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Restoring competition in "winner-took-all" digital platform markets

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Abstract

Digital platforms provide a variety of services such as marketplaces, social networking, search engines and payment systems. Their business model relies on data and data monetization for growth. These are multi-sided, oligopolistic or monopolistic markets characterized by network effects, high economies of scale and scope, and increasing returns to scale, which together raise barriers for new entry. In digital markets, platforms compete for the market and not in the market. These features together with control over user data confer significant market power to incumbent platforms in their respective markets. This has raised concerns about competition and led the competition lawyers and economists reflect on ways to restore the lost competition in digital markets.

This paper suggests adapting competition law tools and analysis to the realities of this new business model; reforming merger control regimes; focusing not only on free but also fair competition in digital markets; adopting regulatory measures such data openness and portability, interoperability between online platforms. The paper also questions the relevance of consumer welfare standard based on price effects and efficiency to the new business model of online platforms. It suggests adopting a broader framework including choice, quality, privacy, innovation, future competition and effective competition structure and competitive process in competition law enforcement.

Key words: Competition, Digital platforms, Online platforms, Market power

Contents

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Introduction

Technological developments have provided consumers with new products and services provided in exchange for their personal data. Digital platforms are at the center of such developments and have had disruptive effects in many economic sectors. The platforms provide a digital infrastructure for a variety of services, including marketplaces (Amazon), application stores (Apple), social networking sites (Facebook) and search engines (Google). Platformization has implications not only for the nature of transactions in certain economic sectors but also for the ability of firms to scale rapidly, thereby affecting the structure of sectors.[1]

Digital platforms are essential elements of the digital economy. Seven of the world's top ten companies by market capitalization use platform-based business models. Out of these seven digital platforms, five are American and two are Chinese companies. United States and China account for 90 per cent of the market capitalization value of the world's 70 largest digital platforms.

The growing market power of these platforms raise concerns for consumers, citizens, as well as consumer and competition law enforcers and policymakers. There has been many recent reports[2] analyzing the business model of digital platforms, their specific nature and its implications for competition in these markets, abusive practices of dominant digital platforms, the concerns arising from their market power, and most importantly, possible solutions on how to deal effectively with platform power.

This paper provides an overview of the digital platform business model; concerns arising from their market power; reviews some of the proposals introduced in the recent reports in this area; and presents policy options for restoring competition in digital platform markets. The paper is structured in three parts. Part 1 provides an overview of the specific features of digital platforms and their business models, highlighting the importance of data in this new business model and the role of data in conferring online platforms a significant degree of market power. Part 2 discusses the implications of market power of major platforms for competition and the role of competition law and policy in tackling such power and its potential abuse. This part focuses first on how competition law enforcement can be adapted to the realities of digital platforms and can be made effective in restoring competition in these markets. Secondly, it looks into the role of regulation in promoting competition and consumer protection in online platform markets. Finally, it questions whether the consumer welfare standard is still relevant in competition law enforcement and provides an overview of the current debate on this matter as well as the alternative approaches provided so far. Part 3 presents policy considerations and recommendations for national governments and competition authorities.

[1] UNCTAD, 2019, Digital Economy Report (United Nations publication, Geneva) (Hereinafter "UNCTAD DER 2019"), https://unctad.org/en/PublicationsLibrary/der2019_en.pdf.
[2] See section 3 of the paper for more information and references to these reports.

1. Specific Features of Digital Platforms

Online platforms are defined as "digital services that facilitate interactions between two or more distinct but interdependent sets of users (whether firms or individuals) who interact through the service via the Internet".[3] Platforms involve services and activities such as marketplaces, social networking, search engines, payment systems, news media, transportation, accommodation and video sharing.

Digital platforms' current business model relies on data value chains and data monetization to grow. The data value chain includes a process from data collection, storage and analysis to the transformation of data into digital intelligence, or so-called "big data". Thereafter data monetization to generate revenue. Some of the ways in which data is monetized include direct sale of data, online advertising (ex: Google, Facebook); operating e-commerce platforms (Amazon, Alibaba, Uber, Airbnb); transforming traditional goods into rentable services (Mobike); and renting out cloud services (Amazon Web Services, Tencent, MyJohnDeere). [4] For instance, advertising accounts for over 80 per cent of the total revenues of Twitter and Google, and close to 100 per cent of those of Facebook and Snapchat.[5]

Data plays a crucial role in the business model of advertiser-funded digital platforms and therefore is a competitive factor. Control over user data, together with network effects, enables platforms to capture more and more data. Facebook and Google have many ways of connecting with consumers, which enable them to capture a significant amount of data, creating a feedback loop that helps them improve their services and attract more users and advertisers. For example, Google distributed its Android operating system free of charge to mobile telephone manufacturers, thereby enabling it to collect more data from mobile phone users.[6] Facebook acquired WhatsApp and Instagram to reach more users and more data. This process has conferred significant market power to big digital platforms, leading to the tipping of markets, at which point the monopoly platform, "the winner", has taken most, if not all, of the market.

Online platforms have multisided business models. This often allows platforms to offer digital services at zero-price on one side of the platform, while subsidizing this service by using the revenues on the other side of the platform. The data collected on the 'free' services side of the platform, for instance search engines, social networking or social media, is analysed and transformed into digital intelligence, and subsequently monetized to subsidize the zero-price services of the business.

Digital platforms are characterized by direct and indirect network effects. A direct network effect "refers to the effect that one user of a good or service has on the value of that product to other existing or potential users".[7] In other words, the value of using digital platforms increases in correlation with the number of its users. Direct network effects are most evident in social media (e.g. Facebook, Twitter, Instagram) and instant messaging (e.g. WeChat and WhatsApp) platforms.

Indirect network effects occur when the rise in the number of users on one side of a platform, possibly due to better services or direct network effects, increases the demand for its services on the other side. As more users join one side, the platform becomes more attractive to users, such as advertisers, on the other side, thereby increasing the number of users on that side. This in turn increases the appeal of the platform on the first side.[8] Facebook and Google are the dominant digital advertising companies and have a combined share of 65 per cent of the total digital advertising spending in 2017.[9] These figures highlight the key linkages

[3] Organisation for Economic Cooperation and Development (OECD), 2019, An Introduction to Online Platforms and their Role in the Digital Transformation, OECD Publishing, Paris, https://doi.org/10.1787/53e5f593-en.
[4] For details on types of digital platforms, see UNCTAD DER 2019, Chapter II. Value in the Digital Economy, p. 29-32.
[5] UNCTAD DER 2019, p.30.
[6] See https://www.businessinsider.com/chart-why-google-gives-away-android-2013-12?r=US&IR=T.
[7] Economic Commission for Latin America and the Caribbean, 2018, *Data, Algorithms and Policies: Redefining the Digital World* (United Nations publication, Santiago).
[8] OECD 2019, p. 22-23.
[9] UNCTAD DER 2019, p.82.

between control of data and market power in digital platform markets. One concern with indirect effects generated by the platform business model is the risk of higher mark-ups for advertisers by a dominant platform as it leverages its market power on the user side to strengthen its bargaining power vis-à-vis advertisers on the other side of the platform. This may imply higher prices to final consumers of advertised products or services.

Digital platforms involve high up-front costs and extremely low marginal costs. The technologies and the initial investment in computer hardware and software development required to establish an online platform can be costly. However, once the system is operational, the marginal cost of processing, storing, replicating and transmitting data is very low. This gives platforms the possibility to grow extensively, and to do so quickly and inexpensively compared to scaling up in physical goods markets. This cost structure means that once online platforms absorb fixed costs, they can serve many additional users at extremely low or negligible marginal costs. That enables the platforms to grow without increasing investments in tangible assets or taking on a significant number of new employees.[10]

Platforms may benefit from economies of scope because of complementarities between two or more of the services they provide on a given platform, or across platforms. Platforms can share development costs and data across business lines. For example, Google provides many services in addition to its internet search engine, including email, video sharing, price comparison, cloud computing and online payment system services. The diversity of services within the same platform eco-system may allow users to gain familiarity with each of these services more quickly. This can help a company's newer platforms to gain users faster, giving them a competitive advantage, which new "solo" platform companies would not have. Moreover, offering more services may keep users connected to the platform's services, which in turn benefit the platform in improving its services or algorithms.[11] These factors may create lock-in effects for both consumers and business users; and facilitate market concentration of big data in the hands of a few players.[12]

The vertically integrated and conglomerate nature of platforms across products and services allow for the leverage of power from one market to another. Vertically integrated platforms have dual roles as platform operators and users of their own platforms. This gives an advantage of self-preferencing their own products or services vis-à-vis competitors on their platforms. For example, Google operates an internet search engine, whereby it can self-preference its comparison shopping services over that of rivals by ranking its own comparison-shopping website on the first page of its search results while demoting rivals' websites. Likewise, Amazon operates a marketplace and sells products in competition with independent traders on its platform. The European Commission fined Google 2.42 billion euros for abusing dominance as a search engine by giving illegal advantage to its own comparison shopping service, which would come in the highest rankings in its search results (the decision is currently under appeal).[13] Likewise, the European Commission opened a formal antitrust investigation in July 2019 to look into the standard agreements between Amazon and marketplace sellers, which allow Amazon's retail business to analyse and use third party seller data, and whether and how the use of accumulated marketplace seller data by Amazon as a retailer affects competition. Self-preferencing practices put third party traders or service providers in a disadvantage vis-à-vis the platform operator. The role of these dominant businesses as platform operators also give them access to sensitive data of independent retailers, which can be used to strengthen their dominant position. Khan (2017) demonstrates how Amazon used sales data from independent retailers in certain product markets to understand consumer preferences and demand, to which it responds with its own brand products. Because of their dual role as platform operators and retailers, these platforms have been compared to essential facilities, which traders depend on to be able to maintain and grow their businesses.[14]

[10] (OECD), 2019, p.23.
[11] OECD 2019, p. 23-24.
[12] Organization for Economic Cooperation and Development (OECD), 2016, Big data: Bringing competition policy to the digital era, DAF/COMP(2016)14, Paris, 27 October.
[13] https://europa.eu/rapid/press-release_IP-17-1784_en.htm.
[14] L Khan, 2017, Amazon's antitrust paradox, The Yale Law Journal, 126(3):564–907.

In connection to the above, the concept of "gatekeeper" platforms has been developed to refer to those platforms that set the rules of the game for market access or the interaction between consumers, business users and service providers.[15] Amazon may be the first one that comes to mind in this regard, as a marketplace that sets the rules for traders who sell on its platforms and provides a channel for consumers to reach the products they are looking for. It has become indispensable for many small and medium sized traders if they would like to remain in e-commerce activity. Examples for other such gatekeeper platforms include application stores on mobile phones. Being the gatekeeper platform confers market power, also referred to as intermediation or bottleneck power, to these platforms. The European Commission's 2019 investigation into Amazon, as mentioned in the previous paragraph, is exactly to assess whether the platform is abusing this power of being the "gatekeeper" vis-à-vis its business users, and implications of such conduct for competition on its marketplace.

The current platform business model prioritizes growth over profits in the short to medium terms, that is, the maximization of the number of users rather than profits at initial stages of their businesses. This has resulted in competition for the market rather than in the market. Dominant platforms can afford such a business strategy given leeway to incur losses by investors. For example, Amazon was permitted by investors to grow without pressure to show profits, and thereby expanded its business and entrenched its dominance as an electronic commerce (e-commerce) marketplace.[16]

Research on behavioural tendencies shows that there is a cognitive cost in switching platforms, in terms of time, effort, energy and the concentration and sustained thought required; competition is therefore not "one click away".[17] It is not easy to switch. Consumers need to understand default settings and how to change them and be willing to do so. What is more, consumer biases and inertia prevent consumers from trying platforms other than dominant ones, further reinforcing dominant platforms' market power.

High economies of scale and scope, data-driven network effects, control over data together with switching costs, and consumer inertia create high barriers to entry in digital platform markets. Establishing a successful platform that can attract sufficient online traffic is a significant challenge for newcomers. Even if start-ups enter the market, they soon face competitive pressure and may eventually be acquired by dominant platforms. As of 10 December 2019, Google has acquired 214 business entities since its foundation in 1998 and the value of these acquisitions exceeds US$17 billion.[18]

This helps understand the persistent dominance of some online platforms in certain markets. For example, over 75 per cent of online consumers in the United States of America mostly shop on Amazon.[19] With regard to specific sectors, Amazon held an over 90 per cent share in five different product markets in the first quarter of 2018, Facebook is the leading social networking site, with a 68.95 per cent share as at February 2019, and Google dominates the search engine market, with an 89.95 per cent share as at January 2019.[20]

[15] https://www.slaughterandmay.com/media/2537538/competition-law-in-the-digital-age-july-2019.pdf
[16] L Khan, 2017, Amazon's antitrust paradox, The Yale Law Journal, 126(3):564–907.
[17] A Candeub, 2014, Behavioural economics, Internet search and antitrust, *I/S: A Journal of Law and Policy for the Information Society*, 9(3):407–434; see https://www.wired.com/2012/10/google-gets-closer-to-a-court-date/.
[18] See https://acquiredby.co/google-acquisitions/ (last accessed on 10 December 2019).
[19] See https://www.cnbc.com/2017/12/19/more-than-75-percent-of-us-online-consumers-shop-on-amazon-most-of-the-time.html.
[20] UNCTAD, 2019, Competition issues in the digital economy, TD/B/C.I/CLP/54, 1 May.

2. Competition Policy, Online Platforms and Market Power

Large technology companies have changed the global business landscape. The top 10 global companies by market capitalization in 2009 included only one technology company, namely, Microsoft ranking sixth, and three oil and gas companies; in 2019, the list included five technology companies, of which Microsoft now the number one, and two consumer services companies that are both large online marketplaces (tables 1[21] and 2). The combined value of the digital platforms with a market capitalization of more than US$100 million has increased from US$4.7 trillion in 2015 to US$7 trillion in 2017.[22] The top seven online platforms in terms of market capitalization include Alibaba Group, Alphabet, Amazon, Apple, Facebook, Microsoft and Tencent (in alphabetical order).[23]

Table 1. Top 10 global companies, 31 March 2009

(Billions of dollars)

Rank	*Company*	*Industry*	*Market capitalization*
1	Exxon Mobil	Oil and gas	337
2	Petro China	Oil and gas	287
3	Walmart	Consumer services	204
4	Industrial and Commercial Bank of China	Financials	188
5	China Mobile	Telecommunications	175
6	Microsoft	Technology	163
7	AT&T	Telecommunications	149
8	Johnson and Johnson	Health care	145
9	Royal Dutch Shell	Oil and gas	139
10	Procter and Gamble	Consumer goods	138

Source: PricewaterhouseCoopers, 2018, *Global Top 100 Companies by Market Capitalization: 31 March 2018 Update* (London).

Table 2. Top 10 global companies, 31 March 2019

(Billions of dollars)

Rank	*Company*	*Industry*	*Market capitalization*
1	Microsoft	Technology	905
2	Apple	Technology	896
3	Amazon.com	Consumer services	875
4	Alphabet*	Technology	817
5	Berkshire Hathaway	Financials	494
6	Facebook	Technology	476
7	Alibaba	Consumer services	472
8	Tencent	Technology	438
9	Johnson and Johnson	Health care	372
10	Exxon Mobil	Oil & Gas	342

Source: PricewaterhouseCoopers, July 2019, *Global Top 100 Companies by Market Capitalization.*
*Alphabet has been the parent company of Google since 2015.

[21] UNCTAD, 2019, Competition issues in the digital economy, TD/B/C.I/CLP/54, 1 May, at https://unctad.org/meetings/en/SessionalDocuments/ciclpd54_en.pdf.
[22] UNCTAD DER 2019.
[23] UNCTAD DER 2019.

Digital platforms have started to draw the attention of many competition agencies and have become the centre of debates on competition law and policy during the last few years. This is due to the significant increase in market power of the largest digital platforms.

According to the UNCTAD Digital Economy Report 2019, market dominance of certain global digital platforms is a result of several factors. First, monopolistic trends related to the nature of data-driven business models and markets: network effects, the ability of platforms to extract, control and analyze data; switching costs of changing platforms for consumers. Secondly, the strategies employed by global platforms such as acquisition of promising innovative startups; and large amounts of capital expenditure and investment in R&D. Amazon and Google have become the top two global spenders on R&D.[24] Thirdly, global platforms expand into other sectors, including through vertical integration, to protect from competition. Google started to produce its own services, such as review sites. Amazon expanded its initial business of book sales online to supplying its own brands on its marketplace as well as providing its own logistics services. Fourthly, information asymmetry and control over data facilitate then maintenance of market power by major global platforms. Platforms unilaterally control huge amounts of information about producers and consumers/users. However, the two sides, that is producers and consumers/users, do not have such information neither about each other nor about themselves, As a result, platform owners can influence the success of producers that use their marketplace by "creating" consumer "demand" based on their analysis of consumer data and behaviour. This can create significant information asymmetries between the platforms on the one hand, and the actors using the platforms on the other, thereby affecting the functioning of the market.[25] The fifth factor, which ensures and maintains platforms' market dominance is their engagement in global policymaking. They do this by lobbying for international rules and regulations that allow and enable them to leverage their business models. This would create an environment where platforms can maintain and further enhance their market power and operate smoothly in global markets continuing with business-as-usual without facing obstacles. Global platforms have spent significant amount of resources to lobbying. Technology companies have replaced the financial sector as the biggest lobbyists in the past few years. In 2018, Google, Amazon, Facebook, Microsoft and Apple spent more than US$60 million on lobbying in the United States.[26]

Distortions to competition in the digital economy can also be a result of tax avoidance or tax optimization practices. While recognizing that tax avoidance is not exclusive to digital platforms, the UNCTAD Digital Economy Report 2019 draws attention to the fact that some of the inherent features of platforms facilitate their use of such practices. First, online platforms depend significantly on intangible assets, which are not easy to value and measure, but easy to move around the world. This facilitates aggressive tax planning. Secondly, there is a lack of clarity about where value is generated. A significant proportion of the value created in the digital economy results from users who provide data. The current international corporate tax system is not adapted to the digital economy. There is not yet a common understanding of "value creation" for taxation purposes in the digital economy. This leads to a disconnect between where value is generated and where taxes are paid. Likewise, the OECD identified three aspects of digitalized businesses, which have significant implications for taxation: (i) the possibility to scale across borders without mass, (ii) heavy reliance on intangible assets (such as software, algorithms or data), and (iii) user contribution to economic value creation through supply of data.[27] These features allow global platforms to easily move profits from high-tax-rate jurisdictions to low ones, thereby reducing their effective tax rate. For example, in 2017 taxes paid abroad by Facebook represented only 2.9 per cent of the profits it generated outside the United States.[28]

The OECD open public consultation on addressing the tax challenges of the digitalization of the economy includes three proposals for revising the profit allocation and nexus rules in response to digitalization. They concern user participation, marketing intangibles and significant economic presence.[29] With increasing

[24] UNCTAD Digital Economy Report 2019, p.87.
[25] UNCTAD Digital Economy Report 2019, p.88.
[26] UNCTAD Digital Economy Report 2019, Figure IV.1, p.89.
[27] OECD (2018a). Tax Challenges Arising from Digitalisation: Interim Report 2018. Inclusive Framework on BEPS. OECD/G20 Base Erosion and Profit Shifting Project, Paris.
[28] UNCTAD Digital Economy Report 2019, table IV.2, p.95.
[29] OECD, 2019, Addressing the tax challenges of the digitalisation of the economy. Public Consultation Document, 13 February–6 March 2019. BEPS Project, Paris.

digitalization, many economic activities are taking place online without the need of a physical presence. Moreover, user participation on the Internet plays an important role in value creation. These have significant implications for taxation. Therefore, a new approach is needed to take these aspects into consideration and to ensure fairness in taxation. A unitary tax system, where multinational enterprises are recognized as a unitary entity rather than as a series of separate legal entities, could substantially rebalance the tax base of global digital platforms. Such a reform would eliminate the scope for manipulating transfer pricing and using subsidiaries for moving profits around, since moving profits around within a unitary firm leads to the same aggregate profit.

While the need for a fairer global tax reform is recognized widely, there are difficulties in reaching consensus on how to do this. This is a concern for all countries but even more so for developing countries, which do not usually have the physical presence of global platforms but do play a significant role in generating data and therefore value for these platforms. However, they have much less bargaining power against dominant global digital platforms.

The concentration of market power in the hands of a few online platforms has raised concerns not only due to monopolization and elimination of competition in these digital markets; but also, its implications for data protection, privacy of individuals, and democratic values and political processes in individual countries. Since 2010, a total of 66 competition investigations have been initiated against global online platforms: 29 involving Google; 20 Amazon; 16 Apple and one against Facebook.[30] In the last five years, 30 market inquiries concerning global online platforms have been undertaken or commissioned by national governments, parliamentary committees and competition authorities.[31]

2.1 Adapting Competition Law Enforcement to the Realities of Digital Platforms

Competition issues in the digital economy were discussed at a round table during the 18th session of the Intergovernmental Group of Experts on Competition Law and Policy (IGE Competition 2019) hosted by UNCTAD from 10 to 12 July 2019 in Geneva.[32] This section will provide an overview of the discussions at IGE Competition 2019, references to some of the findings and proposals of the recent reports on competition in the digital markets, and the author's own suggestions.

Digital markets are different than traditional markets. Besides the now well-known features of economies of scale and scope, massive data collection, use and sale, data-driven network effects and multi-sidedness, they involve increasing returns to scale, interconnectedness, global reach and consumer inertia.[33] These features influence the power and competition dynamics in these markets. Digital markets tip, entry barriers increase and market incentives change.

Regarding innovation, the questions to ask are whether the pace of innovation would be faster with more companies in the race; and whether there would be more differentiated innovation with more competition. Prof. Caron Beaton-Wells states that the long-term risk would be the reduction of innovation in case of sustained

[30] Caron Beaton-Wells, Keynote speech presentation, 18th session of the Intergovernmental Group of Experts on Competition Law and Policy, UNCTAD, 10 July 2019, available at https://unctad.org/meetings/en/Presentation/ciclp18_PPTs_Beaton-Wells.pdf.

[31] Caron Beaton-Wells, Ten things to know about the ACCC's digital platforms inquiry, Competition Policy International, August 2019 (noting that this number excludes the studies and reports published by regional and international intergovernmental organizations, including the UNCTAD, OECD, BRICS, and the World Bank; and reports by private think tanks, institutes and Universities).

[32] See the IGE Competition 2019 meeting website for more information and documents, https://unctad.org/en/Pages/MeetingDetails.aspx?meetingid=1895.

[33] Report of the Intergovernmental Group of Experts on Competition Law and Policy on its eighteenth session (hereinafter Report of the IGE Competition 2019) (TD/B/C.I/CLP/55), UNCTAD, July 2019, p.5. https://unctad.org/meetings/en/SessionalDocuments/ciclpd55_en.pdf.

market power in the hands of one or two players.[34] The proposals of Prof. Beaton-Wells to promote competition in highly concentrated digital markets can be grouped in four categories.[35]

First, competition authorities need to be flexible and adapt their tools and analysis to the new business realities. There is consensus among competition lawyers and economists on the need to adapt competition enforcement tools to better address digital platforms' business models and deal with their market power and its potential abuse, and more importantly to restore the lost competition in digital markets. The revision of the German competition law in June 2017 introduced additional criteria for the assessment of the market position of firms in the digital economy: direct and indirect network effects, parallel use of services from different providers and switching costs for users (as multihoming can lessen the danger of market tipping), economies of scale in connection with network effects, access by firms to data relevant for competition and innovation-driven competitive pressure. The aim of this revision was to explain the aspects that would be considered in market dominance analysis to other parties involved in competition law enforcement and adjudication, such as the judiciary and the business community.[36]

Box 1. How Kenya adapted its competition legislation to the reality of digital markets

The Competition Authority of Kenya (CAK) revised its Guidelines on relevant market definition, to include definitions for multi-sided, non-price and digital markets.[37] It also introduced interoperability as a solution to address the dominance of certain platforms; and moved from using the consumer welfare standard in its narrow sense to applying non-price-related standards. CAK uses moral suasion as an effective way to influence big firms, which works if reputational consequences came into play.

CAK has a dual mandate for competition and consumer protection; and ensures that the two departments work together and have a common approach to addressing digital economy-related challenges. In a fast-evolving digital economy, rather than developing regulations and having to change them as the circumstances change, CAK focuses on advocacy, cooperation with sector regulators and competition law enforcement to promote competition.[38]

There is a need to look at markets with less focus on market shares in distinct product and service categories and more focus on competitive relationships and strategies across market spaces. Competition authorities need to recognize new types of market power, so called gatekeeper, intermediation or bottleneck power. In the absence of zero or non-monetary prices for consumers, the assessment of competitive effects needs to shift to non-price dynamic factors, such as quality, in which privacy and innovation could be included.

[34] Keynote address during the IGE Competition 2019, by Professor Caron Beaton-Wells, Professor in Competition Policy and Law, University of Melbourne, available at https://unctad.org/meetings/en/Presentation/ciclp18_PPTs_Beaton-Wells.pdf.
[35] Report of the IGE Competition 2019, p.6.
[36] Report of the IGE Competition 2019, p.7-8.
[37] Competition Authority of Kenya, Revised Guidelines On Relevant Market Definition, p. 18-20 https://cak.go.ke/sites/default/files/Guidelines%20on%20Relevant%20Market%20Definition%20(1).pdf.
[38] Report of the IGE Competition 2019.

Box 2. Facebook, market power and data privacy[39]

In February 2019, the German Federal Cartel Office (FCA) decided to restrict the collection and processing of user data by Facebook prohibiting the company from combining user data from different sources. The decision was based on the dominance of Facebook in the market in Germany among social networks. There were two theories of harm in the Facebook case: (i) a vertical harm resulting from a company's conduct in imposing unfair business terms on users, who lost control of their data and could not decide freely how their data should be used, in other words, collection and processing of user data without consent, and (ii) horizontal harm in creating impediments for competitors that could not amass the same amount of data as Facebook.[40] However, this decision was suspended by the Higher Regional Court in Dusseldorf.[41] The bigger picture is that Facebook's conduct was made possible as a result of its acquisition of Instagram and WhatsApp, which could not be reviewed by many national competition authorities as it did not fulfill the domestic turnover thresholds of merger control regimes in most if not all jurisdictions.

What is striking about the decision of the FCA is that it establishes a link between antitrust violation and other principles and laws, such as data protection. Facebook was found to be dominant in the national market for social networks in Germany, with a market share exceeding 95 per cent; the FCA also considered other relevant factors in its market power assessment, such as access to competitively relevant data, economies of scale based on network effects, user behaviour and the power of innovation-driven competitive pressure. Consumer harm lay in the loss of control over the use of personal data for profiling purposes and, on the other side of the market, competitive harm was identified with regard to advertising services, whereby advertising customers and competitors were faced with a dominant supplier of advertising space in social networks, as Facebook became more and more indispensable for advertising customers, reflected in the rapid increase in its turnover in recent years. The FCA categorized this case as one of "exploitative business terms" and, notably, based its decision on data protection principles embedded not only in German law but also in the general data protection regulation of the European Union while, according to the case law of the German Federal Court of Justice, civil law principles can be applied in determining whether business terms are exploitative. The FCA applied data protection principles in its assessment of Facebook's terms and conditions; according to data protection legislation, users should be able to decide freely and without coercion how their personal data are used, and Facebook did not obtain effective consent for its processing of data, as user consent would only be effective if the provision of its services were not made subject to this consent.

This case highlights a very important point. Competition law enforcement need to integrate the interface between competition law, consumer protection and data protection. These areas have become more intertwined due to market power, which consumer data confers to digital platforms. There is need for a more flexible approach to abuse of dominance assessments in the data-driven digital platform markets.

Secondly, competition law enforcement needs to be bolder and faster.[42] While remaining committed to evidence-based decision-making, competition authorities need to be more courageous and speedier in selecting cases, making decisions and designing remedies. The risk of underenforcement is higher than overenforcement.[43] The current legal frameworks do not really accommodate for uncertainty, which is inherent in digital markets. Therefore, it would only make sense to call for the standard of proof to be lowered and the

[39] UNCTAD, "Competition issues in the digital economy", Note by the UNCTAD secretariat, 2019, p. 7-8.
[40] Report of the IGE Competition 2019, p.8.
[41] https://techcrunch.com/2019/08/26/facebook-succeeds-in-blocking-german-fcos-privacy-minded-order-against-combining-user-data/.
[42] Report of the IGE Competition 2019, p.6; Furman, Jason et al., Unlocking Digital Competition: Report of the Digital Competition Expert Panel, 2019 (hereinafter Furman Report 2019), p. 13; Stigler Committee on Digital Platforms, Final Report, September 2019 (hereinafter Stigler Report 2019), p.17, available at https://research.chicagobooth.edu/stigler/media/news/committee-on-digital-platforms-final-report.
[43] Report of the IGE Competition 2019, p.6; Stigler Report 2019, p.84.

burden of proof to be reversed.[44] Moreover, considering the lengthy course of enforcement actions while at the same time there is nothing to alleviate the damage done, there is need for greater use of interim measures[45] and curtailment of appeal rights.[46]

Digital markets evolve so quickly that business dynamics may change in the course of investigations. For example, regarding the mobile payments case in Kenya, the dominant firm had concluded exclusive agreements with agents with which customers could deposit or withdraw money, foreclosing that market to competitors. During the investigation, the dynamics of the market had changed, and agents were no longer essential actors, thereby rendering the outcome of the investigation irrelevant.[47] Therefore, faster law enforcement and interim measures become crucial in antitrust investigations in digital markets.

Thirdly, merger control regimes need reform.[48] The mergers and acquisitions in digital markets aim at data complementarity and better data analytics. The acquisition of startups by big technology companies have eliminated emergent competitive threats. There are three elements of such reform: First, the need to adjust merger notification thresholds so that competition authorities have an opportunity to scrutinize the acquisition of innovative and promising startups by big technology companies. Austria and Germany have introduced transaction value-based thresholds in their merger control regime.[49] Secondly, merger analysis should take into consideration the features of online platform businesses, including data, data assets and data-driven economies of scope, and innovation effects. The relevance of data assets in digital market competition should be recognized in merger assessment. A dominant platform can facilitate the gathering of data from different sources through a merger, which would subsequently restrict competition by increasing the advantages of the incumbent platform.[50] Such mergers have implications for data privacy (see Box.3) and should be reviewed including from that perspective. The third element in merger reform is the consideration of the impact of a merger or acquisition on potential competition and harm to innovation by competition authorities in their merger analysis.[51] The Furman report proposes a balance of harms approach in assessing mergers between large platforms and small startups, which may grow to challenge the dominant platform. This approach would require considering both the likelihood and the magnitude of the merger's impact and would mean blocking the merger which it is expected to do more harm than good in the mathematical sense.[52] According to the report, the scale of these potential effects would be considered in a merger decision to a greater extent than is possible under the current approach focusing only on the likelihood of substantially lessening of competition in many jurisdictions.

[44] Report of the IGE Competition 2019, p.6; Stigler Report 2019, p.98; Crémer, Jacques, Yves-Alexandre de Montjoye, Heike Schweitzer, Competition Policy for the Digital Era, 2019 (hereinafter European Commission Report 2019), p. 51.
[45] Report of the IGE Competition 2019, p.6; and European Commission Report 2019, p.
[46] Report of the IGE Competition 2019, p.6.
[47] Report of the IGE Competition 2019, p.6.
[48] Report of the IGE Competition 2019, p.6; European Commission Report 2019, p.124; Furman Report 2019, p.12-13; Stigler Report 2019, p.98.
[49] UNCTAD, "Competition issues in the digital economy", Note by the UNCTAD secretariat, 2019, p.9; European Commission Report 2019, p.124.
[50] Furman Report 2019, p. 96.
[51] Report of the IGE Competition 2019, p.6; European Commission Report 2019, p.124; Furman Report 2019 p.12.
[52] Furman Report 2019, p. 99-100.

Box 3. Facebook-WhatsApp-Instagram, merger control, competition and privacy

Facebook acquired Instagram in 2012 and WhatsApp in 2014. Facebook-Instagram merger was not reviewed by most competition authorities around the world. The Federal Trade Commission (FTC) of the United States and the Office of Fair Trading (OFT) of the United Kingdom, which did review this merger, approved it without conditions. As for Facebook-WhatsApp merger, the FTC approved it with conditions. However, Facebook's acquisition of WhatsApp was for adding "value to its existing messaging services and for the long-term potential of the company", and not "to drive revenue from WhatsApp in the near term, instead focusing on growth".[53]

In Facebook-Instagram merger was reviewed by the OFT, which approved the merger without conditions. OFT concluded that the merger would not give rise to substantial lessening of competition in the supply of photo apps and display advertising. The OFT decided that the evidence did not show that "Instagram would be particularly well placed to compete against Facebook in the short run".[54] In this case, the potential harm would include forgone benefits from competition that a rival, in this case Instagram, could bring through increased quality and new innovative services, lower costs of digital advertising being passed through to consumers, and better privacy protection.[55]

This kind of mergers have implications for users' data privacy. What is more, Facebook is planning to integrate the technical infrastructure which supports WhatsApp, Messenger and Instagram to create a single, unified messaging platform.[56] According to this plan, while maintaining each platform separately, Facebook will unify the technology behind them, allowing users to send messages from one to the other. This will not only eliminate competition among the three platforms, although they all belong to a single company, but will also allow Facebook to unlock huge quantities of user data, which is currently stored in three separate platforms.[57] This move from Facebook may have come as a response to calls for breaking up big technology firms in the United States. Facebook's technological consolidation of three platforms into one could make it hard for authorities to break up this company even if they decide to do so.

[53] Facebook buys WhatsApp for $19 billion, CNN Business, February 19, 2014, https://money.cnn.com/2014/02/19/technology/social/facebook-whatsapp/index.html.
[54] OFT's decision on anticipated acquisition by Facebook Inc of Instagram Inc, ME/5525/12 at https://assets.publishing.service.gov.uk/media/555de2e5ed915d7ae200003b/facebook.pdf.
[55] Furman Report 2019, p. 99.
[56] https://www.wired.co.uk/article/facebook-whatsapp-merger.
[57] https://www.wired.co.uk/article/facebook-whatsapp-merger.

Box 4. The Philippines' perspective on merger control in digital markets

The Philippines Competition Commission reviewed the merger between Grab, a ride-hailing company in Singapore, and the ride-hailing company Uber, after the transaction was made effective. Uber had gained a 27 per cent share in Grab, and this did not meet the merger threshold requirement in the Philippines, and hence not notified to the Commission. This merger review involved the understanding of the algorithms used in the applications, as well as the parameters used to determine the price, supply and demand for particular routes. The transaction had been constrained in the Philippines by the fact that, as the sector regulator had not renewed the licence of Uber to continue operating in the Philippines, Uber could not sell part of its operations. Based on this experience, the Commission advocates for merger notification thresholds to be extended beyond the value of the sales, revenues and assets of firms, to include transaction values. The role of big data needs to be sufficiently assessed in merger reviews in digital markets. According to the Commission, the priority should be not to impose fines but to ensure that anticompetitive conduct ceases. The Competition Commission believes that regional reviews of mergers are preferable and regional cooperation in merger reviews is a process worth pursuing. The UNCTAD Guiding Policies and Procedures under Section F of the United Nations Set on Competition that reached consensus in the eighteenth session of the Intergovernmental Group of Experts meeting on Competition Law and Policy (July 2019) could be a useful tool for national competition authorities to enhance regional cooperation in reviewing mergers in particular, and in competition law enforcement in general.[58]

Competition can only function properly if it is free from distortion resulting not only from market failures but also from unfair business practices. In countries where economic power is highly concentrated in the hands of a few corporate groups, competition law may promote the participation of underprivileged economic agents in the process of competition on one hand and establish the rules of fair and free competition on the other.[59] Japanese and Korean competition laws include provisions on unfair trade practices and abuse of superior bargaining position, which empower them to protect the interests of smaller firms in their contractual relationships with large businesses.[60] These provisions maybe very useful in tackling competition problems found in the platform economy, where small traders find themselves in a disadvantaged relationship with large platforms and face challenges, which often result from the superior bargaining power of these monopolies.

Box 5. Fair competition between large and small businesses - The case of Republic of Korea[61]

In the Republic of Korea, the Monopoly Regulation and Fair-Trade Act addresses imbalances in the bargaining power between parties by prohibiting "trading by unjustly using a superior bargaining position" (Article 23(1)4). In addition, the Republic of Korea Fair Trade Commission (KFTC) aims to ensure the fairness of transactions between large companies and SMEs by enforcing the Fair Transactions in Subcontracting Act, which has been in force since 1984. In this framework, KFTC provides advice and assistance to SMEs in avoiding subcontracts with unfair commercial terms.

[58] Report of the IGE Competition 2019 and UNCTAD Guiding Policies and Procedures under Section F of the UN Set on Competition at https://unctad.org/meetings/en/SessionalDocuments/ccpb_comp1_%20Guiding_Policies_Procedures.pdf.

[59] Simon Roberts, 2010, Competition policy, competitive rivalry and a developmental state in South Africa, in O Edigheji, ed., *Constructing a Democratic Development State in South Africa: Potentials and Challenges*, Human Sciences Research Council Press, Pretoria.

[60] UNCTAD, 2015, The role of competition policy in promoting sustainable and inclusive growth, TD/RBP/CONF.8/6, 27 April.

[61] UNCTAD, 2015, The role of competition policy in promoting sustainable and inclusive growth, TD/RBP/CONF.8/6, 27 April, https://unctad.org/meetings/en/SessionalDocuments/tdrbpconf8d6_en.pdf.

In October 2019, Japan Fair Trade Commission (JFTC) published a report on digital platforms. The report is based on its fact-finding survey conducted in February-March 2019 and examines the nature of business-to-business transactions between online shopping marketplaces and sellers, and between application stores and application developers.[62] The report focuses on competition related issues regarding major platforms' trade practices vis-à-vis the sellers using their platforms. The provisions on unfair trade practices and the provision governing the abuse of a superior bargaining position in the Japanese competition law provide the necessary grounds and powers for JFTC to tackle this kind of anti-competitive practices by big online platforms. These examples from Japan and the Republic of Korea present an alternative and maybe an easier way of dealing with big platforms' bargaining power vis-à-vis small businesses. Competition authorities would be in a position to enforce such provisions or regulations.

Box 6. Findings of the JFTC report into big online platforms' anti-competitive practices

The JFTC report identified the following practices in particular, which may violate the Japanese Anti-Monopoly Act (AMA):

1. Digital platforms with a superior bargaining position providing disadvantages to user companies unreasonably in light of normal business practice (e.g. unilateral revision of contracts with marketplace sellers). This may constitute an abuse of superior bargaining position.
2. Digital platforms unjustly interfering with a transaction between other digital platforms and sellers/consumers (e.g. app stores prevent consumers from downloading apps from their competitors). This may be considered as an interference with a competitor's transactions.
3. Digital platforms with a dual role of both operating the marketplace and selling their brands on it, in competition with independent sellers, making use of transaction data from the latter or arbitrarily manipulating search algorithms. This may be considered an interference with a competitor's transaction.
4. App stores unreasonably forcing app developers to adopt an in-app payment method and not accepting any other payment options, so that they can charge processing fee on the app developers. This practice may be considered as trading on restrictive terms.

Another policy tool available to competition authorities with dual mandates is consumer law. Any policy to restore and protect competition in online platform markets should take into account consumers' rights and interests, how they interact with platforms and how they are affected by platforms' business practices. Therefore, consumer protection law should be actively enforced, and consumer agencies should work with competition authorities in order to promote competition in these markets. The Furman report recognizes the contribution of consumer law enforcement to competition in digital markets.[63] Nowadays, many authorities have dual mandates on both areas, competition and consumer protection. This makes sense in digital markets where businesses and consumers interact and online platforms owe their power to the monetization of consumer data and have positive and negative impact on consumers by providing them easy access to goods and services on the one hand, restricting their privacy on the other. One area where there was consensus among IGE Competition 2019 meeting participants was the need for cooperation at the national level between national competition authorities and other authorities, such as sector regulators, data protection/privacy authorities and media institutions, as well as at the international level is pressing more than ever.[64]

[62] https://www.jftc.go.jp/en/pressreleases/yearly-2019/October/191031Summary.pdf.
[63] Furman Report 2019, p. 109.
[64] Report of the IGE Competition 2019.

Currently, some presidential candidates call for breaking up big technology companies in the United States.[65] Break up is not a new phenomenon and was implemented in the United States in the case of Standard Oil and AT&T. Wu (2018) provides a historical overview of competition law enforcement history in the United States, explaining these break-ups.[66] Breaking up AT&T created opportunities for competitors to enter the market; and the antitrust case against Microsoft in 1990s played a big role in creating today's modern internet. According to Wu, companies like Google and Facebook "owe a sizable debt to the antitrust law".[67] Break-up of big tech could bring about more competition to highly concentrated platform markets, promote new entry, enhance innovation and create alternative options for consumers.

2.2 The Role for Regulation

Many experts speaking at UNCTAD's IGE Competition 2019 agreed on the role for regulation in promoting competition and consumer protection in the digital economy. Regulation can be complementary to antitrust enforcement. Some of the concrete steps towards regulation include: ensuring access to data and data portability for consumers; providing for greater transparency, non-discrimination and fairness in platform dealings with businesses; and maintaining open standards and interoperability to facilitate switching as well as innovation; and lastly preventing practices benefitting from consumer biases and inertia, like default settings.[68]

However better adapted the tools may be to the new business model of platforms, competition law may still not resolve all problems arising from online platforms. These platforms may be disruptive in nature and therefore would have implications for the functioning of markets and consequences for competitors, consumers and non-consumers. For example, in some countries the types of services provided by platforms like Airbnb have caused some urbanist concerns. Competition law is not fit to address such concerns, which would require specific regulations addressing the impact of these platforms on urban life.[69]

A stricter approach would be to restrict a dominant platform from operating in a market in which it provides the infrastructure and competes with businesses that depend on it.[70] For example, Amazon sells on its own store and competes with independent sellers, and is therefore able to exclude or drive out competitors through predatory pricing or showing sellers to a disadvantage in search results. The Government of India introduced a new e-commerce regulation in 2018, which came into effect on 1 February 2019, to promote competition and prevent restrictive and unfair business practices by e-commerce platforms, such as Amazon and Flipkart operating in the country. The new regulation prohibits e-commerce platforms from selling products from companies in which they have an equity interest; platforms are required to provide services, including fulfilment, logistics, warehousing, advertisement and marketing, payments and financing to sellers on the platform at arm's length and in a fair and non-discriminatory manner; and platforms are not permitted to mandate any seller to sell any product exclusively in their marketplaces.[71] In other words, these platforms will have to make their services, like logistics and warehousing, previously offered only to the sellers in which the platforms had stakes, available to all sellers on the platform without discrimination. Further, the new rules prevent a seller from selling more than 25 per cent of their products to a single e-commerce platform. This will prevent a brand or supplier maintaining exclusivity with a unique marketplace.[72] These rules were established following complaints from retailers and traders that large e-commerce platforms used their control of inventory from

[65] *Elizabeth Warren on Breaking Up Big Tech*, Stevens, Matt. New York Times (Online), New York: New York Times Company. Jun 26, 2019.
[66] T Wu, 2018, *The Curse of Bigness: Antitrust in the New Gilded Age* (Columbia Global Reports, New York).
[67] https://www.theverge.com/2018/9/4/17816572/tim-wu-facebook-regulation-interview-curse-of-bigness-antitrust.
[68] Report of the IGE Competition 2019, p.6.
[69] Report of the IGE Competition 2019, p.7.
[70] Khan, 2017.
[71] Ministry of Commerce and Industry, India, 2018, Review of the policy on foreign direct investment in e-commerce, Press note No. 2.
[72] For more examples, see https://hitricks.com/e-commerce-rule-2019.

their affiliates and through exclusive sales agreements to create an unfair marketplace that allowed them to sell some products at low prices.[73] The new rules are expected to prevent anticompetitive and abusive practices, as well as predatory pricing by large e-commerce platforms to the detriment of local small and medium-sized online traders, and create a level-playing field for all the players in e-commerce platforms.

Many of the recent reports on competition policy in the digital economy, have suggested regulation as a complementary and a more effective way of protecting and promoting competition in digital markets before they reach the tipping point.[74] The idea is to complement enforcement and putting in place rules that can prevent anticompetitive conduct before it takes place and generates harm to competition. JFTC report concludes that an approach including sector-specific regulation promoting data portability and access to data while ensuring personal data protection in addition to bolder competition law enforcement would be appropriate in order to maintain a competitive platform economy.[75]

The preliminary report of the Australian Competition and Consumer Commission's (ACCC) digital platforms inquiry, which focused on Google and Facebook, had recommended the establishment of a new digital regulator with investigative powers to monitor, investigate and report on the ranking of news and journalistic content by digital platforms and the provision of referral services to news media businesses.[76] Interestingly though, ACCC withdrew this recommendation from its final report of the digital platforms inquiry.[77] The Furman Report 2019 and the Stigler Report 2019 recommend the establishment of a digital markets unit and a digital authority, respectively. The Stigler Report 2019 stresses "the importance of having a single powerful regulator capable of overseeing all aspects of [digital platforms]."[78] The Furman Report 2019 advocates for pro-competition policy for building in competitive market structures from the start to secure competition in digital markets.[79] This report recommends the establishment of a "pro-competition digital markets unit, tasked with securing competition, innovation, and beneficial outcomes for consumers and businesses to "sustain and promote effective competition in digital markets".[80] This digital unit would be given three tasks. First, setting a code of conduct for companies whose position means other markets depend on them. This code of conduct would provide agreed and acceptable norms of competitive conduct on how firms with "strategic market status" should act vis-à-vis smaller firms and consumers. The report defines digital platforms with strategic market status as dominant platforms with a high degree of power over how their users access the market and a position of control over other parties' market access, where a lot of small and independent businesses rely in their platform to survive.[81] According to the report, these platforms have an enduring market power due to significant direct or indirect network effects, limited offsetting effects of multi-homing and differentiation, and significant sources of non-contestability in the markets in which they operate.[82] Secondly, the digital markets unit would secure data mobility and systems with open standards between services. This could help overcome network effects, which cause markets to tip, by requiring systems to 'talk' to each other. This will allow consumers to carry their data between networks, interact with users on other networks, thus facilitating switching and new entry by small firms, eventually increasing consumer choice. The third task of the digital markets unit would be to secure access to non-personal and anonymized data to tackle the data barrier to entry for smaller firms while protecting privacy.[83] ACCC, in its final report of the digital inquiry, expresses concerns on the practicality of access to data held by major digital platforms. ACCC considers that requiring

[73] Reuters, 2018, India tightens e-commerce rules, likely to hit Amazon, Flipkart, 26 December.
[74] UNCTAD, "Competition issues in the digital economy", Note by the UNCTAD secretariat, 2019; Furman Report 2019; Stigler Report 2019.
[75] https://www.jftc.go.jp/en/pressreleases/yearly-2019/October/191031Summary.pdf.
[76] Australian Competition and Consumer Commission, Digital Platforms Inquiry, Preliminary Report, December 2018, p.11-12.
[77] C Beaton-Wells, Ten things to know about the ACCC's digital platforms inquiry, Competition Policy International, August 2019.
[78] Stigler Report 2019, p. 18.
[79] Furman Report 2019, p. 56-57.
[80] Furman Report 2019, p. 8.
[81] Furman Report 2019, p. 59.
[82] Furman Report 2019, p. 81.
[83] Furman Report 2019, p. 57.

leading digital platforms to share the data with potential rivals and provide interoperability with other services may reduce the barriers to competition in existing markets and address competitive innovation in future markets. However, there are practical considerations, including the extent to which other network effects in these markets may restrict the incentives for portability, privacy concerns and identifying the extent of data to be shared. Therefore, the ACCC considers that data portability would not have a significant effect on barriers to entry and expansion in certain digital platform markets in the short term. If data portability or interoperability were identified to be beneficial in addressing the issues of market power and competitive entry or switching, the ACCC could recommend this to the Government. However, the ACCC did recognize data portability could generate benefits through innovation and the development of new services and included it as a direction for its future work.[84]

Unlike the Furman Report 2019 in the United Kingdom and the Stigler Report 2019 in the United States, the European Commission's report does not recommend creating a new regulator for the digital economy. On the contrary, it points out that the risks associated with such a regime – rigidity, lack of flexibility, and risk of capture – are too high.[85] One has to admit the potential complications and difficulties of establishing a regulatory framework, which should be adopted and implemented by 28 member States of the European Union. Nevertheless, similar to the code of conduct proposal in the Furman Report 2019 and to address the imbalance of power between large platforms and their users, the European Union adopted a regulation to promote fairness and transparency for business users of online intermediation services in June 2019.[86] This regulation sets up new European rules to improve fairness of online platforms' trading practices. It aims at creating a fair, transparent and predictable business environment for businesses and traders using online platforms, as well as providing new possibilities for resolving disputes and complaints. It is part of European Union's digital single market strategy and will apply to the entire online platform economy. It will also apply to search engines to ensure ranking transparency. The new regulation includes provisions that ban certain unfair practices, such as sudden and unexplained suspension or termination of a seller's account without clear reasons, and possibilities to appeal. It requires platforms to use plain and intelligible language for terms and conditions and advance prior notice when changing the terms. Moreover, marketplaces and search engines will need to disclose the main parameters used to rank goods and services on their site. They are required to disclose a range of business practices, such as any advantage they may give to their own products over others in cases where an online platform not only provides the marketplace but is also a seller on the same. They will also be obliged to disclose what data they collect, and how they use it, and in particular how such data is shared with their business partners.[87] This regulation is considered to be the first regulatory attempt in the world to establish a fair, trusted and innovation-driven ecosystem in the online platform economy.[88]

The latest appointment of Margrethe Vestager as the Executive Vice-President of the European Commission signals this new direction, which the European Commission is taking in the digital economy space. Vestager will have the responsibility to coordinate the European Union agenda on "a Europe fit for the digital age" while at the same time continuing her role as the Commissioner for Competition. This implies that the European Commission will have a Competition Commissioner who will be responsible for Europe's digital policy, digital industrial policy, cybersecurity, big data as well as taxation of digital companies.[89] Given the new structure of the Commission together with new powers attributed to the Competition Commissioner, the Commission could, in practice, function as a digital watchdog for Europe.

[84] ACCC Digital Platforms Inquiry - Final Report, 2019, p. 11.
[85] European Commission Report 2019.
[86] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R1150&from=EN.
[87] https://europa.eu/rapid/press-release_IP-19-1168_en.htm.
[88] http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625134/EPRS_BRI(2018)625134_EN.pdf.
[89] https://ec.europa.eu/commission/presscorner/detail/en/IP_19_5542

2.3 Competition law framework for the digital age: Is the consumer welfare standard still relevant?

The current competition law framework in many jurisdictions is based on consumer welfare standard although it is hard to find this drafted in competition laws. It is rather a doctrine applied by enforcers as well as a benchmark for judges in the judicial review process, especially in the United States, than a statutory feature in competition law.

Under the consumer welfare standard, harm to competition is analysed by looking at the effect of business conduct on consumers, particularly through price effects. In the digital economy, looking at impact on consumers would be too narrow an analysis, as in many cases, it is not only consumers who are affected by certain conduct of digital platforms, it is also small traders, start-up firms, and workers who may be affected by the economic power of big platforms and the way they are doing business. Furthermore, the Facebook Cambridge Analytica case shows that concentrated economic power together with policies adopted by monopolist big tech companies like Facebook may affect the outcome of elections, potentially posing a threat to democracy.

The consumer welfare standard falls short of taking into consideration all those that are non-price related aspects and may even fail to protect competition in a sector if the impact on consumer of a conduct or merger is negligible or would be compensated by efficiencies. The goal of competition policy in the digital era should be more than just consumer welfare. It should be concerned about high market concentration, which has implications for new firm entry, citizens' privacy, transparency and independence of media and democratic values. Competition policy should promote a competitive market structure and the competition process.

There are scholars who are rather skeptical about the appropriateness of the consumer welfare standard for competition law enforcement in the digital era. For example, Steinbaum and Stucke looked at what competition authorities understand from consumer welfare and found that it means different things to different competition authorities throughout the world.[90] They examined the 2011 ICN survey on this issue[91] and found that only 7 out of 57 respondent competition authorities agreed with the definition of consumer welfare provided in the survey. According to the definition provided in the Survey, consumer welfare "relates only to consumer surplus" and excludes "non-economic considerations".[92] Some competition authorities have adopted a wider perspective to define consumer welfare. France included "enhancing the competitive process", "stimulating an efficient allocation of resources", and "preventing unchecked market power" within its understanding of promoting consumer welfare in the long run.[93] There is no consensus on what consumer welfare actually means or who are the consumers. This shows that every competition authority has its own policy goals to pursue when enforcing competition law. We have seen this with the Facebook decision of the German Federal Cartel Office (see Box 2 for more information on this case). The 2011 ICN Survey, while recognizing the soundness and usefulness of economic theory in the quantification of effects to consumer welfare, concludes that "solid economic evidence of detriment to consumer welfare in the context of a specific case cannot be based on economic theory or models alone", and that, "there is no easy, non-contestable method for quantifying harm to consumer welfare that will work for all cases".[94] It suggests that "economic evidence must be related to, and tested against, the case-specific evidence and data, i.e. market facts and facts on past or present behaviour or effects, to meet the requisite legal standard of proof."[95] Steinbaum and Stucke (2018)

[90] M Steinbaum and M E Stucke, The Effective Competition Standard, E New Standard for Antitrust, Roosevelt Institute, September 2018.
[91] International Competition Network, Competition Enforcement and Consumer Welfare - Setting the Agenda 4-6 (2011) (referred to as the 2011 ICN Survey in Steinbaum and Stucke (2018) footnote 41) https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/11/SP_CWelfare2011.pdf.
[92] See footnote 42 in Steinbaum and Stucke (2018).
[93] International Competition Network, Competition Enforcement and Consumer Welfare—Setting the Agenda 4-6 (2011) (hereinafter referred to as 2011 ICN Survey), p. 10.
[94] 2011 ICN Survey, p. 47.
[95] 2011 ICN Survey, p. 47.

state that the consumer welfare standard provides little guidance as an antitrust goal while inviting subjectivity and resulting in the tolerance of anticompetitive practices.[96]

The European Commission Report 2019 suggests that "the specific characteristics of platforms, digital ecosystems, and the data economy require established concepts, doctrines and methodologies, … to be adapted and refined."[97] It states that the term consumer welfare includes all users, including business users since they are also affected by the platforms' practices. More importantly, the report recognizes that it would be too complicated to compute the impact on consumers in many cases. The report suggests that "even where consumer harm cannot be precisely measured, strategies employed by dominant platforms aimed at reducing the competitive pressure they face should be forbidden in the absence of clearly documented consumer welfare gains."[98]

This shows the different understanding and flexibility, in terms of its applicability and adaptation to specific situations, among competition experts and authorities. There is no consensus on the definition of consumer welfare, nor its application in competition law enforcement. The European Commission's competition decision against Google (Google shopping case), which is currently under appeal, refers to abusive practices' direct damage to consumers, and indirect harm through their impact on an effective competition structure. The analysis here goes beyond looking at only consumer welfare but also consumer harm that may result from adverse effects of a conduct on competition in the market.

There is an emerging consensus among the proponents of the consumer welfare standard towards incorporating non-price factors such as consumer choice, quality, privacy, innovation and future competition, in the competition analysis or theories of harm.[99]

There are strong critiques of the consumer welfare standard, especially in the United States, where it is applied based on price-effects and efficiency. Khan (2017) finds that this narrow interpretation of consumer welfare restricted to prices and outputs is misguided and that "antitrust law and competition policy should promote not welfare but competitive markets".[100] Khan (2017) and Wu (2018) suggest redirecting the focus on competitive process and market structure in analyzing competition cases and mergers.[101] This need is even more pronounced for online platforms and data-driven markets, where price-based measures of competition policy are not adequate, and data confers significant market power to platforms in these markets. There are examples demonstrating that the antitrust analysis should focus on the impact on competitive process rather than absolutely seeking consumer harm. For example, Microsoft tying its Internet Explorer to its operating system creating an entry barrier for independent web browser developers. the United States Department of Justice case against Microsoft showed that, "Microsoft's actions stifled the competitive process, and that was enough for the government to prove a violation."[102]

The BRICS Report (2019)[103] refers to multiple dimensions of consumer harm that can trigger competition law enforcement. These include consumer surplus; wealth transfer incurred by consumers due to overcharges resulting from the restriction of competition and relating not only to higher prices but also other parameters such as quality, variety and innovation;[104] consumer choice; competitive process; and innovation.[105]

[96] Steinbaum and Stucke (2018), p.14.
[97] European Commission Report 2019, p.3.
[98] European Commission Report 2019, p.3.
[99] BRICS Report 2019, Stigler Report 2019, European Commission Report 2019.
[100] Khan, 2017.
[101] T Wu, 2018, *The Curse of Bigness: Antitrust in the New Gilded Age* (Columbia Global Reports, New York).
[102] Renata Hesse, Acting Assistant Attorney General of the Antitrust Division, US Department of Justice, Opening Remarks at 2016 Global Antitrust Enforcement Symposium, https://www.justice.gov/opa/speech/acting-assistant-attorney-general-renata-hesse-antitrust-division-delivers-opening.
[103] The BRICS Competition Law and Policy Centre, 2019, Digital Era Competition: BRICS View (hereinafter BRICS Report 2019), p. 210-220.
[104] According to the BRICS Report 2019, consume surplus and wealth transfer make up the consumer welfare.
[105] BRICS Report 2019, pp. 210-214.

Perhaps surprisingly, the 'Chicago School' is one the latest critics of the consumer welfare standard, expressing concerns over the monopolization of digital markets.[106] The Stigler Report 2019 finds that markets dominated by digital platforms do not rapidly self-correct and the harm to economic welfare arising from the market power of these platforms are substantial. The report suggests reforming antitrust law, stating that "under-enforcement is likely to be costlier than previously thought because … market power of large technology platforms is more enduring".[107] It advocates for "recalibration of the relative tolerance of antitrust law for the risk of over-enforcement and under-enforcement by prescribing rebuttable presumptions that would ease the high proof requirements currently imposed on antitrust plaintiffs and place on defendants a more rigorous burden of proving efficiencies."[108] The report attributes under-enforcement of antitrust law partly to "courts' reliance on so-called Chicago School assumptions that do not have a sound theoretical or empirical basis".[109] This statement is in line with Stiglitz's argument that "there is a broad role of government to actively encourage competition, recognizing that competition does not simply and naturally arise in the absence of cartels, contrary to the Chicago school presumptions".[110] This is more so in the digital economy, where market power of large technology platforms is more enduring as mentioned above. Stiglitz calls for more interventionist antitrust and regulatory actions and standards,[111] which are particularly relevant for digital markets, where monopolization is most evident.

Moreover, the report, referring to the increasing concern over underenforcement of antitrust laws in recent years in the United States, describes the "antitrust law and its application by the courts over the past several decades" as reflecting "the now outdated learning of an earlier era of economic thought", which seems to be "inhospitable to new learning".[112] By qualifying the current doctrine as outdated, although without explicitly naming it as such,, the report recognizes that the Chicago School doctrine can no longer apply to antitrust enforcement in the digital economy. The report does not reject the consumer welfare standard explicitly but suggests having an "antitrust enforcement better suited to the challenges of the digital age",[113] which may require new legislation. It defines such enforcement as protecting competition on the merits in the first stage and preventing exclusionary conduct in the second stage. It suggests developing tools to explain to courts the role of behavioral biases in the creation of market power and their effect on content quality. It explains that the existence of zero prices implies that measurement of quality will be critical. The report puts an emphasis on potential and nascent competitors and competition and highlights the need for better analytical tools to consider their impact.

Furthermore, the report suggests the establishment of a specialized competition court. This may overcome the delay in the shift from Chicago School thinking to an alternative paradigm, which could take a very long time, especially considering that "oversimplified Chicago School thinking has provided a widely accepted framework for antitrust analysis for more than thirty years", and "many federal judges … are trained in and adherents of that framework".[114] A specialized court might allow judges to see more antitrust cases and develop expertise.

Some scholars have developed alternatives to the consumer welfare approach, which are worth examining. They rightly question about how to incorporate these non-price factors in a price- or cost- based standard. Within the consumer welfare standard, whether it is narrow or broad, competition authorities, in their competition assessment, need to monetize any costs or benefits arising from a business conduct and compare it to the prices or other economic benefits/losses to be incurred by consumers.

[106] Stigler Report 2019.
[107] Stigler Report 2019, p.94.
[108] Stigler Report 2019, p. 93.
[109] Stigler Report 2019, p. 85.
[110] Joseph E Stiglitz, Towards a Broader View of Competition Policy, Roosevelt Institute Working Paper, June 2017, p.17.
[111] Stiglitz (2017), p.18.
[112] Stigler Report 2019, p. 31.
[113] Stigler Report 2019, p. 31.
[114] Stigler Report 2019, p. 93.

BRICS Report 2019 states that due to zero-price products and multi-sided nature of platforms, it would be difficult to assess consumer welfare in these markets. Furthermore, the analysis of the effects of a platform conduct on a relevant market is rendered inconclusive due to platforms' multi-sidedness. The report suggests that competition law consider the broader social cost of restriction of competition in the digital economy, which include inequality, privacy and fairness and complex equality.[115] On incorporating fairness concerns in competition assessment or regulation of digital platforms,[116] the European Commission's Google Search decision refers to (a system of undistorted competition [which] can be guaranteed only if equality of opportunity is secured as between the various economic operators".[117] Regarding inequality, BRICS Report 2019 indicates market power as a significant source of inefficiency and inequality, referencing calls from economists for a robust competition law and policy against inequality.[118]

On privacy, the BRICS Report 2019 states that the collection, processing and control over data by dominant platforms, especially social networking or social media platforms, do not only affect privacy but also, and more dangerously the political processes by influencing and manipulating citizens' choices. The report expresses concern over the power held by digital platforms and warns about the need to take into account "the broader political objective to keep the Internet free from all, State or corporate, gatekeepers".[119] It cautions that "broad international consensus on a decentralized transnational architecture of the Internet … may be jeopardized by the regulatory role of a handful of digital platforms"; and suggests "these concerns provide the philosophical background that justify the consideration of the broader social costs of the restrictions of digital competition than those encompassed by the narrow aim of consumer welfare".[120] This analysis explains very well the insufficiency of the narrow consumer welfare concept and shows the broader implications of digital monopolies for people as citizens and not only as consumers.

The report suggests considering these concerns through the complex equality principle, according to which economic power may lead to political and cultural power. Digital platforms, by leveraging their economic power in various areas of activity achieved a dominant position over a social good, this good being information. Therefore, the report stresses the need to look into this multi-dimensional nature of competition in digital markets.[121]

BRICS report summarizes existing approaches on how to integrate privacy concerns in competition cases involving digital platforms and provides a brief reference to an alternative approach to the traditional consumer welfare standard, namely, the "capability approach" developed by Claassen and Gerbrandy (2016).[122] Claassen and Gerbrandy (2016) demonstrate that the consumer welfare approach fails to integrate non-economic goals into the competition law framework by using the consumer welfare standard in cases in the energy sector.[123] They state that consumer welfare standard in competition law has difficulty with long-term effects and favours short-term consumer benefits.

According to this argument, it might be difficult to take into account the effects of a business conduct on non-economic factors such as privacy, data protection, innovation and future competition. Investigators would need to monetize the impact on consumers regarding each of these factors, most likely by survey. In the context of privacy, it is difficult to translate privacy into monetary or economic terms. Another difficulty is that consumers are not really aware of the extent of violation of their privacy in the process of collection, storage, processing and use of their personal data. Such awareness is crucial in the valuation of one's privacy. Furthermore, there

[115] BRICS Report 2019, pp. 220-229. (The report defines 'complex equality' at p. 228 and refers to M. Walzer, Spheres of justice: A Defense of Pluralism and Equality (Basic Books, 1983) in footnote 680).
[116] BRICS Report 2019, p. 229.
[117] European Commission, Case AT.39740 Google Search (Shopping), Council Regulation (EC) 1/2003, para. 331, p. 73-74.
[118] BRICS Report 2019, p.221.
[119] BRICS Report 2019, p. 220.
[120] Ibid.
[121] BRICS Report 2019, p. 227-229.
[122] R Claassen and A Gerbrandy, 2016, Rethinking European Competition Law: From a Consumer Welfare to a Capability Approach, Utrecht Law Review, Volume 12, Issue 1 (January 2016), http://doi.org/10.18352/ulr.321.
[123] Ibid.

is information asymmetry between users and providers of platform services. A competition assessment based on a consumer welfare standard would need to conduct such cost/benefit analysis in markets where there are zero-price products and where there is information asymmetry about how these markets work for consumers. Claassen and Gerbrandy (2016) developed an alternative, "capability approach" , which differs from consumer welfare approach because it includes other capabilities, such as capability for health, than consumers' capability to purchase at a lower or a higher price, or costs to be incurred due to a certain anticompetitive conduct or merger. For instance, an energy agreement amongst electricity producers to stop producing energy based on fossil fuels would lead to higher electricity prices for consumers but a cleaner and heathier environment. This agreement could be found to violate competition law based on a consumer welfare standard unless there is evidence that such agreement would result in decreased healthcare costs to consumers, which outweigh the loss of welfare due to increased electricity prices. According to the capability approach, such agreement would not be in violation of competition law. The capability approach could consider it to be health capability enhancing and even acknowledge capabilities of future generations (capability for a cleaner environment) and find that the benefits of such agreement exceed its costs.

The capability approach is somewhat similar to a public interest test in analyzing the effects of a proposed merger. A report of the Select Committee on Communications of the House of Lords in the United Kingdom of Great Britain and Northern Ireland suggests considering the implementation of a public interest test for data-driven mergers and acquisitions, stating as follows: "On the one hand, it would create uncertainty around the acquisition of companies which might discourage foreign direct investment. On the other, it would give the CMA [Competition and Markets Authority] greater flexibility to make a judgment in the public interest. Whereas at present case law and the law on consumer welfare might prevent the CMA [Competition and Markets Authority] from intervening in an acquisition even if it were concerned about the accumulation of too much data by a platform."[124]

Another alternative proposal to replace consumer welfare standard is developed by Steinbaum and Stucke (2018) and is called "effective competition standard". This principle is suggested to be the principal objective of antitrust laws; and includes five elements:[125]

i. Preservation of competitive market structures;
ii. Protect individuals, purchasers, consumers, and producers;
iii. Preserve opportunities for competitors;
iv. Promote individual autonomy and well-being; and
v. Disperse private power.

The authors explain how effective consumer standard differs from the consumer welfare standard. First, substantial lessening of competition is sufficient, and enforcers and courts would not need to struggle to measure the harm to consumer from lessening of competition. Secondly, it recognizes that competition needs competitors, thereby putting emphasis on competitive opportunities for entrants and competitors. Thirdly, it does not only focus on consumers but aims to protect all market participants throughout the value chain, including workers and sellers. Finally, the effective competition standard allows actions to prevent monopolies at their incipiency, by eliminating the uncertain step of examining how lessening of competition would harm consumer welfare.[126] Under this standard, competition policy can promote an inclusive economy and open markets. There is need for further dialogue about how competition authorities could put this standard into practice in their competition cases and merger analysis.

Regardless of the standard that competition authorities adopt in their enforcement, they need to consider the impact of an anticompetitive practice or of a merger involving online platforms on choice, quality, privacy, innovation, actual and potential competition, effective competition structure and competitive process in the market, entrenching the already existing market power of incumbent firms in the market, entry barriers. The

[124] Select Committee on Communications, United Kingdom, 2019, Regulating in a digital world, Second report of session 2017–19, 9 March 2019.
[125] Steinbaum and Stucke (2018), p.29-31
[126] Steinbaum and Stucke (2018), p.31-32.

consumer welfare standard in its narrow interpretation based on price effects and efficiency considerations is no longer relevant. The strict application of this standard has led to underenforcement in the United States since late 1970s. Digital economy and online platform business requires a wider perspective to competition law enforcement.

3. Conclusions

The ongoing digitalization of the global economy and platforms' market power challenge scholars and competition law enforcers. There are diverging views on what kind of competition law framework would tackle effectively digital monopolies. The good news is that there is a lot of thinking outside the box, which provides enforcers with innovative ideas and approaches. These proposals are worth studying carefully to come up with an appropriate competition law and policy framework for the digital economy.

Regardless of the level of development, one thing is certain. Robust enforcement against anticompetitive practices in the digital economy is a must for all countries. The European Union's move to bring competition and digital policy under one umbrella within the new structure of the European Commission can be seen as a step forward in this direction.

The overall competition policy goal is to ensure that markets remain open and accessible on fair and reasonable terms for all businesses. This goal needs to be even more pronounced in digital markets, where the market power of large platforms is more enduring and the most important competitive threats to monopolists are likely to come from new entrants that might be vulnerable to exclusionary conduct or anticompetitive acquisitions.[127] It is crucial to prevent monopolies at their incipiency rather than dealing with their effects *ex post*. This is costly, time-consuming and especially likely to be too late to act once they have settled in as the winner which has taken all or most. Therefore, Governments should have in place all the relevant policies and legal frameworks in place to overcome different challenges of the platform economy. These may include competition, consumer protection and privacy policies and legislation.

Another policy to ensure fair competition is an appropriate taxation system, ideally an international one agreed upon by all countries, which recognizes the main aspects of digital businesses that have significant implications for taxation. A unitary tax system, where multinational enterprises are recognized as a unitary entity rather than a series of separate legal entities, could substantially rebalance the tax base of global digital platforms, thereby eliminating the scope for manipulating transfer pricing and using subsidiaries for moving profits around for tax optimization purposes.

On the appropriate standard for competition law enforcement, there are differing interpretations of the definition and scope of consumer welfare standard among jurisdictions, which have adopted it and still advocate for its relevance. What is important in competition assessment is to consider all relevant factors that affect competition in the digital economy. These factors are beyond prices and efficiency considerations. Whichever standard competition authorities adopt in their enforcement, they need to consider the impact of an anticompetitive practice or a merger involving online platforms on choice, quality, privacy, innovation, actual and potential competition, effective competition structure and competitive process in the market, entrenching the already existing market power of incumbent firms in the market, entry barriers. As markets evolve, there might be a need to include other relevant factors. Therefore, competition authorities should not limit their analysis by prescriptive provisions in their laws and leave room for flexibility in their analysis in competition cases involving digital companies.

There is no doubt about the need to adapt competition law enforcement tools to the new business realities of digital platforms, whether by revising laws like in Germany and Austria, or through issuing regulations or guiding documents. Competition enforcers should rather focus on competitive relationships and business strategies in online platform markets than spending their time and energy on defining the market and determining the market share of platforms. They need to recognize new types of market power referred to as gatekeeper, intermediation or bottleneck power. Competition authorities need to consider non-price effects of platforms' anticompetitive practices, including quality, choice, privacy and innovation.

Competition law enforcement needs to be bolder and faster due to the rapidly evolving nature of digital markets. Competition investigations are quite time-consuming for authorities, can last for several years to conclude, and

[127] Stigler Report 2019, p 94.

require specific expertise and resources even more so in developing countries. Therefore, certain adjustments need to be made. First, the burden of proof in competition investigations needs to be reversed and it should be the company subject to investigation which is required to prove that its practices are not anticompetitive. Secondly, interim measures need to be used more often to alleviate the damage resulting from the anticompetitive practice in question in the course of the investigation. However, bolder enforcement would not bear its fruit if the judiciary has a tendency not to uphold the competition authority's decisions. Therefore, there is a pressing need for competition authorities and the judiciary to work together and reach a common understanding of competition problems arising from major online platforms' business model, practices and market power.

Cooperation between competition authorities, consumer protection agencies and sector regulators, including telecommunications, financial services and data protection/privacy agencies, is a must within a holistic approach to effectively tackling the challenges of the digital economy. Given the interface between competition and consumer protection, it may be timely to consider merging competition and consumer mandates under a single authority to achieve sounder outcomes. Knowledge and expertise in one area can very well inform the policy, analysis and enforcement decisions in the other. This could reinforce both agencies in tackling platforms' power.

Merger control regimes need to be reformed to enable competition authorities to scrutinize acquisition of smaller, younger and promising online businesses by major platforms. Merger analysis need to consider specific aspects of digital platforms, such as their access to control over user data, and the extent to which data assets confer market power to digital platforms, establish barriers to entry for new firms, and affect future competition and innovation. Major platforms' acquisition of smaller online businesses aims at accessing more data and reinforcing their dominant position in the market and sometimes even to eliminate potential rivals as in Facebook's acquisition of Instagram. Therefore, it is essential to review these mergers. One concern regarding this type of mergers may be that they often do not fulfill the threshold requirements and therefore not notified to competition authorities. Some countries like Germany and Austria, resolved this issue by adding another threshold based on transaction value in their competition law. However, it may be complicated to determine the transaction value of a merger involving digital companies. For other competition authorities, particularly in developing countries, it might be wiser to observe the implementation of this new threshold in Germany and Austria before engaging in any amendment in this direction. Another option might be to empower competition authorities, by an adjustment in merger legislation, to require major platforms to notify any acquisition or merger plans they have to the competition authority before their execution regardless of the merger notification thresholds in place.

Regional competition authorities where they exist are best positioned to review digital mergers that affect their region. Examples include the European Commission for Europe, COMESA Competition Commission and East African Competition Authority for Africa. In Africa, there is scope to consider developing continental competition rules within the Africa Continental Free Trade Area phase two negotiations. Regional trade agreements or cooperation frameworks exist also in other regions of the world, like ASEAN in Asia, MERCOSUR in Latin America etc. These could be used to develop regional competition rules, set up a regional competition authority, which could start its operations first by conducting merger control at the regional level. Regional competition law enforcement might be more effective. There is more likelihood that mergers, which would otherwise not be notified to national competition authorities, are notified to regional competition authorities.

Competition authorities, especially those in developing countries, need to look for feasible solutions as they wait to see the changes which will be introduced by more experienced authorities as a result of studies and market inquiries conducted so far on competition concerns in the digital economy, which are mentioned in this paper. As one size does not fit all, developing countries may adopt those measures that they deem appropriate for their countries. One area where authorities could look into is fair competition.

It is important to ensure not only free but also fair competition in digital markets, where small firms face challenges in their contractual relationship with big platforms. Competition law provisions on unfair trade practices and abuse of superior bargaining position would empower national competition authorities in

protecting the interests of smaller firms vis-à-vis big businesses.[128] Developing countries could consider this policy measure in revising their competition legislation or introduce a separate regulation concerning digital platforms' dealings with their business users. Such measures could facilitate the entry of local SMEs to platform markets thereby allowing developing countries to reap the benefits of digital economy.

Competition law enforcement needs to be supported by the judiciary. There might be a need for developing a common understanding between the enforcers and the judiciary on the implications of platforms' dominance and its potential abuse for competition and consumers. Platforms' power has implications not only for consumers' privacy but for citizens' well-being in general, when it comes to social media networks and their impact on diffusion of fake news, their influence on national elections and democratic values.

It is crucial to create a level playing field, where both big platforms and small online businesses can co-exist and compete. Pro-competition rules and regulation for digital markets platforms, such as interoperability, data sharing, open standards, data portability for consumers, could promote competition in these markets. These could also be used as remedies in competition cases, where an infringement of competition law by a dominant platform is established.

[128] UNCTAD, 2015, The role of competition policy in promoting sustainable and inclusive growth, TD/RBP/CONF.8/6, 27 April.