United Nations TD/RBP/CONF.9/4

United Nations Conference on Trade and Development

Distr.: General
29 July 2020

Original: English

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
Geneva, 19–23 October 2020
Item 7 of the provisional agenda

Strengthening consumer protection and competition in the digital economy

Note by the UNCTAD secretariat

Summary

The digital economy is bringing about significant changes worldwide. It is becoming increasingly relevant and indispensable for both consumers and businesses, offering opportunities for consumers such as finding the goods and services they need more easily and in a more convenient way and offering opportunities for businesses such as accessing consumers online. Such opportunities should be harnessed to contribute to sustainable and inclusive economic development and, in this regard, there is an increasing need to strengthen consumer protection and competition in the digital economy.

This note provides an overview of the current trends in the digital economy and their implications for consumer protection and competition policies. It reviews emerging issues in consumer protection in electronic commerce (e-commerce), in particular related to legal and policy frameworks, consumer empowerment and business guidance, enforcement and dispute resolution and redress. With regard to competition, it focuses on digital platforms and examines ways to restore competition in these highly concentrated markets, through a review of legal and policy frameworks, enforcement and regulation. Finally, it highlights the role of UNCTAD in promoting international cooperation and provides some policy recommendations.

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I. Introduction

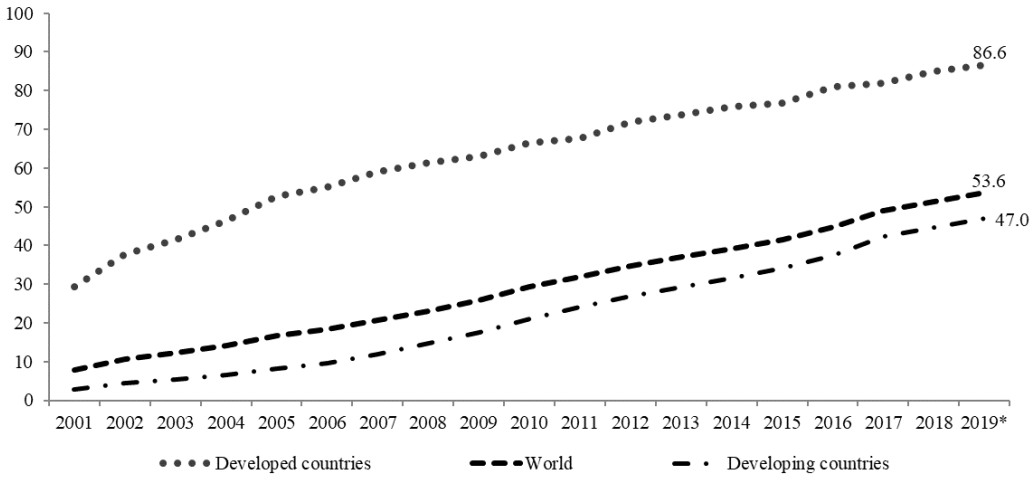
1. The Intergovernmental Group of Experts on Consumer Protection Law and Policy, at its fourth session, and the Intergovernmental Group of Experts on Competition Law and Policy, at its eighteenth session, requested the UNCTAD secretariat to prepare reports and studies for the Eighth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices on strengthening competition and consumer protection in the digital economy.[1]

2. This note introduces current trends in the digital economy and their implications for consumer protection and competition policies. It reviews emerging issues in e-commerce, in particular related to legal and policy frameworks, consumer empowerment and business guidance, enforcement and dispute resolution and redress. With regard to competition, it focuses on digital platforms and examines ways to restore competition in these highly concentrated markets, through a review of legal and policy frameworks, enforcement and regulation. Finally, it highlights the role of UNCTAD in promoting international cooperation and provides some policy recommendations.

II. The rise of the digital economy

3. Developing countries account for 90 per cent of the global growth in Internet use, with the highest growth rate in the least developed countries (see figure). In 2018, the milestone figure of 51.2 per cent of the global population was using the Internet, with 3.9 billion consumers online. However, the digital divide between and within countries remains a significant challenge. Only 40 per cent of low and middle-income countries provide affordable Internet access. In 50 per cent of countries, the proportion of women using the Internet is lower than that of men, with the Internet gender gap, that is, the proportion of women using the Internet compared to that of men, reaching 11.6 per cent globally.[2]

Individuals using the Internet per 100 inhabitants



Source: International Telecommunication Union world telecommunication/information and communications technology indicators database.

*Estimate

Note: Country classifications are based on information from the Statistics Division of the United Nations Secretariat, available at https://unstats.un.org/unsd/methodology/m49/.

[1] TD/B/C.I/CPLP/20; TD/B/C.I/CLP/55.

[2] 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).

4. The amount of data generated in the digital economy is increasing rapidly and exponentially. Global Internet protocol traffic, an indicator of data flows, grew from 100 gigabytes per day in 1992 to 100 gigabytes per second in 2002 and to 46,600 gigabytes per second in 2017. This shows how data drives the growth of the digital economy. The digital economy relies on data value chains and data monetization. Data value chains are composed of data collection, storage and analysis and transformation into digital intelligence. Value in the digital economy can be created once data is transformed into digital intelligence and monetized through commercial use via advertising platforms, e-commerce platforms and platforms providing cloud computing services.[3]

5. According to the UNCTAD business-to-consumer e-commerce index, which measures the readiness of 154 economies to support online shopping, there was an increase of 12 per cent in online consumers between 2016 and 2017. In 2017, in six countries (Denmark, Germany, the Netherlands, Norway, Sweden and the United Kingdom of Great Britain and Northern Ireland), more than 80 per cent of Internet users made purchases online. In contrast, there were over 24 low and lower middle-income countries in which less than 10 per cent of Internet users made purchases online.[4]

6. Technological developments, digitalization and platformization have provided consumers with new products and services, often provided free of charge, in exchange for personal data. Digital platforms have become powerful players in the digital economy and disrupted ways of doing business in many sectors. Online platforms provide a digital infrastructure for a variety of services, including e-commerce, Internet search engines, social networks and application stores. Digital platforms have become indispensable not only for consumers but also for businesses. Table 1 shows the impact of digitalization on the global economic landscape. With regard to specific sectors, Amazon held an over 90 per cent share in five different product markets in the first quarter of 2018, Facebook is the leading social networking website, with a 68.95 per cent share as at February 2019, and Google dominates the search engine market, with an 89.95 per cent share as at January 2019.[5]

Table 1
Top 10 global listed companies, 11 December 2019
(Trillions of dollars)

Rank	*Company*	*Industry*	*Market value*
1	Saudi Aramco	Oil	1.88
2	Apple	Technology	1.18
3	Microsoft	Technology	1.15
4	Alphabet*	Technology	0.93
5	Amazon.com	Consumer services	0.87
6	Facebook	Technology	0.57
7	Berkshire Hathaway	Financials	0.54
8	Alibaba	Consumer services	472
9	JPMorgan Chase	Financials	0.42
10	Tencent Holdings	Technology	0.41

Source: *The Guardian*, 2019, Saudi Aramco becomes most valuable listed company in history, 11 December, available at https://www.theguardian.com/business/2019/dec/11/saudi-aramco-shares-soar-as-it-becomes-world-largest-listed-company.

* Alphabet has been the parent company of Google since 2015.

[3] Ibid.

[4] See https://unctad.org/en/PublicationsLibrary/tn_unctad_ict4d14_en.pdf.
Note: All websites referred to in footnotes were accessed in July 2020.

[5] TD/B/C.I/CLP/54.

7. Seven of the world's top 10 companies by market capitalization are digital platforms, of which five are based in the United States of America and two, in China. China and the United States account for 75 per cent of all patents related to blockchain technologies,
50 per cent of global spending on the Internet of things, at least 75 per cent of the global market for cloud computing and 90 per cent of the market capitalization value of the world's 70 largest digital platforms.[6] The growing market power of digital platforms raises concerns for enforcers of competition and consumer protection laws. Amazon, Apple, Facebook and Google have been subject to competition-related investigations or market inquiries in various jurisdictions, including Australia, Germany, India, Japan, Turkey, the United Kingdom and the European Union. Consumer protection concerns in the digital economy involve misleading and unfair business practices related to online advertising and information provision, as well as to consumer empowerment, business guidance and dispute resolution and redress.

III. Effective consumer protection online

8. The General Assembly, in its resolution 70/186 of 22 December 2015, considered that e-commerce "has become increasingly relevant to consumers worldwide and that the opportunities it offers should be harnessed to help facilitate economic development and growth based on emerging network technologies, with computers, mobile phones and connected devices that promote consumer welfare". The United Nations guidelines for consumer protection, revised in 2015, have a specific section on e-commerce and state that member States should "work towards enhancing consumer confidence in e-commerce by the continued development of transparent and effective consumer protection policies, ensuring a level of protection that is not less than that afforded in other forms of commerce".[7]

9. As business-to-consumer e-commerce continues its 10 per cent annual expansion,[8] strengthening consumer protection in the digital economy increasingly requires policymakers and enforcers to focus on four axes of consumer protection, namely, legal and policy frameworks; consumer empowerment and business guidance; enforcement, including through cooperation in cross-border investigations; and dispute resolution and redress.

10. E-commerce provides convenience and facilitates shopping for consumers. However, the online shopping experience comes with challenges. In 2017, UNCTAD identified the challenges faced by consumers, in particular in developing countries, which related to information on goods, services and traders; returns and refunds for products; data security; payments; and misleading and unfair business practices.[9] To help address such challenges, a chapter on international best practices in e-commerce was included in the UNCTAD *Manual on Consumer Protection*. The Organization for Economic Cooperation and Development and the Group of 20 have prepared a *Toolkit for Protecting Digital Consumers*, with general principles, regulatory advice and advice on institutional oversight for consumer protection in the digital environment, and have also identified challenges to consumer policy in the digital age.[10]

A. Legal and policy frameworks

11. The United Nations guidelines for consumer protection state that Member States should review existing consumer protection policies to accommodate the special features of e-commerce (guideline 64). This can entail revising consumer protection laws to address

[6] UNCTAD, 2019.
[7] A/RES/70/186.
[8] See https://unctad.org/en/PublicationsLibrary/tn_unctad_ict4d14_en.pdf.
[9] TD/B/C.I/CPLP/7.
[10] Organization for Economic Cooperation and Development, 2019, Challenges to consumer policy in the digital age: Background report – Group of 20 international conference on consumer policy.

emerging challenges or amending policies and procedures to adapt to the new environment. The UNCTAD World Consumer Protection Map shows that 97 per cent of the 63 member States that responded to the related UNCTAD questionnaire have a consumer protection law, of which 62 per cent currently address issues related to e-commerce.[11]

12. Consumer protection legislation should aim to be technology neutral, that is, its provisions should be effective regardless of the means of commerce. One of the key issues that is rapidly evolving is the liability of online platforms in consumer protection, that is, the level of legal responsibility of platforms in cases of breaches of consumer law by traders. The traditional approach followed by the United States is to apply safe harbour rules that limit the liability of platforms to the services they provide directly.[12] This seems most appropriate when a platform's business model is to host a list of suppliers and serve as a marketplace only, without adding value to the sellers' products as such (such as by providing, among others, financing, logistics or customer services). However, platforms are increasingly taking a central role in e-commerce, in particular in the context of peer-to-peer markets,[13] and can exert effective control in most operations between providers and consumers.

13. This issue has already been addressed in various judicial decisions worldwide. The Court of Justice of the European Union has ruled that "in circumstances such as those at issue in the main proceedings, in which the consumer can easily be misled in the light of the conditions in which the sale is carried out, it is necessary to afford the latter enhanced protection. Therefore, the seller's liability... must be capable of being imposed on an intermediary who, by addressing the consumer, creates a likelihood of confusion in the mind of the latter, leading him to believe in its capacity as owner of the goods sold".[14] This reasoning was further reinforced when the court ruled that Uber was to be considered a transportation company and not a mere intermediary.[15] In a later case, the court ruled that Airbnb should be considered an information society service and not a real estate company as it could not be proven that it had exerted a decisive influence over accommodation services.[16] In Argentina and Brazil, courts have ruled that the online platform Mercado Libre is to be considered an intermediary and that it thereby holds consumer protection obligations over the underlying relationship between providers and consumers.[17] It is important that consumer protection laws and policies cater to the different levels of platform involvement and attribute consumer protection obligations accordingly, in order to protect the economic interests of consumers while safeguarding legal certainty for businesses.

14. Another key aspect to consider in assessing the appropriateness of consumer protection legislation in addressing challenges in the digital economy is consumer data protection. The United Nations guidelines for consumer protection state that businesses should protect consumers' privacy through a combination of appropriate control, security, transparency and consent mechanisms related to the collection and use of their personal data (guideline 11). Consumers are increasingly concerned about their privacy online.

[11] See https://unctadwcpm.org/map.html and https://unctadwcpm.org/answers.html.

[12] MW Carroll, 2016, Safe harbours from intermediary liability and social media, in JA Rothchild, ed., *Research Handbook on Electronic Commerce Law* (Edward Elgar Publishing, Camberley, United Kingdom:168–184).

[13] Organization for Economic Cooperation and Development, 2017, Trust in peer platform markets, available at https://www.oecd-ilibrary.org/science-and-technology/trust-in-peer-platform-markets_1a893b58-en.

[14] Court of Justice of the European Union, 2016, *Sabrina Wathelet v Garage Bietheres et Fils*, Case No. C-149/15.

[15] Court of Justice of the European Union, 2017, *Asociación Profesional Élite Taxi v Uber Systems Spain*, Case No. C-434/15.

[16] Court of Justice of the European Union, 2019, Criminal proceedings against X, Case No. C-390/18.

[17] *Mercado Libre v Dirección General de Defensa y Protección del Consumidor*, Case No. EXP J-01-00002957-9/2017-0, available at https://ijudicial.gob.ar/wp-content/uploads/2018/06/Mercado-Libre-SRL-c-Direcci%C3%B3n-General-de-Defensa-y-Protecci%C3%B3n-al-Consumidor-s-Recurso-Directo-sobre-Resoluciones-de-Defensa-al-Consumidor.pdf; *Mercado Libre v Ministério Público do Estado de Sáo Paulo*, Case No. 2014.0000254029, available at https://www.migalhas.com.br/arquivos/2014/5/art20140508-06.pdf.

According to a survey in 2019 on Internet security and trust, 78 per cent of those surveyed were concerned about online privacy, with over half (53 per cent) more concerned than one year previously and, in economies in Africa and the Middle East, distrust with regard to e-commerce platforms had increased the most year-on-year (+9 points).[18] The European Union has put in place a comprehensive system through the general data protection regulation, which regulates the collection, processing and use of the data of consumers in the European Union and is binding on all online traders when selling online to the European Union market.[19] According to the general data protection regulation, online traders must provide consumers with the following:

(a) the purposes for which the data will be used;

(b) the legal basis for processing the data;

(c) information on how long data will be stored;

(d) the identity of the person(s) they will share the data with;

(e) basic data protection rights;

(f) information on whether the data will be transferred outside the European Union;

(g) the right to submit a complaint;

(h) information on how to withdraw consent, if it was given;

(i) the contact details of the organization responsible for processing the data and the name of the data protection officer if there is one.

15. The general data protection regulation also recognizes the right to opt out or unsubscribe from advertising, the right to data portability, that is to transfer data to another provider even if it is a competitor, and the right to delete information held by the provider. To date, the European Union regulation has been the most developed consumer data protection framework and is increasingly setting a standard for online providers worldwide. According to the UNCTAD cyberlaw tracker, only 58 per cent of countries have privacy laws that apply to the online context.[20]

16. Another important element in consumer protection online is consumer product safety. As identified by UNCTAD in 2018, there are new challenges in this area due to the cross-border nature of e-commerce. The existence of different national standards can lead to consumer product safety concerns, when products manufactured in one country are then sold online to markets in which they do not meet mandatory or voluntary safety standards. Retailers are often unaware of the relevant safety regulations applicable in export markets and do not necessarily pay due regard to the country in which a consumer is located. They may also overlook the challenges faced by domestic authorities in dealing with cross-border consumer safety issues. Consumer product safety hazards in a globalized and digitalized world exert pressure on existing national frameworks to find common ways to address key issues.[21]

17. There are various cross-border and regional initiatives to share information about product recalls among countries, such as the rapid alert system for non-food products in the European Union, the inter-American rapid alert system for product safety of the Organization of American States and the global recalls portal of the Organization for Economic Cooperation and Development, which aims to share information worldwide. The Organization for Economic Cooperation and Development is also developing behavioural insights to increase the effectiveness of consumer recalls, in particular with regard to

[18] See https://www.cigionline.org/internet-survey-2019.

[19] European Union Regulation 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

[20] See https://unctad.org/en/Pages/DTL/STI_and_ICTs/ICT4D-Legislation/eCom-Global-Legislation.aspx.

[21] TD/B/C.I/CPLP/12.

inducing consumers to respond to recalls.[22] Table 2 provides examples of how new technological applications can enhance product recalls.

Table 2
Benefits of new technological applications on product recalls

	Benefits
Track and trace	With the ability to track and trace the whereabouts of a product, potential hazards can be identified at any point in the supply chain
Monitor and fix	By remotely monitoring the use of products, businesses can identify the need for a recall or fix product defects through software patches
Alert consumers	If a product defect cannot be fixed remotely, a connected device can provide businesses with a direct communications point to notify affected consumers in a timely and effective manner
Deactivate devices	If consumers continue to use an unsafe product, despite being alerted to the risks, businesses can remotely deactivate part of a product or completely switch it off

Source: Organization for Economic Cooperation and Development, 2019.

B. Consumer empowerment and business guidance

18. It is crucial for consumers and businesses to understand their rights and obligations, and even more so in the digital economy, in which transactions for purchases involve only a few steps. This requires a proactive approach by consumer protection agencies in working towards ensuring digital literacy among consumers, so that they are aware of their rights and how to exercise them, on the one hand, and that businesses are provided with guidance in complying with consumer protection laws, on the other.

19. With regard to consumer empowerment, the United Nations guidelines for consumer protection emphasize online disclosures about the identity of a business and information about the goods and services offered (guideline 14). This approach assumes that consumers will grasp the information and make informed and rational decisions based on it. However, information overload can lead to the lack of understanding among consumers. Achieving the right balance requires understanding consumer behaviour and adapting disclosure requirements accordingly. However, digital platforms might design their communications to induce consumers to unwittingly limit their rights to privacy.[23] Further, as the most significant digital markets are highly concentrated, even full disclosure and understanding by consumers cannot lead to increased competition. In effect, there is little or no available choice for consumers except to "tick, click and hope for the best".[24]

20. Business guidance for consumer protection in the digital economy has been a priority in many countries as a cost-effective way to strengthen consumer protection online. For example, the International Consumer Protection and Enforcement Network has issued guidance on standard terms and conditions for consumers in the digital economy, so that businesses are fair and transparent to consumers and do not bury important matters in long and complicated terms and conditions.[25] In 2016, the Network released guidance documents related to online reviews and endorsements for review administrators, for traders and marketing professionals and for digital influencers.

[22] See https://www.oecd-ilibrary.org/science-and-technology/enhancing-product-recall-effectiveness-globally_ef71935c-en.

[23] Forbrukerrådet, 2018, Deceived by design, available at https://www.forbrukerradet.no/undersokelse/no-undersokelsekategori/deceived-by-design/.

[24] See https://www.consumersinternational.org/news-resources/blog/posts/privacy-challenges-in-the-iot/.

[25] See https://www.icpen.org/news/902.

21. Consumer protection enforcement authorities generally attempt to couple business guidance with voluntary commitments to improving compliance. For example, in 2016, under the European Commission, various platforms, including Alibaba, Amazon and Ebay, voluntarily agreed to take specific actions with regard to the safety of non-food consumer products sold online by third parties in their marketplaces.[26]

C. Enforcement

22. As business-to-consumer e-commerce grows, ensuring the observance of consumer protection laws in the digital economy becomes ever more necessary. Consumer protection enforcement powers may either be attributed to a single government agency or shared among several relevant government institutions, such as the consumer protection agency, the financial services authority and the telecommunications regulator. At present, there is no evidence that the particular model is more effective than the others, as each model responds to the specific legal, economic, social and political circumstances in a country.[27] In any case, inter-agency collaboration is fundamental. In 2018, 87 per cent of respondents to a survey by the Organization for Economic Cooperation and Development had arrangements in place for domestic cooperation and were making significant efforts to increase and widen cooperation with other public bodies working on consumer policy.[28]

23. Considerable efforts are made to adapt enforcement tools to the digital economy context, such as online sweeps, investigations and sanctions, and there is a growing trend to set up specialized units for e-commerce within consumer protection enforcement agencies.[29] Online sweeps are a set of checks simultaneously carried out on websites to identify breaches of consumer law in a particular sector. They involve a two-step process whereby enforcers screen websites to find breaches and use this information to carry out enforcement actions or to request traders to take corrective measures. This tool is particularly effective when used in a coordinated manner by various consumer protection agencies worldwide. The European Commission and the International Consumer Protection and Enforcement Network regularly organize international Internet sweep days to build consumer confidence in e-commerce by dedicating a day to intensive searches of suspicious websites, which might lead to enforcement actions targeting fraudulent and deceptive conduct emerging on the Internet and other forms of electronic communications.[30] According to the International Consumer Protection and Enforcement Network, sweeps are effective in the following: "improving market conduct by demonstrating an enforcement presence online; raising the profile of each participating agency by promoting their involvement in a significant event with agencies from over 30 economies; facilitating further action by each agency from education, enforcement and international referrals in light of information revealed from a sweep; and broadening Internet users' awareness by releasing information through the media".[31]

24. In 2018, the European Commission conducted a sweep related to price transparency and drip pricing on 560 e-commerce websites and found that 60 per cent of these websites showed irregularities regarding the respect of European Union consumer rules, predominantly with regard to how prices and special offers were presented, and that in nearly 40 per cent of cases, the final price was higher than the one initially advertised.[32]

[26] See https://ec.europa.eu/info/business-economy-euro/product-safety-and-requirements/product-safety/product-safety-rules_en.

[27] UNCTAD, 2017, *Manual on Consumer Protection* (United Nations publication, Geneva).

[28] See https://www.oecd-ilibrary.org/science-and-technology/consumer-protection-enforcement-in-a-global-digital-marketplace_f041eead-en.

[29] UNCTAD, 2018, Train the trainers on consumer protection module on e-commerce, UNCTAD programme on regional economic integration through the adoption of competition and consumer protection policies in the Middle East and North Africa.

[30] See https://www.icpen.org/initiatives.

[31] See https://icpen.org/international-internet-sweep-day.

[32] See https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1333.

25. Consumer protection enforcement agencies can exercise powers of a civil, criminal and administrative nature; the latter is the most common. Consumer protection enforcement powers may be related to fines, civil penalties, warning letters, cease-and-desist orders, negotiated resolutions, criminal prosecutions, enforcement proceedings in courts or tribunals and bans and licence suspensions, as well as publicizing the violation.[33]

26. Investigations can be triggered by consumer complaints, information from consumer organizations, complaints from businesses, media reports or the experience of staff at an enforcement agency.[34] Several countries have set up specialized units within consumer protection agencies to conduct online investigations, such as the centre of e-commerce surveillance within the General Directorate for Competition Policy, Consumer Affairs and Fraud Control in France. Such units should be granted legal powers to require online platforms and traders to provide information to enforcers, although this may be difficult to implement if such businesses do not have a physical or legal presence in the country.

27. In order to deter infringements, consumer protection enforcement agencies often have the power to impose sanctions. One of the most effective sanctions is the imposition of fines for breaches of consumer protection laws, although maximum ceilings can hamper effectiveness. For example, in 2019, Facebook received the maximum financial penalty of £500,000 from the Information Commissioner's Office in the United Kingdom for breaches of data protection laws and a financial penalty of $5 billion from the Federal Trade Commission of the United States in a similar case.[35] Another important power with regard to digital firms is the ability to close down websites. For example, in Colombia, access to a website may be temporarily impeded, as a precautionary measure in case of a serious violation of consumer protection laws.[36]

28. In 2018, the International Consumer Protection and Enforcement Network-sponsored global complaint platform received more than 29,000 international complaints, showing the need for strengthened cross-border enforcement cooperation with regard to the digital economy.[37] The United Nations guidelines for consumer protection include a section on international cooperation, based on voluntary assistance among member States. The World Consumer Protection Map shows that such cooperation is usually based on memorandums of understanding, that is, informal agreements among State authorities that do not entail international obligations or responsibilities (43.5 per cent), rather than on formal agreements, that is, treaties between States, which entail international obligations and responsibilities (33 per cent). However, there is growing interest among regional organizations to set up enforcement cooperation structures, such as under the Association of Southeast Asian Nations, the Central African Economic and Monetary Community, the Eurasian Economic Community, the European Union and the Organization of American States.

29. Further to enforcing consumer protection laws, member States have sought to enhance consumer welfare by strengthening consumer access to dispute resolution and redress, which should be considered in the wider content of the right of consumers to access justice.

D. Dispute resolution and redress

30. If consumer rights are to be effective, they need to be enforceable, and any damage experienced by consumers should allow for adequate redress. Consumers should also be able to solve disputes with businesses in a fair, affordable and swift manner. In this regard, member States increasingly provide or encourage out-of-court or alternative dispute resolution, in particular online dispute resolution as it imposes fewer costs, delays or undue

[33] Organization for Economic Cooperation and Development, 2018, Consumer protection enforcement in a global digital marketplace, Digital Economy Papers No. 266.

[34] UNCTAD, 2018.

[35] See https://ico.org.uk/facebook-fine-20181025.

[36] Colombia, 2012, Consumer protection statute, article 54, available at https://www.wipo.int/edocs/lexdocs/laws/es/co/co103es.pdf.

[37] See https://www.econsumer.gov/en/News/ComplaintTrend/3#crnt.

burdens on the economic value at stake or on society and businesses. This is particularly relevant in cross-border cases, in which access to local dispute resolution and redress may be less effective. However, online dispute resolution is still not widespread. According to Consumers International, 56 per cent of their member organizations state that online dispute resolution systems are not offered by digital providers in their country and that there is no legal obligation to do so.[38] The World Consumer Protection Map shows that 60 per cent of the 63 member States that responded to the UNCTAD questionnaire do not offer cross-border dispute resolution mechanisms.

31. Privately led online dispute resolution mechanisms are commonly subject to public oversight, as consumers may be more easily misled regarding their procedural and substantive rights, indicating that public enforcers need to be involved to some degree.[39] However, the degree to which platforms should be legally required to play a role in the resolution of disputes arising from transactions concluded via their channels remains unclear.[40] The enforceability of decisions emanating from online dispute resolution, in particular of cross-border disputes, remains an issue in all jurisdictions and relies mainly on the goodwill of businesses. The chargeback and escrow mechanisms of financial services platforms could be highly effective if extended to dispute resolution outcomes.[41] There is currently limited information on the level of participation of the private sector in online dispute resolution and the effectiveness of such mechanisms.[42]

32. Complementing a solid legal and institutional framework that incorporates consumer empowerment, business guidance and dispute resolution and redress with effective enforcement is essential in addressing the challenges posed by the digital economy to consumers. Another policy area that is equally important is competition law and policy.

IV. Effective competition in digital markets

33. Digital markets are multisided markets characterized by economies of scale and scope, massive levels of data collection, storage, processing and use and data-driven network effects.[43] Major online platforms provide a variety of services, ranging from email services to video sharing. Combined with consumer inertia and switching costs, such markets can produce lock-in effects for consumers. The result is high entry barriers that affect competition dynamics in the digital economy. Digital markets are currently highly concentrated, and promoting competition is a challenge for competition authorities. Nevertheless, this is possible, and requires that relevant authorities first recognize that digital platforms pose competition problems, then use appropriate means to deal with them.

34. Dominant platforms have become gatekeepers in certain digital markets. Gatekeeper platforms refer to those platforms that set the rules of the game for market access or the interactions between consumers, business users and service providers.[44] Being a gatekeeper confers specific market power to such platforms. For example, Amazon, as a marketplace setting the rules for traders that sell on its platform and providing a channel for consumers to reach the products they are seeking, has become indispensable for many small and medium-sized enterprises if they aim to remain in e-commerce. Amazon possesses a large amount of data, including sales information, on traders on its platform and, over time, began to use this commercial information to develop its own products, thereby becoming

[38] Consumers International, 2017, World Consumer Rights Day: Building a digital world consumers can trust.

[39] TD/B/C.I/CPLP/11.

[40] Organization for Economic Cooperation and Development, 2019.

[41] Y Yu and M Shen, 2015, Consumer protection as the ‘open sesame’ that allows Alibaba to crush the forty thieves, *Journal of Antitrust Enforcement*, 3(supplement 1):228–241.

[42] Organization for Economic Cooperation and Development, 2017.

[43] TD/B/C.I/CLP/54.

[44] See https://www.debrauw.com/wp-content/uploads/2019/07/CompNewsletter10-2019-new-vs02-002.pdf.

both the platform operator and a competitor to the businesses using its platform.[45] Such activities have given rise to competition-related concerns in digital markets.

35. The market power of major online platforms affects the market structure in the digital economy. Small innovative companies struggle to access and survive in digital markets dominated by large technology companies. Even when start-ups enter the market, they soon face competitive pressure and may eventually be acquired by dominant platforms. For example, as at January 2020, Google had acquired 223 business entities since its foundation in 1998 and the value of these acquisitions exceeded $19 billion.[46]

A. Legal and policy frameworks

36. The features of the new business models of online platforms and the way such businesses operate have changed many basic concepts in competition law, and competition legislation has needed to adapt to the new business models. For example, Germany revised its competition law in 2018 to incorporate the new features of digital markets and introduced a new provision recognizing free products or services provided by platforms as a market.[47] Some jurisdictions have opted to introduce guidelines. For example, in 2019, the Japan Fair Trade Commission issued guidelines concerning the abuse of a superior bargaining position in transactions between digital platform operators and consumers that provide personal information, describing the kinds of conduct of a digital platform operator, related to the acquisition of personal information or use of acquired personal information, that establish abuse of a superior bargaining position under the Antimonopoly Act.[48] The competition authority of Kenya has revised its guidelines on the definition of the relevant market to include definitions for multisided, non-price and digital markets.[49]

37. There is growing recognition that the acquisition of promising start-ups by dominant online platforms may be contributing to the elimination of future competition. It is therefore important to empower competition authorities to scrutinize such acquisitions by reforming merger control regimes. Such transactions usually aim to access more data to reinforce the market position of the dominant platform and eliminate potential rivals, and also have implications for data privacy. For example, following its acquisition of Instagram in 2012 and Whatsapp in 2014, Facebook may be planning to integrate the technical infrastructure supporting the two applications with that of its messaging service, to create a single, unified messaging platform. This would not only eliminate competition among the three platforms but would also allow Facebook to unlock significant quantities of user data stored in each platform.[50]

38. Merger analysis needs to consider specific aspects of digital platforms, such as access to and control over data and the extent to which data assets confer market power to digital platforms, establish barriers to entry for new firms and affect market structure, future competition and innovation. In conducting a merger review, regional competition authorities are best positioned to review digital mergers that affect wider markets. Regional trade agreements or cooperation frameworks may be used to develop regional competition rules and set up a regional competition authority, which could start by conducting merger control at the regional level, as is done, for example, by the competition commission of the Common Market for Eastern and Southern Africa. This could be a more effective way of dealing with digital mergers, in particular in developing countries, in which most platforms do not have a physical presence.

[45] L Khan, 2017, Amazon's antitrust paradox, *The Yale Law Journal*, 126(3):564–907.

[46] See https://acquiredby.co/google-acquisitions/.

[47] See https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html#p0024, section 18(2a).

[48] See https://www.jftc.go.jp/en/pressreleases/yearly-2019/December/191217DPconsumerGL.pdf.

[49] See https://cak.go.ke/sites/default/files/Guidelines%20on%20Relevant%20Market%20Definition%20(1).pdf.

[50] See https://www.wired.co.uk/article/facebook-whatsapp-merger.

B. Enforcement

39. Existing competition law enforcement tools need to be adapted to the new business realities of digital platforms. Online platforms offer zero-price markets on one side of the platform, which are funded by advertising revenues generated on the other side. The relevant market can no longer be determined based on prices or substitute products and services. Further, online platforms have new forms of market power, such as gatekeeper, intermediation and bottleneck powers. Leveraging is another common practice in digital markets, whereby an online platform that is dominant in one business uses, in another segment, its market power in the former segment. For example, the European Commission, in an antitrust investigation, concluded that Google had leveraged its dominance in the Internet search market in the comparison shopping market by giving a separate Google product an illegal advantage in the latter market, thereby abusing its dominance in the former market.[51] Competition enforcers need to take into consideration such aspects of digital markets in their analysis of abuse of dominance by focusing more on competitive relationships and business strategies in these markets rather than simply on market definitions and shares.

40. Digital markets evolve rapidly and competition law enforcement therefore needs to be bolder and faster. However, this requires some changes to the status quo. First, the standard of proof needs to be lowered and the burden of proof in competition-related investigations needs to be reversed. For example, in highly concentrated digital markets with strong network effects and high barriers to entry, it may be preferable to disallow types of conduct or proposed mergers that are potentially anticompetitive and to impose the burden of proof of showing pro-competitiveness on the dominant platform.[52] Second, efficiencies from mergers should not be presumed but be proven through strong supporting evidence showing merger specificity and verifiability by the parties, which have greater knowledge and better access to relevant information.[53] With regard to zero-price markets, the assessment of competitive effects needs to incorporate non-price dynamic factors, including quality, choice, privacy, innovation and future competition. Third, interim measures need to be used more often to alleviate the damage resulting from the anticompetitive practice subject to investigation.

41. The practices of online platforms need to include both competition and consumer protection because consumers and their behaviour and data have implications for such businesses. The practices of platforms, in turn, affect the behaviour and well-being of consumers. Therefore, competition law enforcement in data-driven digital markets needs to integrate the concerns arising from the conduct of platforms in relation to consumer protection and data protection.[54] For example, a decision taken by the Federal Cartel Office of Germany in February 2019 established the link between antitrust violations and data protection; the Office decided to restrict the collection and processing of user data by Facebook and prohibited the company from combining user data from different sources. One of the theories of harm in the case was vertical harm resulting from conduct that imposed unfair business terms on users, who lost control of their data and could not freely decide how their data should be used, that is, collection and processing of user data without consent. The Office categorized the case as one of exploitative business terms and based its decision on data protection principles embedded not only the law in Germany but also in the general data protection regulation of the European Union. The Office applied data protection principles in its assessment of the terms and conditions of Facebook. According to the data protection legislation in Germany, users should be able to freely and without coercion decide how their personal data are used. The decision was suspended by a higher

[51] See https://ec.europa.eu/commission/presscorner/detail/en/MEMO_17_1785.

[52] J Crémer, Y-A de Montjoye and H Schweitzer, 2019, *Competition Policy for the Digital Era* (European Union, Luxembourg).

[53] Stigler Centre Committee on Digital Platforms, 2019, Final report, available at https://research.chicagobooth.edu/stigler/events/single-events/antitrust-competition-conference/digital-platforms-committee.

[54] E Gökçe Dessemond, 2019, Restoring competition in “winner-took-all” digital platform markets, Research Paper No. 40, UNCTAD.

regional court.[55] However, the Federal Court of Justice upheld the decision taken by the Federal Cartel Office.[56]

C. Regulation

42. In October 2019, the Japan Fair Trade Commission published a report on digital platforms based on a fact-finding survey conducted in February–March 2019, which examines the nature of business-to-business transactions between online shopping marketplaces and sellers and between application stores and application developers (see box).

Japan Fair Trade Commission report: Anticompetitive practices of online platforms

The report focuses on competition-related issues regarding the trade practices of major platforms towards sellers using their platforms and identifies the following practices that may violate the Antimonopoly Act:

(a) Digital platforms with a superior bargaining position unreasonably provide disadvantages to user companies in the light of normal business practices (e.g. a unilateral revision of contracts with marketplace sellers): this may constitute abuse of a superior bargaining position;

(b) Digital platforms unjustly interfere with transactions between other digital platforms and sellers and/or consumers (e.g. application stores that prevent consumers from downloading applications from their competitors): this may be considered interference with a competitor's transactions;

(c) Digital platforms with a dual role of operating the marketplace and selling their own brands on it, in competition with independent sellers, make use of transaction data from the latter or arbitrarily manipulate search algorithms: this may be considered interference with a competitor's transactions;

(d) Application stores unreasonably force application developers to adopt an in-application payment method and do not accept any other payment options so that they can charge processing fees to developers: this may be considered trading on restrictive terms.

Source: Japan Fair Trade Commission, 2019, Report regarding trade practices on digital platforms, Press release, 31 October, available at https://www.jftc.go.jp/en/pressreleases/yearly-2019/October/191031.html.

43. Such findings indicate the need to regulate the conduct of online platforms that can be categorized as an unfair trade practice or abuse of a superior bargaining position.[57] The competition laws in Japan and the Republic of Korea include such provisions, which serve to protect the interests of smaller firms in their contractual relationships with large businesses.[58] Such provisions may address the power imbalances in the business relationship between large platforms and traders that use these platforms, thereby contributing to achieving a level playing field in digital markets.

44. Competition law enforcement cannot address all of the concerns arising from the practices of digital platforms and therefore needs to be complemented with appropriate ex ante regulation. Two reports suggest that relying solely on competition law enforcement is not sufficient in addressing competition-related challenges arising from digital platforms.[59]

[55] See https://techcrunch.com/2019/08/26/facebook-succeeds-in-blocking-german-fcos-privacy-minded-order-against-combining-user-data/.

[56] See https://www.nytimes.com/2020/06/23/technology/facebook-antitrust-germany.html.

[57] Gökçe Dessemond, 2019.

[58] TD/RBP/CONF.8/6.

[59] Stigler Centre Committee on Digital Platforms, 2019; United Kingdom, 2019, *Unlocking Digital Competition: Report of the Digital Competition Expert Panel*, available at

The most recent study highlighting the need to regulate is a market study conducted by the Competition and Markets Authority of the United Kingdom to understand how major platforms operate, the drivers behind their market dominance and the implications for competition, consumers and businesses that use their services. In an interim report, the Authority stated that "there is a strong argument for the development of a pro-competitive regulatory regime to regulate the activities of online platforms funded by digital advertising".[60]

45. The global debate on how to address competition and consumer protection-related challenges arising from digital platforms seems to be emphasizing ex ante regulation to restore competition and protect competition and consumers. Some such pro-competitive regulation includes rules requiring digital platforms to provide for interoperability, open access and standards and data portability for consumers. Requiring dominant platforms to provide access to non-personal user data might be useful in facilitating new entries and restoring competition in digital markets. Regulations providing for interoperability and data portability could facilitate switching and multihoming. finally, rules and regulations that apply in particular to digital platforms with strategic market status[61] would contribute to strengthening competition in digital markets.

V. The role of UNCTAD

46. Digitalization is penetrating all sectors worldwide and will continue to do so. Therefore, concerns arising from the digital economy require a global approach. National-level initiatives may prove insufficient to address many of the concerns that online markets raise and there is need for action at the international level. Both the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices and the United Nations guidelines for consumer protection contain provisions on international cooperation. UNCTAD, as the custodian of both internationally agreed documents, is well placed to take the lead in this debate. UNCTAD provides the largest international platform to discuss competition and consumer protection issues and build consensus, as it hosts the annual sessions of the Intergovernmental Group of Experts on Competition Law and Policy and the Intergovernmental Group of Experts on Consumer Protection Law and Policy, which discuss the challenges in their respective areas and seek solutions. UNCTAD endeavours to promote international cooperation in both competition and consumer protection and does so within its wider mandate on trade and development, which allows it to provide sound recommendations to member States and support a holistic policymaking approach. Further, UNCTAD hosts a discussion group on international cooperation in competition law enforcement and two working groups on consumer protection in e-commerce and on consumer product safety. The groups aim to support international consultation and assist competition and consumer protection agencies, in particular in developing countries. UNCTAD also undertakes technical cooperation in both the competition and consumer protection fields in developing countries and countries with economies in transition.[62]

VI. Conclusion and policy recommendations

47. To strengthen consumer protection online, there is a need to review and adjust existing consumer protection legislation to the new business models of the digital economy, if and when necessary. In doing so, consumer protection agencies need to complement legislation reviews with efforts to empower consumers, raise awareness of their rights and

https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel.

[60] See https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study.

[61] United Kingdom, 2019. Digital platforms with strategic market status are dominant platforms with a high degree of power over how their users access a market and a position of control over market access by other parties, whereby many small and independent businesses rely on the platform to survive.

[62] TD/RBP/CONF.9/6.

obligations and improve digital literacy. Consumer protection agencies need to guide businesses to ensure fairness and transparency and reinforce enforcement capacities in digital markets. As digital platforms are global, there is an increasing need to deepen international cooperation in e-commerce.

48. To strengthen competition in digital markets, there is a need for legal frameworks that adapt competition law enforcement tools, to effectively deal with digital monopolies. Robust enforcement against anticompetitive practices in the digital economy is crucial, to ensure open and contestable markets. The pro-competitive ex ante regulation of dominant online platforms may be considered a more effective way of protecting competition in digital markets. Cooperation between competition and consumer protection agencies and sector regulators is essential in responding to the challenges of the digital economy with a holistic approach. Merger control regimes need to empower competition authorities to scrutinize the acquisition of smaller and promising online businesses by dominant platforms. Existing regional competition authorities are best positioned to review digital mergers that affect their regions.

49. Free but fair competition in digital markets is needed, in particular when small firms face challenges in contractual relationships with large platforms. Competition law provisions on unfair trade practices and the abuse of a superior bargaining position could empower national competition authorities to act against such practices. This kind of fair competition legislation could be more straightforward, practical and effective in dealing with the exploitative business practices of large platforms. This is particularly relevant in developing countries, in which there are challenges in investigating the anticompetitive practices of large platforms due to the lack of a physical presence in the countries. Such legislation could also facilitate market access by local small and medium-sized enterprises in both local and global online marketplaces and increase their chances of remaining in business.

50. In this regard, the Intergovernmental Group of Experts on Consumer Protection Law and Policy provides an international forum for sharing experiences and best practices, including through the working groups on consumer protection in e-commerce and on consumer product safety. Under the Intergovernmental Group of Experts on Competition Law and Policy, UNCTAD established a discussion group on international cooperation to discuss the modalities for facilitating international cooperation under section F of the United Nations Set and the resulting guiding policies and procedures in implementing international measures under section F were endorsed by member States at the eighteenth session of the Intergovernmental Group of Experts.

51. Policy recommendations for effective consumer protection online are as follows:

(a) Ensure that consumer protection laws and policies are technology neutral to allow for future technological development;

(b) Enforce the liability and responsibility regimes of platforms in breaches of consumer protection laws depending on their level of involvement in the provision of goods or services;

(c) Protect consumer privacy through a combination of appropriate control, security, transparency and consent mechanisms related to the collection and use of the personal data of consumers;

(d) Harness new technologies to maximize the impact of product recalls and deal with the distribution of hazardous and unsafe products, in particular if they have been recalled in other jurisdictions;

(e) Design education and information campaigns to increase digital literacy among consumers, introducing behavioural insights to maximize their impact;

(f) Entrust consumer protection agencies with enforcement powers to conduct online investigations, impose sanctions and engage in cooperation in cross-border investigations;

(g) Ensure that the necessary resources are devoted to addressing cross-border challenges to consumer protection in the digital economy;

(h) Continue to guide businesses and encourage voluntary commitments to improving commercial practices and ensuring greater levels of consumer welfare online;

(i) Encourage businesses to provide online dispute resolution for consumer disputes, in particular online platforms.

52. Policy recommendations for effective competition in the digital economy are as follows:

(a) Adapt competition law enforcement tools to digital platforms and their business models by revising laws and regulations or adopting guidelines recognizing online zero-price services and products as markets, as well as the features of online platforms, such as multisidedness, network effects, economies of scale, the role of big data in maintaining market power and the leveraging of market power from one segment in another segment;

(b) Reform merger control regimes to enable competition authorities to scrutinize the acquisition of start-ups by dominant platforms, either by revising merger notification thresholds or attributing strategic market status to dominant online platforms and requiring such platforms to notify the competition authority of any merger or acquisition;

(c) Adopt new regulations and/or guidelines or use existing legislation to act against unfair trade practices and abuses of superior bargaining positions by large platforms to promote a level playing field and fair competition between large platforms and smaller firms that use such platforms;

(d) Adopt pro-competitive regulation that requires platforms, in particular those with strategic market status, to provide for interoperability, open access and standards and data portability for consumers, to facilitate switching and multihoming by consumers and market access by new firms;

(e) Adopt rules for platform neutrality, requiring large platforms that also offer their own products or services on their platforms to treat all firms, including their own, neutrally.[63]

53. The following issues may be considered for discussion:

(a) What kind of legislative, regulatory and policy measures are needed to strengthen competition and consumer protection in the digital economy?

(b) What is needed for more effective competition and consumer protection law enforcement?

(c) How can international cooperation contribute to overcoming challenges in the digital economy and how can UNCTAD contribute to facilitating such cooperation?

[63] EM Fox, 2019, Platforms, power and the antitrust challenge: A modest proposal to narrow the United States–Europe divide, *Nebraska Law Review*, 98(2):297–318.