Exploring an Initial Response to Big Tech In Africa

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Around the globe, a number of jurisdictions and initiatives are currently and urgently examining the fast-changing markets and economies of data, ICT, and credit. The source of change is largely understood as the digital revolution. These jurisdictions are particularly trying to understand and respond to corporate structures of increasing scope and power: “big tech”.

Another linked but separable important strand of the political debate regarding big tech and this digital revolution concerns the very substance and character of society’s public sphere itself. There are numerous issues concerning electoral interference and the erosion of civility on social media. Conservatives in the USA express worry that non-left views are censored and kept off of social media such as Twitter. Leftist writers have often expressed concern about extremist views and the ways in which digital media appear to facilitate and deepen nationalist sentiments and white and Hindu supremacists. The announcement this past week that Luminate is creating a new division – termed “Reset” – to address “digital threats to democracy” is the latest indication of their pressing nature. While the issues above are not the primary concerns of this paper, they do often interact with and serve emphasize the issues that are considered here: invasions of privacy and violations of fair market principles.

It is at least in significant part the increasing scope and power of big tech – their apparently dominant and ever-growing market and social power --that has triggered the current political examination and willingness to examine strengthened regulation of these entities. The dominant response is to propose different and increased national regulation, with efforts differing significantly among the UK, the USA, Germany, and Australia. Sectors of particular interest are telecommunications, e-commerce, financial services, and media. Cross-economy regulatory sectors that are part of these proposed responses include competition, privacy, technology standards, and consumer affairs and their respective regulatory institutions.

Africa is of course part of this global change. However, one might initially perceive that Africa as more passive participant than active player. Certainly, for the big tech companies African jurisdictions are a very small part of their user base. For instance, in 2016, Facebook had its lowest average revue per user for African users (80 us cents compared to $8 for US users).

Still, just like anywhere else in the world, Africans are clearly part of the global market. And Africa and its population are a growing part of this global market. One materiality of this inclusion of Africa in the digital was when Microsoft opened two cloud data centres in Johannesburg and Cape Town in March 2019. And two other dimensions, Africa is arguably at least among the global leaders. First, with the phenomenal growth and society-wide uptake of M-Pesa and M-Shwari in Kenya, the concepts of mobile money and mobile credit have become closely linked to the financial services sector in East Africa and are renowned
around the world.\textsuperscript{1} Second, Africa serves as a main battle and proving ground for various and the latest development initiatives. Large organisations such as the World Bank, private sector donor organisations, and ID4Africa pay significant attention (and funds) to the development of biometric identification systems in Africa.\textsuperscript{2} Still, on the whole, the power and place Africa appears to occupy in the digital revolution seems cast dominantly as buyers, consumers, and users.

\textbf{The Digital Trend, Tech Giants, and African Tech Giants (the Isiqhwaga)}

Even if potential responses are just getting traction and momentum in the past couple of years, the societal trends associated with digitalization can be dated from the early 2000s. An important question here may be whether digitalization is an intensification of globalization or a separate development. Further, the relationship of digitalization to the financial crisis of the 2008 needs to be specified.

In any case, the global tech giant firms are now household names. The largest among them are mostly American in origin and culture: Google, Facebook, Microsoft, Amazon, Apple. While perhaps not so much Microsoft, the four of Google, Facebook, Amazon, and Apple are claimed to be drivers of social change. The technology associated with a particular group of companies (each of these tech giants are structured as groups of companies) is directly associated with a major instance of social change itself. The only “mostly” American origins of this group does mean that some diversity exists. Two other tech firms in the global top ten (of all sectors) are Chinese: Alibaba and Tencent.

While these largest tech giants long enjoyed relatively favourable press and perhaps benign neglect from politicians and political institutions, politics regarding this sector has changed dramatically in many jurisdictions. Many nations and some supra-national regions (such as the European Union) are now publicly investigating and debating potential new governmental controls of these tech giants. These efforts unfolding primarily in the global North as well as at the edges of the OECD (in a jurisdiction such as India) differ significantly among themselves. In the United Kingdom, a preliminary investigation held by the competition authority has reported in June 2019 and followed a high profile commission, the Furman Commission.\textsuperscript{3} In the United States, the issue of big tech has registered in presidential campaigns, in congressional hearings, and in announcement of anti-trust investigations by agencies of the federal government. In Germany, the competition authority found against Facebook in 2019 on the theory of abuse of dominance for amassing data and violating privacy laws.\textsuperscript{4} In Australia, the Australian Competition and Consumer


Commission announced the findings and recommendations of its digital platforms inquiry in July 2019.⁵ Like a number of the others noted here, this Australian effort was actually more targeted than a sweeping investigation of big tech – its terms of reference allowed the ACCC to study “digital search engines, social media platforms and other digital content aggregation platforms ... on competition in media and advertising services markets.” Thus, “effectively ... the focus was on Google and Facebook.”⁶

To explore the African contours of this trend as well as an appropriate response, we need to identify and map a second set of tech giants. A number of multinational tech firms from emerging economies have African origins (and perhaps culture). While in a second tier global size/value category, these firms are significant, not least from an African point of view, as their effects on the societies and economies of their jurisdictions of origins can be significant.

While it is still the case that the largest corporations in Africa are for the most part concerned with resources (such as the largest, the Angolan oil parastatal), African tech companies are now large and are growing. Of the largest 100 African firms (across all sectors, McKinsey, 2018) at least seven or eight may be called African tech giants.⁷ These firms are: MTN (SA, 7), Naspers (SA, 15), Datatec (SA, 16), Vodacom (SA, 17), Telkom (SA, 42), Orascom (Egypt, 43), Mroc Telecom (Morocco, 60), Safaricom (Kenya, 62). We might also note Net1 (SA), not on this 2018 list of top 100 African firms. We can call these the African tech giants, the Isiqhwaga.

**The Method of Regulatory Space Analysis and Its Responsive Potential**

A regulatory space analysis would be a good approach to explore an African response to the tech giant phenomenon. In contrast to political orthodoxy which often clings to the view that hierarchical regulation works, a regulatory space analysis begins with a scepticism as to the effects of classical regulation. In this view, it is recognized that regulation often provides a relatively inexpensive instrument for demonstrating symbolic commitment to improvement. Command-and-control in fact and on the ground may often be much more “command” than it is “control”. An analysis of regulatory space thus forms part of the scholarly critique (including that by proponents of responsive regulation) suggesting important limits to the effectiveness of hierarchical regulation. Part of the problem with, for instance, a hierarchical model of regulation is that it does not recognize that a central issue of control in regulatory domains is the fragmented possession of key resources.

As Colin Scott has proposed, the metaphor of ‘regulatory space’, can provide a way of reconceiving regulatory processes which is consistent with the findings of empirical research on regulation and provide a more robust basis for institutional design and reform.⁸ The regulatory space approach locates the understanding of regulation more closely to

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⁶ Beaton-Wells.
dominant approaches to governance within political science. It also considers more directly the limits (and implicitly) the potential for law as one instrument of governance.

The chief idea of the regulatory space metaphor/approach is that resources relevant to holding of regulatory power and exercising of capacities are dispersed or fragmented. These resources are not restricted to formal, state authority derived from legislation or contracts, but also include information, wealth and organisational capacities. The possession of these resources is fragmented among state bodies, and between state and non-state bodies.

The combination of information and organisational capacities may give to a regulated firm considerable informal authority, which is important in the outcome even of formal rule formation or rule enforcement processes. Not only regulators and regulatees exist within regulatory space but also other interested organisations, state and non-state, possessing resources to a variable degree. Relations can be characterized as complex, dynamic horizontal relations of negotiated interdependence. This re-conceptualisation of regulatory processes is important in understanding the limits of law within regulation. The dispersed nature of resources between organisations in the same regulatory space means regulators lack a monopoly both over formal and informal authority.

What does the above imply and imply particularly from an African perspective? Following insights of legal and political anthropology, we need to conceive of strategies of regulation as consisting of a wide range of negotiated processes, of which rule formation and enforcement (the classical focus of the model of hierarchical regulation) are but two. Combining the insights from both rights and regulatory literatures, we need to additionally consider processes of naming, blaming, and claiming as well as monitoring.9

A regulatory space analysis is well-suited for working within the contemporary African political economy. Thinking of the place of corporate firms as well as parastatals in African economies, regulatees often have more power than the regulators (statutory bodies). And negotiation is more often the norm than straightforward rule-enforcement. One example in the area of African big tech could be the slow-motion reduction of the fine levied against MTN by the Nigerian regulator for MTN’s Nigerian subsidiary’s failure to register millions of SIM cards. In Dec 2015, the telecommunications regulator said that it had made “a typing error” when announcing a $500 million reduction in the amount of the levied fine.10

Currently and for the purposes of this paper, we can say that there are some teeth (and considerable potential) in African competition regulation11 and somewhat less in African information/privacy regulators.12 To take this at the simple level of the number of

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functioning regulators, we can count 12 information/privacy regulators as of 2018 (with another three established in law but not yet operational) as compared to 32 competition regimes as of 2015 (27 national and five regional). Similarly, while Sutherland only identified one functioning governance network among the West African region at the African level in 2018, there are such networks for nearly every African region in the competition domain as well as an overarching coordinating body at the continental level, the African Competition Network. Even a preliminary regulatory space analysis would require further detail of existing African regulatory capabilities in competition and privacy, along the lines of studies such as that conducted of Southern African competition authorities.\textsuperscript{13}

**Three Choices: Competition and/or Privacy?**

As outlined above, a regulatory space analysis of competition and information/privacy would require further research into the key but also fragmented resources available in both domains. Pending that work, this paper will explore the regulatory choices at the level of principle and concept. While there is a zone of overlap, the basic choice is between a response centred in competition law & policy on the one hand and one privacy law & policy on the other.

While it will require more attention than is available here, the information privacy domain is a rich and layered space. Its origins arguably lie in the 1960s and 1970s. To point at least to its conceptual core, much of the central theory revolved around and departed from the work of Allan Westin. His work bears both careful reading and re-calibrating in the current day.\textsuperscript{14} Westin’s full definition of privacy is more complex than the usual proposition attributed to him – that information privacy requires control by an individual over his or her personal information. Westin’s work describes four states of privacy – solitude, intimacy, anonymity, and reserve. One (see conclusion below) might achieve one of these states through physical or psychological means. In this view, the claim or right of privacy thus involves, as Lisa Austin puts it, “negotiating a balance between a desire for disclosure and social participation and a desire for withdrawal into one of the states of privacy.

Similarly, it is not possible to span the full space of the competition domain here. One South African writer who has done so in an engaging and personal account is David Lewis. In his book, Thieves at the Dinner Table, Lewis draws on 15 years of work building and operating the competition institutions in South Africa. Lewis crucially locates that story within the politics (and the optics) of redress and cohesion within South Africa. Equally significant, Lewis identifies the substantial and important ways in which the South African version of competition law and policy goes far beyond a narrow (might one say neoliberal here) concern with the market and its failures. Instead of a Chicago School, the South African instantiation of competition law is full-blooded in considering labour/employment


issues and attending to the opportunities of building African firms to participate and compete in global marketplaces.\textsuperscript{15}

The overlap between these two domains may be as crucial as either on their own. There are two approaches here: policy separation and policy consistency.\textsuperscript{16} The Chicago school of antitrust, still ascendant in the US, sees the goals in these two domains as largely distinct (policy separation). In contrast, the EU, “new Brandeis”, and public interest schools (e.g. South Africa etc.) of competition law & policy see the goals of regulation in these two domains as having much overlap (policy consistency). The global debate is often framed between these two poles (the US and the EU approaches), even though third way approaches are at times mooted.

On the African continent, there are probably more resources to respond to the rise of tech giants in a competition paradigm rather than in one of privacy. While there is a distinctive and arguably well-suited indigenous concept of competition developing across the continent, the same cannot be said for information privacy. While one reason for this may be the relative paucity of information and privacy regulatory bodies, that may only be the effect of other causes. While both competition and privacy are at root deep and in many senses contested concepts, privacy is perhaps the more contested, at least in Africa. For instance, there is no right to privacy in the African Charter on Human and Peoples’ Rights, a fact that some information rights advocates in Africa argue is a significant weakness.\textsuperscript{17}

\textbf{Competition + privacy = data portability}

This paper does not attempt an analysis of the specific markets in which the tech giants are participating and their relative shares of market power. As will be discussed below, at least one such analysis is currently taking place, in an open and contested process under the auspices of the South African competition authorities, regarding a potential acquisition by Naspers. Instead, focusing on the overlap of the domains of competition and privacy and exploring an response using existing regulatory resources from competition law and policy, a key issue that can be identified is that of data portability. While it is not the only issue that is significant, data portability is at or near the centre of most contemporary discussions of responding to big tech.

A significant characteristic of the power and profitability of the platform companies that characterize big tech is the relative inability of consumers to switch away from one of these companies once they have engaged in an initial transaction. A technical term used here is “sticky” – consumers are sticky in the markets of big tech. This is partly due to the lack of alternatives, partly due to the superiority of a single platform (Google search is able to constantly aggregate information from most of the world and thus provide a “better” search

\begin{itemize}
  \item [\textsuperscript{15}] David Lewis, \textit{Thieves at the Dinner Table: Enforcing the Competition Act, a Personal Account} (Jacana Media, 2012).
  \item [\textsuperscript{17}] Alex B. Makulilo, “The Context of Data Privacy in Africa,” in \textit{African Data Privacy Laws}, ed. Alex B. Makulilo, Law, Governance and Technology Series (Cham: Springer International Publishing, 2016), 3–23, \url{https://doi.org/10.1007/978-3-319-47317-8_1}.
\end{itemize}
service than competitors), and partly due to the high costs of switching (as the CMA Report and others are documenting through examination of specific privacy and other platform practices, it is not that easy for a user to leave Facebook).

A further dimension underlying the market power of big tech is the high incidence of single purchasing or as the lingo goes, single homing. For instance, while both Bolt and Uber (two different ride-hailing apps) are available in South Africa and Kenya, in recent travel I nearly always use Uber in South Africa and Bolt in Kenya. I am thus to a small extent a multi-homer, switching between and using different platforms. While there are a lot of complicated competition economics at play here, suffice it to say that there can be great efficiencies (centralizing search costs) where most consumers are single-homers but also great potential for market power/dominance.\(^\text{18}\)

There is a further word to say here about privacy and its effect within the overlap of competition and privacy as responses to the rise of big tech in Africa. Privacy solutions – whether of design or otherwise (clarity and ease of use of interface) -- can increase costs of switching by users to another platform – e.g. can increase stickiness. This is of course an unintended consequence of the advocates of the various specific privacy protections. But it is a regulatory phenomenon monitored, understood, and exploited within the firms of big tech.

The focus on consumer data also reveals an important difference between the conceptual routes of competition and privacy in responding to big tech. As C Beaton-Wells puts it in discussing the Australian competition proposals: “At the heart of this model is a basic distinction drawn between privacy and competition as each relates to consumer data. While privacy focuses on managing data use by others, the CDR [consumer data right] focuses on enabling consumers themselves to control its use. In essence, the distinction is between limitation or aversion of a threat (to which privacy policy is directed) and opening up and spreading of opportunity (to which competition policy is directed). Drawing the distinction allows for the narrative surrounding data to be changed, from one concerned with harms to one concerned with benefits.”

Importantly, this allows for keeping in sight and within the analysis some of the positive benefits of this technology --such as openness and other forms and effects of what is sometimes termed “beneficial technology” -- while addressing its harms of exclusion, lack of privacy, and stifling of innovation. This recognition of the potential beneficial effects of this technology is also very much part of the African debate in the competition realm, such as within the South African competition authorities, the ACF, and the UN Economic Commission on Africa.

Within the privacy realm, there are some specific steps being taken recently towards strengthening data portability in the EU and in California. As many South Africans will have no doubt noticed in their internet interactions, these changes in law in these specific jurisdictions have had some effects globally. Article 20 of General Data Protection

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Regulation (GDPR)\(^{19}\) and some provisions of the new California Privacy Law take some steps beyond depending on a notice and consent model to protect the privacy of consumers and move towards enhancement of data portability.\(^{20}\) But both the new GDPR and the new California legal forms are effectively weak forms of what one may term (and they do) the right to data portability.\(^{21}\) There is of course much more to say about such a right – such as its distinction from calls to property ownership over data or from calls to see data as not the new oil but the new CO2 or its linkages to new forms of borders and divides – but we shall maintain the broader rights and regulation framing for now.\(^{22}\)

To continue with a focus on the right of data portability, we can look at the recent Australian public debate. As noted above, proposals have been put forward by the Australian Competition Commission which may be termed a strong version of rights-based data portability approach. The Australian proposals perhaps go furthest of the major jurisdictions, introducing a consumer data right (not a right of property ownership) but a right resulting in the sharing of data between data subjects and data holders.\(^{23}\)

This strong form of a right to data portability rooted in a competition-based understanding of the market power of big tech has several specific improvements beyond the current weak form of the right to data portability. First, the rights-holders include firms as well as individuals. This allows for small enterprises to assert their rights against big tech as well as to improve the dynamics of competition among firms within these markets. Second, the data covered by the strong form as individualized data includes associated data as well as directly-provided data. This means that a consumer has power over a much greater range of data linked to them as an individual. Third, the right proposed is strong enough to empower “consumers to have access to and control over their data, enabling them to have

\(^{19}\) GDPR Article 20: (1) The data subject shall have the right to receive the personal data concerning him or her, which he or she has provided to a controller, in a structured, commonly used and machine-readable format and have the right to transmit those data to another controller without hindrance from the controller to which the personal data have been provided, where: (a) the processing is based on consent pursuant to point (a) of Article 6(1) or point (a) of Article 9(2) or on a contract pursuant to point (b) of Article 6(1); (b) and the processing is carried out by automated means. (2) In exercising his or her right to data portability pursuant to paragraph 1, the data subject shall have the right to have the personal data transmitted directly from one controller to another, where technically feasible. (3) The exercise of the right referred to in paragraph 1 of this Article shall be without prejudice to Article 17.2. That right shall not apply to processing necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. (4) The right referred to in paragraph 1 shall not adversely affect the rights and freedoms of others.


\(^{21}\) Katy Murphy, “Wild West: Firms Interpret California’s Privacy Law as They See Fit,” Politico PRO, accessed January 12, 2020, https://politico.co/2sR2jhW.


it transferred by the data holder to an accredited third party at their direction, and in a form that is digitally practicable”.

The initial proposal made by the Australians was to operationalizing this strong form of a right to data portability “based on an outcomes-focused principle, namely that it should include the data and in the form that a competing business would need in order to make a reasonable offer for the consumer’s patronage. Subject to that principle, it is recognized that types of data will vary between sectors and that technological change will affect the nature of data that is generated over time. Hence there will be an industry data-specification process that enables the relevant industry to agree on the types of data that will be covered, as well as mechanisms for transfer and security protocols.” While the right would be applicable across the economy, the Australia proposal was to roll-this out “sector-by-sector, starting with the banking sector, to be followed by telecommunications and energy”. (Sector by sector work can of course be done in African national and regional jurisdictions.)

Australia, however, has not chosen to run further with these proposals, at least not quickly. Privacy advocates and progressive competition analysts have been disappointed by the official Australian response to these proposals as the only firm commitment made in Dec 2019 has been to fund a new unit within the Australian Competition and Consumer Commission to monitor and report on the state of competition and consumer protection in digital platform markets. Comprehensive reform of the national privacy act and introduction of the consumer data [portability] right remain objects of study and are postponed for the moment. The steps taken however are consistent with understanding competition as the primary rationale and with the competition regulator taking the lead in responding to big tech.

Rescaling the Problem: Constituting an African Perspective on Competition, Privacy, and Big Tech

Using the above terms, can one describe some of the significant past and present conflicts and movements within the sphere of African big tech? To do so, would both demonstrate its validity and test its accuracy, developing further the analysis of the political economy of big tech proposed here. Two good African countries in which to attempt this exercise are Kenya and South Africa. To do so reveals an important further element to the debate – and another contested one -- that of economic development.

Perhaps the most prominent contest over privacy is not taking place among firms but in the public sector in Kenya. Whereas South Africa’s government has at least minimally


25 As Beaton-Wells notes: “Consistent with competition being its primary rationale, the new regime makes the Australian competition authority, the Australian Competition and Consumer Commission, the lead regulator. The Commission is to have responsibilities over the approval of data-specification agreements and standards, accreditation of data recipients, handling complaints about, and taking enforcement action in response to breaches of the CDR rules. In the event of liability, significant penalties would apply.” This is where much inter-regulator work may be done in African jurisdictions.
succeeded in beginning the rollout of biometrically enabled identification to its population, Kenya’s government is still struggling to do so. This public sector large technology project (National Integrated Identity Management System (NIIMS), as known as Huduma Namba) has recently suffered a court setback, where Kenya’s High Court found that the implementation of NIIMS should not continue without a “comprehensive and appropriate” regulatory framework in place to guarantee the security of biometric data and to ensure the system is not exclusionary. This is a ruling on privacy grounds (not competition) against the public sector. Part of the rationale for the ruling was Kenya’s lack of an in-force data protection law, a law which is the subject of a separate court challenge.26

What then is happening within the competition domain with respect to digital markets? What for instance is the view of the Competition Authority of Kenya (one of the strongest competition authorities in Africa) on the risks and opportunities of big tech in Africa? The short would appear to very welcoming. In Dec 2010, the CAK issued a statement on World Competition Day celebrating the “unprecedented growth of our digital economy” and the “new norm” of online markets. This has carried through to 2019, where the CAK is aligned to the Presidency’s Digital Economy Framework announced in July.27 On the whole, the CAK appears aligned with the positive view of many global observers of financial services in Kenya. For example, the Center for Global Development observed in August 2019 that “M-Pesa’s success has led to a series of endogenous innovations that have shaped Kenya’s digital space, placing it ahead of other developing economies in the region in the deployment and use of digital technology. It also explains how the mobile financial services revolution enabled the government to implement its e-governance strategy to better provide a range of services and opportunities to beneficiaries of public programs, business, taxpayers and investors, as well as dynamizing the private sector.”

There is however an alternative narrative that would focus in particular on the role of one of the African big tech giants. Safaricom is an example of an emerging markets-origin multinational enterprise. While it does not have anything like the size and power of Google and Facebook, it is a giant within Kenya and East Africa and is currently aiming to move into Ethiopia.28 From its initial origins as a telecommunications company, it has bought itself a bank and has used its monopoly power in telecommunications to expand into banking and credit.29 The company was until recently headed by a South African CEO, has been reputed to have significant shareholding from both Vodacom and the Kenyatta family30,

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and has only been lightly disciplined once by the Competition Authority of Kenya. An example of the power and reach of SafariCom is evidence in recent research on Kenya’s identification ecosystem, research attuned to the dangers of exclusion and breaches of privacy (but without a focus on competition (but see pp. 36-38)). This research mentions SafariCom 23 times and Facebook only 3 times in discussing SafariCom as Kenya’s provider of a de facto digital credit “developmental ID” system co-existing but also competing with the national ID and NIIMS. Clearly there is a public debate worth having regarding African big tech in Kenya.

In South Africa, the official pronouncements of the competition authorities are more aligned with the concerns expressed elsewhere globally. The Dec 2019 Data Services Enquiry confirmed the high SA prices for data, relative to global and African standards, and made several recommendations re MTN and Vodacom, to be put into various legal and policy processes. Perhaps more significantly, the competition authorities have been part of a process of formulating national industrial policy, titled Towards a Digital Industrial Policy (17 July 2019). The latest publication from this process observes that “[o]nline platforms have the potential to open-up routes to consumers for small, medium and micro enterprises (SMMEs), by lowering entry barriers. But, at the same time, the platforms have substantial market power and can skew the playing field. These tensions are evident in the ways in which e-commerce is changing the face of retail internationally.”

According to the publication, “[d]igital technology policy needs to be integrated with industrial policy and should include measures such as the provision of manufacturing and digital extension services, demonstration projects, and testing and scaling-up facilities such as accelerators for digital start-ups and SMMEs.”

This dti-funded report calls for appropriate regulation for digital platforms to ensure the playing field is level for local businesses. South Africa also needs to develop a clearly defined set of policies on data ownership, data quality, data categorisation and anonymity. On the other hand, South African firms and consumers must retain access to global technologies and platforms. It also recognizes the importance of trade and tax policies, calling for South Africa to work with other countries at the WTO to ensure trade policies can continue to be effective and that digitalisation does not exacerbate base erosion and profit shifting. The ‘Digital 2 Dozen’ agenda which has been pushed by the USA and seeks commitments to zero duties on digital goods and services. A key question is how the government plans to tax and regulate imported and domestic digital products and services.

African-based competition analysts thus call for an appropriate regulatory and policy regime to ensure that local businesses can interface with and layer their own platforms on top of those of the global giants and that they can compete on equal terms. Regulations need to

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31 Caribou, “Kenya’s Identity Ecosystem” (Commonwealth Digital ID Initiative, 2019).
33 Jason Bell et al., “Structural Transformation in South Africa: Moving towards a Smart, Open Economy for All,” April 2018, https://static1.squarespace.com/static/52246331e4b0a46e5f1b8ce5/t/5ad9e4baf950b767531fe8a9/1524229357942/IDTT+Structural+Transformation+in+South+Africa+Moving+towards+a+smart%2C+open+economy+for+all.pdf.
be fit for purpose to address the convergence of payments systems, retail, logistics, customer information and marketing and telecoms through a flexible and responsive regulatory regime.

Three Current & One Past SA Big Tech Battles

Instead of delving into the gory regulatory details of industrial policy reports, an alternative highlighting of African big tech issues would shine a spotlight on three current and one past big tech battles.

One current big tech battle taking place locally concerns a potential merger. Naspers’ bid, through an associated firm, MIH, to take over We Buy Cars (in the “lemon” used car market) has been opposed by the Competition Commission, currently pending in front of Competition Tribunal (closing arguments on Friday 13 March 2020). Naspers already owns Takealot, South Africa’s largest-by-far online retailer, which is a significant though vulnerable asset. According to a South African competition analyst, “Takealot has the potential to become an anchor platform for the country once it has achieved scale. While it is likely to grow further as the largest South African online retailer, it is competitively disadvantaged relative to international competitors should they choose to enter the market. ... Their true competitive advantage is that they are a first mover and are building up the logistics and warehousing capacity locally.” While online retail in the country is currently quite small (1% v 20% in the UK), it is a segment of the market growing at a pace that far surpasses traditional retail with estimates of growth nationally between 20-35% p.a. The result and the reasoning for this legal proceeding, a merger notified to the competition authorities, is of particular interest since it may provide a precedent-setting interpretation of the “national champion” clause in the public interest analysis of South Africa mergers. It also provides an opportunity for the competition regime to take a stance on the growing call within competition law globally to take a harder look at potential mergers in order to prevent the continued dominance of the big tech giants.

A second local big tech battle is already over, and was concluded without much fanfare. With competition authorities approval, Travelstart (a SA company with Swedish origins) has acquired several small travel agency rivals/complements: SafariNow, TravelClub, and FlightSite. One of the key investors in Travelstart is MTN. Each of the acquisitions fell into the small merger category and was approved by the Competition Commission.

A third local big tech battle is taking place within the life insurance industry. Since mid-2019, Liberty and Discovery have been conducting a dispute over data and indices. Liberty is discounting life insurances premiums by 40% to customers who are part of “recognized

35 Sha’ista Goga and Anthea Paelo, “An E-Commerce Revolution in Retail?,” n.d.
wellness programs” including Vitality, Discovery’s wellness program. According to its public statements, Discovery is not contesting that the underlying wellness data and fitness information belong to its customers but is fighting to retain the value of the indices – whether a particular consumer is Vitality blue, bronze, silver, or gold. Discovery has thus taken Liberty to the High Court claiming infringement of copyright in Discovery’s Vitality wellness program, using a theory thus of intellectual property. Perhaps the heat is coming off as Liberty has stated that it is not seeing as much takeup in its product as it expected.38

The biggest local tech battle in South Africa is currently at the whimper and winding down stage. It concerns Net1, a company that had aspirations and real opportunities to become the global biometric bank for emerging markets. This story has been carefully told by Keith Breckenridge.39 Serge Belamont, initially working with a consortium of banks, realized the niche value in a country like South Africa without extensive infrastructure of a payment system through cards with chips storing consumer’s information. The resulting company grew large and listed on the American stock exchange as well as in South Africa. Traveling a bumpy path of opposition from powerful organisations ranging from Pretoria taxi associations to an international cartel-like structure consisting of Visa and Mastercard, Net1 became a South African success story. Through winning tenders following the centralization of the provision of social grants payment, Net1 built a lockin with social grant recipients, benefitting also from an associated captive market for financial products. The company only began to decline when it overplayed its monopoly hand during the era of high state capture. In response to a suit by rival and disappointed tenderers, joined by human rights and civil society groups raising issues of privacy and access to information, Net1 was declared by the Constitutional Court to be an “organ of state” and its profits capped and strictly regulated. The Court further supervised a process by which government un-hitched itself from its lockin with Net1.40

It may be worthwhile to engage briefly with Breckenridge’s analysis of the rise and fall of Net1, an analysis that is within the genre of business history but clearly falls in the competition paradigm. As he puts it, “[t]he tension between the company’s monopoly power and the state’s regulatory responsibility generated a national political crisis of the first order.” One lesson that Breckenridge takes revolves around what he terms “the intractable politics of infrastructural lockin ... the explosiveness of the coercion implied in technological lockin.” So one lesson is that this particular infrastructural volatility should be recognized for the danger it is.

A second lesson is for the historians and the social theorists. The Net1 story demonstrates “that many of the key features of financialised capitalism have been carefully engineered in order to circumvent reforms and policy constraints.” This leads Breckenridge to propose “[a]t a preliminary level of change—in the design of firms and their strategies—... a more

technologically determinist and engineered explanation of the politics and economics of financialisation than is currently influential in either the linguistic or the materialist schools of research on this subject (citations omitted).” Brekenridge thus aligns himself with “a soft technological determinism attributing new methods for extracting value and fostering capital accumulation to the network, the devices and the mathematical algorithms for measuring risk that combines them”.

Conclusion: What Are the African Answers to African Big Tech?

There is a call to activism in the above with some particular features. It is a call for action that is rights-based but regulation-regarding. It is entirely consistent with rights-based approaches in privacy and anti-exclusion domains.\(^4^1\) It leverages and uses African buyer power, a form of power increasingly recognized in the competition realm and in particular in South Africa’s 2018 amendments.\(^4^2\) This is the element of power that Africa does have, additionally thus fitting with the developing indigenous African understanding of competition law – as a site for societal change and redress as well disciplining firms and corporations. Globally, this call aligns with a coordinated networked approach and a focus on research and information sharing, as well as identifying and activating and capacitating existing regulatory structures.\(^4^3\)

A conclusion may be drawn in conversation with a recent WISER talk by Arjun Appadurai on failure, digitality and memory. Using a classic Schumpeterian metaphor, Appadurai gave a vision of the “creative destruction” sweeping through the social in our times, a destruction led by the financial (as distinct from the economic). In his view, apps were monetizing but also significantly changing the social. This talk draws on his recent works.\(^4^4\)

Appadurai argued forcefully that, given this transformation of the social itself – the fodder of social theory – than any adequate response to creative destruction of the social would have to include the search for new concepts and languages. One example is the concept of the “dividual” (a person but more contingent and socio-technologically determined than the historic concept of the individual). At the outermost, it is a call for a new social theory fit for the digital age – or at least new applications of our existing theories of the social. This call for new languages and new concepts needs to be taken into the space of firms, organization fields, and other meso-structures. And Africa is a generative and significant space for this work. One way may be to engage with the democratic and

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42 “Competition Amendment Act 18 of 2018” (n.d.).
43 In funding proposal terms, one might say there is an opportunity for a public/private partnership including university-based organisations to monitor, investigate, and advocate in Africa (e.g. at African level but also at national level within Africa) and across the world using the data portability and consumer rights approach at the intersection of privacy rights and competition law. Such a structure can work with and help create network of competition authorities and information regulators.
organizational dynamic elements of Schumpeter, which Appadurai did not highlight in his talk.\footnote{Joseph Alois Schumpeter, \textit{Capitalism, Socialism and Democracy} (Routledge, 1976).}

For the topic at hand -- dealing with tech giants of varying heights in Africa -- this means continuing with the work of reconceptualizing competition -- as is happening with competition law adopting public interest concepts. Fortunately (and perhaps with an optimistic view), South Africa is leading this development globally and in Africa. In exploring diverse global, national and African developments in responding to the phenomenal rise of tech firms, this paper has explored a potential African innovative response combining rights-based techniques and regulatory strategies within this field. The call is for a response that is conceptually based more in competition than in privacy or exclusion paradigms (while overlapping with both) and that engages in information sharing and activation of existing regulatory capacities.