

An Overview of the Extent of the Powers of South African Competition Authorities in the Regulation of Price Discrimination under the *Competition Act* 89 of 1998 in the Context of Digital Transformation

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Abstract

The purpose of the *Competition Act* 89 of 1998 as amended (the *Competition Act*) is, among others, to promote the efficiency, adaptability and development of the economy as well as to provide consumers with competitive prices and product choices. In line with this purpose, the *Competition Act* provides that a dominant firm is prohibited from engaging in price discrimination if such conduct will likely substantially prevent or lessen competition, which would be to the detriment of consumers. Notably, the *Competition Act* has established various bodies to regulate competition and act against any conduct prohibited by this *Act* in South Africa. These bodies include the Competition Commission, the Competition Tribunal, and the Competition Appeal Court. Notwithstanding the prohibition of price discrimination, the *Competition Act* does not expressly provide adequate enforcement tools for competition authorities to combat uncompetitive practices in the digital era. Moreover, the *Competition Act* does not expressly grant these statutory bodies clear roles and mandates on providing consumers with adequate and suitable redress when they have been victims of algorithmic price discrimination. With recent technological developments, electronic commerce (e-commerce), and digital transformation, consumers have become vulnerable to various challenges such as excessive pricing, data breaches and algorithmic pricing. The online and digital markets are characterised by complex transactions, innovative technologies and business practices which expose all consumers, including vulnerable consumers, to different risks. As such, the role of the competition authorities needs to be recalibrated to enhance consumer protection on the pricing of goods and services. To this end this paper seeks to investigate the role and ambit of the powers of these competition authorities in the regulation of price discrimination in the context of digital transformation and the digital economy. This is done to assess whether the competition authorities have the necessary tools of enforcement to ensure that markets are competitive and to combat uncompetitive conduct in the digital economy and online markets.

Keywords

Competition authorities; price discrimination; algorithmic pricing; consumer protection; digital transformation.

1 Introduction

The *Competition Act*¹ was enacted to promote the efficiency, adaptability and development of the economy as well as to provide consumers with competitive prices and product choices. In this regard, the *Competition Act* prohibits price discrimination to prevent dominant firms from substantially preventing or lessening competition.² Price discrimination refers to the charging of different prices by a seller to different purchasers in the absence of material cost differences that might account for the different prices.³ The *Competition Act* provides that an action by a dominant firm, as the seller of goods or services, is prohibited price discrimination, if it is likely to have the effect of substantially preventing or lessening competition; or impeding the ability of small and medium businesses or firms controlled or owned by historically disadvantaged persons to participate effectively.⁴ Price discrimination is also prohibited if it relates to the sale in equivalent transactions of goods or services of like grade and quality to different purchasers.⁵ Moreover, price discrimination is also prohibited if it involves discriminating between those purchasers in terms of the price charged for the goods or services, any discount, allowance, rebate or credit given or allowed in relation to the supply, the provision of services or payment for services provided in respect of the goods or services.⁶ The legislature has recently amended the *Competition Act* to indicate that it is also prohibited for a dominant firm to avoid selling, or refuse to sell, goods or services to a purchaser that is a small or medium business or a firm controlled or owned by historically disadvantaged persons in order to circumvent the operation of subsection (1)(a)(ii).⁷

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¹ *Competition Act* 89 of 1998 as amended (*Competition Act*) s 2(a)-(b); also see Kelly *et al Principles of Competition Law* 4.

² See s 9(1)(a) of the *Competition Act*; Brassey *et al Competition Law* 286; Van Eeden and Barnard *Consumer Protection Law* 260; Brobeck, Mayer and Hermann *Encyclopedia of the Consumer Movement* 214.

³ Section 9 of the *Competition Act*; also see Motta *Competition Policy* 491-500; also see Sutherland and Kemp *Competition Law* 7-82.

⁴ Section 9(1)(a) of the *Competition Act*; Brassey *et al Competition Law* 286; Van Eeden and Barnard *Consumer Protection Law* 260; Brobeck, Mayer and Hermann *Encyclopedia of the Consumer Movement* 214.

⁵ Section 9(1)(b) of the *Competition Act*; see also Sutherland and Kemp *Competition Law* 7-82.

⁶ Section 9(1)(c) of the *Competition Act*; Brassey *et al Competition Law* 286; Van Eeden and Barnard *Consumer Protection Law* 260; Brobeck, Mayer and Hermann *Encyclopedia of the Consumer Movement* 214; also see Motta *Competition Policy* 491-500; also see Sutherland and Kemp *Competition Law* 7-82.

⁷ Section 9(1A) of the *Competition Act*; Brassey *et al Competition Law* 286; Van Eeden and Barnard *Consumer Protection Law* 260; Brobeck, Mayer and Hermann

Currently, the *Competition Act* does not contain express and specific provisions for regulating algorithmic pricing in South Africa. This could be owing to the fact that algorithmic pricing is part of the emerging trends in the digital markets.⁸ Algorithmic price discrimination entails the process where online retailers use big data and algorithms to charge loyal and repeat customers higher prices than those charged to new consumers for the same goods and services during the same time.⁹ Algorithmic price discrimination is a type of price discrimination by which various firms, suppliers and service providers supply the same product to different classes of consumers with different characteristics at various prices.¹⁰ At the moment, the provisions of the *Competition Act* on price discrimination are silent on the extent to which they could be utilised in possible cases of algorithmic price discrimination.¹¹ This lack of express mention of the extent of the current provisions in the regulation of algorithmic price discrimination creates uncertainty on the extent of the powers of the competition authorities in the regulation of this form of price discrimination in South Africa.

The *Competition Act* has established various competition authorities, namely the Competition Commission, the Competition Tribunal and the Competition Appeal Court, which have been tasked with enforcing the *Competition Act*.¹² This paper seeks to investigate the role and ambit of the powers of these competition authorities in the regulation of price discrimination in the context of digital transformation and the digital economy. This is done to assess whether these competition authorities have the necessary tools of enforcement to combat uncompetitive conduct in the digital economy and online markets.¹³

Encyclopedia of the Consumer Movement 214; also see Motta *Competition Policy* 491-500; Sutherland and Kemp *Competition Law* 7-82.

⁸ See Wu *et al* 2022 *Frontiers in Psychology* 2; also see Gregoire and Fisher 2008 *J Acad Market Sci* 248; see also Grennan 2013 *Am Econ Rev* 148; see further Besbes and Lobel 2015 *Management Science* 92-110; also see Siegert and Ulbricht 2020 *Int J Ind Organ* 1027.

⁹ See Wu *et al* 2022 *Frontiers in Psychology* 2; also see Gregoire and Fisher 2008 *J Acad Market Sci* 248; see also Grennan 2013 *Am Econ Rev* 148; see further Besbes and Lobel 2015 *Management Science* 92-110; also see Siegert and Ulbricht 2020 *Int J Ind Organ* 1027.

¹⁰ Section 9(1) of the *Competition Act*; also see Besbes and Lobel 2015 *Management Science* 92-110; see also Siegert and Ulbricht 2020 *Int J Ind Organ* 1027.

¹¹ Section 9(1) of the *Competition Act*; also see Besbes and Lobel 2015 *Management Science* 92-110; see also Siegert and Ulbricht 2020 *Int J Ind Organ* 1027.

¹² See generally ch 4 of the *Competition Act*.

¹³ See s 2(a)-(b) of the *Competition Act*; also see Kelly *et al* *Principles of Competition Law* 4.

2 The rationale for regulating price discrimination in the context of digital transformation

There are growing concerns, both globally and in South Africa, regarding the challenges posed by digital transformation and the appropriateness as well as the sufficiency of the existing enforcement tools to ensure that markets are competitive and to combat uncompetitive conduct.¹⁴ While this is the case, most consumers want to live in economies where they can afford goods and services such as food, housing, education and medical services, among others.¹⁵ Concomitant with this, the cost of living and the prices for these goods and services are always on the rise while scarcity, affordability, over indebtedness, financial exclusion and poverty continue to remain challenges that most vulnerable consumers, especially the poor and low-income earners, are grappling with.¹⁶ Although the viability of the economy to ensure the availability of goods and services at affordable prices largely depends on there being less interference from the state, there is a need for competition authorities to ensure efficiency in the economy by providing consumers with competitive prices and product choices.¹⁷ The government is also required to adopt policies that will enable consumers to obtain goods and services at the lowest cost and gain the optimum benefit of economic resources and a wide range of goods and services.¹⁸

While recent technological developments in the provision and/or sale of goods and services, the rapid uptake of electronic commerce (e-commerce), and digital transformation have delivered many benefits, these emerging trends are increasingly opening consumers to new forms of vulnerability.¹⁹ During the COVID-19 pandemic most consumers were affected by numerous scams, unfair commercial practices and price gouging in the digital or online markets.²⁰ Today consumers have become

¹⁴ See s 2(a)-(b) of the *Competition Act*; also see Kelly *et al Principles of Competition Law* 4.

¹⁵ Van Eeden and Barnard *Consumer Protection Law* 257.

¹⁶ See s 3 of the *Consumer Protection Act* 68 of 2008 (CPA); also see Chitimira and Magau 2023 *Acta Universitatis Danubius Juridica* 32; see also Magau 2023 *De Jure* 233; see related comments by Chitimira and Ncube 2020 *JAL* 338.

¹⁷ See s 2(a)-(b) of the *Competition Act*; also see Van Eeden and Barnard *Consumer Protection Law* 257; Kelly *et al Principles of Competition Law* 4.

¹⁸ See s 2(a)-(b) of the *Competition Act*; also see Van Eeden and Barnard *Consumer Protection Law* 258.

¹⁹ OECD 2023 <https://www.oecd-ilibrary.org/docserver/4d013cc5-en.pdf> 6; Van Eeden and Barnard *Consumer Protection Law* 552; Papadopoulos and Snail *Cyberlaw@SA* IV 1; Fitzgerald *et al Internet and E-Commerce Law* 13.

²⁰ OECD 2023 <https://www.oecd-ilibrary.org/docserver/4d013cc5-en.pdf> 6; also see related comments by Dandara, Dzobo and Chirikure 2020 *OMICS* 1-5; also see more related comments by Mukumbang, Ambe and Adebiyi 2020 *International Journal for Equity in Health* 2; also see Chitimira and Animashaun 2021 *Acta Universitatis Danubius Juridica* 38.

more vulnerable to various challenges posed by these developments, and such challenges include excessive pricing, data breaches and algorithmic price discrimination.²¹ Most suppliers and service providers are leveraging consumer data to personalise prices, and advertise and market goods and services in a manner that exploits the vulnerability of consumers, for instance.²² In addition to this, most firms are employing the use of algorithms and artificial intelligence to determine the eligibility of customers to obtain goods and services offered by them, which to a large extent could result in the risk of bias and unfair discrimination against vulnerable consumers.²³ Owing to this, it is submitted that it is vital to have effectively functioning competition authorities to combat and deal decisively with any uncompetitive conduct that could adversely affect consumers when acquiring goods and services. The viability and welfare of the economy depend on efficient institutions and regulatory authorities that can promote consumer rights, the rule of law, competitive markets and stable prices.²⁴ Price discrimination must be appropriately and adequately regulated by the law and implemented by competition authorities to protect consumers against the harmful effects of emerging digital practices.

3 The role of selected competition authorities in the regulation of price discrimination in South Africa

3.1 The role of the Competition Commission

The Competition Commission was established as an administrative body under the *Competition Act*.²⁵ It is a juristic body that has jurisdiction across the Republic of South Africa and it is supposed to exercise its function in terms of the *Competition Act*.²⁶ The Competition Commission is led by the Commissioner and two or more Deputy Commissioners who are appointed

²¹ During the COVID-19 pandemic, the South African competition authorities received numerous complaints regarding increases in the prices for face masks and sanitisers. Some of the matters which were dealt with include, *Babelegi Workwear and Industrial Supplies CC v Competition Commission of South Africa* 2021 6 SA 446 (CAC); *Competition Commission v Dis-Chem Pharmacies Limited* (Competition Tribunal) case number CR008Apr20 of 7 July 2020; *National Consumer Commission v Belegi Workwear and Industrial Supplies (Pty) Ltd* (National Consumer Tribunal) case number NCT/160912/2020/73(2) of 12 June 2020; *Competition Commission v Babelegi Workwear and Industrial Supplies CC* (Competition Tribunal) case number CR003Apr20 of 1 June 2020.

²² OECD 2023 <https://www.oecd-ilibrary.org/docserver/4d013cc5-en.pdf> 6.

²³ OECD 2023 <https://www.oecd-ilibrary.org/docserver/4d013cc5-en.pdf> 15.

²⁴ See Cseres *Competition Law and Consumer Protection* 151-152; also see Gwartney *et al Macroeconomics Private and Public Choice* 237-338.

²⁵ Section 19(1) of the *Competition Act*; see Neethling and Rutherford "Competition" paras 249-251.

²⁶ Section 19(1) of the *Competition Act*; also see Reyburn *Competition Law* 9.

by the Minister of Trade and Industry.²⁷ The *Competition Act* provides that the Competition Commission is independent and subject only to the law and the *Constitution of the Republic of South Africa*, 1996 as per the doctrine of legality.²⁸ Moreover, the Competition Commission must be impartial in performing its functions without fear, favour, or prejudice.²⁹ Each organ of state is obliged to assist the Competition Commission in maintaining its independence and impartiality when carrying out its powers and duties.³⁰ The establishment of the Competition Commission was necessary since it operates and functions as the central point of accessing the procedures outlined in the *Competition Act*, as will become apparent below in the description of its functions.

The functions of the Competition Commission include *inter alia* implementing measures to increase market transparency and developing public awareness of the *Competition Act*.³¹ More importantly, the central function of the Competition Commission is to investigate matters pertaining to the contravention of the *Competition Act* by investigating and evaluating alleged prohibited practices under Chapter 2.³² Given this function, the Competition Commission is said to be an investigatory and prosecutorial body that receives and investigates complaints of restrictive practices or initiates investigations that will have to be prosecuted before the Competition Tribunal.³³ Investigations may be initiated informally or tacitly.³⁴ Where an investigation is initiated by a third party or complainant and the Competition Commission elects not to prosecute it, it must give such a party or complainant a certificate for them to bring the matter to the Competition Tribunal.³⁵ At any stage of the investigation the Competition Commission

²⁷ Section 19(2) of the *Competition Act*; see related comments in *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC); also see *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) para 58.

²⁸ Section 20(1)(a) of the *Competition Act*; see Neethling and Rutherford "Competition" paras 249-251.

²⁹ Section 20(1)(b) of the *Competition Act*; Lewis *Enforcing Competition Rules* 42.

³⁰ See s 20(3) of the *Competition Act*; also see Brassey *et al Competition Law* 286-287; see further comments by Van Heerden and Neethling *Unlawful Competition* 44; also see Neethling and Rutherford "Competition" para 229.

³¹ Section 21(1)(a) and (b) of the *Competition Act*; also see Brassey *et al Competition Law* 286.

³² Section 21(1)(c) and (d) of the *Competition Act*; also see Brassey *et al Competition Law* 286.

³³ See Kelly *et al Principles of Competition Law* 60; also see Lewis *Enforcing Competition Rules* 42.

³⁴ See *Competition Commission v Yara (South Africa) (Pty) Ltd* 2013 6 SA 404 (SCA) para 21.

³⁵ See s 49B(1) and (2)(b) read with s 50(2) and (3) of the *Competition Act*; also see Lewis *Enforcing Competition Rules* 42; *Agri Wire (Pty) Ltd v Commissioner of the Competition Commission* 2013 5 SA 484 (SCA) para 24; *Premier Foods (Pty) Ltd v Manoim* 2016 1 SA 445 (SCA).

may conclude an agreement with a respondent regarding an appropriate order under the circumstances and refer such an agreement to the Competition Tribunal for confirmation as a consent order.³⁶

The Competition Commission also considers applications for exemptions from the provisions of Chapter 2 and applications for mergers in terms of Chapter 3.³⁷ Moreover, the legislature has recently amended the *Competition Act* and granted the Competition Commission more powers to initiate and conduct market inquiries in terms of Chapter 4A, among other functions.³⁸ It could be argued that these additional powers to conduct market inquiries have placed the Competition Commission in a better place to deal with issues of price discrimination in the digital market. The Competition Commission is also required to negotiate agreements with any regulatory authority to co-ordinate and harmonise the exercise of jurisdiction over competition matters in the relevant industry or sector, and to ensure the consistent application of the principles of the *Competition Act*.³⁹ Furthermore, the Competition Commission is required to participate in the proceedings of any regulatory authority, and it may also advise and receive advice from any regulatory authority.⁴⁰ The Competition Commission is also empowered to review legislation and public regulations, and report to the Minister of Trade and Industry concerning any provision that permits uncompetitive behaviour. It may also deal with any other matter referred to it by the Competition Tribunal.⁴¹ Additional powers of the Competition Commission include reporting to the Minister of Trade and Industry on any matter relating to the application and purposes of the *Competition Act* as well as performing any other function assigned to it in terms of this or any other Act.⁴²

It was encouraging to note the report on Online Intermediation Platforms Market Inquiry that was released by the Competition Commission in July 2023 in this context.⁴³ This inquiry was aimed at investigating whether local

³⁶ See ss 21(1)(f) and 49D(1) of the *Competition Act*; also see Brassey *et al Competition Law* 287.

³⁷ Section 21(1)(d) and (e) of the *Competition Act*; also see Brassey *et al Competition Law* 286; see also Lewis *Enforcing Competition Rules* 42.

³⁸ See s 21(1)(g)-(gF) of the *Competition Act* as amended by s 16(a) of the *Competition Amendment Act* 18 of 2018; also see Kelly *et al Principles of Competition Law* 60.

³⁹ Section 21(1)(h) of the *Competition Act*; Kelly *et al Principles of Competition Law* 62.

⁴⁰ Section 21(1)(i)-(j) of the *Competition Act*; also see Kelly *et al Principles of Competition Law* 62; also see Lewis *Enforcing Competition Rules* 42.

⁴¹ Sections 21(1)(k)-(l) of the *Competition Act*; also see Lewis *Enforcing Competition Rules* 42; also see Kelly *et al Principles of Competition Law* 60.

⁴² Section 21(2) read with s 3 of the *Competition Act*; also see Lewis *Enforcing Competition Rules* 42; also see Brassey *et al Competition Law* 287; see further Van Heerden and Neethling *Unlawful Competition* 44.

⁴³ See s 21(1) read with ss 4A and 43B(1)(a) of the *Competition Act* as amended by s 16(a) of the *Competition Amendment Act* 18 of 2018; also see Kelly *et al Principles of Competition Law* 60.

and international business-to-consumer (B2C) online platform markets have any features that adversely affect competition in these markets.⁴⁴ The B2C platforms include e-commerce, online travel agencies, food delivery, app stores and property classifieds. The inquiry revealed that there is price discrimination against small estate agents who must compete with large property classifieds such as Property24 and Private Property.⁴⁵ Although the inquiry did not explicitly mention that this form of price discrimination was facilitated by algorithms, it is observed that price discrimination in this form took place in an online platform market which is susceptible to manipulation and algorithms. The findings of the inquiry are a good way to demonstrate how the Competition Commission can utilise its market inquiry powers to investigate instances where firms are using artificial intelligence to achieve algorithmic price discrimination.

The *Competition Act* contains numerous remedies to address violations.⁴⁶ These remedies include imposing financial penalties, private damages, a Corporate Leniency Policy (CLP) and criminal sanctions, among others.⁴⁷ The primary purpose of the remedies is to deter prohibited conduct from perpetuating.⁴⁸ The Competition Commission has provided a number of remedial actions based on its findings, which remedial actions were aimed at providing benefits to various platforms, businesses and consumers. The remedial actions were aimed in particular at enhancing the visibility of and the opportunities for smaller local platforms in order to enable platform competition so that the playing field could be levelled for all businesses operating on these platforms and to ensure that the South African digital economy is inclusive.⁴⁹ The author submits that the findings and the remedial actions provided by the Competition Commission are commendable and a positive step in the direction of promoting the efficiency, adaptability and development of the digital economy, as well as of providing consumers with competitive prices and product choices in the online market.⁵⁰ The recent amendment to the *Competition Act* is also

⁴⁴ Competition Commission 2023 https://www.compcom.co.za/wp-content/uploads/2023/07/CC_OIPMI-Final-Report.pdf.

⁴⁵ Competition Commission 2023 https://www.compcom.co.za/wp-content/uploads/2023/07/CC_OIPMI-Final-Report.pdf.

⁴⁶ See ss 43, 58 and 59 of the *Competition Act*; also see Kelly *et al Principles of Competition Law* 220.

⁴⁷ See ss 43, 58, 59 and 60 of the *Competition Act*; also see Kelly *et al Principles of Competition Law* 220.

⁴⁸ See ss 43, 58, 59 and 60 of the *Competition Act*; also see *Harmony Gold Mining Company Ltd v Mittal Steel South Africa Ltd* 2007 2 CPLR 271 (CT) para 13 read with *Harmony Gold Mining Company Ltd v Mittal Steel South Africa Ltd* 2007 1 CPLR 37 (CT) para 220; also see Kelly *et al Principles of Competition Law* 220.

⁴⁹ Competition Commission 2023 https://www.compcom.co.za/wp-content/uploads/2023/07/CC_OIPMI-Final-Report.pdf.

⁵⁰ See s 2(a)-(b) of the *Competition Act*; also see Kelly *et al Principles of Competition Law* 4.

commendable since it provides that the remedial action taken by the Competition Commission has a binding effect that enhances and strengthens the effectiveness of the Commission. Nonetheless, there is still a long way to go and more still needs to be done to ensure efficiency in investigating price discrimination in the digital economy and to enhance the ability of the Competition Commission to protect consumers from price discrimination in the era of digital transformation.⁵¹ The Commission has conceded that the debate on how to respond appropriately to the challenges of digital markets still needs to continue in order to arrive at more comprehensive solutions, which could include the adoption of regulations and the making of the necessary legislative changes.⁵² It is submitted that the Competition Commission should utilise its powers to review the relevant legislation to suggest possible amendments to the price discrimination provisions of the *Competition Act* in such a manner as to address price discrimination in the digital market.⁵³ Moreover, it is also suggested that the Competition Commission should consider utilising its advocacy function to enhance consumer awareness about algorithmic price discrimination as a way of empowering them when they participate in the digital market place.

3.2 The role of the Competition Tribunal

The Competition Tribunal was established as a specialist administrative tribunal with jurisdiction throughout the Republic of South Africa.⁵⁴ It is a juristic person and a tribunal of record that must exercise its functions according to the *Competition Act*.⁵⁵ The Competition Tribunal consists of a Chairperson and no less than three but not more than fourteen other men and women who are appointed by the President based on the nomination of the Minister of Trade and Industry.⁵⁶ In the case of *Simelane v Seven-Eleven Corporation South Africa*,⁵⁷ the Supreme Court of Appeal held that the Competition Tribunal is a creature of statute and does not enjoy any inherent jurisdiction. In this regard the Competition Tribunal has to exercise

⁵¹ See ss 2(a)-(b) and 9 of the *Competition Act*; also see Kelly *et al Principles of Competition Law* 4.

⁵² Competition Commission 2023 https://www.compcom.co.za/wp-content/uploads/2023/07/CC_OIPMI-Final-Report.pdf.

⁵³ Sections 9(1) and 21(1)(k)-(l) of the *Competition Act*; also see Lewis *Enforcing Competition Rules* 42; Kelly *et al Principles of Competition Law* 60.

⁵⁴ Section 26(1)(a) of the *Competition Act*; Neethling and Rutherford "Competition" para 250.

⁵⁵ Section 26(1)(b)-(d) of the *Competition Act*; also see Brassey *et al Competition Law* 288-289.

⁵⁶ Section 26(2)(a) of the *Competition Act*; also see Kelly *et al Principles of Competition Law* 71; also see Van Heerden and Neethling *Unlawful Competition* 46.

⁵⁷ *Simelane v Seven-Eleven Corporation South Africa (Pty) Ltd* 2003 1 All SA 82 (SCA) para 12; also see Kelly *et al Principles of Competition Law* 71.

its functions in accordance with the framework provided by the *Competition Act*.⁵⁸

The Competition Tribunal has a wide range of functions contained in the *Competition Act*.⁵⁹ The Competition Tribunal is empowered to adjudicate any conduct which is deemed to be a prohibited practice for the purpose of the *Competition Act*.⁶⁰ Moreover, the Competition Tribunal is also empowered to determine if a prohibited conduct has occurred and impose any remedies in the event of a finding that a prohibited conduct has indeed occurred.⁶¹ Furthermore, the Competition Tribunal is empowered to adjudicate on any other matter which it may deem necessary to adjudicate upon and to make a necessary order provided for in terms of the *Competition Act*.⁶² The Competition Tribunal can also deal with appeals from, and reviews of the decisions of the Competition Commission.⁶³ Additionally, the Competition Tribunal may make any ruling or order necessary to or incidental to the performance of its functions in terms of the *Competition Act*.⁶⁴

Notwithstanding the functions of the Competition Tribunal as outlined above, the Competition Tribunal has not dealt with any case for algorithmic price discrimination. This does not take away from the fact that the Competition Tribunal needs to be fully prepared and adequately equipped to be able to deal with such a matter in the event that it is brought before it for adjudication in line with its functions.⁶⁵ Similarly, at the moment no relevant case law exists in other jurisdictions, including developed jurisdictions such as the European Union (EU), regarding algorithmic pricing.⁶⁶ The regulation of price discrimination in the digital market is still a challenge that most authorities across the globe are grappling with. For instance, there is uncertainty in the EU regarding the ability of consumer protection law to effectively address the challenges posed by algorithmic pricing. Nonetheless the EU has recently passed important regulations,

⁵⁸ See s 26(1)(d) read with s 27 of the *Competition Act*; also see Lewis *Enforcing Competition Rules* 42.

⁵⁹ See s 27 of the *Competition Act*; also see Lewis *Enforcing Competition Rules* 42; see further comments by Van Heerden and Neethling *Unlawful Competition* 45-46.

⁶⁰ See s 27(1)(a) read with ch 2 of the *Competition Act*; also see Brassey *et al Competition Law* 288-289.

⁶¹ See s 27(1)(a) read with ch 2 of the *Competition Act*; also see *Seagram Africa (Pty) Ltd v Stellenbosch Farmers' Winery Group Ltd* 2001 2 SA 1129 (C) 1140.

⁶² See s 27(1)(b) of the *Competition Act*; also see Kelly *et al Principles of Competition Law* 71.

⁶³ See s 27(1)(c) of the *Competition Act*; also see Van Heerden and Neethling *Unlawful Competition* 45.

⁶⁴ See s 27(1)(d) of the *Competition Act*; also see *Orion Cellular (Pty) Ltd v Telkom South Africa Ltd* 2004 1 CPLR 198 (CT).

⁶⁵ See s 27(1)(a) read with ch 2 of the *Competition Act*; also see Brassey *et al Competition Law* 288-289.

⁶⁶ Townley, Morrison and Yeung 2017 YEL 723.

which are the *Digital Services Act*⁶⁷ and the *Digital Markets Act*,⁶⁸ which could have relevance to algorithmic pricing. The *Digital Markets Act* and the *Digital Services Act* are aimed at creating a safer digital space in which consumer rights are protected and a level playing field for businesses is established on online and digital platforms.⁶⁹ It is submitted that South African policy makers could consider adopting these legislative developments to empower its regulatory bodies, including the Competition Tribunal, to ensure that it is well capacitated to deal with cases of algorithmic pricing in the event that they arise.

Given the recent report of the Competition Commission on Online Intermediation Platforms Market Inquiry as discussed above and the proliferation of data-driven pricing in the form of algorithmic pricing, it is better to be prepared to ensure that consumers are offered adequate protection against the likely social and economic risks of digital transformation for the economy.⁷⁰ As indicated above, the powers and functions of the Competition Tribunal include imposing administrative penalties on firms that have engaged in prohibited practices, as has been demonstrated in various cases.⁷¹ To this end the author submits that the Competition Tribunal must be prepared to ensure that it imposes appropriate penalties on firms that could be found to have engaged in prohibited conduct such as algorithmic price discrimination to the detriment of consumers and customers when such cases are referred to it.⁷² Such penalties could include requiring any firm which utilises algorithmic pricing to prove that the algorithmic pricing has not contributed to infringement of the law and unfair discrimination against consumers. This penalty would necessitate an amendment to the *Competition Act*, particularly section 9(1), since it does not expressly regulate price discrimination in the form of algorithms. This approach could go a long way toward deterring engagement in such conduct, especially against the backdrop of the

⁶⁷ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and Amending Directive 2000/31/EC OJ L 277/1 (2022) (*Digital Services Act*).

⁶⁸ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on Contestable and Fair Markets in the Digital Sector and Amending Directives (EU) 2019/1937 and (EU) 2020/1828 OJ L 265/1 (2022) (*Digital Markets Act*).

⁶⁹ See Art 27 of the *Digital Services Act* and Arts 11-15 of the *Digital Markets Act* which emphasises algorithmic accountability by requiring the firms to apply transparent, fair and non-discriminatory conditions to their activities regarding algorithmic pricing.

⁷⁰ Competition Commission 2023 https://www.compcom.co.za/wp-content/uploads/2023/07/CC_OIPMI-Final-Report.pdf.

⁷¹ See ss 4, 5, 59 and 60 of the *Competition Act*; also see *Harmony Gold Mining Company Ltd v Mittal Steel South Africa Ltd* 2007 2 CPLR 271 (CT) para 13 read with *Harmony Gold Mining Company Ltd v Mittal Steel South Africa Ltd* 2007 1 CPLR 37 (CT) para 220; also see Kelly et al *Principles of Competition Law* 220.

⁷² See ss 58 and 59(1)(a) of the *Competition Act* as amended.

ongoing digital transformation. The failure to offer consumers adequate protection will expose them to vulnerability and even impair the achievement of the objectives of the *Competition Act*, which include the promotion of efficiency, adaptability, and the development of the economy where consumers are provided with competitive prices and product choices.⁷³

3.3 *The role of the Competition Appeal Court*

The Competition Appeal Court is a court with a status similar to that of a High Court. It has jurisdiction across the Republic of South Africa.⁷⁴ The Competition Appeal Court consists of at least three judges who must each be a judge of the High Court.⁷⁵ Notwithstanding its status, unlike the High Court, the Competition Appeal Court is a creature of statute and does not have an inherent jurisdiction, since it derives its powers and functions from the Competition Act.⁷⁶ The Competition Appeal Court has various functions which, among others, include the powers to review any decision of the Competition Tribunal and to hear appeals from the Competition Tribunal.⁷⁷ Moreover, the Competition Appeal Court can also give any judgement or make any order to confirm, amend or set aside a decision or order of the Competition Tribunal or to remit a matter to the Competition Tribunal for a further hearing on any appropriate terms.⁷⁸

In the case of *Sasol Oil (Pty) Ltd v Nationwide Poles CC*,⁷⁹ the Competition Appeal Court rejected the Competition Tribunal's interpretation of a matter dealing with price discrimination. The Competition Appeal Court rejected the notion that section 9(1) of the *Competition Act* is about protecting small competitors as opposed to advancing competition in the market.⁸⁰ The Competition Appeal Court held that section 9(1) is concerned with whether price discrimination will substantially lessen or prevent competition and that it is not concerned with the competitive relevance of the conduct.⁸¹ The

⁷³ See s 2(a)-(b) of the *Competition Act*; also see Kelly *et al Principles of Competition Law* 4.

⁷⁴ See s 36(1) of the *Competition Act*; also see s 166(e) of the *Constitution of the Republic of South Africa*, 1996; also see Neethling and Rutherford "Competition" para 251.

⁷⁵ Section 36(2) of the *Competition Act*; also see Brassey *et al Competition Law* 289; also see Lewis *Enforcing Competition Rules* 43.

⁷⁶ See s 37 of the *Competition Act*; *Old Mutual Properties (Pty) Ltd v Avalon Group (Pty) Limited* 2003 1 CPLR 46 (CAC).

⁷⁷ Section 37(1)(a) and (b) of the *Competition Act*; see *Old Mutual Properties (Pty) Ltd v Avalon Group (Pty) Limited* 2003 1 CPLR 46 (CAC).

⁷⁸ See s 37 of the *Competition Act*; also see Kelly *et al Principles of Competition Law* 77.

⁷⁹ *Sasol Oil (Pty) Ltd v Nationwide Poles CC* 2006 1 CPLR 37 (CAC).

⁸⁰ See s 9(1) of the *Competition Act*; also see *Sasol Oil (Pty) Ltd v Nationwide Poles CC* 2006 1 CPLR 37 (CAC); also see Kelly *et al Principles of Competition Law* 158.

⁸¹ See s 9(1) of the *Competition Act*; also see *Sasol Oil (Pty) Ltd v Nationwide Poles CC* 2006 1 CPLR 37 (CAC) 48-51.

Competition Appeal Court went on to indicate that the test in section 9(1) is a probabilistic enquiry that requires that the likely effect of the conduct has to be based on evidence and not necessarily on speculations that are not substantiated. In concluding, the Competition Appeal Court held that Nationwide Poles had failed to prove that Sasol's conduct was likely to substantially lessen or prevent competition.⁸²

In South Africa litigation is expensive and it is also intimidating for vulnerable, poor and illiterate consumers.⁸³ Most vulnerable consumers, especially the poor and low-income earners, cannot afford litigation as a way of redress where there is a dispute regarding the competitiveness and reasonableness of prices.⁸⁴ In particular, most poor and low-income earners who have been unfairly discriminated against might not be able to easily afford to litigate against dominant firms, which are usually large corporations and/or entities. Moreover, such vulnerable consumers might also not be able to afford legal representatives who would be able to assist them in proving conduct that might be likely to substantially lessen or prevent competition where there is an allegation of price discrimination, especially in online markets. In this regard the author submits that the Competition Commission as the authority responsible for ensuring access to competition procedures,⁸⁵ together with the Competition Tribunal, must function effectively to investigate and adjudicate matters relating to price discrimination, including algorithmic pricing, to assist vulnerable consumers who cannot afford litigation.⁸⁶ Woker correctly points out that for any law to achieve its objectives, it needs to be enforced effectively.⁸⁷ Investigations by the Competition Commission and adjudications by the Competition Tribunal must be conducted properly and efficiently to combat illicit practices, which include price discrimination in the era of digital transformation and online markets. This is important for achieving the objectives of the *Competition Act*, which include promoting the efficiency, adaptability and development of the economy, as well as providing consumers with competitive prices and product choices.⁸⁸ It is important to

⁸² See *Sasol Oil (Pty) Ltd v Nationwide Poles* CC 2006 1 CPLR 37 (CAC) 56-57; also see Kelly *et al Principles of Competition Law* 158.

⁸³ See related comments by Woker 2016 *SA Merc LJ* 23-24; also see Woker 2017 *SA Merc LJ* 2.

⁸⁴ See related comments by Van Heerden and Barnard 2011 *JICLT* 131-132; see more related comments by Woker 2016 *SA Merc LJ* 23-24; also see Woker 2017 *SA Merc LJ* 2.

⁸⁵ Section 21(1)(a) and (b) of the *Competition Act*; also see Brassey *et al Competition Law* 286; also see Lewis *Enforcing Competition Rules* 42.

⁸⁶ See s 27(1)(a) read with ch 2 of the *Competition Act*; also see Brassey *et al Competition Law* 288-289.

⁸⁷ See Woker 2019 *Stell LR* 109.

⁸⁸ See s 2(a)-(b) of the *Competition Act*; also see Kelly *et al Principles of Competition Law* 4.

bear these objectives in mind when interpreting the *Competition Act* and to understand how the competition authorities apply this Act in South Africa.⁸⁹

4 Concluding remarks

The establishment of competition law authorities under the *Competition Act* is commendable for ensuring an efficient and adaptable economy and protecting consumers and customers against adverse competition practices, including those relating to pricing.⁹⁰ The Competition Commission, the Competition Tribunal, and the Competition Appeal Court, all have an important role to play in championing and promoting the interests of consumers and customers by minimising and ameliorating any disadvantages and challenges faced by consumers and customers when transacting to acquire goods and services. Similarly, digital transformation through the establishment of digital markets and e-commerce are welcome innovative ways of providing goods and services in a convenient manner to consumers. However, digital transformation has the potential to expose consumers to adverse competition practices such as algorithmic price discrimination. It was noted above that the provisions of the *Competition Act* are not adequate or robust in regulating issues of pricing in the context of the digital transformation. For instance, the *Competition Act* does not contain provisions for algorithmic pricing, although it regulates price discrimination. In its current form, the *Competition Act* cannot be applied to price discrimination by algorithms because such powers are not expressly and adequately extended to the regulatory bodies.

In line with the above, it is submitted that South African policy makers should consider regulating algorithmic pricing in line with the price discrimination provisions to protect consumers subject to abuse in the digital marketplace. For instance, it is recommended that the price discrimination provisions under the *Competition Act* could be amended to regulate algorithmic pricing by imposing the burden of proof on the firms which utilise algorithmic pricing to prove that such pricing has not contributed to infringement of the law and unfair discrimination against consumers. Moreover, it is recommended that South African policy makers need to strongly consider adopting and employing the relevant technology and resources to detect and combat the abuse of dominance by firms and suppliers who engage in various forms of prohibited conduct, which may include algorithmic pricing and algorithmic price discrimination, to the detriment of consumers. The author submits that there is a need to consider capacitating and training personnel employed by

⁸⁹ See *Nationwide Poles v Sasol (Oil) (Pty) Ltd* (72/CR/Dec03) [2005] ZACT 17 (31 March 2005), where the Competition Tribunal expressly referred to the preamble and objectives of the *Competition Act* in interpreting s 9, which deals with price discrimination; also see Kelly *et al Principles of Competition Law* 4.

⁹⁰ See s 2(a)-(b) read with ch 4 of the *Competition Act*.

the competition authorities to ensure that they have the requisite skills and knowledge to deal adequately with the abuse of dominance and prohibited practices in the digital markets. The issue of algorithmic pricing is a complex one across the globe since this is an emerging trend that is not well regulated even in countries with more advanced technology. In the EU, for instance, there is no relevant case law on algorithmic pricing.⁹¹ The current position in the EU is that the legal framework such as the *Treaty on the Functioning of the European Union* and the *Unfair Commercial Practices Directive* could be utilised to regulate algorithmic pricing from a competition law and consumer law perspective.⁹²

It is further submitted that enacting clear provisions on pricing under the *Competition Act* in the context of digital transformation and emerging innovations will go a long way toward enhancing the effectiveness of the competition authorities in South Africa. Legislative intervention is necessary to empower the competition authorities to adopt appropriate measures to discharge their functions in line with the developments brought about by digital transformation in order to ensure competitive and fair prices for consumers. Unlike the Competition Appeal Court, both the Competition Commission and the Competition Tribunal are creatures of statute and have to act within the ambit of the functions provided to them by the *Competition Act*.⁹³ As such, the Competition Commission and the Competition Tribunal cannot act beyond the scope of what they are statutorily mandated to do. In line with the principle of legality and the rule of law, all those who exercise public power are required to do so within the powers that have been conferred upon them.⁹⁴ In this regard, the revitalisation of the roles and mandates of these competition authorities has become increasingly vital to ensure that the interests of consumers and customers are protected, especially in the digital markets and the digital economy.

⁹¹ Townley, Morrison and Yeung 2017 YEL 723.

⁹² See Art 102(c) of the *Treaty on the Functioning of the European Union* (1957) and Art 5(2) of the *Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and Amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council OJ L 149/22 (2005) (Unfair Commercial Practices Directive)*.

⁹³ See ch 4 of the *Competition Act*; also see *Simelane v Seven-Eleven Corporation South Africa (Pty) Ltd* 2003 1 All SA 82 (SCA) para 12.

⁹⁴ See *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC); also see *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) para 58; also see *National Credit Regulator v Capitec Bank Ltd* (A440/2014) [2016] ZAGPPHC 125 (23 March 2016); see also Woker 2019 *Stell* LR 109.

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List of Abbreviations

Am Econ Rev	American Economic Review
B2C	business-to-consumer
CLP	Corporate Leniency Policy
CPA	Consumer Protection Act 68 of 2008
e-commerce	electronic commerce
EU	European Union
Int J Ind Organ	International Journal of Industrial Organization
J Acad Market Sci	Journal of the Academy of Marketing Science
JAL	Journal of African Law

JICLT	Journal of International Commercial Law and Technology
LAWSA	The Laws of South Africa
OECD	Organisation for Economic Co-operation and Development
SA Merc LJ	South African Mercantile Law Journal
Stell LR	Stellenbosch Law Review
YEL	Yearbook of European Law