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DIGITAL PLATFORMS REGULATION IN BRICS: PERSPECTIVES ON CHALLENGES AND COOPERATION

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Problems of Digital Platforms Regulation: Challenges and Perspectives for International Cooperation[1]

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Abstract

Digital platforms act as private regulators of their ecosystems. However, until recently, these platforms have not been objects of regulation by the state. Currently, many jurisdictions adapt and update their consumer protection and competition policy instruments and introduce ex ante regulation to protect consumers and competition in digital markets. Regulatory problems derive from the nature of platforms' business models, the transnational character of their operations, and the significant resources necessary to ensure regulation enforcement and monitoring. Coherence of regulatory approaches applied by different jurisdictions creates legal certainty, reduces costs of compliance and prices, and ensures consistency of requirements with regard to the quality of platforms' services and user protection. Despite the advantages of policy coherence, cooperation develops slowly and is fragmented due to a contestation over the influence on the rules of governance.

This article reviews the main problems and key approaches to the digital platforms' regulation, and the challenges of, and perspectives on, international cooperation. The study draws on a survey of research articles, national documents on digital platforms policies and EU

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regulations, analytical materials of research centres and international organizations, and assessments of regulatory practices by concrete jurisdictions. The article explores problems and approaches to ensuring protection of users and fair competition, ex ante regulation application, and multilateral initiatives. In conclusion, the authors put forward some ideas on international cooperation perspectives.

Key words: digital platforms, ex ante regulation, consumers' protection, competition policies, Summit of the Future, Global digital compact

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Introduction

Digital platforms[2] act as private regulators of their ecosystems. They set rules for users, shape the business environment, and control the implementation of rules and the behaviour of ecosystem participants. Their regulatory instruments include access requirements: formats for providing information about goods and services; conditions for the provision of and access to data, the choice and use of software interfaces, and access to information generated on platforms; rules for ensuring privacy and data protection policies; delivery standards and return policies; pricing policies and most-favoured treatment instruments; and the formation of ratings. Ecosystems manage the behaviour of citizens and businesses, while they themselves (until recently) were not subject to regulation by the state and society. Therefore, the management of ecosystems by relevant platforms has become an essential regulatory issue [Gawer, 2022].

Data aggregation through combining services (for example, aggregation of Facebook, Instagram, and WhatsApp user data), data pumping, and data leakage through apps are used for monetization and violate user privacy. A significant challenge at the national and international levels is the protection of user rights in the context of information distortions, disinformation, dissemination of harmful content, or unlawful restrictions on access to online content, which can

[2] The definition of platforms used in this article focuses on their main characteristics. Digital platforms are understood as firms that rely on their high-tech infrastructure, including software, applications, cloud storage, big data processing capabilities, algorithms, predictive analytics, modelling, machine learning, and various services, to create value through organizing interaction of various market participants, performing transaction functions, and innovating. Platforms benefit from network effects, the ability to collect and process large amounts of data, including with the use of artificial intelligence; operate in multilateral markets (not necessarily cross-border); create competition for participants in traditional markets and can create barriers to the entry of new participants into their markets; and act as disruptors not only of traditional economic processes, but also of approaches to regulation.

cause economic (financial), moral, and privacy damage, as well as time losses to consumers [OECD, 2022a]. At the structural level, cumulative harm causes harm to society and distorts competition.

Disruption of established rules is a key feature of digital platform activities [Strowel, Vergote, n.d.]. Given their diversity, regulators have to focus on the fundamental characteristics of platforms and their business models rather than treating them as a single category and assess the applicability of existing regulatory tools [Nooren et al., 2018]. Regulatory challenges are related to the specifics of platform activities, their diversity and transnational nature, and the need for interdepartmental and international coordination. Given the common challenges and the cross-border nature of platform activities, the coherence of regulatory approaches applied by different jurisdictions creates advantages, such as providing legal certainty, reducing compliance costs and service prices, and ensuring consistency in terms of service quality requirements and user protection. However, cooperation develops slowly and is fragmented. Problems include contestation over the influence on regulation of key drivers of digital economy growth (online platforms, digital security,[3] cross-border data flows) [OECD, 2022c] and the formation of global digital governance in a broader context.

This article reviews the key problems and main approaches to digital platforms regulation, as well as the challenges and opportunities for international cooperation. The study draws on the analysis of research articles, national policy documents and EU regulations, materials of expert centres and international organizations, and assessments of regulatory practices of specific jurisdictions.[4] The article explores problems and approaches to ensuring consumer protection and fair competition, application of preventive (ex ante) regulation, and the needs and difficulties of international cooperation. In conclusion, some ideas on international cooperation perspectives are put forward.

Consumer Protection

The existing consumer protection legislation often fails to address so-called "grey commercial schemes" online. Platforms have greater control over the choice architecture[5] than traditional companies and are therefore more likely to use grey commercial schemes. In fact, through

[3] Digital security refers to economic and social aspects of cybersecurity, as opposed to technical, criminal, and national security aspects. Digital security is a set of measures aimed at managing digital security risks to economic and social prosperity [OECD, 2022b].

[4] This article does not present an analysis of country approaches and the European Union (EU) experience. This was carried out for Brazil, Russia, India, China, South Africa, the EU and the U.S. as part of the RANEPA state assignment research programme. Given the importance of cooperation within BRICS, especially in the context of Russia's term as chair in 2024, separate articles of the *International Organisations Research Journal*, vol. 19, no 2 (2024) are devoted to BRICS countries' approaches to regulating digital platforms and ecosystems.

[5] The design of presenting options and algorithms for decision-making that can influence the choice of a solution. The term was introduced in 2008 by R. Thaler and C. Sunstein [2008].

algorithms, offer design, hints, and default choices, they modify the choice architecture for consumers [Lanier, 2018], manipulate users, and can cause direct and indirect harm that is often impossible or difficult to measure [OECD, 2022a].

The scale of their usage, technological level, and artificial intelligence allow platforms to influence users' consumption behaviour through such practices as forced actions (for example, related to data disclosure), interface manipulations (including hidden advertising), nagging, obstruction of the implementation or completion of a transaction without performing forced actions (for example, requiring subscriptions), sneaking (for example, adding payments at different stages of the transaction (drip pricing)), social proof (such as notifications about other purchases), urgency escalation, and other manipulations. Digital platforms use big data, algorithms, predictive analytics, and machine learning to form conclusions about users to manipulate and control users' choices.

Researchers believe that the largest platforms should bear special responsibility for the neutrality of choice architectures [Fukuyama, Richman, Goel, 2020], propose introducing special mechanisms for governance and oversight of platforms [Costa, Halpern, 2019], and tough restrictions on cancellation or reduction of settings that protect users ("consumertarian" default rules) [Stigler Center for the Study of Economy and the State, 2019]. There are proposals for the need to end the practice of high-risk inferences and introduce the right to reasonable inferences [Wachter, Mittelstadt, 2019] and to adopt value principles in the context of digital societies, for example, related to the sovereignty of decision-making and the fairness of mediation [Gawer, 2022].

Some jurisdictions update their existing user protection instruments and adopt targeted legislation on digital platforms, taking into account their role in the digital economy, to address the scale of their access to data and the balance of power vis-à-vis consumers. The European Union (EU) has become a pioneer in ex ante regulation of digital platforms. The Digital Services Act (DSA) and the Digital Markets Act (DMA), adopted in 2022, are positioned by the European Commission as the "new gold standard" of regulation aimed at creating a safe digital space, ensuring the protection of user rights and a level playing field for competition, and innovation and growth in the EU and the world [EC, n.d.a]. India, China, Brazil, South Africa, and the United States are discussing the adoption of ex ante regulations aimed specifically at digital platforms.

Ex ante regulation includes negative obligations to avoid grey schemes and positive obligations to ensure a consumer-friendly choice architecture, as well as requirements regarding platforms' actions in terms of ensuring transparency, among other things.

The EU [n.d.b], the US [Federal Trade Commission Act], and the UK [Consumer Protection from Unfair Trading Regulations, 2008] use general principle-based prohibitions on

misleading and unfair actions and practices. Some jurisdictions, such as the EU and the UK, supplement general principle-based regulations prohibiting misleading and unfair practices with prohibitions on specific practices and incentives for practices that ensure consumer rights (such as rights on choice and data protection).

Differences in requirements for platforms across jurisdictions create challenges in enforcement and protecting user rights. Content moderation is regulated by national laws, while platforms operate across borders. The liability imposed on platforms also varies. For example, Section 230 of the US' Communications Decency Act (1996) limits platforms' liability for content posted by users and allows them to moderate it. In Germany, the Network Enforcement Law (NetzDG) requires social media platforms to remove certain harmful content within a limited time and provides for fines for non-compliance [OECD, 2022d]. According to the EU's Digital Services Act, platforms acting as online intermediaries cannot be held liable for user content if they disable access to content that is illegal or remove it. In this case, upon receiving an order for action against illegal content from the regulator, an intermediary service provider must act immediately and inform authorities accordingly.

Regulations that use general principle-based prohibitions and lists of prohibited practices may not mention some of the grey schemes, as these lists cannot be exhaustive. Accordingly, some grey practices remain outside the regulatory perimeter. In this regard, a number of jurisdictions (EU, UK) have chosen a combination of principles-based and rules-based regulation. Principles-based regulation is broader (prohibiting unfair and harmful commercial practices) and more flexible (leaving the possibility to deal with new and undefined practices), thus making it easier for relevant authorities and courts to protect consumers. Rules-based regulation is more targeted and includes prohibitions of specific existing practices considered harmful.

The platform "toolkit" is constantly evolving. Effective enforcement requires monitoring, allocating significant resources, taking into account the constantly changing toolkit and its personalization by regulators. Monitoring should be aimed at identifying the most frequently used and effective schemes, as well as schemes that are not subject to regulation. Monitoring involves the use of special technologies: artificial intelligence tools, consumer surveys and behavioural experiments, analysis of marketing materials, and legal analysis. Given that enforcement and monitoring require significant resources, cross-border cooperation of regulators is important.

Application and Adaptation of Competition Law

Research shows that "the key concepts, principles and economic foundations of competition policy remain relevant in digital markets and work well to ensure dynamism and innovation. Anti-competitive horizontal mergers, agreements among competitors and vertical restraints produce as much harm in digital markets as in traditional ones. Moreover, network and scale effects may

amplify this harm. Many regulatory practices are flexible enough to address new theories of harm and the unique characteristics of digital markets" [OECD, 2022e]. At the same time, adjustments to both market analysis tools and regulation are needed given the specificities of platforms and ecosystems.

Competition analysis tools should take into account network effects, externalities, innovation dynamics, and non-price competition. Market power assessments should be based on relationships between ecosystem parties and between ecosystems. Difficulties arise in identifying and measuring platform actions such as cross-platform parity agreements [OECD, n.d.a], price collusion [OECD, 2021a], algorithmic collusion, hub-and-spoke arrangements [OECD, n.d.b], use of blockchain technologies [OECD, n.d.c], personalized (unfair) pricing [OECD, n.d.d], monopoly power abuse to set procurement prices (monopsony power) [OECD, n.d.e], merger and acquisition strategies (of competitors or potential competitors) [OECD, n.d.f], acquisition of nascent competitors [OECD, n.d.g], and conglomerate effects of mergers (changes in adjacent markets) [OECD, n.d.h].

To develop competition policy in the digital market, it is important to have well-considered assessments of market concentration levels, abuse of dominance, and market power.[6] The existing legislative and economic instruments for assessing abuse of dominance are not always suitable for digital markets; sometimes alternative instruments are more effective [OECD, 2020]. At the same time, these instruments should not become a barrier to the development of competition and innovation [OECD, n.d.i]. The choice is usually associated with finding a balance between excessive and insufficient regulation and often depends on the historical and legislative context of the competition law of a particular jurisdiction. There are two risks—underestimation and overestimation of dominance. Based on the analysis of its member countries' experience, the Organisation for Economic Co-operation and Development (OECD) recommends changing the assessment balance in favour of the risk of underestimation. The US and the UK are following this path.

An important issue is the assessment by competition authorities of how control and use of data by companies affects competitive dynamics [OECD, 2022f]. Control of data can be a source of market power. It is difficult to assess the impact of mergers between companies with complementary databases [OECD, n.d.j], and this is true both for mergers between competing companies and for mergers between companies that control important sources of data and distribution companies that rely on these data to expand their activities [OECD, 2019].

[6] Dominance is a legal term that codifies the level of market power that determines the ability to engage in behaviour that creates the risks of exclusion or exploitation.

Structural measures and restrictions are not always suitable for regulating mergers and anti-competitive behaviour in digital markets, as they may be incompatible with platform business models or have a negative impact on consumers. Measures to improve business conduct require careful supervision and coordination with sector-specific regulators. Competition authorities should consider demand dynamics when choosing instruments to regulate mergers and the behaviour of digital market participants [OECD, n.d.k]. It is important to strike a balance between minimizing uncertainty and over-regulation [OECD, 2006]. Demand-oriented measures should account for the possibility and advantages of designing and implementing them within the framework of consumer protection policy [OECD, n.d.l].

Jurisdictions are transforming their legislative frameworks and enforcement practices. They create new regulators (EU, UK) and adopt new regulatory requirements (EU, UK, China, India), including special rules for dominant platforms (primarily the so-called "gatekeepers"). The criteria for assessing a dominant position are changing. These criteria may include not only market shares, but also the number of users or income level (the EU and China approach), or the status of a strategic market participant (the UK approach). Legislative changes include applying the provisions on abuse of dominance to firms that are not yet dominant but tend to gain market power, shifting the burden of proof to platforms, and using interim precautionary measures (before a judgment is made on abuse of dominance) (the EU approach). There is a trend toward strengthening digital tools and expertise of competition authorities, including the creation of special units and allocation of resources, including for conducting market research and assessing the need for regulatory changes. Given the cross-border nature of digital markets, interaction on regulation between competition authorities is intensifying. Since 2021, the Group of 7 (G7) has been coordinating policy on a wide range of digital market regulation issues, including platforms [Gov.UK, 2023].

Competition policy cannot regulate all aspects. For example, issues of consumer protection and platform employment, as well as lobbying, are beyond its toolkit. In this regard, proposals for new legislation appear in many jurisdictions, including Brazil, India, China and the United States [Chopra, Khan, 2020].

Introducing Ex Ante Regulation

Dominant global platforms (such as Amazon, Apple, Facebook and Google), with their entrenched market power, control market entry and pricing, and act as gatekeepers, securing their position as strategic market participants through controlling digital infrastructure, identifying potential competitors, buying them, copying them, or otherwise cutting them off from the market [OECD, n.d.g]. Gatekeeper platforms can create ecosystems and define rules, harming not only competitors, but also consumers, society, and the economy as a whole. The potential economic

and social damage resulting from the concentrated structure of the digital economy is of concern to regulators [Prado, 2020].

Ex ante regulation initiatives for digital platforms aim to complement competition policy instruments, taking into account the structural features of the digital economy. The difference between ex ante regulation and competition law relates to the specific features of market failures they are designed to correct. The objective of competition law is to prevent illegitimate acquisition of market power and, in the case of its high concentration, to control its use to ensure the benefits of a competitive market. The aim of ex ante regulation is broader and includes not only the correction of market failures and ensuring the ability of the market to function as efficiently as possible, but also other objectives such as rights protection, fair distribution, and safety standards [OECD, 2021b].

Competition law and regulation can be alternative solutions, but they can also complement each other in practice [OECD, n.d.m]. This requires coordination mechanisms, and such mechanisms are discussed and created, for example, to provide a common space for national competition laws of the EU member states and the instruments of the EU's Digital Markets Act [European Competition Network, 2021].

There is a view that regulation of digital platforms specifically is excessive and that competition legislation and policy instruments are sufficient. However, most experts believe that ex ante regulation can better cope with competition issues related to the specific economic structure of digital ecosystems, as well as ensure fairness, competition, transparency and innovation, and guarantees of compliance with public interests that go beyond purely economic considerations [Cappai, Colangelo, 2020].

Protecting fair competition is the goal of many initiatives. For example, the preamble to the EU's Digital Markets Act notes the need to ensure a fair and more level playing field for all players in the digital sector in order to harness the growth potential of digital platforms. A central objective of regulatory initiatives is to curb the ability of dominant platforms to use their market power to restrict or distort competition in their own or related markets and to prevent their dominance from spilling over into new markets [Schnitzer et al., 2021].

Fairness is defined as economic activity organization for the benefit of users, so that they receive remuneration commensurate with their contribution to economic and social well-being, and business users are not limited in their ability to compete [Crémer et al., 2023].

Contestability—the implementation of the open choice principle—is the most important objective of many regulatory initiatives, including those of the EU and the US. They aim to prevent anti-competitive behaviour, such as conditioning the provision of services on the automatic use of

data without the possibility of choice, and provide for such tools as ensuring interoperability, data portability, and multi-homing.

Most initiatives, including the EU's Digital Markets Act and the American Innovation and Choice Online Act (2022), also aim to stimulate innovation and ensure transparency.

Ex ante regulatory initiatives seek to maximize legal certainty with minimal nuance and ambiguity in interpretation. Their goal is to minimize the potential for lengthy litigation based on quantitative criteria (determining the status of companies), define rules of conduct, limit the ability of regulated companies to defend non-compliant behaviour, and ensure tough sanctions in case of violation [Crawford et al., 2021].

The choice of objects of regulation is an important issue. For example, the proposal of the UK's Digital Markets Taskforce considers digital markets as a whole as an object of regulation. German legislation applies to enterprises active in multi-sided markets [Competition Act, 2023]. The US draft bills define three broad categories of online platforms. The EU's Digital Markets Act lists key platform services offered by gatekeepers to businesses and end users established or located in the EU, regardless of the place of establishment or residence of the platform and regardless of other laws applicable to the provision of these services [EU, 2022]. Such specificity has both advantages and disadvantages. The advantage is that specificity creates legal certainty regarding platforms and their risk-creating characteristics. The disadvantage is that it reflects the current state of competition and market structure, which may change in the future.

Regulators use different definitions and choose different application criteria, but in general they rely on three lists. The first defines what types of digital activities and services are included in the regulatory perimeter. The second includes all types of regulated firms. The third defines what practices are prohibited or required. Regulation focuses on the largest firms, identification and definition of specific services, and quantitative criteria for identifying regulated firms. The quantitative criteria vary but are clearly defined.

Models for determining (identifying) firms subject to regulation may also vary. The EU uses a model of self-assessment of compliance with quantitative and qualitative criteria and notification in case of compliance. According to regulatory proposals from the US and the UK, competent authorities determine the status of a company, send it a decision, and include it in the relevant list.

Ex ante regulation may use a principles-based model (a soft type of regulation proposed in the UK) or a rules-based model with positive and negative obligations (a hard type of regulation adopted in the EU).

Regulations may be prohibitive, mitigating or enabling. For example, prohibitive provisions apply to conduct with exploitative and exclusionary potential, and prohibiting actions

that affect pricing of business users. Provisions aimed at mitigating exploitative practices based on access to data may include obligations to ensure effective data portability and provide data to third parties, measures to limit the merging of data from different markets and sources, and measures to ensure interoperability. Provisions aimed at ensuring transparency and fairness of business practices, including information disclosure requirements, are enabling.

Ex ante regulation sets new merger control requirements that consider the peculiarities of the digital economy and platform practices, such as obligatory notification rules for all transactions. All initiatives provide for measures to be applied in case of non-compliance, including fines (the amounts and procedures for imposing them vary) and behavioural and structural measures (for example, prohibitions on ownership, control, or beneficial interest in any business related to the platform).

Many jurisdictions develop ex ante regulation. There are differences in approaches to the choice of regulatory instruments, including in terms of defining key concepts, the scope of prohibited conduct, and the nature of prohibitions (as such or depending on the analysis of consequences). Institutional models also differ and may include concentrating competences within competition authorities (Germany; proposed by France and Italy), distributing competences between competition and several other authorities (Federal Trade Commission and the US Department of Justice), or creating a specialized unit or structure and a forum of responsible authorities (EU, UK).

The problems of ex ante regulation concern almost all aspects:

1) Selecting the object of regulation (platforms or services) or using a combination of approaches (platforms and services of specific platforms). Greater specification (the EU case) of types of platforms and services allows including new services as a result of market research and at the same time creates greater legal certainty. A greater degree of generality (the US case) eliminates the need to amend legislation in the future.

2) Ensuring a balance between specification, including specification of the object of regulation and requirements for the behaviour of platforms, ensuring the prevention of anti-competitive practices, maximum legal certainty and minimizing the possibility of lengthy proceedings (the EU case), and flexibility, allowing taking account of future changes in the state of competition and market structure (the UK and US cases).

3) Finding a balance between principles-based and rules-based regulation. The choice between soft regulation (without prescribed rules and prohibitions based on codes of conduct and assessment of specific cases—the UK model) and hard regulation (automatic application of requirements to regulated firms without their right to justify their behaviour or prove its pro-competitive nature—the EU model) largely depends on the traditions of each jurisdiction. An

intermediate option is to provide platforms with the right to defend themselves and prove that their behaviour was justified (this approach is adopted in Germany and the US). In this case, the burden of proof lies with the platform.

4) Defining quantitative and qualitative criteria for platforms subject to regulation. Some experts believe it is advisable to regulate only the largest platforms in order to avoid excessive burden on newcomers and potential innovative market participants (this approach is reflected in China's draft classification guidelines and draft guidelines for implementing responsibility).

5) Defining additional qualitative criteria that allow regulation of platforms that do not formally meet quantitative criteria. This is important for making decisions regarding platforms with vague structures and connections between their elements, where it is difficult to isolate the platform core and there are risks of service fragmentation. However, such an approach may lead to the loss of benefits of integrated ecosystems for users and limit competition in markets where platforms are newcomers.

6) Selecting a status identification model (self-assessment and notification or regulators' decisions).

7) Decision on specific rules and requirements. For example, a broad prohibition on influencing prices may be more effective than prohibiting platforms from applying restrictions on most-favoured regimes to business users. At the same time, the requirement for data portability[7] should be specified and applied only to dominant companies[8] and certain types of data (voluntarily provided and observable data).[9]

8) Finding a balance in determining penalties, since tough measures may undermine competition, while softer ones may contribute to market power concentration and monopolization, as well as lengthy litigation that is not beneficial to competition.

9) Developing rules related to mergers and acquisitions and assessing their impact. For example, decisions may be made on mandatory notification about all mergers and acquisitions of regulated companies or, alternatively, only about transactions exceeding a certain value threshold, and on assessing the impact of database mergers on competition and data protection. The choice of mitigation instruments (for example, behavioural, such as prohibition of data pooling or requirements of making data available to competitors and data portability requirements, or

[7] Measures concerning data portability can be different. The OECD defines data portability as a specific form of conditional access to, and exchange of, data [OECD, 2021c].

[8] Data portability requirements may place an excessive burden on businesses. Thus, many authors believe that there should be exceptions for non-dominant companies, or even that portability requirements should only apply to market participants that have achieved a dominant position through anti-competitive conduct.

[9] There is no clear understanding that providing data will enable switching, reduce switching costs, or barriers to entry, but at the same time will not harm data protection and consumer privacy, as well as incentives for investment in data collection and processing.

structural, such as database divestment) should also take into account the impact on competition, user protection, and convenience.[10]

10) Addressing issues of ensuring complementarity of competition legislation and ex ante regulation, including through the creation of coordination platforms and the choice of an institutional model: concentration of competences within competition authorities, distribution of competences between competition authorities and other bodies, or establishing a specialized unit or structure and forum of responsible authorities.

The choice of a solution for each of the listed problems is made considering the digital market development and regulatory traditions of each jurisdiction and is based on the three goals of ex ante regulation of digital platforms: reducing uncertainty and increasing predictability of business conditions, reducing litigation burdens and increasing law enforcement effectiveness, and increasing transparency and creating possibilities for new companies to enter the market.

Cross-Border Cooperation

Digital platforms regulation is shaped at the national level, while platform activities are often cross-border. Given the transnational nature of platforms, home-country regulations become extraterritorial, with differences in regulation across host countries reducing the quality of services and increasing compliance costs for platforms. Global corporations are better able to cope with regulatory differences and use them to their advantage [OECD, 2022g]. There is a consensus on the benefits of coherence in regulatory approaches across jurisdictions. Sound and transparent regulation creates legal certainty for platforms and their users and shapes user expectations regarding services. Coherence in regulatory approaches also alleviates concerns about protectionist aims of regulators [Wiedemann, 2021].

Despite the advantages of regulatory coherence across jurisdictions, cooperation is relatively new, fragmented, and characterized by contestation over the influence on regulatory rules.

Consultations on digital cooperation have been initiated in global governance institutions. The United Nations (UN) discussion on the future of digital governance [n.d.a] culminated in the presentation of the High-Level Panel recommendations [UN, 2019] and the Secretary-General's Roadmap on Digital Cooperation [UN, 2020]. These recommendations have been summarized in a proposal for the Global Digital Compact [UN, n.d.b], to be developed, negotiated and adopted

[10] Until recently, a large number of merger investigations and assessments in the US and the EU found no harm to competition and data protection, although data protection issues were increasingly included in reviews, for example, in the EU and the US in relation to Google/DoubleClick in 2008, and in the EU in relation to TomTom/TeleAtlas in 2008. The EU approved the Facebook/WhatsApp and Apple/Shazam mergers in 2014. In 2018, the US also cleared the Facebook/WhatsApp merger, although the Federal Trade Commission pointed to the parties' obligations to protect consumer privacy [OECD, n.d.n].

as an annex to the Pact for the Future at the Summit of the Future in September 2024 [UN, 2024]. Consultations on key elements of the compact began in February 2024 [“Letter,” 2024]. The process is coordinated by the co-chairs Sweden and Rwanda, with the support of the Office of the UN Secretary-General’s Envoy on Technology. The first reading of the zero draft of the Global Digital Compact was scheduled for 5 April 2024, but no draft text had been submitted by March 2024. Only key elements of the future compact have been sent for discussion.

These key elements include 10 principles, including bridging the digital divide and fostering an inclusive, open, and secure digital future for all; ensuring responsible, accountable, and risk-mitigating development of digital technologies, including AI; and building responsible and interoperable data governance. Possible future commitments and actions are grouped into four areas: closing digital divides and accelerating progress across the sustainable development goals (SDGs) (including accelerating access to digital technologies and innovation); building an inclusive, open, and secure digital space (ensuring a universal, free, open, interoperable, and reliable Internet, human rights, digital trust and security, promoting digital integrity, and combating misinformation and disinformation); strengthening data governance (protecting security and privacy, promoting representative, interoperable, and accessible data exchanges and standards, using data to monitor and accelerate progress across all SDGs, and promoting safe and secure data flows with trust); and governing new technologies, including AI.

Many of the proposed actions and commitments may directly or indirectly determine approaches to regulating platforms, but no substantive proposals have been submitted for consultation, making it difficult to assess the prospects of the Global Digital Compact as a basis for international cooperation on regulating platforms.

The Guidelines for the Governance of Digital Platforms: Safeguarding Freedom of Expression and Access to Information Through a Multistakeholder Approach [UNESCO, 2023], developed by the United Nations Educational, Scientific and Cultural Organization (UNESCO) through a broad consultation process and published in 2023, directly address content moderation regulations. The aim of the guidelines is “to safeguard the right to freedom of expression, including access to information, and other human rights in digital platform governance, while dealing with content that can be permissibly restricted under international human rights law and standards.” The document sets out human rights obligations in the governance system and overarching principles “that should be followed in all governance systems that impact freedom of expression and access to information on digital platforms—independently of the specific regulatory arrangement and the thematic focus” [Ibid, Para. 2]. The principles focus on the protection and promotion of human rights standards, based on the basic premise that in any regulatory system, application of norms and rules must comply with international human rights standards.

The guidelines outline states' duties to respect, protect, and fulfil human rights; the responsibilities of digital platforms to respect human rights; the role of intergovernmental organizations; and the role of civil society, media, academia, the technical community, and other stakeholders in the promotion of human rights.

The broad range of states' duties (19 commitments) includes: promoting universal and meaningful access to the Internet and guaranteeing net neutrality; guaranteeing digital platform users' rights to freedom of expression, access to information, equality and non-discrimination; ensuring that any restrictions imposed upon platforms follow the high threshold set for restrictions on freedom of expression, based on the application of Articles 19 (3) and 20 of the International Covenant on Civil and Political Rights (ICCPR), respecting the conditions of legality, legitimate aim, necessity, and proportionality. States must "adopt laws, grounded in international human rights standards, and ensure their effective implementation to prohibit, investigate, and prosecute online gender-based violence;" refrain from imposing measures that prevent or disrupt general access to the dissemination of information, online and offline, including internet shutdowns; and "refrain from imposing a general monitoring obligation or a general obligation for digital platforms to take proactive measures in relation to content considered illegal in a specific jurisdiction or to content that could permissibly restricted under international human rights law" [Ibid., Para. 26–9]. The latter obligation reflects the positions of platforms and is likely to require clarification, as it may conflict to some extent with the obligations of platforms to analyze content to identify risks and respect the rights of different groups [Ibid., Para. 94–100].

The obligations of digital platforms are grouped around five key principles. In each jurisdiction where they operate, platforms should: conduct human rights due diligence, analyzing risks and identifying mitigation measures; adhere to international human rights standards, including in platform design, moderation, and curation of their content, regardless of whether these practices are implemented through automated or human means; be transparent and open about how they operate, with understandable and auditable policies and metrics for evaluating performance; empower users to make informed decisions about content; and be accountable to relevant stakeholders (including users, the public and actors within the governance system) [Ibid., Para. 30–2]. The principles should apply to platforms with significant size and reach, large market share, and functional features such as real-time posting, potential for virality, volume, and velocity of distribution without content moderation.

The document also outlines the principles of governance systems (transparency, checks and balances, openness and accessibility, inclusion of diverse expertise, and protection of cultural diversity).

The guidelines and their practical application are proposed to be discussed in preparation for the Summit of the Future, as part of the development of the Global Digital Compact, as well as at the Internet Governance Forum, and will be used to create a code of conduct to help preserve the integrity of information on digital platforms. It is not yet clear in what status the principles will be adopted at the Summit of the Future, but they have already been proposed as a reference basis for states to take into account when developing regulations for digital platforms.

Although the guidelines and the Global Digital Compact will not become a source of regulation, they can define common approaches to digital governance and regulation of platforms. Thus, participation in consultations and coordination of positions in preparation for the Summit of the Future is advisable. It is important to discuss the provisions of the guidelines, the draft Pact for the Future, and the Global Digital Compact with partner countries from BRICS, the Eurasian Economic Union (EAEU), the Shanghai Cooperation Organisation (SCO), and the Commonwealth of Independent States (CIS) to formulate and articulate common positions. Russia could initiate discussions of these documents and development of coordinated proposals during its terms as BRICS and CIS chair in 2024.

The Group of 20 (G20) agenda does not include issues of platform regulation, which is probably due to the stalling progress on the G20's digital agenda in general and specific initiatives, for example, on data free flows with trust [Larionova, Shelepov, 2023]. The G7 members pursue a strategy to advance their approaches to regulating the digital economy through deepening "collaboration with like-minded partners to find coherent and complementary ways to encourage competition and support innovation in digital markets" [G7, 2021a] within the G7 and the OECD, and then promoting their standards and norms and shaping a global digital order through international institutions [G7, 2022]. In the context of confrontation between the G7 members[11] and emerging economies, implementation of this strategy in the G20 seems unrealistic. However, the G7 is moving toward its goal. In the framework of the UK presidency, the G7 agreed to coordinate policies on a wide range of digital market regulation issues [G7, 2021b]. The G7 competition authorities adopted a Compendium of Approaches to Improving Competition in Digital Markets [Gov.UK, 2021]. The work continued in 2022 [Gov.UK, 2022] and 2023 [Gov.UK, 2023]. The compendia mainly reflect the experience of updating and applying competition law instruments and developing ex ante regulation and contribute to coordination and deeper cooperation between the G7 competition authorities. One can expect that, in accordance with the established practice, generalized approaches and instruments of the G7 members and their OECD partners will serve as a basis for developing and adopting recommendations for digital

[11] At the bilateral level, the EU-US Trade and Technology Council was established in June 2021, with a mandate to cooperate on regulatory and enforcement practices in digital markets.

platforms regulation. The process of exchanging experiences and identifying best practices is currently underway [OECD, n.d.o].

The OECD promotes itself as a key forum for shaping the global digital policy framework based on its "historical and institutional expertise, extensive normative and regulatory foundations, and authority to set collective norms and standards" [OECD, 2022h]. Indeed, the OECD has developed significant regulatory capacity on various digital economy aspects. In 2022, the OECD adopted two declarations (the Declaration on a Trusted, Sustainable and Inclusive Digital Future and the Declaration on Government Access to Personal Data Held by Private Sector Entities) and four recommendations.[12] Although these documents do not regulate platforms, they shape the environment in which they operate. The declarations are especially indicative, as they reflect the vector of member countries' policies to shape regulation of key aspects in the digital economy.

The Declaration on a Trusted, Sustainable and Inclusive Digital Future aims to create a global digital policy framework by developing a common understanding and policy recommendations on various aspects of digital transformation, including online platforms, immersive environments, AI, data free flow with trust, cross-border data flows, digital security, intellectual property, privacy and data protection, and communication and other infrastructures. The declaration sets the objective of managing the challenges posed by new technologies and business models, including online platforms, through policies regulating competition, communications services, digital trade, data protection, and consumer protection [OECD, 2022h].

The Declaration on Government Access to Personal Data Held by Private Sector Entities does not explicitly mention platforms, but it directly concerns them setting out a provision granting national law enforcement and security authorities the right to access personal data of private companies, including platforms, as an essential condition for the exercise of government sovereign responsibilities. Governments have the right to access and process personal data owned or controlled by private companies in their territory, in accordance with their national law, including the right to request the provision of data if private companies or data are located in other states. In fact, the declaration enshrines the principle of extraterritoriality, which guides the US policy of ensuring security and freedom of cross-border data flows [Fefer, 2020]. The principle provides for the state's access to data collected and stored within the US' borders, as well as all data of companies operating on the basis of US laws outside the country, and is ensured by the Federal Law of 2001 ["USA Patriot Act," 2001] and the 2018 CLOUD Act [DoJ, n.d.].

[12] The Recommendation on Digital Security Risk Management (2022) (replaced the Recommendation on Digital Security Risk Management for Economic and Social Prosperity), the Recommendation on National Digital Security Strategies (2022), the Recommendation on the Digital Security of Products and Services (2022), and the Recommendation on the Treatment of Digital Security Vulnerabilities (2022).

At the same time, the declaration explicitly states that the OECD governments have such a right, since their "approach to government access is in accordance with democratic values; safeguards for privacy and other human rights and freedoms; and the rule of law including an independent judiciary." The principles outlined in the declaration should be a guarantee of commitment to the rule of law and an expression of "common democratic values." These principles include legal basis, legitimate aims, obtaining approvals, and data handling by authorized personnel, transparency, oversight, and redress. At the same time, member countries reject the right of other states to access personal data held by private entities, considering their actions, "regardless of the context, inconsistent with democratic values and the rule of law, unconstrained, unreasonable, arbitrary and disproportionate" [OECD, 2022i].

Thus, despite the recognized benefits of coherent platform regulation, cooperation faces challenges and is fragmented due to a contestation over the influence on digital economy governance.

Conclusion

Digital platforms affect the behaviour of citizens and businesses, while not being subject to control by the state and society. One of the major problems of regulation is the protection of consumer rights from so-called grey schemes used to manipulate and control user choice and "pump" and monetize data. It is necessary to update consumer protection instruments, data protection, and privacy legislation and adopt ex ante regulation of digital platforms. The combination of data protection, consumer protection, and competitive regulation instruments requires regulatory cooperation and a pluralistic approach in choosing the most effective methods of consumer protection.

Competition regulation tools also require adjustments to take into account the specific features of platform and ecosystem business models, including changes in approaches to assessing dominance and its consequences for competition and consumer welfare; indicators of dominance risks and theories of harm application; strengthening control over mergers and acquisitions and changing notification rules to prevent anti-competitive takeovers; including digital aspects in risk assessment, such as the impact of pooling databases on competitive dynamics; imposing an obligation to prove the absence of anti-competitive actions on merging parties; and assessing the consequences of structural measures and restrictions for consumers and their compatibility with platform business models. Strengthening digital tools and competition authorities' expertise is important. However, improving competition policy is not enough, since many aspects of digital platform activities lie outside its toolkit.

Ex ante regulation of digital platforms aims to prevent anti-competitive behaviour and ensure maximum legal certainty based on applying quantitative criteria for determining the status

of companies, defining a set of rules of conduct, limiting the ability of regulated companies to defend non-compliant behaviour, and providing for strict sanctions in case of violation. The difficulties in developing ex ante regulation include, but are not limited to, choosing the object of regulation (platform or service), defining quantitative and qualitative criteria for platforms subject to regulation, deciding on the use of additional qualitative criteria, choosing a status identification model, choosing between soft and hard regulation, finding a balance in determining penalties, defining merger and acquisition rules, and ensuring complementarity between competition law and ex ante regulation.

The transnational nature of platforms' operations determines the need for coherent regulatory approaches and international cooperation to ensure enforcement, monitoring of platforms' activities, and market analysis. However, cooperation faces difficulties. The problems include differences in key participants' approaches and contestation over the influence on regulating the digital economy.

Proposals for digital platforms regulation are not yet on the agenda of the UN consultations on the Global Digital Compact. The UNESCO Guidelines for the Governance of Digital Platforms: Safeguarding Freedom of Expression and Access to Information Through a Multistakeholder Approach, published in 2023, focus on ensuring that digital platforms regulation protects human rights and freedom of expression when dealing with content in line with international human rights standards.

The G20 and BRICS still do not have platform regulation issues on their agendas, while the G7 implements a strategy of deepening cooperation to develop coherent approaches in digital markets and subsequently promote their standards and norms through international institutions. Using the OECD as a platform for developing regulation is traditional for the G7. The latest OECD documents shape the operating environment for platforms in accordance with the vector of development of the G7 states' policies on regulating the main aspects of the digital economy. For instance, the Declaration on Government Access to Personal Data Held by Private Sector Entities enshrines the principle of extraterritoriality for OECD member countries in relation to ensuring security and freedom of cross-border data flows. At the same time, member countries do not recognize the right of other states to access personal data held by private entities. This is eloquently confirmed by President Biden's Executive Order of 28 February 2024, on Preventing Access to Americans' Bulk Sensitive Personal Data and United States Government-Related Data by Countries of Concern [The White House, 2024]. In fact, regulation of data flows discriminatory in relation to other states is being shaped.

Given the lack of productive cooperation within the G20 on regulating digital platforms and the tendency to develop digital markets regulation based on the G7/OECD standards and

norms, it is important to ensure full participation and influence of Russia and its partners in BRICS, the SCO, the EAEU, and CIS in the process of discussing the draft Global Digital Compact and decisions on the practical implementation of the Guidelines for the Governance of Digital Platforms in the framework of preparations for the Summit of the Future.

While the guidelines and the Global Digital Compact will not become a source of regulation, they can be the basis for coordinating approaches to platform regulation and digital governance and guide national policies and international approaches in the future. During its tenure as BRICS and CIS chair, Russia could initiate discussions on draft documents to develop and advance common positions in the context of preparations for the Summit of the Future.

It is important for BRICS to build up cooperation on digital platform regulation and include relevant issues in the forum's agenda. Identifying common problems and best regulatory practices, including in terms of updating and applying consumer protection tools, data protection and privacy instruments, competition policies, and developing ex ante regulation of BRICS countries, could be a step toward developing common approaches for BRICS recommendations (guidelines) on digital platform regulation. This work could be carried out along with the development of a model document describing the principles of interaction between BRICS digital market participants. In the future, using the "BRICS attraction effect" as opposed to the "Brussels effect," BRICS Outreach[13] and BRICS Plus partners could be integrated into this cooperation.

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[13] A term adopted by BRICS to refer to regional partner countries invited by chairmanships to participate in dialogue with the leaders of the group.

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