

# Harnessing the Interaction between Digital Platforms and MSMEs

## *Recommended Best Practices for Digital Platforms (RDP)*

### EMBARGO

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### **I. Introduction**

#### ***A. Context, Goals and Beneficiaries***

The Recommendations for Digital Platforms (**RDP**) laid out in this document seek to address some of the challenges facing MSMEs in view of the surge of digital activity starting with the advent of the COVID-19 pandemic, which were reported in UNCTAD's report on The COVID 19 Pandemic Impact on Micro, Small and Medium Sized Enterprises: Market Access Challenges and Competition Policy.<sup>1</sup>

How to secure the unfettered access of MSMEs to key digital platforms has been a recurring topic since the COVID-19 outbreak as observed by UNCTAD throughout the implementation of the United Nations Development Account technical cooperation project on SMEs resurgence launched in the Spring of 2020 as part of the UN response to the pandemic impact. Several Member States representatives repeatedly raised the issue of digitization and its impact on MSMEs. They emphasized, among other issues, the need to address potentially unfair trade practices in digital sector; the potential reform of the competition laws in respect to the digital sphere; the need to digitalize the public sector and private sector to respond to the challenges posed by e-commerce; and the need for interagency collaboration to address the digital challenges.

The RDP are also aligned with the deliberations and conclusions laid down at the UNCTAD Bridgetown Covenant (2021), the Minister Declaration adopted by the UNCTAD 15 Minister Conference (October 2021).<sup>2</sup> The Covenant recognized that the COVID-19 pandemic has accelerated the digital transformation of the economy and emphasized the potential role that the digital platforms can play to facilitate the access to international markets for firms and entrepreneurs originating and operating in developing countries. Digital

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<sup>1</sup> See document in: <https://unctad.org/es/node/36537>

<sup>2</sup> [https://unctad.org/system/files/official-document/td541add2\\_en.pdf](https://unctad.org/system/files/official-document/td541add2_en.pdf)

technologies hold promises for the structural transformation, as well as for inclusive and sustainable development, of those economies.

However, many developing countries lack the regulatory infrastructure or the regulatory processes that are needed to ensure that the digitization of their economies ends up benefiting their MSMEs and the overall economy, and not only the digital platforms operating in it.

In this context, fair, “sound and robust competition and consumer protection policies and enforcement can maintain a (...) level playing field and enhance transparency for all participants, so that market access is not under anticompetitive practices. Ensuring effective competition, including through support in developing and implementing competition policies (...) will help foster economic efficiency, resulting in safer and better products at lower prices for consumers.<sup>3</sup>

Therefore, UNCTAD can play an instrumental role by supporting these countries in their efforts to design and implement appropriate and effective policies that foster innovation and enable these countries’ MSMEs to effectively participate in the digital economy, reap the developmental benefits of digitization, and mitigate the monopolization risks associated with it.

The RDP set out in this document are at the disposal of the competent authorities of the member States, e.g., the competition authorities, sectoral regulators, or line ministries that have a mandate on digital issues and related measures. The ultimate beneficiaries of the RDP are businesses, especially the MSMEs, in the member States lacking the regulatory infrastructure needed to regulate the digital sector effectively and proportionately.

### ***B. The Importance of Digital Platforms for Economic Development***

Developing countries stand to benefit massively from the digitization of their economies. The benefits of digitization for these countries are bound to be larger than in the developed world as long as the existing digital infrastructure is mature enough to facilitate communication and exchange where traditional infrastructures are lacking. Furthermore, digitization may contribute to inserting local firms into regional or global value chains, and aiding MSMEs, which are

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<sup>3</sup> Bridgetown Covenant, paragraph 56.

most common in these countries, to scale up and grow effectively and efficiently.<sup>4</sup>

Digital platforms acting as intermediaries between business (suppliers, advertisers, content providers, etc.) and all users (consumers, viewers, etc.) play a key role in pushing economies, both in developed and developing countries, towards digitization. That is especially true for large digital platforms, both global players, such as Google, Apple, Facebook (now called META), Amazon, and Microsoft (the so-called GAFAM), regional, sub-regional and national champions, like Yandex in Russia, Alibaba in China, or Mercado Libre in South America. Yet, because some of the markets where such platforms operate are overly concentrated and, on occasion, monopolized, they may also delay the digitization process and limit their benefits for MSMEs.<sup>5</sup>

This is a fundamental concern because the very economic characteristics of some of those markets are such that, when taken in combination, lead to an accumulation of market power among a few platforms, often only one. These features include: (a) the importance of collecting user data as an input to improving product quality and as a barrier to entry; (b) the existence of economies of scale and scope; (c) the availability of zero-price products and services; (d) the existence of network effects creating competition ‘for’ the market rather than ‘in’ the market; (e) the multi-sided nature of these markets; (f) the low marginal costs of many platforms; etc.<sup>6</sup>

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<sup>4</sup> See UNCTAD. (2019). Digital Economy Report. Value creation and capture: Implications for developing countries. Available at [https://unctad.org/en/PublicationsLibrary/der2019\\_en.pdf](https://unctad.org/en/PublicationsLibrary/der2019_en.pdf). Dahlman, C., Mealy, S., & Wermelinger, M. (2016). Harnessing the digital economy for developing countries. *OECD Development Centre Working Papers, No. 334*. Mann, C. L. (2000). Electronic Commerce in Developing Countries. *Institute for International Economics. Working Paper, 3*.

<sup>5</sup> See Furman, J. (2019). Unlocking digital competition. Report of the Digital Competition Expert Panel. Available at [https://unctad.org/en/PublicationsLibrary/der2019\\_en.pdf](https://unctad.org/en/PublicationsLibrary/der2019_en.pdf). Stigler Center for the Study of the Economy and the State. (2019). Stigler Committee on Digital Platforms. Final Report. Available at <https://www.chicagobooth.edu/research/stigler/news-and-media/committee-on-digital-platforms-final-report>. Crémer, J., Montjoye, Y. A. & Schweitzer, H. (2019). Competition policy for the digital era, European Commission. Available at <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>. Jullien, B., & Sand-Zantman, W. (2021). The economics of platforms: A theory guide for competition policy. *Information Economics and Policy, 54*. Gautier, A., & Lamesch, J. (2021). Mergers in the digital economy. *Information Economics and Policy, 54*.

<sup>6</sup> See Evans, D. S. & Schmalensee, R. (2008). Markets with Two-Sided Platforms. *Issues in Competition Law and Policy (ABA Section of Antitrust Law), Vol. 1, Chapter 28*. Belleflamme, P., & Peitz, M. (2016). Platforms and network effects. *Working Paper 16-14. Univ. of Mannheim*. Robles Martín-Laborda, A. (2017). Merger control and Online Platforms: the relevance of Network Effects. *Market and Competition Law Review, 2*. Tucker, C. (2019). Digital data, platforms and the usual [antitrust] suspects: Network effects, switching costs, essential facility. *Review of Industrial Organization, 54(4)*, 683-694. Parker, G., Petropoulos, G., & Van Alstyne, M. W. (2020). Digital platforms and antitrust. *2021 Winner of Antitrust Writing Award*.

Due to these features, these markets exhibit limited contestability: once a platform has achieved a prominent position in a digital market, it is difficult for new entrants to displace it. Furthermore, platforms may leverage their power to monopolize the markets where their business operate; or may develop strategies, including acquiring potential or emerging rivals, to entrench their dominance and control the accessibility and contestability of the markets within which they operate. Finally, by their very nature, large platforms enjoy an unequal position *vis-à-vis* business, consumers and users, including MSMEs, whose business operations may be wholly, or in part, dependent on access to the platforms' services. In such a scenario, platforms' consumers, users and business may be treated unfairly or discriminatorily.

It is, therefore, notable that governments, legislatures, and competition authorities in developed countries have recently become concerned with the power of large digital platforms and have developed, or are in the process of developing, additional regulatory tools to discipline their market power. Australia, France, Germany, Japan, Republic of Korea, the United Kingdom, the United States of America (among others) and the European Union, are discussing and/or implementing novel regimes to regulate digital platforms. Similar initiatives are being considered in various developing countries (such as Brazil, China, India, Mexico, South Africa, Thailand, and Turkey, to name a few).<sup>7</sup> <sup>8</sup> This has led to many different interventions across multiple jurisdictions and will produce a vast web of rules and regulations aimed at conditioning/framing? the conduct of such large digital platforms in many countries.<sup>9</sup>

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<sup>7</sup> It should be noted that at the IGE meeting on Competition Law and Policy in 2019 and at the Eighth UN Review Conference in 2020, UNCTAD organised roundtables at which the desirability of establishing specific regulations in digital markets to complement competition laws was discussed.

<sup>8</sup> See the UNCTAD Secretariat's documents "Competition issues in the digital economy (TD/B/C.I/CLP/54, 1 May 2019) available at: [https://unctad.org/system/files/official-document/ciclpd54\\_en.pdf](https://unctad.org/system/files/official-document/ciclpd54_en.pdf), "Strengthening consumer protection and competition in the digital economy" (TD/RBP/CONF.9/4, 29 July 2020), available at [https://unctad.org/system/files/official-document/tdrbpconf9d4\\_en.pdf](https://unctad.org/system/files/official-document/tdrbpconf9d4_en.pdf), and "Competition law, policy and regulation in the digital era" (TD/B/C.I/CLP/57, 28 April 2021), available at [https://unctad.org/system/files/official-document/ciclpd57\\_en.pdf](https://unctad.org/system/files/official-document/ciclpd57_en.pdf).

<sup>9</sup> See Alexiadis, P., & de Streel, A. (2020). Designing an EU intervention standard for digital platforms (No. 2020/14). *European University Institute*. Beaton-Wells, C. (2018). Platform power and privacy protection: A case for policy innovation. *CPI Antitrust Chronicle*, September. Hoffmann, J., Bakhoun, M., & Beneke, F. (2018). Digital markets, mobile payments systems and development—Competition policy implications in developing countries in light of the EU experience. *Max Planck Institute for Innovation & Competition Research Paper*, (18-13). European Commission. (2020). Proposal for a regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act). Available at [https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en). Department for Digital, Culture, Media & Sport and

However, these helpful developments may eschew many other developing countries, where competition enforcement either is not yet as well established as a policy tool or faces additional challenges due to resource constraints and insufficient competition culture. This would particularly be problematic considering the potential adverse consequences of abusive use of market power held by the digital platforms. On the contrary, there are reasons to believe that consumers, users and business, including MSMEs, in developing countries may in fact, be *more* reliant on the services offered by global, regional, and local leading digital platforms. Specifically, the power imbalance between platforms and MSMEs in developing countries may be way more significant than the one in developed countries, while concurrently MSMEs and consumers may be less protected by consumer and competition authorities. The Covid-19 pandemic coupled with the trend towards digitization associated with it makes these concerns more significant.<sup>10</sup>

## II. RECOMMENDATIONS FOR DIGITAL PLATFORMS<sup>11</sup>

### A. Objectives

The RDP laid out in this document are not meant to substitute the regulatory initiatives of any country or supra-national entity. Rather, it aims to complement those existing, emerging, and future initiatives and guide those countries which (i) do not yet have any regulation or legislation in place in developing their own regulatory frameworks, or (ii) already have a regulatory framework but are

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Department for Business, Energy & Industrial Strategy, United Kingdom. (2021). A new pro-competition regime for digital markets. Available at: <https://www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets>.  
GWB. (2020). GWB-DigitalisierungsgeBRDPz: Act against Restraints of Competition (Competition Act – GWB)). Available at [http://www.geBRDPze-im-internet.de/englisch\\_gwb/englisch\\_gwb.pdf](http://www.geBRDPze-im-internet.de/englisch_gwb/englisch_gwb.pdf).  
Australian Competition and Consumer Commission. (2019). Digital Platforms Inquiry – Final Report. Canberra: ACCC. Available at <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>.  
Ministry of Economy, Trade and Industry (METI), Japan. (2020). Act on Improving Transparency and Fairness of Digital Platforms (TFDPA). Available at [https://www.meti.go.jp/english/policy/mono\\_info\\_service/information\\_economy/digital\\_platforms/index.html](https://www.meti.go.jp/english/policy/mono_info_service/information_economy/digital_platforms/index.html).  
Anti-Monopoly Committee of the State Council, China. (2021). The Anti-Monopoly Guidelines of the Anti-Monopoly Commission of the State Council on the Platform Economy. Available at <https://www.anjielaw.com/en/uploads/soft/210224/1-210224112247.pdf>.  
Department of Economic Development, South Africa. (2021). Online Intermediation Platforms Market Inquiry. Available at [https://www.gov.za/sites/default/files/gcis\\_document/202104/44432gon330.pdf](https://www.gov.za/sites/default/files/gcis_document/202104/44432gon330.pdf).

<sup>10</sup> See Pavlova, N. S., Shastitko, A. E., & Kurdin, A. A. (2020). The calling card of Russian digital antitrust. *Russian Journal of Economics*, 6, 258. Lianos, I., & Ivanov, A. (2019). Digital Era Competition BRICS Report. Available at SSRN 3901413.

<sup>11</sup> See the definitions in the annex attached.

prone to a weak enforcement culture or may not have effective capacity to effectively deal with the complexities of digital platform regulation.

The RDP are meant to support, among other things, the continued digitization and growth of MSMEs in developing countries post-Covid-19. The success of these businesses is vital for these countries to achieve the United Nations Sustainable Development Goals, because MSMEs are the backbone of these economies. They account for the majority of GDP and employment and are particularly important in providing opportunities to women, unskilled workers, and the youth. By supporting their access to online distribution channels, eliminating entry barriers, and reducing the unfairness and the lack of transparency that these businesses face in dealing with online platforms, this RDP could help MSMEs to better secure vital financing to grow their operations successfully and innovate. Consequently, this will lead to higher levels of economic growth, better outcomes for consumers that benefit from increased competition, wider choice, lower market prices and greater opportunities for business owners and employees to succeed.<sup>12</sup>

### ***B. Targeted Services and Key Digital Platforms***

The RDP are targeted at digital platforms offering or providing certain platform services – the **Targeted Services** – which are indispensable to both consumers and users (e.g., search engines and social networks) and business selling or trading online (e.g., online marketplaces) and are thus identified as Key Digital Platforms (**KDPs**) by virtue of their absolute and relative significance in connection with the provision of the Targeted Services in one or more countries.

The list of Targeted Services includes: (a) online intermediation services; (b) online search engines; (c) online social networking services; (d) music/video-sharing platform services; (e) number-independent interpersonal communication services; (f) operating systems; (g) software application stores; (h) cloud computing services; (i) online browsing services; (j) online payment services; and (k) advertising services, including any advertising networks,

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<sup>12</sup> See Boateng, K., Sodem, N., & Nagaraju, Y. (2019). The contribution of MSMEs to the growth of the Indian and global economy. *International Journal of Multidisciplinary*, 4(3). Myovella, G., Karacuka, M., & Haucap, J. (2020). Digitalization and economic growth: A comparative analysis of Sub-Saharan Africa and OECD economies. *Telecommunications Policy*, 44(2), 101856. Matthes, M., & Kunkel, S. (2020). Structural change and digitization in developing countries: Conceptually linking the two transformations. *Technology in society*, 63, 101428.

advertising exchanges and any other advertising intermediation services, provided by a provider of any of the Targeted Services listed above.<sup>13</sup>

The provision of these services is particularly likely to be dominated by KDPs acting as the main intermediaries between business, consumers and users, because of network effects, close-to-zero marginal costs, and data-driven economies of scale and scope. In developing countries, the widespread availability of these Targeted Services can be particularly important in resolving institutional shortcomings and market frictions. For example, in the ride-hailing market, KDPs can act as institutional entrepreneurs by creating new marketplaces for labor transactions or new trusted payment systems.<sup>14</sup>

In any given country, a platform providing or offering Targeted Services shall be categorized/identified as a KDP when

- a) it has an important economic position (such as a significant market share) and a significant role in the provision of such services in the country or in one substantial part of it,
- b) operates a Targeted Service platform which serves as an important gateway for business to reach consumers and users; and
- c) enjoys an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future on the basis of the lack of effective competition and barriers to entry. (e.g., within two or three years).

Firms that meet these conditions operate in settings where a large number of businesses depend on them to access users and consumers and vice versa. Such significant dependencies of consumers, users and business on the KDPs could create a conglomerate ecosystem around them, reinforcing entry barriers for each of the Targeted Services they provide. Additionally, these dependencies would make it nearly impossible for the KDPs to be displaced from their role as

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<sup>13</sup> See Parker, G., Petropoulos, G., & Van Alstyne, M. W. (2020). Digital platforms and antitrust. *2021 Winner of Antitrust Writing Award*. Lianos, I., & Ivanov, A. (2019). Digital Era Competition BRICS Report. Available at SSRN 3901413. Mansell, R. (2015). Platforms of power. *Intermedia*, 43(1), 20-24.

<sup>14</sup> See Heeks, R., Gomez-Morantes, J. E., Graham, M., Howson, K., Mungai, P., Nicholson, B., & Van Belle, J. P. (2021). Digital platforms and institutional voids in developing countries: The case of ride-hailing markets. *World Development*, 145, 105528. Schmidt, F. A. (2017). Digital labor markets in the platform economy. *Mapping the Political Challenges of Crowd Work and Gig Work*, 7, 2016.

intermediaries thus, solidifying their position as an “enabler” in the two-sided market they operate in.<sup>15</sup>

So-called GAFAM firms that operate worldwide and have a significant presence in many countries satisfy these criteria and therefore can be identified as global KDPs. There are other digital platforms that are important to national or regional territories but may not have global reach, which can also be categorized as KDPs in the countries or regions where they satisfy the three conditions above. Distinguishing between the two becomes important when both global and national KDPs offering the same Targeted Service are present in the same country. For example, in Russia, the growth of global platforms may have reduced the market power of national players. In Indonesia, the merger of Uber and national ride-hailing firm Grab could reduce the ability of any other national firms to compete effectively.<sup>16</sup>

### *C. Principles*

The RDP pursue the following two core principles:

1. *Market accessibility and contestability.* The RDP seek to foster competition within platforms satisfying (i) to (iii) above; between those platforms and other platforms offering the same Targeted Services; as well as in the provision or offering of other Targeted Services which could be entered by platforms that should be regarded as KDPs.<sup>17</sup>

Market contestability helps to ensure that incumbent digital platforms stay alert, encouraging innovation and service quality and variety. It means that platforms do not enjoy entrenched market power, and that consumers, users and business are less likely to be locked in and exploited. It also reduces the risk that

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<sup>15</sup> See Geradin, D. (2021). What is a digital KDP? Which platforms should be captured by the EC proposal for a Digital Market Act? *Which platforms should be captured by the EC proposal for a Digital Market Act?* Kadri, T. (2020). Digital KDPs. *Texas Law Review*, 99. Competition and Markets Authority. (2020). A new pro-competition regime for digital markets. Advice of the Digital Markets Taskforce, available at <https://www.gov.uk/cma-cases/digital-markets-taskforce#taskforce-advice>.

<sup>16</sup> See Pavlova, N. S., Shastitko, A. E., & Kurdin, A. A. (2020). The calling card of Russian digital antitrust. *Russian Journal of Economics*, 6, 258. Khozen, I., Setianty, I., & Meiriza, F. D. (2021). What Can We Learn from Business Innovation Failure of Uber in Southeast Asia Market? *Inovbiz: Jurnal Inovasi Bisnis*, 9(1), 124-132.

<sup>17</sup> See Bourreau, M., & De Streel, A. (2019). Digital conglomerates and EU competition policy. Available at SSRN 3350512. Schweitzer, H., Haucap, J., Kerber, W., & Welker, R. (2018). Modernizing the law on abuse of market power. *Report for the German Federal Ministry for Economic Affairs and Energy*. Federico, G., Morton, F. S., & Shapiro, C. (2020). Antitrust and innovation: Welcoming and protecting disruption. *Innovation Policy and the Economy*, 20(1), 125-190.



platforms can leverage their control over data into gaining dominance in adjacent markets.<sup>18</sup>

2. *Fair competition and fairness.* The RDP seek to ensure that platforms satisfying (i) to (iii) above treat business, fairly and non-discriminatorily. Platforms adopting the RDP shall therefore recognize their responsibility to provide business with clearly defined rights, offering commitments that protect their autonomy and provide them with sufficient certainty as to their future treatment by the platform provider.<sup>19</sup>

Fair competition and fairness help to ensure that the short-term benefits of digital platforms are realized, meaning that even platforms currently in a dominant position are encouraged to provide a good service to business and their consumers and users. It is important to mitigate the potential imbalances of power between platforms and business. Fairness is thus particularly relevant in developing countries, given that platforms may possess disproportionate power due to the lack of a strong digital infrastructure and the limited alternatives available to MSMEs and their suppliers or customers. Since these issues are heavily rooted in local features of different societies and existing socio-technical regimes, they are difficult to resolve with technical solutions alone.<sup>20</sup>

While promoting contestability and accessibility may help to correct abusive or unfair behavior, this may take time and, therefore, it is of paramount importance to limit the potential for abuse by regulating the conduct of KDPs *vis-à-vis* business without waiting for markets to self-correct.

#### ***D. Specific Commitments***

These core principles describe the general standards and approach that KDPs complying with the RDP should take when dealing with business. These principles are useful for understanding the general issues at stake and ought to serve as a guide for platform owners when making decisions in all areas.

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<sup>18</sup> See Krämer, J., & Wohlfarth, M. (2018). Market power, regulatory convergence, and the role of data in digital markets. *Telecommunications Policy*, 42(2), 154-171. Wohlfarth, M. (2019). Data portability on the internet. *Business & Information Systems Engineering*, 61(5), 551-574. Vickers, J. (2004, January). Economics for consumer policy. In *Proceedings of the British Academy* (Vol. 125, pp. 287-310). Oxford University Press.

<sup>19</sup> See Bostoen, F. (2018). Neutrality, fairness or freedom? *Principles for platform regulation. Internet Policy Review*, 7(1), 1-19. Twigg-Flesner, C. (2018). The EU's Proposals for regulating B2B relationships on online platforms transparency, fairness and beyond. *Journal of European Consumer and Market Law*, 7(6).

<sup>20</sup> See Kang, J., & Park, S. (2014). Factors influencing electronic commerce adoption in developing countries: The case of Tanzania. *South African Journal of Business Management*, 45(2), 83-96. Shin, D. D. (2019). Socio-Technical Design of Algorithms: Fairness, Accountability, and Transparency. In *30th European Regional ITS Conference, Helsinki 2019* (No. 205212). International Telecommunications Society (ITS).

However, it can be difficult for business and third-party observers (including regulators) to verify whether the concrete actions of KDPs conform to such general principles. Therefore, it is necessary that KDPs commit to a series of specific commitments, which are guided by the core principles, but which are narrower, easier to interpret and straightforward to understand and verify in practice.

To achieve community acceptance and compliance across many different jurisdictions, these specific commitments will have to be tailored to the circumstances of platforms and their users, as well as to the societies in which such platforms operate. These commitments are meant to guide present policy and decision making, but also provide a basis for the critical assessment of past performance. The RDP thus provide a set of standards of conduct that can be made more concrete in accordance with the dynamic nature of the digital industries involved and tailored to reflect societal differences between countries and regions.<sup>21</sup>

#### 1. On Accessibility and Contestability

The RDP specify the following commitments in connection with the objective of preserving the *accessibility and contestability* of the market or markets where KDPs operate and in adjacent markets:

a) *Preserving within platform competition.* KDPs need to ensure competition within the platforms they control.

(i) *Non-discriminatory access.* KDPs should grant non-discriminatory access to their platforms, data, and services to all similarly situated business.<sup>22</sup>

(ii) *No self-preferencing.* KDPs should not seek to disadvantage those business that may be in competition with the KDP's own products or services.<sup>23</sup>

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<sup>21</sup> See Pearson, R., & Seyfang, G. (2001). New hope or false dawn? Voluntary codes of conduct, labor regulation and social policy in a globalizing world. *Global Social Policy*, 1(1), 48-78. Neill, J. D., Stovall, O. S., & Jinkerson, D. L. (2005). A critical analysis of the accounting industry's voluntary code of conduct. *Journal of Business Ethics*, 59(1), 101-108. Harris, H. (2004). Performance measurement for voluntary codes: An opportunity and a challenge. *Business and Society Review*, 109(4), 549-566.

<sup>22</sup> See Krämer, J., & Schnurr, D. (2018). Is there a need for platform neutrality regulation in the EU? *Telecommunications Policy*, 42(7), 514-529. Krämer, J., Schnurr, D., & de Streel, A. (2017). Internet platforms and non-discrimination. Available at SSRN 3083114.

<sup>23</sup> See Caro de Sousa, P. (2020). What Shall We Do About Self-Preferencing? *Competition Policy International*, June Chronicle. Alexiadis, P., & de Streel, A. (2020). Designing an EU intervention standard for digital platforms (No. 2020/14). *European University Institute*.

- (iii) *No discrimination.* Policies and actions of KDPs should apply equally to all business that are similarly placed and should not be changed with the intention of targeting one or a small number of specific users.<sup>24</sup>
- (iv) *Competition oversight.* KDPs should not encourage or allow restrictions of competition on their platforms. On the contrary, KDPs should motivate business to act according to legitimate organizational goals and objectives and to comply, among other legal provisions, with extant competition laws in their respective jurisdictions, so that they add value to the design and governance of the platform ecosystem.<sup>25</sup>
- b) *Preserving actual competition with platforms offering the same Targeted Services.* KDPs have a special responsibility towards competition with rival platforms. As a result, unless they can demonstrate a sufficient efficiency justification,

  - (i) *Multi-homing.* KDPs should commit not to restrict business patronizing their platforms from dealing with rival platforms for the same or similar Targeted Services.<sup>26</sup>
  - (ii) *Switching costs and defaults.* KDPs should refrain from taking any action, contractually or technologically, that could create or increase switching costs across substitutable or complementary platforms for consumers, users and/or business. Additionally, KDPs should not lock in end or business or disincentivize them

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<sup>24</sup> See Cabral, L., Haucap, J., Parker, G., Petropoulos, G., Valletti, T. M., & Van Alstyne, M. W. (2021). The EU Digital Markets Act: A Report from a Panel of Economic Experts. *The EU Digital Markets Act, Publications Office of the European Union, Luxembourg*. Wismer, Sebastian, Intermediated vs. Direct Sales and a No-Discrimination Rule (2013). *BGPE Discussion Paper No. 131*.

<sup>25</sup> See Hein, A., Schreieck, M., Riasanow, T., Setzke, D. S., Wiesche, M., Böhm, M., & Krcmar, H. (2020). Digital platform ecosystems. *Electronic Markets, 30(1)*, 87-98. Schreieck, M., Wiesche, M., & Krcmar, H. (2016). Design and governance of platform ecosystems—key concepts and issues for future research. *Research Papers, 76*. Halckenhäußer, A., Förderer, J., & Heinzl, A. (2020). Platform governance mechanisms: an integrated literature review and research directions. *In Proceedings of the 28th European Conference on Information Systems (ECIS)*.

<sup>26</sup> See Jullien, B., & Sand-Zantman, W. (2021). The economics of platforms: A theory guide for competition policy. *Information Economics and Policy, 54*, 100880. Koh, T. K., & Fichman, M. (2014). Multihoming users' preferences for two-sided exchange networks. *Mis Quarterly, 38(4)*, 977-996.

to switch to other platforms offering the same Targeted Services through, for example, default arrangements.<sup>27</sup>

(iii) *Contracts that reference rivals.* KDPs should refrain from entering contracts that restrict competition with rival platforms, such as, e.g., retail parity agreements or other clauses capable of producing similar distortive effects.<sup>28</sup>

c) *Preserving potential competition with platforms offering the same Targeted Services.* KDPs have a special responsibility towards potential entrants offering the same Targeted Services. As a result, unless they can demonstrate a sufficient efficiency justification,

(i) *No platform envelopment.* Platform envelopment involves the combination or bundling of the KDP's Targeted Services, or the assets used in the provision of those services (e.g., data), with the platform services it offers in an adjacent market, or the assets used in the provision of such services. The goal is to leverage, e.g., shared user relationships. This strategy can distort competition and cause consumer harm by allowing KDPs to foreclose adjacent markets and protect their leading position from potential entrants from such adjacent markets.<sup>29</sup>

Hence, in order to ensure that competition in adjacent markets, especially those concerning the provision of other Targeted Services,

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<sup>27</sup> See Tucker, C. (2019). Digital data, platforms and the usual [antitrust] suspects: Network effects, switching costs, essential facility. *Review of Industrial Organization*, 54(4), 683-694. Basaure, A., Vesselkov, A., & Töyli, J. (2020). Internet of things (IoT) platform competition: Consumer switching versus provider multihoming. *Technovation*, 90, 102101. Vickers, J. (2004, January). Economics for consumer policy. In *Proceedings of the British Academy* (Vol. 125, pp. 287-310). Oxford University Press.

<sup>28</sup> See Belleflamme, P., & Peitz, M. (2019). The competitive impacts of exclusivity and price transparency in markets with digital platforms (No. crctr224\_2019\_137). *University of Bonn and University of Mannheim, Germany*. Padilla, J., Piccolo, S., & Watson, N. (2021). The Simple Economics of Wholesale Price-Parity Agreements: The Case of the Airline Tickets Distribution Industry. *Journal of Competition Law & Economics*, 17(2), 364-379. Carroni, Elias and Madio, Leonardo and Shekhar, Shiva, Superstars in Two-Sided Markets: Exclusives or Not? (2019). *CESifo Working Paper No. 7535*. Marty, F., & Pillot, J. (2021). Cooperation, dependence, and eviction: how platform-to-business cooperation relationships should be addressed in mobile telephony ecosystems. In *Challenges to Assumptions in Competition Law*. Edward Elgar Publishing. Colangelo, M. (2017). Parity clauses and competition law in digital marketplaces: the case of online hotel booking. *Journal of European Competition Law & Practice*, 8(1), 3-14.

<sup>29</sup> See Condorelli, D., & Padilla, J. (2020). Harnessing platform envelopment in the digital world. *Journal of Competition Law & Economics*, 16(2), 143-187. Coyle, D. (2019). Practical competition policy implications of digital platforms. *Antitrust Law Journal*, 82(3), 835-860. Eisenmann, T., Parker, G., & Van Alstyne, M. (2011). Platform envelopment. *Strategic management journal*, 32(12), 1270-1285.

is preserved, KDPs should commit not to engage in commercial practices that leverage their power to other markets beyond the ones already under their control. This would not only ensure the contestability of these adjacent markets but would make it possible for firms operating in them to contest the position of the KDP in their Targeted Services markets. In particular,

- *No Tying or bundling Targeted Services.* KDPs should refrain from requiring business, consumers and users of a Targeted Service to purchase, subscribe to or register with any other Targeted Service identified in above as a condition to access, sign up or register to any of their Targeted Services.<sup>30 31</sup>
- *No Data bundling.* KDPs should be transparent towards consumers and users about the options they have when agreeing to consent about the combination of personal data obtained from the KDPs' Targeted Services platforms with personal data from any other services offered by the KDP, or with personal data from third-party services, and about the implications of signing into other services of the KDP where the ultimate goal is the combination of their personal data.<sup>32</sup>

(ii) *Mergers and acquisitions.* KDPs should make public all acquisitions of potential providers of the same Targeted Services they undertake when such acquisitions may fall outside the relevant merger control regime and do not meet the notification thresholds. A potential competitor could be a new entrant planning to compete head-to-head with the KDP in the provision of the latter's Targeted Services or a company operating in an adjacent market which could develop by

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<sup>30</sup> See Iacobucci, E., & Ducci, F. (2019). The Google search case in Europe: Tying and the single monopoly profit theorem in two-sided markets. *European Journal of Law and Economics*, 47(1), 15–42. Au, T. H. (2012). Anticompetitive tying and bundling arrangements in the smartphone industry. *Stan. Tech. L. Rev.*, 16, 188.

<sup>31</sup> For example, KDPs should refrain from bundling of in app payment systems with app stores.

<sup>32</sup> See Campbell, J., Goldfarb, A., & Tucker, C. (2015). Privacy regulation and market structure. *Journal of Economics & Management Strategy*, 24(1), 47-73. Jones, C. I., & Tonetti, C. (2020). Nonrivalry and the Economics of Data. *American Economic Review*, 110(9), 2819-58. Schepp, N. P., & Wambach, A. (2016). On big data and its relevance for market power assessment. *Journal of European Competition Law & Practice*, 7(2), 120-124.

virtue of its successful operation in such a market the skills needed to enter the markets where the KDP delivers its services.<sup>33</sup>

## 2. On Fairness towards business

Furthermore, the RDP list the following specific *fairness* commitments that should guide the conduct of KDPs in their dealing with business:

a) *Duty to deal fairly and equitably.* In their dealings with business, KDPs should recognize a general and positive duty to trade fairly and equitably; and not seek to exploit the dependence these firms may have on continued access to their platforms. In particular,<sup>34</sup>

(i) *Good faith.* KDPs should assume a general and positive duty to deal with their business responsibly, in good faith and with professional diligence. Contracts between KDPs and their business must comply with the principles of transparency, clarity, concreteness, and simplicity.<sup>35</sup> In particular, KDPs should

- Disclose their default terms and conditions prior to entering negotiations with business.

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<sup>33</sup> See Cunningham, C., Ederer, F., & Ma, S. (2021). Killer acquisitions. *Journal of Political Economy*, 129(3), 649-702. Kamepalli, S.K., Rajan, R., & Zingales, L. (2020). Kill Zone. *Stigler Center for the Study of the Economy and the State*. Holmström, M., Padilla, J., Stitzing, R., & Sääskilähti, P. (2018). Killer Acquisitions? The Debate on Merger Control for Digital Markets. *The Debate on Merger Control for Digital Markets*. Yun, J. M. (2020). Potential Competition, Nascent Competitors, and Killer Acquisitions. *The Global Antitrust Institute Report on the Digital Economy*, 18. Bryan, K. A., & Hovenkamp, E. (2020). Antitrust limits on startup acquisitions. *Review of Industrial Organization*, 56(4), 615-636. Gautier, A., & Lamesch, J. (2021). Mergers in the digital economy. *Information Economics and Policy*, 54, 100890. Motta, M., & Peitz, M. (2021). Big tech mergers. *Information Economics and Policy*, 54, 100868. Argentesi, E., Buccrossi, P., Calvano, E., Duso, T., Marrazzo, A., & Nava, S. (2021). Merger Policy in Digital Markets: An Ex-Post Assessment. *Journal of Competition Law & Economics*, 17(1), 95-140.

<sup>34</sup> See Arica, E., & Oliveira, M. (2019). Requirements for adopting digital B2B platforms for manufacturing capacity finding and sharing. *24th IEEE International Conference on Emerging Technologies and Factory Automation (ETFA)* (pp. 703-709). Podszun, R. (2013). Unfair Trading Practices: The Commission's Green Paper for Fairness in B2B-Dealings. *J. Eur. Consumer & Mkt. L.*, 2, 42.

<sup>35</sup> See Perogianni, M. (2003). B2B Internet Trading Platforms: Opportunities and Barriers for SMEs. *Enterprise Directorate General, European Communities, Brussels*. Chen, Ying-Hueih; Wu, Jyh-Jeng; Lu, Irene R. R.; and Chien, Shu-Hua. (2013). Exploring Impact of E-Marketplace Reputation and Reference Group on Trust of E-Marketplace. *PACIS 2013 Proceedings*. 136.

- Commit not to change those terms and conditions without prior notification to business, allowing the latter to oppose the proposed changes or negotiate the change in good faith.

(ii) *Fair and equitable negotiations.* KDPs should not abuse their bargaining power when negotiating contractual terms with business. Specifically,

- *No delisting threats.* KDPs should not explicitly or implicitly threaten a business with a deterrent action that would not apply to them absent the negotiation, e.g., threatening to delist them if they do not agree to the platform owner's terms, even though the business would not be in violation of the platform's policies.<sup>36</sup>

- *Collective negotiations.* KDPs should, where asked, negotiate with a collection of similarly placed firms that wish to bargain collectively. Such collective bargaining should aim to reduce the imbalance in bargaining power but should be limited to those firms that are "micro" or "small" according to the relevant domestic legislation, e.g., not allowing illegal horizontal agreements between large media publishers.<sup>37</sup>

(iii) *Customer relationships.* Business should be allowed to retain the direct relationship with their customers. KDPs should not seek to restrict the interactions between business and their customers, for example by requiring them to use ancillary services provided by the platform owner to communicate with customers or restricting their ability to inform customers of other sales channels, without reasonable justification. Additionally, if requested, business should be granted access to data / information on customers using their services (e.g., how often users make use of a certain product / service, reviews, comments,

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<sup>36</sup> See Bougette, P., Budzinski, O., & Marty, F. (2019). Exploitative abuse and abuse of economic dependence: What can we learn from an industrial organization approach? *Revue d'economie politique*, 129(2), 261-286. Cutolo, D., & Kenney, M. (2020). Platform-dependent entrepreneurs: Power asymmetries, risks, and strategies in the platform economy. *Academy of Management Perspectives*.

<sup>37</sup> See Hein, A., Weking, J., Schreieck, M., Wiesche, M., Böhm, M., & Krcmar, H. (2019). Value co-creation practices in business-to-business platform ecosystems. *Electronic Markets*, 29(3), 503-518. Gorjon, Sergio, Digital Platforms: Developments in Their Regulation and Challenges in the Financial Arena (October 20, 2020). *Banco de España Article 33/20*.

ratings, etc.) as long as this practice complies with data protection rules<sup>38</sup>

(iv) *Alternative equitable dispute resolution.* KDPs should establish effective and verifiable fair, accessible, and free dispute resolution mechanisms and provide a clear, non-arbitrary and succinct procedure to resolve commercial disputes among business, or between business and the platform provider. Any procedure should keep all parties informed of the reason for any action taken against them by the platform, for example if their products have been delisted from the platform due to alleged rule violations.<sup>39</sup>

b) *Neutrality.* Business active in large online platforms may compete both against other businesses and directly against the platform owner itself, for instance when an online marketplace provider sells its own products or services that compete with those of third-party sellers. KDPs should treat similarly placed business equally. In particular, KDPs should respect the commitments of *No discriminatory access*; *No self-preferencing*; and *No discrimination*, aimed at protecting within platform competition, listed above.<sup>40</sup>

c) *Transparency.* Platforms are often privy to data generated by business. They also have a complete understanding of the inner workings of the platform and how this affects business and their customers. While it would be unnecessary and counter-productive to share all this data publicly,<sup>41</sup>

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<sup>38</sup> See Bougette, P., Budzinski, O., & Marty, F. (2019). Exploitative abuse and abuse of economic dependence: What can we learn from an industrial organization approach? *Revue d'economie politique*, 129(2), 261-286. Hänninen, M., & Smedlund, A. (2019). On retail digital platforms suppliers have to become responsive customer service organizations. *Strategy & Leadership*.

<sup>39</sup> See Rabinovich-Einy, O., & Katsh, E. (2014). Digital justice: Reshaping boundaries in an online dispute resolution environment. *IJODR*, 1, 5. Katsh, E., & Rule, C. (2015). What we know and need to know about online dispute resolution. *SCL Rev.*, 67, 329.

<sup>40</sup> See Bostoen, F. (2018). Neutrality, fairness or freedom? Principles for platform regulation. *Principles for Platform Regulation (March 31, 2018)*. *Internet Policy Review*, 7(1), 1-19. Renda, A. (2015). Antitrust, regulation and the neutrality trap: A plea for a smart, evidence-based internet policy. *CEPS Special Report*, 104. Chander, A., & Krishnamurthy, V. (2018). The myth of platform neutrality. *Geo. L. Tech. Rev.*, 2, 400.

<sup>41</sup> See Flyverbom, M. (2016). Digital age| transparency: Mediation and the management of visibilities. *International Journal of Communication*, 10, 13. De Streef, A. (2018). Online Intermediation Platforms and Fairness: an assessment of the recent Commission Proposal. Available at SSRN 3248723.



- (i) *Choice integrity.* It is incumbent on KDPs to share with business and their customers sufficient information so that they can make informed choices on those matters that directly affect them.<sup>42</sup>
- (ii) *Algorithmic transparency.* KDPs should supply business with the search ranking criteria and a clear understanding of how their products or services will appear to customers in search, display or other ranking systems, and inform business in advance of any change that will detrimentally affect them.<sup>43</sup>

### ***E. Implementation Issues***

#### **1. Compatibility with Existing Legislation and Institutional Frameworks**

The RDP is a voluntary soft-law instrument that member States may wish to consider in accordance with their domestic legislations and institutional frameworks. The RDP purports to provide guidance to member States, MSME associations, and digital platforms to ensure that digital markets are fair and contestable to the ultimate benefit of users and business (in particular, MSMEs). The RDP should be viewed as a complement to the existing competition regulatory frameworks and enforcement powers which may already apply to the conduct of digital platforms in each jurisdiction.

#### **2. Digital Platforms**

Digital platforms providing one or more Targeted Services wishing to behave in accordance with the commitments of the RDP laid out above are thus expected to convey the following information with the competent authority<sup>44</sup>:

- a) self-assess and declare whether they hold a KDP position in the provision of one or more of Targeted Services; and
- b) declare whether they accept all specific commitments laid out in the RDP without exception (*full commitment*) or, instead, in case they wish to limit

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<sup>42</sup> See Martin, K. E. (2020). Manipulation, Choice, and Privacy. *Albany Law Review, Forthcoming*.  
Susser, D., Roessler, B., & Nissenbaum, H. (2018). Online manipulation: Hidden influences in a digital world. *4 Georgetown Law Technology Review 1 (2019)*.

<sup>43</sup> See Di Porto, F., & Zupetta, M. (2021). Co-regulating algorithmic disclosure for digital platforms. *Policy and society, 40(2)*, 272-293. Kemper, J., & Kolkman, D. (2019). Transparent to whom? No algorithmic accountability without a critical audience. *Information, Communication & Society, 22(14)*, 2081-2096.

<sup>44</sup> See point 3 below.

the scope of their commitments (*partial commitment*), they should enumerate those they agree with and intend to respect.

KDPs' commitment declarations will be made public through the KDP's websites, so that they can be monitored by the competent authority, current and potential users and business as well as other third-party observers and, as a result, have a proper deterrent effect.

Digital platforms should be motivated to participate in this voluntary exercise, either because it sends a positive signal to external stakeholders (such as consumers and users, business, regulators, and investors), or because it sets out reasonable unofficial industry standards that they are willing to sign-up to (hoping to encourage industry wide take-up).

### 3. Competent Authorities

Interested member States should consider appointing a Competent Authority (CA), e.g., the competition law enforcer or institutions entrusted with overseeing digital markets in their respective jurisdictions.

CAs will draw from the RDP in dealing with KDPs, especially in cases where there are no existing provisions in the laws. CAs should make their best efforts to acknowledge and disseminate the RDP among business, digital platforms, consumers and users, and national and supra-national regulators to increase the reputational value of adoption and voluntary compliance.

The CA should encourage business to complain if they feel they have been mistreated. It will also encourage digital platforms to produce annual compliance reports. As member States implement the RDP in their territories and receive complaints from business and users, the CA should gather and manage a repository of such declarations to facilitate access by business, users, regulators and courts, and academics.

Additionally, the launch of the RDP may be accompanied by the establishment of a multi-stakeholder group including representatives of CAs, companies affected by the RDP, academics, think tanks and professional associations. This group's mission should be to help complying companies to implement the RDP correctly. Over time, the development of a rating system could also be considered to encourage KDPs to follow internationally accepted principles.<sup>45</sup>

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<sup>45</sup> See Chrysaki, M. (2020). The sustainable commercialization of space: the case for a voluntary code of conduct for the space industry. *Space Policy*, 52, 101375.

## **ANNEX: Definitions**

1. “Digital platform” means a company that provides digital services intermediating between users and business, often between business and their customers.
2. Targeted Services
  - a. “Online intermediation services” means services which allow business to offer goods or services to customers, with a view to facilitating the initiating of direct transactions between those business and customers, irrespective of where those transactions are ultimately concluded.
  - b. “Online search engine” means a digital service that allows users to input queries in order to perform searches of, in principle, all websites, or all websites in a particular language, on the basis of a query on any subject in the form of a keyword, voice request, phrase or other input, and returns results in any format in which information related to the requested content can be found.
  - c. “Online social networking service” means a platform that enables consumers and users to connect, share, discover and communicate with each other across multiple devices and, in particular, via chats, posts, pictures, videos and recommendations.
  - d. “Music/Video-sharing platform service” means an audio/audiovisual service which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of audio/audiovisual programs, in order to inform, entertain or educate, to the general public by electronic communications networks.
  - e. “Number-independent interpersonal communications service” means an interpersonal communications service which does not connect with publicly assigned numbering resources, namely, a number or numbers in national or international numbering plans, or which does not enable communication with a number or numbers in national or international numbering plans.
  - f. “Operating system” means a system software which controls the basic functions of the hardware or software and enables software applications to run on it.
  - g. “Cloud computing services” means a digital service that enables access to a scalable and elastic pool of shareable computing resources.
  - h. “Software application stores” means a type of online intermediation services, which is focused on software applications as the intermediated product or service.
  - i. “Browsing services” means a software service that allows users to navigate or browse the Internet retrieving the desired content from a web server and then displaying such content on the user’s device.

## Proposal subject to changes and suggestions by member States and other stakeholders

- j. “Online payment services” means a digital service that manages the transfer of funds from a customer to the business user of an e-commerce website.
- k. “Online advertising services” means a digital service that allows business to advertise and market their products or services through the Internet as a medium to attract customers, and target and deliver marketing messages to the right customers.
3. “Key Digital Platform” means a provider of Targeted Services designated pursuant to A.3. which fulfils the conditions set out in B.1 below.
4. “Business” means any natural or legal person acting in a commercial or professional capacity using core platform services for the purpose of or in the course of providing goods or services to consumers and users.
5. “Users” means any legal person using Targeted Services.
6. “Consumer” generally refers to a natural person, regardless of nationality, acting primarily for personal, family or household purposes, while recognizing that Member States may adopt differing definitions to address specific domestic needs.<sup>46</sup>
7. “Data” means any digital representation of acts, facts or information and any compilation of such acts, facts, or information, including in the form of sound, visual or audiovisual recording.
  - a. “Personal data”. Information relating to an identified or identifiable natural person. An identifiable person is one that can be identified directly or indirectly by reference to an identifier such as name, identity card number, location data, an online identifier or factors relating to the physical, physiological, genetic, mental, economic, cultural, or social position of the natural person.
  - b. “Non-personal data”. Any data that is not considered personal as per the definition above.
8. “Unconditional consent regarding personal data”. User’s option to not consent to KDPs’ privacy policy or limit the amount and nature of personal data collected and/or the ways in which such data are used without the loss access to the desired services with the same quality as if the user had not requested such restrictions.

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<sup>46</sup> In accordance with the revised United Nations Guidelines for Consumer Protection (2015), guideline 3, while recognizing that Member States may adopt differing definitions to address specific domestic needs. Available at [https://unctad.org/system/files/official-document/ditccplmisc2016d1\\_en.pdf](https://unctad.org/system/files/official-document/ditccplmisc2016d1_en.pdf).