

**Rethinking Competition Policies for Digital Gatekeepers: Lessons for Kenya and South
Africa**

Authors: Ntwanano Chauke & Donald Kiprop

DECLARATION

The authors declare that this paper is their original texts and all the sources have been appropriately cited. Donald Kiprop is an Advocate of the High Court of Kenya and is currently stationed in the Legal Department of the Competition Authority of Kenya (CAK). Ntwanano Chauke, Mcom Economics (University of Pretoria) is a Researcher for the Market Inquires Division at the Competition Commission of South Africa (CCSA). The opinions of the authors expressed in this publication are personal to the authors and do not represent the official views or policy position of the CAK and CCSA.

Abstract

The rapid advancement in the use of digital platforms has transformed global commerce, communication and innovation by creating a multi-sided market model where platforms act as essential facilitators for interaction between businesses and consumers. Simultaneously this growth creates new competition law challenges arising from network effects, accumulation of extensive data, and sophisticated algorithms leading to concentration of market power among a few dominant digital gatekeepers. Traditional *ex post* enforcement on competition law in response to these novel characteristics, has struggled to keep up with the speed and the complex nature of digital markets. This paper will examine the evolution of competition regulation in regulating digital gatekeepers, focusing on Kenya and South Africa while drawing comparative insights from the European Digital Markets Acts (DMA). It will analyse some of the competition concerns posed by digital platforms including abuse of its market power, the effects on African markets and the emerging issues such as algorithmic collusion, personalized pricing and AI-assisted decision making. The paper will also analyze the existing regulatory frameworks governing the Kenyan and South African jurisdictions and through selected case studies demonstrate the transitioning towards *ex ante* regulatory approaches whose aim is to curb the anti-competitive conduct before it occurs thereby preserving market contestability and therefore promoting innovation and consumer welfare. The paper adopts a doctrinal and comparative methodology and concludes by arguing that Kenya and South Africa should adopt pro-competitive regime tailored to the Kenyan and South African digital value chain balancing international best practices with the imperative of digital sovereignty and inclusive economic growth.

Keywords: *Digital Gatekeepers, Digital Markets, Competition Law, digital platform*

Rethinking Competition Policies for Digital Gatekeepers: Lessons for Kenya and South Africa**1. Introduction**

The global economy is currently experiencing significant and unprecedented digital transformation characterized by rapid technological advancement, rise of Artificial Intelligence (AI) and widespread internet connectivity transcending both physical and geographical boundaries creating an ecosystem driven by data. Over time, digital platforms have evolved from conventional online marketplaces to becoming essential facilities for commerce, communication, finance, and the delivery of public and private services (Nicoletti G, 2023). Consequently, businesses and consumers have consistently utilized these platforms to interact thus placing them in a position to influence access to digital markets, shape the flow of information and direct economic activities. These platforms exercise a certain degree of influence over the consumers and businesses (digital stakeholders) in the digital sector and has thus positioned them as digital gatekeepers as they are able to control over critical digital ecosystems and dictate terms for the participants in the digital economy. In sum, gatekeepers are companies that provide a platform service so large that consumers and business users are dependent on it (Urolovich, 2025).

While there have been substantial economic benefits such as reduced transaction costs, expanded market access and innovation, digital platforms have facilitated the concentration of economic power. Compared to traditional firms, digital gatekeepers gain competitive advantages from network effects, accumulation of extensive data, sophisticated algorithms, economies of scale and vertically integrated ecosystems, which advantages often produce a winner-take-all market. These characteristics similarly leave traders at the mercy of dominant platforms thus entrenching their market power in the digital

economy. In response, competition authorities have moved to reassess the place of traditional *ex-post* enforcement in regulating anti-competitive conduct in the rapidly evolving digital markets and whether the aforesaid enforcement mechanisms remain adequate.

Consequently, rather than relying solely on *ex-post* enforcement, competition authorities at the European Union, Germany, United Kingdom, Brazil and other jurisdictions have adopted a proactive *ex-ante* regulatory framework (Nicoletti G, 2023). This initiative imposes obligations on platforms designated as digital gatekeepers thus preventing the occurrence of anti-competitive conduct before the market harm is entrenched. The idea is to formulate policies that foresee the anti-competitive conduct and have the firms designated as digital gatekeepers comply with said policies in a bid to maintain effective competition and protect consumers from abuse (Nicoletti G, 2023).

Kenya and South Africa have emerged as the continent's digital leaders with each having a substantial internet penetration and thus serve as ripe jurisdictions for this paper. South Africa in addressing the regulation of digital markets have adopted an increasingly interventionist approach by conducting market inquiries and sector-specific investigations into digital platforms that act as intermediaries between consumers and businesses (Elettra Bietti, 2025). Kenya on the other hand has proposed significant legislative reforms aimed at improving oversight in competition in digital markets. While both nations strive to address gatekeeper power of US-based tech-giants, the regulatory responses reveal tensions between wholesale adoption of international practices and pursuing indigenous developmental goals (United Nations Conference on Trade and Development, 2021).

The prevailing tension gives rise to fundamental policy questions such as those of balancing between pushing for innovation and regulating market power. This arises primarily from the advantages of large digital ecosystems which play a significant role in facilitating markets access for small-scale

traders, reduce transaction costs and provide ‘free’ services to consumers; yet this same platforms use their control over critical data and algorithmic ranking to exclude competitors, perform algorithmic ranking to self-preference their products at the detriment of local/domestic firms and limiting consumer choice (Franck, 2026). The other conflict that particularly raises a policy-dilemma is balancing between economic efficiency and regulatory intervention. Critics argue that aggressive intervention including employing tools such as mandated data sharing and interoperability may raise compliance cost and as such may trigger market exit (Elettra Bietti, 2025). This challenge therefore calls for striking the appropriate balance between policies that encourage competition, innovation, consumer protection and inclusive economic development (Freer, Does Africa Need Its Own Digital Markets Act? Key Takeaways from the Centre for Competition Law and Economics’ Webinar on Digital Competition Policy Developments in Africa, 2026).

This paper proceeds to argue that although the European Union Digital Markets Act, offers valuable guidance, their full adoption may risk overlooking institutional, economic and developmental realities of the African economy. South Africa has traditionally developed its policies based on existing tools such as market inquiries to build institutional expertise, while the Kenya’s Competition (Amendment) Bill, 2024 signals towards UK’s model of focusing on the strategic status of an undertaking.

Accordingly, this paper will examine the evolving nature of digital gatekeeping(ers), analyze the challenges it possess to competition arising from their growing market power, evaluate the regulatory frameworks in Kenya and South Africa against international regulations, and propose recommendations for policy formulation towards developing an effective framework that ensures maintaining of competition, while encouraging/preserving innovation, safeguards consumer welfare and thus nurturing fair and contestable digital markets.

2. Gatekeepers and Market Power

2.1. Growth of gatekeeper dominance in digital markets

The rise of Big Tech firms, such as Google, Amazon, Meta, Apple, and Microsoft, has fundamentally reshaped the digital economy, creating unprecedented levels of market dominance. These companies act as gatekeepers to essential digital infrastructures such as search engines, app stores, e-commerce platforms, social networks, and cloud services. Their dominance is not only measured by market share but also by their control over data, algorithms, and ecosystems that lock users and businesses into their platforms. This concentration of power has shifted competition economics away from traditional concerns about pricing toward deeper issues of access, innovation, and consumer choice.

Dominance of these companies is largely driven by strategic acquisitions, vertical integration, network effects, and control over data assets. Meta's purchase of Instagram and WhatsApp eliminated rival social media (Murphy & Palma, 2025), while Amazon's dual control of e-commerce and cloud computing entrenched its influence in both consumer and enterprise markets (Adoldo, 2024). Apple's App Store policies and Google's Android ecosystem exemplify platform lock-in, where developers and users face high switching costs (Milošević & Spasenić, 2025). These practices create formidable barriers to entry, making it difficult for small and medium enterprises (SMEs) to compete, and reinforcing Big Tech's dominance across multiple layers of the digital economy.

While Big Tech firms drive innovation and efficiency, their dominance risks stifling diverse innovation by controlling access to digital infrastructure and data. Consumers face reduced choice, privacy concerns, and dependency on a handful of platforms, while governments worry about technology sovereignty (Lindenmayr, Kircher, Stolte, & Foerderer, 2022). Policymakers are responding with measures such as the EU's Digital Markets Act, U.S. antitrust lawsuits, and the UK CMA

investigations, but regulatory frameworks often lag behind technological change. The challenge for competition economics is to balance the benefits of scale and innovation with the need to prevent entrenched monopoly power in digital markets. In his paper, Urolovich (2025) recommends that regulatory regimes should integrate provisions that explicitly address the unique dynamics of data-driven, multi-sided digital markets, moving beyond traditional price-based criteria.

Unlike traditionally addressed competition concerns, digital gatekeepers present fundamentally different sets of competition challenges. Whereas conventional monopolies, cartels and oligopolies exercise their market power through pricing control and output restriction, digital gatekeepers get their market power from network effects, strategic accumulation of extensive data, sophisticated algorithms, economies of scale and digital ecosystems (Milošević & Spasenić, 2025).

One of the primary drivers of concentration is the network effects. Platforms become more valuable as more users join, which in turn attracts even more participants. For example, Facebook benefits from direct network effects, where users join because their friends are already there. On the other hand, Amazon benefits from indirect network effects, where more sellers attract more buyers. Moreover, Digital platforms have the ability to operate as a participant as well as an intermediary between consumers and businesses in the markets, and as such could influence and control the conditions under which enterprises can compete, consumer can access digital services and how innovation occurs. As the influence of digital platforms continues to expand, these characteristics present as a challenge to traditional competition enforcement frameworks and as such calls for the need to reassess policies and enforcement strategies (Milošević & Spasenić, 2025).

Another factor reinforcing concentration is the role of data as a competitive asset. Dominant platforms collect vast amounts of user data, which they use to refine algorithms, personalize services

and target advertising. This creates a self-reinforcing cycle, where more users generate more data to improve services and attract even more users. Smaller competitors, lacking access to comparable datasets, struggle to compete effectively. This data-driven advantage has been particularly evident in search engines, where Google maintains overwhelming dominance.

Table 1 shows the market share over view of the big tech companies which dominant digital markets. Market concentration in digital platforms reveals a recurring trend, with American technology companies occupying dominant positions worldwide and shaping competition across diverse markets.

Google dominates the sector of internet applications because it is involved in Mobile Browsers such as Android and the Google search engine, Google Chrome, YouTube, YouTube Music, Google Play Store, Gmail, Google Meet, Google Maps, and many other applications. Google as the internet giant has the biggest market share of 94% in South Africa. (Nkuna, Potgieter, & Mukhudwana, 2026). Apple is also featured prominently in the software market through its IOS software which powers the Apple iPhone, iPad, and MacBook. The Apple ecosystem also consist of apps such as Safari browser, iCloud, Siri, App Store, Apple Music and Apple Maps. Apple is the second dominant in the Mobile OS Market with a market share of 16 in 2024. Meta started in 2004 as Facebook is very dominant in the social media space. Meta bought Instagram in 2012 and WhatsApp in 2014 to become the biggest social media giant in the world, and attaining a market share of 68% in 2024.

Table 1: Big Tech Market Share Overview (2024)

Firm	Primary Market	Market Share
Google	Search Engine	94.4
Meta (Facebook)	Social Media	67.5
Google's Andriod	OS Mobile	83.8
Apple's iOS	OS Mobile	16

Source: GMIC Project (2026)

From a regulatory perspective, digital platforms are not strictly regulated like the traditional sector such as Radio, Television, and Telecoms (Nkuna, Potgieter, & Mukhudwana, 2026), thus, concentration in digital markets poses unique challenges. Traditional competition law frameworks struggle to address issues like multi-sided markets, rapid scaling, and cross-market integration. Authorities such as the European Commission and the African Competition Forum have highlighted risks of market tipping, where once a platform achieves scale, rivals cannot realistically compete. This has led to calls for new regulatory tools, including ex-ante rules for gatekeepers, stricter merger controls, and enhanced data portability requirements.

The dominance of digital platforms reflects both the strengths and vulnerabilities of the digital economy. On one hand, dominant platforms provide efficiency, innovation, and global connectivity. On the other hand, their entrenched positions risk stifling competition, reducing consumer choice, and undermining local innovation. Addressing these challenges requires a balance

between fostering growth and ensuring fair competition. Without intervention, digital markets may continue to consolidate around a handful of big tech firms, shaping not only economic outcomes but also social dynamics in African markets.

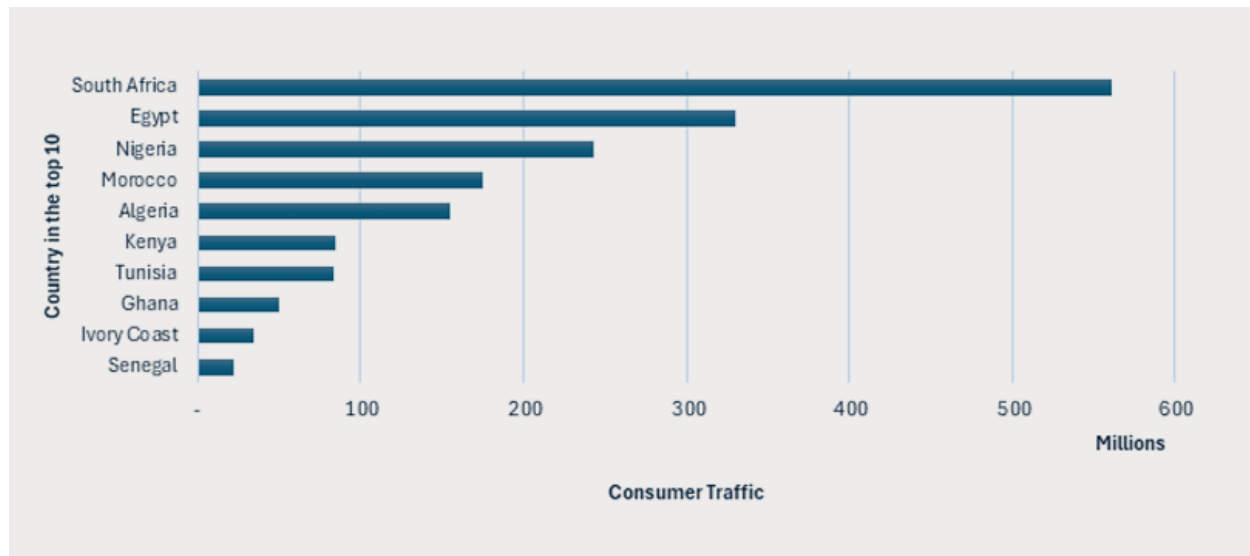
2.2. Dependence of SMEs on Digital Platforms

In the era of the digital economy, SMEs, which are the backbone of most economies (Asadullah, 2021), have had to restructure their operations and transform their business models to survive and grow in the digital economy. SMEs increasingly rely on digital platforms to access markets, essential infrastructure, and connecting directly with suppliers and buyers, fostering efficient communication and expanding market reach (Nayak, Nayak, & Joshi, 2025). Various studies have suggested that SMEs can leverage digital platforms to overcome their resource limitations and benefit from the opportunities that are driven by the platforms (Asadullah, 2021). Platforms such as Amazon and eBay allow SMEs to sell products globally without the need for physical stores, while app developers depend on Apple's App Stores and Google Play to reach billions of users. This dependence stems from the high importance, low discretion, and limited substitutability of the digital platforms, and provides SMEs with visibility and scale that would otherwise be unattainable, but it also ties their success to the rules and algorithms controlled by Big Tech companies.

The African digital economy has experienced rapid growth in recent years, though it remains in the early stages of development compared to more mature global markets. Key indicators include revenue growth, customer base expansion, access to finance, and operational efficiency (Noutchie, 2025). The Global System for Mobile Communications Association (GSMA, 2025) report that, in 2024, the mobile sector contributed \$220 billion to Africa's economy, representing 7.7% of GDP. This is expected to increase to \$270 billion, or 7.4% of GDP, supported by expanding mobile services,

enterprise digitalisation and broader adoption of digital technologies (GSMA, 2025). Figure 1 below shows consumer traffic to digital platforms in 10 countries on the continent. South African, Egypt and Nigeria show the highest consumer traffic to digital platforms in Africa, while consumer traffic in Morocco, Algeria and Kenya is gradually increasing.

Figure 1: Consumer Traffic in Digital Platforms in 10 countries on the African Continent (2024)



Source: (Govinda, et al., 2024)

Noutchie (2025) provides a comparative analysis on the use of digital platforms by SMEs in Kenya, South Africa and Nigeria. As South Africa has the highest consumer traffic to digital platforms, SMEs in benefit from sophisticated digital infrastructure and well-developed fintech ecosystems. Noutchie (2025) notes that 68% of SMEs use digital platforms in at least one operational area, and 45% are actively integrating them into sales and marketing strategies. SMEs leverage platforms such as Takealot and Yoco, and cloud-based solutions for financial management and analytics.

The gradual increase of digital adoption in Kenya has been demonstrated by SME engagement with digital platforms, particularly mobile money services like M-Pesa. These platforms enable seamless transactions, real-time fund transfers, inventory management, and loan access, especially for micro and small enterprises operating in the informal sector (Noutchie, 2025). The GSMA (2025) reports that in 2022, 80% of SMEs in Kenya's urban and peri-urban regions use mobile money regularly. Furthermore, SMEs generated an average revenue increase of 23% and improved liquidity due to reduced dependence on cash-based systems.

In Nigeria, the adoption of digital platforms has gained momentum, particularly in urban fintech, as SMEs use e-commerce platforms like Jumia, Paystack, and Flutterwave to expand customer reach and streamline transactions (Noutchie, 2025). In 2023, the World Bank (2023) reports that nearly 52% of SMEs in Nigeria are digitally active, and reporting revenue increases of up to 17%.

The growing dependence of SMEs on digital platforms underscores the need for support regulation. Policymakers must balance enabling digital adoption with safeguarding SMEs from exploitative practices. Without measures to safeguard SMEs, their dependence on digital platforms could evolve into systemic vulnerability, and undermining long-term competitiveness.

3. Competition Concerns Posed by Gatekeepers

3.1. Abuse of Market Power

Self-Preferencing

This competition concern arises where a dominant digital platform grants systematic privileges to its products or services over those of competing businesses which depend on the same platform to reach its customers. The digital platforms implement the said conduct through search rankings, online

marketplaces, digital advertisement forums, and application stores (Odima, 2026). Whereas traditional forms of discrimination can be easily detected due to their outright conduct, self-preferencing is embedded within the algorithm, lacks transparency and is hard to detect for regulators and even for the customers to detect that there may be a form of bias or commercial preference towards a particular product of interest. By using ingrained algorithmic decision-making processes predetermined to showcase a preferred product, it leads to the distortion of competition by reducing the visibility of rival products, limits choices of consumers and widens the barriers to market entry (Urolovich, 2025).

Platforms such as google have consistently been used by consumers and businesses and have since attained the status of being an essential facility in the current digital era. The European Commission in the *Google Search (Shopping) case* investigated and fined Google Inc. for engaging in self-preferencing by systematically granting privileges its own comparison-shopping services over other providers with similar products (European Commission, 2017). This case demonstrated how digital platforms could abuse their dominant positions and although it arose in the European Union, the underlying principles can be used in the African digital markets where major industries, governments, and SME(s) are increasingly relying on the platform to be extremely relevant in providing their services, advertising, running daily business operation.

Leveraging Market Power

Considering their influence over digital markets, dominant digital platforms exercise leveraging strategies such as exploiting the demand of an essential digital service/product and bundling them with multiple services/products or imposing tying arrangements leaving consumers with little choice but to purchase the said service/product (Elettra Bietti, 2025).

Additionally, digital ecosystems can integrate numerous services such as operating systems, cloud computing, payment services, advertising platforms and messaging services into one interconnected system. Consequently, consumers of the said platform end up increasingly dependent on a single provider making it difficult for competitors to gain access to the market. This form of leveraging the digital ecosystem forecloses competition and may restrict interoperability and thus may further entrench the market power of the current dominant digital platform (Pop & Coelho, 2024).

Data Concentration

Digital platforms provide services to users for “free”; however, while interacting with a digital service, the digital platforms accumulate data enabling them to improve their algorithms, personalize service, optimize advertising, predict consumer behaviour and develop sophisticated Artificial Intelligence systems. Essentially, digital services are not entirely as “free” as users of the service tend to “pay” with the data they feed the digital platform (Pop & Coelho, 2024). This accumulation of data creates a self-reinforcing competitive advantage as more data generated by the user improves the performance of the platform, promotes the platform and further strengthens their market power. These characteristics are of concern to competition authorities considering their potential to limit essential business information, interoperability and data portability as dominant platforms tend to restrict access to commercially significant data or prevent users from transferring their data to competing services (Pop & Coelho, 2024).

3.2. Effects on African Markets

Market Entry Barriers and innovation

The foregoing arguments demonstrate how digital platforms exhibit strong network effects, possess large volumes of data and utilize algorithms whereby the value of the platform continues to increase with the number of users and consequently creating a significant barrier to entry as competitors would struggle to attract sufficient users to effectively compete (Freer, Does Africa Need Its Own Digital Markets Act? Key Takeaways from the Centre for Competition Law and Economics' Webinar on Digital Competition Policy Developments in Africa, 2026).

In both Kenya and South Africa, these barriers are accentuated by the uneven digital infrastructure, limited investment capital, and the high dependence on existing foreign-based platforms to market technological start-ups. Dominant platforms such as TikTok and Google therefore end up becoming unavoidable trading platforms increasing its dependence and reducing the opportunity for independent innovation and therefore resulting in limited emergence of local competitive digital ecosystem (Freer, Does Africa Need Its Own Digital Markets Act? Key Takeaways from the Centre for Competition Law and Economics' Webinar on Digital Competition Policy Developments in Africa, 2026).

Opportunities for SMEs and Start-ups

Kenya and South Africa, are both characterized by a growing economy of small and medium enterprises (SMEs) which have seen a high rate of adoption of technology for marketing, logistics, electronic payments and customer engagement. The digital platforms have provided a wider reach of markets for many businesses compared to conventional means leading to a wider adoption of its use

(Nayak, Nayak, & Joshi, 2025). However, this dependence creates vulnerable situations which digital platforms can take advantage of, including limiting their bargaining power when negotiating terms and conditions of a platform (which are normally fixed on a take-it-or-leave basis). They may also be subjected to unilateral charges and changes limiting their search rankings, advertising opportunities or access to advanced digital infrastructure. These limitations consequently works against competition as they limit the ability of smaller firms to compete on equal terms (Nayak, Nayak, & Joshi, 2025).

Consumer Welfare, Data Privacy and Platform Fairness

Instead of the traditional price consideration in exchange for a service, digital platforms offer their services in exchange for data which may extend to personal information from users. This information is then monetized by digital platforms through advertising, profiling users, algorithmic decision-making and training sophisticated AIs (Pop & Coelho, 2024).

Consequently, the intersection of competition law with the issues of data privacy, user autonomy and fairness often poses as a challenge with users facing exploitative data collection practices as a precondition to access digital services. These practices necessitate a shift from the conventional understanding of consumer harm towards adopting broader concepts of digital market welfare (Pop & Coelho, 2024).

Cross-Border Digital Trade

Digital platforms have played a crucial role in facilitating cross-border trade globally including in both Kenya and South Africa connecting the businesses with consumers from different jurisdictions. Their significance will continue to gain traction with the continued technological advancement and following the implantation of regional policies such as the African Continental Free Trade Area (AfCFTA)

Digital Trade Protocol which aims at integrating continental digital markets (Freer, Does Africa Need Its Own Digital Markets Act? Key Takeaways from the Centre for Competition Law and Economics' Webinar on Digital Competition Policy Developments in Africa, 2026).

With dominant international platforms operating across different jurisdictions, regulation of said platforms raise complex concerns considering that their operations continue to remain subjected to fragmented national regulatory frameworks. This phenomenon allows for the said platforms to take advantage and complicate enforcement of competition law by individual states thus prompting a need for greater regional cooperation (Freer, Does Africa Need Its Own Digital Markets Act? Key Takeaways from the Centre for Competition Law and Economics' Webinar on Digital Competition Policy Developments in Africa, 2026).

3.3. Emerging Competition Concerns

Algorithmic Collusion

With the advent of AI, there has been fundamental transformation in the way companies approach their pricing strategies. Instead of the conventional sharing of prices, meeting in golf clubs, or hotels to discuss prices, sophisticated pricing algorithms can be used to continuously monitor competitor's prices, predict consumer behaviour, and automatically change/adjust prices; while the economy does benefit from the use of technological systems, it creates room for new risks such as algorithmic collusion (Pop & Coelho, 2024).

Algorithmic collusion occurs where algorithms facilitate coordinated market conduct without the need to have explicit communication between competing firms as they emerge through autonomous machine learning which may be hard to detect and additionally prove as challenge to competition

authorities to demonstrate the existence of agreement or concerted practice using the traditional enforcement tools (Pop & Coelho, 2024).

Considering that current legislations were largely drafted before widespread adoption of AI, the risks of algorithmic collusion is particularly relevant in regulating cartel conduct especially for markets in both Kenya and South Africa. The markets highly likely to be susceptible include the e-commerce platforms, ride-hailing apps, telecommunication services and online travelling agencies among others (Elettra Bietti, 2025).

Personalized Pricing

The advancement of AI has enabled platforms to analyse behavioural data and implement a sophisticated form of pricing where prices are tailored specific to consumer characteristics, their purchasing history, location and the type of device. Unlike physical shops where consumers can compare prices in real-time, digital platforms have limited transparency and as such said consumers are frequently unaware that prices they are being offered differ from other users. The risk posed is mainly facilitated by access to extensive behavioural data that allows for targeted and personalized pricing and considering its novel nature, it raises significant policy and economic questions as to whether these pricing practices are fair or exploitative (Franck, 2026).

AI Decisions

The use of AI is undeniably useful and has increasingly seen its way into governing critical commercial decisions including search rankings, moderation of content, recommendations of products, advertisement place, access to other digital platforms and assessment of credit status. While they improve efficiency of a platform to run its operations, their limited transparency poses significant

challenges for competition authorities seeking to understand the effect of algorithmic decisions on competitors and consumer welfare. This challenge further raises questions as to who is to be held accountable, and where to exercise regulatory oversight thus calling for greater technical expertise and enhanced investigative powers among competition authorities to address any potential anti-competitive concerns (Pop & Coelho, 2024).

4. Existing Regulatory Frameworks

The rapid increase in the development and adoption of digital markets has exposed limitations in the traditional competition landscape prompting the need to reconsider policies and legislation governing regulations of market power in digital-based economies (Bietti et al., 2025). Traditional competition enforcement consistently relies on *ex post* enforcement mechanisms where the anti-competitive conduct is addressed after it has occurred and has often proved slow and reactive. Regarding its application on digital markets, by the time an investigation into anti-competitive conduct such as an abuse of dominance is concluded, network effects and data accumulation may have entrenched their market position of the subject platform (Bietti et al., 2025).

Considering this challenges, competition authorities have shifted towards *ex ante* intervention mechanisms where the digital gatekeeper is subjected to predefined conditions intended to ensure that competition in the market is preserved before any harm materializes (Bietti et al., 2025).

4.1. South Africa's Online Intermediation Platforms Market Inquiry

In 2021, the Competition Commission of South Africa launched the Online Intermediation Platforms Market Inquiry (OIPMI) under Section 43B of the Competition Act (CCSA, Online Intermediation Platforms Market Inquiry (OIPMI), 2023). The inquiry was motivated by concerns

that certain features of online platforms, such as e-commerce, travel, food delivery, and digital advertising, were impeding and distorting fair competition. The OIPMI aimed to ensure that SMEs and historically disadvantaged persons (HDPs) can participate meaningfully in digital markets without being excluded by dominant global platforms.

The OIPMI focused on business-to-consumer (B2C) platforms that facilitate transactions between businesses and consumers. This includes e-commerce (Takealot), online classifieds (OLX, Gumtree), app stores (Google Play, Apple App Store), travel and accommodation platforms (Booking.com, Airbnb) and food delivery services (Uber Eats, Bolt Food). Digital advertising was also included, particularly where it creates barriers to entry for SMEs. The OIPMI thus identified several practices that distort competition, including, (i) price parity clauses, (ii) self-preferencing, (iii) use of sensitive business data, and (iv) differentiated trading terms.

In 2025, the CCSA issued a Guidance Note on Online Intermediation Platforms (CCSA, 2025). This guidance note provides clarity on what types of conduct may be considered harmful and advises dominant platforms to justify such practices with strong efficiency arguments. Platforms are expected to incorporate these guidelines into their compliance frameworks, ensuring fair treatment of SMEs and HDPs. By curbing unfair trading terms and ensuring transparency, these guidelines aim to create a more level playing field. This is particularly important for African markets, where digital platforms are increasingly central to commerce, and where inclusive participation is a policy priority.

South Africa's guidance note on Online Intermediation Platforms align with international regulatory development such as the EU's Digital Markets Act (DMA). These frameworks similarly target gatekeeper platforms and impose obligations to ensure contestability and fairness. As digital markets

expand, these frameworks and guidelines must continue to adapt, ensuring that dominant platforms do not undermine competition and SMEs and HDPs can thrive in the digital economy.

4.2. Kenya's Competition Amendment Bill

Kenya's Competition (Amendment) Bill, 2026 signals a deliberate shift towards prescriptive rules which are set to 'modernize' the mandate of the Competition Authority of Kenya (CAK). The proposed reforms seek to address platform-based business models that are characterized by network effects, algorithmic decision-making and data-driven market power. The Bill grounds the mandate of the authority in regulating and exercising oversight over digital markets and specifically addressing the limits to gatekeeper power.

A significant proposal is the shift from the traditional definition of **strategic market position**, which initially focused on dominance based primarily on market share towards recognizing that substantial market influence can be exercised through network effects, switching costs, access to commercially significant data and technological advances. Clause 4(7) Amendment Bill further provides that in assessing market power, the conventional market threshold need not be satisfied; thus, appreciating the distinguishing nature of digital markets from the traditional markets. Clause 4(5) of the said amendment further provides for the factors that the CAK would consider to assess strategic market position including economies of scale, network effects, access to commercial data relevant for competition, the degree of competitive pressure generated through innovation, the ability of users to multi-home and their significance as an intermediary in the market (Republic of Kenya, 2026).

The Amendment Bill also addresses when digital markets can be considered to be **abusing their superior bargaining power** which extends the traditional buyer power to include the relationship between the digital platform and the business users dependent on the platform. A digital platform may

be considered to have superior bargaining power if it has the ability to create an imbalance in rights and obligations relating to its commercial relations with the business users dependent on it and is challenging for the business user to find another economically viable platform (Republic of Kenya, 2026).

Further, the Bill under clause 40B6 identifies several forms of prohibited conduct by digital platforms. They include unreasonable collection or processing of business user data, unilateral variation of contractual terms without adequate notice, the imposition of unfair contractual conditions, and the creation of unreasonable obstacles to terminate platform relationships. These proposed provisions recognize that anti-competitive practices within the digital markets arise contractually rather than the conventional exclusionary practices alone (Republic of Kenya, 2026).

Perhaps the most significant provision of the Bill is the enhanced powers conferred upon the CAK. Clause 40B grants the CAK power to, where it identifies a sector(s) vulnerable to abuse of superior bargaining power, monitor platform conduct, impose reporting and prudential requirements and regulations to ensure compliance, and develop a binding code of practice governing commercial relationships between the digital platform and the business users (Republic of Kenya, 2026). The proposed provision enables the CAK to proactively intervene before the anti-competitive conduct/practice becomes entrenched.

Notwithstanding these progressive reforms, unlike conventional contracts, agreements with digital platforms rely on click-wrap or browse-wrap agreements where the user basically accepts the terms and conditions before accessing the service. These agreements are rarely negotiable, signed or even retained by users and are subject to unilateral changes by the digital platforms with minimal notice to

the users. Consequently, it may prove difficult for CAK to determine the contractual obligations at a specific time or if the amendments result in the abuse of superior bargaining obligations

4.3. Comparative insights from EU's Digital Markets Act

The European Union's Digital Markets Act (DMA) has emerged as the leading global framework for regulating digital gatekeepers representing the shift from traditional mechanism of enforcing competition law. While conventional competition law enforcement, as discussed by this paper, relies on *ex post* mechanisms, the DMA introduces *ex ante* regulatory approach. The DMA imposes predefined obligations on digital platforms which have been designated as gatekeepers ensuring that the market distortions are prevented before they occur (Urolovich, 2025). The DMA has had a major influence on other regulatory bodies including those of United Kingdom (UK), Australia, Brazil, South Africa and Kenya. The said regulations drew their inspiration from the DMA and modified it to suit their economic, social and legal backgrounds (Urolovich, 2025).

Core Objective and Regulatory approach of the DMA

The principal objective of the DMA is to ensure that there is fairness and contestability in the digital markets. The DMA achieved thus by regulating digital platforms which serve as the primary/crucial gateways between business user and consumers. It is premised on the fact that there are digital platforms which operate as a central tool to the extent that they can influence the markets as demonstrated in the aforesections (Ireland, 2024).

By imposing predefined conditions before the anti-competitive conduct becomes entrenched, the DMA is able to preserve a competitive digital market structure; a proactive approach which differs greatly from the conventional mechanisms of competition enforcement (Elettra Biatti, 2025). This

DMA system which sets predetermined obligations also by large, reduces the need for prolonged litigation while enabling the competition authorities to monitor and address any structural competition concerns more effectively (Elettra Bietti, 2025).

The DMA model is prescriptive at best, subjecting digital platforms that have been designated as a digital gatekeeper to a comprehensive list of obligations and prohibitions, including restrictions on self-preferencing, limitation on combining user data across services without consent, requirements on interoperability and portability and prohibitions against discrimination of business user data. The DMA also limits the scope on the application to justify prohibited conduct underscoring the view that some practices are inherently capable of undermining competition (e-Conomics, n.d.). The UK unlike Europe, adopted more flexible approach allowing firms to justify the prohibited conduct and introducing the concept of Strategic Market Status (SMS) where obligations are tailored to specific characteristics of each designated gatekeeper. A similar approach is by the US where they rely on affirmative defences to justify an otherwise impugned conduct including justifications such as cybersecurity, and preservation of competitive process (Pop & Coelho, 2024).

These comparative approaches demonstrate the continuing debate on refining regulations in the digital markets towards achieving a balance where the market is not overly regulated to that it limits business and innovation.

Criteria for Gatekeeper Designation

Rather than relying solely on the traditional market analysis, the DMA introduces an objective framework for identifying digital gatekeepers including its focus on whether the digital platform provides a core service and whether it occupies a strategic position within the digital ecosystem. In particular, the DMA identifies two approaches, the quantitative and qualitative analysis (Ireland, 2024).

For the quantitative approach, the DMA establishes a threshold where a firm is presumed to be a gatekeeper where it generates a European Economic Area turnover of at least €7.5 billion, and a market cap of €75 billion annually and serves more than 45 million monthly active end-users and 10,000 yearly business users in the EU (Ireland, 2024).

As for the qualitative analysis, the European Commission conducts an assessment and designate a platform as a gatekeeper after conducting a market investigation even if it does not meet the quantitative threshold. The designation of Apple's iOS illustrates the Commission's willingness to adopt a functional analysis where the market realities justify the intervention of the regulator (Ireland, 2024). This qualitative assessment is similar to the approach taken by Kenya, where the proposed Competition (Amendment) Bill adopts a broad definition of digital activities. However, it departs from the EU model by introducing the concept of 'strategic market position' (UK's approach) enabling the CAK to assess market power using broader qualitative factors rather than the conventional dominance thresholds (Elettra Bietti, 2025).

South Africa, on the other hand, has taken a different regulatory approach. Rather than dedicating a specific gatekeeper legislation, South Africa opted to utilize market inquiries to impose remedies, which, notwithstanding the novel model, resembles obligations imposed under the DMA (Elettra Bietti, 2025). Kenya and South Africa's approach illustrate that they are not merely transplanting European Regulation but adapting them to practices that appreciate the economic realities of their respective jurisdiction.

Critiques by Scholars: The Schweitzer Approach

Despite the aforementioned influences the DMA has on the global competition regulation arena, commentators, including Professor Heike Schweitzer, point out some of the limitation of the DMA.

He argues that the regulation's objectives are still insufficient, and in particular, the meaning assigned to 'fairness'. Schweitzer posits that the absence of precise definition risks converting the DMA into a tool for misuse due to its broad nature instead of the intended competition tool (Franck, 2026).

Schweitzer further questions the uniform application of the DMA on all digital platforms regardless of their business model, technological characteristics and the competitive environments. He notes that by imposing similar obligations on all digital platforms designated as a gatekeeper, it may produce an inefficient or disproportionate regulatory outcomes. Schweitzer proposes that a more nuanced framework would allow for obligations to be tailored specific to different market circumstances promoting competition while preserving innovation (Franck, 2026).

Additionally, Schweitzer critiques the DMA's limitation of scope on applying for an exemption justifying the anticompetitive conduct. The scholar argues that a more flexible approach would allow for the Commission to distinguish between genuinely harmful conduct and commercial practices that enhance innovation consumer welfare and market efficiency (Franck, 2026).

Shweitzer's approach is particularly relevant to the Kenyan and South African jurisdictions given the developmental significance of attracting digital investment and limited institutional capacities. The experience of Kenya and South Africa adopting balanced approaches may be well better suited for their economies compared to the wholesome adoption of the DMA model.

5. Case Studies

5.1. Google Search (Shopping) Service

To understand how dominant digital platforms exercise their dominance over the markets through self-preferencing, the Google Shopping case serves as a significant legal precedent. This case highlights

the limitations experienced by *ex post* enforcement mechanism and directly informs the design for contemporary regulations on digital markets.

The Conduct

The European Commission made a finding that Google Inc. and Alphabet Inc. used their dominant position, where they dominated the national market for general search in the European Economic Area (EEA) having market shares of upto 90% to benefit their own comparison shopping service (European Commission, 2017). The abusive conduct consisted of two main components including prominent placement and rich graphical display. Google was found to have position its own services at the top of the search results page in product universal and shopping units. Further its own shopping results were displayed with pictures and dynamic pricing information which enabled their serices and products to achieve significantly higher click-through rates than the rivals simple text links (European Commission, 2017).

Mechanisms of Abuse

The Commission found that Google subjected the comparison shopping services to demotion algorithms such as Panda which had the effect of reducing the visibility in the generic search results. Google argued that the algorithms were designed to penalize sites which had low original content; however, the Commission found that Google's own shopping service was not subjected to these demotions despite having similar characteristics. The Commission noted that internal emails confirmed that the executives were aware that their shopping services would not rank organically is they were subjected to the same standards as the rivals (European Commission, 2017).

Anti-competitive effects

The Commission stressed the significance of user traffic for the ability of a comparison-shopping service to compete effectively and found that the diverted traffic by Google led to a lasting decrease in generic search traffic to rivals and consequently increased traffic to Google's own service. The Commission further concluded that Rivals to Google's shopping service could not replace their lost organic traffic with other sources such as AdWords considering that the paid advertising was more expensive and addressed different user needs. The Commission noted that by depriving their rivals of the traffic required to reach critical mass of users that would allow them to compete against Google. This deprivation also has the effect of reducing the rival's incentive to innovate and further due to the higher fees for merchants and attendant higher prices for consumers, risks rival exit, eventually leading to a potential to foreclose competing comparison shopping services (European Commission, 2017).

Regulatory Significance and Lessons for Kenya and South Africa

The Google Shopping decision presents an opportunity towards furthering the evolution of digital competition law and its enforcement mechanisms. The case illustrates the ability of dominant digital gatekeepers to function as private regulators where they determine competitive conditions governing the entire digital ecosystems by establishing rules under which businesses operate considering they have control over search rankings, online market places, application stores and recommendations systems (Franck, 2026). This is particularly significant for Kenya and South Africa considering the role of search engines, online marketplaces, application platforms and digital advertising platforms as gateways for connecting local businesses and consumers.

Notably the investigations began in the year 2010 and was concluded in 2017 which duration, Google's market position continued to strengthen, and thus representing the limitations of conventional *ex post* competition enforcement mechanisms. This illustrated how lengthy investigation processes may work

against competition as it allows digital markets to continue entrenching an impugned conduct and consequently irreversibly tip the market in their favour (Franck, 2026). This reinforces the idea of proactively regulating the digital markets for both Kenya and South Africa to therefore avoid the undesirable effects of lengthy investigations.

The case further serves as a precedent on self-preferencing which informed the Article 6(5) of the DMA expressly prohibiting self-preferencing by gatekeepers transforming traditional periods of investigation and litigation into direct enforceable regulatory obligation codifying the principles emerging from this said case. Broadly, the Google shopping case establishes that algorithmic design, digital ecosystem architecture and platform governance form a significant part of competition law scrutiny (Urolovich, 2025).

6. Conclusion And Recommendation

The transition for competition authorities towards proactive *ex ante* regulation for digital gatekeepers marks a fundamental shift from the traditional *ex post* competition enforcement therefore shaping future competitive structure of the digital ecosystems into ‘real-time’ enforcement (Elettra Bietti, 2025). For Kenya and South Africa, this evolution represents a strategic foothold towards asserting ‘digital sovereignty’ and safeguarding competition, ensuring contestability and promoting innovation.

Accordingly, Kenya and South Africa in a bid to secure their digital economies should investigate the role of algorithmic processes which play a decisive role in influencing gatekeeper behaviour. In essence, the Kenyan and South African regulators need to address enforcement oversights (gaps) by employing Regtech (regulatory technology) solutions, which are automated digital market monitoring tools to analyze algorithmic outcomes in real time (Elettra Bietti, 2025).

Additionally, the competition authorities must require gatekeepers to enhance transparency and be obligated to provide business users with access to essential performance data and provide consumers with clear information regarding items containing personalized prices and fees (Franck, 2026). Further regional harmonization framework would serve to bridge any regional gaps; this includes ensuring that there is effective competition enforcement mechanisms such as leveraging on joint investigations, case referrals and developing common standards for access (Freer, 2026).

Kenya and South Africa could also employ the use of negative obligations where conduct such as self-preferencing are banned thus minimizing on compliance costs. Further, the competition authorities should treat dominant digital platforms as ‘critical infrastructures with a ‘special’ responsibility considering their strategic position, to act as a neutral facilitator for public services and local SMEs (Elettra Bietti, 2025).

By aligning the said competition policies, Kenya and South Africa can shift from being a mere consumer of digital services to becoming an active digital platform regulator that adapts to the fast-paced world of technological advancement, prioritizes inclusive growth and fosters local innovation.

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