader in setting international standards and regulations through the diffusion of its norms,[69] particularly in competition law policy,[70] data protection,[71] artificial intelligence,[72] and general platform governance.[73] Bradford refers to the ability of the EU to externalize its laws and regulations in other jurisdictions through regulation as the 'Brussels Effect'.[74] Drewes and others argue that the DMA's extraterritorial effects will likely occur de jure in the form of regulatory responses or by undertakings complying with the DMA outside the EU Market (de facto).[75] The de facto Brussels Effect occurs through firms' compliance, which extends the EU rules to other markets, making the EU rule a global standard. The de jure Brussels Effect, on the other hand, occurs when other countries adopt rules similar to those of the EU.

For instance, evidence has shown that the EU GDPR has had de facto and de jure Brussels effects in developing countries. By 2025, 40 African countries had adopted data protection laws modelled after the EU GDPR, showing the potential of the EU influencing legislation

[69] On how EU influences global regulatory framework through norm sharing, see: Tyyne Karjalainen, 'European Norms Trap? EU's Connectivity Policies and the Case of the Global Gateway' (2023) 40 East Asia 293; On normative power of the EU in setting standards through its legislation, see, Ian Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40(2) Common Market Studies 235.

[70] Tim Büthe and Vellah Kedogo Kigwiru, 'The Spread of Competition Law in Africa: A Research Agenda' (2020) African Journal of International Economic Law; Anu Bradford, Adam Chilton, Katerina Linos and Alexander Weaver, 'The Global Dominance of European Competition Law Over American Antitrust Law' (2019) 16(4) Journal of Empirical Legal Studies 731.

[71] Simon Gunst and Ferdi De Ville, 'The Brussels Effect: How the GDPR Conquered Silicon Valley' (2021) 26(3) European Foreign Affairs Review 437.

[72] See Shu Li, Béatrice Schütte and Suvi Sankari, 'The Ongoing AI Regulation Debate in the EU and Its Influence on the Emerging Economies: A New Case for the Brussels Effect?' in Mark Findlay, Li Ong and Wenxi Zhang, *Elgar Companion to Regulating AI and Big Data in Emerging Economies* (Edward Elgar Publishers 2023) 22-41; Charlotte Siegmann and Markus Anderljung, *The Brussels Effect and Artificial Intelligence: How EU Regulation will Impact the Global AI Market* (Center for the Governance of AI 2022).

[73] Markéta Šonková, 'Brussels Effect Reloaded? The European Union's Digital Services Act and the Artificial Intelligence Act' (EU Diplomacy Paper No 4 2024); Dawn Carla Nunziato, 'The Digital Services Act and the Brussels Effect on Platform Content Moderation' (2023) 24(1) Chicago Journal of International Law 115.

[74] Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020).

[75] Helena Drewes and Alexander Kirk, 'Extraterritorial Effects of the Digital Markets Act: The "Elusive Long Arm" of European Digital Regulation' (2024) 47(4) World Competition 473, 478.

adopted in Africa.[76] This part of the paper focuses on the question whether the AfCFTA DMCR goals could adapt to the DMA goals. In short, we analyze the possibility of the DMA having a de jure Brussels Effect in the AfCFTA. According to Drewes and Kirk, 'the pioneer position of the DMA, the strictness of the regulation…the economic weight of the EU, and the high assertiveness and competence of the Commission as an enforcement authority' increases the ability of the DMA to have de jure Brussels Effect.[77] Indeed, the DMA will remain a model that can be emulated in other jurisdictions. However, in countries that have adopted ex-ante DMCRs, they have not copied and pasted the DMA. Some differences do exist. In Japan, for instance, while self-preferencing is prohibited under Article 9 of the Smartphone Act, unlike Article 6(5) of the DMA, justifications are possible.[78]

While some have challenged the notion that the DMA and its goals of ensuring contestability and fairness in the market should be the blueprint for adopting DMCRs in other countries, [79] at this juncture, it is impossible, with some variations, to overstate the influence of the EU DMA on future DMCRs.[80] This is not because the EU has a first-mover advantage or other countries always look up to the EU regulatory governance but because the EU DMA addresses the same challenges developing countries are interested in. The EU also plays an active role in influencing African legislations through norm sharing and technical assistance.[81] As noted by Ayadi and Ronco, the EU's 'Brussels effect in global norm-setting and Europe's ability to stand behind its values and principles' increases its attractiveness for African countries to work and collaborate with the EU.[82] As expected, the EU will likely actively influence the AfCFTA DMCR through lobbying and/or technical assistance.

Generally, we do not recommend that African countries copy-paste the twin goals of the DMA. Still, while the DMA can be a template to shape the AfCFTA DMCR, we recommend adapting the goals of the AfCFTA DMCR accordingly to align with Africa's digital market structure, political context, national-level experiences in the enforcement of

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[76] Martina F Ferracane, Simón González Ugarte and Erik van der Marel, 'The Brussels Effect in Africa: Is it Beneficial for Intra-Regional Trade in Digital Services' (2025) Journal of International Economic Law <https://doi.org/10.1093/jiel/jgae059> last accessed April 2025.
[77] Helena Drewes and Alexander Kirk, 'Extraterritorial Effects of the Digital Markets Act: The "Elusive Long Arm" of European Digital Regulation' (2024) 47(4) World Competition 473.
[78] Simon Vande Walle, 'Is the EU's Digital Market Act Going Global? How Japan is Crafting its Own Version of Digital Regulation with Smartphone Act' (21 August 2024, EU-RENEW).
[79] Lazar Radic, 'Digital-Market Regulation: One Size Does Not Fit All' (17 April 2023, Truth on the Market).
[80] Antonios Nestoras, 'The 'Brussels Effect' in Digitization and the Future of Transatlantic Relations', European Liberal Forum Papers Policy Brief No. 4 January 2022; Anu Bradford, 'The Brussels Effect' (2012) 107(1) Northwestern University School of Law 1.
[81] Anu Bradford, *Digital Empires: The Global Battle to Regulate Technology* (Oxford University Press 2023).
[82] Rym Ayadi and Sara Ronco, 'The EU- Africa Partnership and Development Aid: Assessing the EU's Actorness and Effectiveness in Development Policy' (CEPS in-Depth Analysis No.10 2023), 67.

competition law in digital markets and African business firms' ability to participate in the global digital markets.[83] Nonetheless, the influence of the DMA on the AfCFTA DMCR cannot be disregarded for various reasons. Most platforms designated by the EU Commission – Alphabet, ByteDance, and Booking.com– as digital gatekeepers are also leading in the African market.[84] For instance, Google is dominant in the African search market.[85]

Furthermore, Article 11 of the AfCFTA CP has significant similarities with the DMA. Similar to the DMA, the scope of the AfCFTA DMCR will be limited to designated digital gatekeepers.[86] A gatekeeper is defined under Article 1(h) of the AfCFTA CP 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 that it will enjoy such a position in the near future'. On the other hand, Article 3 of the DMA designates digital gatekeepers based on three criteria: significant impact on the internal market, an important gateway for business users to reach end-users, and platforms that have or will have an entranced and durable position in the market. Qualitatively, a platform will be designated as a digital gatekeeper if it:

> 'A) Achieves EU revenue of at least €7,5 billion in each of the last three financial years or having an average market capitalization/fair market value of at least €75 billion in the last financial year, and providing the same CPS in at least three Member States; B) Provides a core platform service that has at least 45 million monthly active end-users and 10.000 yearly active business users in the EU in the last financial year; and C) meets the threshold of (b) in each of the last three financial years.'[87]

Furthermore, both the DMA and the AfCFTA DMCR regulate the designated digital gatekeepers' core digital services. Regarding prohibited conduct, Article 11 of the AfCFTA CP prohibits designated gatekeepers from engaging in self-preferencing,[88] imposing price parity clauses on business users,[89] imposing anti-steering provisions,[90] using business data to

[83] Garret Johnson, 'Economic Research on Privacy Regulation: Lessons from the GDPR and Beyond', NBER Working Paper 1, 29 (December 2022).
[84] For EU Digital gatekeepers designation process, see Alba Ribera Martínez, 'Asymmetrical Regulation and What Makes or Breaks a Gatekeeper: Lessons for the AfCFTA and the COMESA Competition Regime' < https://www.youtube.com/watch?v=IF1ea1ixOZQ&t=711s> accessed 20 January 2025.
[85] Mathew Freer, 'Betting on Fair Play: Competition Tribunal orders Interim Relief to Lottoland in Google Ads Dispute' 29 January 2025, African Antitrust and Competition Law; Simphiwe Gumede and Phathushedzo Manenzhe, 'Competition Regulation for Digital Markets: The South African Experience' (2023) 31 The African Journal of Information and Communication.
[86] Elias Deutscher, 'Reshaping Digital Competition: The New Platform Regulations and the Future of Modern Antitrust' (2022) 67(2) The Antitrust Bulletin.
[87] The EU DMA, Article 3(2).
[88] AfCFTA CP, Art 11(4, d) is similar to DMA, Art 6(5).
[89] AfCFTA CP, Art 11(4, a) is similar to DMA, Art 5(3).
[90] AfCFTA CP, Art 11(4, b) is similar to DMA, Art 5(4).

compete with businesses,[91] combining personal data from different services offered by the gatekeeper, [92] inhibiting platform switching for business users and end users,[93] and restricting data portability.[94] These provisions are also reflected in the DMA.[95] The AfCFTA CP was drafted in 2022 when the discussion on the DMA was ongoing. This indicates that the inclusion of Article 11 of the AfCFTA CP drew some insights from what was happening in the EU. The inclusion of provisions similar to the DMA – Articles 5(2), 5(3), 5(4), 6(2), 6(5). 6(6), 6(7) and 6(9) – is also evidence of the DMA's de jure Brussels effect on the AfCFTA CP and the AfCFTA DMCR. The de jure effect of regulatory governance occurs when the adopted regulation triggers regulatory response by other states.[96]

Furthermore, as we will see in Section V of this paper, the prohibition of unjustified differentiation in fees or treatment against small and medium enterprises,[97] failing to identify paid ranking as advertising in search results and allowing paid results to exceed organic results on the first results page by designated gatekeepers under Article 11(4) of the AfCFTA CP, was informed by the OIPMI provisional report. These differences espouse the intricate interplay of external influence on domestic dynamics.[98] This indicates that African countries considered both national and international experiences in digital markets. In particular, African countries drew some lessons from the DMA. Thus, the goals of the DMA can inform the AfCFTA DMCR goals. This makes it necessary to understand what informed the DMA's goals of contestability and fairness.

[91] AfCFTA CP, Art 11(4, c) is similar to DMA, Art 6(2).
[92] AfCFTA CP, Art 11(4, h) is similar to DMA, Article 5(2, b). The AfCFTA CP only mentions the combination of personal data. According to Article 5(2) of the DMA, in relation to personal data, designated digital gatekeepers are prohibited from processing and combining personal data
[93] AfCFTA CP, Art 11(4, f) is similar to DMA, Art 6(6).
[94] AfCFTA CP, Art 11(4, f) provision on data portability is similar to DMA, Art 6(9).
[95] Friso Bostoen,'Understanding the DMA' (2023) 68(2) Antitrust Bulletin, 20–21.
[96] Michal Bernat and Francesco Spera, 'The De Jure "Brussels Effect": Current Legal Trends in the EU's Unilateral Regulatory Globalization' (2024) 4 Studies in Europe Affairs 77; Anu Bradford, 'Exporting Standards: The Externalization of the EU's Regulatory Power Via Markets' (2015) 42 International Review of Law and Economics 158.
[97] This provision reflects Article 6(11) of the DMA, which requires digital gatekeepers to 'apply fair, reasonable and non-discriminatory general conditions of access for business users to its software application stores, online search engines and online social networking services'.
[98] Wenlong Li and Jiahong Chen, 'From Brussels Effect to Gravity Assists: Understanding the Evolution of the GDPR-inspired Personal Information Protection Law in China' (2024) 54 Computer Law and Security Review 105994.

What informed the EU's DMA goals?

According to Cini and Czulno,[99] the adoption of the EU DMA was driven by four factors: technological development and competition agencies' concern about digital platforms' market power, the European Commission's experience with digital platform cases, experts' consensus arguing for new legislation; and the failure by digital platforms to lobby for change. Moreover, EU competition law was deemed slow and insufficient to address anti-competitive conduct in digital markets where platforms have gatekeeping power. In particular, as competition law is enforced ex-post, it could not address the harm posited by digital platforms.[100] The DMA, an ex-ante regulation,[101] was necessary to complement EU competition law in regulating digital markets.[102] In this paper, drawing from the growing scholarly work on digital markets and the DMA, we identify three explanations that informed the goals of the DMA: a. the legacy of Ordoliberalism, b. the features of the digital markets and c. the imbalance of power among market participants.

a. Ordoliberalism and the DMA

According to Massarato, the adoption of DCRs should reflect a country's historical and intellectual framework.[103] Indeed, there is a growing strand of literature arguing that the ordoliberal ideology underpins the DMA.[104] Generally, there is a broad consensus among scholars that the EU's competition regime and platform governance stand on an ordoliberal tradition.[105] An in-depth discussion of Ordoliberalism goes beyond the scope of this paper and

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[99] Michelle Cini and Patryk Czulno, 'The Origins of the Digital Markets Act: Explaining Policy Change' (Vista Policy Paper 02/2022).

[100] Friso Bostoen, 'Understanding the DMA' (2023) 68(2) Antitrust Bulletin, 20–21.

[101] Patrice Bougette, Oliver Budzinski and Frédéric Marty, 'Ex-Ante versus Ex-Post in Competition Law Enforcement: Blurred Boundaries and Economic Rationale' (2024, GREDEG WP No. 2024-18).

[102] Assimakis P Komninos, 'The Digital Markets Act: How Does it Compare with Competition Law' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4136146> last accessed April 2025.

[103] Giovanna Massaroto, 'Regulating Tech Titans: What American Antitrust Can Learn from Europe', available here:<https://awards.concurrences.com/IMG/pdf/ssrn-5021134_4_.pdf?134324/ed848f1c7ab807c8192488b35adde7379fb7a38a74b6320321f7149acf381d12> last accessed April 2025.

[104] Manuel Wörsdöfer, 'The Digital Markets Act and the EU Competition Policy: A Critical Ordoliberal Evaluation'; Pierre Larouche and Alexandre de Streel, 'The European Digital Markets Act: A Revolution Grounded on Traditions' (2021) 12(7) Journal of European Competition Law and Practice 542-560.

[105] Benjamin Farrand, 'The Ordoliberal Internet? Continuity and Change in the EU's Approach to the Governance of Cyberspace' (2023) 2 European Law Open 106; Andreas Kornelakis and Pauline Hublart, 'Digital Markets, Competition Regimes and Models of Capitalism: A Comparative Institutional Analysis of European and US Responses to Google' (2022) 26(3-4) Competition and Change 334; Frank Maier-Rigaud, 'On the Normative Foundations of Competition Law-Efficiency Political Freedom and the Freedom to Compete' in Daniel Zimmer (ed), The Goals of Competition Law (2012).

has already been the subject of an earlier paper by the same authors,[106] tackling specifically how this school of thought could apply to the African context. Hence, here we only highlight key aspects of Ordoliberalism that could inform the goals of the DMA.

In the first place, as argued earlier by the same authors,[107] Ordoliberal thought is conducive to a home-grown/grassroots approach to the building of the institutional design of regulatory regimes. Hence, its bottom-up logic could offer fruitful ground for the building of context-specific DMCRs for Africa. Additionally, ideologically, Ordoliberal thought stands firmly against the concentration of economic power in the hands of a few actors as the latter can curb individual freedom and weaken the state and the rule of law.[108] In this sense, Ordo thinking exhibits commonalities with neo-Brandeisian rhethoric, which originated in the USA and which we elaborate on in Section V below. At this juncture, we quickly want to sketch the core convergences between the two schools of thought. In this sense, we want to point out that – according to Ordoliberals – the goal of competition law is to 'protect the process of competition, where the focus is *not* on outcome but on s*tructur*e and *conduct*'.[109] To Ordoliberals[110], competition law aims to 'promote the competitive process and rivalry between firms'.[111] Hence, to protect individual freedom in the economy, Ordoliberals advocate for state regulation. Similar sentiments have also been voiced by prominent neo-Brandeis thinkers in the US, such as former FTC Chairwoman Lina Khan who already in the early 2010's proclaimed the need to regulate digital giants[112] and even to structurally separate them.[113]

With respect specifically to digital markets, a modern reading of Ordoliberal thought would conclude that monopolies should be constrained in the digital market as well.[114]

[106] Zlatina Georgieva and Vellah Kedogo Kigwiru, 'Regulating US Big Tech Companies beyond Local Markets: Building African Digital Markets (A Theoretical Perspective)' SSRN Working Paper, available here <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4337524> last accessed April 2025.
[107] Ibid.
[108] Anselm Küsters, *The Making and Unmaking of Ordoliberal Language: A Digital Conceptual History of the European Competition Law* (Nomos, 2023).
[109] Andreas Kornelakis and Pauline Hublart, 'Digital Markets, Competition Regimes and Models of Capitalism: A Comparative Institutional Analysis of the European and US Responses to Google' (2022) 26(3-4) Competition & Change 334, 339.
[110] Ignacio Herrera Anchustegui, 'Competition Law through Ordoliberal Lens' (2015) 2(2) Oslo Law Review 139.
[111] Alexandre De Streel 2020, 'Should Digital Antitrust be Ordoliberal?' *February 2020, Concurrences N° 1-2020, Art. N° 92610, pp. 2-4*.
[112] Lina Khan, 'Amazon's Antitrust Paradox' (2017) The Yale Law Journal, available here: <https://www.yalelawjournal.org/pdf/e.710.Khan.805_zuvfyyeh.pdf> last accessed April 2025.
[113] Lina Khan, 'The Separation of Platforms and Commerce' (2019) Columbia Law School Scholarship Archive, <https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3794&context=faculty_Scholarship> (accessed 17 October 2024).
[114] Andreas Kornelakis and Pauline Hublart, 'Digital Markets, Competition Regimes and Models of Capitalims: A Comparative Instituional Analysis of the European and US Responses to Google' (2022) 26(3-4) Competition & Change 334.

Additionally, given that Ordo thought puts an emphasis on the legal system as structuring economic relations, this logic would justify the introduction of regulation. Consequently, Ordoliberalism could be seen to provide the normative framework, upon which the DMA's existence could be justified and on which its goals are founded.[115] According to Massarotto, 'Ordoliberalism focuses on a socio-economic meaning of competition, which includes fairness and contestability (DMA purpose) and a strong state to secure it (DMA approach) through rules (DMA legal framework) to regulated economic power in a modern industrialized economy (DMA scope)'.[116]

Therefore, if we apply the above logic to the African context, the AfCFTA DCR should endeavour to protect the individual freedom of market participants and control the private economic power of tech companies that create entry barriers for SMEs and African-owned business to participate in the digital markets.

b. Features of the platform market

The features of the digital platform's core platforms services informed the DMA goals.[117] These features include network effects,[118] strong economies of scale, vertical integration, limited multihoming, and benefits derived from data.[119] Generally, the features of core platform services create barriers to entry and expansion of business users in the digital market and related ecosystems limiting contestability.[120] As noted by Bostoen, 'the idea is that features of platform markets (network effects, strong economies of scale, benefits from data) currently limit contestability of gatekeeper positions and that the DMA should lower the barriers to entry, in particular to the benefit of new challengers'.[121]

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[115] Alexandre De Streel 2020, 'Should Digital Antitrust be Ordoliberal?' *February 2020, Concurrences N° 1-2020, Art. N° 92610, pp. 2-4*
[116] Massarotto (note 103) at 19.
[117] Ariel Ezrachi, 'EU Competition Law Goals and the Digital Economy' (June 6, 2018). Oxford Legal Studies Research Paper No. 17/2018, available at SSRN on <https://ssrn.com/abstract=3191766> last accessed April 2025.
[118] Steven S Salop, 'Dominant Digital Platforms: Is Antitrust Up to the Task?' (2021) 130 The Yale Law Journal Forum 563.
[119] Jens Prüfer and Inge Graef, 'Mandated Data Sharing is a Necessity in Specific Sectors' (2018) 103 ESB 298, 300.
[120] See Jonathan S Kanter, 'Digital Markets and Trends towards Concentration' (2023) 11(2) Journal of Antitrust Enforcement 143.
[121] Friso Bostoen, 'Understanding the Digital Markets Ac' (2023), 68(2) The Antitrust Bulletin 263, 266.

Take this example. Digital markets are data-driven markets.[122] The more a digital platform accumulates data, the more its market power gets entrenched.[123] Such a platform will have incentives not to share the accumulated data beyond societal objectives such as protection of privacy and security concerns.[124] Hence, contestability becomes low when access to data is unavailable to rivals seeking to enter the market and compete against the incumbents by providing similar services.[125] As noted by Budzinski and Stöhr,[126] 'data-based barriers may include (the restriction of) access to relevant data, to relevant amounts of data, or to sophisticated data analysis tools and skills'.

In addition to features of the core platform services, high investment costs in the digital markets limit contestability.[127] Contestability, as noted in Recital 3 of the DMA, is reduced in digital markets due to the 'existence of very high barriers to entry and exit, including high investment costs, which cannot, or not easily be recuperated in case of exit, and the absence of, or reduced access to, some key inputs in the digital economy such as data'. Therefore, the core platform service's features informed the DMA goal of promoting contestability.

The term 'contestable' was developed at the end of the 1970s and beginning of the 1980s by Professor William Baumol and others,[128] who argued that a 'contestable market is one into which entry is absolutely free, and exit is absolutely costless. In short, contestability requires that there be no cost discrimination against entrants'.[129] Recital 32 of the EU DMA provides that contestability refers to the 'ability of undertakings to effectively overcome barriers to entry and expansion and challenge the gatekeeper on the merits of their products and services'.[130]

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[122] Nora von Ingersleben-Seip and Zlatina Georgieva, 'Old Tools for the New Economy?:Counterfactual Causation in Foreclosure Assessment and Choice of Remedies on Data-Driven Markets' (2024) Journal of Antitrust Enforcement.

[123] The DMA under Recitals 36-44 underscores the role of data as a barrier to entry and expansion, limiting contestability. Digital gatekeepers collect personal data from their end users and third-party end-users to provide online advertising services. The accumulation of personal data gives gatekeepers advantages in terms of accumulation of data, raising barriers to entry.

[124] Giuseppe Colangelo and Mariateresa Maggiolino, 'Data Accumulation and the Privacy– Antitrust Interface: Insights from the Facebook Case' 2018 8(3) International Data Privacy Law 224-239.

[125] On data and contestability see, Jan Krämer and Daniel Schnurr, ' Big Data and Digital Markets Contestability: Theory of Harm and Data Access Remedies'

[126] Budzinski at al., 'Outstanding Relevance across Markets: A New Concept of Market Power?' (2020) 17(3) Concurrences, 38-42, 28.

[127] Nora von Ingersleben-Seip and Zlatina Georgieva, 'Old Tools for the New Economy?:Counterfactual Causation in Foreclosure Assessment and Choice of Remedies on Data-Driven Markets' (2024) Journal of Antitrust Enforcement.

[128] William J Baumol, 'Contestable Markets: An Uprising in the Theory of Industrial Structure' 1982 72 AM. ECON, REV. 1

[129] Ibid., at 3.

[130] EU Digital Markets Act, Recital 32.

The DMA,[131] therefore, calls upon the 'banning of certain practices by gatekeepers that are liable to increase barriers to entry or expansion, and impose certain obligations on gatekeepers that tend to lower those barriers'.

Some scholars have argued that what constitutes contestability in the DMA is not straightforward.[132] Thus, what constitutes contestability in the context of the DMA will be subject to varying meanings.[133] In an attempt to define contestability as encapsulated under the DMA, Crèmer and others provide that contestability as used in the DMA should be understood as 'the ability for non-dominant firms to overcome barriers to entry and expansion to the benefits of users'.[134] According to Beems, contestability in the DMA is 'arguably linked to decreasing entry barriers on digital markets and to creating a level-playing field for gatekeepers and (potential) competitors'.[135] This implies that small firms, irrespective of core features of the digital markets, should have an opportunity to enter and benefit from the digital markets – an idea also reminiscent of the Ordoliberal premises as explained above. According to Bania and others, contestability as a goal extends to inter and intra-platform competition.[136] Beems notes that 'contestability can be interpreted narrowly by linking the principle to competition *on* the market. In this case, contestability relates to the threat of short-term entry. Alternatively, a broader interpretation may entail both competition *on* and *for* the market and competition in *other* markets'.[137]

More generally, contestability refers to market openness resulting from low entry barriers.[138] A contestable market increases rivalry among participants by reducing entry and expansion barriers.[139] Hence, a contestable market allows new entrants to enter the market and

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[131] Oles Andriychuk, 'Shaping the New Modality of the Digital Markets: The Impact of the DSA/DMA Proposals on Interplatform Competition' 2021 44(3) World Competition 261-286; Alba Ribera Martínez, 'Rocking the Contestability and Fairness Foundations: Multi-Level Governance and Trust Relations for Futureproofing the DMA's Effectiveness' (2023) in Bäumler et al (eds.), *European Yearbook of International Economic Law* (Springer, 2023).
[132] H Schweitzer, 'The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair: A Discussion of the Digital Markets Act Proposal' (2021)3 ZEuP, available at SSRN: <https://ssrn.com/abstract=3837341> last accessed April 2025.
[133] Jörg Hoffman, 'Gatekeeper's Potential Privilege – the need to Limit DMA Centralization' 2024 12 Journal of Antitrust Enforcement 126-147, at 133.
[134] Jacques Crémer and others, 'Fairness and Contestabilty in the Digital Markets Act' 40 Yale J. on Regulation
[135] Beems, note 62, at 6.
[136] Konstantina Bania and others, 'The Digital Markets Act' September 2022, https://www.concurrences.com/en/review/numeros/no-3-2022/on-topic/the-digital-market-act Accessed 10 July 2024; Bostoen, note 121, at 267.
[137] Beems, note 62, at 5.
[138] Oliver Budzniski and Annika Stöhr, 'Perfect Competition, Market Power, and Contestability' (Ilmenau Economics Discussion Papers, Vol 29, No.189, 2024).
[139] Ribera Martínez, note 131.

constrain the market power of the incumbents.[140] In this scenario, a DMCR should aim to 'reduce the structural factors that facilitate the entrenchment of incumbents' market power and mute their incentives to impair horizontal competition by foreclosing or acquiring competitors.'[141]

In addition to structural features, market contestability in digital markets can be evidenced by exclusionary conduct by the incumbent, which deters entry.[142] As aptly put by OECD that, 'ensuring contestability involves preventing exclusionary or discriminatory behaviours by gatekeepers that impede entry by innovating competitors or limit their ability to expand and attract users'.[143] Exclusionary conduct is anti-competitive conduct that forecloses a market to rivals and inhibits rivals from entering the market.[144] Exclusionary conduct includes predatory pricing, tying and bundling, margin squeezing, exclusive dealing, refusal to sell or supply, and price discrimination. In informing the AfCFTA DMCR goals, the presence of exclusionary conduct evidenced by national-level experiences and existing entry barriers for African businesses to participate in digital markets should lead to contestability as a goal. In this case, contestability, as a goal of the AfCFTA DMCR, should be informed by structural barriers in Africa's digital market that undermine Africa's businesses' ability to enter and expand in the digital markets based on their products and services.

c. Imbalances in bargaining power

The market features of digital platforms have granted gatekeeping power and led to an imbalance of bargaining power among market participants, enabling the digital platforms to impose unfair trading conditions on trading partners who are economically dependent on the digital infrastructure offered by the digital platforms.[145] When bargaining power imbalances exist in the digital market, digital platforms are incentivized to dictate unfair commercial terms

[140] Massimo Motta, Competition Policy: Theory and Practice (CUP, 2004).
[141] Elias Deutscher, 'Reshaping Digital Competition: The New Platform Regulations and the Future of Modern Antitrust' 2022 67(2) The Antitrust Bulletin 302-340.
[142] Björn A Kuchinke and Miguel Vidal, 'Exclusionary Strategies and the Rise of Winner-takes-it-all Markets on the Internet' (2016) 40(6) Telecommunications Policy 582.
[143] Giuseppe Nicoletti, Cristiana Vitale and Carolina Abate, 'Competition, Regulation and Growth in a Digitized World: Dealing with Emerging Competition Issues in Digital Markets' OECD Working Papers No.1752, ECO/WKP(2023) 5 at 27.
[144] Juan David Gutiérrez Rodriguez, 'Exclusionary Practice' (Global Dictionary of Competition Law, Concurrences, Art. N° 12334).
[145] Qian Li and Caroline Cauffman, 'Abuse of Relative Dominance by Digital Platforms: A Law and Economics Perspective' (2025) GRUR International <https://doi.org/10.1093/grurint/ikaf001> last accessed: April 2025.

to business users.[146] The OECD asserts that 'imposing a condition of fairness on digital platforms is one way to address the concerns about market power and the exploitative or abusive conducts of the platforms in a position of dominance'.[147] The DMA recognizes that it is a result of the serious imbalances in bargaining power that enables digital platforms to engage in unfair practices and conditions for business users 'as well as for end users of core platform services provided by gatekeepers, to the detriment of prices, quality, fair competition, choice and innovation in the digital sector'.[148] As noted under Recital 4 of the DMA:

> 'The combination of those features of gatekeeper is likely to lead, in many cases, to serious imbalances in bargaining power and, consequently, to unfair practices and conditions for business users, as well as for end users of core platform services provided by gatekeepers, to the detriment of prices, quality, fair competition, choice and innovation in the digital sector.'

To address the negative consequences of the imbalance in bargaining power among market participants, the goal of fairness is incorporated in the DMA. Under the DMA, Recital 33 defines unfairness as the 'imbalance between the rights and obligations of business users where the gatekeepers obtain a disproportionate advantage'. The DMA recognizes that because of the gatekeeper's gateway position and superior bargaining power, 'it is possible that gatekeepers engage in behaviour that does not allow others to capture fully the benefits of their own contributions, and unilaterally set unbalanced conditions for the use of their core platform services.'[149] Consequently, the digital gatekeeper can unilaterally set unbalanced access conditions to their platform. Recital 33 of the DMA goes further to provide that such an 'imbalance is not excluded by the fact that the gatekeeper offers a particular service free of charge to a specific group of users, and may also consist in *excluding or discriminating against business users*, in particular, if the latter compete with the services provided by the gatekeeper.'

The principle of fairness has found itself as a cornerstone in regulating digital markets under the DMA**.** By and large, fairness as a concept is not new in competition law enforcement.[150] We do not seek to define or redefine the concept of fairness because, despite its appealing nature, the application of fairness in competition law has been criticized for its

[146] Linus J Hoffmann, 'Fairness in the Digital Markets Act', available here: <https://pure.strath.ac.uk/ws/portalfiles/portal/179298965/Hoffman-EP-2023-Fairness-in-the-Digital-Markets-Act.pdf> last accessed April 2024; Schweitzer (note 132).
[147] OECD Global Forum on Competition 2021, Note on Abuse of Dominance in Digital Markets, available here: <https://one.oecd.org/document/DAF/COMP/GF(2020)4/en/pdf> 15.
[148] DMA Recital 4.
[149] EU DMA, Recital 33.
[150] Jacobien Rutgers and Wolf Sauter, *Promoting Fair and Private Governance in the Platform Economy: EU Competition and Contract Law Applied to Standard Terms,* 23 Cambridge Yearbook of European Legal Studies 343 (2021).

moral vagueness, which makes it difficult to have a monolithic definition of what constitutes fairness. The concept of fairness is also based on socio-cultural values, which tend to be relative from one society to another. This makes it difficult to operationalize fairness as an economic concept.[151]

Additionally, it is far from clear what fairness in competition law constitutes. To some, fairness in competition law has a social rationale and refers to equal opportunities.[152] To others,[153] fairness in competition law aims to protect the competitive process, which constitutes the protection of rivalry, economic freedom, and small firms.[154] As noted by Beems, 'in competition law, the concept of fairness is centered around the *process* where rivalry on the market should be determined on the merits and not by the degree of market power.'[155] Suttle describes competitive fairness as fairness between competitors and argues that 'this is the sense of fairness that we invoked when we complain that a competitor has unfair advantage, or is using unfair means, to succeed in the market at our expense.'[156]

Critics of fairness as a goal of competition law in digital markets have asserted that it is susceptible to regulatory exploitation because of its vagueness. According to Colangelo, 'indeed a goal that cannot be measured is irresistibly attractive to enforcers because it can mean anything they want it to', making the concept of fairness susceptible to exploitation by policymakers. Gerard also notes, 'the resurgence of fairness in the field has also elicited mixed reactions; in particular competition professionals have displayed some discomfort towards an inherently multifaceted nature and seemingly limitless reach of fairness as an enforcement principle.'[157]

This paper is not concerned with defining the concept of fairness in competition law. Rather, it intends to trace why the EU recognized the goal of fairness in the DMA and the extent to which it can inform whether fairness as a goal should be incorporated in the AfCFTA

[151] Lee Anne Fennell and Richard H McAdams, *Fairness in Law and Economics* (Edward Elgar 2013).
[152] On literature on fairness in competition law enforcement see, Niamh Dunne, 'Fairness and the Challenge in Making Markets Work Better' 84(2) Modern Law Review 230 (2021); Kokott and D Dittert, 'Fairness in Competition Law and Policy' in D Gerard, A Komninos and D Waelbroeck (eds), *Fairness in EU Competition Policy: Significance and Implications. An Inquiry into the Soul and Spirit of Competition Enforcement in Europe* (Bruylant 2020).
[153] Jörg Hoffmann, 'How to Implement the DMA in order to Attain its Goals of Contestability and Fair Digital Markets for Core Platforms Services' 20 July 2023, available here <https://blogs.law.ox.ac.uk/oblb/blog-post/2023/07/how-implement-dma-order-attain-its-goals-contestability-and-fair-digital> last accessed 9 July 2023.
[154] G. Colangelo, 'In Fairness We (Should Not) Trust. The Duplicity of the EU Competition Policy Mantra in Digital Markets' (2023) 68(4) The Antitrust Bulletin.
[155] Beems, note 62, at 6.
[156] Oisin Suttle, 'The Puzzle of Competitive Fairness' (2022) 21 Politics, Philosophy &Economics 190, 191.
[157] Damien Gerard, 'Fairness in EU Competition Policy: Significance and Implications' (2018) 9(4) Journal of European Competition Law and Practice 211, 211.

DCR. Generally, it is hard to provide an exact definition of fairness as applied in the DMA,[158] a challenge that the AfCFTA CA could face if the goal of fairness is incorporated in the AfCFTA DCR. The goal of fairness in the DMA, nevertheless, was informed by the imbalances of bargaining power between the digital gatekeeper and among market participants using its core platform service.[159] Some scholars, therefore, note that because of the imbalances of bargaining power among market participants in the digital market, fairness under the DMA is about equity, not equality.[160] Hoffman, for instance, notes that:

> 'equity is not equality. While under formal equality, individual attributes are purposefully ignored for the distribution of legal entitlements…under equity, entitlements are distributed with particular attention to an attribute of the subject…This is exactly what the DMA does…fairness in the DMA means that firms receive different entitlements according to their market power. Those with more market power receive less entitlements and see their economic freedom restrained , and those with less market power receive more entitlements.'[161]

According to Bania and others, 'conventional competition policy seems to be concerned with issues of distributive fairness. However, the DMA seems –when using the term "fairness" – to deal with something else; it is about more than distributive justice… about fair behaviour in competition.'[162] The goal of fairness under the DMA starts from the realization that there is a limited level playing field in digital markets, and digital gatekeepers should engage in fair behavior. To enhance fairness through fair market behavior, Recital 62 of the DMA requires designated gatekeepers to provide services to other businesses on terms and conditions that are fair, reasonable and non-discriminatory (FRAND).

The DMA also anticipates that the digital gatekeeper's *market conduct* can lead to *an unfair outcome*. This implies that competition agencies should identify the market conduct that led to the unfair outcome.[163] As Katz questions, 'do some forms of rivalry constitute "unfair competition" and thus fail to generate fair outcomes regardless of the degree of rivalrous conduct?'[164] If the goal of fairness is to be incorporated in the AfCFTA DCR, then African

[158] Giorgio Monti, 'The Digital Markets Act: Improving its Institutional Design' (2021) Eur. Competition & Reg. L. Review.
[159] Elias Deutscher, 'Reshaping Digital Competition: The New Platform Regulations and the Future of Modern Antitrust' 2022 67(2) The Antitrust Bulletin 302-340.
[160] Behrang Kianzad, 'Defining fairness in Digital: How to Operationalize an Ideal?' (18 November 2021, D'Kart Antitrust Blog).
[161] Hoffman (note 146), at 20.
[162] See the Concurrences note on the DMA here: <https://www.concurrences.com/en/review/numeros/no-3-2022/on-topic/the-digital-market-act> last accessed April 2024.
[163] Michael L Katz, 'Does it Matter if Competition is "Fair" or "on the Merits"?: An Application to Platform Self-Preferencing' (2025) 66 Review of Industrial Organization 43, 46.
[164] Ibid.

countries must identify if specific market conduct by digital gatekeepers in the African market is likely to lead to unfair outcomes.

Exploitative abuses occur when an undertaking with a dominant position takes advantage of its position to impose unfair prices and conditions on businesses and consumers.[165] In competition law, unjustified exploitative conduct always leads to unfair outcomes and harms competition.[166] Research on exploitative abuses in digital platforms has recently gained momentum in digital markets.[167] Balasingham and D'Amico argue that digital markets are prone to exploitative conduct because of the presence of high and non-transitory barriers to entry, which lead to enhanced dominance.

Indeed, the imbalances in bargaining power among market participants on the digital platforms, businesses' economic dependence on digital platforms, and competing with businesses to sell their products on the same platforms provide a reason for digital platforms to engage in exploitative behavior. For instance, combining users' personal data across services or using third parties' data for the platform's benefit is considered exploitative conduct in data-driven and zero-price markets.[168] Additionally, self-preferencing –which constitutes the manipulation of search and ranking to favor a digital platform's own products– is an exploitative conduct.[169]

The DMA identifies market conduct that could lead to unfair outcomes. Recital 52 of the DMA, in particular, requires digital gatekeepers not to engage in 'any form of differentiated or preferential treatment in ranking on the core platform services, and related indexing and crawling, whether through legal, commercial or technical means, in favor of products or services it offers itself or through a business user which it controls.' Recital 52 of the DMA further stipulates that 'to ensure this obligation is effective, the conditions that apply to such ranking should also be generally fair and transparent.' More so, Article 6(d) of the DMA

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[165] Marco Botta, 'Exploitative Abuses: Recent Trends and Comparative Perspectives' in Pinar Akman and others (eds), Research Handbook on Abuse of Dominance and Monopolization (Edward Elgar Publishing 2023).

[166] D Melamed, 'Exclusionary Conduct under the Antitrust Laws: Balancing, Sacrifice and Refusals to Deal' (2005) 20(2) Berkeley Technology Law Journal 1247.

[167] Baskaran Balasingham and Alessia D'Amico, 'Beyond Exclusion: Revisiting Exploitative Abuses in Digital Platforms Market' (2024) Journal of Antitrust Enforcement <https://doi.org/10.1093/jaenfo/jnae050> last accessed April 2025.

[168] On literature on exploitative conduct in digital markets, see: Liza Lodvdahl Gormsen and Jose Tomas Llanos, 'Facebook's Exploitative and Exclusionary Abuses in the Two-sided Market for Social Networks and Display Advertising' (2022) 10 Journal of Antitrust Enforcement 90; Miriam Caroline Buiten, 'Exploitative Abuses in Digital Markets: Between Competition Law and Data Protection' (2021) 9(2) Journal of Antitrust Enforcement 270; Marco Botta and Klaus Wiedemann, 'Exploitative Conduct in Digital Markets: Time for Discussion after the Facebook Decision' (2019) 10(8) Journal of European Competition law & Practice 465.

[169] Yuta Kittaka, 'Self-preferencing by Platforms: Literature Review' (2023) 66 Japan and the World Economy.

applies fair and non-discriminatory conditions to the ranking of services and products and to refrain from self-preferential ranking.[170]

In the context of the AfCFTA CP, by prohibiting the abuse of economic dependence, the AfCFTA CP recognizes the imbalances of bargaining power between business users and gatekeepers. The AfCFTA CP also recognizes that certain conduct can lead to unfair outcomes. For instance, in addition to prohibiting designated digital gatekeepers from engaging in self-preferencing, Article 11(4, e) of the AfCFTA CP prohibits differentiation in fees or treatment against small and medium enterprises. The second provision that reveals the possibility of unfair treatment among business users is Article 11(4, g) of the AfCFTA CP, which prohibits the gatekeepers from 'failing to identify paid ranking as advertising in search results and to allow paid results to exceed organic results on the first results page'. Thus, from the prohibited conduct under Article 11(4) of the AfCFTA, we anticipate the goal of fairness to be incorporated in the AfCFTA DCR. Article 12(7) of the AfCFTA CP requires State Parties to ensure that their respective competition laws adhere to the principles of transparency, independence and procedural fairness. In its Preamble, the African countries are conscious 'of the central role that national and regional competition agencies will continue to play in promoting fair competition and inclusive growth in intra-Africa trade and seeking to support their work through the creation of appropriate institutional mechanisms at the continental level.'

Moreover, in a market where entry barriers are high, there are imbalances in bargaining power between market participants, and most business users are economically dependent on digital platforms to reach end-users; African governments are more likely to consider contestability and fairness.[171] If African countries consider fairness and contestability as goals of the AfCFTA DCR, they have to establish a coherent and comprehensive basis for assessing whether market conduct is unfair or undermines contestability.[172] In the DMA, the contestability and fairness goals complement each other. Recital 34 of the DMA provides that contestability and fairness are intertwined, as stated, 'the lack of, or weak, contestability for a certain service can enable a gatekeeper to engage in unfair practices. Similarly, unfair practices

[170] In relation to search results, Article 6(11) of the DMA requires designated gatekeepers: To provide any third party undertaking providing online search engines, at its request, with access on fair, reasonable and non-discriminatory terms to ranking, query, click and view data in relation to free and paid search generated by end users on its online search results. Any such query, click and view data that constitutes personal data shall be anonymized.

[171] Fairness as a social rationale of competition law becomes attractive as a goal of the AfCFTA DCR.

[172] Michael L Katz, 'Does it Matter of Competition is "Fair" or "on the Merits"?: An Application to Platform Self-Preferencing' (2025) 66 Review of Industrial Organization 43.

by a gatekeeper can reduce the possibility of business users or others to contest the gatekeeper's position.' Drexl and others have called for a narrow interpretation of the concepts of fairness and contestability under the DMA.[173] They argue that 'contestability and fairness should be interpreted against the backdrop of the provision of the specific core platform service that the DMA regulates and not the gatekeeper status per se.'[174] For instance, if barriers to entry and the expansion of rivals in digital markets undermine contestability, it is important to identify the specific barriers.

d. Beyond the DMA Goals of Contestability and Fairness

In this broader debate on the goals of DMCRs, several scholars have voiced their concerns on the best approach developing countries should adopt to regulate competition in digital markets.[175] This raises a critical question: Should DMCRs adopted in other jurisdictions incorporate or deviate from the twin goals of the DMA? What should inform the goals of DMCRs adopted beyond the EU? These are the questions at the heart of this paper.[176]

After a thorough review of literature, two additional goals seem to be important within the developmental context and the African circumstances in particular – innovation and inclusivity. In this section, we tackle the goal of innovation, while the goal of inclusivity is dealt with in Section V below, in the context of the South African Competition Commission's (SACC) OIPMI study. Although South Africa does not fully represent digital market development across the continent, the OIPMI study comes up with valuable insights in terms of goals of digital regulatory regimes, which are transferrable to the upcoming pan-African DMCR. Hence, we refer to the OIPMI study of SACC when discussing the goal of inclusivity, while we further outline the dimensions of the goal of innovation here.

Innovation: The first strand of literature argues that developing countries should adopt a less interventionist approach and not adopt DMA-like rules.[177] Neither should they copy the goals of the EU DMA.[178] According to Kiss:

[173] J Drexl et al., 'Position Statement of the Max Planck Institute for Innovation and Competition of 2 May 2023 on the Implementation of the Digital Markets Act (DMA)' (May 2, 2023). Max Planck Institute for Innovation & Competition Research Paper No. 23-11, available at SSRN <https://ssrn.com/abstract=4437220>, 4. Last accessed April 2025.
[174] Ibid, at 4.
[175] Shin-yi Peng, 'The Uneasy Interplay Between Digital Inequality and International Economic Law' (2022) 33(1) European Journal of International Law 205.
[176] Zlatina Georgieva, 'How(Not) to Regulate Digital Markets: Lessons from the EU' (26 August 2021, AfronomicsLaw).
[177] Richard Murgatroyd, Simon Lee and Theon Van Dijk, 'One Size Fits All? Competition Rules for Digital Markets Outside Europe' 46(4) (2023) World Competition 459-478.
[178] Helena Drewes and Alexander Kirk, 'Extraterritorial Effects of the Digital Markets Act: The "Elusive Long Arm" of European Digital Regulation' (2024) 47(4) World Competition 473.

'the global DMA-export trend raises red flags and calls for a more nuanced and cautious approach…First, it is crucial to avoid viewing regulation as the only viable solution…Secondly, the DMA was designed to address the European situation, and its universal applicability in other jurisdictions remains untested…Third, the DMA's imposition of ex-ante rules of per se antitrust prohibitions disregards the need to treat competition-promoting conduct differently from inherently suspect behavior.' [179]

Another argument often heard is that in developing countries, the markets are still in earlier stages of development.[180] There is no market failure or general lack of competition.[181] Consequently, adopting DMCRs could be too early and dampen innovation,[182] efficiency and investment.[183] When DMCRs protect competitors rather than competition,[184] it leads to free riding and thwarts foreign direct investment in developing countries. According to Manne and Auer, 'it is probably fair to say that, in many (maybe most) emerging markets, the most pressing challenge is to attract investment from international tech firms in the first place, not how to regulate their conduct.'[185]

If developing countries were to learn from this debate,[186] it would be prudent to acknowledge that the EU's intensive regulatory governance of tech companies has hindered the growth of EU tech companies.[187] Therefore, regulation of digital markets in developing countries will lead to missed opportunities such as job creation and stimulating a country's competitiveness.[188] Murgatroyd and others assert that:

'Markets that are less mature may have a greater scope for innovation, which, as is generally accepted, may be disincentivized by over-intervention. In addition, regulating

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[179] Lila Nóra Kiss, 'One Import Nations Do Not Need: The EU's Digital Markets' (7 December 2023, Information Technology and Innovation Foundation), available here <https://itif.org/publications/2023/12/07/nations-do-not-need-eu-digital-markets-act/> last ccessed 10 October 2024.

[180] Shilpa Das, 'Ex-Ante Regulation: An Evolving Need in Digital Markets' (2024) 5(1) Competition Commission of India Journal on Competition Law and Policy 55.

[181] Mario A Zúñiga and Dirk Auer, 'Ex-Ante Regulation of Digital Platforms in Latin America' (27 January 2025, International Center for Law & Economics).

[182] Çagri Çavus, 'Does DMA Interoperability Promote Innovation: A Comparative Study from the EU Competition Law to the DMA' European Competition Journal; Maureen K Ohlhausen and John M Taladay, 'Are Competition Officials Abandoning Competition Principles' (2022) 13(7) Journal of European Competition Law & Practice 463.

[183] Mark Jamison, 'Open App Markets Act: A Misguided Approach that Could Stifle Competition' <https://www.aei.org/technology-and-innovation/open-app-markets-act-a-misguided-approach-that-could-stifle-america/> Accessed 22 February 2025.

[184] Milton Handler, 'The Brandeis Conception of the Relationship of Small Business to Antitrust' (1960) 16 ABA Antitrust Section 13.

[185] Geoffrey A Manne and Dirk Auer, 'Brussels Effect or Brussels Defect: Digital Market Regulation in Emerging Markets' (20 December 2022, Truth on the Market).

[186] Anu Bradford, The False Choice Between Digital Regulation and Innovation, 119 Nw. U. L. Rev. 377 (2024).

[187] P Larouche and A de Streel, 'Will the Digital Markets Act Kill Innovation in Europe? (May 20, 2021). CPI Columns Europe, May 2021, University of Montreal Faculty of Law Research Paper, available at SSRN <https://ssrn.com/abstract=3855505> last accessed April 2025.

[188] David J Teece and Henry J Kahwaty, 'Is the Proposed Digital Markets Act the Cure for Europe's Platform Ills? Evidence from the European Commission's Impact Assessment' (BRG INSTI. 19-23).

local champions…may weaken their ability to compete effectively with global entrants that possess other relative advantages. It may also deter the entry of larger global players in the event those global players would face the same type of regulation. Competitive benefits would be foregone in both cases.'[189]

If a group of scholars has argued against regulating digital markets on the ground that it will hinder innovation, it is the neo-Schumpeterians.[190] According to De Streel, 'the neo-Schumpeterians claim that the digital economy is very competitive with rival products just "one click away" and new invention one garage away, hence markets should be left alone'.[191] Researchers at the Information Technology & Innovation Foundation (ITIF), Schumpeter Project on Competition Policy, have, in response to DMCRs in developing countries, opined that such an approach is detrimental to developing countries for the following reasons.[192] First, market power is transient and critical for innovation. Second, digital markets in developing countries are not highly concentrated and do not have digital gatekeepers like in the EU markets. For instance, in Mexico, there is empirical evidence that Amazon faces competition from local e-commerce platforms.[193] In developing countries, digital markets are dynamic, and there are many competitors.[194] In this case,[195] developing countries need to focus on digital innovation. Third, even if market failure existed in digital markets, developing countries' competition legislation is sufficient to regulate digital markets instead of adopting a DMCR.[196] Finally, they claim a DMCR could harm developing countries' reputations as non-tech friendly, adversely affecting foreign tech investment. In particular, Coniglio and Kiss, in their opinion on India's 2024 Digital Competition Bill, warned that:

'The Bill's deleterious effects on innovation risk stifling the economic growth and technological progress India needs to escape the middle-income trap and fully develop into an advanced economy. In particular, by following the EU's model of per se rules, the Bill will ban generally pro-competitive activities…without allowing firms to justify their behavior. These heavy-handed provisions will hinder innovation and harm Indian consumers. Additionally, by saddling America's leading digital firms with regulation, the Bill risks not only diminishing future investments in India but also straining the important

[189] Murgatroyd and others, note 177, 473.
[190] See Nicolas Petit and David J Teece, 'Innovating Big Tech Firms and Competition Policy: Favoring Dynamic over Static Competition' (2021) 30(5) Industrial and Corporate Change 1168-1198.
[191] De Streel, at 111.
[192] Trelysa Long, 'The Case for Cracking Down on Large Corporations and Promoting Small Businesses is Deeply Flawed' (22 July 2024, ITIF).
[193] Raymundo M Campos Vàzquez, 'Amazon's Effect on Prices: The Case of Mexico' (2022).
[194] Joseph Coniglio, 'Beyond the EU's Digital Markets Act: How Africa's Competition Regimes Should Approach High Tech Market', available at <https://www.youtube.com/watch?v=JoCNwU_lNYk&t=28s> last accessed 26 February 2025.
[195] Joseph V Coniglio and Lilla Nóra Kiss, 'Comments to Kenya's Competition Authority Regarding the Draft Competition (Amendment) Bill 2024' (ITIF, 11 June 2024).
[196] Lilla Nòra Kiss, 'Comments to the National Congress of Brazil Regarding Regulation of Digital Markets' (20 November 2023, ITIF).

> relationship between America and India that is crucial toward facing urgent geopolitical challenges that require a pro-innovation business environment amongst America and its allies.' [197]

The neo-Schumpeterians build their arguments on the work of Joseph Schumpeter.[198] Schumpeter argued that scale is positive and government intervention is a market error. The appeal of the Schumpeterian school of thought lies in its assumption that market concentration is central to innovation.[199] The theory of creative destruction posits that 'the threat of entry via innovation served as disciplining force in concentrated industries and promoted long-run economic progress'. [200] In this scenario, firms compete in the market through innovation, only to be challenged by a leapfrog competitor that supplements the current competitor with a new product, attracting consumers.[201]

Critics of the Schumpeterian approach to digital markets posit that in today's digital market landscape, some incumbent digital platforms use innovation to reduce and suppress rival competition.[202] Big tech companies control the entire platform ecosystem and access to the digital infrastructure, making it difficult for rivals to enter and innovate. As aptly put by Hausfeld:

> 'Gatekeepers that control the operation of entire ecosystems around their core "cash cow" platform services lack the incentive to innovate against their own technology. And they have an incentive and the ability to suppress any significant innovation from third parties within their ecosystems, which could, potentially, weaken their core platform business.' [203]

According to Hausfeld, creative destruction is unlikely to occur in digital markets because big tech companies control the innovation infrastructure.[204] They set the conditions for innovators to reach end users, prevent disruptive innovation through killer acquisitions, control the diffusion of innovations within their ecosystem, and they can imitate and integrate new innovations in their ecosystem.[205] Recent EU decisions on Google's refusal to provide access

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[197] Joseph V Conoglio and Lilla Nòra Kiss, 'Comments to the Indian Ministry of Corporate Affairs Regarding Digital Competition Law' (15 May 2024, ITIF).
[198] Joseph Schumpeter, 'Capitalism, Socialism and Democracy' (1942).
[199] Ibid.
[200] Ann Helwege and Ann Hendricks, 'Contestability and Creative Destruction: Two Approaches to Monopoly' (1985) 2(3) Review of Industrial Organization 218, 219.
[201] J Gregory Sidak and David J Teece, 'Dynamic Competition in Antitrust Law' (2009) 5(4) Journal of Competition Law & Economics 581-631.
[202] Hausfeld, 'Creative destruction in digital ecosystems revisited', available here < https://www.hausfeld.com/en-de/what-we-think/competition-bulletin/creative-destruction-in-digital-ecosystems-revisited/> accessed 26 February 2025.
[203] Hausfeld, ibid.
[204] Ibid.
[205] Hausfeld, note 203.

to rivals are examples of businesses relying on digital gatekeepers to innovate.[206] This analysis, therefore shows that developing countries, including Africa, should prioritize innovation and foreign direct investment. We turn to an in-depth overview of the African context next.

IV. REGULATING COMPETITION IN AFRICAN DIGITAL MARKETS

African digital market structure

The African market is characterized by informal markets and small- and medium-sized enterprises (SMEs). These SMEs are a key driver of Africa's economic development. The growth of digital markets allows SMEs to reach more end users in the national, regional, and international markets. Hence, the digital infrastructure is critical for the success of the SMEs and African digital platforms. A growing body of evidence has shown that although Africa's digital infrastructure is not as developed as that of developed countries, Africa has become more connected with an increasing growth rate in mobile internet connectivity and usage.[207] According to Statista, by 2025, Nigeria, Egypt and South Africa will lead internet usage at 107, 96.3 and 50.8 million users, respectively.[208] Morocco (90.7%), Libya (88.4%), Seychelles (86.7%), Tunisia (79.6%) and Botswana (77.3%) lead in internet penetration.[209] According to the International Telecommunication Union (ITU), in 2024, 87% and 92% of the population have internet access in Europe and America, respectively. [210] By 2024, although mobile internet connectivity and usage vary across African countries, 38% of Africa's population had access to internet usage globally.[211]

The increasing internet penetration and usage provide a conducive environment for African startups to emerge. The US continues to lead in tech startups, followed by the UK. The leading tech companies by market capitalization in 2025 are Apple, Microsoft, Nvidia, Amazon,

[206] Judgment of 25 February 2025, *Alphabet and Others*, C-233/23, EU:C:2025:110.

[207] ITU, 'Internet Use Continues to Grow, But Universality Remains Elusive, Especially in Low-Income Regions' <https://www.itu.int/itu-d/reports/statistics/2024/11/10/ff24-internet-use/?utm_source=chatgpt.com> accessed 24 February 2025.

[208] Statista, 'Countries with the Largest Digital Populations in the World as of February 2025 (in Millions)' https://www.statista.com/statistics/262966/number-of-internet-users-in-selected-countries/ accessed 25 February 2025.

[209] Statista, 'Mobile Internet Traffic as Percentage of Total Web Traffic in January 2025, by Region' < https://www.statista.com/statistics/306528/share-of-mobile-internet-traffic-in-global-regions/> accessed 25 February 2025.

[210] ITU, 'Internet Use Continues to Grow, But Universality Remains Elusive, Especially in Low-Income Regions' < https://www.itu.int/itu-d/reports/statistics/2024/11/10/ff24-internet-use/?utm_source=chatgpt.com> accessed 24 February 2025.

[211] Ibid.

Alphabet, Meta, Tesla, TSMC, Broadcom and Tencent.[212] Although it will take decades for an African startup to be among the leading tech companies by market capitalization, technology presents an opportunity for African startups to 'circumvent traditional infrastructural deficits that have held back productivity.'[213] It should be noted that what constitutes an African tech startup is controversial. In the simplest definition, an African start-up would be founded by an African and headquartered in Africa, targeting African-based end-users. However, Disrupt Africa has noted that this is not the case in all scenarios as:

> 'Many African-based, Africa-focused startups are founded by non-Africans. Many Africa-focused startups are, for regulatory and financial reasons, headquartered outside the continent. Many Africa-founded, Africa-based startups target customers elsewhere in the world.'[214]

The AfCFTA DMCR, therefore, should create a conducive environment for the growth of African tech startups by regulating anti-competitive conduct in digital markets. The African digital market is undergoing nascent innovation. Tech startups are increasingly being developed in fintech, e-commerce, e-health, logistics, agri-tech, ad-tech, energy, transport, recruitment, entertainment, marketing, AI, and other sectors of the economy.[215] Africa has growing leadership in mobile money, revolutionizing the fintech industry and financial inclusion.[216] Mobile money services have also opened up business opportunities, particularly in e-commerce, evidenced by the increasing growth of mobile money transactions in Africa. According to GSMA, in 2023, international remittances and merchants' payments were among the major uses of mobile money in Sub-Saharan Africa.[217] In particular, the GSMA notes that in 2023:

> 'Merchant payments grew by 14% reaching around $74 billion in 2023. Many customers now use mobile money to pay for goods and services: in 2019, one in every ten dollars circulating in the mobile money ecosystem was spent on merchant payments; in 2023, this grew to two in every ten dollars.'[218]

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[212] Statista, 'Leading Tech Companies Worldwide as of January 28, 2025, by Market Capitalization (in Billion US Dollars)' <https://www.statista.com/statistics/1350976/leading-tech-companies-worldwide-by-market-cap/> accessed 25 February 2025.
[213] Landry Signé, *Africa's Fourth Industrial Revolution* (Cambridge University Press 2023), 2.
[214] Disrupt Africa, at 5.
[215] Janny Lay and Tevin Tafese, 'Africa's Emergent Tech Sector: Characteristics and Development' (Giga African Spectrum 2025).
[216] Ellis L.C Osabutey and Terence Jackson, 'Mobile Money and Financial Inclusion in Africa: Emerging Thesmes, Challenges and Policy Implications' (2024) 202 Technological Forecasting and Social Change.
[217] GSMA, *The State of Industry Report on Mobile Money 2024* (GSMA 2024).
[218] Ibid, at 7.

Nigeria, South Africa, and Kenya mostly dominate in African tech startups.[219] Despite this across-country variation in the adoption of tech startups, the growth of African startups and homegrown digital platforms is an opportunity for African firms to leapfrog.[220] This implies that the AfCFTA DMCR should prioritize creating a conducive environment for the growth of African startups, making innovation a key goal.[221]

In addition to innovation, capital investment is one of the biggest challenges facing African startups' entry and expansion in the digital market.[222] African tech startups rely on equity and debt funding.[223] In 2023, Disrupt Africa found that the African tech startup funding declined and the number of active investors dropped dramatically compared to 2023.[224] More so, there is variation in countries that attract funding. Nigeria, Kenya, Egypt, and South Africa startups attracted more funding in 2023 than other countries.

We noted earlier that the tech startup scene is characterized by immense investment. This implies that investment poses an entry barrier to African businesses and can lead to limited contestability. Big tech companies like Google and Meta have invested immensely in the African tech market to address the investment and digital infrastructure challenge.[225] According to Tafese, 'tech giants, primarily from the United States, have recognized a business opportunity in Africa's existing connectivity gaps and have begun investing heavily in subsea data cables, data centers, and technology hubs.'[226] The African the tech startup scene is in dire need of foreign investment. Thus, besides innovation, the AfCFTA DMCR should incorporate foreign investment as a goal.

While there is a steady increase in African tech startups, internet use and digital platforms are dominated by international platforms –Google, Facebook, WhatsApp, YouTube,

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[219] Landry Signé, *Africa's Fourth Industrial Revolution* (Cambridge University Press 2023).

[220] Antonio Andreoni & Simon Roberts, Report 'Governing Data and Digital Platforms in Middle Income Countries: Regulations, Competition and Industrial Policies, With Sectoral Case Studies from South Africa', available here <https://www.bsg.ox.ac.uk/sites/default/files/2020-11/Governing%20data%20and%20digital%20platforms%20in%20middle-income%20countries-%20regulations%2C%20competition%20and%20industrial%20policies%2C%20with%20sectoral%20case%20studies%20from%20South%20Africa.pdf> last accessed April 2025.

[221] See Umut Aydin and Tim Büthe, 'Competition Law & Policy in Developing Countries: Explaining Variations in Outcomes; Exploring Possibilities and Limits' (2016) 79 Law and Contemporary Problems 1, who argue that developing countries should use competition law to dismantle public and private barriers that inhibit innovation, human development, private sector rivalry.

[222] African Union, *The Digital Transformation Strategy for Africa (2020-2023)* (AU, 2020).

[223] Disrupt Africa, 'Africa Tech Startups Funding Report 2023 & Full Startup List' (Disrupt Africa 2023).

[224] Disrupt Africa, at 8.

[225] Jann Lay and Tevin Tafese, 'Africa's Emergent Tech Sector: Its Characteristics and Impact on Development and Labour Markets' (GIGA Working Papers No. 333 2023).

[226] Tevin Tafese, 'Digital Africa: How Big Tech and African Startups are Reshaping the Continent' (German Institute for Global and Area Studies, 2022).

and Booking.com.[227] However, not all big tech companies dominate the African digital market. For instance, while Amazon dominates the EU e-commerce market, it has no dominance in Africa. In Africa, in 2023, Jumia (Nigeria), Souq (Egypt) and Takealot (South Africa) are the leading e-commerce platforms.[228] These global and leading African tech platforms provide a gateway for African businesses and startups to reach end users and make sales, making African tech startups and businesses economically dependent on the Big Tech platforms. For instance, Google Search market is dominant in the African digital market, and African businesses rely on the Google Search market to reach end-users.

Similar to the EU, with the advent of technology, the exclusion of SMEs from the market is driven by digital platforms' power to control who accesses the digital infrastructure. African tech startups and businesses grapple for their share in global digital trade. Africa's participation in digital trade is growing, albeit slowly. At the global level, in 2022, Africa contributed less than 1% of digitally delivered exports.[229] There are also disparities in digital trade among African countries. So far, by 2022, Ghana, South Africa and Morocco lead in the export of digitally delivered services in Africa.[230]

In markets where big tech companies and leading African platforms are intermediaries for African businesses and tech startups, amid capital constraints to pay for access, there is an imbalance in bargaining power. When imbalances in bargaining power exist, as noted in the DMA, digital gatekeepers are likely to exploit business users and impose unfair trading conditions on them. This makes fairness an important goal that should be incorporated in the AfCFTA DMCR. In conclusion, an analysis of the African market structure shows high barriers to entry and an imbalance in bargaining power between business users and big/leading tech companies. This analysis makes the goals of *contestability, innovation, foreign investment* and *fairness* key goals for the AfCFTA digital market.

> 'It is true that where access to such an infrastructure -or service or input– is indispensable in order to allow competitors of the dominant undertaking to operate profitably in a downstream market, this increases the likelihood that *unfair practices* on that market will have at least potentially anticompetitive effects and will constitute abuse within the meaning of Article 102 TFEU.'

[227] Mark-Oliver Mackenrodt, 'Price and Condition Parity Clauses in Contracts Between Hotel Booking Platforms and Hotels' (2019) 50 International Review of Intellectual Property and Competition Law 1131.
[228] Statista, 'Leading Online Market Places in Africa as of 2023, Based on Number of Monthly Visits' < https://www.statista.com/statistics/1243149/monthly-visits-on-main-online-marketplaces-in-africa/> accessed 25 February 2025.
[229] WTO, *Digital Trade for Development* (WTO 2023).
[230] Ibid.

In the next section, we analyze national-level experiences in enforcing competition law in African digital markets to inform the AfCFTA DMCR.

The South Africa Competition Commission Online Intermediation Platform Market Inquiry

a. The Goals of South Africa's Competition Regime

Although the South African tech market is more developed than other African countries, South Africa is the first country in Africa to undertake market inquiry in digital markets.[231] In particular, the South Africa Competition Commission (SACC) has undertaken three market inquiries in digital markets – the data market inquiry in 2019,[232] the Online Intermediation Platform Market Inquiry (OIPMI) in 2021,[233] and the Media and Digital Platforms Market Inquiry in 2023.[234] Before delving into the findings of the OIPMI, it is necessary to understand what informs the goals of regulating competition in South Africa's digital market ecosystem. As South Africa does not have an ex-ante Regulation similar to the EU DMA to regulate digital platforms, the goals of competition law in regulating the digital market in South Africa are governed by the broader goals of the South African Competition Act.[235]

In the broader sense, the goals of competition law in South Africa are linked to the effects of colonialization and the apartheid regime in South Africa.[236] The apartheid regime was characterized by the segregation of black South Africans from political and economic governance. The non-white South Africans were required to live separately from white South Africans and use separate public facilities.[237] Laws regulating markets were adopted to favor the white population. According to Mncube and Ratshisusu:

> 'racial discriminatory laws and policies such as preferences in subsidy and support programs were designed to support white businesses and shielded white owned businesses from competing with black firms. These policy measures resulted in racially

[231] The Competition Authority of Kenya has not undertaken a comprehensive market inquiry in digital markets. It has undertaken a market study in the 'Online Food and Grocery Delivery Market' available here < https://www.cak.go.ke/sites/default/files/Online-Food-and-Groceries-Delivery-Platforms-Market-Study.pdf> accessed 4 March 2025.

[232] SACC, 'Data Market Inquiry' < https://www.compcom.co.za/newsletter/data-market-inquiry/> accessed 4 March 2025.

[233] SACC, 'Online Intermediation Platform Market Inquiry' < https://www.compcom.co.za/online-intermediation-platforms-market-inquiry/> accessed 4 March 2025.

[234] SACC, 'Media and Digital Platforms Market Inquiry' < https://www.compcom.co.za/media-and-digital-platforms-market-inquiry/> accessed 4 March 2025.

[235] John Oxenham, Michael-James Currie, Charl van der Merwe, and Jacob Muller, 'Competition and Digital Markets: State Play in South Africa' (2022) 13(7) Journal of European Law & Practice 500.

[236] Michael Wise, 'Competition Law and Policy in South Africa' (2004) 5(4) OECD Journal of Competition Law and Policy 7.

[237] Liberty Mncube and Hardin Ratshisusu, 'Competition Policy and Black Empowerment: South Africa's Path to Inclusion' (SCIS Working Paper No.22, Black Economic Empowerment Project 2021).

> skewed concentrated markets and put roadblocks on the participation of black-owned firms in the formal economy.'[238]

Consequently, the apartheid regime led to a racially skewed market, evidenced by the concentrated market that favored firms owned by white entrepreneurs. The Apartheid regime had limited the economic participation of the Black South Africans in the economic sphere. In this apartheid regime, as illustrated by Fox:

> 'The white minority owned and ran all of the business enterprises of any significant size, and non-whites were barred by law from most segments of commerce. A number of markets became highly concentrated, dominated by monopolies or cartels, while a few groups, run by prominent and wealthy business leaders, controlled almost all of the country's economy. There was, and still is, extreme disparity of wealth between the white minority and the excluded black community.'[239]

Thus, when South Africa gained independence in 1994, the government prioritized the inclusion of the marginalized and underrepresented in the economy on non-racial grounds. As stated by Mncube and Ratshisusu, the first democratic government in South Africa prioritized the 'transformation of society on non-racial, democratic and local foundations. All law in South Africa is expected to contribute to economic transformation and redress the imbalances related to past racial divisions.' [240] The South African competition law and policy, similar to other laws adopted post-Apartheid, was driven by the desire to redistribute the control of economic wealth and promote *inclusive* economic growth.[241] The South African Competition Act reiterates in its Preamble that:

> '…apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anti-competitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans.'[242]

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[238] Liberty Mncube and Hardin Ratshisusu, 'Competition Policy and Black Empowerment: South Africa's Path to Inclusion' (2023) 11 Journal of Antitrust Enforcement 74, 75.

[239] Eleanor M Fox, 'Equality, Discrimination, and Competition Law: Lessons from and for South Africa and Indonesia' (2000) 41 Harvard International Law Journal 579, 583.

[240] Mncube and Ratshisusu,2021, at 1.

[241] A Ezrachi, A Zac and C Decker, 'The Effects of Competition Law on Inequality –an Incidental By-Product or a Path for Societal Change? (2023) 11(1) Journal of Antitrust Enforcement 51; Shaista Goga and Imraan Valodia, 'Ownerhsip and Inequality: Policy Interventions in South Africa and Possible Ways Forward' (2021)Development South Africa 1; Eleanor Fox and Mor Bakhoum, *Making Markets Work for Africa: Markets, Development, and Competition Law in Sub-Saharan Africa* (Oxford University Press, 2019) 89-120; Thembalethu Buthelezi, Thando Mutani and Liberty Mncube, 'The Extent of Market Concentration in South Africa's Product Market' (2019) 7 Journal of Antitrust Enforcement 352; Simon Roberts, 'Competition Policy, Competitive Rivalry, and a Developmental State in South Africa', available here <https://www.researchgate.net/publication/373766915_11_Competition_policy_competitive_rivalry_and_a_developmental_state_in_South_Africa> last accessed April 2025.

[242] On literature explaining how the Apartheid regime influenced the South African competition regime, See Diane R Hazel, 'Competition in Context: The Limitation of Using Competition Law as a Vehicle for Social Policy in the Developing World' (2015) 37 Houston Journal of International Law 275, 312-328; D Lewis, '*Enforcing Competition Rules in South Africa: Thieves at the Dinner Table'* (Edward Elgar, 2013).

Following apartheid, in addition to promoting efficiency and consumer welfare, the South African Competition regime *envisages additional goals* for its competition law enforcement. As such, to address the historical injustices perpetuated by the Apartheid regime and enhance South Africa's participation and inclusivity in the market, South Africa's competition law has broader objectives.[243] According to Article 2(1) of the South African Competition Act, these goals include promoting employment and advancing the social and economic welfare of South Africans; ensuring South African firms can participate in the global markets; ensuring SMEs have an equitable opportunity to participate in the market; and promoting a greater spread of ownership, in particular, to increase the ownership stakes of historically disadvantaged persons (HDP). HDPs are defined under Section 3(1A) 2(a) 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 based on race.'[244]

Generally, the effect of competition on SMEs and HDPs in South Africa is a key feature underlying the decision of the SACC on cartel conduct, merger analysis and market inquiries. A firm designated by the Minister as dominant is prohibited from requiring or imposing on a supplier that is an SME or a firm owned and controlled by unfair prices, price discrimination or other trading conditions that can lead to a competitive imbalance.[245] Neither can a dominant firm avoid selling or refuse to sell to a purchaser who is an SME or a firm owned or controlled by HDP. Furthermore, as per Section 12(A) (3) (c) of the SA Competition Act, the SACC and the SA Competition Tribunal can prohibit a merger, in the absence of competition concerns, if that merger will affect the 'ability of small and medium businesses or firms controlled or owned by historically disadvantaged persons to effectively enter into, participate in and expand within the market.' In 2020, the SACC prohibited a merger involving the sale of Burger King (South Africa) (RF) (Pty) Ltd (BKSA) to ECP Africa on the ground that post-merger, the shareholding of HDPs would decrease from 68% to 0%.[246] This merger raised no competition concerns. The South African competition law also seeks to protect the ability of national industries to compete

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243 Jonathan Baker, 'Exclusion as a Core Competition Concern' (2013) 78 American University Washington College of Law 527; Simon Roberts, 'The Role for Competition Policy in Economic Development: The South African Experience' (2004) 21(1) Development South Africa 227.

244 Thando Vilakazi and Teboho Bosiu, 'Black Economic Empowerment, Barriers to Entry, and Economic Transformation in South Africa' in Antonio Andreoni et al., *Structural Transformation in South Africa: The Challenges of Inclusive Development in a Middle Income Country* (Oxford University Press 2021) 189-212.

245 Section 8(4)(a), 1998 Competition Act South Africa.

246 CCSA, 'Commission Prohibits the Acquisition Between ECP Africa Fund, Burger King South Africa and Grand Foods' (1 June 2021, CCSA Media Statement).

in international markets. This means that competition law can be used to enhance African SMEs in global markets.

At the core of South Africa's competition enforcement is enhancing the equity, equality,[247] participation, and inclusivity of South African SMEs and HDPs in light of economic development.[248] To incorporate these goals in competition law enforcement, public interest considerations are a defining feature in assessing mergers, cartel conduct and grant of exemptions in South Africa.[249] All African competition laws have incorporated public interest considerations in their legislation. There is no conclusive list of public interest considerations. For instance, under Section 30(2) of the 2009 Botswana Competition Act, the competition agency is required to consider the following public interest issues in cartel conduct: whether the agreement or conduct promotes exports from Botswana or employment; whether it advances the strategic or national interest of Botswana in relation to a particular community; whether it provides social benefits which outweigh the effects on competition; whether it occurs within the context of citizen empowerment initiatives of government, or otherwise enhances the competitiveness of SMEs; whether it enhances the effectiveness of government programmes for the development of the economy of Botswana. Critics of public interest considerations argue that they enhance protectionism rather than enhancing competition.[250] Oxenham and others argue that by introducing a price discrimination provision that protects SMEs and HDPs, the SA Competition Act protects a particular class of competitors at the expense of competition and consumers.[251]

[247] Karisaa Moothoo Padayachie, 'Has Competition Law Enforcement Been Effective in South Africa' (2024) Development South Africa; A Ezrachi, A Zac, C Decker, 'The Effects of Competition Law on Equality: An Incidental By-Product or a Path for Societal Change?' (2023) 11 Journal of Antitrust Enforcement 51.
[248] Frederic Jenny, 'An Essay: Can Competition Law and Policy Be Made Relevant for Inclusive Growth of Developing Countries?' (2020) 65(1)The Antitrust Bulletin.
[249] The question of public interest consideration in South African competition law has received criticism and support on different fonts. For literature on public interest considerations in South African competition law see James Hodge, Sha'sita Goga, and Tsepiso Moahloli, 'Public Interest Provisions in the South African Competition Act: A Critical Review' in Kasturi Moodaliyar and Simon Roberts (Eds), *The Development of Competition Law and Economics in South Africa* (HSRC Press 2013).
[250] Prince M Changole and Willem H Boshoff, 'Non-Competition Goals and their Impact on South African Merger Control: An Empirical Analysis' (2022) 60 *Review of Industrial Organization* 361; W Duncan Reekie, 'The Competition Act, 1998: An Economic Perspective' (1999) 67(2) The South African Journal of Economics 257; W Myeni, 'Public Interest and Merger Controls in South Africa: The Role of Public Interest in Merger Evaluations and How Efficiency-Driven Principles are Reconciled with Public Interest Considerations (Masters of Law Thesis, University of Capetown 2008).
[251] Oxenham and others, 2022, at 502.

Developing countries should follow their path to address competition concerns. Competition policy should address economic inequality on digital markets,[252] especially in a developmental context. As SMEs characterize African markets, international competition rules are needed to address power dynamics in data-driven markets.[253] From this analysis, African competition laws should encompass multiple goals to enhance equality of opportunities.[254]

b. SACC's Online Intermediation Platform Market Inquiry

The OIPMI was initiated on 19 May 2021 in accordance with Section 43B(1)(a) of the South African Competition Act 89 of 1998, which grants the SACC the power to initiate market inquiries. The findings of the SACC's 'Competition in the Digital Economy' (CDE) Report informed the OIPMI.[255] The rationale for the CDE Report, as stated by the SACC, was informed by the realization that:

> '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 digitization, South Africa must create a commercial and regulatory environment designed to extract those benefits and distribute them in a way that ensures inclusive growth, that is (i) greater participation by black and women-owned firms and (ii) increased and meaningful participation.'[256]

The CDE Report showed that in addition to digital market structures, such as network effects that hindered effective competition in the digital market, digital platforms engaged in deliberate strategies, such as killer acquisitions and self-preferencing to retain leadership, undermining the ability of South African SMEs and independent entrepreneurs to enter and participate in the market.[257] Moreover, entry barriers in the digital markets, such as investment capital and customer acquisition, undermined and could undermine the inclusive growth and *participation* of South African SMEs and firms controlled by historically disadvantaged

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[252] Alexander Beyleveld and Franziska Sucker, 'Regulating Cross-Border Data Flows under the AfCFTA Protocol on Digital Trade: The What, Why, How, Where and When' (2023) 20(2) Manchester Journal of International Economic Law 299.
[253] Shin-yi Peng, 'The Uneasy Interplay Between Digital Inequality and International Economic Law' (2022) 33(1) European Journal of International Law 205.
[254] Eleanor M Fox, 'South Africa, Competition Law, and Equality: Restoring Equity by Antitrust in a Land where Markets were Brutally Skewed' (2019) 3(1) CPI Antitrust Chronicle 1.
[255] CCSA, 'Competition in Digital Economy: Version 2' Available at < http://www.compcom.co.za/wp-content/uploads/2021/03/Digital-Markets-Paper-2021-002-1.pdf> accessed 10 January 2025. The Report was published in September 2020.
[256] SACC CDE Report, p. 6.
[257] CCSA, 'Online Intermediation Platforms Market Inquiry Terms of Reference; Draft for Public Comment' (19 February 2021, CCSA).

persons (HDPs).[258] Hence, it became important for SACC to initiate a market inquiry in the online intermediation platforms (OIP) market.

The OIPMI focused on online intermediation platforms defined by SACC in its statement of issues as 'platforms that facilitate transactions between business users and consumers (or so-called "B2C" platforms) for the sale of goods, services and software, regardless of whether the transactions are concluded on the platform itself, on the online site of the business user or offline.'[259] OIPs provide business users access to a large customer base, increasing business reach to end users, creating larger markets and increased sales. OIPs have become a critical channel for business users' customer acquisition. For instance, Google Search is the first channel customers use to reach business users. Hence, business users who appear on the first Google search page have the advantage of reaching more consumers and making more sales.

Consequently, the SACC initiated the OIPMI in several markets: travel and accommodation, Google Search, e-commerce, software application stores, online classifieds, food delivery, insurance comparator sites. The OIPMI focused on four areas of competition and public interest in South Africa. These include investigating market features that inhibit, impede, or distort competition among *digital platforms*, hinder *competition among business users or undermine consumer choice,* give rise to discriminatory or exploitative treatment of *business users*, and negatively affect the effective participation of *historically disadvantaged persons (HDP)* and *small and medium enterprises (SMEs).*[260] This shows that SACC was interested in market contestability, fairness, and inclusivity in digital markets. In particular, the main priority of SACC is to increase the entry and participation of SMEs and HDP firms in the digital economy. As was noted by SACC:

> 'In this regard, the government can employ tools to ensure more inclusion for SMEs that can participate in the sector. These tools can be direct (e.g. special funds) or even indirect (e.g. tax rebates). Investments, including those that are non-financial (such as skills development), will go a long way to ensure that domestic SMEs can participate in the digital markets.' [261]

In July 2022, the SACC released the OIPMI Provisional Findings Report.[262] This Report shows that in all the markets under the inquiry, there were one or two leading platforms, as shown in Table 1 below. Many factors influence whether a platform is leading, including

[258] CCSA, Competition in Digital Economy', at 6.
[259] CCSA, OIPMI Statement of Issues (19 May 2021, CCSA), at 3.
[260] CCSA TOR, at 12.
[261] CCSA, Competition in Digital Markets at 57.
[262]CCSA, OIPMI Provisional Findings Report (CCSA 2022) Available at <https://www.compcom.co.za/online-intermediation-platforms-market-inquiry-provisional-report/> accessed 13 January 2025.

consumers' global and local dimensions. For instance, Booking.com is leading because most of the consumers using it are global. Takealot, a South African platform, is leading in e-commerce because most customers are local, in addition to the high cost required for last-mile investments.

Market	Leading Platform
Software App Stores	Apple App Store and Google Play Store.
General Search	Google[263]
e-Commerce	Takealot.
Travel and Accommodation	Booking.com and Airbnb
Food Delivery	Mr. Delivery and UberEats.
Property Classified	Property24 and Private Property
Automobile	Autotrader and Cars.co.za

Table 2: Leading Platforms in South Africa in specific sectors under the OIPMI. Source: CCSA, 2022, 7

In July 2023, SACC released the final findings of its OIPMI Final Report.[264] In this Section, we discuss the key findings of the OIPMI and how it could inform the AfCFTA DMCR goals. We find that the OIPMI findings speak to contestability, fairness and inclusivity goals as discussed below.

i. Contestability

The SACC, in its Provisional Report, found that small platforms face entry barriers resulting from leading platforms' first-mover advantages, limited business user multi-homing and limited consumer multi-homing.[265] These market features favor large firms. Access to data was identified as one of the major entry barriers that South African digital platforms and businesses encounter. According to Buthelezi and Hodge:

> 'Given the existing level of concentration, digital startups complain that the large incumbent firms remain gatekeepers to accessing customers, and also control the vast stores of customer transactional and behavioral data that could be the basis for the new business models. As a result, the incumbents use their position to either pursue these opportunities alone, or enter partnerships with the ultimate aim of appropriating the business or copying it. The result is that the incumbents are able to shut out the next generation of entrepreneurs and ensure less disruption in the market.'[266]

[263] Google is the de facto monopoly in South Africa accounting for more than 90% of the general search market.
[264] CCSA, Online Intermediation Platform Market Inquiry Final Report, Available https://www.compcom.co.za/online-intermediation-platforms-market-inquiry-final-report-launch/ accessed 22 April 2025.
[265] CCSA, OIPMI Provisional Findings Report (CCSA 2022) Available at <https://www.compcom.co.za/online-intermediation-platforms-market-inquiry-provisional-report/> accessed 13 January 2025, 21-25.
[266] Ibid, at 204.

In addition to market features, limited capital is an entry barrier for SMES and HDP firms. Unlike international platforms, SMEs have limited funds and capital backing to acquire customers and pay for visibility and promotions.[267] For instance, Google provides more prominence to paid search results, giving business users with capital muscle a competitive advantage over others.[268] This has led to the exit of local platforms in South Africa. As was noted by SACC:

> 'For local delivery platforms in SA without that capital backing, there is simply no way to match the marketing spend at all. It is for this reason that the local platforms have exited in large numbers, with the surviving ones in areas outside where the national chains operate. However, that will not last very long.'[269]

Platform market features and limited capital backing for South African digital platforms, SMEs and HDPs firms have undermined market contestability by erecting high entry barriers. In this case, contestability becomes a key goal on African digital markets.

ii. Fairness

The OIPMI analyzed business user treatment in the markets under study and found that there are power imbalances in bargaining power resulting from SMEs and HDPs firms' economic dependence on a few big tech companies to reach end-users and weak bargaining power across all markets under study.[270] In particular, the SACC found that the majority of the business users identified report moderate to high levels of dependency on the leading platforms.[271] As the level of business user dependency on the platform increases, the leading digital platforms exploit and discriminate among business users.[272] The SACC OIPMI Report clearly states this when it provides that where dependency exists to drive only sales, 'businesses will typically tolerate a fair amount of exploitation and discrimination, as the alternative, which is to forego online sales altogether, is typically far less attractive'.[273] Moreover, customer acquisition strategies, such as commission payments, discounted services, and loyalty programs are at the core of this imbalance.

[267] OIPMI Provisional Report, 17.
[268] CCSA 2023 Final OIPMI Report, at 25 para 39.
[269] Ibid, at 17, para 54.
[270] Baskaran Balasingham and Alessia D'Amico, 'Beyond Exclusion: Revisiting Exploitative Abuse in Digital Platforms' (2024) 00 Journal of Antitrust Enforcement 1.
[271] Ibid, 26.
[272] Barbara Engels, Vera Demary and Christian Rusche, 'Differentiated Treatment of Business Users by Online Platforms: An Analysis of Incentives with an In-depth Look at App Stores and E-Commerce Platforms', available here <https://www.researchgate.net/publication/344646210_Differentiated_Treatment_of_Business_Users_by_Online_Platforms_-An_Analysis_of_Incentives_with_an_In-Depth_Look_at_App_Stores_and_E-Commerce_Platforms> last accessed April 2025.
[273] OIPMI Final Report, at 21 para 27.

The SACC OIPMI identifies four market strategies by which leading digital platforms in South Africa exploit economic dependency and influence competition among business users.[274] The first is fee revenue maximization, which has led to price discrimination among business users**.** SACC noted that 'in looking to maximize fee revenues, the platform may extract more out of those business users with greater dependency and less bargaining power, resulting in a system of discriminatory pricing.'[275]

The second is when the platform seeks to monetize business user *visibility* and 'effectively favor those businesses with deep pockets to appear at the top far more often.'[276] Visibility takes different forms, including appearing in a specific position, ranking boost, impression boost, advertising, and promotion. Business users have to buy visibility by paying more commissions or product discounts. Booking.com, the leading platform in the hotel and accommodations sector in South Africa, has visibility boosters that boost the ranking of accommodation providers based on paying more commission or through discounted accommodations. However, paying more commission does not guarantee more prominence on Booking.com for accommodation providers. According to SACC OIPMI, 'great prominence is mainly provided through the Preferred Partner and Genius Loyalty program or through promotional deals that involve accommodation funded discounts which provide a ranking boost.'[277] This implies that SMEs with limited capital muscle to pay for visibility cannot effectively compete with deep-pocketed businesses, as was noted by SACC:

> 'even where the sale of visibility is pervasive, the inquiry found that it favors larger business users, not only because they have deeper pockets (and can therefore appear on top of morse searches), but also because of the pervasive price discrimination…larger business users could purchase the listing with boosted visibility at the same price or less than an SME could purchase a standard listing. Unsurprisingly, the evidence was that fewer SMEs relative to larger business users made use of promoted visibility.'[278]

Third, the platform *transfers the risk or costs* to the business users as they continue to drive greater profitability. Fourth is through ranking, where *ranking* parameters on the search results page appear to be rational but contain bias towards one's own products or certain business users. For instance, in the Google Search market, SACC found that nothing precludes a platform from dominating both organic and paid search results.[279] As a result:

[274] OIPMI Final Report, at 21 para 26.
[275] Ibid.
[276] CCSA OIPMI Final Report, at 21, para. 26.
[277] CCSA 2023 Final OIPMI Report, at 44, para. 100.
[278] OIPMI Provisional report, at 34, para. 92.
[279] CCSA 2023 Final OIPMI Report, at 26, para. 40.

> 'Small and new entrant platforms face the dual problem of large platforms performing better on paid and organic search but also having their organic results being reduced and pushed down…performance in organic is at the mercy of the Google algorithm. Duplication of domains in paid and organic results adds to the visibility problem for smaller platforms and is arguably not in the interests of consumers either.'[280]

iii. Price discrimination

We briefly discuss the OIPMI findings on price discrimination, which show how power imbalances in bargaining lead to unfair outcomes, making fairness a critical goal of the AfCFTA DMCR. SACC found that price discrimination among business users takes the form of differentiated treatment.[281] Differentiated treatment occurs when platforms apply dissimilar conditions to business users in equivalent situations.[282] Differentiated treatment is not undesirable or problematic, particularly when legitimate justifications such as cost or consumer needs exist. However, when differentiated treatment is exploitative and/or exclusionary on unjustified grounds, it raises competition issues. Unjustified differentiated treatment leads to unfair contractual terms and competitive disadvantages, hindering the ability of local platforms and business users to enter, compete, and expand in the market, as illustrated in Recital 62 of the DMA that states:

> 'In particular, gatekeepers which provide access to software application stores are an important gateway for business users that seek to reach end users. In view of the imbalance in bargaining power between those gatekeepers and business users of their software application stores, those gatekeepers should not be allowed to impose general conditions, including pricing conditions, that would be unfair or lead to unjustified differentiation.'

In analyzing business-user treatment in digital markets, the SACC OIPMI found that price discrimination was rampant in the food delivery platforms and online classified markets. In the food delivery market, leading platforms –Uber Eats and Mr. D Food– have adopted a pricing model favoring larger and international restaurants. In this pricing model, independent restaurants were charged higher fees than international chain restaurants despite their contribution to profit in the food delivery platform market.[283] According to SACC,

> 'On the reported information from mid-2022, that discrimination sits at between 30-45% based on the average category, slightly lower than the 30-60% reported previously,

[280] Ibid.
[281] Marco Botta and Klaus Wiedemann, 'Exploitative Conducts in Digital Markets: Time for a Discussion after the Facebook Decision' (2019) 10(8) Journal of European Competition Law & Practice 465.
[282] Inge Graef, 'Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence; Marco Botta and Klaus Wiedemann, 'The Interaction of EU Competition, Consumer, and Data Protection Law in the Digital Economy: The Regulatory Dilemma in the Facebook Odyssey' (2019) 64(3) Antitrust Bulletin 428.
[283] Ibid, para 84.3.2.

but with many independent restaurants still being charged 50-60% higher. Those same financial reports, demonstrated that this difference is not based on cost and neither of the leading platforms seriously tried to make this claim.'[284]

It was also observed that price discrimination in the food delivery platforms depended on their bargaining power with restaurants. Not all platforms in the food delivery market treat businesses differently. In particular, local platforms treat chain and independent restaurants equally.[285] The more economically dependent restaurants were on a food delivery platform, the higher the differentiated treatment. As was argued by SACC, 'the more favourable treatment of Uber Eats of international chains relative to domestic ones is likely a reflection of the greater bargaining power those restaurant chains have from multi-market contact.'[286] This explains why local food delivery platforms do not charge independent restaurants higher commission fees.[287]

Differentiated treatment in competition law is not, per se, illegal. In defending the differentiated treatment, the leading platforms argued that large business users bring in more end customers, the transactions are not equivalent, the commission fees were based on variable cost, and the differential treatment does not lessen competition because the platforms are not dominant.[288] In response, SACC noted that the difference in fees was not based on cost but on the value businesses brought to the platform.[289] The argument on value is still contestable. SACC contested the argument by leading food delivery platforms that commissions were based on food basket value and noted that:

'In addition, for the platform itself, these independents add scale collectively, a wider variety of cuisines important for consumer choice and a [30-60] % higher food order basket value than restaurant chains, which feeds directly into improved profitability for the platform. Whilst one platform claimed that basket value was a factor in determining commissions, alongside restaurant numbers, this is not evident from actual practice.'[290]

In the online classified platform market, the leading platforms claimed that large agents brought in more volume than small agents; hence, the differentiated price was based on the agent's value. In refuting this claim, SACC also asserted that:

'Even if the Inquiry were to accept this rationale, the primary difficulty for the platforms is explaining why this justifies price differentials in excess of 300% on rate card, and even greater if the bespoke pricing to national dealer groups and agencies is included. None have

[284] OIPMI Final Report, at 99 para 272.
[285] OIPMI Final Report, at 100 para 275.
[286] Ibid.
[287] OIPMI Final Report, at 101 para 281.
[288] Ibid, 29 para 83.
[289] Ibid, Para 84.
[290] OIPMI Final Report, at 99 para 273.

> attempted to do so, and the differences in the level of discrimination suggest that there is no objective value based pricing model at play. Rather it appears to be relative bargaining power that drives price differences. Collectively, the small agents and dealers contribute a substantial proportion of the listings, but the fact that they are dispersed over many individual businesses means that each one lacks bargaining power. The lack of bargaining power is not just about size but also a product of their high level of dependency with few alternatives.'[291]

The SACC stressed that an 'obvious explanation for the discrimination is simply the result of differences in bargaining power, and the ability to exploit SMEs/HDPs relative to larger business users.'[292] Smaller restaurants, lacking bargaining power, incur additional costs and higher commission rates than international restaurants, which have the advantage of bringing in volumes. This was illustrative in the case of property classifieds, where the SACC found that the leading platform, Property 24, charges a monthly fee depending on volume leads. Simply put, differentiated treatment between small and larger business users by leading platforms is based on large business users' bargaining power based on volumes, reputation and consumer preferences. This in itself is not surprising. The OIPs are profit-driven and adopt strategies that bring in more revenue. Thus, they are more likely to treat business users who bring revenue differently and favorably. It is important to note that African business users compete among themselves and with globally established business users and platforms for customer acquisition. Hence, African countries should incorporate fairness as a goal in digital market regulations.

Charging SME's more fees resulting from unjustified price discrimination undermines the ability of SMEs to participate in the digital markets. For instance, the SMEs pass the higher fees charged to consumers, making them less attractive. It also reduces the SMEs' budget that could be used on marketing and visibility on the platforms.[293] Indeed, African digital platforms and business users are not in a comparable position to their international counterparts. Thus, the extent of differentiation power is a function of relative bargaining power rather than objective value assessment. When business users are unjustifiably treated differently, this affects the participation of SMEs in the market. That is why Article 11(4) (e) of the AfCFTA CP prohibits digital gatekeepers from engaging in differentiation treatment and impose such terms against SMEs.

[291] OPMI Final Report, at 84, para 231.
[292] OIPMI Provisional Report, at 31, para 84.3.1.
[293] See Marco Botta and Klaus Wiedemann, 'Exploitative Conducts in Digital Markets: Time for Discussion after the Facebook Decision' (2019) 10(8) Journal of European Competition Law & Practice 465.

iv. Inclusivity

The other goal we observe from the SACC OIPMI is inclusivity. SACC recognizes that African digital platforms are not on an equal playing field with international platforms or businesses. Through remedial actions, SACC is placing an obligation on leading platforms to treat SMEs and HDP firms differently (i.e. equitably) in order to enhance their participation in digital trade. For instance, to remedy price discrimination, SACC has recommended *improved pricing* for SMEs and HDP firms to increase their participation and enable them to compete on an equal footing. Moreover, to offset SMEs and HDP firms' disadvantages in accessing the OIPs. For instance, in the online classified market, SACC seeks to enhance the *inclusion* of SMEs by asking digital platforms to grant SMEs lower commissions as argued below:

> 'The Inquiry notes that whilst the remedial actions aim to place a maximum cap of 10% on price differentiation to SMEs, there is definitely scope for the platforms concerned to reduce this further and eliminate any differentiation. Moreover, whilst the Inquiry has accepted the cap of 10% as a practical solution in this particular instance for an initial four year period, this does not in any way create a safe harbour for that level of differentiation going forward.'[294]

In the online classified market, SACC requested the leading platforms –Property24, Autotrader and Cars.co.za– to design specific HDP programs such as marketing strategies to increase awareness of HDP firms to platform clients and no cost personal training for HDP firms.[295] As a remedial action, the SACC requires Booking.com to ensure 'substantial funding programs to identify, onboard, promote and grow accommodation establishments, activities and experiences provided by SMEs that are HDP-owned and HDP community over three years.'[296] To improve South African businesses' organic visibility via Google, the CSSA recommended that Google:

a. Introduce SA platform badges and filtering of the search results for SA platforms within 12 months.
b. Introduce a new platform sites unit allowing content-rich display for non-leading South African platforms in travel and shopping within 18 months, and in other intermediation categories within 24 months, along with augmentation of organic results with content-rich display.[297]

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[294] OIPMI Final Report, at 87 para 241.
[295] Ibid, at 88.
[296]CCSA 2023 Final OIPMI Report, at 48 para 115.1.
[297] CCSA 2023 Final OIPMI Report, at 28 para 49.1 and 49.2.

c. Provide the following support programs in South Africa to the value of R330m for five years:
   1. R180m in advertising credits for non-leading South African platforms, with a particular focus on SME and HDP platforms;
   2. Free in-depth technical training to maximize the efficacy of ad campaigns and reduce the effective cost of customer acquisition through general search;
   3. Funding support for SME and HDP digital platforms, including Google product credits, along with startup training and networking; and
   4. Register online profiles for 500,000 SMEs and HDP-owned businesses.

Therefore, the objective of the SACC OIPMI remedies is to neutralize some of the business users and digital platforms' competitive advantages and rebalance competition. According to SACC, remedial action should provide business users with:

> 'greater visibility and opportunity for smaller SA platforms to acquire customers' …enable more intense platform competition in each of the categories…provide a level playing field for the small business selling through these platforms…and providing a more inclusive digital economy through overcoming impediments for participation and fair competition by black owned South African businesses on online platforms and funding opportunities for black entrepreneurs.'[298]

One can argue that SACC's remedial actions seem controversial. They seek to protect competitors, a criticism levied against the goals of DMCRs. It also raises the question whether the leading platforms will adhere to these remedial actions. Nevertheless, it shows that in a region where African digital platforms and businesses have weak bargaining power constrained by limited capital to participate in the market, inclusivity is also a critical goal that needs to be considered when designing regulation in digital markets.

V. THE NORMATIVE FRAMEWORK ON GOALS OF COMPETITION LAW

Going back to the discussion of goals, and as mentioned above, on top of the Ordoliberal thinking evident in the EU's DMA, the New Brandeis movement has taken the lead in the US in calling for government intervention in digital markets. Our aim is not to engage in the debate for and against the New Brandeisian movement but to show how, in a region comprised of small businesses economically dependent on few digital platforms to reach end users,[299]

[298] Final Report at 28.
[299] Simphiwe Gumede and Phathushedzo Manenzhe, 'Competition Regulation for Digital Markets: The South African Experience' (2023) 31 The African Journal of Information and Communication.

African countries can draw insights from the New Brandeisian intellectual thinking in formulating the goals of the AfCFTA DMCR.

The Neo-Brandeis movement, intellectually led by Barry C. Lynn,[300] Tim Wu,[301] Jonathan Kanter,[302] Zephyr Teachout,[303] and Lina Khan,[304] among others,[305] originates in the US and draws from the thinking of Justice Louis Brandeis.[306] Justice Brandeis was a strong proponent of the democratic distribution of economic power.[307] Brandeis had an issue with the rise of big firms, and he argued that if not regulated, big business could eliminate independent entrepreneurs.[308] As he explicitly warned about the implications of bigness, 'human nature is such that monopolies, however well intentioned, and however well regulated, inevitably become, in course of time, oppressive, arbitrary, unprogressive and inefficient.'[309]

Wary of big firms' economic exploitation potential, Brandeis asserted that big was not only bad but a curse and a threat to democracy and individual liberty.[310] Brandeis asserted that firm efficiency was a product of management and not firm size.[311] He championed small businesses and workers and advocated for their protection from economic exploitation.[312] As illustrated by Wörsdöfer:

> 'Brandeis was deeply committed to protecting small firms against larger rivals: he can thus be seen a champion of small business. Due to his work for "small men (and women)" – that

[300] Barry C Lynn, Cornered: The New Monopoly Capitalism and the Economics of Destruction (1st edn, John Wiley & Sons Ltd 2010).
[301] Tim Wu, 'After Consumer Welfare, Now What? The "Protection of Competition" Standard in Practice' (2018) Compet. Pol'y Int'l.
[302] The Federalist Society, 'Whither "Neo-Brandeisian" Antitrust Enforcement: A Candid Conversation with Jonathan Kanter' (8 December 2022).
[303] Zephyr Teachout and Lina Khan, 'Market Structure and Political Power: A Taxonomy of Power' (2014) 9 Duke Journal of Constitutional Law and Public Policy 37.
[304] Lina Khan was the FTC Chair. Lina Khan, 'The End of Antitrust History Revisited' (2020) 133 Harvard Law Review 1655; Lina Khan, Amazon's Antitrust Paradox, 126 Yale L. J 710 (2017).
[305] Yunsieg P Kim, 'A Revolution Without a Cause: The Digital Markets Act and Neo-Brandeisian Antitrust' Wisconsin Law Review 1247 (2023).
[306] Louis D Brandeis, *The Curse of Bigness: Miscellaneous Papers of Louis D Brandeis* (Osmond K Fraenkel ed, Kennikat Press, 1965). Brandeis served on the US Supreme Court between 1916 and 1939.
[307] Manuel Wörsdöfer, 'Louis D Brandeis and the New Brandeis Movement: Parallels and Differences' (2023) 68(3)
[308] Massarotto, note 103, at 35.
[309] Mason, at 181.
[310] Richard P Adelstein, 'Islands of Conscious Power: Louis D Brandeis and the Modern Corporation' (1989) 63(3) The Business History Review 614.
[311] Herbett Hovenkamp, 'Slogans and Goals' (2023) 25 N.Y.U J. LEG & PUB. POL. 705.
[312] Brandeis was also a proponent of industrial democracy and worker protection. He advocated for the creation of workers union to protect workers and counter the power of large corporations. See generally Milton Handler, 'Introductory - The Brandeis Conception of the Relationship of Small Business to Antitrust' (1960) 16 American Bar Association Section of Antitrust Law 13.

is, industrial workers, small farmers, and small producers – he was called the people's lawyer or small businessman's lawyer.'[313]

Furthermore, as noted by Foster and Thelen, Brandeis 'believed that larger companies should be subjected to more stringent rules than smaller companies and that certain predatory, exclusionary, and abusive practices should be forbidden in most cases.'[314] Thus, Brandeis conceptualized regulated competition.[315] As Berk[316] points out, 'in this framework, state checked the tendency to concentrated power in the first instance by steering competition from predation into improvements in products and production processes.'[317] Brandeis advocated for state intervention and industry-led coordination on price and output, which supported small firms in competing in the market without sacrificing productivity, which in turn was a way of countervailing the power of big firms.[318] Brandeis's school of thought led to the emergence of the Harvard School, the new Harvard School, and the current neo-Brandeis movement.

The New Brandeisian movement, which traces its intellectual thinking to Brandeis, is far more concerned with protecting competition and other harms caused by the concentration of economic power in the hands of a few firms.[319] In a broader sense, the New Brandeisian movement calls for reinvigorating competition law and policy and refocusing attention on the structural underpinnings of the competitive process.[320] The New Brandeisian movement criticizes consumer welfare and efficiency as the only goals of competition law,[321] which have dominated competition law enforcement for centuries, focusing on price and output.[322] To New

313 Manuel Wörsdöfer, 'Louis D Brandeis and the New Brandeis Movement: Parallels and Differences' (2023) 68(3) Antitrust Bulletin 440, 442.
314 Chase Foster and Kathleen Thelen, 'Brandeis in Brussels? Bureaucratic Discretion, Social Learning, and the Development of Regulated Competition in the European Union' (2024) 18(4) Regulation & Governance 1083, 1086.
315 In a system of regulated competition, State officials allow for interfirm cooperation among small firms to enhance competition and increase production.
316 Gerald Berk, *Louis Brandeis and the Making of Regulated Competition, 1900-1932* (Cambridge University Press, 2009).
317 Ibid, at 1.
318 See Jared M Stehle, 'New Brandeis, New Battleground' (2024) Wisconsin Law Review 1219.
319 Wolf Sauter, 'The Impact of the Neo-Brandeis Movement on Antitrust: A Skeptical View' (26 June 2024 Network Law Review) available at <https://www.networklawreview.org/wolf-future-brandeis/> accessed 22 January 2025.
320 Mathew Sipe, 'Covering Prying Eyes with an Invisible Hand: Privacy, Antitrust and the New Brandeis Movement' (2023) 36 HARV. L. J. & TECH 359; Carl T Bogus, 'The New Road to Serfdom; The Curse of Bigness and the Failure of Antitrust' (2015) 49(1) U. MICH. J. L. REFORM 1; Leon B Greenfield, Perry A Lange and Nicole Callan, 'Antitrust Populism and the Consumer Welfare Standard: What are We Actually Debating' (2020) 83 Antitrust Law Journal 393.
321 Mark Glick and Darren Bush, 'The Chicago School, the Post-Chicago School, and the New Brandeisian School of Antitrust: Who is Right in Light of Modern Economics?' (2023) 30(4) George Mason Law Review 936.
322 Also known as the Borkian approach to competition law. On literature criticizing consumer welfare as the only goal of competition law see: Herbet J Hovenkamp, 'Is Antitrust's Consumer Welfare Principle Imperiled?' (2019) University of Pennsylvania Carey Law School 101-128; Tim Wu, 'After Consumer Welfare, Now What? The "Protection of Competition" Standard in Practice' (2018) Compet. Pol'y Int'l.

Brandeisians, consumer welfare, as postulated by the Chicago School, is deficient.[323] The current consumer welfare as the only goal of competition law should be abandoned. Instead, there is a need to adopt ex ante regulation especially when it comes to digital markets.[324]

The Chicago school of thought took hold in the 1970s and 1980s and was championed by Robert Pork. For the Chicago School,[325] the only goal of competition law is consumer welfare measured through efficiency and prices.[326] Bork's argument was that competition law should advance the interests of consumers and ignore other non-economic considerations like the protection of small businesses or less efficient competitors.[327] By focusing on consumer welfare through efficiency, the New Brandeisian movement argues that competition law enforcement has overlooked *other harms* of anticompetitive conduct emanating from the concentration of private power among a few firms,[328] undermining market competition,[329] stifling innovation and threatening democracy.[330] As aptly noted by Khan and Vaheesan:

> 'Antitrust laws must be reoriented away from the current efficiency and focus toward a broader understanding that aims to protect consumers and suppliers from the market power of large sellers and buyers, maintain the openness of markets and disperse economic and political power.' [331]

Concerning digital markets, New Brandeisians assert that the consumer welfare standard in competition law is ill-equipped to address the harm caused by Big Tech firms in zero-price markets.[332] More so, it fails to take into account other values such as product quality and

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[323] See also Anu Bradford, Adam S Chilton and Filippo Maria Lancieri, 'The Chicago School's Limited Influence on International Antitrust' (2020) 87(2) University of Chicago Law Review 297.
[324] Dirk Auer, 'The Legacy of Neo-Brandeisianism: History or Footnote' (9 July 2024, Network Law Review), available at <https://www.networklawreview.org/auer-radic-brandeisianism/> accessed 15 January 2025.
[325] Robert H Bork, *The Antitrust Paradox: A Policy at War with Itself* (Basic Books 1978).
[326] Robert H Lande, 'A Traditional and Textual Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers and Consumer Choice' (2013) 81 Fordham Law Review 2349; Robert H Lande, 'Wealth Transfer as the Original and Primary Concern of Antitrust; the Efficiency Interpretation Challenged' (1982) 34 Hastings L.J 65; Maurice E Stucke, 'Reconsidering Antitrust Goals' (2012), available on SSRN here <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1904686> 33, last accessed in April 2025; Maurice E Stucke and Ariel Ezrachi, 'The Rise, Fall and Rebirth of the US Antitrust Movement' (2017) Harvard Business Review <https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement> accessed 15 Jan 2025.
[327] Daniel A Crane, 'The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy' (2014) 79 Antitrust Law Journal 835.
[328] Steven Vogel, 'Market Governance as Balance of Power' (2023) 51(3) Politics & Society 319-336.
[329] John B Kirkwood, 'The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct' (2013) 81 Fordham L. REV 2425.
[330] Lina Khan and Sandeep Vaheesan, 'Market Power and Inequality: The Antitrust Counterrevolution and its Discontents' (2017) 11 Harvard Law and Policy Review 235.
[331] Ibid, at 237.
[332] Christos A Makridis and Joel Thayer, 'The Big Tech Antitrust Paradox: A Reevaluation of the Consumer Welfare Standards for Digital Markets' (2024) 27 Stanford Tech Law Review 71; Alan J Devlin, 'Testing the Neo-Brandeisian Vision' in Alan J Devlin, 'Reforming Antitrust' (CUP, 2021); John M Newman, 'Antitrust in Zero-Price Markets: Foundation' (2015) 164 U. PENN. L. REV 149; Luke Mason, 'The Big Tech Debate, Neo-Brandeisians, and Competition' (4 December 2020, Dr. Herbener Colloquim).

innovation**.** Thus, focusing on price or output as a measure of consumer welfare negates other forms of economic power, such as gatekeeping power in digital markets, which harms the competitive process.

The New Brandeisian movement argues that competition law should pursue broader social goals. This reflects the debate on the goals of competition law in developing countries, which also calls for a multiplicity of goals.[333] For New Brandeisians, the goal of competition law cannot be a single goal but multiple goals complementing each other,[334] including political goals and power distribution. In the words of Khan:

> 'Focusing antitrust exclusively on consumer welfare is a mistake. For one, it betrays legislative intent, which makes clear that Congress passed antitrust laws to safeguard excessive concentrations of economic power. This vision promotes a variety of aims, including the preservation of open markets, protection of producers and consumers from monopoly abuse, and the dispersion of political and economic control. Secondly, focusing on consumer welfare disregards the host of other ways that excessive concentration can harm – enabling firms to squeeze suppliers and producers, endangering system stability (for instance, by allowing companies to become too big to fail,) or undermining media diversity, to name a few.'[335]

New Brandeisians prioritize the competition process and call for the 'protection of competition standard' to replace the consumer welfare standard.[336] As they claim, what is needed is a 'standard that directly addresses the broader social and political effects of economic concentration and anticompetitive harm.'[337] They further argue that the protection of fair competition is an instrument for power distribution. Competition law should promote *actual* competition, 'unlike the present framework, which is overseeing concentrations of power that risk precluding real competition.'[338]

To New Brandeisians, economic considerations should not be at the core of competition analysis but be an adjacent part of the substantive analysis. Competition law should, therefore, 'address the structural imbalances that allow corporations to wield disproportionate power over

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333 Umut Aydin and Tim Büthe, 'Competition Law & Policy in Developing Countries: Explaining Variations in Outcomes; Exploring Possibilities and Limits' (2016) 79 Law and Contemporary Problems 1.

334 Maurice E Stucke, 'Reconsidering Antitrust Goals', available on SSRN here <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1904686> last accessed April 2025; Eric A Posner, 'How Antitrust Failed Workers' (Oxford University Press 2021).

335 Lina Khan, 'Amazon's Antitrust Paradox' (2017) The Yale Law Journal, available here: <https://www.yalelawjournal.org/pdf/e.710.Khan.805_zuvfyyeh.pdf, at 743.

336 Marshall Steinbaum and Maurice E Stucke, 'The Effective Competition Standard' (2020) 87(2) University of Chicago Law Review 595.

337 Nolan McCarty and Sepehr Shahshahani, 'Testing Political Antitrust' (2023) 98 New York University Law Review 1169, at 1178.

338 Lina Khan, 'Amazon's Antitrust Paradox' (2017) The Yale Law Journal, available here: <https://www.yalelawjournal.org/pdf/e.710.Khan.805_zuvfyyeh.pdf, at 737.

our economy and politics.'[339] In doing so, competition policy should not focus on specific outcomes such as consumer welfare and efficiencies but on the market *structures and process of competition*.[340] As aptly put by Khan:

> 'Gauging real competition in the twenty-first century–especially in the case of online platforms–requires analysing the underlying structure and dynamics of markets…a company's power and the potential anticompetitive nature of that power cannot be fully understood without looking into the structure of a business and the structural role it plays in markets.'[341]

In a New Brandeisian perspective, competition agencies should not be blind to Big Tech's harm to small businesses. Thus, they advocate for regulated competition to protect small businesses,[342] workers,[343] and consumers in the marketplace.[344] In particular, competition law should protect small businesses from the whims of big firms. The New Brandeisian claim that before the Chicago School of thought, which emphasized the consumer welfare standard as the main goal of US antitrust law, the foundational goal of the latter enforcement regime was to protect small producers against big business, a goal that the US courts and competition agencies are currently straying away from.[345] For instance, Vaheesan notes that, between the 1890 and 1930s, the US Courts 'aimed to protect small business from the power of their larger rivals and preserve opportunities for independent entrepreneurs' and condemned conduct that excluded competitors and undermined equality of opportunity for small businesses.'[346]

New Brandeisians also conceive competition law as a 'redistributive tool to disperse economic power among many small firms.'[347] In the words of Hovenkamp, ultimately,

[339] Zephyr Teachout, 'The Long Future of the Neo-Brandeisian Movement, in Three Parts' (24 July 2024, Network Law Review), available at https://www.networklawreview.org/teachout-future-neobrandeis/ accessed 20 January 2025, para 5.

[340] Chase Foster and Kathleen Thelen, 'Brandeis in Brussels? Bureaucratic Discretion, Social Learning, and the Development of Regulated Competition in the European Union' (2024) 18(4) Regulation & Governance 1083.

[341] Lina Khan, 'Amazon's Antitrust Paradox' (2017) The Yale Law Journal, available here: <https://www.yalelawjournal.org/pdf/e.710.Khan.805_zuvfyyeh.pdf, Khan 2017, at 717.

[342] Naomi R Lamoreaux, 'The Problem of Bigness: From Standard Oil to Google' (2018) 33(3) Journal of Economic Perspectives 94.

[343] On competition law and its harm to workers, see Sanjukta Paul, 'Antitrust as Allocator of Coordination Rights' (2020) 67 UCLA L. REV. 378; Hiba Hafiz, 'Labor Antitrust Paradox' (2020) 87 U. CHI. L. REV 381.

[344] Sandeep Vaheesan, 'How Contemporary Antitrust Robs Workers of Power' (19 July 2018, LPE Project), available at <https://lpeproject.org/blog/how-contemporary-antitrust-robs-workers-of-power/> accessed 25 January 2025.

[345] Sandeep Vaheesan, 'The Evolving Populism' (2014) 93(2) Nebraska Law Review 370, at 373; John B Kirkwood, 'The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct' (2013) 81(5) Fordham Law Review 2125.

[346] Vaheesan (note 346) at 376.

[347] Oisin Suttle, 'The Puzzle of Competitive Fairness' (2022) 21 Politics, Philosophy &Economics at 1663.

competition law in digital markets should create a level playing field for all market participants.[348] To Teachout, competition law should be a:

> 'tool to promote fair competition, prevent market concentration, and ensure that economic power is distributed broadly rather than concentrated in the hands of a few. This vision is about creating a more just and equitable economy where small businesses can thrive, workers are treated with dignity, and consumers have real choices.'[349]

The New Brandeisian proposition to protect small businesses is in tandem with the African markets, which is characterized by SMEs. In this case, the goal of competition law should be to create opportunities for constrained African business users. Their ability to enter and expand in the digital market ecosystem is constrained without such opportunities.[350]

New Brandeisians also contest the argument that the goals of competition law or market structure are apolitical and value-neutral.[351] New Brandeisians, therefore, link competition law to democracy.[352] According to this view, the concentration of economic power translates into political power.[353] The firms' political power, similar to the government, allows them to set policies and regulations. [354] As Teachout and Khan noted, the power to set policy can manifest through campaign funding, staffing and recruiting in government, creating information, and directing the politics of employees and contractors. The power to regulate encompasses the power to govern the market and to self-regulate.[355]

The implication is that if unchecked, concentrated economic power can subvert democracy because it grants a handful of actors with political power to influence political governance in their favor, coupled with unrestricted and unaccountable private governance, which harms consumers, small businesses, competition and workers.[356] As noted by Zingales, 'the largest

[348] Milton Handler, 'The Brandeis Conception of the Relationship of Small Business to Antitrust' (1960) 16 ABA Antitrust Section 13.
[349] Zephyr Teachout, 'The Long Future of the Neo-Brandeisian Movement, in Three Parts' (24 July 2024, Network Law Review), available at https://www.networklawreview.org/teachout-future-neobrandeis/ accessed 20 January 2025, para. 8.
[350] See Lina Khan and Sandeep Vaheesan, 'Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents' (2017) 11 Harvard Law and Policy Review 235.
[351]Zephyr Teachout and Lina Khan, 'Market Structure and Political Law: A Taxonomy of Power' (2014) 9(1) Duke Journal of Constitutional Law and Public Policy 37; Sandeep Vaheesan, 'The Twilight of the Technocrats; Monopoly on Antitrust' (2018) 127 Yale L. J. F 980.
[352] Thomas A Lambert and Tate Cooper, 'Neo-Brandeisianism's Democracy Paradox' (2023) 49 Journal of Corporation Law.
[353] Luigi Zingales, 'Towards a Political Theory of the Firm' (2017) 31(3) Journal of Economic Perspectives 113-130.
[354] UN Development Program, Report 'The Concentration of Economic and Political Power', available here: <https://www.un-ilibrary.org/content/books/9789210057844c006> last accessed April 2025.
[355] Ibid, at 53.
[356] On the intersection between competition and democracy, see Harry First and Spencer Weber Waller, 'Antitrust Democracy Deficit' (2013) 81 Fordham Law Review 2543; Elias Deutscher, 'The Competition—Democracy Nexus Unpacked—Competition Law, Republican Liberty, and Democracy' (2022) 41 YB. Eur. L. 1, 13.

modern corporations facilitated a massive concentration of economic (and political) power in the hands of a few people, who are hardly accountable to anyone', and yet influence the rules of the game.[357] Teachout and Khan explicitly argue that 'for democratic purposes, an economy populated by many small businesses is preferable to an economy dominated by large and concentrated industries.' [358] Khan reiterates that:

> 'Brandeis and many of his contemporaries feared that concentration of economic power aids the concentration of political power, and such private power itself undermines and overwhelms public government. Dominant corporations wield outsized influence over political processes and outcomes, be it through lobbying, financing elections, staffing government, funding research, or establishing systematic importance that they can leverage. They use these strategies to win favorable policies, further entrenching their dominance'.[359]

As African countries rely heavily on foreign investment in the digital markets, they should be wary of the influence of the Big Tech companies on the adoption of the AfCFTA DMCR. In the EU, the US Big Tech companies tried to influence the DMA through lobbying.[360] Currently, the US has taken an active role in influencing other governments' (non) intervention in regulating US Tech companies. For instance, the United States Trade Representative (USTR) Jamieson Greer has warned Korea against the regulation of US tech companies.[361] On 21st February 2025, US President Donald Trump warned that he would take strong action – including tariffs – against governments imposing unfair regulations on US tech companies.[362] Many have noted that US warnings are also targeting the EU DMA, and countries that will adopt DMA-like rules.[363]

US threats are likely to affect African countries whose businesses are economically dependent on US big tech companies. African countries are also in dire need of investment and innovation. This explains why the New Brandeisian movement has received its share of

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[357] Luigi Zingales, 'Towards a Political Theory of the Firm' (2017) 31(3) Journal of Economic Perspectives 113-130, at 114.
[358] Zephyr Teachout and Lina Khan, 'Market Structure and Political Law: A Taxonomy of Power' (2014) 9(1) Duke Journal of Constitutional Law and Public Policy 37.
[359] Khan, 'The New Brandeis Movement: America's Antimonopoly Debate' (2018) 9(3) JECLAP, 131.
[360] On failure of the Big Tech companies to influence the EU DMA see generally, Andy Tarrant, 'Lobbying and the EU Digital Markets Act' in David Coen and Alexander Katsaitis (eds), *Handbook on Lobbying and Public Policy* (Edward Elgar Publishers 2024) 444-456; Andy Tarrant and Tim Cowen, 'Big Tech Lobbying in the EU' (2022) 93(2) The Political Quarterly 218.
[361] The Korea Times, 'USTR Nominee Warns Against Korea, Others' Regulatory Moves that Would Affect US Tech Firms' <https://koreatimes.co.kr/www/nation/2025/02/120_391715.html> accessed 7 March 2025.
[362] AJP Press, 'Trump warns of tariffs over foreign regulations on U.S. tech firms' <https://www.ajupress.com/view/20250222142320101> last accessed April 2025.
[363] Clotilde Bômont, 'Trump Takes Aim at "Overseas Extortion' of America Tech Companies: The EU-US Rift Deepens' (27 February 2025, European Union Institute for Security Studies).

criticism.[364] Supporters of the Schumpeterian approach to competition law criticize the Neo-Brandeis movement for prioritizing the protection of competitors rather than innovation, competition and consumers.[365] According to Long, the New Brandeisians want to revive the US Robinson-Patman Act (RPA) to protect small businesses and undermine dynamic competition.[366] The RPA seeks to prohibit big firms from receiving discounts from sellers if smaller firms cannot receive the same discounts.[367]

Critics also question the empirical foundation of the New Brandeisian arguments.[368] According to Crane, Neo-Brandeisian will 'need to master a set of empirical skills as robust as any associated with the economics profession of today' and they should commit to induction and empiricism.[369] New Brandeisians have not sufficiently adopted an economic theory.[370] Lindeboom[371] identifies two challenges that the Neo-Brandeisian movement faces. The first challenge is convincing competition law enforcers to shift away from consumer welfare and efficiency and focus on domination in the Republican conceptualization of antitrust. Second, Lindeboom argues that Neo-Brandeisian proposals are too polycentric and that they are unclear in balancing distinct values. To address these challenges, Lindeboom proposes a formalistic approach.

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[364] Joshua D Wright et al, 'Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust'(2019) 51 Arizona State Law Journal 293; Daniel A Crane, 'How Much Brandeis Do the Neo-Brandeisians Want? (2019) 64 Antitrust Bulletin 531; D Melamed, 'Antitrust Law and its Critics' 83 Antitrust Law Journal 269.

[365] ITIF, 'Assessing the Neo-Brandeisian Revolution: Looking for Mr. Schumpeter' (3rd June 2022, ITIF) available at https://www.youtube.com/watch?v=B2XjHZApMZw accessed 26 Jan 2025; Aurelien Portuese, *The Battle for the Future of Antitrust: Brandeis, Bork, and Schumpeter* (Springer Nature Switzerland, 2024).

[366] Treylsa Long, 'No, Reviving the Robinson-Patman Act Will Not Lead to More Competition or a Better Economy' (25 November 2024, ITIF).

[367] On literature on the RPA, see Daniel A Hanley, 'Controlling Buyer and Seller Power: Reviving Enforcement of the Robinson-Patman Act' (2024) 52(2) Hofstra Law Review 314; Herbert Hovenkamp, The Robinson-Patman Act and Competition: Unfinished Business' (2000) 68(1) Antitrust Law Journal 125. See also Christopher L Sagers, 'Antitrust' (Wolters Kluwer, 2014).

[368] Yunsieg P Kim, 'A Revolution Without a Cause: The Digital Markets Act and Neo-Brandeisian Antitrust', (2023) Wisconsin Law Review 1247; Christine S Wilson and Adam S Cella, 'Deconstructing the Worldview of the Neo-Brandeisians Through Marxism and Legal Studies' (2022) 29(4) GEO. MASON. L. REV. 961; Andre Fiebig and David Gerber, 'The Causes and Consequences of the Neo-Brandeisian Antitrust Movement in the United States' (2021) 19(4) De Gruyter.

[369] Daniel A Crane, 'How Much Brandeis Do the Neo-Brandeisians Want? (2019) 64 Antitrust Bulletin 531, at 538.

[370] Mark Glick and Darren Bush, 'The Chicago School, the Post-Chicago School, and the New Brandeisian School of Antitrust: Who is Right in Light of Modern Economics?' (2023) 30(4) George Mason Law Review 936. Joshua D Wright and others, 'Consumer Welfare and the Rule of Law: The Case Against the New Populist Antitrust Movement' (2020) 47 Pepperdine Law Review 861; Jonathan B Baker, 'Finding Common Ground Among Antitrust Reformers' (2022) 84 Antitrust L.J 705; Carl Shapiro, 'Antitrust: What Went Wrong and How to Fix it' (2021) 35(3) Antitrust 33.

[371] Justin Lindeboom, 'Two Challenges for Neo-Brandeisian Antitrust' (2023) 68(3) The Antitrust Bulletin.

Others posit that the Neo-Brandeis movement pushes the ideology that big is bad.[372] Yet, anti-bigness will entail the loss of efficiency. According to Crane:

> 'in the near term, the neo-Brandeisians may have to come to grips with the possibility that their anti-bigness crusade will entail losses of economic efficiencies, for which consumers will have to pay…that will be the moment of truth for the neo-Brandeisians: Are they prepared to stick to their guns and oppose mergers that clearly benefit consumers but create excessive bigness. Will they pursue antimonopolization rules that handcuff dominant firms from exploiting efficiency advantages in the name of protecting the "little guy" and promoting a level playing field.'[373]

Other critics argue that in seeking to protect competitors rather than competition, Neo-Brandeisian movement sacrifices consumer welfare, driven by efficient firms.[374] Kennedy argues that consumer welfare is able to handle some of the concerns raised by the Neo-Brandeisians.[375] Moreover, pursuing the Neo-Brandeisian goals such as 'protecting businesses, especially small firms, against legitimate competition…will reduce consumer welfare and economic growth.'[376] Critics of the neo-Brandeis movement fault the movement for trying to 'redistribute wealth away from consumers and towards less efficient competitors.'[377] Consumer welfare is not only about prices. This is not entirely surprising because, as others have pointed out, the consumer welfare standard is not limited to price alone, it includes quality and efficiency. To others, the Neo-Brandeisian movement is merely 'populist' and unpredictable.[378] It is more theoretical than practical.[379] Critics of the New-Brandeisian movement have warned that it will die or 'soon run out of steam'.[380] If pursued, the Neo-Brandeisian policy proposals will hurt innovation.[381]

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[372] See generally Christopher Marchese, 'Debunking the "Big is Bad" Bogeyman: How Facebook Benefits Consumers'; D Daniel Sokol, 'Antitrust's "Curse of Bigness" Problem' (2020) 228(6) Michigan Law Review 1259; Barak Orbach and Grace Campbell Rebling, 'The Antitrust Curse of Bigness'; Amelia Miazad, 'Prosocial Antitrust' (2022) 73(6) Hastings Law Journal 1637.

[373] Crane 2019, at 537.

[374] Sokol has written extensively on this topic, see: D Daniel Sokol, 'Analyzing the Robinson-Patman' (2015) 83 The George Washington Law Review 2064; D Daniel Sokol, 'Limiting Anticompetitive Government Interventions that Benefit Special Interests' (2009) 17 GEO. MASON L. REV 119; Trevor Wagener, 'The Curse of Tradeoffs: Neobrandeisians vs Consumers' (21 May 2021, Disruptive Competition Project) available at <https://project-disco.org/competition/052121-the-curse-of-tradeoffs-neo-brandeisian-antitrust-versus-consumers/> accessed 23 December 2024.

[375] Joe Kennedy, 'Why the Consumer Welfare Standard Should Remain the Bedrock of Antitrust Policy' (October 2018, ITIF);

[376] Ibid, para 1.

[377] Oisin Suttle, 'The Puzzle of Competitive Fairness' (2022) 21 Politics, Philosophy &Economics 190, at 1663.

[378] Joshua D Wright and others, 'Consumer Welfare and the Rule of Law: The Case Against the New Populist Antitrust Movement' (2020) 47 Pepperdine Law Review 861.

[379] Yunsieg P Kim, 'A Revolution Without a Cause: The Digital Markets Act and Neo-Brandeisian Antitrust', (2023) Wisconsin Law Review 1247.

[380] Jared M Stehle, 'New Brandeis, New Battleground' (2024) Wisconsin Law Review 1219, 1221.

[381] Amelia Miazad, 'Prosocial Antitrust' (2022) 73(6) Hastings Law Journal 1637.

Despite the criticism against the Neo-Brandeisian movement, in the previous Biden administration, the movement's philosophies were endorsed by various political leaders.[382] For instance, the US Senator Warren[383] has called for the break up of the US big tech companies to restore competition and increase the participation of the US small businesses in the digital market. The impact of the Neo-Brandeis movement,[384] as Teachout notes, will be profound and enduring, especially in digital markets where economic power is concentrated in the hands of a few.[385] That is why, in our view, the AfCFTA DMCR should draw insights from the argument posited by the New Brandeisian movement while considering the criticism levied against the movement.

In the EU, some scholars have noted that the key features of the New Brandeisian movement are also permeating the Old Continent through a social learning process.[386] Scholars such as Kim,[387] have already started discussing the connection between the New Brandeisian movement, the DMA and Ordoliberalism – a phenomenon, which we pointed out in Section III.a). According to Vezzoso, the New Brandeisian movement informed the DMA objectives.[388] Sauter, however, notes that although 'there is some superficial convergence between the neo-Brandeis school and the EU approach to Big Tech, from my point of view, the neo-Brandeis focus on bigness is different from the focus on contestability and fairness, albeit directed at big undertakings that characterize EU competition law and the DMA.'[389] Be it as it may, as Justice Brandeis envisioned the protection of smaller firms, so does the new

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[382] Lina Khan was appointed as the Chairperson of the FTC, while Tim Wu was appointed as Special Assistant to the President for Technology and Competition Policy at the United States from 2021 to 2023.

[383] Elizabeth Warren, 'How we Can Break up Big Tech' (8 March 2019, the Medium), available at <https://elizabethwarren.com/plans/break-up-big-tech/?sc=web_home_rotator> accessed 29 January 2025.

[384] J Nadler et al, 'Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations', available here <https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf?stream=top> last accessed April 2025.

[385] Zephyr Teachout, 'The Long Future of the Neo-Brandeisian Movement, in Three Parts' (24 July 2024, Network Law Review), available at <https://www.networklawreview.org/teachout-future-neobrandeis/> accessed 20 January 2025.

[386] Chase Foster and Kathleen Thelen, 'Brandeis in Brussels? Bureaucratic Discretion, Social Learning, and the Development of Regulated Competition in the European Union' (2024) 18(4) Regulation & Governance 1083, 1086. The authors of this paper provide that, 'over time, the EU system has come to embody aspects of the Brandeis' ideal of "regulated competition" that have not been realized fully in the United States. Not only does the EU Competition system contain strong rules that limit the exploitation of economic power, but European regulators have developed concrete and practical ways to reconcile this goal with efficiency concerns and new technological developments. Rules governing horizontal relations empower smaller and weaker parties to coordinate their activities against larger companies while also aggressively policing cartel activity'.

[387] Yunsieg P Kim, 'A Revolution Without a Cause: The Digital Markets Act and Neo-Brandeisian Antitrust'(2023) Wisconsin Law Review 1247.

[388] Simonetta Vezzoso, 'The First New Brandeisian Decision in Europe? available on SSRN here <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4048158> last accessed April 2025.

[389] Wolf Sauter, 'The Impact of the Neo-Brandeis Movement on Antitrust: A Skeptical View' (26 June 2024 Network Law Review) available at <https://www.networklawreview.org/wolf-future-brandeis/> accessed 22 January 2025, para 5.

Brandeisian movement provide the AfCFTA with a lens through which it can ensure that digital platforms do not abuse their position of economic dependence. In turn, such an approach could ensure greater protection of African SMEs from exploitation.

VI. CONCLUSION

The AfCFTA creates the second-largest market in the world by the number of participating countries after the World Trade Organization (WTO). African and global businesses will compete for a large consumer base created under the AfCFTA. This continental market, therefore, provides a conducive environment for competition. Yet, business users, particularly on digital markets, will not have an equal playing field as some will have a higher (or lower) competitive advantage as witnessed in various scenarios described above. In particular, some business users cannot afford access to major online platforms. Some will have the resources to afford measures the platforms adopt to acquire more customers and some will not. Finally, the platforms could adopt measures that favour certain business users who are in a position to bring more consumers. The AfCFTA DMCR should, therefore, aim at fostering competition and not lean solely towards protecting competitors.

Additionally, the discussion on the goals of digital market regulation under the AfCFTA CP should be viewed within the goals of competition law and global developments in the regulation of digital markets. In this sense, the goals of a digital market regulation should not turn a blind eye on the role of public interest considerations in competition law enforcement in Africa.[390] Beyond the classical 'fairness' and 'contestability' goals that form a common core for most jurisdictions in the world who have adopted a DMCR, we believe that in the African context, the additional two goals of innovation and inclusivity are also crucial.

Specifically, given the imbalance in bargaining power between business users, there is a need for a policy framework geared towards programs that will enhance the inclusiveness of African-based businesses.[391] The principle of inclusivity will address the barriers that lead to weaker contestability and neutralize the competitive advantages of global business users. When it comes to innovation, the AfCFTA CMDR should not weaken with unnecessary regulatory clutter the ability of African digital platforms to innovate and compete with global digital

[390] Dina I Waked, 'Antitrust as Public Interest Law: Redistribution, Equity and Social Justice' (2020) 65 The Antitrust Bulletin 87.
[391] Thembalethu Buthelezi and James Hodge, 'Competition Policy in the Digital Economy: A Developing Country Perspective' (2019) 15(2) Competition Law International 201, 2023.

platforms. Only with an open policy to innovation can the technological leapfrogging in digital markets that Africa has shown in the past,[392] be enabled for the future.

In order to more robustly anchor the above-stated aims, from a purely pragmatic perspective, this study concludes that, similarly to the Australian and South African competition authorities, the AfCFTA Secretariat should undertake market inquiries into national and regional level market dynamics, which will inform the goals of regulating digital markers. As seen above, such goals should be internally driven, addressing market distortions, enhancing competition, consumer welfare and hence providing Africa with a global voice.[393]

[392] Marianne Matthee and Caren Brenda Scheepers, 'Technological leapfrogging in Africa: critical success factors to drive inclusive growth' in Swartz et al. (eds), *Technological Leapfrogging and Innovation in Africa* (Edward Elgar, 2023), 55-70.

[393] E Fox, 'Integrating Africa by Competition and Market Policy' (2022) 60 Review of Industrial Organization 305.