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Competition law, policy and regulation in the digital era

Note by the UNCTAD secretariat

Summary

Digital platforms are essential elements of today's economy, in particular since the outbreak of the coronavirus disease of 2019 (COVID-19) pandemic, and are a key issue for Governments and competition authorities worldwide.

Building upon previous discussions at UNCTAD on competition issues in the digital economy, this note provides an overview of the challenges faced by competition authorities in dealing with competition issues in digital markets and introduces recent competition cases involving online platforms, as well as legislative and regulatory initiatives undertaken in some jurisdictions. It provides a comparative analysis of recent initiatives taken by Governments worldwide and includes recommendations for developing countries in dealing with competition issues relevant to digital markets.



I. Introduction

1. Technological developments have provided consumers with new products and services, in many instances offered free of charge in exchange for their data. Digital platforms are at the centre of such developments and provide digital infrastructure and intermediation services in different markets, including marketplaces (Amazon), application stores (Apple), social networking sites (Facebook) and search engines (Google).¹ Digital platforms are essential elements of the digital economy and have been useful, in particular since the outbreak of the pandemic.

2. The increasing use of online services during the pandemic has allowed digital platforms to grow larger and more powerful. In 2020, the electronic commerce (e-commerce) platforms Pinduoduo, Meituan Dianping and Shopify entered the list of global top 100 companies by market capitalization for the first time and in March–June 2020, the market capitalization of technology companies in the global top 100 list increased by 28 per cent compared with in December 2019–March 2020.² As at June 2020, seven of the world's top 10 companies by market capitalization were digital platforms, of which two are based in China and five, in the United States of America.³ In January–September 2020, the price of Apple stock increased by 50 per cent; Amazon, by 64 per cent; and JD.com, by 96 per cent.⁴ These indicators show the extent to which online platforms have benefited from restrictions on movement introduced in response to the pandemic.

3. The Intergovernmental Group of Experts on Competition Law and Policy, since 2019, and the Eighth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, held in 2020, have been discussing competition issues in the digital economy.⁵ This note builds on the notes prepared for and the discussions held during the conference and sessions of the Intergovernmental Group of Experts. References to member States refer to the respective competition authority.

II. Recent initiatives and developments in competition law and policy for the digital era

4. During the round-table discussion on competition issues in the digital economy held during the eighteenth session of the Intergovernmental Group of Experts on Competition Law and Policy in 2019, many experts and enforcers expressed the view that existing competition laws and tools were adequate to address competition concerns arising from the market power of dominant digital platforms and that adapting the competition toolkit would be sufficient to address such problems.⁶ Since then, views have slightly changed in favour of legislative reforms and ex ante regulation.

5. This chapter provides an overview of challenges faced by competition authorities and of recent competition cases and legislative and regulatory initiatives undertaken in some jurisdictions, including developing countries and emerging economies, to address competition concerns arising in digital markets, based on research and on information provided by competition authorities in developing countries and emerging economies,

¹ Mention of any firm or licensed process in this note does not imply the endorsement of the United Nations.

² See <https://www.pwc.com/gx/en/services/audit-assurance/publications/global-top-100-companies.html>.

Note: All websites referred to in footnotes were accessed in April 2021.

³ TD/RBP/CONF.9/4.

⁴ UNCTAD, 2020, *Impact of the COVID-19 Pandemic on Trade and Development: Transitioning to a New Normal* (United Nations publication, Sales No. E.20.II.D.35, Geneva).

⁵ TD/B/C.I/CLP/54; TD/RBP/CONF.9/4.

⁶ TD/B/C.I/CLP/55.

namely Argentina, Brazil, Colombia, Egypt, Indonesia, Kenya, Pakistan, Peru, the Russian Federation and Turkey, in response to an UNCTAD questionnaire.⁷

A. Challenges faced by competition authorities in law enforcement in digital markets

6. This section summarizes the challenges faced by competition authorities in developing countries in dealing with competition law enforcement and other related issues in digital markets, based on information provided in response to the UNCTAD questionnaire.

1. Appropriate tools for analysing anticompetitive practices

7. Several competition authorities, including those of Argentina, Colombia, Pakistan, the Russian Federation and Turkey, emphasized the difficulties of using conventional competition tools based on prices and consumer welfare to handle emerging competition issues in the digital economy. This is mainly due to the distinguishing characteristics of digital markets, such as their multisided nature, as well as zero-price services, network effects, economies of scale and scope and the importance of access to and monetization of data. The competition authorities of Egypt, Kenya, Peru and Turkey reported defining the relevant market and determining dominance in digital markets as particularly challenging. Several competition authorities, including those of Brazil, Indonesia, Kenya, the Russian Federation and Turkey, reported that standard economic analysis mechanisms and traditional competition tools, such as market share and the small but significant and non-transitory increase in price test (used to define the relevant market in abuse of dominance and merger control assessments) were insufficient in cases involving digital platforms. For example, the Federal Antimonopoly Service of the Russian Federation noted challenges in handling abuse of dominance cases involving digital platforms, such as with regard to self-preferencing and gaining access to the information of sellers using platforms and using it in their business interests, thereby affecting competition in the respective markets. The Competition Authority of Turkey reported that the analysis of a dominant position in digital markets was complicated by the distinguishing features of such markets. Defining markets and establishing market power was particularly challenging for case handlers, as reported by the competition authorities of Argentina, the Russian Federation and Turkey.

8. The dynamic structure of digital markets, zero-price services, network effects, market tipping, lock-in effects and multihoming (in this context, the practice of using more than one digital platform simultaneously, such as using two different search engines at the same time) are among the factors that require careful consideration when defining markets and establishing market power in digital markets. In some cases, it is not clear whether digital platforms compete with traditional businesses or brick-and-mortar traders or whether they establish separate relevant markets. This requires careful analysis and an understanding of market dynamics. The Administrative Council for Economic Defence of Brazil noted challenges in adapting competition policy to the particularities of digital markets, such as lock-in effects, without losing legal certainty. For example, one difficulty related to identifying the technology-based barriers to multihoming.

2. Efficiencies, procompetitive effects and innovations

9. Some competition authorities, for example those of Brazil, Egypt and Turkey, referred to the need for balanced competition law enforcement to ensure that overenforcement or underenforcement did not slow down innovation and investment in the digital economy. In digital markets, however, the process of analysing and quantifying

⁷ The questionnaire included the following questions: (1) What are the challenges in general that your authority faces in dealing with competition issues in digital markets?; (2) Has your authority taken any initiatives regarding digital markets (cases, regulations, market studies) during the last three years? If yes, please describe; (3) What are the challenges that your authority has experienced in designing, adopting or implementing the initiatives, if any, mentioned in your answer to (2)?

efficiencies is often a challenge. In this context, the Administrative Council for Economic Defence of Brazil referred to another challenge, namely, the capacity to act effectively and in a timely fashion in these markets to prevent harm to competition due to the dynamic and constantly changing nature of the markets. It is crucial not only to determine when to intervene but also how to intervene (for example, through remedies, interim measures or ex ante regulation), to maintain competition on the one hand and to avoid stifling innovation on the other hand. Another important factor is the design of measures that fit the particularities of the digital economy in an environment of innovation and greater technological advances. The transnational character of the digital economy reveals the importance of cooperation between competition authorities from different jurisdictions.

10. In the area of mergers and acquisitions, the Competition Authority of Egypt referred to challenges in analysing efficiencies in proposed mergers and acquisitions in digital markets. Assessing dynamic efficiencies, such as increased innovation, requires extensive knowledge and understanding of the sector and the technologies involved, as well as making predictions despite the unpredictable nature of innovation. The Competition Authority attempts to address these challenges by increasing understanding of the underlying technology in the relevant sector and closely following developments in these markets. The Authority examines the behaviour of firms and consumers and identifies the problems faced by consumers and how firms may respond to them. This requires close cooperation among the parties to the transaction in providing the requested information.

11. The Federal Antimonopoly Service of the Russian Federation noted that one challenge related to the need to strike the right balance between protecting competition and respecting the intellectual property rights of digital firms. In competition investigations in digital markets, defendants may argue that the practices under consideration by the regulator are solely the exercise of intellectual property rights, to which antimonopoly legislation cannot be applied.

3. Collection and analysis of data in competition investigations

12. Some competition authorities, such as those of Indonesia and Turkey, stated that challenges in competition investigations involving digital markets were related to accessing accurate data to conduct comprehensive and sound analyses and contacting the parties involved and gathering quality data from them. This is particularly true with regard to multisided platforms due to various factors such as the multiplicity of parties, including consumers and sellers on the respective platforms, and the high number of users on each side. Furthermore, there is the issue of extraterritoriality; for investigations in which data are required from undertakings based abroad, notifications to these undertakings and requests for information and documents are sent via diplomatic missions. In some circumstances, such requests fall under the rules of letters rogatory (documents making a request through a foreign court to obtain information or evidence from a specified person within the jurisdiction of that court) and therefore written replies may not be provided before the end of an investigation despite the time and effort put into the process. Digital platforms may be reluctant to provide the requested information to competition authorities due to their physical absence in the relevant jurisdictions.

13. Other related challenges include inadequate specialized skills to handle competition issues raised by online platforms and difficulty in analysing digital market data, as well as inadequate tools to identify anticompetitive practices, as reported for example by the competition authorities of Brazil, Colombia, Indonesia and Kenya. For example, the Superintendence of Industry and Commerce of Colombia is investing in technologies to facilitate the collection and analysis of data, to equip competition case handlers with modern tools for data analysis and to increase the efficiency of investigations. The Superintendence noted that one challenge related to the ways in which information from stakeholders was gathered and used in market studies and confidentiality preserved when publishing research findings since revealing confidential information might facilitate anticompetitive practices.

14. In summary, many of the competition-related challenges in digital markets faced by competition authorities in developing countries appear to also be common among many of the authorities in developed countries. However, it is more difficult for authorities in many

developing countries, with fewer human and financial resources, to overcome some of the challenges. In addition, some challenges related to the collection of data, in particular from dominant platforms, may be more prominent in developing countries, where platforms do not have a physical presence and whose markets may not be considered as significant for such platforms.

B. Recent competition cases involving digital platforms

15. This section describes recent competition law enforcement and merger review cases involving digital platforms undertaken by competition authorities in developing countries, emerging economies and developed countries.

16. The competition authority of Argentina has reviewed merger cases and possible violations of competition law involving digital platforms such as Kaizen and Kinexo.

17. The Administrative Council for Economic Defence of Brazil reviewed the acquisition by Naspers of 13 per cent of the shares of Rocket Internet in Delivery Hero, the European food delivery company, as the transaction would result in horizontal overlap in the online food delivery market. The Administrative Council considered it important to monitor the strategy of Naspers of acquiring companies in the relevant market segment, as well as any future exclusive agreements with restaurants, as these could pose entry barriers to new entrants. The acquisition was cleared without restrictions due to the low level of concentration resulting from the transaction, as well as the existence of sufficient rivalry and contestability in this fast-growing market. The Administrative Council has two ongoing competition investigations, both initiated in 2019, one analysing the effects on competition of the conduct of Google in licencing its Android mobile operating system in the licensable operating systems market in Brazil and one on the potential scraping by Google of journalistic content published on the websites of media and news companies, whereby Google would be abusing its dominant position in leveraging the website access rates that it maintained to attract online advertisement.

18. In Egypt, the Competition Authority has undertaken two merger reviews in digital markets in the past three years, one of which was an ex ante investigation of the acquisition of the regional ride-hailing firm Careem by global competitor Uber, which was analysed as an anticompetitive agreement under article 6 of the competition law. The Competition Authority commenced procedures by issuing interim measures in October 2018, ordering the ride-hailing service providers to notify the Authority before the occurrence of any such transaction, to avoid an infringement of article 6 and to avail themselves of an exemption under article 6 (2). The parties complied and the Competition Authority finalized its assessment in December 2019 by issuing orders that required the parties to ensure that following the transaction, both riders and drivers would not be harmed through price increases or through decreases in quality and innovation. The commitments of the parties also encouraged market entry by requiring the incumbent to share data with new entrants, allowing them to compete more effectively in the market. Given the difficulty and complexity of assessing efficiency in this case with digital features, the Competition Authority held meetings with different stakeholders in the wider digital market, analysed a consumer survey conducted by the Information and Decision Support Centre on behalf of the Authority and reviewed the legal and institutional framework governing transport in Egypt. These steps allowed the Competition Authority to define the relevant market in a way that realistically reflected the transportation market in Egypt and to analyse the barriers to entry and theories of harm. The second merger review by the Competition Authority was of the horizontal agreement between the delivery service provider Glovo and major investor Delivery Hero, the leading provider in the Middle East and North Africa. In 2018, Delivery Hero had entered into a shareholder agreement with Glovo that attributed a minority shareholding to the former, allowing it to access commercially sensitive information on its competitor's operations in the market in Egypt and to influence strategic business decisions. Following the decision by Glovo to exit the market in Egypt, despite having acquired a 70-80 per cent market share in the highly competitive national food delivery market, the Competition Authority intervened and, in its investigation, found that Delivery Hero had used its minority shareholding rights in a manner that had led to the elimination of effective

competition.⁸ Delivery Hero required Glovo to exit the market in Egypt, clearing the market for its other subsidiary Otlob. The intervention by the Competition Authority led to the return of Glovo to the market as a competitor, preserving the jobs of around 3,000 employees, while allowing for more space for new competitors to grow.

19. The Competition Commission of Indonesia has dealt with two competition cases in the digital market, one on discriminatory practices and vertical integration by Grab and one on the blocking of Telkom by Netflix.

20. The Competition Commission of Pakistan reviewed the Careem and Uber merger case in 2019, given the large market share of Careem in Pakistan and the amount of consumer data possessed by the company. The Competition Commission imposed two conditions in clearing the merger, namely, that Uber should allow access to consumer data by any new entrant in the market in accordance with reasonable terms and conditions, to avoid any abuse of digital data dominance; and that Uber should allow individual consumers to retrieve their personal data and switch to another platform, thereby encouraging multihoming. The Competition Commission has reviewed other cases relevant to digital markets and data, including, in 2018, the investment by Ant Group in the Telenor Microfinance Bank and the acquisition by Alibaba of Daraz, an online shopping platform also operating in other countries in South Asia.

21. In the Russian Federation, in 2017, the Federal Antimonopoly Service conducted an investigation into possible anticompetitive practices by Google, concluding that Google had abused its dominant position in the pre-installed application market; to restore competition, Google was obliged to revise its contracts with mobile device manufacturers to exclude anticompetitive requirements that restricted the installation of the applications and services of other developers.⁹ The Federal Antimonopoly Service has also issued a ruling against Apple that established abuse of a dominant position, imposing remedies that required the company to remove provisions giving it the right to reject third-party applications in its store for any reason; and ensured that in-house applications would not take precedence over third-party applications.

22. The Competition Authority of Turkey reported that the number of cases brought before it and the resulting investigations in digital markets had been increasing in the last 10 years and currently made up a significant part of its enforcement workload. The Authority has adopted three decisions in digital markets in the last three years, of which two involved Google, and has five ongoing investigations into digital platforms, of which two involve Google and three involve local platforms.

23. These cases show that competition authorities in many developing countries and emerging economies have been actively dealing with anticompetitive practices and mergers and acquisitions involving digital platforms, despite some challenges. In some cases, they have been innovative in finding remedies that will keep the respective markets competitive, for example, the review by the Competition Authority of Egypt of the acquisition of Careem by Uber, following which the Authority required the incumbent to share data with new entrants to maintain competition in the market. Competition authorities in developing countries are adapting existing tools and designing remedies to address the realities of digital markets.

24. Competition authorities in developed countries have continued to use their enforcement powers against large technology companies. Some, after a long period of non-action, have begun to initiate competition investigations into digital platforms. For example, in the United States, in October 2020, the Department of Justice and 11 state attorneys general initiated an antitrust lawsuit against Google, alleging that Google had unlawfully maintained monopolies through anticompetitive practices in the search and search advertising markets, which is the first enforcement action by the United States against a large technology company under the Sherman Act since the case against Microsoft in 1998.¹⁰ The Federal Trade Commission has aimed to act against the potential

⁸ See <https://www.menabytes.com/eca-glovo-delivery-hero>.

⁹ See <http://en.fas.gov.ru/press-center/news/detail.html?id=50028>.

¹⁰ See <https://www.competitionpolicyinternational.com/too-big-not-to-fail-googles-antitrust-woes/>.

abuse of market power by large platforms that attempts to eliminate competition in digital markets by inhibiting entry and removing competitive threats that may come from promising start-ups. To help deepen understanding of the acquisition activity of large technology firms and whether such acquisitions are potentially anticompetitive and eliminate nascent or potential competitors, in February 2020, the Federal Trade Commission issued special orders under section 6 (b) of the Federal Trade Commission Act to five large technology firms, namely Alphabet, Amazon, Apple, Facebook and Microsoft, requiring them to provide information about prior acquisitions not reported to the antitrust authorities, including information and documents on the terms, scope, structure and purpose of each transaction.¹¹ In December 2020, the Federal Trade Commission filed a complaint against Facebook following an investigation in cooperation with a coalition of the attorneys general of 46 states, the District of Columbia and Guam, alleging that Facebook “is illegally maintaining its personal social networking monopoly through a years-long course of anticompetitive conduct” and that it had engaged in a systematic strategy to eliminate threats to its monopoly, including through acquisitions and the imposition of anticompetitive conditions on software developers, a course of conduct that “harms competition, leaves consumers with few choices for personal social networking and deprives advertisers of the benefits of competition”; the Commission is seeking a permanent injunction in federal court that could require, among others, “divestitures of assets, including Instagram and Whatsapp; prohibit Facebook from imposing anticompetitive conditions on software developers; and require Facebook to seek prior notice and approval for future mergers and acquisitions”.¹²

C. Legislative and regulatory initiatives by competition authorities involving digital platforms

25. Competition authorities have adopted regulatory and other initiatives to deal with competition issues in digital markets. This section provides an overview of amendments to competition laws to be able to address the new business models of the digital economy; new regulations for digital platforms; and other, softer approaches such as guidelines and/or market studies that have recently begun to be used worldwide.

1. Amendments to competition laws to adjust to digital market features

26. Some Governments have amended or are planning to amend their competition laws to better capture anticompetitive practices in digital markets, for example, by introducing and defining new relevant concepts.

27. In Europe, the first legislative revision to address competition concerns involving digital platforms was undertaken in Germany. The Federal Cartel Office has been dealing with competition issues in this field and the aim of restoring and protecting competition in digital markets may be seen in recent decisions taken following investigations into Amazon, Apple and Facebook.¹³ In September 2020, Germany approved the tenth amendment to the competition law, to create a new framework for addressing the digital economy and related competition issues, which entered into force in January 2021.¹⁴ This digitalization act introduces a new category of companies, namely, undertakings of

¹¹ See <https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies>.

¹² See <https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization>.

¹³ See https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/17_07_2019_Amazon.html, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/19_01_2017_audible.html and https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html.

¹⁴ Germany, Federal Cartel Office, 2020, Bundeskartellamt welcomes Economic Affairs Ministry’s plans to modernize competition law, 25 February.

paramount significance for competition across markets, which are prohibited from engaging in specific abusive practices. Section 19 (a) empowers the Federal Cartel Office to intervene at an early stage in cases where competition is threatened by this new category of companies. The Office will be able to prohibit certain types of conduct by gatekeeper platforms, such as self-preferencing a platform's own services or preventing third companies from entering the market by denying them access to specific data. The amendment also adds new criteria to be considered in the assessment of market power, namely, access to data relevant for competition; and the intermediation power of a digital platform. The Office is now empowered to order large online platforms to grant access to data in favour of firms dependent on them, in return for adequate compensation, and the amendment ensures the effectiveness of this provision by shortening the legal process. Appeals against Federal Cartel Office decisions on the basis of section 19 (a) can now bypass the Düsseldorf Higher Regional Court, the court of first instance in all other competition law proceedings, and be brought directly before the Federal Court of Justice.¹⁵

28. Developing countries and emerging economies have also amended legislation to regulate digital platforms, although as at February 2021, these had not yet entered into force. For example, China aims to revise its competition law to increase the scrutiny of online platforms. In January 2020, the State Administration for Market Regulation, the competition authority, issued a draft amendment to the competition law that included criteria for the consideration of abuse of dominance in digital markets, such as network effects, economies of scale, lock-in effects and the ability to acquire and process relevant data.¹⁶ In the Russian Federation, the national digital economy programme has led to the drafting of an amendment to the competition law, to include new concepts such as digital platforms and network effects and new approaches to dealing with anticompetitive practices in digital markets.¹⁷

2. New regulations for digital platforms

29. Some jurisdictions, rather than amending competition law, have chosen to develop new regulations specific to digital platforms. The European Commission, one of the most proactive authorities with regard to digital platforms in terms of both enforcement and regulatory reforms, adopted regulation 2019/1150 on promoting fairness and transparency for business users of online intermediation services, which entered into force in the European Union in July 2019.¹⁸ To complement this regulation and facilitate its implementation, as well as compliance by digital platforms, in December 2020, the European Commission adopted guidelines on ranking transparency that aim to assist digital platforms in applying the requirements of regulation 2019/1150 and help optimize the manner in which the main parameters determining rankings are identified and presented to business and corporate website users.¹⁹ The European Commission is also developing a new competition tool to address gaps in the current European Union competition rules and allow for timely and effective intervention with regard to structural competition problems across markets.²⁰ The new tool is expected to be similar to the market investigation tool of the Competition and Markets Authority of the United Kingdom of Great Britain and Northern Ireland and to allow the European Commission to study markets more broadly, collect evidence and conduct informal consultations with market actors. Furthermore, the European Commission has prepared an ex ante regulation for gatekeeper platforms, namely, a digital markets act, which defines the criteria for a platform to be considered a gatekeeper and holds such platforms responsible in digital markets by setting out common rules,

¹⁵ See https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB%20Novelle.html.

¹⁶ See https://res.cloudinary.com/gcr-usa/image/upload/v1578304424/ChinaDraftAMLAmdendment_untimm.pdf and <https://www.cnbc.com/2020/11/12/morgan-stanley-chinas-draft-anti-monopoly-rules-impact-on-internet-firms.html>.

¹⁷ See <http://en.fas.gov.ru/documents/documentdetails.html?id=15345>.

¹⁸ See <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019R1150>.

¹⁹ See <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020XC1208%2801%29>.

²⁰ See https://ec.europa.eu/competition/consultations/2020_new_comp_tool/index_en.html.

including on the prohibition of self-preferencing by such platforms, which compete with independent traders on their own platforms, and requiring such platforms to not prevent users from uninstalling any pre-installed software or application. To ensure the effectiveness of the new rules, the draft legislation foresees sanctions in cases of non-compliance, with fines of up to 10 per cent of a company's total worldwide annual turnover and, in the case of systematic infringements, the imposition of additional remedies, including structural remedies such as divestiture or break up of a business.²¹

30. Japan is adopting specific regulations aimed at regulating digital platforms. In February 2021, Japan enacted the Act on Improving Transparency and Fairness of Digital Platforms, to improve transparency and fairness in transactions, noting that the regulations should not interfere with digital innovation. Article 3 on basic principles states that digital platforms contribute to an increase in benefits for users and play an important role in achieving sustainable economic development in the country and, therefore, any measures for improving the transparency and fairness of digital platforms should be implemented primarily based on voluntary and proactive initiatives by the platforms themselves and that involvement by the Government or through other regulations should be kept to a minimum so that digital platforms can adequately exercise their originality and ingenuity. The Act requires digital platforms to: (a) disclose relevant information, including their terms and conditions, and pre-notify when any changes are made; (b) establish appropriate internal procedures to ensure the fairness of transactions or to settle disputes with users; and (c) submit annual self-assessment reports regarding the status of (a) and (b) to the Minister of Economy, Trade and Industry. Failure to comply with this reporting obligation is subject to fines. The Minister reviews and evaluates the reports, discloses evaluation results and, if required, has the authority to issue recommendations and public announcements; if there is any suspicion of a violation of the competition law, it is referred to the Japan Fair Trade Commission. The Act was based on discussions held at the Headquarters for Digital Market Competition, set up within the Cabinet in September 2019, involving the Japan Fair Trade Commission, the Ministry of Economy, Trade, and Industry and the Ministry of Internal Affairs and Communications.²²

3. Guidelines

31. Given the cumbersome and lengthy process of legislative amendments, in the last several years, many competition authorities have opted to issue guidelines to set out rules and clarify their approaches towards certain types of conduct by digital platforms.

32. In China, in February 2021, the State Administration for Market Regulation issued antitrust guidelines on the platform economy, to prevent and stop monopolistic behaviour by online platforms and guide them to comply with national competition law. The principles in the guidelines are coherent with the proposed amendment to the competition law. The guidelines illustrate anticompetitive practices related to digital platforms, such as anticompetitive agreements using data and algorithms on platforms to collect or exchange sensitive information. In addition, the guidelines include factors to be taken into account in establishing the dominant market position of a digital platform and conduct that may be considered abuse of dominance, such as refusal to deal without justification. The guidelines also refer to merger reviews by China with regard to online platforms. Remedies may include the divestiture of data, the termination of exclusive agreements and the modification of platform rules or algorithms.²³

33. Japan has been clarifying its approach to competition concerns in digital markets under the current competition law regime by publicizing relevant guidelines and reports, as well as by adopting specific regulations for digital platforms.²⁴

²¹ See https://ec.europa.eu/cyprus/news_20201216_2_en.

²² See <https://elaws.e-gov.go.jp/document?lawid=502AC0000000038> and https://www.kantei.go.jp/jp/singi/digitalmarket/pdf_e/documents_200218.pdf.

²³ See http://gkml.samr.gov.cn/nsjg/fldj/202102/t20210207_325967.html.

²⁴ See <https://www.jftc.go.jp/en/pressreleases/yearly-2019/December/191217.html>, https://www.jftc.go.jp/en/pressreleases/yearly-2019/December/191217_DP.html, <https://www.jftc.go.jp/en/pressreleases/yearly-2017/June/170606.html>,

34. In the Russian Federation, in advance of the enactment of an amendment to the competition law, and to complement the amendment, the Federal Antimonopoly Service issued, under the current competition law, recommendations on practices in the use of information technologies in trade, including those related to the use of price algorithms (2019) and recommendations on the detection and prevention of cartels and other anticompetitive agreements in the digital economy (2020), which introduced and defined new terms and concepts and described legally acceptable and unacceptable business practices in digital markets.²⁵

4. Market studies

35. As a softer approach compared with amending or introducing regulations, competition authorities in developing countries, including Brazil, Colombia, Kenya, Indonesia and Turkey, as well as in developed countries and jurisdictions, including Australia, the United States, the United Kingdom and the European Union, have conducted market studies and published reports on competition in digital markets. Such studies and reports examine business practices and competition concerns involving dominant digital platforms and propose solutions for how to deal with such issues.

36. Whether Governments opt to amend competition laws or to adopt new regulations or guidelines, any legislative or regulatory initiative concerning digital platforms needs to be procompetitive and facilitate new entries. For example, the Superintendence of Industry and Commerce of Colombia has emphasized the role of competition advocacy as key in developing procompetitive regulations, to create a culture of compliance with competition rules among digital businesses and highlight the benefits of competition to young people. The Superintendence has conducted a market study on digital matching platforms for tourist accommodation services and also engaged in advocacy activities with other branches of the Government, regulators and lawmakers.

37. The Competition Commission of Indonesia has undertaken market studies on the digital economy in Indonesia (2017) and prepared a policy brief on digital platforms (2019).²⁶

38. The Competition Authority of Kenya has prioritized enforcement in digital markets as one of its strategic areas of focus and conducted studies of digital markets, in particular in the financial sector.

39. In Pakistan, the recent increase in data-driven mergers and acquisitions in digital markets has led to renewed interest in the mandates of different regulators with regard to such markets. The Competition Commission has suggested a collaborative approach between competition authorities and relevant sectoral regulators, to formulate a regulatory regime that adjusts to the dynamism of digital markets rather than regulating different aspects of such markets through different institutions. However, this requires a significant reorientation of organizational mandates and strategic objectives, as well as extensive consultations to revise existing legal frameworks, which requires significant political will, effort and time. The Competition Commission has been engaged in initiatives launched by Pakistan to ensure open digital markets and assisted the Government in drafting the national e-commerce policy framework.²⁷ In 2020, the Competition Commission submitted an addendum to the framework that defines the possible competition and consumer protection concerns that can arise in e-commerce. The Commission has also begun to participate in meetings of the National Telecommunications and Information Security Board, which bring together key stakeholders to discuss the importance of personal data protection and the role of platforms as data collectors and data processors, an important initiative since the business models of digital platforms affect many areas, such as competition, consumer

<https://www.jftc.go.jp/en/pressreleases/yearly-2019/October/191031.html> and
<https://www.jftc.go.jp/en/pressreleases/yearly-2020/April/200428.html>.

²⁵ See <https://fas.gov.ru/documents/1-16fb9764-b5c1-48fe-8088-9f3f02144aea> and
<https://fas.gov.ru/news/30139>.

²⁶ See <https://eng.kppu.go.id/report/> and https://eng.kppu.go.id/wp-content/uploads/DigPlatBrief_FINAL-pdf.pdf.

²⁷ See <https://www.commerce.gov.pk/ecommerce-policy-2019/>.

protection and data collection and protection. The digital economy requires a holistic policy approach by sectoral regulators, to address its multidimensional nature.

40. In Peru, the National Institute for the Defence of Competition and Protection of Intellectual Property is conducting a market study on payment systems to identify opportunities for improvement in the competition conditions in this market and to propose regulatory reforms. The study explores the use of digital means of payment, which are key to achieving digital and financial inclusion.

41. The Competition Authority of Turkey reported on recent work on a report on digitalization and competition policy, a recent initiative to keep up to date with national and international developments in the digital economy, to shape competition policy in the digital era. The report will elaborate on competition policy goals in the digital era and the overarching principles for shaping competition law enforcement in digital markets. In 2020, the Authority initiated a sectoral inquiry into e-commerce platforms that aims to look into competitive outcomes and anticompetitive concerns raised by e-commerce.

D. Considerations for inclusive economic recovery

42. Online platforms provide an opportunity for microenterprises and small and medium-sized enterprises to access markets. In the context of inclusive economic recovery from the crisis triggered by the pandemic, supporting market access by such enterprises is more crucial than ever, in particular in developing countries. Competition authorities need to ensure fair competition in online marketplaces and that the contractual relationship between online marketplaces and microenterprises and small and medium-sized enterprises is fair. For example, in the Republic of Korea, the Act on the Regulation of Terms and Conditions applies to contracts between businesses and such a regulation could be used to address unfair terms and conditions imposed on traders by online platforms. The Republic of Korea Fair Trade Commission regulates unfair business practices, such as the abuse of a superior bargaining position, by non-dominant undertakings. The national competition law regulates both traditional competition violations such as abuse of dominance, cartels and anticompetitive mergers, and unfair business practices. The main difference between cases of abuse of dominance and unfair business practices is that, in the latter, the Fair Trade Commission does not have to prove that the undertaking concerned is dominant in a relevant market. The Monopoly Regulation and Fair Trade Act stipulates an exhaustive list of unfair business practices, including trading with a certain transacting partner by unfairly taking advantage of his or her position in trade (article 23 (4)).²⁸ This provision can be invoked to sanction the abuse of a superior bargaining position by online platforms. The article aims to deal with exploitative conduct by a firm against its trading partner by way of exerting a superior bargaining position. Competition authorities can use such provisions to address unfair conduct by online platforms, such as imposing unfair contract terms or unilaterally increasing commission rates or changing contract terms.

43. The greatest challenge in many developing countries in dealing with large digital platforms appears to be in the sizes of their markets. Large developing or emerging economies are important markets for large technology platforms and may be in a better position to impose rules and sanctions on large platforms. In contrast, most developing countries have relatively smaller markets and, therefore, it may be more difficult for these countries to impose stricter rules or sanctions on global platforms. This challenge may be overcome by seeking solutions at the regional level. For example, several regional economic organizations have adopted competition rules, such as the Common Market for Eastern and Southern Africa, the Economic and Monetary Community of Central Africa, the Economic Community of West African States, the Eurasian Economic Union and the West African Economic and Monetary Union. In Africa, such a solution could be undertaken under the African Continental Free Trade Area. In Asia, the Association of Southeast Asian Nations could reinforce its regional competition initiatives and move

²⁸ See https://www.ftc.go.kr/eng/cop/bbs/selectBoardList.do?key=2835&bbsId=BBSMSTR_000000003631&bbsTyCode=BBST11.

towards a regional competition regime. In Latin America, the regional competition rules within the Andean Community could be revitalized.

III. Comparative analysis of recent initiatives

44. This chapter provides a comparative analysis of initiatives taken by Governments worldwide.

A. New or amended legal and regulatory frameworks

45. As described in chapter II, many Governments have been making proactive efforts to deal with competition issues in the digital economy. Among these, there is a worldwide trend to adopt specific new regulations or to amend competition laws targeting such issues, as well as to clarify or adjust existing competition laws. This trend has been observed not only in developed countries but also in some developing countries and emerging economies. For example, China, Germany and the Russian Federation have amended their competition laws to address competition issues that have emerged in digital markets. Such amendments have attributed new powers to competition authorities, for example, the Federal Cartel Office may now intervene at an early stage in cases. The amendments have also introduced new categories of companies such as gatekeeper platforms or undertakings of paramount significance for competition across markets. Such companies would be subjected to greater scrutiny and be given more responsibilities to maintain the market in which they operate competitive and open to potential entry. The recent amendments have listed practices that may raise competition concerns. They have also extended or clarified the scope of the application of competition laws in digital markets.

46. Japan and the European Union have prepared new ex ante regulations for online platforms. Japan has prescribed new obligations, such as on the disclosure of information. In the European Union, the digital markets act may be seen as an extension of or a complement to the existing competition law regime, as it identifies gatekeeper platforms and prohibits certain practices by these platforms, including self-preferencing and preventing users from uninstalling any pre-installed software or application, with sanctions in the case of violations.

47. Of note, the development of such new regulations involves public bodies other than competition authorities and goes beyond the competence of competition authorities, with implications for consumers and their privacy. It means that Governments intend to regulate online platforms not only due to competition concerns but also other policy considerations such as those related to consumer protection, data protection and digital industrial policy. In Japan, the drafting process of the Act on Improving Transparency and Fairness of Digital Platforms was led by the Cabinet in cooperation with the Japan Fair Trade Commission, the Ministry of Economy, Trade, and Industry and the Ministry of Internal Affairs and Communications. In Germany, where the competition law was amended rather than new regulations introduced, the draft was prepared by the Federal Ministry for Economic Affairs and Energy in consultation with the Federal Cartel Office.²⁹ The drafting and implementation of the digital markets act in the European Union involves, besides competition, policy areas such as internal markets, industry, entrepreneurship and small and medium-sized enterprises, communications networks and technology.

48. Compared with regulations and guidelines, amendments to laws confer more powers to competition authorities and establish a clearer line between acceptable and unacceptable business practices, providing legal certainty for businesses. Legal reforms, however, take time and require strong advocacy efforts from competition authorities, as the Government and legislative bodies need to be convinced of the need to amend the law. As in Germany, for example, academia need to be involved and to conduct research and studies to prove the inadequacy of the existing law and therefore the need to amend it. With regard to regulations, some of the new ex ante regulations designed for digital platforms are still

²⁹ Germany, Federal Cartel Office, 2020.

based on self-regulation by such platforms. For example, in Japan, the Act on Improving Transparency and Fairness of Digital Platforms requires platforms to conduct self-assessments, rather than imposing sanctions on certain business practices. This is based on the idea that the regulations should be implemented through the voluntary initiatives of digital platforms so that they can adequately exercise their originality and ingenuity. Other regimes go beyond self-regulation or assessment and envisage sanctions, such as the digital markets act in the European Union. The choice between legal reforms or a softer approach to regulating digital platforms depends on the legal tradition and culture in a State.

B. A softer approach: Market studies

49. Many competition authorities have conducted market studies and research on specific digital markets and relevant competition issues. This corresponds to a softer approach compared with legal reform and the adoption of new regulations. The issuance of guidelines about digital platforms, observed worldwide, may also be regarded as part of such a softer approach, often following the undertaking of market studies. Such studies are useful in better understanding the functioning of digital platforms and identifying competition issues in related markets. They raise awareness among other governmental bodies, digital platforms, businesses and consumers of the implications of certain practices that may infringe competition law and even consumer protection and data protection rules. In this way, they help prepare the ground for the harder approach, that is, the adaptation of legal and regulatory frameworks to address the identified challenges, not only in the area of competition but also consumer protection and data protection. In this regard, it would be particularly beneficial for competition authorities to exchange and examine various experiences, explore common challenges and gain insights from each other. Competition authorities would benefit from access to market studies and reports by other competition authorities. This might inspire them to find their own adapted solutions to the challenges they face.

IV. Conclusion and recommendations for competition authorities in developing countries

50. There is an increasing understanding of the shortcomings of relying solely on competition law enforcement to deal with competition concerns raised by digital platforms. In addition, there is a recognized need to regulate such platforms *ex ante*, to address issues before they arise, that is, to pre-empt certain anticompetitive practices rather than wait until they cause competition-related harm in the market and attempt to fix them *ex post*, in particular as the latter requires spending large amounts of time and resources.

51. To address competition issues in digital markets, some jurisdictions have amended their competition laws, introducing and defining new concepts or introducing new enforcement tools, to address gaps in legal frameworks or enforcement and adjust to the business models and particularities of digital platforms. Other jurisdictions have adopted regulations or guidelines to regulate certain types of conduct by digital platforms that affect competition and consumers, such as self-preferencing.

52. In choosing whether to amend competition law or adopt regulations or guidelines the decision in each State depends on the legal system, resources and size of the economy. Legal reforms require some groundwork to identify gaps, including market studies, research and enforcement experience, and may involve lengthy legislative procedures. However, in return, legislative reforms can provide more legal certainty and confer additional powers to competition authorities. Guidelines about digital platforms and digital markets, as a softer approach, may be easier to develop and require less time and effort to adopt. However, guidelines may require self-regulation by digital platforms.

53. Competition authorities in developing countries have been active in conducting market studies of digital platforms. Such studies can be a useful tool in better understanding digital markets, how online platforms function and the implications of certain conduct for competition, consumers and privacy. Such studies can help identify competition and

consumer protection concerns in the market and develop appropriate solutions to address them and may eventually be conducive to legislative or regulatory reforms.

54. Whether initiating reforms to existing competition laws or adopting new regulations or guidelines, developing countries need to create fair and open digital markets to support an inclusive economic recovery from the pandemic and contribute to achieving inclusive economic development goals. Online platforms provide market access opportunities to local firms and microenterprises and small and medium-sized enterprises. Competition authorities in developing countries need to adopt rules and regulations to ensure that such markets are and remain fair and open. They need to advocate for fair terms and conditions for such enterprises by working with large platforms to ensure that they do not abuse their bargaining position or market power with regard to smaller firms. Competition authorities also need to raise awareness among such enterprises of existing and new competition rules and regulations. Such enterprises may not be aware that certain practices of platforms infringe competition laws and that they can file complaints with the competition authority against such conduct.

55. The need to regulate online platforms and digital markets, taking into account various policy perspectives, including competition, consumer protection and privacy, is increasingly recognized. It is equally important not to deter innovation in digital markets and to keep them open to competition and innovation from new entrants. The practices of digital platforms have implications not only for competition but also for consumers and their privacy. This requires a holistic approach whereby competition, consumer protection and data protection authorities work in close cooperation.

56. The regulations and competition law amendments mentioned in this note have either recently been introduced or will soon be enacted. Therefore, it is crucial for competition authorities to observe their impacts on the conduct of digital platforms, as well as on new entries, competition and innovation in digital markets in the years following their implementation.

57. Due to the global and cross-border nature of digital platforms, international cooperation is becoming more important in competition law enforcement, as emphasized by some competition authorities in their replies to the UNCTAD questionnaire and at international forums, including UNCTAD, the International Competition Network and the Organisation for Economic Co-operation and Development.

58. Finally, regional cooperation within existing regional economic organizations could help members in seeking collective solutions to common challenges, in particular among developing countries considered small markets for large digital platforms. In Africa, the African Continental Free Trade Area is the appropriate forum to act together, once the protocol on competition to the African Continental Free Trade Area Agreement has entered into force. In Asia, the Association of Southeast Asian Nations could reinforce its regional competition initiatives and move towards a regional competition regime. In central and west Asia, the Eurasian Economic Union adopted, in 2015, a legal and institutional framework for regional competition law enforcement and, in 2020, UNCTAD provided an assessment of the competition rules and regulations. In Latin America, the regional competition rules within the Andean Community could be revitalized.



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Corrigendum

Paragraph 19

For the existing text *substitute*

19. The Competition Commission of Indonesia has dealt with two competition cases in the digital market, one on discriminatory practices and vertical integration by Grab and one on the blocking of Netflix by Telkom.

