



CCIA Comments on the Competition Authority of Kenya’s Draft Competition (Amendment) Bill, 2024

The Computer & Communications Industry Association (CCIA)¹ welcomes the opportunity to submit comments on the Competition Authority of Kenya’s (the CAK) on the Draft Competition (Amendment) Bill,² 2024 (the Bill), which was released for public consultation on May 28, 2024.³

Digital platforms offer innovative and popular services that have revolutionized the way Kenyan consumers and businesses interact with each other. CCIA strongly believes that, to determine if there are any potential competition concerns that need to be addressed through regulation, it is paramount for Kenyan policymakers to understand the various digital business models and services fully and accurately, as well as the industries in which they operate. As such, when proposing any *ex-ante* regulatory framework for digital markets, Kenyan policymakers must consider market realities and how the proposed regulation might affect businesses, consumers, and the country’s overall economy.

These comments discuss important principles for policymakers in Kenya to consider when contemplating and designing any regulation for digital markets. Without relying on some key regulatory considerations, an *ex-ante* regulation could run the risk of harming Kenya’s consumers, competition, and innovation. Therefore, these comments offer some important regulatory principles and recommendations regarding some of the key aspects of Kenya’s digital economy and its competitive ecosystem.

I. Key Considerations and Principles to Guide Regulatory Proposals

Global digitalization across several industries of the economy has provided consumers and businesses with tremendous benefits. Numerous studies have confirmed the many ways in which digital services and multi-sided business models create and stimulate competition in the

¹ CCIA is an international, not-for-profit trade association representing a broad cross-section of technology and communications firms. For over fifty years, CCIA has promoted open markets, open systems, and open networks. The Association advocates for sound competition policy and antitrust enforcement. CCIA members employ more than 1.6 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. For more, visit www.ccianet.org.

² Competition Authority of Kenya, “draft Competition (Amendment) Bill, 2024” (May 28, 2024), <https://www.cak.go.ke/sites/default/files/2024-05/THE%20COMPETITION%20%28AMENDMENT%29%20BILL%2C%202024.pdf>.

³ Competition Authority of Kenya, “Request For Comments On The Draft Competition (Amendment) Bill, 2024” (May 28, 2024), https://cak.go.ke/sites/default/files/2024-05/PUBLIC%20NOTICE%20ON%20COMPETITION%20%28AMENDMENT%29%20BILL%2C%202024_0.pdf

economy.⁴ Given the dynamic and innovative nature of digital markets, any proposed digital regulation needs to consider the wider potential implications for businesses, consumers, innovation, and the broader economy.

Digital technology is diffusing across the entire economy in industries as diverse as advertising, agriculture, automotive, manufacturing, and retail. With the ongoing digitalization across the economy,⁵ many industries have digital components and digital offerings that also compete with physical ones, including retail and telemedicine.⁶ Businesses usually described as “digital” are companies that adopted early on the use of technology and digital tools across various industries. As the Kenyan government recognized, digital technologies have created opportunities for disruption and have given consumers direct access to markets that were previously closed, connecting consumers and businesses by lowering transaction costs and reducing information asymmetries.⁷ Thus, as the entire economy is moving towards digitalization, creating a different set of rules for digital companies could create asymmetric results in the market, leading to ambiguity and inconsistency.

Importantly, an overly burdensome and heavy-handed regulation for digital markets could significantly hinder innovation and economic growth. This should be a particularly

⁴ See, e.g., European Commission, “Staff Working Document: Evaluation of the Vertical Block Exemption Regulation” (Sep. 8, 2020), at 32, https://competition-policy.ec.europa.eu/public-consultations/2018-vber_en#reference-documents (“[A]lternative online distribution models such as online marketplaces have made it easier for retailers to access customers. By using these third-party platforms, small retailers may, with limited investments and effort, become visible to potential customers and sell products to a large customer base and in multiple Member States.”); Oxera, “How platforms create value for their users: implications for the Digital Markets Act” (May 12, 2021), at 34, <https://www.oxera.com/wp-content/uploads/2021/05/How-platforms-create-value.pdf> (“The bundling and tying of different features and services by a platform can boost the efficiency of a market by reducing transaction costs, increasing choice for consumers, and helping businesses to achieve scale economies.”).

⁵ See, e.g., Sarah Robson and Tim Cowell, AVEVA, “The four pillars of a trusted industrial information infrastructure” (2023), https://discover.aveva.com/paid-search-industrial-cloud-hybrid-saas/whitepaper-the-four-pillars-of-a-trusted-industrial-information-infrastructure?https://discover.aveva.com/paid-search-industrial-cloud-hybrid-saas/whitepaper-the-four-pillars-of-a-trusted-industrial-information-infrastructure&utm_term=industrial%20digitalization&utm_campaign=G_S_A_NA_All_Campaign_Solution_Cloud_Industrial%20Cloud%20Hybrid%20SaaS&utm_source=adwords&utm_medium=ppc&gad_source=1&gclid=Cj0KCQjwir2xBhCARIsAMTXk87r9vMQVFqoLl5eh0XMKGAY_cDwx6mfund3avCiupvdLEEQ0UbGRnAaAmYmEALw_wcB; Yifat Perry, NetApp BlueXP, “Digital Transformation: Examples from 5 Industries” (Jun. 2022), <https://bluexp.netapp.com/blog/cvo-blg-digital-transformation-examples-from-5-industries>.

⁶ Rosa Abrantes-Metz and Mame Maloney, CCIA Research Center, “Competitive Dynamics of Online and Brick-and-Mortar Retail Prices” (Aug. 2, 2022), <https://research.ccianet.org/reports/competitive-dynamics-online-brick-mortar-retail-prices/>; Trevor Wagener, Jeff Simpson, and David Kearns, Deloitte, InsightIQ, “Consumer Preferences Embrace a Mix of Physical and Digital” (Jan. 31, 2022), <https://ccianet.org/research/reports/consumer-preferences-embrace-mix-physical-digital-shopping/>; John Glaser and Kyle Zebley, Harvard Business Review, “It’s Time to Cement Telehealth’s Place in U.S. Health Care” (Jan. 20, 2023), <https://hbr.org/2023/01/its-time-to-cement-telehealths-place-in-u-s-health-care>; Prashant Gandhi, Somesh Khanna, and Sree Ramaswamy, Harvard Business Review, “Which Industries Are the Most Digital (and Why)?” (Apr. 1, 2016), <https://hbr.org/2016/04/a-chart-that-shows-which-industries-are-the-most-digital-and-why>.

⁷ Republic of Kenya, “Digital Economy Blueprint - Powering Kenya’s Transformation” (2019), at 39, <https://www.ict.go.ke/wp-content/uploads/2019/05/Kenya-Digital-Economy-2019.pdf>.

important consideration for Kenya and its digital economy, which is a key pillar in the country’s economic growth.⁸ As a report by USAID shows, Kenya hosts a dynamic digital ecosystem and has been a longstanding leader in technology innovation in Africa,⁹ being considered the “Silicon Savannah.”¹⁰ Moreover, the country is one of the ten fastest-growing digital economies in the world and a leader on the continent when it comes to access to digital infrastructure.¹¹

Another important point for policymakers to consider is that any proposed new regulation, if any would be needed, should be of general applicability at a principle-level, and not target particular companies imposing specific provisions against them.¹²

Policymakers should take into account that any regulatory proposal for digital markets will likely have a significant impact not only from a competition enforcement and policy perspective, but in other policy areas as well, such as data privacy, national security, cybersecurity, and intellectual property, with important ramifications for businesses operating in Kenya. This interconnectedness of policy areas in the digital space requires a particularly careful calibration of any *ex-ante* regulatory considerations in this area.¹³

I.1. Policymakers Should Analyze the Costs and Benefits Before Implementing Any New Regulation

Given the potentially significant economic impact of regulating digital markets, it is fundamental for policymakers to engage with stakeholders in the development of any new *ex-ante* regulatory framework. Introducing new regulations is not costless, especially given the

⁸ Kenya recently received a US\$390 million grant from the World Bank to support their development of the digital economy; U.S. Department of Commerce, International Trade Administration, “Market Intelligence - Kenya Digital Economy Acceleration Project (KDEAP)” (Jan. 17, 2024), <https://www.trade.gov/market-intelligence/kenya-digital-economy-acceleration-project-kdeap#:~:text=The%20Government%20of%20Kenya%20recently,pillar%20in%20Kenya's%20economic%20growth>

⁹ USAID, Digital Ecosystem Country Assessment, “Kenya Digital Ecosystem Country Assessment” (Sep. 2020), at 3, https://www.usaid.gov/sites/default/files/2022-05/DECA_Report_KENYA_EXTERNAL_2OCT2-2-2.pdf.

¹⁰ Ubuntu, “Welcome To The Silicon Savannah: How Kenya Is Becoming The Next Global Tech Hub” (May, 2022), <https://www.ubuntu.life/blogs/news/welcome-to-the-silicon-savannah-how-kenya-is-becoming-the-next-global-tech-hub>.

¹¹ Ennatu Domingo, ECDPM, “The Achilles’ heel of Kenya’s growing digital economy” (Mar. 27, 2023), <https://ecdpm.org/work/achilles-heel-kenyas-growing-digital-economy>.

¹² Julia Black, Martin Hopper, and Christa Band, Law and Financial Markets Review, “Making a success of Principles-based regulation” (2007), 1(3), at 192, <https://www.lse.ac.uk/law/people/academic-staff/julia-black/Documents/black5.pdf>.

¹³ See, e.g., United Nations, Report of the UN Secretary-General’s High-level Panel on Digital Cooperation, “The age of digital interdependence” (2019), at 6, <https://www.un.org/en/pdfs/DigitalCooperation-report-for%20web.pdf>; OECD, OECD Report to G-20 Finance Ministers, “Achieving Inclusive Growth in the Face of Digital Transformation and the Future of Work” (Mar. 19, 2018), https://www.oecd.org/g20/OECD_Achieving%20inclusive%20growth%20in%20the%20face%20of%20FoW.pdf.

dynamic and innovative nature of digital markets. As a result, the ultimate objective of any new regulatory framework should be to promote and stimulate competition and innovation.

As the Organisation for Economic Cooperation and Development (OECD) and the International Competition Network (ICN) have underscored, to ensure that the cost of any new regulation does not outweigh its benefits, it should allow clearly procompetitive or competitively benign conducts, and recognize justifications for legitimate protections.¹⁴ Without appropriate safeguards, a regulation may harm Kenyan consumers and businesses, including small and medium-sized businesses (SMBs) that use and rely on digital services. Therefore, CCIA encourages Kenyan policymakers to analyze the potential impact of any *ex-ante* regulation and whether its benefits would outweigh its potential harms to the country’s consumers, businesses, and economy.¹⁵

I.2. Balancing Competition and Regulation in Digital Markets

Overly complex, intrusive, or broad regulatory regimes are likely to deter entry and investment from innovative companies.¹⁶ Therefore, any *ex-ante* regulation should only be introduced to address particular market failures,¹⁷ which is not the same as the mere existence of market power. Dynamic competition, which is particularly relevant in digital markets, comes forth as a natural way to resolve market failures by firms competing for the market and creating new and innovative products.¹⁸ In this regard, a key consideration before proposing any *ex-ante* regulation is whether the existing enforcement and policy frameworks, including competition,

¹⁴ OECD, OECD Global Forum on Trade 2023, “Key Issues in Digital Trade” (Oct. 2023), at 13, <https://www.oecd.org/trade/OECD-key-issues-in-digital-trade.pdf>; ICN, ICN Advocacy Working Group, “Framework of Competition Assessment Regimes” (Apr. 2015), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AWG_FrameworkCompetitionAssessmentRegimes.pdf; OECD, “Maintaining Competitive Conditions in the Era of Digitalization” (Jul. 2018), at 4, <https://www.oecd.org/g20/Maintaining-competitive-conditions-in-era-of-digitalisation-OECD.pdf>.

¹⁵ See OECD, Regulatory Policy Outlook (2021), https://www.oecd-ilibrary.org/governance/oecd-regulatory-policy-outlook-2021_38b0fdb1-en; OECD, Regulatory Impact Assessment (2020), <https://www.oecd.org/gov/regulatory-policy/regulatory-impact-assessment-7a9638cb-en.htm>.

¹⁶ See, e.g., Aghion, Philippe and Bergeaud, Antonin and Van Reenen, John, “The Impact of Regulation on Innovation” (Jan. 16, 2023), Banque de France Working Paper No. 804, forthcoming, <https://ssrn.com/abstract=4325116>; Regulatory Reform and Innovation, OECD, <https://www.oecd.org/sti/inno/2102514.pdf>; “Regulation that enables innovation,” William D. Eggers, Sam J Walsh, Carsten Joergensen and Pankaj Kamleshkumar Kishnani (Mar. 23, 2023), <https://www2.deloitte.com/us/en/insights/industry/public-sector/government-trends/2023/regulatory-agencies-and-innovation.html>.

¹⁷ Jean Tireole, Concurrences, Analysis Group, “Summary of remarks by Jean Tireole” (Sep. 27, 2018), https://www.analysisgroup.com/globalassets/uploadedimages/content/insights/ag_features/summary-of-remarks-by-jean-tireole_english.pdf.

¹⁸ Joseph A. Schumpeter, “Capitalism, Socialism, and Democracy,” 81 (1942).

consumer protection, and data privacy already provide more proportionate ways to achieve the desired outcomes. Importantly, the mere presence of a market failure does not equate to the need for regulatory intervention. Proposed *ex-ante* regulatory frameworks should properly balance the competitive circumstances of the market and balance the policy priorities to determine, after a proper cost-benefit analysis, if regulation, with both its intended and unintended potential consequences in the economy, is the best way to address the potential market failures. Therefore, clarifying the expected outcomes of a proposed regulatory framework in advance is particularly important for consumers and businesses alike.

Ex-ante regulation for digital markets, in the absence of a specific market failure that requires correction, would hinder not only the growth of companies in the digital and connected markets, but would also harm innovation and competition, and thereby the overall economy.¹⁹ Hence, regulation of a specific sector of the economy should only be considered when there is evidence of a sector-specific market failure that harms competition, which does not appear to be the case for Kenya and its digital economy sector.

Kenya's startup sector is one of the most robust of the African economies, with nearly 40 startup incubators and over 1200 startups in the greater Nairobi region.²⁰ This has led U.S. and EU-based investors to invest in Kenya as an entry point to the East African market.²¹ Moreover, the country's tech sector has grown on average more than 10 percent since 2016,²² and Kenya's digital sector is expected to contribute as much as 9 percent of the country's GDP by 2025.²³ As

¹⁹ OECD, Directorate For Financial and Enterprise Affairs, Competition Committee, "Ex-Ante Regulation and Competition in Digital markets - Note by BIAC" (Dec. 2, 2021), at 4, [https://one.oecd.org/document/DAF/COMP/WD\(2021\)79/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2021)79/en/pdf); Badri Narayanan and Hosuk Lee-Makiyama, ECIPE, "Economic Costs of Ex-Ante Regulations" (Oct. 2020), https://ecipe.org/wp-content/uploads/2020/10/ECI_20_OccPaper_07_2020_Ex-ante_Regulations_LY06.pdf; Fed. Trade Comm'n, "Broadband Connectivity Competition Policy Staff Report 9" (Jun. 2007), <https://www.ftc.gov/sites/default/files/documents/reports/broadband-connectivity-competition-policy/v070000report.pdf> (advising that "[i]n evaluating whether new proscriptions are necessary, we advise proceeding with caution before enacting broad, ex-ante restrictions in an unsettled, dynamic environment").

²⁰ Peter Chacha Wankuru, The World Bank. Edition No. 20, "Kenya's Economic Update - Securing Future Growth: Policies to Support Kenya's Digital Transformation" (Oct. 2019), at 29, <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/968481572468094731/kenya-economic-update-securing-future-growth-policies-to-support-kenya-s-digital-transformation>.

²¹ Microsoft, "Microsoft and G42 announce \$1 billion comprehensive digital ecosystem initiative for Kenya" (May 22, 2024), <https://news.microsoft.com/2024/05/22/microsoft-and-g42-announce-1-billion-comprehensive-digital-ecosystem-initiative-for-kenya/>; CNBC Africa, "US tech giant Cisco invests in Kenya's tech & cybersecurity infrastructure" (Apr. 22, 2024), <https://www.cnbc.com/africa/media/6351419541112/us-tech-giant-cisco-invests-in-kenyas-tech-cybersecurity-infrastructure-/>; Digwatch, "EU launches digital economy package to support Kenya's technological transition" (Nov. 13, 2023), <https://dig.watch/updates/eu-launches-digital-economy-package-to-support-kenyas-technological-transition>.

²² *Supra* n. 24, at 26.

²³ UNESCO and Huawei, "White paper: ICT talent cultivation for Kenya's digital economy" (2022), at 15, <https://unesdoc.unesco.org/ark:/48223/pf0000381538>.

such, the recommended approach for Kenyan policymakers would be to avoid overregulation that can hinder innovation in its blooming digital sector, which would have dire consequences for the country's economy, and rather keep strengthening the country's digital economy as one of the continent's tech leaders.

I.3. Policymakers Should Carefully Assess Market Power Thresholds and “Superior Bargaining Position” Considerations

It is key to adequately consider and analyze market realities to determine if a company has market power. In the Bill, the CAK considers that firms with market shares even below 40 percent can have market “dominance” in digital markets.²⁴ This is particularly concerning when we see that, internationally, the experience points towards higher thresholds to determine the existence of market power. In the U.S., court rulings have traditionally established a threshold of 70 percent, or at the very least 55 percent, to make a case for market power.²⁵ As for Europe, the European Commission has stated that if a company has a market share of less than 40 percent, it is unlikely to be dominant.²⁶

Besides the significantly low threshold for market power considerations, the Bill additionally establishes an overly broad definition for what the CAK considers “superior bargaining position,”²⁷ as well as several prohibitions and the possibility of additional requirements for the companies that the Authority deems as having a “superior bargaining position.” The definition included in the Bill is of such broadness that it may include companies from all sectors and all sizes, regardless if they have or do not have market power, and without consideration of a risk or potential risk to competition. As such, with this new definition, the prohibitions included in the Bill might cover several companies that not only lack market power, but that are unlikely to harm or influence competition in the market.

²⁴ *Supra* n. 2 at 2.

²⁵ *Exxon Corp v. Berwick Bay Real Estate Partners*, 748 F.2d 937 (5th Cir. 1984); “a share significantly larger than 55% has been required to establish prima facie market power;” *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 187 (3d Cir. 2005). See also *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), when referring to market power “it is doubtful whether sixty or sixty-four percent would be enough; and certainly, thirty-three percent is not.” See also *Image TechServs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1206 (9th Cir. 1997).

²⁶ European Commission, “Procedures in Article 102 Investigations - Assessing dominance” (2024), https://competition-policy.ec.europa.eu/antitrust-and-cartels/procedures/article-102-investigations_en#:~:text=The%20Commission's%20view%20is%20that,is%20unlikely%20to%20be%20dominant.

²⁷ *Supra* n. 2, at 2 (““superior bargaining position” means the ability of an undertaking to control, direct, define or determine the conditions of business operations with counterparties which are favourable to itself without reference to the undertaking's dominant market position or market power in the relevant market;”).

Hence, CCIA would recommend the CAK to reassess the market share thresholds in the Bill to determine if a company has or does not have market power, as well as the definition and prohibitions associated with the “superior bargaining position” standard, as the current language in the bill risks overregulating the market, which can hinder competition and innovation in Kenya and lead to less investment in the country’s digital economy. Moreover, given the broadness of the authority the Bill would give the CAK for the determination of companies with a “superior bargaining position,” and the obligations and prohibitions they would have, Kenyan policymakers need to put in place procedural safeguards to guarantee checks and balances regarding the CAK’s use of powers. It is crucial to implement procedural guardrails to ensure that companies have robust rights of appeal, which are proportionate to the breadth of powers given to the Authority with the Bill.

I.4. Policymakers Should Be Cautious in Relying on Untested International Regulatory Experiments

Ex-ante digital regulatory proposals are currently being discussed and debated in several jurisdictions worldwide.²⁸ However, it is important to underscore how, so far, there are only two jurisdictions with fully operational *ex-ante* digital regulatory frameworks: Germany, through the 10th amendment of the German Competition Act (GWB)²⁹ and Section 19a of the GWB,³⁰ and the European Union’s (EU) Digital Markets Act (DMA),³¹ which became fully operational in March 2024.³² In addition, the United Kingdom has recently adopted the Digital Markets Competition and Consumer Act,³³ which is expected to become fully operational later in 2024.³⁴ However, there is still a long road ahead before the concrete application of the DMA can be

²⁸ See, e.g., Center for Strategic and International Studies (CSIS), “Digital Competition Policy Tracker” (Apr. 2024), <https://www.csis.org/programs/scholl-chair-international-business/competition-policy-digital-era>.

²⁹ 10th Amendment to the German Competition Act (GWB), Federal Law Gazette Volume 2021 Part I No. 1, issued in Bonn on January 18, 2021, https://www.bgbl.de/xaver/bgbl/start.xav#_bgbl_%2F%2F%5B%40attr_id%3D%27bgbl121s0002.pdf%27%5D_1701266446605.

³⁰ *Id.*, Section 19a (“The Bundeskartellamt may issue a decision declaring that an undertaking which is active to a significant extent on markets within the meaning of Section 18(3a) is of paramount significance for competition across markets.”).

³¹ Regulation (EU) 2022/1925 of The European Parliament and of The Council (Sep. 14, 2022), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2022.265.01.0001.01.ENG&toc=OJ%3AL%3A2022%3A265%3ATOC.

³² European Commission, News Announcement, “Designated gatekeepers must now comply with all obligations under the Digital Markets Act” (March 7, 2024), https://digital-markets-act.ec.europa.eu/designated-gatekeepers-must-now-comply-all-obligations-under-digital-markets-act-2024-03-07_en.

³³ United Kingdom, Digital Markets, Competition and Consumers Act (2024), <https://www.legislation.gov.uk/ukpga/2024/13/enacted>.

³⁴ CMS Law-Now, “The DMCC Act Becomes Law” (May. 24, 2024), <https://cms-lawnow.com/en/ealerts/2024/05/the-dmcc-act-becomes-law>.

properly assessed, with significant litigation roadblocks in its path.³⁵ Given the extremely limited experience with these regulations,³⁶ policymakers in Kenya and other countries will likely want to first learn from the experience in these jurisdictions and wait for more concrete results of those digital regulatory experiments. This, in turn, may help inform policymakers about whether these regulatory examples even end up providing the results for which they were originally crafted. Therefore, CCIA strongly recommends being cautious when relying on international regulatory experiments in this area.

Although digital reforms are being considered in various jurisdictions, there are no convergent proposals or results in sight. For example, the U.S. antitrust bills targeting a handful of technology companies raised numerous major concerns and seem to have no political support to be adopted.³⁷ Brazil and India are discussing DMA-like bills to regulate digital markets, which, following a public consultation period, are yet to be adopted.³⁸ Other regulatory models around potential codes of conduct are being discussed in Australia and the United Kingdom.³⁹ Alternatively, they could potentially provide a more flexible and tailor-made regulation, which only time will tell.⁴⁰ Japan provides another international model with their so-called

³⁵ See, e.g., Nicholas Hirst, MLex, “DMA litigation will be a different beast to antitrust appeals, Kramler says” (Sep. 14, 2023), <https://mlexmarketinsight.com/news/insight/dma-litigation-will-be-a-different-beast-to-antitrust-appeals-kramler-says>; Aymeric de Moncuit and Sarah Wilks, Mayer Brown, “The New EU Digital Regime: Already in Court” (Sep. 19, 2023), <https://www.mayerbrown.com/en/insights/publications/2023/09/the-new-eu-digital-regime-already-in-court>; Foo Yu Chee, Reuters, “Top EU judge expects a wave of litigation from tech giants against new tech law” (Mar. 17, 2023), <https://www.reuters.com/technology/top-eu-judge-expects-wave-litigation-tech-giants-against-new-tech-law-2023-03-17/>.

³⁶ Germany’s GWB went into effect just over two years ago in 2021. The EU’s DMA became fully operational in March 2024.

³⁷ See, e.g., Krisztian Katona, Project DisCo, “AICOA’s Data Security, Privacy, and Content Moderation Issues Call for Risk Assessment” (Jun. 7, 2022), <https://www.project-disco.org/privacy/060722-aicoas-data-security-privacy-and-content-moderation-issues-call-for-risk-assessment/>; Project DisCo, “AICOA’s Failure and the Future of Competition Policy in Congress” (Jan. 6, 2023), <https://www.project-disco.org/competition/010623-aicoas-failure-and-the-future-of-competition-policy-in-congress/>.

³⁸ See e.g., CCIA, “CCIA Comments on Brazilian Bill No. 2768/2022” (Dec. 4, 2023), <https://ccianet.org/library/ccia-comments-on-brazilian-bill-no-2768-2022/>; CCIA, “CCIA Comments on the Report on Digital Competition Prepared by the Indian Ministry of Corporate Affairs’ Committee on Digital Competition Law and Draft Digital Competition Bill” (May 15, 2024), <https://ccianet.org/wp-content/uploads/2024/05/CCIA-Comments-on-the-Report-on-Digital-Competition-Prepared-by-the-Indian-Ministry-of-Corporate-Affairs-Committee-on-Digital-Competition-Law-and-Draft-Digital-Competition-Bill.pdf>.

³⁹ See, e.g., CCIA, “CCIA Comments on the Australian Treasury’s Consultation Document on the Australian Competition and Consumer Commission’s Regulatory Reform Recommendations” (Feb. 17, 2023), <https://ccianet.org/wp-content/uploads/2023/02/CCIA-Comments-to-the-Australian-Treasury.pdf>; CCIA, “CCIA Comments on the United Kingdom’s “Digital Markets, Competition, and Consumer Bill”” (Jul. 18, 2023), <https://ccianet.org/wp-content/uploads/2023/07/CCIA-Comments-to-UK-Parliament-on-DMCC.pdf>.

⁴⁰ See “ACCC calls for new competition and consumer laws for digital platforms” (Nov. 11, 2022), <https://www.accc.gov.au/media-release/accc-calls-for-new-competition-and-consumer-laws-for-digital-platforms>.

Transparency Act,⁴¹ which stipulates that designated digital platforms take voluntary and proactive steps to ensure transparency and fairness under a so-called co-regulatory approach.

It is worth noting how each of these regulatory proposals came as an answer to specific regulatory concerns in the particular jurisdiction. It is important that policymakers considering *ex-ante* regulatory frameworks, particularly concerning digital markets, and analyze the specific characteristics and necessities of their national markets.⁴² Therefore, and based on the extremely limited experience with recent *ex-ante* regulatory proposals worldwide, CCI A recommends that Kenyan policymakers take a step back and analyze the potential effects of importing these international regulatory experiments. The recommended approach for countries analyzing these types of proposals would be to first allow some time to gauge how these international experiments are working in practice and then evaluate whether the reforms end up benefiting or harming consumers and innovation.⁴³ This would be of particular importance for Kenya, given the importance of digital markets to the country's economy.

II. Kenya's Digital Economy

As noted above, Kenya has been a continental leader when it comes to digital transformation, having the greatest digital economy contribution to the national GDP in Africa with 7.7 percent in 2020, followed by Morocco and South Africa.⁴⁴ The digital economy is expected to add KSh 1.4 trillion (around US 12.8 billion) to Kenya's GDP by 2025.⁴⁵ Already in 2015, Kenya had about 40,000 tech startups creating 160,000 jobs,⁴⁶ a number that is only expected to grow.

A great example of Kenya's digital success is based on its mobile technology industry. As reported by the Communications Authority of Kenya,⁴⁷ in March of 2023 there were 66.1

⁴¹ Act on Improving Transparency and Fairness of Digital Platforms, (Jun. 3, 2020),

https://www.meti.go.jp/english/policy/mono_info_service/information_economy/digital_platforms/index.html.

⁴² UNCTAD, eWeek 2023, "The Geneva Vision on the Future of the Digital Economy (2023), at 20,

https://unctad.org/system/files/information-document/GenevaVision_OutcomeUNCTADeWeek2023.pdf.

⁴³ See, e.g., "Interview with Alexandre Cordeiro Macedo, President, Administrative Council for Economic Defense (CADE)," Conducted by Krisztian Katona on behalf of the ABA Antitrust Magazine (Jun. 30, 2023), https://www.americanbar.org/groups/antitrust_law/resources/source/2023-june/interview-with-alexandre-cordeiro-macedo/

⁴⁴ International Finance Corporation - World Bank Group and Google, "eEconomy Africa 2020" (2020), at 16, <https://www.ifc.org/content/dam/ifc/doc/mgrt/e-economy-africa-2020.pdf>.

⁴⁵ *Id.*; Miriam Wangui, The Kenyan Wall Street, "Kenya to Earn KSh 1.4 Trillion from Digital Economy by 2025" (2020), <https://kenyanwallstreet.com/kenya-to-earn-ksh-1-4-trillion-from-digital-economy-by-2025/>.

⁴⁶ Humphrey Njogu, Kenya Institute for Public Policy Research and Analysis (KIPPRA), "Building a Robust Digital Economy in Kenya" (Jun. 30, 2023), <https://kippra.or.ke/building-a-robust-digital-economy-in-kenya/>.

⁴⁷ Communications Authority of Kenya, "Mobile Subscriptions Hit 66m as at March 2023" (Mar. 28, 2023), <https://www.ca.go.ke/mobile-subscriptions-hit-66m-march-2023>.

million mobile (SIM) subscriptions in the country. A key pillar of the country's mobile technology has been through mobile payment services, particularly the M-PESA service.⁴⁸ With M-PESA, Kenyans can send and receive money, access short-term loans, store money, and pay for goods and services regardless of their banked or unbanked status.⁴⁹ Moreover, it is estimated that more than 50 percent of jobs in the country will rely on digital skills by 2030.⁵⁰

As such, given the increasing importance of the digital sector in the country's economy, it would be recommended for Kenyan policymakers to avoid overly burdensome regulatory measures targeted at digital companies that can hinder innovation and the digital economy. The focus should remain on fostering competition and innovation in the country, particularly in the digital sector, to maintain Kenya's leading position in the continent's digital investment and innovation. This is particularly important as Kenya should be mindful that there is global competition for technology investment. Companies want to operate in jurisdictions and economies with clear, fair, and principle-based regulatory environments, without extreme regulatory obligations and paying excessive expenses to operate.⁵¹ This is particularly important for the global export competitiveness of Kenyan companies as well. The important question from a business perspective is – how does Kenya want to position itself in this global competition for investment? What kind of national regulatory framework does it want to provide for international companies? After all, before regulating competition, a country needs to attract it.

III. Conclusion

Before contemplating *ex-ante* regulation for digital markets, Kenyan policymakers should first assess if there are actual market issues that require regulation. This is particularly important for Kenya, a major leader in technology investment and development in Africa. Therefore, the role of Kenya's policymakers remains to ensure that the country's competition regime and

⁴⁸ Safaricom, M-PESA, "M-PESA Services", <https://www.safaricom.co.ke/main-mpesa/m-pesa-services>.

⁴⁹ Nanjira Sambuli, Carnegie Endowment, "When the Rubber Meets the Road: Cybersecurity and Kenya's Digital Superhighway" (Oct. 12, 2023), <https://carnegieendowment.org/research/2023/10/when-the-rubber-meets-the-road-cybersecurity-and-kenyas-digital-superhighway?lang=en>.

⁵⁰ Ennatu Domingo, ECDPM, "The Achilles' heel of Kenya's growing digital economy" (Mar. 27, 2023), <https://ecdpm.org/work/achilles-heel-kenyas-growing-digital-economy>.

⁵¹ See, e.g., Christian M. Dippon and Matthew D. Hoell, NERA Economic Consulting, CCIA Research Center, "A Quantitative Evaluation: The Economic Costs of Structural Separation, Line of Business Restrictions, and Common Carrier Regulation of Online Platforms and Marketplaces," (Mar. 18, 2022), <https://research.ccianet.org/reports/economic-costs-regulation-online-platforms-marketplaces/#main-content>; Engine and CCIA Research Center, "Tools to Compete Lower Costs, More Resources, and the Symbiosis of the Tech Ecosystem" (Jan. 25, 2023), <https://research.ccianet.org/reports/tools-to-compete/#main-content>.



regulatory framework are fit for purpose and support the domestic economy, promote innovation, and deliver benefits to Kenyan consumers.

CCIA is pleased to provide this input and looks forward to continuing to engage on this important proposal with the Authority.