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# Country Statement:
# Competition Issues in the Digital Economy
# – The Case of Kenya-

**Contribution by Competition Authority of Kenya**

# COUNTRY STATEMENT

# COMPETITION ISSUES IN THE DIGITAL ECONOMY

# THE CASE OF KENYA

### A. Introduction

1. The Digital Economy includes, but is not limited to activities that are influenced in one way or another by the digital world. The digital world implies that transactions are carried out using technological devices that include electrical gadgets and computers.

2. Competition by business entities in the digital world is considered different and suave from that in the traditional world. The traditional world of competition looks at issues of competition from a direct and face value perspective such as the number of firms on a given market or sector, how they carry out their activities and their sizes (Khumalo, 2010).

3. The digital world, on the other hand, is more complex as the market and its activities are virtual and intangible. Analysis of competition issues, therefore, requires a new and different approach that is able to reveal the tenets of competition from a market that is otherwise virtual.

4. Stakeholders in the digital space and competition agencies grapple with various issues such as the ever evolving world of technology, technological mavericks and free spirits, market definition in the digital economy and market power.

5. The digital economy is characterized by high innovation in that while the traditional sectors were entrenched based on incumbency, the players in the digital economy have to recoup; the innovation comes with Intellectual Property Rights, meaning that competition agencies have to work with more than one regulator to enforce the law. The agencies may in many cases, have challenges in terms of the requisite knowledge required to not only regulate, but also understand the workings of the innovation.

### B. The Ever-Evolving World of Technology

6. Technology is so rapidly advancing that competition regimes are forced to change regulation in

order to address the emerging issues. The nature of regulation in most countries is that agencies have to identify a need and address it through amendments to the relevant tools of competition.

7. The process of amendment of these tools requires a substantial amount of time. By the time the process is concluded and the amended tools are released for use the rapidly evolving digital economy may have changed. For competing entities in the digital economy, lack of innovation means that one can easily be edged out of the market and rendered obsolete within a short time.

8. For instance, the European Union (EU) has sighted an increase in cross-border business activities made possible by the growing digital economy. The EU has recorded 20% increase in e-sales over retail sales as at 2016 ("Key Figures on Europe — 2016 edition", 2019).

### C. Technological Mavericks and Free Spirits

9. Mavericks ride on innovation and new ways of production to edge out incumbents, driven by minimal cost of production (Johansson, Karlsson & Stough, 2006). They are considered to bring market disruptions as they distort a competition equilibrium that is pre-existing in a given sector prior to their entry.

10. Through efficiencies brought about by technological breakthroughs, mavericks are able to produce quality products at very low cost. A good example of such breakthroughs is the App-based Uber case in Kenya.

11. The traditional taxi hailing players in the market faced stiff competition from the online based taxi hailing application; Uber reduced the cost of operating the taxi business substantially to the benefit of the consumers. The traditional taxi operators were unable to match the excessively low prices that the new entrant taxi was offering in the market.

12. The traditional taxi operators approached the Competition Authority of Kenya (the Authority) alleging that Uber was under-pricing their services. Upon reviewing the matter, the Authority,

established that there was no predatory pricing as alleged by the traditional taxi operators and that the consumers were able to benefit from this new entrant. Further, the entry of Uber did not introduce any barrier to entry and the traditional taxi operators had the option of switching to the app-based taxis, with ease.

13. The Uber case in Kenya resonates with many others around the world. In the EU for instance, cases on use of algorithms and Resale Price Maintenance are common, in that an online seller discourages retailers from competing on price, regardless of the cost of transportation. With algorithms, cost of transport and storage is greatly minimized through prudent maximization of time and place utilities.

14. Artificial Intelligence (AI) has helped also shape consumer behaviour and inform manufacturers and sellers on crucial market intelligence data. The ability to analyse huge volumes of data has made it possible for markets to rely on AI to remain operational and competitive, even at very low cost of production where margins are squeezed towards zero.

**D. Market Definition in the Digital Economy**

15. The development of the competition act is motivated by the existing scenarios in the market. Additionally, competition authorities draft guidelines to explain the act further, where it is not explicit (Leonardi, n.d.) and tailor-made to their specific local /domestic context.

16. The Market Definition guidelines developed by the Authority will guide implementation of the Competition Act in this Era of the digital economy. Unlike the traditional brick and mortar market places, virtual markets are hard to evaluate especially under the old market definition guidelines since the point of contact between the buyer and the seller cannot be physically identified. Therefore, placing the market geographically is a challenge.

17. In addition, price may not be an element in digital markets. There are several platforms such as Google, Bing, and Facebook which offer their services 'free' or a zero-price to its clientele. The

non-price element of digital markets makes the SSNIP and the Hypothetical Monopolist tests[1] (HMT) impossible to the competition analyst in defining the market. Where market definition is complex, apportioning market shares and determining any elements of market power become difficult to ascertain.

18. Further, the substitutability elements of digital markets are complex in nature (Malecki & Moriset, 2008), since there exists more than one side of the market. According to the OECD (2015), there are two sides of the digital markets which have separate and distinct elements that differ in analysis. For instance, the numerous online marketplaces target consumers through advertisement platforms; both the customers who want to shop and those who want to place their products in the marketplace.

19. Platform markets may also inhibit anticompetitive behaviours especially in situations where it is a hybrid kind of market. Hybrid platforms may constrain intra competition according to articles 101/102 of the Treaty of the Functioning of the European Union (Article 101/102 of the TFEU[2]). Some of these anticompetitive constraints include, but are not limited to; exclusionary conduct, exchange of information and coordination, discrimination, predatory pricing in a case of dominance and refusal to deal.

[1] The HMT employs the common SSNIP test, which involves selecting a pool of products which may form the relevant market and subjecting it to a small but significant non-transitory increase in the price. If the scenario would enable a hypothetical monopolist to operate profitably, then that is the relevant market. However, if profitability cannot be achieved, then the candidate market is widened by adding more products into the pool and running the test again until a hypothetical monopolist behavior is achieved.

[2] Article 101 prohibits business agreements or arrangements which prevent, restrict, or distort competition within the internal market and affect trade between Member States. Article 102 TFEU governs abusive conduct by dominant undertakings. The possession or strengthening of a dominant position by way of competition does not fall within the scope of the prohibition. Dominance alone is never an offence and many global players (such as Microsoft or Intel) are a direct result of their inventions and entrepreneurship. The competition regime generally encourages such efforts as they form the basis of our society's competitive layout. Therefore, unless there is an abuse, there can be no finding of an infringement of Article 102 TFEU.

### E. Market Power

20. The ability to raise prices independent of the competitors in a market and remain profitable is a possible scenario in digital markets even where there are no evidential market shares pointing towards a dominant firm. Therefore, assessing market power using the traditional measures may not be effective in the digital platforms. The presence of mavericks who come up with unique technologies that bring about market disruptions may, in the short run, exercise market power before the other players in the market catch up with the new technology (Raisinghani, 2004).

21. The Uber case in Kenya presents itself as a mere maverick bringing about a disruption in the market. However, after a substantial amount of time, other market players in the taxi hailing business such as, Little Cab, Mondo and Taxify among others entered the market and prices dropped significantly. Evidentially, the first entrant into the taxi hailing app market might have enjoyed some form of market power in the short run due to their monopoly of the technology before the other market players entered the market by developing their own applications.

22. This resulted in consumer savings as the app-based operators revised their prices downwards from Ksh. 35/ per kilometer to Ksh. 30/ per kilometer.

### F. Conclusion

23. In conclusion, the digital economy is an essential element of growth and development in any economy. The fact that this economy is highly flexible and subject to change any time provides a challenge to competition regulators especially based on the fact that most reviews to regulations take a long period of time and are mostly reactive.

## G. References


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