

Regulating digital platforms: A comparative analysis of Kenya and South Africa

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Regulating digital platforms: A comparative analysis of Kenya and South Africa

Karissa Moothoo Padayachie Nair¹ and Reena das Nair²

Abstract

Kenya, often referred to as Africa's "Silicon Savannah", has rapidly evolved to become the regional digital business hub in East Africa. While Kenya's approach to regulation has led to some market-driven competition, it faces similar competition-related challenges that many jurisdictions around the world face in the constantly evolving digital markets landscape. There have been competition concerns raised by entrepreneurs and businesses with respect to accessing markets and competing against the large domestic and global players that have already entered and taken up lead positions in Kenya's digital ecosystem. This led to the Competition Authority of Kenya (CAK) introducing the Competition Amendment Bill in 2024 which is targeted at addressing platform dominance in digital ecosystems. South Africa adopted a different approach to regulating the digital economy using market inquiries as the primary tool to address potential harm to competition. The market inquiries highlighted concerns surrounding platform dominance and barriers to entry in e-commerce, amongst other concerns.

Drawing on insights from a recent study by the World Bank and the CAK, this study undertakes a comparative analysis of Kenya and South Africa's regulatory frameworks and approach to digital transformation. It focuses on three markets, e-commerce, food delivery and app development. The findings show that Kenya's largely light touch approach to regulation has enabled rapid digital transformation, while also contributing to the emergence of concentrated markets driven by network effects and first move advantages. In contrast, South Africa has relied more heavily on market inquiries and targeted interventions aimed at addressing the conduct of specific firms and barriers to entry and participation in digital markets. The comparison highlights the importance of regulatory timing and the trade-offs between early intervention and preserving the ability of markets to develop without premature regulatory constraints.

Keywords: Digital platforms, competition policy, digital market regulation

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Executive Summary

Digital platforms have transformed economies around the world, creating new opportunities for innovation, market access and participation. At the same time, concerns have emerged regarding the increased market power of large digital platforms and the ability of existing competition law and policy to respond effectively to the unique challenges posed by digital markets.

Kenya and South Africa provide for an interesting comparison given that they have adopted different approaches to regulating digital markets. Kenya, often referred to as Africa's "Silicon Savannah", has historically adopted a light touch approach to regulation which has allowed digital markets to develop organically with limited intervention by authorities. While this approach has been associated with rapid growth in sectors such as fintech, e-commerce and digital services, it has also led to many global tech giants entering the Kenyan market and taking up lead positions. This has resulted in complaints being raised through the CAK regarding competition in digital markets and raised questions about whether there is a need for more intervention by the competition authority given the dominance of some of the lead firms. In 2024, the Competition Amendment Bill (2024) (the Bill) was introduced to address the dominance observed across various sectors, and in particular digital platforms which have grown rapidly in Kenya.

In contrast South Africa's approach to digital markets has relied more heavily on competition policy tools, and in particular, market inquiries, to identify and address concerns arising in digital markets. Market inquiries allow for detailed sectoral assessments and tailored interventions. However, concerns have arisen about their effectiveness. Over the last 5 years there have been two digital market inquiries initiated in the form of the Online Intermediation Platforms Market Inquiry (OIPMI) and the Media and Digital Platforms Market Inquiry (MDPMI).

Using a combination of primary and secondary data derived from a study conducted by the Centre for Competition, Regulation and Economic Development (CCRED) for the World Bank in collaboration with the CAK in 2023 for Kenya, and publicly available information and interviews from South Africa, this paper seeks to provide a comparative analysis of the Kenyan and South African experiences to identify key insights into how different regulatory approaches shape digital markets. The key research questions to be answered in this study are, (1) How do Kenya and South Africa differ in their regulatory approach to digital markets? and (2) What insights can be drawn from a comparison of Kenya and South Africa's regulatory approaches?

Importantly, the paper does not seek to suggest that one regulatory approach is superior to the other. Rather, it treats the Kenyan and South African experiences as reflecting different responses to similar issues arising in digital markets, each with their own unique set of trade-offs.

With respect to Kenya, the research draws from primary and secondary data derived from the study with the World Bank. For South Africa, the data are drawn from the OIPMI, which was selected because it covered similar markets to the World Bank study. This is supplemented with primary data collection through semi-structured interviews with industry stakeholders and participants for the South African perspective. A total of 17 semi-structured interviews were conducted in Kenya (as part of the World Bank study) and South Africa for this study. The selected markets from the OIPMI mirror the World Bank study and include retail e-commerce, food delivery and app development.

To guide the analysis the study adopts and extends the framework developed by Bonakele, das Nair and Roberts (2022) for assessing the outcomes of market inquiries which distinguishes between (i) pure competition issues; (ii) competition plus issues, and (iii) broader public policy issues.

This framing allows for a holistic comparative analysis to be conducted between the two countries, providing a nuanced comparison of how each addresses market power, participation and inclusion across the three markets, e-commerce, food delivery and app development. This approach assists to identify where gaps persist and how competition law and policy can be used to balance outcomes within digital markets. It also contributes to a more nuanced understanding of how the regulatory approach adopted and the timing of interventions by the authorities impacts the market and shapes outcomes in digital markets.

E-commerce

The findings show that both Kenya and South Africa's e-commerce markets are characterised by a small number of large platforms which benefit from first mover advantages and network effects. In both countries this has led to increased market concentration and raised concerns regarding platform dominance, barriers to entry and the ability of smaller firms to enter and compete effectively.

In Kenya, the e-commerce market has been shaped by platforms such as Jumia and Kilimall, which benefited from entering the market early and investing significantly in logistics, payment systems and building consumer trust. The study found that market concentration is not only shaped by the conduct of dominant firms but also by broader structural issues of fragmented logistics networks, limited access to capital and difficulties associated with last mile delivery. Several competition concerns were identified including high barriers to entry, platform dominance and the ability of large firms to leverage their scale, data and networks to further entrench their position in the market. Competition plus issues also arose which include buyer power concerns, weak consumer recourse mechanisms, and low levels of trust of online transactions.

South Africa's e-commerce market is similarly concentrated, with Takealot taking up a dominant position in the market. Unlike Kenya however, the focus of regulatory intervention has largely been on the conduct of a dominant platform. The OIPMI identified concerns related to self-preferencing, price parity clauses and access to data. The inquiry found that Takealot's position as both the marketplace and a retailer created conditions under which independent sellers using the platform could be disadvantaged. Concerns were also raised regarding the dependence of sellers on the platform and the information asymmetries that arise given Takealot's access to detailed sales and consumer information.

The comparison between Kenya and South Africa approach to e-commerce has highlighted distinct differences between them. Kenya's approach has increasingly been focused on strengthening the broader regulatory framework as can be seen in the Competition Amendment Bill and its draft E-commerce Policy.

South Africa has instead relied on market inquiries and targeted interventions aimed at addressing the conduct of dominant firms.

Kenya's draft e-commerce policy largely adopts an ex-ante approach, which seeks to strengthen the overall regulatory environment. South Africa, by contrast, has moved towards a direct, firm-specific approach through the use of market inquiries to impose binding, remedies on dominant platforms. This, in a sense, is an ex-post approach as potential conduct that prevents or distorts competition has already been identified through the inquiry. This reduces the risk of over-regulation and preserves some flexibility in the market for firms. South Africa's approach is therefore not merely reactive but appears to be a deliberate strategy to intervene only when market distortions or anticompetitive harm is identifiable.

Food delivery

The findings have shown that food delivery platforms have become important intermediaries connecting restaurants and customers, allowing restaurants to access a wider customer base.

In Kenya the food delivery market has largely been dominated by platforms such as Glovo and Uber Eats following the exit of Jumia Food. The study found that competition concerns arose from the concentrated nature of the market and the dependence of restaurants on a small number of food delivery platforms. Concerns were raised regarding commission structures, platform governance, access to data and the ability of dominant platforms to influence pricing and visibility on the platform.

Similar concerns emerged in South Africa, where the market is dominated by Uber Eats and Mr D. The OIPMI identified concerns relating to commission structures (particularly between independent restaurants and larger retail chains). There were also concerns regarding information asymmetries, and the dependence of restaurants on these platforms as a route to market.

While the concerns may be similar between the countries, the regulatory approaches have differed. In Kenya much of the approach has been focused on identifying concerns and strengthening the underlying regulatory framework. In South Africa, the concerns identified have been addressed through the OIPMI. Kenya's approach while anticipatory can be argued to treat platform dominance as still emerging in food delivery. The food delivery market is relatively new, and they are less inclined to intervene more strongly. South Africa, on the other hand, is treating platform dominance as entrenched.

App Development

Unlike e-commerce and food delivery, the app development eco-system is shaped largely by the role of global technology firms. In both Kenya and South Africa, app developers rely heavily on app stores owned by Google and Apple. In this market, concerns relate to platform governance, market access and participation.

In Kenya, app developers raised concerns regarding the dominance of app stores and the dependence on global platforms. Developers highlighted that access to consumers is largely determined by the rules and conditions imposed on app developers by the app stores. Similar challenges have arisen in South Africa, where app developers have likewise raised concerns related to the visibility of their apps and the ability to compete effectively on these app stores.

A comparison of the two approaches to regulation reveals that the CAK has not directly intervened in app store governance, nor has app development been the subject of any market inquiry. However, the Competition Amendment Bill (2024) has signalled a marked shift. The Bill is set to enable Kenya to address issues similar to those raised by app developers globally. South Africa has used the market inquiry tool to identify and address barriers to entry and participation. The comparison of the app development market in both countries reveals that the challenges being faced by app developers has arisen due to the structure of this digital market ecosystem, and particularly the role of global players.

Key takeaways

The findings have illustrated the two different approaches to regulating digital markets by Kenya and South Africa. Kenya's earlier light touch approach to regulation has been associated with rapid digital transformation. However, concerns regarding platform dominance and barriers to entry and participation have increasingly prompted calls for stronger intervention by authorities. This has led to the development of the Competition Amendment Bill and a range of proposed interventions contained in the Draft E-Commerce Policy.

South Africa's approach to the regulation of digital markets has relied on market inquiries and interventions targeted at the conduct of specific firms.

A key insight arising from the comparison between Kenya and South Africa has been the trade-off between innovation and market power in digital markets. While earlier intervention, through ex-ante regulation, may assist authorities in addressing anti-competitive conduct before it becomes entrenched, such regulation may also risk constraining innovation and entry. On the other hand, while ex-post regulation, may help to facilitate rapid growth and innovation, it may also result in highly concentrated markets, which raises concerns about competition and welfare. The key policy challenge is therefore not only about when to intervene but how to balance the benefits of innovation with the longer-term risks of entrenched market power.

1 Introduction

“Platforms can have both positive and negative effects on development, but the net impact on Africa will ultimately be shaped by the responses of industry, regulators, government and civil society.” (Insight2Impact, Global Resource Centre, 2019:1)

Kenya, often referred to as Africa’s ‘Silicon Savannah’, has emerged as the leading digital business hub in East Africa (Zhu et al., 2022). The rapid expansion of internet accessibility, coupled with government driven initiatives such as the ICT Masterplan and Digital Economy Blueprint 2019, have positioned Kenya as a frontrunner in digital transformation on the continent. Some of the major sectors driving this growth have been fintech, e-commerce and more recently newer platforms³ in digital financial services and agriculture.⁴

Many global tech giants have entered the Kenyan market, taking up lead positions in certain sectors. Kenya’s coordinated strategic frameworks, such as the ICT Masterplan and Digital Economy Blueprint 2019, have been associated with an environment which encourages innovation, and which has led to fintech and mobile money flourishing within the country with limited constraints. Kenya’s regulatory bodies, such as the Competition Authority of Kenya (CAK), and other sector specific regulators have also chosen to intervene selectively and mainly in response to market failures. For example, in the case of mobile money in Kenya, actions by regulatory authorities have previously focused on issues such as interoperability.⁵ Concerns, however, are increasingly being raised through complaints to the CAK regarding competition in digital markets and whether there is a need for more intervention by the competition authority given the dominance of some of the lead firms.

In 2024, the Competition Amendment Bill (2024) (the Bill) was introduced to address the dominance observed across various sectors, and in particular digital platforms which have grown rapidly in Kenya.⁶ The Bill has introduced strict measures in an attempt to curb monopolistic tendencies and enable fair competition in digital marketplaces where global tech giants and local platforms both play a crucial role. If the bill is passed, these changes could mirror similar ex-ante regulation implemented in Europe (Bietti et al., 2025).

In contrast, South Africa’s approach to regulation has primarily been through market inquiries as a tool for intervention. Over the last 5 years there have been two digital market inquiries initiated in the form of the Online Intermediation Platforms Market Inquiry (OIPMI) and the Media and Digital Platforms Market Inquiry (MDPMI). While market inquiries allow for detailed sectoral assessments and tailored interventions, concerns remain about their effectiveness.⁷ The binding nature of inquiries and certain remedies imposed are also being legally challenged (Lesofe and Tetani, 2021; African Rainbow Capital (Pty) Ltd vs Competition Commission (Case no. 270/CAC/Apr25)). As digital markets expand and global players enter the country, concerns have arisen regarding market access, platform

³ Platforms can be defined as, “A digital service that facilitates interactions between two or more distinct but interdependent set of users (whether firms or individuals) who interact through the service via the internet” (OECD, 2021).

⁴ <https://www.africanleadershipmagazine.co.uk/the-kenyas-growing-digital-economy/> Accessed: 20 November 2023.

⁵ See <https://itweb.africa/content/6GxRKMYJBl1qb3Wj> Accessed 17 November 2025.

⁶ See <https://www.capitalfm.co.ke/business/2025/02/govt-moves-to-regulate-market-dominance-in-digital-economy/> Accessed 17 November 2025.

⁷ Interview with independent expert, 19 November 2025.

dominance, consumer welfare, labour market shifts and, importantly, the regulatory response to these changes (Vilakazi, 2025). Ensuring a competitive and inclusive digital economy will require a balancing of regulation that fosters innovation and fair competition (Vilakazi, 2025).

While Kenya and South Africa have adopted different regulatory approaches to digital markets, these approaches reflect distinct trade-offs.

In digital markets characterised by network effects, economies of scale and data advantages, ex-ante regulation may enable earlier intervention by authorities to address anti-competitive conduct before it becomes entrenched. However, such regulation may also risk constraining innovation and entry. As such, these “proactive” measures must be carefully implemented to avoid regulatory rigidity which could potentially stifle local competition preventing effective competition with global giants (Motta and Peitz, 2020; European Commission, 2021). In early periods, limited intervention by authorities may help to facilitate rapid growth and innovation. However, this may also result in highly concentrated markets, which raises concerns about competition and welfare. The key policy challenge is therefore not only about when to intervene but how to balance the benefits of innovation with the longer-term risks of entrenched market power (See World Bank, 2023; Motta and Peitz, 2020). Early intervention may prevent firms from entrenching their market power but risk firms not innovating. On the other hand, delaying intervention may help markets to grow organically, but risk entrenchment of market power which is difficult to reverse.

Using a combination of primary and secondary data derived from a study conducted by the Centre for Competition, Regulation and Economic Development (CCRED) for the World Bank in collaboration with the CAK in 2023 for Kenya, and publicly available information and interviews from South Africa, this paper seeks to provide a comparative analysis of the Kenyan and South African experiences to identify key insights into how different regulatory approaches shape digital markets. The key research questions to be answered in this study are, (1) How do Kenya and South Africa differ in their regulatory approach to digital markets? and (2) What insights can be drawn from a comparison of Kenya and South Africa’s regulatory approaches?

This paper does not seek to suggest that one regulatory approach is superior to the other. Rather, it treats the Kenyan and South African experiences as reflecting different responses to similar issues arising in digital markets, each with their own unique set of trade-offs.

Section 2 provides a brief literature review. Section 3 provides background of Kenya and South Africa’s approach to the regulation of digital markets in Kenya and South Africa. Section 4 discusses the data and methodology used for the country comparisons. Section 5 to Section 7 set out the comparative analysis between Kenya and South Africa’s approach to digital markets for selected markets of e-commerce, food delivery and app development respectively. Section 8 concludes by reflecting on the trade-offs associated with the two different regulatory approaches to digital markets and key insights for South Africa going forward.

2 Brief literature review

The rise of big tech platforms such as Google, Amazon, Apple, Microsoft and Facebook, has raised concerns regarding the potential economic harms of these firms (See Rochet and Tirole, 2003; Evans and Schmalensee, 2017; Khan, 2017; Prado, 2021). Digital markets are often concentrated due to the large amount of data gathered and network effects. The market power that accrues to these digital platforms can harm customers, consumers and competitors requiring the intervention of competition authorities (Calvano and Polo, 2021). This section provides a brief discussion of some of the literature on digital platforms and focuses on sources of market power, the challenges this poses for competition law and policy and regulatory responses.

2.1 Digital platforms and market power

Market power can be defined as, *“the ability of a firm to raise price above some competitive level - the benchmark price - in a profitable way. Since the lowest possible price a firm can profitably charge is the price which equals the marginal cost of production, market power is usually defined as the difference between the prices charged by a firm and its marginal costs of production”* (Motta, 2004:41). In the context of digital markets, this traditional industrial organisation conceptualisation of market power needs to be redefined. This is because ‘prices’ to end users are often zero and the competitive advantage of dominant platforms arises out of the accumulation of large volumes of customer data (Franck and Peitz, 2019; OECD, 2022).

Digital platforms operate at different scales. While some operate in specific markets and are limited in their ability to collect data, others, like the big tech, operate their business in several digital markets. Big tech has the capacity to collect large amounts of data. The manifestation of market power is thus less straightforward, also given the ability of these platforms to leverage their market power from one market to another in the digital economy (Prado, 2021; Franck and Peitz, 2023, Knapstad, 2024).

A further characteristic of digital markets is the two-sided nature of digital platforms. Two-sided markets can be defined as, *“markets in which one or several platforms enable interactions between end-users and try to get the two (or multiple) sides ‘on board’ by appropriately charging each side. That is, platforms court each side while attempting to make, or at least not lose, money overall”* (Rochet and Tirole, 2006:1). The two-sided nature of digital platforms has given rise to so-called gatekeepers (OECD, 2022). Caffara and Scott Morton (2021) define a gatekeeper as *“an intermediary who essentially controls access to critical constituencies on either side of a platform that cannot be reached otherwise, and as a result can engage in conduct and impose rules that counterparties cannot avoid.”* Gatekeeper power thus represents a particular type of market power. These incumbent firms are also able to benefit from the direct and indirect network effects that arise due to their size and presence in multiple markets (Prado, 2021).

Other features of digital markets that give these platforms market power, include cross subsidisation, self-preferencing⁸, winner takes all dynamics, switching costs, and global reach (Competition Commission, 2021; Motta, 2023).

⁸ Self-preferencing “describes a situation whereby a vertically integrated firm discriminates in favour of its affiliate to the detriment of its competitors, also belongs to the category of vertical foreclosure conduct” (Motta, 2022:2).

Market power is therefore not solely expressed through prices but through control over data, access and the rules governing participation on the platform. This form of market power can shape entry and exit dynamics, as well as the visibility and competitiveness of rival firms (Prado, 2021; Motta, 2023; Franck and Peitz, 2023).

2.2 Competition and regulatory responses in digital markets

The dynamic nature of the digital economy has led to governments around the world discussing how digital markets should be regulated to ensure that these markets continue to positively contribute to economic development. Concerns have been raised about the ability of big tech companies to engage in anti-competitive conduct to the detriment of consumers and small firms (Khan, 2017).

A key challenge which has been identified in the literature, and which is covered in this paper, is the debate about whether ex-post or ex-ante regulations are most suitable to deal with digital markets. It has been argued that ex-post anti-trust remedies are limited in their ability to foster competition given the length of time it takes for these remedies to bring about change. There has therefore been growing support for competition authorities to consider the use of ex-ante interventions which are more flexible and fast-paced (CMA, 2020). Ex-ante rules or regulations can discourage anticompetitive conduct in the short term (Prado, 2021). On the other hand, ex-ante regulations might stifle entry and innovation.

This paper contributes to the literature by demonstrating the importance of regulatory timing and the choice between ex-post and ex-ante interventions in shaping market outcomes in digital markets.

3 Background of Kenya and South Africa's approach to the regulation of digital markets

In this section, we provide an overview of Kenya and South Africa's digital eco-system and their approach to regulation.

3.1 Kenya's approach to the regulation of digital markets

Kenya's approach to regulation has focused on striking a balance between market liberalisation and state intervention, with the aim to foster innovation and competition while still addressing market failures. The Competition Authority of Kenya (CAK) plays a dual role as the custodian of both competition law and consumer protection. In digital markets the approach by the Kenyan authority has been to regulate dominant players through its existing competition law. The rise of digital platforms has not been without challenges, with the CAK actively addressing concerns arising in fintech and e-commerce. The approach to regulation can be viewed as one which was focused on enabling market access while mitigating any anticompetitive behaviour (World Bank Study, 2023).

Much of the literature on Kenya's rapid digital transformation has focused on the proliferation of mobile money or the mobile money revolution. Some of the early literature illustrated Kenya's light touch approach to regulation and how this propelled the adoption of mobile banking services (see for example Mbiti and Weil, 2011). For example, the success of Safaricom's M-PESA was the catalyst for the significant increase in financial inclusion however this would not have been possible without the minimal regulatory interference which enabled this mobile giant to scale. Concerns about anticompetitive conduct by Safaricom soon arose (See Robb and Vilakazi, 2016; Paelo and Roberts, 2022). This is because Safaricom's M-PESA network had initially been designed with exclusivity clauses, requiring agents to only sell Safaricom's services. The CAK and competitors raised issues with this practice arguing that it reduced competition. Safaricom eventually agreed to open its network, allowing agents to offer services from other rival mobile money providers.⁹ While M-PESA was successful and led to an increase in financial inclusion, it also led to Safaricom entrenching its position in the market resulting in competition concerns over time.

Other studies have focused on the impact of mobile money on long-run poverty and gender inclusion with respect to how digital financial services can reshape socio-economic outcomes. For example, a study by Suri and Jack (2016) found that through limited and/or minimal regulatory interference, substantial positive externalities resulting in increased financial services to the most marginalised can be realised. However, at the same time, this can also lead to significant market concentration. What this study points out is that although there are certainly positives to limited regulatory interference in the face of innovation, this can risk creating monopolistic players over time, inhibiting competition amongst firms.

With the introduction of the Competition Amendment Bill in Kenya in 2024, the digital market landscape is set to change once more with stricter measures being imposed on lead firms and those that abuse their dominance. The bill will introduce specific measures for regulating digital activities

⁹<https://africanantitrust.com/category/settlement/#:~:text=Back%20in%20July%2C%20the%20watchdog%20said%20all,on%20Safaricom's%20troubles%20with%20the%20Kenyan%20Competition>

such as online intermediation services, search engines, social networking services, video-sharing platforms, and cloud computing services. Additionally, it sets out that dominance can be established in digital activities even for companies with market shares below 40 percent, provided they exhibit significant market influence through factors like “direct and indirect network effects and entry barriers arising in connection with those network effects” (Competition Amendment Bill, 2024:2). Additionally, the bill recognises that dominance can also arise from economies of scale and scope, particularly where firms may have access to data relevant for competition (Competition Amendment Bill, 2024). Naturally concerns have been raised that the authorities need to be cautious in applying blanket regulations that could constrain growth. Some critics have noted that regulating unilateral dominance is unduly strict and amounts to over-regulation.¹⁰ This bill is still in the legislative process and is subject to changes.

3.2 South Africa’s approach to the regulation of digital markets

In 2020, the Competition Commission of South Africa published its strategic view on regulating competition in the digital economy.¹¹ South Africa’s approach to competition regulation of digital markets has been distinct, relying on market inquiries as a tool for intervention to address potential competition concerns. According to this report, “market inquiries represent more effective tools to promote and retain competition in markets where common industry practices may collectively contribute to the hindering of competition. These inquiries also provide a more effective means of addressing barriers to participation in such markets, particularly by SME and firms owned and controlled by historically disadvantaged persons” (Competition Commission, 2020:37).

The CCSA has conducted two market inquiries on digital platforms. The Online Intermediation Platforms Market Inquiry (OIPMI) and the Media and Digital Platforms Market Inquiry.

A range of concerns were identified in the OIPMI inquiry which included price parity clauses, self-preferencing by dominant platforms, as well as the lack of transparency in online advertising. This inquiry concluded by making platform specific recommendations aimed at improving market access and competition (CCSA, 2023). This is discussed in more detail in later sections (Section 5 to 7).

Following the OIPMI, the Media and Digital Platforms Market Inquiry was launched. This inquiry sought to understand the relationship between digital platforms and media publishers. This was specifically in relation to the distribution of media content via search engines, social media and aggregators (CCSA, 2023). The findings focused on four areas (i) search and news; (ii) social media; (iii) generative artificial intelligence and (iv) digital advertising technology. The Inquiry found that major global platforms such as Google, Meta, Microsoft, TikTok, X and AI companies such as OpenAI, dominate key gateways through which South Africans access information, namely search, social media, and AI-powered tools. The inquiry recommended a comprehensive package of remedies designed to restore fairness, transparency, and sustainability in South Africa’s media ecosystem.

¹⁰ <https://www.capitalfm.co.ke/business/2025/02/govt-moves-to-regulate-market-dominance-in-digital-economy/>

¹¹ <https://www.compcom.co.za/wp-content/uploads/2020/10/Competition-in-the-Digital-Economy-Report-7-September-2020.pdf>

The competition authorities have also been faced with mergers; abuse of dominance and cartel conduct in digital markets. Since 2018, there have been the following notable transactions and/or cases: *MIH and WeBuyCars*, *Google and Fitbit*; and *GovChat v Facebook*.

MIH e-Commerce (Pty) Ltd (MIH) t/a OLX South Africa (OLX) and WeBuyCars proposed merger involved the acquisition of 60% of shares in WeBuyCars.¹² This was one of the first cases in which the competition authorities had to consider features of digital markets which would significantly impact the market. In 2020, the Competition Tribunal of South Africa prohibited the transaction based on two defining features typical of digital markets, (1) the centrality of online platforms in the market and (2) the growing and strategic importance of data access. The Tribunal recognised that unlike in traditional markets, where competition concerns typically revolve around products, competition in digital markets depends on who controls data (in this instance user data) and the ability to leverage this data to their benefit (Gumede and Manenzhe, 2023).

The Tribunal's assessment marked a unique shift away from the traditional assessment of portfolio effects. It found that the data advantages that would accrue to the acquiring firm "could be leveraged to entrench WeBuyCars' dominant position in the purchasing of used cars from the public, and this dominance would also likely translate into dominance on the wholesale of second-hand car stock to used car dealers. This would result in higher prices being paid by used car dealers for wholesale stock sourced from the public" (Competition Commission, 2020:2).

The Google and Fitbit merger in 2020 was classified as a small merger due to the low turnover and asset value of Fitbit. The merger was notified in the EU, UK and Australia. Even though it was a small merger (which did not need to be notified in South Africa), the Competition Commission of South Africa assessed it, and considered several issues: (i) the removal of potential competition in the production and supply of wearable devices; (ii) input foreclosure; (iii) using Fitbit data or data collected from wrist-worn wearable devices to enter the market for the provision of digital health; and (iv) preventing future competition in the provision of digital health (Gumede and Manenzhe, 2023).

The Commission found that Google's acquisition of Fitbit would remove Fitbit as an independent, non-vertically integrated competitor in the wearable devices market. It further concluded that the merger would raise barriers to entry and significantly expand Google's advantage due to it having access to Fitbit data. However, the Commission considered foreclosure to be unlikely as Google's wearable operating system (OS), did not constitute significant input in the production and supply of wrist-worn wearable devices. The Commission also found that ownership of Fitbit's existing health data when combined with Google's non-individualised non-health data could result in Google entering into the market for the provision of health and health insurance (Gumede and Manenzhe, 2023).

Ultimately the merger was approved in 2020, subject to several behavioural conditions for a period of 10 years. This transaction was important as it showed how traditional competition tools, the imposition of behavioural conditions and long-term monitoring, can be used in digital markets. The case further demonstrated the complex nature of digital markets and how digital mergers can have

¹² OLX is an online classified advertising platform and a wholly owned subsidiary of media giant, Naspers (which also operates Car Trader (Pty) Ltd t/a Autotrader, an online specialist advertising platform for the purchase and sale of used and new vehicles). WeBuyCars is a guaranteed buyer and seller of used cars.

spillover effects into adjacent markets i.e. health and health insurance (Gumede and Manenzhe, 2023).

Finally, the GovChat v Facebook case was an application for interim relief. In this case, GovChat brought an application to the Competition Tribunal requesting it to prevent Facebook (the owner of Whatsapp) from offboarding the GovChat offering on its platform. It argued that Whatsapp is dominant and that its conduct amounted to a refusal to supply scarce goods or services to a competitor or customer under the Act i.e. in contravention of Section 8(1) (d) (ii) and 8(1)(c). This case was unique in that the Competition Tribunal found that Whatsapp was scarce and that the platform could not be easily duplicated.

While the Act has been used to address competition concerns in digital markets, the question arises as to whether in its current form the Act will be able to address more complicated issues associated with digital markets as they arise. This is likely to be a natural consequence given that many of South Africa's digital markets are arguably in their nascent phase.¹³

¹³ Interview with independent expert on digital markets, 19 November 2025.

4 Data and Methodology

The discussion thus far has shown that the approaches adopted by Kenya and South Africa are distinctly different. Kenya's approach, based on its earlier light touch regulatory stance, has led to rapid market development. South Africa's approach emphasises a targeted response mainly in the form of market inquiries. The differences that arise highlight the trade-off between innovation and market power when regulating digital markets.

This study therefore provides a unique opportunity to draw on a comparison of the Kenyan and South African experiences and to provide insights for the development of digital regulation in South Africa. The key research questions to be answered in this study are, (1) How do Kenya and South Africa differ in their regulatory approach to digital markets? and (2) What insights can be drawn from a comparison of Kenya and South Africa's regulatory approaches?

While this study compares the different regulatory approaches to digital markets, it does not seek to establish causal relationships. This is because differences in broader economic conditions limit the ability to attribute outcomes observed to regulatory choices alone. Instead, the analysis is comparative and more descriptive in nature, drawing out linkages between regulatory approaches and the prevailing market environment.

4.1 Data Sources

With respect to Kenya, the research draws from primary and secondary data derived from the study with the World Bank.¹⁴ For South Africa, the data are drawn from the OIPMI, which was selected because it covered similar markets to the World Bank study. This is supplemented with primary data collection through semi-structured interviews with industry stakeholders and participants for the South African perspective.

Industry stakeholders and participants in South Africa include firms in the different markets, regulators and independent experts. These stakeholders were interviewed to gauge their perspectives on key developments and competition in the different subsectors. Information, where available, is also drawn from other secondary sources including government policy documents and reports, previous relevant research studies, and publicly available aggregate data, including from World Bank databases. A total of 17 semi-structured interviews were conducted in Kenya (as part of the World Bank study) and South Africa for this study.

The selected markets from the OIPMI mirror the World Bank study and includes retail e-commerce, food delivery and app development. Understanding the diversity of businesses and other actors, different business models employed, as well as the linkages between actors is critical for interpreting the market outcomes that are observed in the identified segments. This is important for deriving a view of stakeholder perceptions on regulation.

¹⁴ Researchers only drew on interview notes from the World Bank study specific to the markets discussed in this research paper. This paper is confidential and not publicly available.

4.2 Methodology and analytical framework

A key objective of this study is to conduct a comparative analysis of how competition issues have been addressed by Kenya and South Africa in selected digital markets. The study first analyses the market features, competitive dynamics and key players in each country. It then examines the regulatory approach adopted and how the competition authority has intervened to address findings of dominance and barriers to entry and participation. The study provides for a comparative analysis of how different regulatory approaches shape markets and outcomes, and the trade-offs that ensue. It does not seek to make causal claims regarding the relative effectiveness of one approach over the other. This is also in light of key differences in the structure of digital markets in Kenya and South Africa and in the absence of a clear counterfactual to support a causal claim (Angrist and Pischke, 2009). These findings provide insights into how different regulatory approaches can be applied in digital markets.

To guide this comparative assessment, the study adopts and extends the analytical framework developed by Bonakele, das Nair and Roberts (2022) for assessing the outcomes of market inquiries which distinguishes between (i) pure competition issues; (ii) competition plus issues, and (iii) broader public policy issues.

Pure competition issues refer to straightforward competition law concerns, that relate directly to the exercise of market power and ensuring competition in the market. This includes abuse of dominance, exclusionary conduct, collusion etc.

Competition plus issues generally refer to behavioural or structural factors in the market that impact competition or fairness along the value chain. These issues do not necessarily amount to a contravention of competition law but can amount to a distortion of competition. These issues include information asymmetry, buyer power and other forms of strategic behaviour that affect the ability of firms to compete effectively.

Public policy issues extend beyond competition regulation and comprise sector specific policies and their interlinkages with other policies.

It is important to note that based on the circumstances of the markets, these categorisations may overlap and are not mutually exclusive.

This framing allows for a holistic comparative analysis to be conducted between the two countries, providing a nuanced comparison of how each addresses market power, participation and inclusion across the three markets, e-commerce, food delivery and app development. This approach assists to identify where gaps persist and how competition law and policy can be used to balance outcomes within digital markets. It also contributes to a more nuanced understanding of how the regulatory approach adopted and the timing of interventions by the authorities impacts the market and shapes outcomes in digital markets.

5 Comparative analysis of Kenya and South Africa's approach to e-commerce

Electronic commerce also referred to as e-commerce, can be defined as “the buying and selling of goods and services over the internet” (Moothoo Padayachie and Vilakazi, 2023). E-commerce likely represents one of the most popular and visible forms of digital transformation connecting buyers and sellers through an integrated platform which generally offers logistics, pay gates and data analytics.

Kenya's e-commerce sector has grown rapidly given the relative ease of access for companies to enter and reach consumers. This has largely been due to advancements in technology and the Covid-19 pandemic which drove increased reliance on e-commerce.

While there are various business models which may be adopted, the most common one used is Business-to-Consumer (B2C). In this model, a customer visits the website of the e-commerce business, browses their available stock and purchases online. With increased smartphone penetration, most e-commerce businesses also have an app which consumers can use to complete their transactions.

Several players have entered the e-commerce market in Kenya. This includes Masoko (powered by Safaricom), Jiji, Glovo and Copia. Jumia and Kilimall are the two preferred retail e-commerce platforms (based on consumer survey data) and compete head-to-head (Thomi, 2021).

Jumia, an e-commerce retailer was established in Nigeria in 2012. At the time it was touted as being the next Amazon of Africa. In 2013, Jumia entered Kenya where it fast became the market leader and has remained as such till today. Within the e-commerce market, Jumia was a pioneer. It not only created a platform for buyers and sellers but also established the logistical and payment services to complete transactions (Thomi, 2021). Soon after Jumia's entry into Kenya, Kilimall entered in 2014 and became the 2nd largest e-commerce retailer. Originally, it had been created to serve as an e-commerce platform for small businesses. By 2022, it had approximately 10 million registered users, 7.2 million active users and more than 8000 merchants listing on their platform. It has been one of the most successful ventures creating over 5000 jobs in Kenya. Its success is largely attributed to its ability to reduce costs by leveraging off its supply chain in China. Merchants in China send their products to a warehouse based in Africa prior to customers placing orders. This enables Kilimall to dispatch goods quickly and offer a range of readily available products across various categories.¹⁵

This has created concerns for local manufacturers as the volume of imported goods has surged, undermining the domestic industry.¹⁶

South Africa is ranked as the largest e-commerce market in Africa. In South Africa, the e-commerce market was still in its infancy in 2019 (Goga and Paelo, 2019). However, the Covid19 pandemic had a similar effect of boosting the growth of e-commerce as people became wary of crowds. This accelerated the plans of many retailers to offer their products online. The market leader in e-

¹⁵

<https://english.news.cn/20231112/c532d0ba59b344ed9547f23e2ca97710/c.html#:~:text=By%20the%20end%20of%202022,Africa%20in%20terms%20of%20downloads>.

¹⁶ See <https://www.standardmedia.co.ke/business/business/article/2001539091/government-steps-up-push-for-local-manufacturing> Accessed: 28 January 2026.

commerce is Takealot with a market share of >35% which includes other intermediation platforms and direct retailer or manufacturer sales channels.¹⁷

Takealot leads in most product categories, and its competitors comprise only a fraction of its size in online sales. In the narrower market for marketplace services to sellers, there is also a high dependency on Takealot. Other players in this market include Amazon, Temu, Makro.

In both Kenya and South Africa, e-commerce has evolved as a critical component of the broader digital eco-system, re-shaping retail markets expanding consumer choice and redefining the concept of traditional brick and mortar stores.¹⁸ Much of the discussion on Kenya has emerged out of Kenya's earlier light touch approach to regulation. Kenya's more recent policy responses, including the Competition Amendment Bill, and Draft E-Commerce Policy, should be viewed as a response to the challenges emerging from its earlier regulatory approach, although the effects of these interventions are not yet observable.

In this section, we conduct a comparison of the pure competition issues, competition plus issues and public interest concerns which have arisen in Kenya and South Africa's e-commerce space.

5.1 'Pure' competition issues in Kenya and South Africa's e-commerce space

5.1.1 Kenya

Kenya's e-commerce market exhibits several competition issues that stem directly from its concentrated structure, the conduct of dominant platforms, and barriers that limit entry and expansion. The market is characterised by a few large platforms that hold significant market power. This market power has been shaped by first mover advantages, particularly by major players such as Jumia and Kilimall.

Time and capital are key to the success of new entrants wanting to enter this space. This makes it difficult for new entrants without substantial capital backing. As an early entrant, Jumia recognized the need to build trust and service on the platform alongside issues of price and quality.¹⁹ Similarly, Kilimall recognized that to compete against Jumia, it would also need to build brand loyalty, and trust with its customers. When it first launched and entered the Kenyan market in 2014, its brand was faced with a lack of trust by customers and towards online shopping in general. It therefore became acutely aware that to be successful it would require both time and capital, which it had. To build up this trust, Kilimall began to offer customers an option to pay on delivery. This strategy proved successful and helped to boost sales. As word spread, more customers started to use their platform.²⁰ For new start-ups without significant capital backing, logistics capability or a well-recognised brand, such as Kilimall,

¹⁷ CCSA OIPMI final report.

¹⁸ CCSA OIPMI report.

¹⁹ <https://www.africaoutlookmag.com/company-profiles/526-jumia#:~:text=One%20such%20investment%20was%20to%20overcome%20the,the%20Jumia%20delivery%20service%20cash%20on%20delivery.>

²⁰ <https://techcabal.com/2025/04/19/ecommerce-website/>

their ability to grow and expand within e-commerce will be limited.²¹ Kilimall is a household name in Kenya because it was the first Chinese e-commerce company to enter Africa.

The inherent features of the e-commerce market in Kenya have created conditions under which large players can entrench their dominance. These dynamics have since prompted Kenya to implement policy to address these concerns.

Kenya's draft e-commerce policy 2025, aims to directly respond to the above competition issues arising from entrenched market power and high capital requirements. The draft e-commerce policy recognises that dominant platforms are able to leverage their access to data and networks to entrench their positions in the market making it difficult for new firms to enter (Ministry of Investments, Trade and Industry, 2025).

Kenya's e-commerce legal framework is governed by several sector specific regulations.²²

Despite the range of legal instruments available above, the draft e-commerce policy recognises that the national legal framework on e-commerce cannot adequately cover e-commerce. In addition, that there are still gaps in terms of a legal framework to support effective coordination across Ministries, Departments, and Agencies of Government for effective and efficient management of the sector (Ministry of Investments, Trade and Industry, 2025).

Kenya's draft e-commerce policy seeks to address these issues, see Table 1 below.

Table 1: Link between the identified competition issues and the draft e-commerce policy interventions

Competition Issue	Draft e-commerce policy intervention
Market concentration and dominant firms benefiting from first mover advantages	• Safeguarding of Competition in the market – Section 1.2.3 • Strengthening mandate of the Competition Authority of Kenya in digital markets – Section 1.2.3 • Regulatory clarity to prevent monopolies and anti-competitive mergers – Section 3.4.
High capital requirements	• Establishment of a National E-Commerce innovation and investment fund to support MSMEs and start-ups – Section 3.4.1. • Public-private co-investment framework to scale digital infrastructure and reduce private sector risk – Section 3.4.1 • National innovation sandbox enabling low-cost testing of digital solutions – Section 3.4.1

²¹ Interview with independent expert, 28 September 2023.

²² This includes the, Kenya Information and Communications Act, CAP 411A (KICA); Data Protection Act, Cap 411C; Competition Act, Cap 504; Computer Misuse and Cybercrimes Act, Cap. 79C; Income Tax Act and Digital Service Tax Regulations, 2023; National Payment Systems Act, Cap 491A (2011); Kenya Revenue Authority Act, Cap. 469; Consumer Protection Act, Cap 501; National Electronic Single Window System Act, Cap 485D; Anti-Counterfeit Authority Act, Cap 510; Postal Corporation of Kenya Act Cap 411; Standards Act, Cap 496; Trade Descriptions Act Cap 505; Weights and Measures Act Cap 513; Central Bank of Kenya (Digital Credit Providers) 2022.

The above interventions directly target the mechanisms through which dominant platforms have entrenched market power. By recognising predatory pricing²³, self-preferencing and the conduct of large firms in this market, the policy attempts to lay the foundation for a more robust and proactive legal framework (Ministry of Investments, Trade and Industry, 2025).

This recognition is important given that this is a market in which first mover advantages, network effects, established customer trust have given large firms an entrenched position in the market. The strengthening of the CAK's mandate as well as the commitment to improve regulatory clarity and coordination across the different agencies represents a shift toward being more interventionist in the future (Ministry of Investments, Trade and Industry, 2025).

A second set of policy interventions straddle pure competition, competition plus and public policy issues. These are aimed at addressing the high capital requirements that currently limit the successful entry of small entrants. The establishment of the National E-Commerce Innovation and Investment Fund recognises the challenges faced by small players. This fund, together with the National innovation sandbox will also provide low-cost testing of digital solutions, supporting the growth and entry of small players (Ministry of Investments, Trade and Industry, 2025).

These policy interventions are intended to reduce entry barriers, improve competition and stimulate a more inclusive e-commerce market in Kenya.

5.1.2 South Africa

South Africa's e-commerce sector is also concentrated. Competition issues in e-commerce in South Africa have arisen mainly from Takealot's vertically integrated structure and conduct.

Specifically, the OIPMI found that Takealot holds a dominant position in terms of overall online sales and has control over key infrastructure through which smaller businesses access this digital market channel, this includes warehousing and delivery services.

Competition concerns arising from the inquiry included self-preferencing, narrow price parity clauses, and data access.

Concerns of self-preferencing arose due to Takealot operating as both a platform for sellers and a retailer, competing directly with its sellers while setting the rules that govern them. This dual role created an inherent conflict of interest, allowing it to engage in exclusionary conduct. One example was that Takealot prevented independent sellers from selling certain high value brands or fast-moving consumer products even when these sellers could source the product at more competitive prices. This restricted competition and ensured that Takealot's own retail division was able to maintain control over the most profitable product categories (Competition Commission, 2023). This restriction constituted a vertical restraint, that foreclosed rivals, limiting platform contestability and distorting competition.

²³ Predatory pricing is defined, "in economic terms as a price reduction that is profitable only because of the added market power the predator gains from eliminating, disciplining or otherwise inhibiting the competitive conduct of a rival or potential rival. Stated more precisely, a predatory price is a price that is profit maximizing only because of its exclusionary or other anticompetitive effects." (Bolton et al., 2000:2242).

A second mechanism which enabled Takealot to self-preference was through the data and algorithmic design of its platform. Through its platform, Takealot was able to gather data on prices, sales volumes and consumer search behaviour. This enabled Takealot to identify high performing products and replicate them under their own brand and/or adjust pricing to undercut competitors on the platform (Competition Commission, 2023).

Thirdly, Takealot's Buy Box feature was also recognised as a critical feature. This feature determined which seller's item gets prioritised and tends to prioritise those already in the Takealot warehouse. Given that Takealot's own products are likely to already be stored in its warehouses, this placed it in a preferred position to its competitors.

With respect to price parity, Takealot's use of narrow price parity clauses required that sellers offer their products at prices no higher than those advertised on their own websites. The effect of this was to limit competition and lock sellers into its platform. By preventing sellers from offering discounts on their own websites, this removed an important competitive constraint for Takealot. These clauses had the effect of entrenching platform dominance by removing pressure from outside the platform.

Given that Takealot hosts and processes all transactions on its marketplace, this further afforded it an opportunity to gather very granular data. This data provides critical insights into customer behaviour, seasonal demand, and product performance that other platforms do not have to the scale that Takealot has.

To address these concerns, the OIPMI imposed a comprehensive set of remedies on Takealot. This included the removal of narrow price parity clauses, the separation of Takealot Retail from marketplace operations and strict data access restrictions to prevent self-preferencing. The inquiry was careful to also release market wide principles and expectations of conduct to act as a signal to new entrants. In 2024, Amazon entered the South African e-commerce space but has not overtaken Takealot, which remains the market leader as of 2025. This suggests that the first-mover advantages established prior to the regulatory intervention, potentially continue to shape competition.²⁴

5.1.3 Comparative insights

A comparison of Kenya and South Africa's regulatory response to e-commerce competition concerns reveal the two distinct approaches to governing e-commerce platforms by the two authorities. Although both countries have concentrated e-commerce markets shaped by first mover advantages, network effects, and brand loyalty, their response diverges significantly in terms of how to address potential anticompetitive effects.

Kenya's draft e-commerce policy largely adopts an ex-ante approach, which seeks to strengthen the overall regulatory environment. South Africa, by contrast, has moved towards a direct, firm-specific approach through the use of market inquiries to impose binding, remedies on dominant platforms. This, in a sense, is an ex-post approach as potential conduct that prevents or distorts competition has already been identified through the inquiry.

²⁴<https://www.itweb.co.za/article/takealot-extends-e-commerce-lead-despite-arrival-of-disruptors/rW1xLv5n3Z17Rk6m> Accessed: 29 January 2026

The approach adopted by Kenya reflects the recognition that concentration in its e-commerce market is not only shaped by platform conduct but also broader constraints such as fragmented logistics, limited last mile delivery capability, limited access to capital and the absence of National addressing system. As such its regulatory agenda has been tailored around these issues as well. The interventions, as they have been designed, are crafted to reshape the underlying conditions of competition, ensuring that it is easier for firms to enter and realistically challenge incumbents. These interventions also signal that Kenya's approach is focused on shaping competition rather than directly addressing firm conduct. By strengthening the role of its competition authority, and improving coordination across government agencies, Kenya is placing emphasis on a coherent regulatory framework to address the gaps. This will assist it to be ready for any future contraventions.

It is however important to note that such an ex-ante regulatory approach is not costless. It requires continuous monitoring and technical expertise to implement. In the developing country context, this can prove challenging especially where regulatory capacity may already be constrained. As such, while ex-ante regulatory approaches result in early intervention, they do carry risks if not carefully managed by the relevant authorities. The success of these interventions relies critically on the institutional capacity of the authority (OECD, 2021). We are yet to observe the effects of Kenya's new regulatory approach.

South Africa's regulatory response has been different. The problem at hand is largely the conduct of a single player, which has been able to leverage its position in the market through self-preferencing, price parity clauses, and data driven strategies. The OIPMI therefore imposed detailed behavioural and structural remedies to enhance competition. South Africa's approach directly targets platform behaviour rather than broader concerns. This targeted approach works well in contexts where an abuse of market power or distortion of competition has already been identified, as it allows the authorities to focus their interventions on the conduct of these firms without imposing broad regulatory constraints across the market.

Issues surrounding the abuse of dominance and the adequacy of the Act have nonetheless been raised. Interviewees highlighted that there is also a question of whether market inquiries are the correct tool to address these issues and in particular, the conduct of one specific firm, Takealot.²⁵ This is because the Act specifically deals with the abuse of dominance. These provisions are specifically designed to deal with unilateral conduct of dominant firms. We argue however that market inquiries are appropriate for dynamic and new markets where the 'traditional' competition tests and principles have not 'caught up' sufficiently to detect and evaluate market outcomes. Conventional enforcement tools, like abuse of dominance provisions in the South African Competition Act, could take prolonged periods to finalise, delaying the correction of market distortions or anticompetitive harm.

The time bound nature of these remedies is subject to a period of 3 to 5 years. The suggestion is that the Commission's intervention in this market and digital markets should not be too long or permanent given that these markets are very dynamic. Over a longer period, it was the view that markets should be allowed to run their course and evolve organically. Further interviewees noted that the Competition Act as it relates to the abuse of dominance may in its current form need further amendments. This is also in light of the emergence of new issues which will soon affect South Africa

²⁵ See interview with independent expert -Dated 19 November 2025 and interview with an association, dated 8 December 2025.

and includes the rise of AI²⁶. The countries illustrate two different regulatory responses in the e-commerce market. Kenya's new strategy aims to pre-empt potential behaviour and shape the broader conditions of competition, with the intention of making it easier for firms to enter the market. South Africa's approach has been to address potential platform abuses head on. Kenya's approach reflects a more anticipatory regulatory stance, while South Africa's approach is more targeted and enforcement driven. Both approaches entail distinct trade-offs in terms of regulatory timing and the ability to address entrenched market power (Motta and Peitz, 2020). Earlier intervention may help to prevent the entrenchment of market power but may also risk constraining innovation, especially in fast evolving digital markets. On the other hand, more targeted interventions may allow the market to evolve with some flexibility while risking the further entrenchment of market power. While ex-ante regulation approaches may enable earlier intervention, they may also introduce risks of regulatory hurdles creating unintended barriers for new players to enter. Finally, there are of course costs to both ex ante and ex post forms of regulation that need to be weighed up.

In conclusion, Kenya's initial light touch approach to regulation may have indeed supported growth of its digital markets but may have also contributed to the entrenched markets, which has given large firms first mover advantages. This has also led to new ex-ante regulation being developed to manage these concerns. South Africa's approach, through the use of market inquiries, targets specific instances of exclusionary conduct and platform behaviour allowing for targeted interventions. This in a sense reduces the risk of over-regulation and preserves some flexibility in the market for firms. South Africa's approach is therefore not merely reactive but appears to be a deliberate strategy to intervene only when market distortions or anticompetitive harm is identifiable.

5.2 Competition 'plus' issues in Kenya and South Africa's e-commerce space

5.2.1 Kenya

There are potential issues of buyer power in the Kenyan e-commerce market. This is largely due to the dependence of smaller businesses on these platforms, i.e. Jumia and Kilimall, to sell their products (Nzomo, 2017). This dependence leaves smaller businesses with little bargaining power and subject to the policies and terms ('rules') as set by the platform. These 'rules' shape outcomes and leave smaller sellers vulnerable to unilateral decisions made by the platforms.

The CAK has the mandate to intervene in markets on matters of buyer power. To date, buyer power-related concerns raised in e-commerce markets include delayed or withheld payments, and refusal to trade or accept delivery, without reasonable justification.²⁷ However, the CAK's ability to take enforcement action against e-commerce providers remains constrained under the current legal framework. Furthermore, because some digital platforms act as intermediaries, facilitating transactions without taking ownership of the goods, they do not fall within the definition of buyers under the existing competition provisions.

There is therefore a gap in the ability of the CAK to institute or enforce actions against e-commerce providers with buyer power under the current framing of provisions in its governing legislation.

²⁶ Interview with an association, 8 December 2025.

²⁷ Interview with expert on e-commerce platforms, 28 September 2023.

In addition to the above, online trading platforms are not considered as an electronic service as envisaged by the Act and are not licensable. This means that customers are also not protected by the Consumer Protection Act and have no recourse if things go wrong. Generally, consumer protection and recourse tend to be embedded in the policies of individual platforms. The only recourse customers have found for themselves has been to turn to social media.²⁸

In Kenya, we categorise under competition plus issues as those that stem largely from power asymmetries (such as buyer power discussed above), information asymmetries and issues of trust. Kenyan consumers are often routinely confronted by issues of poor product quality, delivery, and returns processes, which have undermined confidence in e-commerce. As a result, Jumia and Kilimall have been strategic about investing in mechanisms to build customer trust. To do this they have invested substantially in offering clients' certain services such as payment on delivery. While these services have been beneficial for consumers, they have raised the cost of entering this market. In other words, these improvements have increased the credibility of the platform but placed a burden on new and smaller firms entering.

The above demonstrates that in Kenya competition plus issues influence the context within which firms are operating in this market.

Kenya's draft e-commerce policy directly speak to these issues, see Table 2 below.

Table 2: Link between the identified competition plus issues and the draft e-commerce policy interventions

Competition Plus Issue	Draft policy intervention
Trust and concern about brands and product quality	- National E-Commerce Trustmark and verified digital seller identities – Section 3.4.1 - Consumer protection mechanisms addressing misleading conduct – Section 1.2.2
Weak dispute resolution and limited customer recourse	Online reporting and dispute resolution system under the State Department for Trade – Section 3.2.1
Low trust in online transactions	Trustmark system, enhanced data protection, cybersecurity enforcement

These policy measures illustrate a deliberate shift towards strengthening the behavioural and trust related dimensions affecting the e-commerce market. For example, the National E-Commerce Trustmark and verified seller identities give consumers peace of mind when transacting online. This will also help new and smaller firms, without the brand presence, to build up trust with consumers.

The improved online reporting and dispute resolution system will also hold e-commerce providers accountable and improve the reliability of online transactions.

This draft policy will help to address the consumer protection gaps which have been evident in this market.

²⁸ Interview with expert on e-commerce platforms, 28 September 2023.

5.2.2 South Africa

The inquiry also highlighted buyer power concerns around Takealot's fees, commissions and promotional pricing strategies. Sellers reported that platform commissions were high and non-negotiable, unlike the more favourable terms available to Takealot's own retail arm. Sellers also pointed out that participation in promotions, and visibility enhancing tools came at a significant cost making it difficult for small players to compete with Takealot Retail and large third-party sellers.

To address these issues, the OIPMI imposed a series of remedies. First, it required Takealot to separate its retail division from its marketplace operations, with strict limitations on data sharing. This remedy prevents Takealot Retail from leveraging seller data.

Second, it required Takealot to implement a 60-day dispute resolution rule which stipulates that all disputes regarding refunds, returns, stock loss or platform errors be resolved in this time period.

Similarly to Kenya, information asymmetry has provided Takealot with a competitive advantage given its control over sales data. This data allows it to forecast demand trends, category performance as well as determine the most competitive pricing. Takealot was found to have used this information for its retail arm which competes actively with the sellers on its platform. While Takealot did provide some of this information to sellers of the platform it was not at the same level of granularity. This imbalance in access to data, placed sellers at a disadvantage unable to optimise their listings, pricing strategies or promotional activities.

Smaller sellers are also dependent on Takealot to list their products and are thus subject to the rules set by Takealot (who governs the platform). Sellers have complained about the nature of these rules and the precarious position it places them in. This included complaints about limited avenues to contest platform decisions and delays in dispute resolution which can have direct consequences for sellers. The OIPMI explicitly identified these issues as a source of harm particularly given the cash flow constraints of SMEs and HDP owned sellers.

5.2.3 Comparative insights

While both jurisdictions face concerns about information asymmetry, dependency on dominant platforms, buyer power concerns and weaknesses in platform governance, their approaches to regulation diverge in terms of their scope, and regulatory depth.

Kenya's regulatory response is largely anticipatory. Rather than targeting the conduct of the platforms themselves, the draft e-commerce policy seeks to focus on trust enhancing and consumer protection mechanisms, such as the National E-Commerce Trustmark, verified seller identities, and improved dispute resolution mechanisms. These interventions are designed to directly address concerns raised by consumers and provide recourse.

Currently, the absence of a coherent regulatory framework for digital markets has generated uncertainty around buyer power. While the CAK has the ability to intervene in cases of unfair trading terms, they are constrained by definitions of dominance and "buyer" which excludes online e-commerce platforms. For Kenya the combination of competition and consumer protection under the

CAK has proven to be efficient but more challenging in the wake of digital markets.²⁹ This is mainly because of the complexities arising from data, platform governance, and information asymmetries.³⁰

South Africa's approach to e-commerce is more direct. The mandated separation of Takealot Retail from marketplace operations, limiting data use, and redesigning the buy box are all targeted at restructuring the relationship between Takealot and its sellers.

An assessment of the competition plus issues reveals that Kenya's approach focuses on developing rules for digital platforms while South Africa is rebalancing power directly, again, through targeting power of identified firms.

5.3 Public policy concerns in Kenya and South Africa's e-commerce sector

5.3.1 Kenya

Public policy concerns arising in Kenya's e-commerce sector derive mainly from the institutional and regulatory environment. One significant issue has been the lack of infrastructure which has affected last mile delivery. Unlike large incumbents that can invest in a logistics system and/or negotiate preferential terms with courier partners, smaller businesses remain heavily reliant on unreliable last mile delivery networks (World Bank Study, 2023).

Most e-commerce start-ups tend to rely on third-party services and/or 'boda-bodas' (motorbike taxis) which operate mostly in main cities. Last mile delivery is the most significant expense for e-commerce platforms, hence the need for large capital backing. Without this, new entrants struggle to enter and compete in this market.³¹

Other concerns mentioned by our interviewees were the lack of a national address system, making it difficult to find the delivery address of customers online and on the ground. This coupled with poor road networks has made it even more challenging for delivery services such as e-commerce retailers.³²

Kenya's draft e-commerce policy recognises that poor infrastructure has limited nationwide delivery (See Table 3 below). It has therefore been positioned as a core policy issue requiring intervention. The proposed policy addresses the logistical issues associated with last mile delivery which has been a defining feature of Kenya's challenges with digital markets. The commitment to establish a National Addressing System, developing country level logistics zones and promoting smart warehousing represents a significant intervention on this issue. These measures are intended to reduce the logistical cost burden for smaller firms, while expanding the geographical reach of players in the e-commerce space.³³

²⁹ <https://www.hsfkramer.com/notes/africa/2025-posts/Consumer-enforcement-increasingly-a-focus-for-dual-mandate-competition-and-consumer-authorities-in-Africa#:~:text=Authorities%20in%20key%20jurisdictions%20on,mandate%20under%20its%20empowering%20regulations>.

³⁰ See for example the challenges that have arisen in food delivery <https://www.cak.go.ke/enhancing-consumer-welfare-digital-platforms>

³¹ Interview with independent expert, 28 September 2023.

³² Ibid.

³³ Ibid.

Table 3: Link between the identified public policy issues and the draft e-commerce policy interventions

Competition Plus Issue	Draft policy intervention
Logistics constraints	• Development and implementation of a National Addressing System to promote accurate and traceable location identification between buyers and sellers. -Section 3.2.1. • Establishment of country level logistics zones, aggregation hubs, and smart warehousing³⁴ – Section 3.4.1 • Commitment to smart logistics and last mile delivery services – Section 3.4.1

5.3.2 South Africa

While broader public policy concerns may exist in South Africa's e-commerce sector, no major public policy issues emerged within the scope of this study.

³⁴ Facilitates decentralized access to digital infrastructure and fulfilment services built around aggregation for local businesses, promoting inclusive growth and regional market integration.

6 Comparative analysis of Kenya and South Africa's approach in Food Delivery

Food delivery platforms provide for consumers' changing lifestyles through the facilitation of food and grocery deliveries to their doors. They also create increased revenue opportunities for restaurants given the reach and convenience of food delivery apps. Internationally, and in countries like South Africa, firms such as Uber Eats have disrupted this market and gained significant market share (CCSA, 2023).

Food delivery platforms operate as intermediaries, connecting restaurants to consumers through a digital interface. Consumers access the service by downloading the platform's app, logging in, browsing the available restaurants, before making a meal selection. Once the selection is made, the user will pay for the meal through the platform using cash, credit, mobile money etc. After payment is initiated, the order is confirmed by the restaurant through a dedicated device supplied by the platform. The restaurant can either accept or decline the order. Once the order is accepted, a delivery time is estimated, and the platform will also allocate a driver to collect and deliver the order.³⁵

In this section, we set out a comparative analysis of the pure competition issues, competition plus issues and public policy issues in food delivery platforms in South Africa and Kenya.

6.1 'Pure' competition issues in Kenya and South Africa's food delivery markets

6.1.1 Kenya

Online food and grocery delivery in Kenya is an emerging market, with only 9.3% of its population using this service as of 2023. It is estimated that this figure would increase to 16.7% by 2027 (CAK, 2024). Kenya's food delivery sector exhibits several competition issues that stem directly from its market structure and the behaviour of lead firms in this sector. This behaviour has raised barriers to entry and participation. Within Kenya's food delivery market there are only a few main players which included Glovo, Jumia Food (prior to its exit in 2023) and Uber Eats. With Jumia's exit, there are essentially two large players. These platforms benefited significantly from entering the market early, which also enabled them to scale quickly as they partnered with established restaurant brands in Kenya. Similarly to e-commerce, first mover advantages allowed these firms to build strong networks as consumers gravitated towards platforms with a wide selection of restaurants. In turn, restaurants prefer to list on platforms that have a large active user base. This makes entry into the food delivery market particularly challenging for new and small firms as they struggle to scale.³⁶ Consumers also tend to favour certain platforms. This gives rise to platform power which has direct competition implications, particularly where platforms have direct control over the commercial terms attached to participation (World Bank Study, 2023).

One competition issue relates to the commission rates charged by the platforms to list on their app. These commission rates are often high and ultimately shape outcomes. The result of this is that the price observed on the food delivery app for certain food items may differ to the in-store price. This

³⁵ Interview with a food delivery platform, 7 October 2023.

³⁶ Interview with food delivery platform, 27 October 2023.

can raise some challenges for the food delivery app, as consumers are aware that they are paying for items at a premium which may deter them from using the app. To overcome this issue, many food delivery apps offer incentives to restaurants to match their in-store prices to the app. Incentives include for example more visibility on the app by being listed as a preferred restaurant by the app. To increase their own visibility, restaurants can also choose to pay for position on the app i.e., to improve visibility on the app.³⁷ Restaurants using these apps have in a way become commercially dependent on them, giving these platforms influence over their pricing and visibility (World Bank Study, 2023). Retailers are forced to accept the fee structures and contractual terms as set out by the platforms, or risk not being able to access customers (CAK, 2024).

Platforms also collect vast amounts of data, which allows them to optimize their logistics, pricing and promotional strategies. By contrast, smaller restaurants and delivery firms have limited access to data which places them at a disadvantage, enabling the incumbent firms to entrench their market positions.

In 2024, the CAK released its Online Food and Grocery Delivery market study which sought to identify concerns in this market as well as potential solutions for addressing these concerns.³⁸ The findings of this market study are not binding and are advisory in nature. Its recommendations may be used by the CAK at a later stage to guide enforcement, advocacy and amendments to its competition law. This contrasts with South Africa, where the findings of market inquiries are binding, and enforceable. With respect to these platforms, the market study confirmed that the sector is highly concentrated with two platforms capturing the bulk of traffic and orders.

The market study proposed several interventions/made the following observations to address these issues:

- (1) Strengthening of regulatory framework for digital platforms. This recognized that the current laws do not explicitly govern platform conduct or competition issues arising from digital markets.
- (2) Enhanced market monitoring of platform practices. This includes pricing structures, fees, onboarding or delisting decisions, and data usage.

6.1.2 South Africa

South Africa's food delivery market is dominated by two platforms, Uber Eats and Mr D, the latter being locally owned. Other smaller platforms such as Bolt Food also operate in the market. While there are smaller platforms operating in this space, they have faced challenges with building scale due to the dominance of market leaders. Uber Eats and Mr D have benefited from first mover advantages, strong brand recognition, marketing, and substantial investments in delivery services. These early mover advantages coupled with the substantial capital investments have meant that these firms have been able to build 'must have' platforms. Restaurants want to list on them to access consumers, and consumers want to use these platforms for their convenience, and range of offering. Some restaurants also do not have their own delivery services and are therefore dependent on these delivery platforms.

³⁷ Ibid.

³⁸ <https://cak.go.ke/arch/sites/default/files/Online-Food-and-Groceries-Delivery-Platforms-Market-Study.pdf>

The OIPMI revealed that there were concerns related to the commission fees charged by the platforms. Platforms were found to be charging independent restaurants substantially more than restaurant chains. The unequal commission fees meant that smaller independent restaurants find it more difficult to compete against larger restaurant chains.

The conduct of the platforms has had an effect not only on the restaurants that list but also on smaller food delivery platforms entering this space as it raises barriers to entry. In terms of pricing, online food delivery apps get a fixed margin of the total order value from the restaurant. Restaurants are typically charged a commission rate of anywhere between 15 to 30% depending on the popularity of the restaurant and/or size of the restaurant. There is a recognition that platforms need to strike a balance between the commission rates charged and the commercial viability of restaurants, and be open to negotiating a lower commission rate especially where for instance, the restaurant may be small or starting out.³⁹

The inquiry also identified concerns related to price parity clauses. While Uber Eats had begun to phase this out, Bolt Food continued to impose parity requirements compelling restaurants to maintain the same prices across platforms. This restricted the restaurants' ability to price lower on competing platforms and prevented small delivery platforms from competing on price.

The Commission imposed a set of binding remedies aimed at reducing foreclosure and levelling the playing field. Uber Eats was required to implement a standardized tiered commission schedule for independent restaurants, while Mr D was required to introduce a promotional rebate to reduce the disproportionate commission burden placed on smaller restaurants. This is another example of the Commission targeting the behaviour of individual firms through the market inquiry tool.

Third, the Commission required all platforms to remove price parity clauses. Other remedies included that the OIPMI prohibited franchises from restricting franchisees from partnering with emerging platforms. In addition, it required platforms to introduce pop-up notifications stating that restaurants pay commission fees and that prices may differ to those charged in store.

6.1.3 A comparative analysis of pure competition issues in food delivery in Kenya and South Africa

In both countries, food delivery is dominated by a small number of large players. In Kenya there was Jumia Food (prior to their exit), Glovo and Uber Eats. Now the latter two are the largest. This entrenched position has given these firms platform power, to control commission rates, visibility and the terms of service. Kenya's regulatory challenge is compounded by the fact that there are many gaps in its current legal framework and that they do not explicitly govern platform dominance. The CAK's approach to food delivery has been to launch the market study. This market study is not binding on firms, and measures are designed to guide future enforcement.

Kenya's proposed interventions, strengthening the legal framework, improving transparency and establishing domestic contact points, do not necessarily compel platforms to adjust their behaviour in the short term. As a result, it is likely that the status quo in Kenya's food delivery market will persist

³⁹ Interview with food delivery platform, 27 October 2023.

until such time as these recommendations become enforceable. In contrast South Africa's OIPMI remedies directly change the commercial terms under which specific platforms operate.

Concerns regarding the commission rates charged to different restaurants was handled differently by the two countries. Whereas Kenya acknowledges the high commission rates and fees charged, it stops short at proposing recommendations to address these issues. The South African approach directly addresses this issue, identifying it as a key mechanism through which exclusion can manifest.

Finally, Kenya's approach while anticipatory can be argued to treat platform dominance as still emerging in food delivery. The food delivery market is relatively new, and they are less inclined to intervene more strongly. South Africa, on the other hand, is treating platform dominance as entrenched.

6.2 Competition 'plus' issues in food delivery

6.2.1 Kenya

Restaurants are dependent on food delivery platforms. This gives the platforms a form of 'buyer' power over them. Restaurants tend to therefore accept the commercial terms of the leading platforms because opting out would mean losing out on a significant customer base (World Bank Study, 2023). Given that most of the delivery platforms only have head offices outside of Kenya, this created further challenges with respect to dispute resolution. In the event of any competition and consumer complaints cases, the communications have to be submitted to the head offices outside the country. This has time and cost implications to consumers and players in the value chain including restaurants and courier service providers (CAK, 2024). The market study found evidence that various challenges were raised with having the head offices of the platform outside Kenya including lengthy redress processes as some of the user complaints must be handled from the headquarters of the platforms. These customer service offices are often unreachable, and emails may go unanswered for days. To enhance and facilitate the timely resolution of consumer issues as well as value chain issues including competition issues, the market study recommended that platforms have country offices domiciled in Kenya with powers to resolve these issues promptly.

Secondly the market study found that in addition to these issues, platforms unilaterally decided courier charges with couriers having very little room to negotiate. This is indicative of there being a significant imbalance in bargaining power between the platforms and couriers. Couriers indicated that they were required to maintain exclusivity with the platforms that they were signed on. In addition, that they had challenges with unfair contract terms as they were not given room for negotiation as the terms of service are unilaterally devised by the platforms. Additionally, there were frequent changes to contract terms. The market study concluded that platforms had more power over couriers than restaurants concerning exclusive agreements, unfair contract terms, and frequent changes of contracts.

Finally, a key competition plus issue we identified in food delivery in Kenya has been information asymmetry. Digital platforms are able to collect data on order volumes, consumer behaviour, delivery times and customer ratings. Restaurants do not have access to this data and are generally unaware of how these metrics are generated, or how this may influence their visibility on the app. For smaller independent restaurants this can have significant implications on their ability to improve service and optimise their pricing relative to their competitors (World Bank Study, 2023).

To address these issues, the CAK's market study proposed a series of interventions:

- (1) Online platforms should be supported in the development of a framework for self-regulation including developing and implementing codes of conduct. There is need to enact a code of conduct for online platforms where the terms and conditions relating to data should have opt-in/opt-out options, clearly distinguishing consent for the processing of data that is strictly required for the functioning of transactions on the platform and those that are not.
- (2) Encouraging the establishment of local offices or contact points to ensure faster response times and ease of regulatory oversight.
- (3) To address the issues of power relations between platforms and the couriers, the Authority should undertake to analyze the contract terms between couriers and platforms to determine whether platforms have a superior bargaining position over couriers and whether they are abusing the same.
- (4) Further, the Authority may consider enhancing its enforcement powers to allow for investigations into abuse of superior bargaining position and *suo moto* initiation of consumer cases.

6.2.2 South Africa

In South Africa, the dependency of restaurants on delivery platforms, Mr D and Uber Eats, is without dispute. Restaurants have to be on these platforms due to customer demand. This dependency means that they have very limited bargaining power. This includes the commission rate that must be accepted. The inquiry found that the level of commission fees charged were significantly higher for independent restaurants compared to large restaurant chains. This issue is not only a pure competition issue but is also a competition plus issue given that it affects participation in food delivery.

The two leading food delivery platforms both offered significantly differentiated terms of service to the independent restaurants compared to chain restaurants by charging a much higher level of commission fees for food orders on their platforms. The inquiry found that independent restaurants pay between 30-45% more than restaurant chains, and in some cases 50-60% more. This disadvantages these restaurants, forcing them to raise their menu prices. This is because both chain and independent restaurants tend to add a menu surcharge roughly in line with the commission fee, resulting in independent restaurants adding a higher surcharge due to their higher commission fees (CCSA, 2024).

The inquiry found that the differentiation in commission fees impedes and distorts competition in food delivery, particularly to the detriment of SME and HDP restaurants. The Inquiry found that independent HDP restaurants faced further impediments to effective participation and competition on the platforms in the form of onboarding costs and promotions. Differences in the offer of marketing commitments for lower commissions contributes to this effect. The OIPMI required Uber Eats and Mr D to introduce HDP programmes.

The inquiry found that:

- Uber Eats must implement a standardized tiered commission fee structure whereby independent restaurants have the option of selecting from a range of commission fees associated with different

levels of service and/or monthly/ongoing charges. This would offer a material reduction in the commission fee for the standard service levels and includes at least one commission fee tier significantly below that. Mr D Food put in place a promotional rebate for independent restaurants on their gross sales which can be used for discounts or promotions on Mr D Food, along with monthly advertising credits. These interventions would effectively reduce the commission fee paid and promote greater sales for the independent restaurants.

- With respect to national food chains, they were prohibited from restricting or dictating the choice of food delivery platform by its franchisees. However, this did not preclude the national restaurant chains from setting minimum standards or guidance criteria, as long as these do not include terms that are exclusionary of local delivery platforms and new entrants by their very nature. It also does not preclude centralised rate negotiations.

6.2.3 *A comparative analysis of competition plus issues in food delivery in Kenya and South Africa*

In Kenya, the CAK has focused on the development of a code of conduct, strengthening of consent mechanisms for data processing, and encouraging the establishment of local offices to deal with dispute resolution. These recommendations are advisory and reflect Kenya's recognition that this market is still emerging. For example, Kenya calls for the development of a code of conduct allowing for self-regulation of digital platforms with respect to data.

South Africa's approach to the food delivery market focuses on addressing any potential harm. For example, where it recognizes that the conduct of platforms may be harming competition, with respect to the commission fee structure, it imposes remedies to reduce the burden on smaller independent restaurants immediately. South Africa's stance also reflects its strong focus on SME participation both from a restaurant and delivery platform perspective.

6.3 Public policy issues in food delivery

6.3.1 *Kenya*

Public policy issues arising in Kenya's food delivery market extend to infrastructure concerns and regulation.

As mentioned already, infrastructure concerns persist as they relate to last mile delivery. This raises the cost of doing business for smaller firms wanting to enter into food delivery. These infrastructure gaps also affect the quality of service, delivery times and customer experience, which also indirectly affects the competitive landscape.⁴⁰

The treatment of courier drivers could also be considered a public policy issue. These couriers form a critical part of the success of delivery platforms, yet they are unable to negotiate terms or working conditions with the platforms. This points to issues of unfair labour practices and a lack of protection

⁴⁰ Interview with food delivery platform – Dated 27 October 2023.

for these workers. Labour and consumer protection concerns are both important and need to be addressed.⁴¹

The CAK's market study did not directly address the issues of infrastructure in its study, but this was covered in its draft e-commerce policy (2025) which acknowledges the issues of infrastructure and last mile delivery. This is an example of an overlapping concern affecting digital markets where delivery is required. This issue would also lie outside of the mandate of the CAK.

Finally, to address the issues of power relations between platforms and the couriers, it was recommended that the authority analyze the contract terms between couriers and platforms to determine whether platforms have a superior bargaining position over couriers and whether they are abusing the same. Further that the Authority may consider enhancing its enforcement powers to allow for investigations into abuse of superior bargaining position and *suo moto* initiation of consumer cases.

6.3.2 South Africa

There appear not to have been any major public policy issues that arose in the inquiries with regards to food delivery in South Africa.

⁴¹ Interview with expert on food delivery platforms – Dated 27 September 2023.

7 Comparative analysis of Kenya and South Africa's approach in app development

Since the onset of Covid-19, the global app market has experienced a major shift as more consumers become reliant on digital markets. It was estimated that consumer spend on mobile apps had peaked at approximately \$64.9 billion globally in the first half of 2021 across Google Play Store and Apple.⁴² On the African continent, South Africa, Nigeria and Kenya were Africa's largest app markets between Q1 2020 and Q1 2021.⁴³

Nairobi has become a technology hub in Africa, and the mobile app development industry is growing. This has also largely been supported by the Kenyan government which has been driving technological development through support for start-ups and investment in infrastructure.⁴⁴ The primary app stores used by app developers in Kenya are Google's Play Store and/or Apple's App Store. Based on the type and complexity of the app required, app development can take anywhere from between 2 – 6 months.⁴⁵ The process and costs of developing an app are similar across markets and are shaped by several factors. This includes the type of platform, complexity of the app, app development company used, and testing.⁴⁶ The cost to develop an app is relatively low in Kenya compared to other regions in the world. It has been estimated that it is 30% to 50% cheaper in Kenya compared to other parts of the world and is a result of cheaper labour, a large pool of app developers and a growing tech industry.⁴⁷

South Africa's app development landscape has similarly expanded. Local app developers also operate within a landscape dominated by Google Play and Apple's App store.

7.1 'Pure' competition issues arising in app development

7.1.1 Kenya

Pure competition issues arising in app development in Kenya emerge from the structure of the market. App development is relatively cheap to undertake in Kenya. App development itself is not constrained by high barriers to entry. Rather there are challenges with respect to the distribution of apps. In this regard, app developers rely heavily on global app stores, such as Google Play and Apple App Store. These platforms operate as gatekeepers for app listing. Although the cost of listing is not considered insurmountable, the lack of alternative app stores means that app developers are subject to the terms of use as set by these global giants.

⁴² <https://techcrunch.com/2021/07/13/nigeria-leads-mobile-app-market-growth-in-africa-as-use-of-gaming-apps-surge-44-from-q1-2020/#:~:text=Staff-,Nigeria%20leads%20mobile%20app%20market%20growth%20in%20Africa%20as%20use,surge%2044%25%20from%20Q1%202020&text=The%20pandemic's%20effect%20on%20the,%25%20and%20Kenya%20increased%2029%25.>

⁴³ <https://venturesafrica.com/africas-mobile-app-market-is-thriving-heres-why/>

⁴⁴ <https://neetable.com/blog/how-much-does-it-cost-to-develop-mobile-app-in-nairobi>

⁴⁵ Interview with app developer, 23 October 2023.

⁴⁶ Ibid.

⁴⁷ <https://neetable.com/blog/how-much-does-it-cost-to-develop-mobile-app-in-nairobi>

App developers in Kenya recognise Google and Apple as the leading platforms globally and value their reliability however they note concerns about their conditions. These issues have emerged internationally. For Kenya, which has largely left digital markets to evolve naturally, this means that competition in app distribution is subject to rules set outside of its domestic market and by two global players. While there have been concerns globally about the terms of access to app stores, these issues do not appear to be a concern in the Kenyan market as yet. However, the Competition Amendment Bill (2024), suggests that the CAK is repositioning itself to potentially intervene in the future. The draft Bill explicitly includes app stores in its definition of online intermediation services. Further it introduces a new section 40A to the Competition Act, prohibiting the abuse of a superior bargaining position.⁴⁸ The concept of abuse of a superior bargaining position will apply to all contractual relationships irrespective of whether they are in a position of supplier or purchaser.⁴⁹

The Amendment Bill provides that the following conduct will be determined to be an abuse of superior bargaining power:

- delays in payment of suppliers without justifiable reason in breach of agreed terms
- unilateral termination or threats of termination of a commercial relationship without notice or on short notice without justification
- failing to provide the affected party with prior terms and conditions
- unilateral variation of contractual terms, conditions or other rules without prior notification
- transfer of costs and commercial risk to the affected party
- demands for preferential terms unfavourable to the affected party
- imposing unduly difficult conditions for the termination of service
- obstruction of business activities or interference with the affected party's management of its business

This means that in the future, the CAK would have the legal means to challenge the behaviour of global app stores if they disadvantage or harm local app developers and consumers.

7.1.2 South Africa

Competition issues in South Africa's app development space also arise directly from the dominance of the two app stores, Google Play and Apple App Store and the unilateral commercial terms placed on app developers. The OIPMI found that app developers are dependent on these app stores for the distribution of their apps. Alternative app stores are available however these are commercially insignificant. This means that terms of access, visibility and monetisation are determined entirely by these two global players (CCSA, 2023).

The revenue model is to charge a commission on sales only where the app generates revenue through the delivery of digital content. The stores do not permit alternative payment processing services on their stores for all in-app payments (IAPs) and imposed anti-steering rules to prevent app developers from circumventing their IAP by steering consumers to outside options. This means that where

⁴⁸ This would also apply to food delivery platforms discussed above.

⁴⁹ <https://bowmanslaw.com/insights/kenya-competition-amendment-bill-2024-a-new-chapter-in-competition-law-enforcement/>

discovery of the app takes place through the application store, consumers are ignorant of alternative payment options, limiting their discovery and use. The anti-steering rules restrict competition from alternative payment methods for the app available through other channels. The result is high commission fees that either raise the pricing of apps to the detriment of consumers or reduce the earnings of app developers which impedes investment and innovation (CCSA, 2023).

The OIPMI found that Google Play and Apple App Store are unconstrained in the commission fees they charge paid app developers and the anti-steering rule limits competition. To address this distortion, the remedial actions required that Google Play and Apple App stores stop preventing apps from directing consumers to pay on the app's own website, and to ensure continued free use by consumers of content purchased from that website.

7.1.3 *Comparative insights on pure competition issues in app development in Kenya and South Africa*

In Kenya, pure competition issues arise from the lack of alternative app stores for distribution of apps as well as the unilateral terms imposed by Apple and Google on app developers. Although the cost of app listing is relatively low, developers remain limited to these two app stores. This means that they have to accept the terms of use unilaterally decided by these firms. Kenya has historically chosen to adopt a light touch regulatory approach and has left the market to evolve organically. As a result, concerns that may have arisen internationally regarding Google and Apple, have not yet become issues of contention in Kenya. The CAK has not directly intervened in app store governance, nor has app development been the subject of any market inquiry. However, the Competition Amendment Bill (2024) has signalled a marked shift. The Bill is set to enable Kenya to address issues similar to those raised by app developers globally.

In South Africa, there is a similar dependence on Apple App Store and Google, but more explicit competition concerns have been identified. The OIPMI documented evidence of restrictive in-app payment rules coupled with anti-steering rules, which impeded the ability of new and small app developers from competing effectively. The OIPMI required the app stores to stop preventing apps from directing customers to pay on the app's own website.

Kenya has not yet intervened in this market and thus its approach remains anticipatory, which is in contrast to South Africa which has been quite deliberate with its intervention in this market.

7.2 Competition plus issues in app development

7.2.1 *Kenya*

Kenya has a large pool of app developers who can develop apps at a relatively low cost. However, despite this there still exists stark differences in the quality of apps produced given the differences in the technical ability of app developers. For small businesses it can be difficult to distinguish between high quality and low-quality app developers. This is largely due to the lack of a structured rating or referral mechanism for app developers such that businesses generally rely on informal referrals. For small businesses with not a lot of capital backing this can place them at a disadvantage to larger businesses who ensure they use high quality app developers (World Bank Study, 2023).

7.2.2 South Africa

Two main competition plus issues arising from app development in South Africa relate to the distribution and monetisation of apps.

With respect to distribution, as noted, the most popular app stores are Google Play and Apple App store. These are the main app stores that app developers must list on. Although this dependency is a competition issue, the commercial implications and operational challenges that persist can be considered competition plus issues.

App developers often have difficulty navigating the processes imposed by the major players. This can refer to issues with respect to sudden policy changes or delays in getting approval for the app. This has commercial implications and can hinder timely entry or updates to apps, especially for smaller app developers⁵⁰

Another competition plus issue refers to mandatory in-app payments system which the Commission addressed in its market inquiry. While at its core, the commission structures and anti-steering rules, represent pure competition issues, they disproportionately affect smaller developers. Our interviews reinforced that the commission charged has implications especially for small businesses affecting their ability to compete in subtler ways. By restricting app developers from redirecting customers to alternative payment platforms, this made them more dependent on platform-controlled systems, more so than larger players. The remedial actions have required that Google Play and Apple App stores stop preventing apps from directing consumers to pay on the app's own website, and to ensure continued free use by consumers of content purchased from that website.

7.2.3 Comparative insights on competition plus issues in app development in Kenya and South Africa

In Kenya, competition plus issues arise due to the structure of the app development market and the lack of a regulatory framework to govern this market. However, there is also a gap in market mechanisms to signal to small businesses about the rating of the app developer. At this stage it is likely too early to require a regulatory intervention in this market. Instead, what is needed are tools to assist players to participate more effectively such as an accredited referral mechanism.

In contrast, issues arising in South Africa, derive from the dependency of app developers on Google and Apple. These issues had the potential of hindering the ability of small app developers to compete effectively. The OIPMI have allowed app developers to direct customers to external payment channels.

7.3 Public policy issues in app development

7.3.1 Kenya

At this stage it is not possible to identify broader public policy issues arising from app development in Kenya.

⁵⁰ OIPMI transcript 2 November 2021.

7.3.2 *South Africa*

There were no explicit public policy issues arising in app development in South Africa.

8 Conclusion: Trade-offs in regulating digital platforms

The study sought to compare how Kenya and South Africa differ in their approach to regulating digital markets, and what insights can be drawn from this comparison, especially for South Africa. The analysis showed that while both countries face similar challenges, their regulatory response reflected different priorities in addressing market power and other competition concerns.

Kenya's earlier light touch approach to regulation has fostered rapid digital transformation, however, concerns over platform dominance and the impact on smaller players are now emerging. This has led to the recent amendments to the competition act, and specific policies, like the draft e-commerce policy, being introduced to address these concerns. In contrast, South Africa has primarily relied on market inquiries as a tool to address competition issues, however concerns remain about the long-term effectiveness of recommendations made in these inquiries and the legalities on firm-specific remedies.

The study has broadly provided the following key insights:

The importance of early regulatory foresight. Kenya's first mover platforms were able to acquire significant market power during the period in which the approach to competition policy frameworks for digital markets were still nascent. By the time concerns were raised about concentration and abuse of dominance, these structural barriers were already entrenched. Given that for the most part, digital markets are still either in their infancy or early stages of development, South Africa can draw from this experience by strengthening its monitoring functions. Since 2020, South Africa has launched two digital market inquiries which have made binding remedies. The market inquiry tool has been used to signal to players how the market should operate. South Africa, through its market inquiries has targeted remedies on specific dominant firms ex post, rather than industry-wide remedies. However, in most of the digital markets assessed in the inquiries, a single or at most two firms, dominate the industry. Importantly, market inquiries are appropriate for dynamic and rapidly changing markets in which competition authorities do not yet properly know or have the tools to detect or evaluate market distortions, delaying the correction of harm to the market.

There are also questions being raised about whether the Competition Act is sufficient and able to deal with some of the more unique aspects arising from digital markets.⁵¹ This includes issues of big data, algorithms and market power.⁵² There is potentially room for future specific amendments to be made to deal with these issues. However, such amendments will require time to develop and structure considering the dynamic nature of these markets. In addition, there are also issues of institutional capacity and lack of skills to deal with digital markets within the authority. This will require additional training and skills development. This will be crucial to the investigative function going forward.⁵³

Internationally, there has been a noticeable shift towards ex-ante regulatory approaches and the constraining of "gatekeeper" platforms, rather than relying only on ex-post enforcement. For example, the European Union's Digital Markets Act introduced obligations to improve contestability

⁵¹ Interview with independent expert, 19 November 2025.

⁵² Ibid.

⁵³ Interview with independent expert, 19 November 2025.

and fairness in digital markets. This includes restrictions on self-preferencing and requirements relating to access and interoperability.⁵⁴ Similarly, the UK Parliament enacted the Digital Markets, Competition and Consumers Act (the Act).⁵⁵ Under this Act, the CMA can impose conduct requirements and carry out pro-competition interventions such as mandating data sharing or interoperability. Kenya's new Competition Bill (2024) if passed, will place its regulation very much in line with international trends.

These international developments point to the need for South Africa to consider further amendments to its competition framework in the future. However, such interventions are not without costs, particularly in rapidly changing digital markets, where regulation may risk constraining innovation and the development of the market. In addition, given the capacity constraints faced by competition authorities, the development and implementation of such amendments will likely take time.

Competition policy alone cannot guarantee fairness in digital markets. Competition authorities have at their disposal regulation to assist them in addressing issues such as exclusionary conduct, abuse of dominance and anticompetitive mergers. Although it can be argued that both authorities require amendments to their Acts to deal with the dynamic nature of digital markets, it is also clear at least from the Kenyan experience that digital markets present a much broader set of concerns. Issues of consumer protection, data governance, platform transparency and the treatment of users are issues or matters arising in the Kenyan jurisdiction. These issues don't necessarily fit neatly under competition law and policy.

Given the dual mandate of the CAK, this provides them with a much wider set of tools to address anti-competitive conduct and its effects in digital markets. South Africa will require effective coordination between regulators to ensure that market outcomes are both competitive and fair given that it has two separate authorities to address competition and consumer protection concerns.

Data is a competitive asset. The success of Jumia in Kenya and Takealot in South Africa can be tied to the collection and use of data. Regulating data access and ensuring transparency in relation to big data will remain an issue of concern for the foreseeable future. How competition authorities deal with this issue will be important to not stifle competition while trying to promote it. The Competition Commission of South Africa has faced this issue in the WeBuyCars transaction. This transaction was ultimately prohibited for many reasons, one of which was the amalgamation of data between the merging parties which would give them an unfair competitive advantage over others in the market. The latest OIPMI has also sought to address this. Remedies were made with respect to data and required Takealot not to share data which would place its internal retail arm at an unfair advantage. The Kenyan experience highlights the importance of addressing data concerns early enough to avoid these dominant firms from entrenching their positions.

Address infrastructure constraints that shape competition. An assessment of digital markets in Kenya reveals that these markets are not only shaped by platform conduct but also by broader infrastructural

⁵⁴[https://www.hsfkramer.com/notes/crt/2024-03/digital-markets-act-overview#:~:text=The%20Digital%20Markets%20Act%20\(DMA,following%20gatekeepers/services%20so%20far:](https://www.hsfkramer.com/notes/crt/2024-03/digital-markets-act-overview#:~:text=The%20Digital%20Markets%20Act%20(DMA,following%20gatekeepers/services%20so%20far:)

⁵⁵

https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2024/05/digital_markets_competition_consumers_act.pdf

constraints. For example, the lack of a national addressing system which makes last mile delivery difficult, especially for smaller platforms with a relatively smaller capital backing. Kenya is taking proactive steps in dealing with this through the draft e-commerce policy. In South Africa, the dependence of sellers on Takealot for warehousing and delivery highlight similar constraints. The key lesson for South Africa here is that more is needed from a structural perspective to support the growth of SMEs and HDPs which may require coordination amongst various government departments.

Nurture local platforms. Kenya's digital eco-system comprises many local platforms across various digital markets i.e. agritech, insure tech, food delivery, e-commerce, ride hailing, digital credit lending etc. This diversification can largely be credited to policy choices that have enabled experimentation without a substantive regulatory burden. South Africa's digital market on the other hand remains heavily dominated by a handful of global players and a small number of large local incumbents. This reflects not only strong first mover advantages, but also the lack of a coordinated set of enabling policies aimed at fostering local digital platform development and lowering barriers to entry for emerging firms. In this regard, regulatory sandboxes may assist in supporting the experimentation and innovation by local digital platforms while allowing regulators to monitor risks as these markets evolve.

Regulation needs to account for the interlinked nature of digital eco-systems. In Kenya, the dominance of M-PESA in payments has had implications for e-commerce, digital credit lending as well as app development. Kenya recognises that there is a need for regulatory coordination amongst government institutions and agencies. Further that there is a need for a coordinated regulatory response, or legal framework to be developed. For South Africa, as digital markets evolve it may soon find a blurring of the boundaries between markets. It will therefore be important for South Africa to also assess how remedies in one market may affect adjacent markets. Kenya's experience highlights that without this regulatory foresight, South Africa may risk implementing remedies piecemeal, improving outcomes in the short term.

To conclude, this paper did not seek to determine whether the Kenyan or South African approach to regulating digital markets is superior. Rather, it has demonstrated that regulating digital markets often involves navigating complex trade-offs between innovation and competition. The findings suggest that the policy challenge is not choosing between the Kenyan and South African approaches but lies in designing regulations which are able to balance innovation with competition.

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