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Enforcing competition law in digital markets and ecosystems: Policy challenges and options

Note by the UNCTAD secretariat

Summary

The digital economy continues to have an increased role in economic development and has attracted the attention of competition authorities worldwide due to the various types of competition issues related to its operability. The challenges derived from the significant economic power of large platforms are of concern to Governments and competition authorities.

The present note provides information on recent developments, including law enforcement cases against abuses of market power and merger control cases, legal amendments to adapt to anticompetitive practices in the digital ecosystem and other types of initiatives, namely soft law instruments, highlighting challenges faced by Governments and competition authorities in this area. With regard to developing countries, enhancing regional and international cooperation is recommended, to strengthen the actions of competition authorities in a more coordinated manner in order to deal with challenges in digital markets.



I. Introduction

1. The Intergovernmental Group of Experts on Competition Law and Policy, at its twenty-first session, requested the UNCTAD secretariat to prepare, for the consideration of the Intergovernmental Group of Experts at its twenty-second session, a report as background documentation on enforcing competition law in digital markets and ecosystems: policy challenges and options.¹

2. In the past two decades, there has been a transformation driven by the rapid development of the digital economy. Digital platforms have grown from technological developments and given rise to new business models and novel products and services.² The increasing use of online services during the pandemic further allowed digital platforms to grow larger and more powerful.³ This transformation entails challenges and risks, for example due to high levels of concentration in digital markets, embodied by global big technology companies with high market shares and significant market power worldwide.⁴

3. Competition authorities have identified the risks posed to competition by digital platforms and digital ecosystems and are making efforts to address them.⁵ They are addressing the challenge of finding a balance between mitigating the detrimental effects of conduct that limits competition in the digital sector and fostering innovation by digital platforms, given that high levels of market concentration require a combination of instruments. With regard to abuse of dominance, many law enforcement cases have been related to exclusionary conduct, which creates or heightens barriers to entry and drives competitors out of a market.⁶ There is also a new trend involving the exploitative abuse of users by dominant platforms with regard to user data.⁷

4. Competition authorities face an increasingly challenging task in predicting the evolution of such markets in order to conduct merger control, as they often exhibit high entry and exit rates, coupled with ongoing innovations that give rise to entirely new markets. In particular, as digital markets become more concentrated due to the growth of big technology companies, concerns are raised about “killer acquisitions”, that is, the use of mergers to eliminate the possibility of innovation through discontinuing the innovation projects of other firms and pre-empting future competition.⁸ Such acquisitions may cause consumer harm due to anticompetitive amalgamations of data, increased prices and reduced entry opportunities.⁹

5. Governments and competition authorities worldwide have faced difficulties in using traditional competition regimes and enforcement tools to address competition concerns in the digital markets. Moreover, authorities need to consider the effects that digitalization and the significant power of big platforms have on the social, economic and financial stability of the system. This implies considering objectives that are more ambitious than market power and market efficiencies, and taking into account social and economic development, to curb economic power driven by economic efficiency considerations, as well as social

¹ TD/B/C.I/CLP/72.

² TD/B/C.I/CLP/54; UNCTAD, 2019, Digital Economy Report 2019: Value Creation and Capture – Implications for Developing Countries (United Nations publication, Sales No. E.19.II.D.17, Geneva).

³ TD/B/C.I/CLP/57.

⁴ In 2009, the top five global companies by market capitalization did not include any technology companies; in 2023, such companies constituted four of the top five; see TD/B/C.I/CLP/54.

⁵ Lianos I, 2022, Reorienting competition law, *Journal of Antitrust Enforcement*, 10(1):1–31.

⁶ See <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2020/07/UCWG-Report-on-dominance-in-digital-markets.pdf>; and <https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets.htm>.

Notes: All websites referred to in footnotes were accessed in April 2024.

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⁷ Exploitative abuse is where a dominant firm raises prices or lowers quality or variety or otherwise acts in a way that enriches itself in a way it could not in a competitive market; TD/B/COM.2/CLP/66.

⁸ See <https://www.oecd.org/competition/theories-of-harm-for-digital-mergers.htm>.

⁹ Motta M and Peitz M, 2021, Big tech mergers, *Information Economics and Policy*, 54.

justice.¹⁰ Competition authorities should also interact with sectoral regulators in order to jointly address the challenges brought about by the digital revolution.

6. Competition authorities in developing countries face additional challenges in enforcing competition law in digital markets. Many young and small authorities have limited resources and experience with which to analyse complex digital markets and, therefore, need to improve capabilities to enforce not only traditional competition laws but, simultaneously, respond to the new challenges brought about by digital markets.

7. Discussions in this regard have been held at sessions of the Intergovernmental Group of Experts on Competition Law and Policy and at 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. UNCTAD has been working on the issue of competition in the digital economy; conducting research in collaboration with academia, to analyse different competition-related responses to the impacts of digital platforms in markets;¹¹ and gathering information on the use of competition law or other legislative instruments, on new legislation and regulations and on soft-law instruments in different jurisdictions. For example, in a recent study, UNCTAD details recent initiatives, including enforcement cases and legislative measures taken by competition authorities worldwide.¹²

8. Building on this work and responses from member States to an UNCTAD questionnaire,¹³ in the present note, a review of key enforcement cases is provided, in chapter II, as well as of challenges faced, in chapter III. In chapter IV, policy responses through new regulations and soft law approaches, along with the role of international forums, are discussed, to inform competition authorities.

II. Enforcing competition law in digital markets

A. Antitrust law

9. Several characteristics are observed in analysing enforcement cases related to abuse of dominance in digital markets. With regard to market definition, multiple markets are closely related to each other and the conduct of companies involves multiple markets; such interconnected markets may be referred to as an ecosystem.¹⁴ Moreover, it has become insufficient to use price changes as an exclusive tool in market definitions because of the multisided nature of digital markets, whereby users are often not charged and data such as personal information is considered resources. Because of these characteristics, there is an increased need for competition authorities to consider various factors such as the amount of user data and network effects, in addition to market share standards, in determining market dominance.¹⁵ Competition authorities are increasingly aware of these issues in addressing abuse of dominance by big technology companies (table 1).

¹⁰ See https://www.ucl.ac.uk/cles/sites/cles/files/cles_6-2019_final.pdf.

¹¹ TD/B/C.I/CLP/54; TD/B/C.I/CLP/57; TD/RBP/CONF.9/4; see <https://unctad.org/publication/competition-and-consumer-protection-policies-inclusive-development-digital-era>.

¹² UNCTAD, 2023, *Global Competition Law and Policy Approaches to Digital Markets* (United Nations publication, Sales No. E.24.II.D.5, Geneva).

¹³ Responses to the UNCTAD questionnaire were received from Brazil, El Salvador, India, Japan, Mexico, the Philippines, the Republic of Korea and Türkiye.

¹⁴ Lianos, 2022.

¹⁵ For example, anticompetitive foreclosure is often used to describe a situation wherein conduct seeks to exclude competitors by hindering entry or causing them to exit the market, allowing the dominant company undue influence, to its own advantage and to the detriment of competition and consumer welfare.

Table 1
Competition law enforcement: Abuse of dominance

<i>Type of abuse</i>	<i>Example</i>
Exploitative data collection	Germany: Decision concerning Facebook, 2019 – The competition authority ordered Facebook to limit data collection without users’ voluntary consent, highlighting that exploitative personal data collection could constitute an abuse of dominance in a private social network market
Tying/ exclusive dealing	Egypt: Decision concerning a food ordering and delivery platform, 2022 – The Competition Authority found an abuse of dominance by a food ordering and delivery platform, stating that the company engaged in exclusive dealing in order to create barriers to entry and tying practices that forced restaurants listed on the platform to use its delivery service India: Decision against Alphabet, 2022 – The Competition Commission found several abuses of dominance by Alphabet related to the application stores market for the Android operating system in India and the market for applications facilitating payments through the relevant market in India, and decided that the collection of data on users through the requirement for developers to use the billing system of Alphabet was a potential form of abuse of dominance
Self-preferencing	Republic of Korea: Decision concerning Kakao, 2023 – Kakao operated a mobility platform, with 90 per cent of the market share, and discriminated against non-franchise taxis through self-preferencing by using algorithms to allocate rides. The Fair Trade Commission stated that leveraging market power through self-preferencing had raised the market share of Kakao among taxi services from 14 to 74 per cent in two years, raising concerns about the exclusion of competitors and price increases Türkiye: Decision concerning Google online shopping comparison services, 2021 – The Competition Authority decided that Google had abused its dominant position with algorithm updates and by means of positioning text-based advertising in a way that made their nature as advertisements unclear
Unfair trading conditions	European Commission: Decision concerning Apple, March 2024 – The European Commission decided to sanction Apple for applying restrictions on application developers that prevented them from informing Apple operating system users about alternative and cheaper music subscription services available outside of the application (i.e. antisteering provisions)

Source: UNCTAD. See UNCTAD, 2023; <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf>; and <https://www.cci.gov.in/antitrust/orders/details/1072/0>; and https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1161.

10. Most relevant cases relate to self-preferencing behaviours (Republic of Korea; Türkiye), exclusivity agreements (India), most favoured nation clauses¹⁶ in food deliveries (Egypt), abusive use of personal data (Germany) or unfair trading conditions (European Commission). Competition authorities focus on the exclusionary effects of such conduct, aimed at strengthening the market power of the incumbent company and hindering the entry

¹⁶ A promise by one party in a vertical relationship, the supplier, to treat the buyer as well as it treats its best, most favoured customer; see <https://www.ucl.ac.uk/cles/sites/cles/files/cles-1-2021.pdf>.

of new competitors. However, in Germany, the Competition Authority carried out an analysis of exploitative abuse by Amazon in relation to personal data and the decision was appealed before the higher regional court of Düsseldorf, which raised a preliminary question to the Court of Justice of the European Union, which decided that the competition authority might take data protection rules into consideration in weighing interests in decisions under competition law.¹⁷ In the Apple case, the European Commission concluded that the antisteering provisions amounted to unfair trading conditions and negatively affected the interests of users of the operating system; the provisions were neither necessary nor proportionate for the protection of commercial interests in relation to the application store on Apple mobile devices and negatively affected the interests of users, in breach of article 102 (a) of the Treaty on the Functioning of the European Union prohibiting abuse of dominance.

11. The analysis of the effects of exploitative abusive behaviour on users and consumers should be expanded on when assessing abuse of a dominant position in digital markets, whereas in recent years only exclusionary abuses have generally been prohibited or punished.

B. Merger control

12. In assessing mergers in the digital market, competition authorities focus on preventing the lessening of competition when companies in a vertical or adjacent relationship merge. Merger cases in digital markets require analysis because they often have horizontal, vertical and conglomerate effects across several markets (table 2).

Table 2

Competition law enforcement: Recent merger control cases

<i>Jurisdiction</i>	<i>Case</i>
Japan	Google and Fitbit, 2021 – The Fair Trade Commission approved the merger of Google with Fitbit, which provides mobile health-related services, subject to the implementation of remedies, to ensure competition in vertical relationships, including the provision of Android application programming interfaces to wearable device manufacturers and health-related databases for 10 years.
Mexico	Walmart and Cornershop, 2019 – The competition authority blocked the acquisition by Walmart of Cornershop, a retail platform offering logistical services for supermarkets, stating that the merger would substantially lessen competition through conduct such as refusing to offer the products of Walmart’s competitors on Cornershop or by offering discounts to competitors’ purchasers, using detailed data on consumer behaviour from the platform (In Chile, the National Economic Prosecutor approved the acquisition by Uber Technologies of Cornershop without remedies).
United Kingdom of Great Britain and Northern Ireland and European Union	Microsoft and Activision, 2023 – The Competition and Markets Authority decided that the merger of Microsoft and Activision was anticipated to result in a substantial restriction of competition in the cloud gaming services market, due to vertical effects from input foreclosure. Microsoft restructured the merger, renouncing the

¹⁷ See <https://curia.europa.eu/juris/document/document.jsf?text=&docid=276478&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=846870>.

<i>Jurisdiction</i>	<i>Case</i>
	<p>acquisition of cloud gaming services rights outside Europe for existing Activision desktop computer and console games and new games released by the developer in the next 15 years. Ubisoft, a third-party content supplier, would supply Activision’s gaming content to all cloud gaming services providers, including Microsoft. In October 2023, the Competition and Markets Authority provided clearance for the changed merger. The European Union approved the merger, stating that the transaction was pro-competitive due to Microsoft’s agreement to licence popular Activision games to rival streaming platforms.</p>
United States of America	<p>Visa and Plaid, 2020 – The Department of Justice challenged the proposed acquisition by Visa of Plaid, alleging that the acquisition intended to eliminate the innovative payments platform developed by Plaid; the challenge was dropped after the merger was abandoned.</p> <p>Meta and Within, 2022 – The Federal Trade Commission challenged the merger of Meta with Within, a virtual reality development studio, stating that potential competition was reduced through the choice by Meta of a merger rather than the development of its own innovations (called “reverse killer acquisitions”). The district court declined to grant a preliminary injunction on the grounds that the Federal Trade Commission had shown that the virtual reality fitness application market was highly concentrated but had not proved that there was a reasonable probability that Meta would enter the market independently.</p>

Source: UNCTAD. See <https://www.jftc.go.jp/en/pressreleases/yearly-2021/January/210114r.pdf>; https://www.fne.gob.cl/wp-content/uploads/2020/06/inap2_F217_2020.pdf; https://assets.publishing.service.gov.uk/media/64e3735b4002ee0014560ca5/Final_order_explanatory_note.pdf; <https://www.gov.uk/government/news/microsoft-concession-a-gamechanger-that-will-promote-competition>; https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2705; <https://www.justice.gov/opa/pr/visa-and-plaid-abandon-merger-after-antitrust-division-s-suit-block>; https://www.govinfo.gov/content/pkg/USCOURTS-cand-5_22-cv-04325/pdf/USCOURTS-cand-5_22-cv-04325-1.pdf; and <https://www.ftc.gov/legal-library/browse/cases-proceedings/221-0040-metazuckerbergwithin-matter>. On reverse killer acquisitions, see <https://cepr.org/voxeu/blogs-and-reviews/how-tech-rolls-potential-competition-and-reverse-killer-acquisitions>; and <https://oecdonthellevel.com/2020/11/27/how-tech-rolls-potential-competition-and-reverse-killer-acquisitions>.

13. The Microsoft case shows how the analysis criteria differ between authorities; some are not only concerned with protecting competition in the market but also with promoting innovation as a key element of competitiveness. In this regard, some authorities choose the imposition of remedies prior to approving an operation, such as in the cases in Japan and the United Kingdom, and other authorities choose to prohibit operations when they reinforce the position of the acquiring company, such as in the case in Mexico. In other instances, a merger may be abandoned due to non-acceptance of the conditions or remedies imposed by the competition authority, such as in the case involving Visa in the United States. In such dynamic markets, authorities need to carry out prospective analyses that can meet the legal standards of proof required by the courts, such as in the case involving Meta in the United States.

III. Challenges faced by States in applying competition law and policy in digital markets

14. In responses to the UNCTAD questionnaire, member State competition authorities noted the difficulty of using conventional price-related competition to deal with competition issues in the digital economy. This is mainly due to the characteristics of digital markets, which exhibit limited contestability; once a platform has achieved a prominent position in a digital market, it is difficult for new entrants to displace it. Digital platforms may leverage power to monopolize the markets in which their businesses operate or may develop strategies, including on acquiring potential or emerging rivals, to entrench dominance and control the accessibility and contestability of the markets wherein they operate.

15. Moreover, the characteristics of the digital ecosystem¹⁸ can also lead to various competition law concerns. As noted by the Court of Justice of the European Union in the *Android* case, several markets that make up an ecosystem may overlap or be connected to each other in the digital ecosystem.¹⁹ In such an ecosystem, the operator with the core digital platform can use methods such as self-preferencing or tying to give its services an unfair competitive advantage even if it does not have a dominant position in a particular market, since the ecosystems lock-in users through high switching costs, which makes it easier for core platform operators to leverage their power in adjacent markets; competition authorities should therefore pay more attention to the dynamics of competition within and across platform ecosystems.²⁰ Some researchers note that, beyond policy, the broader challenge is that the current analytical toolkit is ill suited to addressing the nature of the offence, the metrics to measure it or the means to address it. If States focus on the welfare criterion, the status quo may not be seen as problematic. Moreover, the protection of the competitive process, as an alternative to the welfare criterion, has yet to be convincingly articulated in conceptual and theoretical terms. The greater issue is that remedies as traditionally construed have done little to curb competitive excesses. Some proposals therefore consider bolder structural options, such as disaggregating key firms.²¹

16. Methods of addressing problems arising from the market power of digital platforms and ensuring a level playing field differ between States. The objective is to prohibit abusive exclusionary conduct resulting from unfair practices (self-preference, exclusivity, tying and bundling contracts, etc.) and abusive exploitative conduct (using data, restricting privacy, imposing unfair trading conditions, etc.) that directly affect consumers and end users. Some experts suggest a new, more holistic approach to dealing with broader goals, including considering consumer welfare, privacy, inequality and the impact of economic power on society, in the analysis of behaviours in digital markets, as well as the need for greater coordination with other regulators and more international cooperation so that responses in States are coherent.²²

IV. Policy responses in States

17. Competition authorities continue to enforce competition law against anticompetitive practices. Some States have revised the law, adopting new concepts and adjusting merger control standards, or have adopted new legislation to complement existing legal

¹⁸ See Jenny F, 2021, Competition law and digital ecosystems: Learning to walk before we run, *Industrial and Corporate Change*, 30(5):1143–1167; and Kerber W, 2019, Updating competition policy for the digital economy? An analysis of recent reports in Germany, [United Kingdom], [European Union] and Australia, available at <https://ssrn.com/abstract=3469624>.

¹⁹ See <https://curia.europa.eu/juris/documents.jsf?num=T-604/18>.

²⁰ Lianos I and Ivanov A, 2019, Digital Era Competition: A BRICS [Brazil, Russian Federation, India, China, South Africa] View, BRICS Competition Law and Policy Centre.

²¹ Jacobides MG and Lianos I, 2021, Regulating platforms and ecosystems: An introduction, *Industrial and Corporate Change*, 30(5):1131–1142.

²² See <https://www.cepal.org/en/publications/46817-digital-technologies-new-future>.

frameworks. Moreover, new proposals have been made, and different approaches taken, including soft law and market research, to strengthen the powers of competition authorities.

A. Revised competition laws

1. Amendment of antitrust rules

18. Some States have amended competition laws in order to better address practices carried out in digital markets. China, Germany and the Russian Federation have adopted modifications, to provide the competition authority with further means to address competition problems in the market and expand the scope of the law to allow authorities to intervene against possible abuses carried out by digital companies (table 3).

Table 3
Previously amended competition laws

<i>Country and title</i>	<i>Summary</i>
China: Antimonopoly law, amendment 2022	Adding “encouraging innovation” to the legislative goals; prohibiting the abuse of data and algorithms, technologies, platform rules or capital advantages to engage in monopolistic behaviour
Germany: Competition act, tenth amendment, 2021; eleventh amendment, 2023	Prohibiting practices by undertakings of paramount significance for competition across markets; granting further enforcement powers to the competition authority and integrating investigative powers related to the Digital Markets Act into the competition law
Russian Federation: Amendment to federal law on protecting competition, 2023	Introducing new definitions of the terms “digital platform” and “network effect”

Source: UNCTAD. See <https://www.faegredrinker.com/en/insights/publications/2022/7/amendments-to-chinas-anti-monopoly-law-what-has-changed-and-what-to-expect>; https://www.bundeskartellamt.de/EN/Digital_economy/RulesDigital_economy/rulesdigialeconomy_node.html and <https://www.pgplaw.com/analytics-and-brochures/alerts/podpisan-pyatyy-antimonopolnyy-paket/>.

19. Some amendments are intended to broaden the definition of the relevant market and prohibit abuse in order to engage in monopolistic behaviour (China). Other amendments have progressively granted the authority extensive powers to control the activities of digital platforms, using the concept of “paramount significance”, allowing the authority to intervene even towards companies that do not have a dominant position that carry out practices that are not objectively justified (Germany).

2. New standards in merger control

20. Legal modifications involve granting greater merger control power, either by reducing the notification threshold (Germany) or modifying merger control criteria (Germany; Russian Federation). In digital markets, there is a greater risk of, inter alia, runaway horizontal consolidation, the movement of customers to a winner-take-all platform protected by network effects and the potential foreclosure of rivals through vertical integration (table 4).

Table 4
New standards in merger control

<i>Country</i>	<i>Summary</i>
Canada	Under the competition law as amended in 2023, efficiencies will no longer be analysed as a separate second step in merger analysis that allows “any other relevant factor” to be considered. Other options included replacing the efficiencies exception with the inclusion of efficiencies as a non-determinative factor within the competitive effects test or retaining the exception but changing the way it operates
Germany	The ninth amendment in 2017 introduced several modifications to the merger rules to make them more suitable for digital markets and introduced an additional threshold based on transaction value, to control acquisitions of companies with low turnover rates but highly competitive potential. The tenth amendment in 2021 introduced further modifications to the merger rules not specifically directed to digital markets. The eleventh amendment in 2023 further amended merger rules with regard to requests for notifications of future concentrations
India	Competition Act, 2002, was amended through Competition (Amendment) Act, 2023
Philippines	In 2023, the Competition Commission issued guidelines for the Motu Proprio review of mergers and acquisitions in digital markets
United States	In 2023, the Federal Trade Commission and the Department of Justice released updated merger guidelines

Source: UNCTAD. See <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/guide-december-2023-amendments-competition-act>; https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html, sections 35 and 39; https://loksabhadocs.nic.in/lsscommittee/Finance/17_Finance_53.pdf; <https://www.phcc.gov.ph/mergers-and-acquisitions/guidelines-for-the-motu-proprio-review-of-mergers-and-acquisitions-in-digital-markets/>; and <https://www.justice.gov/atr/2023-merger-guidelines>.

21. Amendments in most States have modified the thresholds for mandatory notification (Germany; United States). Another amendment concerns the value of a transaction as a determining criterion to force the notification of a merger operation. In India, one amendment introduced a deal value threshold that, inter alia, may also capture transactions involving digital markets and related ecosystems.²³ Some authorities are granted exceptional measures only applicable in this area. In Canada, the merger control regime provided an efficiency exception for anticompetitive mergers when the private benefits or efficiencies of a merger outweighed any broader economic harms; however, the Government removed this exception. In Germany, the Competition Authority can order an undertaking to notify every future concentration below the usual thresholds in one or more specific sectors following a sectoral inquiry. Finally, some authorities have drafted merger control guidelines to address the particular problems of digital markets. The proposed amendments in the Philippines and the United States include the consideration of digital markets and ecosystems in analyses of vertical and conglomerate mergers.

B. New regulations

22. The competition-based regulation of digital markets advanced in 2023. The adoption of new legislative and regulatory frameworks complementing competition law seeks to ensure that markets remain competitive, open and accessible. At present, only Japan and the

²³ See <https://www.cci.gov.in/images/whatsnew/en/background-note-draft-combination-regulations-20231693886977.pdf>.

European Union have adopted and implemented regulations to complement competition rules establishing mandatory principles (transparency, fairness, neutrality, non-discrimination) to be respected in the functioning of digital markets, using different models (table 5).

Table 5
New regulations

<i>Jurisdiction</i>	<i>Summary</i>
Japan	The Act on Improving Transparency and Fairness of Digital Platforms was promulgated in June 2020 and took effect in February 2021. The law promotes transparency and fair dealing by digital platforms, particularly with regard to transactions, data usage and impacts on fair competition
European Union	The Digital Markets Act entered into force on 1 November 2022 and became applicable in May 2023, and aims to “ensure contestability and fairness for the markets in the digital sector in general, and for business users and end users of core platform services provided by gatekeepers in particular”.

Source: UNCTAD. See https://www.meti.go.jp/english/policy/mono_info_service/information_economy/digital_platforms/tfdpa.html; and <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R1925>.

23. With regard to goals, in Japan, the act aims to address the lack of transparency and low level of predictability in assessing transactions in digital markets and to deal with inadequacies in existing procedures and systems for dealing with such transactions. In Japan, the law allows the Ministry of Economy, Trade and Industry to identify a digital platform as a specified digital platform provider, that is, a firm that provides multi-sided markets to connect product providers with consumers using digital technology; provides these services through the Internet; and provides services in a manner that involves network effects. In the European Union, the Digital Markets Act has three main objectives: fostering competition in digital markets, addressing unfair practices by technology firms that control large online platforms and safeguarding the interests of smaller businesses and consumers. The Digital Markets Act applies to gatekeepers, that is, companies that operate large online platforms meeting specific criteria, such as having a significant impact on digital markets, acting as intermediaries between businesses and users and having a durable position of market power with significant influence over innovation.²⁴ The law is aimed at regulating companies that operate digital platforms at the core of digital ecosystems.²⁵

24. Enforcement of these regulations differs substantially. In Japan, the act is primarily based on voluntary and proactive initiatives, to be implemented by digital platforms themselves, with limited government intervention. The rationale for this approach is to allow digital platforms to continue to be as innovative as possible. The Digital Markets Act uses an ex ante regulatory approach to achieve these goals; once an enterprise is designated as a gatekeeper, obligations and prohibitions apply after six months (as of March 2024 for those designated in September 2023).

25. Obligations imposed on platforms also differ. In Japan, specified digital platform providers must disclose terms and conditions and other relevant information to users (transparency). Moreover, they must develop procedures and systems to voluntarily ensure fairness and submit a report for each fiscal year on measures implemented, along with a self-assessment of efficacy. In the European Union, the Digital Markets Act lists the obligations and prohibitions for gatekeepers and introduces several key provisions, including obligations for gatekeeper platforms to refrain from unfair or anticompetitive practices, provide access to data collected on or generated by their platforms, ensure

²⁴ See https://digital-markets-act.ec.europa.eu/gatekeepers_en.

²⁵ See https://digital-markets-act.ec.europa.eu/index_en.

interoperability and avoid preferential treatment of their own or their partners' functionality or services.

26. With regard to merger control, the Digital Markets Act introduces certain elements that have the potential to significantly impact the merger control system in the European Union; one of the obligations imposed on gatekeepers is to inform the Commission of any intended concentrations irrespective of whether they are notifiable under European Union merger laws. The Act authorizes the Commission to prohibit a gatekeeper, for a limited time, from conducting any more acquisitions in the sector affected by systemic non-compliance with obligations under the Act.

27. With regard to enforcement bodies, in Japan, the Government will review the self-assessments of specified digital platform providers against the guidelines, and the Ministry of Economy, Trade and Industry can request the Fair Trade Commission to intervene if it suspects that a violation of competition law has occurred. In the European Union, a joint team in the Directorate-General for Competition and the Directorate-General for Communications Network, Content and Technology is responsible for the implementation and enforcement of the Act, through a combination of investigative powers, monitoring mechanisms and penalties for non-compliance. The law in Japan focuses on promoting competition in the digital market by enhancing transparency and predictability in transactions in digital markets, and the law in the European Union imposes more direct regulation on gatekeepers that operate core platforms, based on the digital ecosystem model.

C. Proposed amendments

1. Competition law

28. Proposals and amendments are wide-ranging (table 6). Some address changes explicitly or implicitly informed by challenges posed by the digital economy and digital platforms, and relate to merger control, abuse of dominance, competitor collaborations and cartel conduct, as well as simplifying and accelerating competition litigation. The amendments would bring the laws and rules more in line with international counterparts, including adding a framework for conducting market studies with information-gathering powers, removing the efficiency defence in merger reviews and restructuring the test for abuse of a dominant position.²⁶

Table 6

Bills under consideration

<i>Country and proposed bill</i>	<i>Summary</i>
Brazil: Digital markets act bill, 2022	Introducing an ex ante regulatory regime for digital platforms and including provisions to prevent the abuse of dominant positions by digital platforms
Canada: Competition act bill, 2022	Expanding the substantive scope of the act in line with the digital era, including some changes explicitly or implicitly informed by challenges posed by the digital economy and digital platforms, related to merger control, abuse of dominance, competitor collaborations and cartel conduct, and simplifying and accelerating competition litigation
Greece: Protection of free competition bill, 2022	Prohibiting abuse of position of power in an ecosystem, with importance given to competition, and defining requirements in detail

²⁶ UNCTAD, 2023.

<i>Country and proposed bill</i>	<i>Summary</i>
India: Digital competition bill, 2023	Introducing measures targeted at key anticompetitive practices, including antisteering provisions, self-preferencing, bundling and tying and data usage on digital platforms
United Kingdom: digital markets, competition and consumers bill, 2023	Increasing the ability of the Competition and Markets Authority to regulate the most powerful firms in digital markets
United States: Competition and antitrust law enforcement reform act bill, 2021	Strengthening merger control and exclusionary conduct that presents an appreciable risk of harming competition

Source: UNCTAD. See https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=2214237&filename=PL%202768/2022; https://www.parl.ca/Content/Bills/441/Government/C-19/C-19_3/C-19_3.PDF; https://www.epant.gr/en/legislation/protection-of-free-competition/item/download/2550_cc0f0a358b15bbeff4eb402508a97ad8.html; <https://bills.parliament.uk/bills/3453>; and <https://www.congress.gov/bill/117th-congress/senate-bill/225>.

2. New regulations

29. Some countries have new regulatory proposals, to complement competition law with regard to digital markets (table 7).

Table 7
New regulatory proposals

<i>Country</i>	<i>Summary</i>
Australia	In 2022, the Competition and Consumer Commission, as part of a five-year inquiry, released a regulatory reform report outlining a range of reforms, including on legislative principles, sector-specific regulations and guidelines addressing issues such as anticompetitive self-preferencing, tying and exclusive pre-installation agreements in the digital platform services sector
Brazil	In 2022, Bill 2768, proposing an ex ante regulatory regime for digital platforms, was presented to the House of Representatives. As of November 2023, the Congress Rapporteur for the Committee on Economic Development continues to consider the bill, following a public hearing held in August 2023
India	A digital competition bill based on a report by the Standing Committee on Finance in 2022 on anticompetitive practices by big technology companies is expected to be introduced to the legislature for consideration
United Kingdom	The digital markets, competition and consumers bill was presented in 2023 and is currently being assessed in Parliament; it introduces an ex ante regime to target competition concerns with regard to powerful firms, enhances the powers of the competition authority and implements new merger thresholds to address killer acquisitions

Country	Summary
United States	The following bills have been presented to Congress proposing the regulation of digital platforms, to address antitrust concerns: open app[lication] markets act; American innovation and choice online act; augmenting compatibility and competition by enabling service switching act and ending platform monopolies act, to introduce a structural separation regime for digital platforms

Source: UNCTAD. See <https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platform-services-inquiry-2020-25/september-2022-interim-report>; <https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2337417>; https://loksabhadocs.nic.in/lsscommittee/Finance/17_Finance_53.pdf; <https://www.gov.uk/government/publications/vabeo-guidance>; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1118417/CCS1022065440-001_SECURE_HMT_Autumn_Statement_November_2022_Web_accessible__1_.pdf; <https://sgp.fas.org/crs/misc/R46875.pdf>; <https://www.congress.gov/bill/117th-congress/house-bill/3849>; and <https://www.congress.gov/bill/117th-congress/house-bill/3825/text>.

30. All of the proposals refer to the need to adopt complementary regulations with regard to competition law, to address the problems arising from high levels of concentration and anticompetitive practices in relations with supplier companies (self-preferencing; tying; using exclusivity agreements; impeding switching; denying interoperability; withholding access to important hardware, software and data inputs; lack of transparency; ability to degrade the quality of services on offer; acquisitions involving nascent or potential competitors; use of data collected; certain advertising policies).

31. With regard to goals, Australia aims to provide the Competition and Consumer Commission with the power to elaborate legally binding codes of conduct containing targeted obligations for designated digital platforms, to achieve a form of regulation that is flexible, targeted, clear and certain; each code would apply to a particular type of designated service (e.g. application marketplace services, advertising technology services, search services). Brazil requires greater transparency from digital platforms, and to ensure that consumers have more control over their data. India aims for control of essential access, freedom of initiative, free competition, consumer protection, the reduction of regional and social inequalities, repression of the abuse of market power and the expansion of social participation in the discussion and conduct of matters of public interest. The United Kingdom aims to lower barriers to entry and investigate competition concerns in digital markets, to enable quicker enforcement actions. All of the proposals (except in Australia) envisage establishing an ex ante control system for certain platforms that meet objective criteria. In India, “systemically important digital intermediaries” need to be identified for law enforcement purposes and the Government and the competition authority are working together on a definition based on revenue, market capitalization and the number of active business and end users. In the United Kingdom, the ex ante regime for digital markets in the proposed bill would only apply if the Competition and Markets Authority designated an undertaking as having strategic market status if the undertaking had both substantial and entrenched market power and a position of strategic significance in relation to the digital activity. The proposals confer enforcement to particular bodies, whether competition authorities (India; United Kingdom), government bodies (Australia) or sectoral regulators (Brazil). Most proposals, where possible, are aimed at aligning with measures taken in other jurisdictions, such as Europe, to reduce the regulatory burden (Australia, Brazil, India).

32. An analysis by the Organisation for Economic Co-operation and Development of the approved laws and proposals on ex-ante regulation in seven advanced jurisdictions (Brazil, Germany, Japan, the Republic of Korea, the United Kingdom, the United States and the European Union), focused on nine categories (reform status, regulated entity, type of proposed reform, institutional setting and powers, merger control, conduct, access to data, limits to gatekeeper use of data and compliance and remedies), noted that there was convergence on a common asymmetric scope and a focus on access to data as a source of

market power, through the imposition of data portability and interoperability obligations, but that there were different approaches adopted (rules-based versus principles-based regulations), different enforcement bodies (not exclusively competition authorities) and different types of access to data modalities and types of compliance instruments (sanctions and remedies).²⁷

D. Other initiatives

33. Some competition authorities have developed soft law instruments, either to complement legal amendments or as a temporary alternative, providing guidance for businesses. Such documents draw a line between acceptable and unacceptable business practices from the perspective of competition authorities. Competition authorities in several developing countries have also issued guidelines and policy documents or have undertaken studies outlining enforcement priorities. Such documents fill gaps in existing competition-related legal frameworks or update analytical frameworks previously considered ill-suited to the digital economy. Examples are provided in this section.

34. In Brazil, in 2019, the Administrative Council for Economic Defence addressed competition in the digital economy by stressing the importance of balancing intervention to protect consumers and competition against the risk of harming innovation.²⁸ In 2021, the Council examined issues in the digital economy, including mergers in 1995–2020, showing a significant increase in the number of digital mergers in recent years, particularly in 2018 and 2019.²⁹

35. In El Salvador, the institutional strategy of the Competition Superintendency includes a digital component that has prioritized the development of a digital forensics lab, allowing for greater efficiency in enforcing competition law. The Superintendency also monitored digital platforms and issued non-binding opinions from a competition analysis standpoint related to electronic signatures, electronic securities, personal data, universal digital inclusion, ride-hailing provided through digital platforms and electronic commerce.³⁰

36. In Mexico, in addition to law enforcement, the Federal Economic Competition Commission has invested efforts into competition advocacy in digital markets; for example, in 2020, a digital strategy was issued, consisting of actions for addressing market digitalization, including the consolidation of a new organizational model, positioning economic competition on the public agenda and strengthening international cooperation.³¹

37. In 2023, the Philippines Competition Commission issued guidelines for the Motu Proprio review of mergers and acquisitions in digital markets, intended to provide greater transparency on the understanding of the Commission of the Competition Act as applied to transactions occurring in digital markets.³²

38. In South Africa, in July 2023, the Competition Commission issued final findings and remedial actions from an online intermediation platforms market inquiry initiated in 2021, aimed at understanding the market features of online intermediation platforms that might impede, distort or restrict competition and at promoting the participation of small and medium-sized enterprises and historically disadvantaged persons in these markets.³³

39. Market studies are used in Türkiye to identify areas for intervention under the existing rules of competition law and/or areas in which new tools are needed. Studies

²⁷ Organisation for Economic Co-operation and Development, 2023, [Group of 7] inventory of new rules for digital markets: Analytical note, available at <https://www.oecd.org/competition/digital-economy-innovation-and-competition.htm>.

²⁸ See <https://cdn.cade.gov.br/Portal/assuntos/noticias/2024/BRICS%20Digital%20Economy.pdf>.

²⁹ See <https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/estudos-economicos/cadernos-do-cade/plataformas-digitais.pdf>.

³⁰ Response to the questionnaire from the Government of El Salvador.

³¹ See https://www.cofece.mx/wp-content/uploads/2022/04/COFECE-013-2022_ENG.pdf.

³² Response to the questionnaire from the Government of the Philippines.

³³ See https://www.compcom.co.za/wp-content/uploads/2023/07/CC_OIPMI-Summary-of-Findings-and-Remedial-action.pdf.

consider data-based concerns in digital markets in mergers and acquisitions, in terms of both market power and entry barriers, as well as potential competition violations.³⁴

40. Exchanges of experiences have been held among Brazil, the Russian Federation, India, China and South Africa in addressing anticompetitive practices in the digital economy, including on combating cartels, through examining and discussing cases; considering transactions of economic concentration in the digital era; and developing new mechanisms to address anticompetitive practices, adapted to the digital reality.³⁵

41. In 2022, the competition authorities of Egypt, Kenya, Mauritius, Nigeria and South Africa established the Africa Heads of Competition Authorities Dialogue, to address the rapid transformation in the global economy due to digital markets, the challenges digital markets present for competition law enforcement and policy and the need for competition authorities to consider how digital markets impact domestic participation in the local and global economy and the terms of participation.³⁶

E. International forums

42. International forums have facilitated the exchange of experiences and views on best practices in promoting competition and dealing with issues in digital markets. UNCTAD, in addition to conducting research, has organized round tables to facilitate discussions between States and held high-level sessions on digital platforms and competition during UNCTAD e-week. Through this work, UNCTAD has emphasized the importance of capacity-building among developing country authorities and of regional and international cooperation, recommending that States continue to exchange experiences and views in addressing competition issues in digital markets and to consider all available policy options.

43. The Organisation for Economic Co-operation and Development has organized several round tables on competition in digital markets and issued studies on the need to implement reforms and regulations, to address the competition concerns generated by large digital platforms; in *Ex Ante Regulation and Competition in Digital Markets*, a summary is provided of a number of the main regulatory initiatives on protecting competition in digital markets in the face of significant market power by large platforms, stating that ex-ante regulation ought to have at least the following three goals: reduce ambiguity concerning the law or regulation, to enhance predictability; reduce the burdens of litigation and enforcement, to enhance efficiency; and reduce opacity, to enhance transparency and participation.³⁷

44. The International Competition Network is working to build consensus on how to address competition issues in digital markets, through its working groups and annual discussions and reports; in 2019, its Unilateral Conduct Working Group started a new multi-year project focused on issues related to unilateral conduct in digital markets, in particular, an assessment of dominance and substantial market power in these markets, encompassing the experiences of responding agencies in 2013–2019 and aimed at collecting available information on the relevant topics.³⁸

45. Competition concerns raised by digital platforms are global challenges and efforts at the regional and international levels should therefore continue to support the exchange of information and knowledge and coordinated responses when feasible and to encourage innovative approaches to promoting competition in digital markets.

³⁴ Response to the questionnaire from the Government of Türkiye.

³⁵ Lianos I and Ivanov A, 2019.

³⁶ See <https://comesacompetition.org/updates/press-release/joint-statement-of-the-african-heads-of-competition-authorities-dialogue-on-regulation-of-digital-markets/>.

³⁷ See <https://www.oecd.org/competition/digital-economy-innovation-and-competition.htm>; and <https://www.oecd.org/daf/competition/ex-ante-regulation-and-competition-in-digital-markets.htm>.

³⁸ See <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2020/07/UCWG-Report-on-dominance-in-digital-markets.pdf>.

V. Conclusions and questions for discussion

46. To address competition issues in digital markets, strong competition law enforcement remains an important instrument in addressing abusive conduct and persuading platforms to raise standards worldwide.³⁹ Moreover, some countries have amended competition laws, defining new concepts or introducing new enforcement tools, to adapt to the particularities of digital platforms. Others have introduced regulations or guidelines to regulate certain types of conduct by digital platforms that affect competition and consumers. Policy options chosen by States reflect concerns with large digital platforms. For example, in Japan, through the Act on Improving Transparency and Fairness of Digital Platforms, and in the European Union, through the Digital Markets Act, a control system has been established that expressly targets specified digital platform providers and gatekeepers, respectively. In other States, such as Australia, Brazil, India, the United Kingdom and the United States, legislative proposals have been drafted to harness digital ecosystems.

47. The ex-ante regulations adopted in advanced jurisdictions share some features, but adopt different approaches, involve different enforcement bodies, types of access to data modalities and types of compliance instruments.⁴⁰ The possible extraterritorial effects of such regulations and their different timing risk further fragmenting regimes with inconsistencies, increasing the complexity of the regulatory environment.⁴¹ Legal reforms may involve lengthy legislative procedures and require groundwork, including market studies and enforcement experience. Yet such reforms can provide greater legal certainty and confer additional powers to competition authorities. Soft law approaches may be easier to adopt and take less time to develop, but may not be persuasive enough.

48. The options may also depend on the legal tradition, available resources, level of experience and culture in a country.⁴² There is no one-size-fits-all solution appropriate for all jurisdictions. Less experienced authorities in developing countries face other significant challenges. In this regard, the use of market inquiries in collaboration with sectoral regulators may provide deeper insight into digital markets.⁴³ Moreover, recruiting skilled experts to better understand the functioning of the digital economy is also crucial, but may be difficult. In this regard, the exchange of knowledge through regional and international cooperation can support efforts to take advantage of the potential of the digital economy. Technical assistance and capacity-building remain highly relevant for young and small authorities in improving skill sets and intelligence. Regional and international cooperation plays a key role in enhancing knowledge and tools better suited to digital markets.

49. Competition law and policy should continue to prevent and sanction abusive conduct of an exploitative nature as well as of an exclusionary nature. It is also critical to prevent discriminatory behaviour towards companies without negotiating power, such as microenterprises and small and medium-sized enterprises. Moreover, it is necessary to better address the challenges created by data analytics, as one of the major lessons learned in the past five years is that the weight and nature of data strengthen market power. At the same time, technology provides opportunities for improving the detection of anticompetitive practices through more granular market monitoring and new screening tools.

³⁹ UNCTAD, 2023.

⁴⁰ Organisation for Economic Co-operation and Development, 2023.

⁴¹ Ibid.

⁴² UNCTAD, 2023.

⁴³ For example, in Canada in 2023, the Competition Bureau, the Radio-Television and Telecommunications Commission and the Office of the Privacy Commissioner announced the creation of the Canadian Forum of Digital Regulators, aimed at facilitating greater partnership and cooperation, to better fulfil individual mandates; see <https://www.canada.ca/en/competition-bureau/news/2023/06/canadian-digital-regulators-forum-established-to-better-serve-canadians-in-the-digital-era.html>.

50. Moreover, there is growing international consensus that competition in the digital economy is key to fostering innovation and strong, sustainable and inclusive growth.⁴⁴ Some state that, given current existential issues, competition policy should be reoriented, since concentration can lead to greater economic power and political influence, which can exacerbate inequalities.⁴⁵ In this regard, analyses of anticompetitive practices and efficiencies should consider aspects other than the traditional consideration of consumer welfare. Competition policy needs to develop a more holistic vision, to effectively address market concentration and the functioning of ecosystems in both the digital sector and other significant sectors in the economy, such as pharmaceuticals, and to fully address global challenges such as sustainability.⁴⁶ This requires improved collaboration and coordination between competition authorities and other regulators, to develop a comprehensive toolbox exploring the advantages of digitalization in a more holistic way.

51. The digital economy is having far-reaching impacts on markets and societies worldwide. Challenges arising from digital markets therefore require a global approach. UNCTAD is committed to supporting developing countries in addressing such challenges in the most effective way, in cooperation with other regional and international organizations and networks.

52. The following issues may be considered for discussion:

(a) What are the main challenges that competition authorities, particularly recently established ones, face in competition law enforcement in digital markets?

(b) What are the best policy options with which to address competition issues in digital markets, particularly in developing countries? Should a new approach be developed in the application of competition policy?

(c) What are the roles of international and regional organizations, particularly UNCTAD, in promoting international cooperation in dealing with competition issues in digital markets?

⁴⁴ See <https://innovazione.gov.it/notizie/articoli/en/g7-ministerial-declaration-on-industry-technology-and-digital/>.

⁴⁵ Lianos, 2022.

⁴⁶ See <https://unctad.org/publication/competition-and-consumer-protection-policies-sustainability>.