

# Competition Law

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KENYA

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## Insights from the Kenya Competition Authority's study: A snapshot of the online delivery market

The Competition Authority of Kenya (Authority) conducts market studies as part of its mandate derived from the Competition Act, 2010 (Act), which includes investigating, analysing and researching competition-related matters and consumer interests. Market studies enable the Authority to identify emerging issues, grey areas or ambiguities that may require regulation. Market studies also support the primary goal of competition law, which is to promote effective competition and prevent unfair and misleading market practices in Kenya.

Some of the sectors the Authority has conducted market studies on in the past include Kenya's seed industry, artificial insemination market, banking sector, fertilizer market, Unstructured Supplementary Service Data (USSD) service provision market, retail market, leasing sector, shipping, trucking and haulage sector, digital lenders market, and digital credit market. An outcome of these studies has been the development of sector-specific regulations such as the Central Bank of Kenya (Digital Credit Providers) Regulations, 2022 and the Retail Trade Code of Practice, 2021 for the digital creditors and players in the retail market sector, respectively. Other outcomes include investigation of entities suspected to be carrying out anti-competitive practices, such as Yara East Africa and Mea Limited, which are players in the fertilizer sector.

### **Online Food and Groceries Delivery Platforms Market Study**

The Authority's latest study was the Online Food and Groceries Delivery Platforms Market Study (Study). The Study's aim was to evaluate current competition practices and identify consumer protection issues within online market platforms; provide recommendations to ensure that online food and groceries delivery platforms comply with Kenya's competition laws; and educate consumers and users of these platforms about the platforms' obligations and their own rights and remedies under the Act.

The Study outlined the main players currently operating in the market in Kenya and the relationships between these platforms and their users in Kenya. The platforms include Glovo, with 33% of the market share, Jumia Foods



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with 23%, Uber Eats with 21%, Bolt Foods with 16% and Yum Deliveries with 2%. It highlighted that, despite there being no shared ownership among the platforms and that competition appeared healthy, the market is highly concentrated, with the top four platforms controlling the market. The Study found that this could lead to co-ordinated anti-competitive behaviour. Further, it was noted that most platforms in Kenya are foreign-owned and have their headquarters outside of Kenya, meaning competition and consumer complaint cases must be communicated to a foreign head office. This was found to cause delays, additional costs and, sometimes, non-responsiveness. As part of the recommended mechanisms, the Study proposed that foreign-owned platforms establish offices in Kenya to address and resolve issues promptly.

The role of data was a major finding in the Study. The market power of these platforms is often derived from data collected for purposes of research and development, marketing, service delivery and improvement of consumer experiences. While this directly facilitates continuous improvement in product quality and service delivery, it can potentially compromise consumers' privacy as the use of these platforms is contingent upon agreeing to the platforms' privacy terms and conditions. The Data Protection Act mandates the inclusion of opt-in and opt-out choices in cases where data is used for commercial and marketing purposes. To manage risk and prevent imposition of penalties by the Office of the Data Protection Commissioner (ODPC), platforms should ensure compliance with this mandate.

The Study also raised concerns about responsibility for product quality control on the platforms. It opined that despite the presence of the Kenya Bureau of Standards and the Anti-Counterfeit Agency, there is a lack of clarity regarding the responsible party for quality assurance in respect of products sold online. This concern is arguably far-fetched, as the supplier of products to an online platform legally bears the responsibility for product quality assurance. Online platforms should protect themselves from liability by ensuring that they only sell products from compliant suppliers. Platforms should also have robust agreements with suppliers that address product quality, regulatory compliance, passage of risk, and liability for breach, amongst other protective provisions.

### Expectations following the Study

As mentioned earlier, market studies usually result in the development of regulations to address gaps identified. The Authority has developed a draft Competition (Amendment) Bill, 2024 (Bill) which was publicised in May 2024. The Bill defines "*digital activities*" as services provided via the internet or digital content delivery, benefiting either business or individual consumers, regardless of payment or whether the activity is multi-sided. This definition applies to online marketplaces and app stores.



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The Bill specifies that when evaluating the competitive effects of digital activities, the Authority will consider the factors that typically confer significant market power. Dominance can be established even with a market share of below 40%, whether the digital activity spans one or multiple markets. The Computer and Communications Industry Association, a powerful American lobby group whose members include Amazon, Facebook parent Meta, and X, has opposed the move by the Authority to regulate digital platforms and opined that overly restrictive and stringent regulations on digital markets could greatly impede innovation and slow economic growth.

The Study placed extensive focus on foreign ownership of delivery platforms, quality control and the role of data. Online food and grocery delivery sector players should anticipate enhanced collaboration between the Authority and other governmental bodies, particularly the ODPC, going forward. This integration will empower consumers and foster consumer trust as consumers are likely to engage more with platforms that prioritize their data privacy and security.

Platforms should review the Study and the Bill in detail and seek advice on the implications for their businesses.

**Martha Mbugua, Stefani Wanjeri and Prisca Mburu**

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### Competition Law

Chambers Global 2011–2024 ranked our Competition Law practice in:

**Band 2:** Competition/Antitrust.

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**Albert Aukema** ranked by Chambers Global 2023–2024 in **Band 5:** Competition/Antitrust.

**Lara Granville** ranked by Chambers Global 2022–2024 in **Band 5:** Competition/Antitrust.





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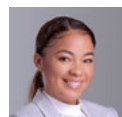
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