A SOUTH AFRICAN PERSPECTIVE ON SELF-PREFERENCING AS A FORM OF ABUSIVE CONDUCT IN THE DIGITAL MARKET

by

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DECLARATION

I Yolisa Nolwazi Madiya (Student number: 1498011) declare that this Research Report is my own unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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ABSTRACT

This research report highlights how dominant firms abuse their dominance in the digital market by engaging in self-preferencing initiatives to the detriment of competition in this market. It illustrates the negative impact of the skewed flow of information and deliberate denial of access to information by dominant firms to their competitors in the downstream market to leverage their services or products which ultimately affects competition in this market. Most significantly, this report reflects on how the European Union has addressed the growing self-preferencing concerns to determine lessons (if any) that South Africa can learn therefrom.

Data has become an important input into the decision-making of many digital firms which has increased the reliance on privacy regulations. This report also discusses the negative impact of privacy regulation in competition law and demonstrates how it enhances the adoption of self-preferencing practices in the digital economy. The value of data and the characteristics of online platforms propels the tension between access to data and consumer's long-term interest. It is shown in this report that the limitation of data portability using privacy regulation qualifies as a form of self-preferencing and strengthens the control of a dominant firm in a digital economy. South African Competition Act 89 of 1998 is discussed in this report to evaluate its adequacy in addressing self-preferencing concerns.

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I. INTRODUCTION

This research report discusses concerns relating to dominant online firms in the upstream market adopting restrictive privacy-centered measures and other tactics that discriminate against or foreclose third parties in favour of their own first-paying services or products in the digital retail market. It assesses how these firms distort competition in digital economy to the detriment of other firms in the downstream market. The purpose of this report is to discuss the adoption of privacy-centered measures that resemble self-preferencing practices by selected dominant firms in the digital market. The way the European Union (hereafter 'EU') deals with the competition challenges that arise due to self-preferencing in the digital market will also be discussed.

This report aims to demonstrate how privacy-centered practices can potentially violate section 8(1)(*b*) of the Competition Act (Competition Act) which deals with the essential facility doctrine.[1] It will assess the impact of data-driven networks on the assessment of market power. In this report, the importance of data in online platforms which encourages the adoption of self-preferencing practices will also be discussed, having regard to the intersection between data protection law and competition law. Section II immediately below provides a contextual understanding of various important concepts that are dealt with in this report. Section III discusses the concept of self-preferencing and demonstrates how dominant firms conduct themselves in the digital retail market to the detriment of competition. Herein, the role of data in the digital economy will be discussed. Section IV discusses the regulatory framework of the digital market in the EU. Section V discusses the abuse of dominance provisions of the Competition Act to assess whether this legislation is adequately placed to address self-preferencing concerns. Section VI concludes the discussion.

II. THE CONCEPTUAL BACKGROUND

It is customary for brick-and-mortar retailers to place their products or those of the firms they are closely associated with in areas where such products are easily accessible to consumers in their physical stores.[2] Usually, this is done to provide some consumer advantage to their own

[1] Competition Act 89 of 1998.
[2] Guillaume Duquesne *et al* 'What Constitutes Self-Preferencing and its Proliferation in Digital Markets' available at *https://globalcompetitionreview.com/guide/digital-markets-guide/third-edition/article/what-constitutes-self-preferencing-and-its-proliferation-in-digital-markets*, accessed on 19 February 2024.

products against those of their competitors. However, this can impact the ability of firms whose products are not made easily accessible to consumers to effectively compete.[3]

This is a form of self-preferencing, which unfortunately is not restricted to physical stores. While self-preferencing does occur with respect to physical stores, it has not yet raised significant challenges in this space as it has in digital marketplaces.[4] This is because the choice between firms is not as significant in digital retail markets as it is in physical retail markets.

Self-preferencing has migrated to the digital space where large digital platforms easily distort competition by adopting technical strategies that benefit them. Self-preferencing can be understood to be the preferential treatment of one's own products or services when competing with those of other firms.[5] This form of abuse already exists as a general theory of harm governing competition.[6] For example, it can be found when vertically integrated digital firms compete downstream with third parties.[7] Therefore, self-preferencing can be used as an instrument of anticompetitive leveraging in various digital online markets such as online searches, price comparisons, mobile operating systems, and smartphone applications.[8]

In the digital market, self-preferencing can be seen as the adoption of privacy-centered policies restricting access to the digital firm's ecosystem. Self-preferencing can also occur where data protection intersects with competition law. Particularly, where a digital platform accumulates data on the products and customers of its competitor thereby benefitting from complete and asymmetric information.[9]

The adoption of this practice threatens competitors by placing competitors in situations where they are economically dependent on dominant firms which limits their access to the desired market.[10] Ultimately, this can lead to vertical and horizontal exclusionary abuse and encourage exploitative abuse. The non-transferability of data from a dominant online platform causes competition concerns as it can create a customer lock-in.[11] This results in a diverged interaction between data privacy and competition frameworks.

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[3] Ibid.
[4] Ibid.
[5] Elias Deutscher 'Google Shopping and the Quest for a Legal Test for Self-Preferencing Under Article 102 TFEU' (2021) 6 *European Papers- A Journal on Law and integration* 1345-1361 at 1348.
[6] Duquesne *et al* op cit note 2.
[7] Ibid.
[8] Bougette *et al* 'Self-Preferencing and Competitive Damages: A Focus on Exploitative Abuses' (2022) 67 *The Antitrust Bulletin* 190-207 at 191.
[9] Ibid at 4.
[10] Ibid at 5.
[11] Barbara Engels 'Data portability among online platforms' (2016) 5 *Internet Policy Review* 1-17 at 2.

III. SELF-PREFERENCING IN DIGITAL MARKETS

(a) Characteristics of self-preferencing

The shift to data-driven online networks offers numerous opportunities for market participants to drive structural reforms, develop new products, and reach previously untapped customers. In the digital economy, self-preferencing typically occurs in cases where an abusive player is dominant in the downstream market relating to the end products.[12] It also commonly occurs in platforms that have a dual role.[13] A dual platform's critical feature is of an open nature to third-party services.[14] A dominant player can be active in the downstream market or can be vertically integrated into a dual platform.[15] In South Africa, an example of a dual-role platform is Takealot which is an online shopping mall in retail that provides a marketplace for third-party sellers whilst also selling its own products.

Various forms of self-preferencing measures have been adopted in the digital economy. The typical form would be the exploitation of transaction data which is a platform operator that has access to marketing activities of its own product.[16] Some digital firms can also manipulate the order of search results in favour of their platforms' own products or services.[17] The occurrence of self-preferencing in the digital economy is heavily influenced by the digital firms' business model that acts as the incentive based on its critical features. For instance, a neutral, open platform with a business model based on data commercialization decreases the incentive to self-preference.[18]

This business model does not provide an incentive to discriminate amongst other business users such as independent sellers in the marketplace, app developers in a mobile operating system and hotels in a booking platform.[19] Platforms that depends solely on obtaining remuneration from the data extracted and commission paid by platform users increases the incentive to self-preference.[20] It would be more profitable for a digital firm to manipulate its algorithms for a higher commission and periodically promote users to foster upstream

[12] Bougette *et al* op cit note 8 at 192.
[13] Yuta Kittaka, Susumu Sato, Yusuke Zennyo ' Self-preferencing by Platforms: A literature Review' (2023) 66 *Japan and The World Economy* 1-11 at 2.
[14] Bougette *et al* op cit note 8 at 192.
[15] Ibid at 4.
[16] Kittaka *et al* op cit note 13 at 1.
[17] Ibid.
[18] Ibid at 4
[19] Bougette *et al* op cit note 8 at 192.
[20] Ibid at 4.

competition.[21] This practice occurs frequently in online platforms which are described as a range of services available on the internet including marketplaces, search engines, social media, creative content, outlets, app stores, communications services, payment systems, services comprising the gig economy.[22]

They are characterized by the generation and capitalisation of user data which informs the development of firms' own services.[23] An online platform is also characterised by strong network effects, feedback loops switching cost and global geographic scope.[24] Network effects create the incentive for self-preferencing because of the relevance for data-driven economies that occur when goods or services increase in usefulness with more users.[25] This enables firms to derive market power from network effects because they indicate an increasing return to firm sizes.[26] Switching cost, another important factor relating to the cost of a customer switching to different products causing a customer lock-in effect can be an incentive to self-preference.[27]

The likelihood of adopting self-preference measures is influenced by the feedback loop factor of an online platform that occurs when the quality of a product increases because of continual access to data which attracts more customers.[28] These characteristics create an environment where no extra cost of production has to be incurred but the volume of production increases.[29] This makes digital firms leverage their access to users' data to increase their commission, increase the quality of products, and produce higher volumes of products at the expense of third-party users.

Unlike traditional brick-and-mortar economies, these data-driven online platforms pose a significant barrier to entry for new entrants.[30] This is because online platforms exhibit pro-dominance characteristics that create barriers to entry.[31] This significant use of self-

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[21] Bougette *et al* op cit note 8 at 191.
[22] OECD 'An Introduction to Online Platforms and Their Role in the Digital Transformation' 2019 available at https://doi.org/10.1787/53e5f593-en, accessed on 18 February 2023 at 22.
[23] Ibid at 26.
[24] Gupta 'Antitrust Concerns in the Age of Data-Driven Economies: The Need to Revive the Essential Facility Doctrine' *(*2023) 11 *The Liverpool Law Review* 1-26 at 11.
[25] Catherine Tucker 'Digital Data, Platforms and the Usual [Antitrust] Suspects: Networks Effects, Switching Costs, Essential Facility' (2019) 54 *Review of Industrial Organization* 683–694 at 683.
[26] Ibid.
[27] Gupta op cit note 24 at 8.
[28] Ibid at 9.
[29] Ibid.
[30] Ibid at 11.
[31] Ibid at 17.

preferencing actions in digital markets based on different business models has caused a flurry of contestation in the data privacy and competition sphere.

(b) The role of data in the digital economy

Data acts as a determinant of pricing, advertising, and product recommendations for firms.[32] Data has an extensive variety of benefits for improving industrial processes, developing new goods and services based on data, and enhancing research about consumer's preferences.[33] It can be deduced from these benefits that a competitive advantage is created through possessing data. Data information is used by companies in our modern economy to provide important input into decision-making.[34] Stucke and Grunes coined the term 'Data-opoly' which gives context to leading platforms obtaining market power-based data-based activities.[35]

The discussion around viewing data as an essential facility has become significant following a move to the digital era. Refusing access of third parties to data can act as a form of self-preferencing by dominant digital firms. Whether this refusal of access to data by a dominant firm constitute an abusive behaviour requires a critical analysis of the test for the essential facility doctrine This concept of an essential facility is contemplated in section 8(1)(*b*) of the Competition Act.

This provision states that a dominant firm is prohibited from refusing to give a competitor access to an essential facility when it is economically feasible to do so.[36] This section is usually triggered in a monopolistic environment where it is not economically feasible to duplicate the facility because of low marginal cost and high fixed cost.[37] This is a nuanced way of forcing dominant firms to not unfairly disadvantage its competitors in instances where firms in the downstream market cannot introduce new products to the market because of the refusal of access to a facility.

Three requirements determine whether data is an essential facility. First, a consideration into the rival's access to other means of obtaining data.[38] Second, whether data is valuable in

[32] Samuel G. Goldberg, Garrett A. Johnson, Scott K. Shriver 'Regulating Privacy Online: An Economic Evaluation of the GDPR' (2024)16 *American Economic Journal: Economic Policy* 325–358 at 325.
[33] Ibid
[34] Daniel L. Rubinfeld, Michal S. Gal 'Access Barriers to Big Data' (2017) 59 *The Arizona Law Review 1-47* at 3.
[35] Tucker op cit note 25 at 683.
[36] 89 of 1998.
[37] Jere Lehthiokasa *Big Data as an Essential Facility: The Possible Implications for Data Privacy* (Unpublished LLM thesis, University of Helsinki, 2018) 21.
[38] Tucker op cit note 25 at 694.

the production process.[39] Last, whether the firms have control of who has access to the data.[40] According to Tucker data is unlikely to be considered an essential facility because it is usually not useful and is universal.[41]

(c) Self- preference practices and the creation of data as an essential facility

Data is viewed to be non-rivalrous in nature and has a nearly-zero marginal cost of generation and delivery, which compliments its re-usability. [42] This means that companies can obtain the same data from users on a digital platform.[43] Tucker confirms that data can be created, accessed, and used for free.[44] The assumption that data does not inevitably become valuable after production can be true.[45]

In a digital economy where data does not fall under the essential facility doctrine, the refusal of access to data would not impact competition negatively and provide an added advantage to vertically integrated dominant firms competing in the downstream market.[46] A case-by-case examination should be used in situations when data is highly tailored or rapidly becomes outdated.[47] This occurs when data is made exclusive by contract or protected by sui generis database rights and trade secret law.[48] The refusal to give access to data to third-party online platforms in the downstream market by a vertically integrated dominant firm can negatively impact competition.

The privacy concerns of a consumer are used as a basis of refusing access to data. This is a typical form of self-preferencing that usually occurs in the digital economy. In cases relating to the essential facility doctrine, the trade-off essentially decides whether to grant competitors access to the necessary information and allow them to produce goods that complement those of the dominant firm, or to withhold access, which would primarily encourage competitors to produce products that compete with the dominant firm's product. [49] A refusal of access to data

[39] Ibid.
[40] Ibid.
[41] Ibid.
[42] Ibid at 9.
[43] Lehthiokasa op cit note 37 at 84.
[44] Ibid.
[45] Ibid.
[46] Khushi Saraf, Jhandkar Katare 'Data as an Essential Facility: Understanding the Flipside' available *https://cbcl.nliu.ac.in/competition-law/data-as-an-essential-facility-understanding-the-flipside/*, accessed 23 February 2024.
[47] Tucker op cit note 25 at 687.
[48] Inge Graef *EU Competition Law, Data Protection and Online Platforms Data as Essential Facility'* (2016) *16*.
[49] Ibid at 10.

as a form of self-preferencing cannot be unlawful unless it threatens to create significant market power in which dominant firms sell or are vertically integrated.[50]

IV. REGULATION OF DIGITAL MARKETS IN THE EUROPEAN UNION

a) *Approach of the EU*

The EU is the first jurisdiction that brought the concerning behaviour of self-preference in the digital economy to light. Abuse of dominance that reflects self-preferencing in the digital economy was highlighted in *Google and Alphabet v Commission (Google Shopping*).[51] Google LLC is a leading US-based company that focuses on providing internet-related products and services.[52] It is known for its search engines that allow users to locate and access their desired internet search results.[53]

In 2015, Google LLC was a subsidiary of Alphabet Inc, its parent company.[54] It started offering comparison shopping results to its internet users in 2002 from a specialised page which it discontinued for a new Shopping unit that reflected the text for advertisements and the general search results.[55] The Shopping Unit directed internet users who clicked on the advertisement to the advertiser's website.[56]

The federal cartel office in Germany referred this matter to the European Commission after receiving numerous complaints that Google was engaged in favouring practices.[57] The Commission accused Google of abusing its position by favouring its own comparison-shopping service over competitors in Google's general search results pages.[58] It also accused Google of abusing the prohibited conducts provided for in Article 102 TFEU. The European Commission claimed that Google’s conduct not only apply to the strengthening an existing dominant market position but also to distorting competition.[59]

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[50] Ryan Hawthorne 'Has the Conduct-based Approach to Competition Law in South Africa Led to Consistent Interpretation of Harm to Competition (2018) 11 *SAJEM* 292-305 at 294.
[51] Bougette *et al* op cit note 8 at 190.
[52]Case T-612/17 available at https://curia.europa.eu/juris/document/document.jsf;jsessionid=52270C015B8448C713FDE5923118ED12?text=&docid=250881&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4268073, accessed 26 February 2024.
[53] Ibid para 1.
[54] Ibid.
[55] Ibid.
[56] Ibid.
[57] Ibid para 63.
[58] Ibid para 57.
[59] Ibid.

Article 102 of TFEU lists types of abuse by one or more undertaking of a dominant position within the internal market. The identified prohibited abusive conducts involved imposing unfair prices, trading conditions, and limiting production to consumers' disadvantage.[60] Google was also accused of applying dissimilar conditions to transactions with other parties, putting them at a competitive disadvantage.[61] It was further contended that contracts were subjected to acceptance of supplementary obligations, which do not directly extend the subject's position to a neighbouring market [62]

The European Commission claimed that this technique reduced Google's overall search results traffic to competitive retailers while increasing traffic to Google's comparison-shopping offerings.[63] The European Commission emphasized that Google's general results page results, particularly those within the first three to five, significantly drive website traffic, accounting for 95% of clicks.[64] The placement of a link in the generic results has significant effects on its click-through rate, regardless of the web page's relevance.[65] The Commission contested Google's arguments to challenge the 2017 findings by the lower court in the EU.

In response, Google denied that the identified practice could discriminate because it applied different methods for the collection, storage, and discovery of data.[66] Google contended that the Commission ignored industry trends and user preferences, including the increased popularity of merchant platforms for comparative shopping queries.[67] It claimed that these platforms have enhanced service quality, resulting in higher ranks than comparison shopping sites in generic searches.[68] However, this is intimately related to how Google's algorithms rank generic results, which is one of the practices at dispute.[69]

In determining this issue, the General Court found that Google had infringed Article 102 of TFEU by exploiting its dominant position in national markets for generic search services.[70] The General Court upheld the decision held by lower EU courts in 2017 which impose a fine of EUR 2 424 495 000 to Google and Alphabet.[71] The General Court reasoned that Google had

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[60] Ibid para 56.
[61] Ibid.
[62] Ibid.
[63] Ibid para 65.
[64] Ibid.
[65] Ibid.
[66] Ibid para 277.
[67] Ibid at 391.
[68] Ibid.
[69] Ibid.
[70] Ibid para 703.
[71] Ibid para 702.

the knowledge of its conduct undermining the equal opportunities of its complementors.[72] The substantial loss of traffic experience by complementors shopping services was a clear harm to competition. [73]

The General court found that although the practice adopted by Google had some exclusionary effects, it was not a passive refusal of access to general search results page but was merely an active favouring of its own comparison shopping services.[74] It reasoned that the practice adopted by Google could be as harmful to competition like the general theories of harm found in Competition Law such as price-fixing, refusal of supply of a scarce good and market sharing agreements.[75] However, it recognized the favouring practice as an independent, well-established form of abuse falling outside the scope of Competition Law.[76]

This report believes that the standalone recognition of self-preferencing is crucial for circumstances when the elements of the general theories of harm are not accurately applicable. Privacy-centered self-preference actions can be recognised as independent forms of abuse. This recognition does not preclude the application of this practice under article 102 of TFEU.[77] Therefore, self-preference actions prioritizing privacy and data collection can be considered as exclusionary and vertical foreclosure strategies.[78] However, the General Court's failure to establish the elements underpinning the act of self-preference actions as an independent form of abuse propel the adoption of self-preference actions as digital firms are left uninformed.

[72] Ibid para 616.
[73]Ibid para 680.
[74] Ibid at para 218.
[75] Ibid.
[76] Ibid para 218.
[77] Ibid at 248.
[78] Renato Nazzini ' Google and the (Ever-Stretching) Boundaries of Article 102' (2015) 6 *The Journal of European Competition Law* 301–314 at 9.

b) Digital Market Act

In the EU, the Digital Market Act (DMA) was promulgated in 2022 to create a digital environment that is fair and more competitive.[79] The DMA applies to all 'gatekeepers' or hard-to avoid online platforms with the mandate that ensures equal footing with other digital platforms and promotes fair behaviour online.[80] A clear prohibition of self-preferencing is found in Article 6(5) of the DMA,[81] which states that

> "The gatekeeper shall not treat more favourably, in ranking and related indexing and crawling, services and products offered by the gatekeeper itself than similar services or products of a third party. The gatekeeper shall apply transparent, fair, and non-discriminatory conditions to such ranking."[82]

This Article prohibits gatekeepers from favouring their own services and products on their core platform over identical services or goods provided by third parties in terms of ranking,[83] indexing, and crawling.[84] Article 6(5) of the DMA protects vulnerable providers of third-party content when the obligations outlined in Article 5 of the DMA are deemed insufficient.[85] Article 5 of the DMA captures the relationship between data privacy and competition. This article offers users protection of their data and restricts gatekeepers from building a critical database and using it to favour themselves.[86] It requires all gatekeepers to obtain additional consent for a combination of personal data from different sources.[87]

According to Article 6(5) of the DMA, a dominant firm cannot differentially and unfairly present, communicate information about items, services, and search results.[88] A gatekeeper cannot discover, store and organize information to the detriment of their upstream and

[79] European Parliament ' EU Digital Markets Act and the Digital Services Act Explained' 14 December 2021 available at *https://www.europarl.europa.eu/topics/en/article/20211209STO19124/eu-digital-markets-act-and-digital-services-act-explained*, accessed 29 November 2023.
[80] Ibid.
[81] Regulation (EU) 2022/1925 available at *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R1925*, accessed 29 November 2023.
[82] Ibid.
[83] Regulation (EU) op cit note 51. Article 2(22) of the DMA defines ranking as presenting and communicating information about items, services, and search results in many formats, such as display, rating, linking, and voice results.
[84] Christophe Carugati ' How to implement the self-preferencing ban in the European Union's Digital Market' (2022) 22 *Bruegel Policy Contribution Issue* 1-11 at 3.
[85] Regulation (EU) op cit note 80.
[86] Kira Beatriz et al 'Regulating digital ecosystems: bridging the gap between competition policy and data protection' (2021) 30 *Industrial and Corporate Change* 1337-1360 at 1339.
[87] Ibid.
[88] Ibid.

downstream complementors in order to leverage their control.[89] The adoption of non-price strategies such as discovering third-party data for a dominant firm's own benefit is anticompetitive and prohibited.

Article 6(5) of the DMA mirrors circumstances that are outlined in Recital 51 to the DMA. It is observed in this Recital that when offering their products or services, gatekeepers reserve better trading positions for themselves to ensure that their products and services are placed in an advantageous situation over those of their competitors.[90] Recital 61 facilitates the effective application of Article 6(5) by setting out grounds in which dual platform gatekeepers directly undermine the contestability for those products or services on those core platform services, to the detriment of business users who are not controlled by the gatekeeper.[91]

The DMA requires gatekeepers to apply transparent, fair, and non-discriminatory criteria to such ranking, indexing, and crawling.[92] This positive factor suggests that gatekeepers may promote their own services and products over those of their rivals, as long as the treatment is objective and unbiased.[93] An understanding of consumer preference for first-party offers is crucial because aligns with gatekeepers acting in the best interests of consumers and not violating Article 6(5). Article 5 of the DMA further states that:

> "The gatekeeper shall not do any of the following: (a) process, for the purpose of providing online advertising services, personal data of end users using services of third parties that make use of core platform services of the gatekeeper; (b) combine personal data from the relevant core platform service with personal data from any further core platform services or from any other services provided by the gatekeeper or with personal data from third-party services; (c) cross-use personal data from the relevant core platform service in other services provided separately by the gatekeeper, including other core platform services, and vice versa; and (d) sign in end users to other services of the gatekeeper in order to combine personal data, unless the end user has been presented with the specific choice and has given consent within the meaning of Article 4, point (11), and Article 7 of Regulation (EU) 2016/679. Where the consent given for the purposes of the first subparagraph has been refused or withdrawn by the end user, the gatekeeper shall not repeat its request for consent for the same purpose more than once within a period of one year."

[89] Ibid.
[90] Peitz 'The Prohibition of Self-Preferencing in the DMA' (2023) 14 *The Journal of European Competition & Practice* 310- 315 at 12.
[91] Ibid.
[92] Ibid.
[93] Carugati op cit note 86 at 3.

This Article deals with non-price strategies that a dominant online platform adopts to strengthen its control of the market. Article 5(2)(b) of the DMA specifically deals with combining the personal data sourced from these core platform services with personal data from any other services offered by the gatekeeper or with personal data from third party services.[94] Article 5(2)(a) of the DMA prohibits gatekeepers from processing to provide online advertising services, personal data of end users using services of third parties that make use of core platform services of the gatekeepers.[95] The presence of these restraints are to prevent gatekeepers from potentially getting advantages from the accumulated data, thereby raising barriers to entry.[96]

The scope of the self-preferencing measure adopted must be defined when implementing the Article 6(5) of the DMA.[97] Self-preferencing is typically an easily assessable practice. However, it can be difficult to recognize, and this is because of the characteristic of network effects.[98] To ensure efficacy and adequately prevent self-preferencing in the digital economy, any measures with the same effect are captured with the scope according to Recital 52 of the DMA.[99]

Article 6(1) of the DMA is another obligation that addresses self-preferencing in a broader sense as it is concerned with the privileged access and use of data as way to treat first-party products and services more favourably.[100] The ban on self-preferencing outlined in the DMA requires context. It has been argued that the European Commission and courts should not treat this as an automatic exemption and engage in mechanical enforcement.[101] Further, they should use the DMA to identify self-preferencing acts that are likely to be detrimental to market competition and consumers' long-term interests.[102]

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[94] Ibid.
[95]Ibid.
[96] Wolfgang Kerber, Louisa Specht ‘Synergies between Data Protection Law and Competition Law’ (2021) available at *https://ssrn.com/abstract=3977039*, accessed 05 December 2023.
[97] Peitz op cit note 92 at 7.
[98] Max Klasse *et al* ' Self-preferencing under the DMA' available at *https://www.lexology.com/library/detail.aspx?g=5e3e48d7-c481-4276-ab51-268f4d4168eb*, accessed 23 February 2024.
[99] Ibid.
[100] Peitz op cit note 92 at 7.
[101] Ibid at 29.
[102] Ibid.

c) The weaponization of data privacy law by leading online platforms

In the digital economy, it has become vital to collect and use consumer's personal information.[103] Online platforms are rapidly recognizing the benefits of privacy programs, as they can broaden data usage, differentiate from competitors, and build trust with customers, partners, investors, regulators, and the public.[104] This insight is captured in the European Commission' decision dealing with Apple, Google, and Amazon decision that are discussed below.

The introduction of privacy regulation has brought a new focus on privacy consideration in the digital economy as the customer's data is vigorously protected.[105] However, this has created a parallel where online platforms strengthen their control by leveraging privacy enhancements.[106] Privacy- centred practices adopted by dominant firms achieve the means of being abusive to its competitors. This occurs when the benefits of data privacy are used beyond the means of achieving regulatory compliance.[107] The weaponization of data protection legislation occurs when firms use privacy concerns as an 'excuse' to engage in practices that strengthen their control in markets such as self-preferencing.[108]

Privacy-centered policy frameworks typically take the form of self-preferencing when refusal of access to data using privacy concerns is used as an excuse to strengthen control of the downstream and upstream market. It also takes the form of a dominant firm adopting frameworks that completely remove access to third-party cookies from competitors in the downstream market. A tension exists between allowing access to rivals and protecting consumer privacy.[109] In a brick-and-mortar ages, this took the form of hospitals limiting the portability of data and citing privacy concerns as the basis for this.[110]

The adoption of self-preferencing practices in South Africa's economy will have a dire impact as there are more small and medium enterprises operating in the downstream market. The Information Regulator must provide guidelines on privacy regulations that are considered

[103] Katherine Kemp 'Concealed data practices and Competition: Why privacy matters' (2020) 16 *European Competition Journal* 628-672 at 4.
[104] Aaron Tan 'How Organisations can weaponise data privacy' 29 March 2023 available at https://www.computerweekly.com/news/365534050/How-organisations-can-weaponise-data-privacy, accessed on 25 February 2024.
[105] Ibid.
[106] Ibid at 76.
[107] Ibid.
[108] Ibid.
[109] Tucker op cit note 25 at 16.
[110] Ibid.

to dissuade dominant firms from favouring their own products and goods over those of its competitors. The Information Regulator must also provide types of *'per se'* prohibitions for certain privacy-centered policies where obtaining consent is not needed. This is to inform both the users and digital platform of conduct that is permissible.

Self-preferencing underpins many decisions laid against leading digital firms in the digital economy. A notable case where privacy-concerns are used by a dominant platform operator that could possibly exploit consumer and user data in the downstream market is the Privacy Sandbox project. This project was established by Google to develop new standards that enhanced user privacy and enable online advertising without third-party cookies.[111] It aimed to remove cross-site and cross-app tracking while enabling publishers and developers to keep online content free.[112]Historically, the role of third-party cookies was to ensure that businesses target advertising effectively and fund free online content for consumers.[113] The use of these cookies came with general concerns regarding their legality and use from a privacy perspective as they permitted the tracking of consumer behaviour. In 2021, the CMA opened an investigation into this project. Its objective was to determine if this project's proposition would increase the amount of money spent on Google's ecosystem at the expense of competitors.[114] The CMA established that the Privacy Sandbox project obstructed the ability of publishers, such as newspapers to generate and deter competition in digital advertising.[115] It received complaints from marketers from a group of newspaper publishers alleging that Google was abusing its dominant position. [116]

Pursuant to this complaint, the CMA had been participating in an active discussion with regulators to implement, design and evaluate the Privacy Sandbox proposal to consider its general impact on the privacy principles outline in data legislations.[117] It also set to evaluate its impact on competition and user experience in digital advertising.[118] A final report was

[111]Privacy Sandbox 'What is the Privacy Sandbox' available *at https://developers.google.com/privacy-sandbox/overview*, accessed 06 March 2023.
[112] 'The Privacy Sandbox: Technology for a More Private Web' available at *https://www.privacysandbox.com/,* accessed on 06 March 2023.
[113] Competition and Market Authority 'CMA to investigate Google's Privacy Sandbox' browser changes' available at *https://www.gov.uk/government/news/cma-to-investigate-google-s-privacy-sandbox-browser-changes, accessed* on 19 September 2023.
[114] Ibid.
[115] Ibid.
[116] Ibid.
[117] Ibid.
[118] Competition and Market Authority' available at *https://assets.publishing.service.gov.uk/media/62052c6a8fa8f510a204374a/100222_Appendix_1A_Google_s_final_commitments.pdf,* accessed on 9 September 2023

published in February 2022 and concluded that Google was committed to refraining from sharing data within its ecosystem which would have favoured itself over its competitors after the removal of third-party cookies.[119] Recently, an updated report was published on the implementation of the Privacy Sandbox commitments. This report considered building a deeper understanding of Google's internal data control system to eventuate Google's commitment to refrain from sharing data within its ecosystem.[120] It also engaged with international counterparts and data protection authorities to reach a better understanding of any issues and ensure consistency in approach before the implementation of the commitments.[121] These collaborative efforts are positive step towards ensuring harmony between respective legal frameworks.

Self-preferencing underpins the Amazon decision laid out by the European Commission where Amazon was blamed for using its dominant position to take advantage of its upstream activities. In July 2019, the European Commission opened a formal investigation into Amazon's use of non-public data public data of its marketplace sellers.[122] A decision was laid in 2020 which found that Amazon's reliance on marketplace sellers' non-public business data calibrated its retail decisions, altered fair competition and impeded effective competition.[123] Amazon has pledged to address data use issues by refraining from using non-public data gathered from independent sellers on its marketplace for the purpose of marketing branded items.[124]

Self-preferencing is also at the core of the release of the App Tracking and Transparency framework (ATT framework) which was introduced by Apple in April 2021.[125] The ATT framework provided an update to all Apple devices prompting all apps to request

[119] Competition Commission South Africa 'Online Intermediation Platforms Market Inquiry Final Report and Decision' 2023 available at *https://www.compcom.co.za/wp-content/uploads/2023/07/CC_OIPMI-Final-Report.pdf*, accessed 15 August 2023 at 61
[120]Competition & Market Authority ' CMA Q2 2023 Update Report on Implementation of Privacy Sandbox Commitments' available at *https://assets.publishing.service.gov.uk/media/64c234da7f0215000d88d857/Google_Sandbox_report.pdf*, accessed 06 March 2023.
[121] Ibid.
[122] European Commission 'Antitrust: Commission accepts commitments by Amazon barring it from using marketplace seller data, and ensuring equal access to Buy Box and Prime' 20 December 2022 available at *https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7777*, accessed 25 April 2023.
[123] Ibid.
[124] Ibid.
[125] Klaus Wiedemann 'Data Protection and Competition Law Enforcement in the Digital Economy: Why a coherent and Consistent Approach is Necessary' (2021) 52 *International Review of Intellectual Property and Competition Law* 915–933 at 917.

consent to track user's behaviour across apps and websites.[126] This framework required app developers to provide users with supplementary information for the purpose of tracking. [127] In the instance of receiving a refusal to consent, app developers are limited in accessing the Identifier for Advertisers (IDFA) which is assigned to every Apple device.[128] The IDFA is typically known as an administrator of personalized advertising.[129] Following the enforcement of the ATT framework, the opt-in rates were extremely low which eventually damaged the businesses operating and depending on mobile advertising.[130] As a solution to this dilemma, Apple created measurement tools that provide advertisers with organic and time-delayed feedback on their post-ad click conversion events.[131] This provides a relief from the overall limitations of the framework. This framework grabbed the attention of the *Autorite de la Conconcurrence* (*Autorite*) - the French National Competition Regulator. Several association representing a variety of players of French online advertising raised complaints to the *Autorite* regarding the exclusionary nature of the ATT framework.[132] These complainants claimed that the ATT framework aimed to dissuade users from giving consent to third-party tracking.[133] They argue that the tracking permission prompt is unnecessary, as consent must be initially retrieved under the GDPR and users might be subject to a negative user experience due to the additional consent forms they are facing. [134] Further, they argued that Apple engaged in anticompetitive self-preferencing by continuously engaging without adopting tracking permission prompt themselves.[135] The *Autorite* held that the *Autorité* did not find evidence that Apple engages in illegal self-preferencing, as its own advertising service does not fall under the definition of third-party tracking under the ATT framework.[136] There was commitment that the authority will continue its investigation in this regard.[137] The *Autorite's* failure to acknowledge the clear exclusion of Apple as third party clearly falls into the definition of self-preferencing. It is in these instances, where the failures of the General Court in *Google v*

[126] Ibid.
[127] Ibid.
[128] Ibid.
[129] Ibid.
[130] Garett A. Johnson, Julian Runge, and Eric B. Seufert 'Privacy-centric Digital advertising: Implications for Research' (2022) 9 *Springer Nature B.V* 49-54 at 49.
[131] Ibid.
[132] Wiedemann op cit note 127 at 4.
[133] Ibid.
[134] Ibid at 5.
[135] Ibid.
[136] Ibid.
[137] Ibid.

Shopping shine resulting in a diminished value in free internet which is provided by personalised advertising.[138]

V. REGULATION OF COMPETITION IN THE SOUTH AFRICAN DIGITAL MARKET

(a) Major players in the Digital Market

Digital platforms generate vast amounts of data that differ from traditional markets. They can access information on all sellers and buyers on multiple sides of their platform, enhancing market dynamics.[139] Platforms collect and monetize data in various ways, such as through direct subscription models.[140] In South Africa, different digital firms operate with varying degrees of dominance across numerous industries.

In the eCommerce industry, Takealot is a clear market leader and holds the dominant share of online sales.[141] Its dominant position is stronger in narrower markets for marketplace services to sellers.[142] Takealot is a direct retailer that also provides online marketplace services to sellers. It has dual functions in its services to South African consumers. A typical dual-platform firm fosters the existence of a conflict of interest because of its dual functions. This made smaller businesses trading on online marketplace in South Africa exceedingly dependent on Takealot.[143] UberEats and Mr D Food are the leading online platforms for food deliveries with estimated share of 80- 90 percent, with each passing the market share threshold for presumed dominance.[144] In the online travel agents account for 90 percent of platform revenue shares.[145] Travel agents include booking.com, Airbnb and SafariNow to name a few.[146] Booking.com has 50 percent of the revenue share of online travel agents and is one of the largest traditional accommodations established.[147] Booking.com's dominance is aided by its business tactics, which include tight pricing parity, significant accommodation-funded discounts.[148] This business model has the ability of preventing establishments from pricing

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[138] D Daniel Sokol, Feng Zhu 'Harming Competition and Consumers under the guise of protecting privacy: An analysis of Apple's iOS 14 policy updates' (2021) 107 *Cornell Law Review Online* 94-122 at 102.
[139] Beatriz *et al* op cit note 88 at 1340.
[140] Ibid.
[141] Competition Commission op cit note 119 at 51.
[142] Ibid at 52.
[143] Ibid.
[144] Ibid.
[145] Ibid at 37.
[146] Ibid.
[147] Ibid at 38.
[148] Ibid.

lower on Booking. Com 's website.[149] Therefore, a dependency is created with digital firms obtaining higher commissions from this scheme that punishes low-ranking firms. This scheme self-preferences Booking.com.[150] There are many more online intermediaries that have active dominance in the South Africa.

(b) Competition Commission's Inquiry

In 2021, The South African Competition Commission (hereafter 'Commission') published a second version of a paper titled *'Competition in the Digital Economy',* following the submissions received from the September 2020 version.[151] The September 2020 version of this paper highlighted the increased consideration given by the Commission to the use of algorithms, artificial intelligence, and personal data in the context of abuse of dominance in competition law.[152]

The Commission proposed resolutions regarding the efficiency of the existing antitrust toolkit in dealing with issues of abuse of dominance that are raised within the digital economy.[153] The Commission's recent paper focused on various industries such as the eCommerce, food delivery, and app stores as they affected business activities across a wide range of the economy.[154]

Takealot being one of the biggest e-Commerce platforms has grabbed the Commission's attention in the online intermediation platform market inquiry (OIPMI).[155] Its dominant position was confirmed by the inquiry's survey where it was determined that business users had a higher level of dependency on Takealot core platform despite selling through other platforms.[156] This meant that Takealot could easily engage in conduct that potentially harmed competition or exploited sellers without fear of losing them from its marketplace.[157]

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[149] Ibid at 6.
[150] Ibid.
[151] Competition Commission South Africa 'Competition in the Digital Economy version 2" available at *http://www.compcom.co.za/wp-content/uploads/2021/03/Digital-Markets-Paper-2021-002-1.pdf,* accessed on 05 December 2022.
[152] Competition Commission South Africa 'Competition in the Digital Economy' available at *http://www.compcom.co.za/wp-content/uploads/2020/09/Competition-in-the-digital-economy_7-September-2020.pdf*, accessed on 05 December 2022.
[153] Ibid.
[154] Ibid.
[155] Competition Commission op cit note 119 at 10.
[156] Ibid.
[157] Ibid.

The Inquiry into Takealot indicated that the form of self-preferential treatment adopted was the use seller data by Takealot buyers to inform their own retail offering on the marketplace and develop their own private label lines.[158] Seller's data is information collected and analysed about sellers on an online marketplace.[159] This includes sales, performance, customer feedback, product listings and inventory levels.[160] In instances, where customer feedback reveals information that is identifiable to a natural or juristic person than the Protection of Personal Information Act is triggered. This finding reflects the practice of self-favouring by a dominant firm which uses valuable data at the expense of third parties wishing to compete in the same market and consumers.

Takealot use of seller's data was found to unfairly take advantage of sellers who invested in developing or identifying products that may appeal to South African consumers and have invested in promoting those products to build awareness and popularity, both on and off the marketplace.[161] The OIPMI's final report and ruling compelled Takealot to segregate its retail sector from its marketplace operation, prohibit its retail services from accessing seller data, and unilaterally prohibit sellers from competing for specific brands.[162] The remedial action proposed in the final report and decision of OIPMI aligns with the European Commission's decisions in the Amazon case.

The Commission also investigated Google's self-preferencing of its own products in its Shopping, Travel and Search core platforms. Google has a *de facto* monopoly position in its search, travel, and shopping platforms.[163] In terms of the Google search, Google holds more than 90 percent of searches across desktops, tablets, and mobile services.[164] The Google search ranking matters since customers are inclined to click on the top results, presuming they are most relevant to the query. This feature promoted the adoption of self-preferencing practices in search results.[165] This practice is seen by Google duplication of platform in both the organic and paid results.[166]

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[158] Ibid.
[159] Lucy Keller 'Seller Data: Best Datasets & Databases' available *at https://datarade.ai/data-categories/seller-data*, accessed 28 December 2023.
[160] Ibid.
[161] Competition op cit note 119 at 7.
[162] Ibid at 10.
[163] Ibid at 27.
[164] Ibid at 5.
[165] Ibid.
[166] Ibid.

The inquiry held that the practice adopted in Google Search distorted competition as small and new platforms struggled to be visible and acquire customers.[167] Google was ordered to introduce new platform sites to display smaller South African platforms and provided R180 million for the training of customer's acquisition.[168] For both Google Travel and Shopping, the inquiry found that Google was always at the top of the organic search results as the first organic result.[169] The Shopping Unit and Google Travel is a visually appealing display of products that differs from the text ad format found in other paid result.[170] The inquiry's remedial actions required Google not to prioritize its own services or products in ranking and indexing above those of third-party providers.[171] Google should employ transparent, fair, and non-discriminatory criteria for ranking.[172]

The OIPMI also looked at the Apple app store which accounts for a vast majority of mobile users, app downloads, and revenues earned in South Africa.[173] Despite having fewer smartphone users, Apple has a higher amount of app downloads and app store revenue due to its high-end target demographic.[174] Apple's strong market position is influenced by its exclusivity-based business model. For example, on its iOS devices, Apple bans side-loading of software onto its devices by not providing any alternative to the App Store.[175]

The inquiry merely requested Apple to acknowledge that its App Store had an effective device monopoly because of this business model.[176] It has demonstrated no willingness to challenge its business model, which is particularly under scrutiny in this report. The lack of focus on the business model was an oversight on the side of the inquiry, as in the confluence between data protection law and competition law this very business model influences the adoption of self-preferencing practices.

The Commission adequately investigated online platforms successfully operating in the South African digital economy leaving us informed about the ways of dealing with privacy-centered practices adopted. The heavy reliance on the EU's decisions requires South African

[167] Ibid.
[168] Ibid.
[169] Ibid at 30.
[170] Ibid at 33.
[171] Ibid.
[172] Ibid.
[173] Ibid at 8.
[174] Ibid.
[175] Ibid at 63.
[176] Ibid.

competition authorities to employ a case-by-case examination when dominant firms' self-preference by using data to the detriment of third-party sellers.

(c) Abuse of dominance

The objective of the Competition Act is to promote and protect competition in all platforms and markets in the Republic.[177] Its purpose is to provide consumers with competitive prices and product choices.[178] It also attempts to promote the efficiency, adaptability, and development of the economy.[179] It further aims to promote employment and spread greater ownership in South Africa.[180] The Competition Act also highlights some of the restricted and prohibited practices that harm competition. Abuse of dominance is one of the prohibited practices and is dealt with in sections 7, 8 and 9 of the Competition Act. Section 7 of the Competition Act provides the test that can be used to determine whether a firm can be regarded as dominant.[181] In terms of this test, dominance is generally determined through the firm's market share and power. Market power illustrates the firm's ability to conduct itself in a way that disregards competition. It is important to determine whether a firm has market power in the digital economy. Market power will invariably allow such a firm to accumulate big data and network effects in the digital economy that offer it a competitive advantage. [182]

Section 8 of the Competition Act provides that excessive pricing, refusal of access to an essential facility and exclusionary behaviour are forms of conduct that would constitute abuse of dominance. This is particularly when the conduct of the firm that is abusing its dominance has an unjustified anti-competitive effect. To determine whether the conduct in question is an exclusionary act, there are different approaches that address the application of section 8 of the Competition Act, rule of reason and per se prohibitions.[183] In terms of the rule of reason analysis, the legality of conduct that may restrict competition is accessed, whereas the per se rule renders conduct automatically unlawful. The onus remains on the complainant to determine whether the anti-competitive effect of the conduct outweighs any efficiency justification.

[177] Section 2 of Competition Act 89 of 1996.
[178] Ibid.
[179] Ibid.
[180] Ibid.
[181] Section 7 of Competition Act 89 of 1998 states that a firm must hold more than 45 per cent of overall shares in the market. It must at least have 35 per cent but less than 45 per cent, unless indicated it does not have market power. It can also have less than 35 per cent but still hold market power.
[182] Competition op cit note 162 at 7.
[183] GovChat *Proprietary Limited and Another v Facebook Inc and* others available at https://www.comptrib.co.za/open-file?FileId=52581, accessed 25 February 2024 at 7.

Conducts that induce a supplier from not dealing with a competitor; refuse supply of scarce goods to a competitor when it is economically feasible to do so; engages in margin squeeze; and sells goods at a predatory price or with a condition unrelated to the object of the contract would fall under section 8(1)(*d*) of the Competition Act. If the conduct falls under the listed specific types of exclusionary acts found in section 8(1)(*d*), an assessment of its anti-competitive effect must ensue. Conduct listed in section 8(1)(*d*) of the Competition Act will be anti-competitive only if there is evidence of actual harm to the consumer or the exclusionary act is substantial or significant in terms of foreclosing the market to rivals.[184] The burden of proving this anti-competitive effect rest on the respondent.[185] It is clear that the exclusionary acts are different from the anti-competitive effects.[186] Exclusionary acts are more egregious and the 'per se' treatment is warranted.[187]

The Competition Tribunal (hereafter 'Tribunal') in *Emedia Investments (Pty) Ltd South Africa v Multichoice (Pty) Ltd and another* held that MultiChoice's refusal to carry the discounted channel did not constitute an exclusionary act as captured in section 8(1)(*a*) of the Competition Act.[188] It rejected the claim that the effect of the refusal to supply was anti-competitive as MultiChoice renewed its contract with other news network.[189] The Tribunal held that there was no harm to competition but eMedia incurred a financial harm that did not trigger section 8(1)(*d*) or 8(1)(c) of the Competition Act.[190] The Competition Appeal Court held that eMedia failed to establish *prima facie* that MultiChoice's refusal to carry the discounted channel amounted to a prohibited practice under section 8(1)(*d*)(ii) or section 8(1)(*c*) of the Competition Act.[191]

In *Competition Commission of South Africa v Media 24 (Pty) Limited*, the Constitutional Court dealt with predatory pricing found in section 8(1)(*d*)(iv) or section 8(1)(*c*) of the Competition Act.[192] First, the Tribunal found that Media24 had not priced its advertising below its average avoidable cost, and thus the Commission failed to establish that Media24 priced below the lower standards of average variable cost or marginal cost.[193] The Tribunal relied on section

[184] Ibid.
[185] Ibid at 43.
[186] Ibid.
[187] Ibid.
[188] *Emedia Investments (Pty) Ltd South Africa v Multichoice (Pty) Ltd and another* [2022] 2 CPLR 23 (CAC) at 13.
[189] Ibid at 15.
[190] Ibid at 16.
[191] Ibid.
[192] Competition Act 89 of 1998.
[193] Ibid at 8.

8(*c*) and not section 8(*d*)(*iv*) of the Competition Act.[194] It held that the average total cost could be an appropriate cost standard for finding under section 8(*c*) of the Competition Act when accompanied by additional evidence of predation.[195]

The Tribunal held that Media24 was guilty of predatory pricing logic in terms of section 8(c) of the Competition Act based on the internal communication found that directly intended to undercut Media24 complementors.[196] It held that the closure of Forum (community newspaper acquired by Media24) directly after the departure of GNN from the market amounted to indirect intentions to predate GNN.[197] The additional evidence of Vista's increased price after the departure of GNN established a strong form of recoupment.[198] The Tribunal reasoned that it was unlikely that the efficiency of GNN was the reason for its departure from the market because it had previously gained market shares so quickly.[199] The matter was appealed to the Competition Appeal Court, which held that subjective evidence of intent should not be examined in proving predatory pricing under section 8(*c*) of the Competition Act.[200] It rejected the average total cost-plus intention established by the Tribunal.[201] Conclusively, it held that Media24 had not violated section 8(*d*)(*iv*) or 8(*c*) of the Competition Act.[202]

The matter was ultimately appealed to the Constitutional Court, where Media24 argued for the removal of the average total cost standard and that the additional evidence as a relevant cost measure for establishing the predatory pricing under section 8(*c*) of the Competition Act.[203] Whereas the Tribunal and Commission held that the average total cost and additional evidence are appropriate measures,[204] The Constitutional Court held that the exclusion of a cost standard by the Competition Appeal Court was incorrect.[205] It was of the view that this exclusion limited the prosecutorial powers of the Commission.[206] It reasoned this by listing other circumstances where the cost standard might be useful such as multi-product firms.[207] The Constitutional Court held that irrespective of the particular cost standard adopted, a

194 Ibid.
195 Ibid at 9.
196 Ibid.
197 Ibid at 10.
198 Ibid.
199 Ibid at 11.
200 Ibid at 12.
201 Ibid.
202 Ibid.
203 Ibid at 29.
204 Ibid.
205 Ibid at 39
206 Ibid.
207 Ibid at 34.

conduct of pricing below a cost standard needed to have anti-competitive effects that were outweighed by its technological gains as listed in section 8(*c*) of the Competition Act.

In *GovChat v Facebook*, GovChat asked theTribunal to prevent from 'off-boarding' GovChat from WhatsApp Business[208] GovChat claimed that WhatsApp is dominating and that its actions constitute a prohibited activity, specifically a violation of sections 8(1)(*d*)(*ii*) and 8(1)(*c*) of the Competition Act.[209] In assessing the elements of section 8(1)(*d*)(*ii*) of the Competition Act, the Tribunal held that WhatsApp had prima facie dominance in the market for over-the-top (OTT) applications.[210] Therefore, it held that the applicant were complementors. It reasoned that WhatsApp app or platform was treated as a service in the draft reference of the OIPMI that cannot be easily duplicated.[211]. The court determined that a refusal to supply is a rule of reason prohibition with anti-competitive implications demonstrated by consumer welfare harm and significant foreclosing effects.[212] The Tribunal found that WhatsApp was selectively applying its terms and conditions to support its own business service providers, rendering services directly to government departments.[213]

It is submitted that the above discussed decisions have provided a judicial guidance for the interpretation and implementation of abuse-of-dominance rules to digital markets.[214] These decisions provided a framework within which section 8(1)(*d*)*(ii*), 8(1)(*d*)(*iv)* and 8(1)(*c*) of the Competition Act can be applied to digital markets.[215] For instance, in multi-product firms the adoption of self-preference practices increases. Therefore, it would be appropriate to use the cost standard in assessing the self-preference actions that predate complementors under section 8(*c*) of the Competition Act. In assessing these self-preference actions as exclusionary acts, an anti-competitive effect analysis ought to be established. A financial harm will not solely be a substantial effect.

It cannot be doubted that self-preferencing can take place in the form of price discrimination by a dominant firm as expressed in section 9 of the Competition Act. In terms of Section 9 of the Competition Act, an action by a dominant supplier is prohibited price

[208] *Govchat Proprietary* op cit note 184 para 2.
[209]Ibid para 157.
[210] Ibid para 104.
[211] Ibid para 113.
[212] Ibid.
[213] Ibid para 166.
[214] Simphiwe Gumede, Phathutshedzo Manenzhe 'Competition regulation for digital markets: The South African experience' (2023) *The African Journal of Information and Communication* 1-19 at 13.
[215] Ibid.

discrimination if it is likely to have the effect of substantially preventing or lessening competition or impeding the ability of SMEs or historically disadvantaged persons to compete effectively in a market. [216] In the digital economy, this will take the form of a dual-operating firm charging third party for distribution.[217]

(d) Data privacy and competition in the digital market

Data privacy regulation is known to systematically regulate the use of information about people.[218] The regulation of South African people's private information can be traced back to the Bill of Rights included in the Constitution of the Republic of South Africa, 1996 (Constitution). In terms of section 14 of the Constitution everyone has the right to privacy, which includes the right not to have their property or persons searched; and the privacy of their communication infringed to name a few.[219] In *Bernstein and others v Bester and others NNO,* the Constitutional court held that the right to privacy is recognized as an independent personality right included in the concept of dignity.[220]

The Protection of Personal Information Act was promulgated to give effect to the right to privacy and regulate the processing of personal information in harmony with international standards.[221] It established eight requirements for the lawful processing of personal information that are harmonious with the General Data Protection Regulation (GDPR) central tenets.[222] The GDPR serves as a global benchmark for most data protection legislations and inspired many other data protection laws around the continent.[223] The maintenance of competitive processes in digital platforms to expand opportunities for South African participants such as small and medium-sized enterprises is a critical objective of the competition law.[224] The Protection of Personal Information Act directly protects consumers and data subject's rights, whereas the Competition Act indirectly protects of consumers through its maintenance of market efficiency.

The Protection of Personal Information Act came with a lot of uncertainty about its enforceability in the digital market especially when privacy regulation is used as a weapon. A notable scholar named Victoria Bronstein makes a credible argument regarding the South

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[216] Competition Act 89 of 1998.
[217] Duquesne *et al* op cit note 2.
[218] Kemp op cit note 102 at 7.
[219] Constitution of the Republic of South Africa Act 108 of 1996.
[220] *Bernstein and others v Bester and others NNO* 1996 (2) SA 751 (CC) para 68.
[221] Protection of Personal Information Act 4 of 2013.
[222]Ibid.
[223] Jeremy De Beer ' Digital markets, big data, data privacy, and competition: where crossroads meet' (2020) *without prejudice* 16-17 at 16.
[224] Ibid.

African Information Regulator being overburden with the mandate of giving exemptions, authorisations and pre-approvals whereas the UK Information Commissioner’s Office relies on data controllers to make decisions about processing of data in line with the principles in the GDPR.[225] The command-control feature of the Protection of Personal Information Act dilutes the accountability requirements found in the GDPR which results in an overburden Information Regulator and slims the chances of establishing guidance for types of privacy policies that can be deemed as self-preference measures.[226] It is fair to expect more self-preferencing adopted by dominant firms in South Africa besides Takealot

A recommendation of adopting a more collaborative approach that aligns with the memorandum of agreement entered between the Information Regulator and Competition authority that maintains the intra vires principles requiring each party to recognise and respect the independence, governance structures and internal process of others.[227] Scholars such as Meriani argue that data protection consideration must be made through the lens of Competition Law when it influences the legal framework.[228] This is critical when privacy regulations are used as tool to foreclose rivals in digital markets. Both the Information Regulator and Competition Authorities must reinforce a stronger relationship with different sectors operating in the digital economy to ban self-preferencing in any form that is not intrusive.[229] Collaboration can enhance the Information Regulator's workload and address the use of privacy regulations to self-preference, as identified by competition authorities. Our data culture cannot be solely based on the Information Regulators’ coercive powers, and therefore some legislative reform is needed in that regard.[230] This legislative reform will deal with the extensive use of prior approvals in the Protection of Personal Information Act.[231] It is highly unlikely that some coherence between the Protection of Personal Information Act and the Competition Act will be reached until guidance about the forms of self-preferencing practices dominant in our economy is provided.

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225 Ibid at 30.
226 Ibid at 31.
227 Memorandum of Agreement available https://www.compcom.co.za/wp-content/uploads/2021/12/20211021-MOA-between-the-CCSA-and-the-Information-Regulator-of-SA-002-signed.pdf, accessed on 20/02/2024 at 6.
228 Orla Lynskey ‘At the crossroad of data protection and competition law: time to take stock’ (2019) 8 *International Data Privacy Law* 179-180 at 179.
229 Cezley Sampson, Faye Sampson ‘Competition and Sectoral Regulation Interface’ 2003 at 6, available at https://www.cuts-ccier.org/pdf/Competition_and_Sectoral_Regulation_Interface.pdf, accessed 9 September 2023.
230 Victoria Bronstein ‘Prioritising Command-and-Control Over Collaborative Governance: The Role of the Information Regulator Under the Protection of Personal Information Act’ (2022) 25 *Potchefstroom electronic law journal* 1-41 at 31.
231 Ibid at

(e) Lessons learnt from the EU

The OIPMI perfectly captures the goal of a fair and contestable market as stipulated in article 1(1) of the DMA. The similarities in the approach adopted between Amazon and Takealot indicate that the DMA provides some guiding parameters to Commission on how to resolve the uncompetitive digital markets caused by a dominant firm's adopting of a self-preferencing practice. It is clear from the final report on the OIPMI that reliance was placed on article 6(5) of the DMA relating to Googles actions.[232] However, the Inquiry urged that upon the implementation of article 6(5) relevant adaptations are made in South Africa in consultation with the Commission.[233]

The non-price strategies captured in recital 51 of the DMA can be argued to have informed similar cases relating to a South African vertically integrated firm using sellers' data from its core platform to compete with third parties in the same platform. The prohibition of gatekeepers cross using the personal data from their core platforms into other services provided separately by the gatekeeper unless consent is provided is important. This prohibition is captured in article 5(2) of the DMA and perfectly aligns with general privacy principles captured in the Protection of Personal Information Act. It ensures that self-preferencing practices are not easily adopted by a vertically integrated platform and are detrimental to its competitors in the downstream or upstream markets. The Commission's report acknowledgements of the DMA advocates for legislative reform in South Africa's digital economy dealing primarily with self-preferencing practices adopted by leading platforms.

This report supports the stricter regulation of digital platforms provided by the DMA. Most of the intermediary platforms operating in South Africa's digital economy have some substantial connection to the EU, their impact on South African consumers is paramount and evident. The DMA is useful for South African consumers operating within the EU's and South Africa's digital economy.

VI. CONCLUSION

This research report discussed the favouring of a dominant digital firm's own products in the upstream and downstream market resulting in the foreclosure of its rivals. In this report, it was

[232] Case op cit note at 52 chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.compcom.co.za/wp-content/uploads/2020/09/Competition-in-the-digital-economy_7-September-2020.pdf, accessed 25 February 2024.
[233] Ibid.

argued that the characteristic of an online platform influences the dominant use of practices by firms that favour themselves unlike the brick-and-mortar economies. It was further illustrated that data can be considered an essential facility in exceptional cases and the refusal to access it would constitute an anti-competitive abuse found in section 8(1)(*b*) of the Competition Act. It was demonstrated that in the EU self-preference practices that take the form of weaponizing privacy regulations are standalone theories of harm that can be prohibited by Article 102 of TFEU. The lesson that South Africa can learn is that dual operating platforms must separate its online marketplace and refrain from cross-using user's personal data without consent. This was emphasised by the Commission which argued in its report that ordered Takealot to separate its retail division as using seller's data was self-preferencing itself. There are dominant firms in the digital economy that are abusing their dominance by manipulating search results, using data gained from rivals on their platform to improve first party offer and limiting access to a third-party's applications. It was shown that section 7, 8 and 9 of the Competition Act have been interpreted by South African courts in a manner that makes them to be easily applied to the anticompetitive conducts that arise in the digital economy. Notwithstanding this, the legislative framework can be improved by amending the command-and-control feature found in the Protection of Personal Information Act.

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