

CONTROL OF ABUSE OF DOMINANCE IN THE DIGITAL MARKETS:

STEPS TO BE TAKEN BY GEORGIA

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ABSTRACT

Rapidly evolving digital markets have created challenges for competition law across the world. Among them is the challenge to monitor abuse of dominance in digital markets through existing tools, which have been ineffective in tackling such abuses by digital giants. This is especially true in connection with developing countries that are in the process of implementing well-recognized standards of competition law and developing practices by their young competition authorities. Georgia, as a post-soviet country, is one of those jurisdictions that is relatively new to regulating competition in its market.

The major reform in Georgian competition law took place in 2020, making domestic law compliant with EU regulations. However, despite the substantial approximation of national competition law with the one of the EU, neither Georgian competition law nor the practice of the local competition authority specifically addresses unfair competition in the digital markets.

The purpose of my thesis is to examine how Georgia should approach controlling abuse of dominance in digital markets, as well as how it should implement the respective EU competition law in its domestic legislation.

The thesis illustrates that the digital markets in Georgia are not developed since the Georgian population lacks digital literacy while local businesses lack awareness and technical skills to digitalize their commerce. However, policy documents of Georgian authorities, as well as cooperation between the EU and Georgian government and respective projects implemented, show that one of the main goals of Georgia is the development of a digital economy, promoting e-commerce in Georgia by raising awareness among the population as well as local businesses and providing technical support for the digitalization of commerce. On the other hand, research shows that giant tech companies, such as Google and Facebook dominate Georgian markets

while Amazon holds a considerable market share in the Georgian e-commerce market, and they can potentially engage in anticompetitive conduct in Georgian digital markets. In order to address the research question, the thesis compares Georgian and EU competition law to identify gaps in Georgian law in relation to addressing abuse of dominance in digital markets. Lastly, the thesis discusses how, Georgia, as a developing country, should proceed with controlling the abuse of dominance by digital players. Specifically, it suggests steps that Georgia should take in connection with abuse of dominance in digital markets and discusses whether, and to what extent, it should implement the EU Digital Markets Act into its national legislation.

INTRODUCTION

Globally, the rapid development of digital markets has posed challenges to competition law. One of these challenges is monitoring abuse of dominance by digital platforms through existing tools, which have been ineffective in tackling such abuses.¹ In order to address these challenges, competition authorities in the EU have adapted antitrust analytical tools to the digital markets in order to efficiently tackle the abuse of dominance by digital giants such as Amazon, Google, Facebook, etc.² Importantly, in 2022, the Digital Markets Act (DMA)³ was adopted in the EU in order to ensure fair competition in digital markets and more choice for users by, inter alia, targeting so-called “gatekeepers”.

In developing countries, dealing with digital platforms is even more challenging as the competition authorities in developing economies have limited resources⁴ and lack skilled personnel who thoroughly understand how digital markets function. Georgia, as a post-soviet country, is one of those jurisdictions that are relatively new to regulating competition in their markets. However, it has implemented well-recognized standards of competition law in a domestic setting to ensure fair competition in Georgia.

¹ See e.g. OECD, ‘The Evolving Concept of Market Power in the Digital Economy, OECD Competition Policy Roundtable Background Note’ (2022) <<https://www.oecd.org/daf/competition/the-evolving-concept-of-market-power-in-the-digital-economy-2022.pdf>> accessed 9 June 2023.

² OECD, ‘Rethinking Antitrust Tools for Multi-Sided Platforms’ (2018) <<https://www.oecd.org/daf/competition/Rethinking-antitrust-tools-for-multi-sided-platforms-2018.pdf>> accessed 6 May 2023.

³ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265/1.

⁴ World Bank, ‘Antitrust and Digital Platforms: An Analysis of Global Patterns and Approaches by Competition Authorities. Equitable Growth, Finance and Institutions Insight - Trade, Investment and Competitiveness’ (2021) 57 <<http://hdl.handle.net/10986/36364>> accessed 13 May 2023.

More specifically, in 2014, Georgia entered into Association Agreement with the EU (the “Association Agreement”)⁵ which contains a competition chapter,⁶ recognizing the importance of “free and undistorted competition”. Article 204 of the Association Agreement provides a general undertaking of the parties to “maintain [...] comprehensive competition laws, which effectively address [...] anticompetitive unilateral conduct of enterprises with dominant market power”. The latter provision indirectly requires Georgia to develop a competition framework that encapsulates provisions similar to those found in EU law in domestic legislation.⁷ Considering the above undertaking, in case Georgian digital markets face the risk of restriction of competition by digital players, Georgia is required under the Association Agreement to implement legislation effectively tackling this issue.

The Law of Georgia on Competition (the “Competition Law”), currently in force, was adopted in 2012.⁸ Although it was somewhat harmonized with the law of the EU, it fell short of ensuring fair competition in Georgian markets.⁹ Therefore, in 2020, massive amendments were made to the Competition Law in order to make it fully compliant with the EU competition rules and its best practices. Having said that, similar to even developed jurisdictions across the world,¹⁰ Georgia will also face difficulties in terms of tackling abuse of dominance in digital markets through existing competition tools.

⁵ Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part (adopted on 27 June 2014, entered into force on 1 July 2016).

⁶ *ibid* Title IV, Chapter 10.

⁷ Liana Japaridze and Erika Szyszczak, ‘Competition Developments in Georgia: Approximating to the EU Regime’ (2022) 1 *Concurrences* 1 <<https://www.concurrences.com/en/review/issues/no-1-2022/international/liana-japaridze>> accessed 1 April 2023.

⁸ Law of Georgia on Competition 2012.

⁹ ‘History of Competition Policy Enforcement in Georgia’ (*Georgian National Competition Agency*) <<https://gnca.gov.ge/index.php?m=347&lng=eng>> accessed 10 June 2023.

¹⁰ See e.g. OECD, ‘Rethinking Antitrust Tools for Multi-Sided Platforms’ (n 2).

The purpose of this paper is to address the question of how Georgia should tackle the abuse of dominance in digital markets and how it should implement the respective EU law (especially the DMA) so that it guarantees fair and sound competition in Georgian digital markets.

There is a significant amount of scholarly work and reports of international organizations discussing the inefficiency of existing competition tools for tackling the abuse of dominance in digital markets in the EU as well as developing countries.¹¹ In addition, scholars today agree that while developing countries should study the practices of developed economies as a starting point for developing domestic laws, their legal systems should be adapted to their socio-economic and political environment.¹² Considering that the digitalization of Georgia's economy is inevitable, and the traditional competition analytical tools will eventually have to be modified in accordance with the characteristics of digital markets, and since no research has yet been conducted in this field in relation to Georgia, this paper serves as a starting point for determining what steps Georgia, as a developing country, should take to address the above challenges, and how to approximate its legislation with EU law to prevent abuse of dominance in digital markets.

This thesis does not engage in the discussion of how competition law interacts with other fields of law, such as data protection law, consumer law, etc., and how abuse of dominance in digital

¹¹ See e.g. OECD, 'Rethinking Antitrust Tools for Multi-Sided Platforms' (n 2); OECD, 'The Evolving Concept of Market Power in the Digital Economy, OECD Competition Policy Roundtable Background Note' (n 1); Maciej Bernatt, 'Competition Law and the Digital Economy: Poland' (2019) <<https://papers.ssrn.com/abstract=3431641>> accessed 11 May 2023; 'Stigler Committee on Digital Platforms, Final Report' (2019) 3 <<https://www.chicagobooth.edu/research/stigler/news-and-media/committee-on-digital-platforms-final-report>> accessed 13 May 2023; Competition Commission of South Africa, 'Competition in the Digital Economy' (2020) <<http://www.compcom.co.za/wp-content/uploads/2021/03/Digital-Markets-Paper-2021-002-1.pdf>> accessed 11 May 2023; 'Ensuring Open, Competitive and Fair Digital Markets' (UNCTAD / *Prosperity for All*, 12 July 2021) <<https://unctad.org/news/ensuring-open-competitive-and-fair-digital-markets>> accessed 30 May 2023; Harry First, 'Digital Platforms and Competition Policy in Developing Countries' (2021) 2 *Concurrences* 1.

¹² See e.g. Michal Gal and Eleanor M Fox, 'Drafting Competition Law for Developing Jurisdictions: Learning from Experience' in Michal S Gal and others (eds), *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (Edward Elgar Publishing 2015); Bojana Hajdini and Gentjan Skara, 'Lost in Implementation: EU Law Application in Albanian Legal System' (2017) 19 *Journal of Legal Studies* 43.

markets should be handled interinstitutionally by the relevant authorities. In addition, the thesis does not examine specific abusive conduct, but rather examines abuse of dominance in Georgian digital markets in general, using specific digital markets (online marketplaces, social networks, search engines, and ride-sharing platforms) for illustration purposes. Furthermore, as there are no practices of the Georgian National Competition Authority (the “GNCA”) relating to the abuse of dominance of digital markets, this paper will not examine whether the GNCA applies and interprets the provisions of the Competition Law on abuse of dominance in accordance with EU practice. Lastly, the thesis will primarily focus on procedural, rather than substantive, recommendations for Georgia. Specifically, it does not provide specific substantive recommendations for amending Georgia's competition law since it requires an understanding of the competitive environment in Georgian digital that I could not acquire due to the following reasons: Georgian authorities have not yet conducted an investigation into digital markets; statistics provided in Chapter I or any publicly available data on digital market players are not sufficient for accurately determining the Georgian digital markets’ dynamics; and I do not possess sufficient knowledge, skills, or resources to collect and analyze data required for assessing dynamics in digital markets.

In order to address the research question stated above, the paper takes a law-in-context approach. First, this thesis analyzes the statistical data to examine the state of the digital market in Georgia and identifies potential abusive behavior in relevant digital markets in light of the practices of developed and developing jurisdictions. The thesis then applies comparative analysis to identify gaps in Georgian legislation in light of the EU law to determine what Georgian competition law and tools lack for effectively dealing with abusive conduct in digital markets. The thesis then discusses the steps to be taken by Georgia as a developing country based on the practices of other competition authorities of both developed and developing economies. For the purposes of this analysis, the thesis will use a doctrinal approach and focus

on primary and secondary sources of law and will review relevant literature addressing the issues of adaptation of competition law and analytical tools to characteristics of digital markets as well as the implementation of the law by developing countries.

The structure of the thesis is as follows: Chapter I examines the state of digital markets based on studies and statistics regarding internet connectivity, digital literacy, and e-commerce, as well as the positions of the main players in certain digital markets, such as online marketplaces, search engines and social networks, as well as ride-sharing platforms. Based on this analysis, it will assess whether the digital markets are emerging and if there are concerns in relation to the abusive conduct by dominant digital platforms. It will further overview Georgia's obligation under the Association Agreement to harmonize its legislation with EU law and examines the EU law that Georgia may need to implement for addressing abuse of dominance in digital markets. Chapter II will discuss how competition policy goals should be defined and what steps should be taken by Georgia to implement effective competition laws and analytical tools in relation to the abuse of dominance by digital players. The conclusion of this paper contains a summary of recommendations regarding how Georgia should tackle abusive conduct in digital markets.

I. DIGITAL MARKETS AND COMPETITION LAW IN GEORGIA AT PRESENT

The purpose of this Chapter is to analyze the situation in the Georgian digital markets and examine the current Georgian competition law in order to lay a foundation for further analysis of how Georgia should address the abuse of digital market power.

1. Digital Markets in the Present

This Subchapter examines the current situation and potential for the development of digital markets in Georgia. Specifically, Section 1.1 examines the level of development of Georgian digital markets. Section 1.2 turns to players and their positions in digital markets, focusing on online marketplaces, search engines, social networks and ride-sharing platforms. Section 1.3 summarizes the findings regarding the state of the digital markets in Georgia and identifies concerns that the GNCA may face in connection with abusive conduct by digital players.

1.1. Development of Digital Markets in Georgia

This Section examines the current situation and potential for the development of Georgian digital markets by examining the level of internet connectivity, digital literacy, and e-commerce usage in Georgia. It then seeks to analyze the visions of the Georgian authorities in terms of the development of digital markets in Georgia. Further, it turns to the players and their positions in digital markets, focusing on online marketplaces, search engines, social networks and ride-sharing platforms. It concludes by summarizing the findings regarding the state of the digital markets in Georgia and identifies concerns that the GNCA may face in connection with abusive conduct by digital players.

1.1.1. Internet Connectivity and Digital Literacy

As of July 2022, 88.4% of households in the territory of Georgia had access to the internet which was 4.6% and 2.3% more than in 2020 and 2021, respectively.¹³ Statistics show that internet access in households in all regions (except for Mtskheta-Mtianeti) of the country has

¹³ National Statistics Office of Georgia, 'Information and Communication Technologies Usage in Households - National Statistics Office of Georgia' s Share of Households with Internet Access <<https://www.geostat.ge/en/modules/categories/106/information-and-communication-technologies-usage-in-households>> accessed 6 April 2023.

been gradually increasing from year to year.¹⁴ In addition, more than 97% of the Georgian population was using mobile devices to access wireless internet (away from home or work) in 2021 and 2022.¹⁵ As for the local companies, they are also provided with internet access to a great extent, since as of 1 January 2022, 84.2% of the local enterprises had access to the internet in the enterprise.¹⁶

In spite of the improvement in internet access, there is a relatively low level of digital literacy among Georgians. For example, a report by the International Telecommunication Union (ITU) published in 2021 indicated that in 2019, only 31% of the Georgian population possessed basic ICT skills¹⁷ while 13.7% possessed standard level and only 1.1% had advanced ICT skills.¹⁸ In 2021, according to a survey conducted by Caucasus Barometer, 47% of Georgians did not possess the basic knowledge to use computers, and 13% had a beginner's level of computer knowledge.¹⁹ Based on these numbers, more than half of the Georgian population lacks the technical skills (consequently, cognitive skills that are also components of digital literacy) to use the digital tools to “find, evaluate, create and communicate information.”²⁰

¹⁴ *ibid.*

¹⁵ *ibid* Share of Population Using Mobile Devices (Mobile Phone, Laptop, Tablet, etc.) to Access the Wireless Internet from any Location.

¹⁶ National Statistics Office of Georgia, ‘Information and Communication Technologies Usage in Enterprises - National Statistics Office of Georgia’ s Access and Use of Internet <<https://www.geostat.ge/en/modules/categories/105/information-and-communication-technologies-usage-in-enterprises>> accessed 6 April 2023.

¹⁷ Basic ICT Skills include “copying or moving a file or folder, using copy and paste tools to duplicate or move information within a document, sending e-mails with attached files, and transferring files between a computer and other devices”. See International Telecommunication Union, ‘Digital Trends in Europe 2021: ICT Trends and Developments in Europe, 2017-2020’ (2021) 11 <https://www.itu.int/hub/publication/d-ind-dig_trends_eur-01-2021/> accessed 14 April 2023.

¹⁸ *ibid*; ISET, ‘Electronic Commerce’ s Population According to ICT Skills <<https://www.mediator.iset-pi.ge/data-e-commerce>> accessed 18 April 2023.

¹⁹ Caucasus Research Resource Centers, ‘Caucasus Barometer 2019 Georgia’ s Knowledge of Computers <<https://caucasusbarometer.org/en/cb2019ge/COMPABL/>> accessed 14 April 2023.

²⁰ Jamie Harris, ‘Seven Elements of Digital Literacy for Adult Learners’ (*Tech Tips*, 10 September 2020) <<https://edtech.worlded.org/seven-elements-of-digital-literacy-for-adult-learners/>> accessed 14 April 2023; US Museum and Library Services Act 2018 s 9101(2).

1.1.2. Use of E-Commerce

E-commerce is not widely used in Georgia since only 23.8% of the population in Georgia used the internet for buying/ordering goods or services in 2022.²¹ As for the enterprises' side, 96% of the enterprises having internet access didn't have web sales at all in 2021.²² Within the remaining 4%, only 1.9% used online marketplaces (local and international) to sell their products. Barriers to digitalizing commerce could be, among others, a lack of awareness regarding the importance of e-commerce as well as the lack of resources and qualified employees for digitalizing commerce.²³

Having said that, statistics show that there was an increase in the e-commerce market between 2018-2020. Specifically, the share of local e-commerce in total online purchases increased from 11% to 23% between 2018 and 2020²⁴ (however, e-commerce market share in retail sales was just 1.1% which was well below the average of 12% in Europe²⁵). Such a significant increase in local e-commerce resulted from the Covid-19 pandemic which forced local companies to boost their online sales while international companies had difficulties in shipping goods to Georgia.²⁶ However, cross-border e-commerce spending has also been increasing, by an average of 40.3% per year between 2018 and 2020.²⁷ Notably, there are predictions that by 2025, local e-commerce will make up more than half of all online purchases.²⁸

²¹ National Statistics Office of Georgia (n 13) s Share of Population Using the Internet for Buying/ordering Goods or Services.

²² National Statistics Office of Georgia (n 16) s E-commerce.

²³ Vano Benidze, 'Small and Medium-Sized Enterprises in a Globalizing Business Environment: Importance and Challenges of E-Commerce Adoption' (The 2nd International Scientific Conference: Challenges of Globalization in Economics and Business, Tbilisi, 2017) 87.

²⁴ Galt & Taggart, 'E-Commerce in Georgia' (2021) 5 <https://api.galtandtaggart.com/sites/default/files/2021-07/report/e-commerce-in-georgia_july-2021_eng.pdf> accessed 6 April 2023.

²⁵ *ibid* 6.

²⁶ *ibid* 4.

²⁷ *ibid* 9.

²⁸ *ibid* 20.

Based on the above statistics, it can be concluded that e-commerce in Georgia is not developed. The Georgian population lacks sufficient digital literacy in order to engage in e-commerce. Consequently, local businesses lack qualified individuals to assist them in digitalizing their commerce, including by using online marketplaces. However, statistics show that e-commerce has been gradually gaining popularity among consumers and local businesses over the past few years which tendency is predicted to be continued in the following years.

1.1.3. Visions of Georgian Authorities Regarding the Development of the Digital

Markets

In February 2021, the Georgian government approved the “Program for 2021-2024 Towards Building a European State” which states that one of the main priorities of the Georgian government is to develop a digital economy through information and communication technologies,²⁹ improve access to broadband internet in Georgia and develop digital literacy.³⁰ Importantly, the document specifies that the government will continue taking measures for the integration of the Georgian digital market with the EU Single Digital Market.³¹ For this purpose, the EU supports Georgia’s development of the digital economy through the EU4Digital Initiative and helps Georgia to develop, among others, digital skills for citizens³² and e-commerce skills for businesses.³³ A further objective of the project is to increase cross-border e-commerce with the EU by 50% through cooperation between Georgia and the EU.³⁴

²⁹ Government of Georgia, ‘Program for 2021-2024 Towards Building a European State’ (2021) 31 <<https://www.gov.ge/wp-content/uploads/2021/10/programa-20.02.2021.pdf>> accessed 11 April 2023.

³⁰ *ibid* 32. For the projects/activities implemented by Georgia for developing digital skills in the country, see OECD, *Fostering Business Development and Digitalisation in Georgia* (OECD Publishing 2022) 75.

³¹ *ibid*.

³² ‘ESkills’ (*EU4Digital*) <<https://eufordigital.eu/thematic-area/eskills/>> accessed 15 April 2023.

³³ ‘Georgian SMEs Master E-Commerce Skills to Enter New Markets’ (*EU4Business*, 27 August 2020) <<https://eu4business.ge/en/news/georgian-smes-master-e-commerce-skills-to-enter-new-markets/>> accessed 18 April 2023.

³⁴ ‘The European Union and Georgia’ (*Factsheet: The EU and Georgia*, June 2022) <https://ec.europa.eu/commission/presscorner/detail/en/FS_22_3922> accessed 11 April 2023.

Considering the above strategies of the Georgian government and the EU's active support, it is obvious that one of the main goals of Georgia is the development of digital markets through improving access to the internet across the country, fostering digital skills and digital literacy among the population, and generally, integration of Georgian digital market with that of the EU. Thus, the policy of Georgia supports the dynamics discussed in previous Sections of this Subchapter, in particular, the increasing use of e-commerce by the Georgian population and businesses. A further demonstration of this is that the draft law on e-commerce is currently being developed in order to ensure the best possible protection for consumers.³⁵

1.2.Main Players

To gain a general understanding of the competitive landscape in Georgian digital markets, this Section focuses on digital markets where abuse of dominance by digital platforms has occurred most frequently around the globe, particularly, online marketplaces, social networks, search engines and ride-sharing platforms.

Online Marketplaces

International online marketplaces are very popular among the Georgian population. This is demonstrated by the fact that $\frac{3}{4}$ of total online spending goes to foreign retailers.³⁶ Notably, Amazon, eBay, Taobao and Aliexpress had a $\frac{2}{3}$ share in total cross-border purchases in 2020.³⁷ Their main local competitors are mymarket.ge, extra.ge, vendoo.ge and be.ge.³⁸ Despite the fact that local e-commerce accounted for 23% of total e-commerce in 2020, in 2025

³⁵ 'eCommerce' (*Georgia - Country Commercial Guide*, 15 August 2022) <<https://www.trade.gov/country-commercial-guides/georgia-e-commerce>> accessed 15 April 2023.

³⁶ Galt & Taggart (n 24) 5.

³⁷ *ibid* 9.

³⁸ *ibid* 10.

it is anticipated that local e-commerce will represent more than half of all online spending in Georgia.³⁹

Therefore, at this point, foreign online marketplaces dominate the Georgian market together, and Amazon arguably holds the biggest share of the market (based on the analysis of traffic to the websites).⁴⁰ However, it is not clear whether Amazon has a dominant position from the competition law perspective, not to mention its effects on the Georgian market. In addition, if the predictions regarding significant growth of local e-commerce turn out to be right, and since online marketplaces are better means for SMEs and individuals to reach consumers, there is a possibility that local e-commerce platform(s) will eventually strengthen their positions in the Georgian market. In spite of this, taking into account the statistics, and since both foreign and local platforms offer different benefits (wide variety of products/lower prices and avoidance of shipping costs/import tax, respectively) to consumers, it is unlikely that one online marketplace will acquire dominance in the near future.

Search Engines and Social Networks

It is not surprising that Google dominates the search engine market in Georgia. In 2021-2022, its share in the Georgian search engine market was 90.84%.⁴¹ As for the social networks, in 2021-2022 Facebook held more than 90% share.⁴² Although its market share decreased to 73% in 2023,⁴³ it has not lost its dominant position. It is important to notice that even though a

³⁹ *ibid* 5.

⁴⁰ *ibid* 12.

⁴¹ 'Search Engine Market Share Georgia' (*StatCounter Global Stats*) <<https://gs.statcounter.com/search-engine-market-share/all/georgia/>> accessed 13 April 2023.

⁴² 'Social Media Stats Georgia' (*StatCounter Global Stats*) <<https://gs.statcounter.com/social-media-stats/all/georgia/>> accessed 13 April 2023.

⁴³ *Ibid*.

significant portion of the Georgian population lacks digital literacy and knowledge to use computers, more than 95% were using the internet for social networks in 2021 and 2022.⁴⁴

Ride-sharing platforms

Bolt and Yandex Taxi are the main players in the Georgian ride-sharing apps market. Bolt started operating in Georgia in 2013.⁴⁵ Even though it provides better quality in service,⁴⁶ it is not expected to significantly strengthen its position in the Georgian market due to its high prices.⁴⁷ Yandex entered the Georgian market in 2016.⁴⁸ A number of its local competitors went out of business as a result of its dumping prices.⁴⁹ It is notable that in December 2016 local taxi companies and the Taxi Drivers' Union required the GNCA to monitor the activities of Yandex since it entered the market with dumping prices and demand for their services has significantly decreased.⁵⁰ However, this request did not result in any investigation on the part of the GNCA.⁵¹ Moreover, the chairperson of the GNCA stated that, unless there are other complaints, they would not investigate the market at their initiative, but rather use their limited resources for ensuring competition in other, more important, markets.⁵²

⁴⁴ National Statistics Office of Georgia (n 13) s Share of Population Aged 15 and Older by Purposes of Internet Use.

⁴⁵ 'Bolt Food Is Already in Batumi!' (*Marketer*, 2021) <<https://www.marketer.ge/bolt-food-batumi/>> accessed 15 April 2023.

⁴⁶ Emily Lush, 'How to Use Taxis in Tbilisi: Essential Tips, Common Issues & 3 Best Taxi Apps Compared' (*Wander-Lush*, 15 April 2023) <<https://wander-lush.org/taxi-tbilisi/>> accessed 15 April 2023.

⁴⁷ Maka Kikilashvili, 'Georgia: Reality and Future Perspectives of the Sharing Economy Development' in Andrzej Klimczuk, Vida Česnuityte and Gabriela Avram (eds), *The Collaborative Economy in Action: European Perspectives* (University of Limerick 2021) 132.

⁴⁸ *ibid* 131.

⁴⁹ *ibid*.

⁵⁰ Natia Liparteliani, 'Georgian Taxi Firms Receiving 70% Fewer Calls as Yandex Taxi Enters Georgian Market' (*Georgia Today*, 12 December 2016) <<http://gtarchive.georgiatoday.ge/news/5377/Georgian-Taxi-Firms-Receiving-70%25-Fewer-Calls-as-Yandex-Taxi-Enters-Georgian-Market>> accessed 10 June 2023.

⁵¹ Salome Metskhvarishvili, 'Competition Agency Does Not Plan to Study the Yandex Taxi Case' (*Business Media Georgia*, 11 July 2017) <<https://bm.ge/ka/article/konkurenciis-saagento-yandex-taxis-sakitxis-sheswavlas-ar-gegmavs/12761>> accessed 15 April 2023. It was claimed by the GNCA that the documentation needed to be corrected due to errors. They did not open an investigation on their own initiative as well.

⁵² *ibid*.

1.3. Concerns Regarding Abuse of Dominance by Digital Players

It is evident from the statistics discussed in this Subchapter that digital markets are not developed in Georgia. The lack of digital literacy among the population remains a significant barrier to the development of Georgian digital markets. Indeed, statistics show that e-commerce in Georgia has not yet developed significantly. Therefore, control of abuse of market power in digital markets may not appear to be a high priority for Georgian authorities at this point because the potential damage that may be caused by the large tech companies probably seems relatively small. Consequently, the GNCA may consider it more important to use its limited resources on ensuring competitiveness in other markets that are more developed and the effects of its players may have more impact on Georgian consumers.

Although this is the case, the statistics also show that Georgia's digital markets are gradually developing there has been an increase in internet access and e-commerce use among both individuals and businesses across the country every year. In addition, the Georgian government and EU have implemented (and plan to implement in the future) a number of initiatives to promote digital literacy and facilitate the digitalization of the commerce of local small and medium-sized businesses. These factors make it possible to predict further growth in Georgia's e-commerce sector, both on the consumer and business side. Due to this, online marketplaces (foreign or local) may strengthen their positions in Georgian markets, creating the risk of engaging in anticompetitive conduct (e.g. self-preferencing, imposing unfair contract terms on local sellers, etc.).⁵³

⁵³ See e.g. 'Bundeskartellamt Obtains Far-Reaching Improvements in the Terms of Business for Sellers on Amazon's Online Marketplaces' (*Bundeskartellamt*, 17 July 2019) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/17_07_2019_Amazon.html> accessed 31 May 2023.

As for the search engines and social networks, Google and Facebook already hold dominant positions in respective digital markets in Georgia. Therefore, the risk of abuse of dominance is higher by these tech companies (e.g. self-preferencing by Google, data exploitation by Facebook, etc.). With regard to these markets, it is worth mentioning that an empirical study, conducted in ten countries (the United Kingdom, Germany, France, Italy, the United States, Australia, Singapore, India, China, and Brazil) found that the majority of consumers using the internet does not know how Google search engine and Facebook social network are funded or provided to them free of charge and how the search engine ranks its results.⁵⁴ More than half of the countries where the surveys were conducted are developed countries, having higher digital literacy rates than Georgia.⁵⁵ This means that the situation in relation to the knowledge of how their data is used by tech giants would not be any better among Georgian consumers. Therefore, in the absence of digital literacy among the population, the vulnerability to misinformation and the risk of exploitation of consumers' personal data are even higher.

In terms of ride-sharing platforms, predatory pricing by dominant players is a widespread practice designed to eliminate online and offline competitors. In Brazil, India, Kenya and South Africa, there were cases against Uber for predatory pricing and algorithmic collusion.⁵⁶ Moreover, in January 2023, the competition authority of Moldova initiated an investigation for alleged abuse of dominance by Yandex.⁵⁷ Despite these practices, the GNCA failed to investigate the market on the basis of complaints or on its own initiative, even though local competitors alleged that Yandex in Georgia was imposing predatory pricing that led to their

⁵⁴ Pinar Akman, 'A Web of Paradoxes: Empirical Evidence on Online Platform Users and Implications for Competition and Regulation in Digital Markets' (2022) 16 Virginia Law and Business Review 217, 272.

⁵⁵ See e.g. 'How Many Citizens Had Basic Digital Skills in 2021?' (*Eurostat*, 30 March 2022) <<https://ec.europa.eu/eurostat/web/products-eurostat-news/-/ddn-20220330-1>> accessed 7 May 2023.

⁵⁶ World Bank (n 4) 32.

⁵⁷ Alex Bagley, 'Moldova Kicks off First-Ever Digital Markets Probe' (*Global Competition Review*, 27 January 2023) <<https://globalcompetitionreview.com/article/moldova-kicks-first-ever-digital-markets-probe>> accessed 27 May 2023.

bankruptcy. It may be argued that the GNCA failed to effectively tackle abusive conduct in ride-sharing platforms market.

In light of the above, as in any other country, there is a risk of abuse of dominance by big tech companies in respective digital markets, and this risk will increase with the development of Georgia's digital markets. In order to address the above risks, especially given the limited resources of the GNCA, action may be needed on the part of Georgia to ensure the existence of competitive digital markets.

2. Georgian Competition Law Addressing Abuse of Dominance

In 2014, Georgia entered into the Association Agreement with the EU which contains, among others, competition law-related obligations to be adhered to by the parties. Article 204 of the Association Agreement requires parties to “maintain [...] comprehensive competition laws, which effectively address [...] anticompetitive unilateral conduct of enterprises with dominant market power”. There is no explicit requirement for Georgia to implement EU law as a legal transplant. In other words, in case Georgian digital markets face the risk of restriction of competition by digital players, Georgia is required under the Association Agreement to implement legislation and competition tools effectively tackling this issue. Thus, when it comes to developing a competition framework and adopting competition laws, Georgian authorities have considerable discretion. Thus, Georgia has the right to modify its competition laws to meet its socioeconomic needs, as long as these changes do not conflict with the key principles of EU competition law. The purpose of this Subchapter is to identify gaps in Georgian competition law with regard to the abuse of digital market power in light of the relevant EU law.

2.1.EU Law on Digital Markets

The basic framework to control abuse of dominance in the EU is provided under Article 102 of the Treaty on Functioning of the European Union (TFEU). The applicability criteria of Article 102 have been shaped by the case law of the EU courts and the European Commission's Guidelines on Enforcement Priorities of Article 102⁵⁸ (as amended in 2023)⁵⁹ (the "Commission Guidance on Enforcement Priorities of Article 102 TFEU"). However, even though Article 102 still serves as a basis for establishing abuse of dominance by digital players, characteristics of digital platforms forced EU authorities to adjust existing analytical tools and methodologies, as well as the traditional theory of harm, in applying competition law in the digital era.⁶⁰ In response to the challenges posed by the digital markets, the EU has adopted new competition analytical tools for defining relevant market and market power of the undertaking⁶¹ and introduced new theories of harm for establishing abuse of dominance adapted to the unique characteristics of digital markets.⁶² In particular, forced free riding, abusive leveraging and self-preferencing, as well as privacy policy tying, have been proposed as new theories of harm to effectively tackle abusive conduct by digital giants.⁶³

Nevertheless, the EU remained concerned that Article 102 TFEU does not address, or does not effectively address, the conduct of so-called 'gatekeepers'⁶⁴ that provide online platform services to business users and end users.⁶⁵ The concern, in particular, was that the

⁵⁸ Communication from the Commission - Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7.

⁵⁹ Communication from the Commission - Amendments to Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2023] OJ C 116/01.

⁶⁰ Directorate-General for Competition (European Commission) and others, *Competition Policy for the Digital Era* (Publications Office of the European Union 2019) 39 <<https://data.europa.eu/doi/10.2763/407537>> accessed 10 April 2023.

⁶¹ *ibid* 41–50.

⁶² OECD, 'Abuse of Dominance in Digital Markets' (2020) 54–56 <<https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf>> accessed 3 May 2023.

⁶³ *ibid* 56.

⁶⁴ The criteria for designation of undertakings as 'gatekeepers' is provided under Digital Markets Act art 3.

⁶⁵ Digital Markets Act recital 5.

characteristics of online platforms, including extreme economies of scale, strong network effects, lock-in effects, lack of multi-homing, and data-driven advantages, create an imbalance in bargaining power, which may lead to unfair practices of gatekeepers and unfair conditions for businesses and end users, which would adversely affect "prices, quality, fair competition, choice, and innovation".⁶⁶ The EU got to the conclusion that Article 102 TFEU does not effectively address the conduct of 'gatekeepers' since it applies only to certain instances of market power.⁶⁷ Also, it does not address the conduct of 'gatekeepers', having an effect on the EU internal market, that does not necessarily have a dominant position under traditional competition law.⁶⁸ Furthermore, an important concern was that Article 102 TFEU required an investigation of anticompetitive behavior *ex-post*, which took a significant amount of time and resources.⁶⁹

The above concerns led to the adoption of the Digital Markets Act (DMA), which entered into force on November 1, 2022. The DMA serves as an '*ex-ante*' tool to prevent anticompetitive conduct by the online platforms that qualify as 'gatekeepers' under the DMA criteria⁷⁰ and applies in addition to Article 102 TFEU and national competition laws.⁷¹ Specifically, it prohibits the 'gatekeepers' designated under the DMA from engaging in certain anticompetitive practices *ex-ante*, without the necessity of defining the relevant market or showing the undertaking's dominant position.⁷² The DMA somewhat reflects the respective EU case law and practices of the European national competition authorities,⁷³ providing prohibitions of the conduct by digital players that were deemed anti-competitive under such

⁶⁶ *ibid* recitals 2-5.

⁶⁷ *ibid* recital 5.

⁶⁸ *ibid*.

⁶⁹ *ibid*.

⁷⁰ *ibid* recital 3.

⁷¹ *ibid* recital 10.

⁷² Nicolas Petit, 'The Proposed Digital Markets Act (DMA): A Legal and Policy Review' (2021) 12 *Journal of European Competition Law & Practice* 529, 530.

⁷³ *ibid* 535.

case law and practices. For example, Article 5(3) of the DMA reflects the prohibition of MFN clauses,⁷⁴ Article 6(5) prohibits self-preferencing established under the *Google Shopping* case,⁷⁵ etc. By doing so, the EU ensured that only those cases that do not fall under the scope of the DMA will be investigated *ex-post* under Article 102 TFEU, thereby saving considerable resources and time for the EU Commission.

To summarize, the characteristics of the online platforms made it difficult for the EU to effectively tackle abusive conduct in digital markets through existing competition law and analytical tools. Therefore, in order to ensure undistorted competition in the internal market, the EU came up with new tools for defining relevant markets and a dominant position in digital markets, as well as new theories of harm through case law. Most importantly, to reduce costly and time-consuming *ex-post* enforcement requiring in-depth investigations of complex cases by the EU Commission and to prevent restriction of competition by *inter alia* non-dominant undertakings in relevant digital markets, the EU introduced the DMA imposing a number of obligations on the ‘gatekeeper’ platforms and restricting certain practices *ex-ante*. Violation of these obligations will directly lead to the imposition of behavioral or structural remedies, fines and periodic penalty payments.⁷⁶

2.2.Georgian Competition Law: Gaps Identified in Light of the EU Competition Law

As stated, the Association Agreement contains Article 204 requiring Georgia to have competition laws, which effectively address the abuse of digital market power. In line with this undertaking, massive amendments were made to the Competition Law. As a result, Article 6 of the Competition Law on the prohibition of abuse of dominance became almost identical to

⁷⁴ See e.g. BGH, Judgment of 18 May 2021 – KVR 54/20 (Booking.com); Case AT.40153 *E-book MFNs and related matters* (Amazon).

⁷⁵ Case AT.39740 *Google Search* (Shopping).

⁷⁶ Digital Markets Act arts 18, 30, 31.

Article 102 TFEU. Additionally, the Competition Law contains the definition of a “dominant position”⁷⁷ and rules and methods for its determination.⁷⁸ It should be noted that the definition of “dominant position” reflects the interpretation made in CJEU cases *Hoffmann-La Roche*⁷⁹ and *United Brands*.⁸⁰ In addition, the GNCA had adopted the Guidelines on the application of Article 6 of the Competition Law in line with the EU executive and judicial practice’.⁸¹ This document provides an overview of the EU case law that the GNCA applies in relation to Article 6 of the Competition Law that the GNCA applies in relation to Article 6 of the Competition Law (since it is identical to Article 102 TFEU), including *Case T-201/04 Microsoft Corp. v. Commission*⁸² and *Case AT.40099 — Google Android*.⁸³ It does not refer to any other case law involving digital players or provide definitions and interpretations similar to the Commission Guidance on Enforcement Priorities of Article 102 TFEU. Notably, amendments were made to the latter document based on the new enforcement practices of the EU Commission and the EU case law, however, these practices have not been reflected in the Guidelines on the Application of Article 6 of the Competition Law of Georgia.

Furthermore, for the purpose of determining abuse of dominance, the GNCA follows the same steps as the EU: (i) identifying the undertaking; (ii) defining the relevant market; (iii) defining the dominant position; and (iv) establishing abuse.⁸⁴ The Competition Law and Methodical Guidelines of Market Analysis provide provisions for assessing each of the above elements similar to EU law (Article 102 TFEU, Commission Notice on the definition of relevant

⁷⁷ Competition Law art 3(i).

⁷⁸ *ibid* 5.

⁷⁹ Case C-85/76 *Hoffmann-La Roche v Commission* [1979] ECR I-461.

⁸⁰ Case C-27/76 *United Brands v Commission* [1978] ECR I-207.

⁸¹ Georgian National Competition Agency, ‘Guidelines on Definition of Provisions of the Article 6 of Georgian Law on Competition on the Basis of EU Executive and Judicial Practice’ (2018) <<https://gnca.gov.ge/index.php?m=351&lng=geo>> accessed 30 May 2023 (in Georgian).

⁸² Case T-201/04 *Microsoft Corp v Commission of the European Communities* [2007] ECR II-3601.

⁸³ Case AT.40099 *Google Android*.

⁸⁴ E.g. *GlobalAgro* case, Georgian National Competition Agency, Order #148, October 12, 2015

market⁸⁵ and case law) since they are a result of the implementation of EU competition law into the domestic setting as required under the Association Agreement.

Nonetheless, the Competition Law or any other legislative act does not contain provisions specifically addressing anticompetitive conduct in digital markets. Neither there are relevant GNCA or court practices on abuse of dominance in digital markets, as of yet. The only case that addressed anticompetitive conduct by a digital player in Georgia was a *Booking.com* case,⁸⁶ which concerns anticompetitive agreements. However, this case is important in that it takes into account approaches of national authorities of the EU countries for defining the relevant product market and accepting the behavioral remedy suggested by Booking.com to remove so-called “wide” MFN clauses from its agreements.⁸⁷ Importantly, this is one of the cases where the GNCA states that in the process of performing the obligation under the Association Agreement to maintain ‘comprehensive competition laws’, it generally takes into account the legislation and experience of the EU and its member states.⁸⁸

As shown in the previous paragraphs of the present Section, Georgia has not implemented any laws similar to the DMA, nor has it developed guidelines for the application of Article 6 of the Competition Law similar to the EU. Also, the GNCA or courts have not provided any case law relevant to the abuse of dominance in digital markets. Based on the foregoing, despite the fact that Georgian competition law is drafted in line with that of the EU, traditional competition

⁸⁵ Commission Notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5.

⁸⁶ *Booking.com* case, Georgian National Competition Agency, Order No. 05, January 09, 2016

⁸⁷ Notably, different approaches are taken by the national competition authorities of the EU with respect to remedies: Booking.com was required to remove only “wide” MFN clauses in Italy, Sweden, France, etc. while Germany required the removal of both “wide” and “narrow” MFN clauses. However, the GNCA does not discuss the different approaches. It concluded that at that time there was no reasonable doubt that MFN clauses of Booking.com restricts competition in Georgian markets. Thus, it found that there was no reason to open an investigation.

⁸⁸ This approach is a reflection of the Georgian Competition Policy Strategy approved by Decree No.1551 of the Government of Georgia which states that in the process of developing competition law the focus should be on EU law and international standards.

tools are widely considered inefficient to maintain fair competition in digital markets, including in terms of defining relevant markets or dominant positions of the undertakings. As stated above, the case law of the GNCA, as well as the Georgian Competition Policy Strategy shows that the current policy of the GNCA is to follow the best practices of the EU and its member states and harmonize Georgian legislation with EU law. Therefore, taking into account the recent developments in the EU competition law, Georgia may need to implement the new competition analytical tools and respective EU regulations – the relevant provisions of the DMA - to effectively tackle the abuse of dominance in digital markets. Yet, considering Georgia's limited resources and the current state of its digital markets, the question of how such harmonization should take place remains to be answered.

II. STEPS TO BE TAKEN BY GEORGIA FOR ADDRESSING ABUSE OF DOMINANCE IN DIGITAL MARKETS

The 2021 World Bank Report notes that digital players are investigated significantly less frequently for anti-competitive conduct in developing countries than in developed jurisdictions.⁸⁹ There may be two reasons for this: either competition authorities believe digital players have little impact on their economies or because of their limited resources they are not able to effectively combat global tech giants,⁹⁰ especially those which do not have a local presence in their jurisdictions. Since the rapid development of technology has made the digitalization of economies inevitable, developing countries have slowly started focusing their attention on digital markets. As a result, there are a number of *ex-post* enforcement in developing countries where the national competition authorities were forced to investigate the abusive conduct of the digital players due to the significant impact of their conduct on competition.⁹¹

The above statements are true in the context of Georgia as well. Specifically, Chapter I of this paper shows that Georgian digital markets are still in their infancy and there is only one case in Georgia involving digital markets. However, statistics also demonstrate that more and more consumers and businesses choose to purchase/sell or advertise goods online. At the same time, social networks and search engines, as well as ride-sharing platforms, are heavily used in Georgia. Chapter I further states that the current Georgian competition law and traditional analytical tools are not sufficient to address issues related to the abuse of dominance in digital

⁸⁹ World Bank (n 4) 9–10.

⁹⁰ *ibid.*

⁹¹ See e.g. Marcin Alberski and Stanislaw Szymanek, ‘Most Popular Online Trading Platform In Poland Fined For Abusive Practices Towards Both Business Users And Consumers’ (*Mondaq*, 25 January 2023) <<https://www.mondaq.com/antitrust-eu-competition-/1274624/most-popular-online-trading-platform-in-poland-fined-for-abusive-practices-towards-both-business-users-and-consumers>> accessed 13 May 2023. Article discusses the Polish case on self-preferencing. Since the Polish competition authority may have believed that new technologies do not pose significant anticompetitive risks, and therefore antitrust enforcement was very low in the digital field, its case against Allegro – Poland’s largest e-commerce platform, is of great importance, where the competition authority fined Allegro due to its self-preferencing practices.

markets. The present Chapter discusses how Georgia, as a developing country, should proceed with addressing competition in digital markets, and what steps it should take to implement laws effectively protecting competition in digital markets.

1. Enhancing Digital Literacy

Before proceeding with specific steps to be taken by Georgia, it should be noted that digital illiteracy remains a major barrier to the development of digital markets in Georgia, which, in turn, is essential for economic development in today's world. Ensuring that consumers are able to make informed decisions may be even more important for preventing consumer harm in digital markets than tackling large online platforms through competition laws and tools.⁹² Hence, enhancing digital literacy and ICT skills among the Georgian population should be part of the competition policy of Georgia.

2. Competition Law Goals

Identifying the goals of Georgian competition law requires an examination of the Constitution of Georgia, the Association Agreement and the Competition Law. The Constitution of Georgia states that “the State shall take care of developing a free and open economy, and free enterprise and competition”.⁹³ The Constitutional Court of Georgia defines such goals as an obligation of the State to protect the process of competition,⁹⁴ as well as ensure equal opportunities for the market participants.⁹⁵ In addition, under the Association Agreement, the parties recognize the

⁹² See e.g. Pinar Akman, ‘We Can’t Tackle Platform Competition Issues without Increasing Digital Literacy’ (*The Digital Economy*, 3 June 2021) <<https://www.weforum.org/agenda/2021/06/platform-competition-digital-literacy/>> accessed 30 May 2023.

⁹³ Constitution of Georgia 1995 art 6.2.

⁹⁴ *Ltd “Russenergoservice”, Ltd “Patara Kakhi”, JSC “Gorgota”, Givi Abalaki’s Individual Company “Farmer” and Ltd “Energia” v the Parliament of Georgia and the Ministry of Energy of Georgia* [2008] Constitutional Court of Georgia N1/2/411.

⁹⁵ *Ltd “Giganti Security” and Ltd “Security Company Tigonis” v the Parliament of Georgia and the Minister of Internal Affairs of Georgia* [2018] Constitutional Court of Georgia N2/11/747.

importance of free and undistorted competition for gaining benefits from trade liberalization.⁹⁶ Thus, Georgian competition law may have as one of its specific goals the promotion of Georgia's integration into the EU market.⁹⁷ The Competition Law aims to promote free trade and competition, which includes ensuring equality of undertakings in their activities and proper conditions for free access to the market, amongst others.⁹⁸ Notably, even though the consumer welfare standard is not specifically determined as a competition law goal in the Competition Law text, in Article 6.1(b) (Article on the prohibition of abuse of dominance), for example, anticompetitive conduct is determined based on the harm to consumers. Thus, the Competition Law is indirectly referring to the consumer welfare standard as well. It is obvious that the laws of Georgia include both economic and non-economic goals. However, how these objectives interact and whether Georgian competition law can achieve all of them is unclear.⁹⁹

Generally, one of the main objectives of a developing country such as Georgia is to achieve economic growth. Free markets are generally conducive to greater innovation and higher quality of goods/services as well as low prices for consumers,¹⁰⁰ and consequently, to the economic growth of the country. However, where market failure occurs, the intervention of regulators is needed to ensure effective competition in the markets. Competition law plays an important role in addressing market failure by, inter alia, preventing exploitation and abuse by market players. In the context of developing countries, competition law goals may also include the protection of competitors of dominant players.¹⁰¹ However, this should not mean implementing protectionist measures in favor of inefficient businesses at the expense of

⁹⁶ Association Agreement (n 5) art 203.

⁹⁷ Liana Japaridze and others, *Georgian Competition Law* (Liana Japaridze and Ketik Zukakishvili eds, 1st edn, New Vision University Press 2019) 100.

⁹⁸ Competition Law art 2.

⁹⁹ Japaridze and others (n 97) 107.

¹⁰⁰ Paul Crampton, 'Striking the Right Balance between Competition and Regulation: The Key Is Learning from Our Mistakes' (OECD 2002) 2.

¹⁰¹ For example, Article 2 of the 1998 Competition Act (as amended) of South Africa includes in its purposes promotion of employment and ensuring equitable opportunity for SMEs to participate in the economy, as well as participation of the firms owned by historically disadvantaged persons.

competition and efficiently working markets.¹⁰² In terms of abuse of dominance, competition law should aim to prevent significant unjustified exclusions,¹⁰³ i.e. prevent abuse of market power by dominant undertakings.

The Association Agreement indirectly requires Georgia to recognize the EU's competition law goals. In order to address abuse of dominance by digital platforms, the established consumer-welfare standard has been construed wider in the EU so as to include prohibitions against the dominant platforms' strategies aimed at reducing the "competitive pressure" they face even when it is not possible to evaluate precise consumer harm.¹⁰⁴ When it comes to defining the goals of competition law for Georgia, the EU's approach should serve as a starting point. However, they should be defined in accordance with the specifics of Georgian markets. Even back in the 2000s, when it was widely considered that in the globalized world developing economies needed to implement universal standards, generally referring to the laws of the US and the EU, Professor Eleanor M. Fox contested this general belief and claimed that antitrust for developing countries should be looked at in a broader context to include their socio-economic needs and characteristics of the jurisdiction.¹⁰⁵ This statement also applies to digital markets. Dominant tech players may impact the competition and consumers differently in developed and developing jurisdictions. Therefore, Georgia should define the goals of the competition law in relation to digital markets taking into account market dynamics in Georgia and its specific socio-economic needs.

Firstly, it is notable that large digital platforms, such as Amazon, Google, Facebook, etc., are essential tools for e-commerce development.¹⁰⁶ In particular, they provide the possibility for

¹⁰² Gal and Fox (n 12) 36.

¹⁰³ *ibid* 38.

¹⁰⁴ Directorate-General for Competition (European Commission) and others (n 60) 3.

¹⁰⁵ Eleanor M Fox, 'Economic Development, Poverty, and Antitrust: The Other Path' (2007) 13 *Southwestern Journal of Law and Trade in the Americas* 211, 215.

¹⁰⁶ Harry First, 'Digital Platforms and Competition Policy in Developing Countries' (2021) 2 *Concurrences* 1, 2 <<https://www.concurrences.com/en/review/issues/no-2-2021/article-3751/100660>> accessed 10 June 2023.

Georgian SMEs to reach local or foreign consumers by advertising and/or selling their products through the platforms. Thus, access to the platforms and fair competition practices between as well as within the online platforms should be of high priority in Georgia.¹⁰⁷ Competition law should play a key role in achieving this objective. On the other hand, maintaining markets that are free from unnecessary protectionist regulations and are attractive to large tech companies, which in turn would potentially enhance the innovation and efficiency of local businesses, is also important for the economic growth of Georgia. Moreover, large e-commerce platforms such as Amazon, Taobao, etc. provide Georgian consumers with a wider range of choices in products and low prices. Without such platforms, Georgian consumers would either have no access to certain products that are not available in Georgia or would have to buy them from local platforms for higher prices. Notably, if local platforms offer the same product at the same price as foreign platforms, Georgian consumers tend to buy such products through local online marketplaces to receive products in a timely manner and avoid paying shipping and customs fees. Therefore, in defining the goals of competition law, Georgian authorities should balance the above interests.

Based on the foregoing, it is advisable for Georgia to clearly define the competition law goals in accordance with its specific social-economic needs and tailor them to Georgia's reality and define how these goals should be construed or balanced against one another in relation to digital markets to ensure fair competition. This would also make enforcement of competition law effective since the goals are starting point for the interpretation and application of the statutory provisions. Therefore, for addressing abuse of dominance in digital markets, Georgian authorities should have a thorough understanding of the situation in their digital markets, specifically, what are the practices of digital players, who are those harmed by such practices

¹⁰⁷ *ibid.*

(if any) and if they should be protected by competition law, as well as how, and at what expense, can Georgia tackle such practices within the limited resources of the GNCA.

3. Enforcement by the GNCA

Competition authorities in developing countries, including the GNCA, lack adequate financial and human resources as well as experience to pursue independently the powerful tech giants abusing their dominance in their respective jurisdictions. Thus, their jurisdictional reach is limited compared to the authorities of developed economies, such as the EU Commission or FTC/DoJ in the US, especially when such tech companies do not have any local presence. Moreover, there have been instances where large tech companies either threatened or exited the local markets because they did not want to comply with local laws.¹⁰⁸ In a small economy such as Georgia, the likelihood of this issue occurring is even greater. It is a common view that the only remedy to these concerns is the cross-country spillovers from actions against tech giants taken by powerful antitrust authorities in developed economies.¹⁰⁹ When imposing remedies, the competition authorities in developed countries should give thought to the spillover effects of such remedies on the jurisdictions where the enforcing authorities are not capable of pursuing tech giants. Their goal should be achieving competition in the whole market,¹¹⁰ which is the world market for most large online platforms. The spillover effects of the competition enforcement by the EU authorities would deal with the anti-competitive practices that the GNCA is unable to independently deal with due to its limited resources,

¹⁰⁸ See Spanish case where Google left Spanish market due to licensing requirements for news aggregators under the copyright law and threatened Australia to do the same, available at: 'Ensuring Open, Competitive and Fair Digital Markets' (*UNCTAD / Prosperity for All*, 12 July 2021) <<https://unctad.org/news/ensuring-open-competitive-and-fair-digital-markets>> accessed 30 May 2023. A similar threat has also been made in South Africa by global firms regarding compliance with merger rules: See Thembaletu Buthelezi and James Hodge, 'Competition Policy in the Digital Economy: A Developing Country Perspective' (2019) 15 *Competition Law International* 201, 202.

¹⁰⁹ World Bank (n 4) 59.

¹¹⁰ Eleanor M Fox, 'Remedies and the Courage of Convictions in a Globalized World: How Globalization Corrupts Relief American Antitrust Institute Symposium: Thinking Creatively about Remedies' (2005) 80 *Tulane Law Review* 571, 593.

consequently, preventing market failure to a great extent. Moreover, such spillover effects would contribute to the integration of the Georgian and the EU markets which in turn is part of Georgian policy.¹¹¹ On the other hand, this would raise the concern of a jurisdictional overreach since the enforcement effects would be extended to Georgian markets without the involvement or consent of Georgian authorities. This would be even more problematic if the effects of conduct concerned do not have similar anticompetitive effects, or rather has pro-competitive effects on Georgian markets. Therefore, if following this approach, developed jurisdictions should implement the least restrictive measure that would be sufficient for maintaining undistorted competition in the relevant market. In the context of Georgia, the benefits of spillover effects would arguably outweigh its disadvantages since this may be the only way to prevent the failure of Georgian digital markets caused by the conduct of tech giants. As regards the threats of tech giants about leaving the local market, it has been suggested that collaboration between competition authorities to address the same conduct of the same tech company at the same time could eliminate this risk since leaving 10-15 markets would be problematic for the tech giants.¹¹²

Furthermore, in order to make the competition law work, the GNCA must be able to effectively enforce it. Under the 2020 amendments to the Competition Law, the GNCA has acquired strong investigative and fining powers.¹¹³ The problem of understaffing, however, remains the main obstacle to effective enforcement. Notably, in 2022, the new Law on the Protection of Consumer Rights entered into force which designates the GNCA as an enforcement body.¹¹⁴ Even though the interplay between the competition law and consumer protection law is significant, still focusing all the resources of the GNCA on the enforcement of the competition

¹¹¹ Government of Georgia (n 29).

¹¹² 'Ensuring Open, Competitive and Fair Digital Markets' (n 108).

¹¹³ Competition Law art 17.

¹¹⁴ Law of Georgia on the Protection of Consumer Rights 2022 art 28.

law may have been more effective for the young competition authority such as GNCA. In addition, a lack of expertise and knowledge in the digital field is the barrier to tackling the abuse of dominance in digital markets. Thus, the GNCA should be equipped with more and highly qualified staff, consisting of legal experts, economists, as well as experts in data science, technology, etc. In other words, the GNCA personnel should have a thorough understanding of how digital markets function and how certain practices may affect competition and consumers. For this purpose, Georgia should be gaining existing knowledge and technical expertise through cooperation with more experienced and powerful national authorities and international organizations, such as OECD, that are staffed with more experienced and skilled practitioners in the digital field. In addition, it should keep an eye on future investigations and works produced by leading competition authorities and international organizations on further developments of or changes in digital platforms' business models to identify the abusive conduct that may have the same anticompetitive effect on Georgian markets and adapt its competition tools according to new findings.

Lastly, the primary goal of the GNCA for tackling abuse of dominance in digital markets should be the adaptation of its analytical tools to the characteristics of digital platforms so that it can accurately define the relevant market¹¹⁵ and dominant position and determine the abuse, by the inclusion of emerging features of digital markets (such as multihoming, data as essential facility/barrier to entry, network effects, etc.) into the analysis. This can be made either through amendments to the competition law or through case law. For these purposes, the GNCA should take advantage of the practices of competition authorities in developed economies dealing with the abuse of dominance in digital markets by tech giants. Even though amending competition law for this purpose would provide more certainty for businesses, it requires lengthy

¹¹⁵ The GNCA should amend the Methodical Guidelines of Market Analysis in accordance with the characteristics of digital markets.

proceedings of legislative changes and strong advocacy with the legislative bodies as well as all the stakeholders. Therefore, since digital markets are not yet developed in Georgia and, arguably, the impacts of large digital platforms on Georgian markets are not significant, it may not be crucial for the GNCA at this time to initiate legislative changes and may prefer adapting analytical tools on a case-by-case basis based on the case law of the EU and other jurisdictions, and consequently, save its resources for competition issues of immediate relevance. Either way, understanding the business model of online platforms and adapting analytical tools accordingly should be the main goals of the GNCA in addressing the abuse of dominance in digital markets.

4. Market Inquiries

In order to implement an effective competition framework in relation to digital markets, each jurisdiction needs to understand the dynamics in their markets and identify if there are features of the digital markets that could distort competition. Market inquiries are considered an effective tool for better understanding market dynamics in connection with business models of the digital platforms, market structure, consumer behavior and the potential impacts of certain conduct for competition in the market and consumers.¹¹⁶ Such studies may become the basis for further legislative reforms¹¹⁷ and effective enforcement.

A South African example is a good illustration of the usefulness of market inquiry for identifying potential abusive conduct of digital players. The Competition Commission of South Africa (CCSA) initiated a market inquiry into online intermediation platforms in 2021.¹¹⁸ The inquiry was focused on (i) market features that may hinder competition between platforms or

¹¹⁶ World Bank (n 4) 16.

¹¹⁷ UNCTAD Secretariat, 'Competition Law, Policy and Regulation in the Digital Era' (2021) 14 <https://unctad.org/system/files/official-document/ciclpd57_en.pdf> accessed 5 June 2023.

¹¹⁸ Competition Commission of South Africa, 'Online Intermediation Platforms Market Inquiry – Terms of Reference' (2021) <https://www.compcom.co.za/wp-content/uploads/2021/04/44432_09-04_EconomicDevDepartment.pdf> accessed 11 May 2023.

result in discriminatory treatment of business users, and (ii) market features that may adversely affect the participation of small and medium-sized firms and/or HDPs (historically disadvantaged persons).¹¹⁹ According to the provisional report of the CCSA published in July 2022, among others, the CCSA found that due to the prominence of paid search results at the top of the Google search results page, as well as the lack of sufficient distinction between organic and paid search results, and Google's dominant position, competition between intermediation platforms across the majority of categories was materially restricted.¹²⁰ This is because the payment for customer acquisition is elevated in favor of leading platforms with deep pockets.¹²¹ The CCSA also found that its dominant e-commerce platform was engaged in self-preferencing practice.¹²² In the provisional report, the CCSA provided provisional remedial actions and recommendations to address the findings of the inquiry. Moreover, based on this inquiry into online intermediation platforms, the CCSA has recently initiated a new market inquiry into media and digital platforms.¹²³ Specifically, the 2023 report of the CCSA states that in the process of online intermediation platforms market inquiry, the news publishers expressed concern that Google and Meta, as dominant gateways to consumers, are engaged in anticompetitive conduct since these platforms use their dominance to effectively extract copyright news snippet content for free by demoting news articles that lack a snippet on the search engine results page or exclude them from the social media feed.¹²⁴ Therefore, the online intermediation platforms market inquiry revealed not only specific abusive conduct of digital platforms and their impact on competition and consumers but also identified the potential abuse

¹¹⁹ Competition Commission of South Africa, 'Online Intermediation Platforms Market Inquiry – Statement of Issues' (2021) 4 <https://www.compcom.co.za/wp-content/uploads/2021/05/OIPMI-Statement-of-Issues_May-2021.pdf> accessed 11 May 2023.

¹²⁰ Competition Commission of South Africa, 'Online Intermediation Platforms Market Inquiry – Provisional Summary Report' (2022) 47 <<https://www.compcom.co.za/wp-content/uploads/2022/07/OIPMI-Provisional-Summary-Report.pdf>> accessed 16 May 2023.

¹²¹ *ibid.*

¹²² *ibid* 58.

¹²³ Competition Commission of South Africa, 'Media and Digital Platforms Market Inquiry – Terms of Reference' (2023) <<https://www.compcom.co.za/media-and-digital-platforms-market-inquiry/>> accessed 11 May 2023.

¹²⁴ *ibid* 2.

of dominance by Meta and Google in the news media market leading to a separate market investigation by the CCSA.¹²⁵

The importance of collecting empirical data on consumer behavior is also important for making legislative amendments that would effectively tackle the abuse of dominance in digital markets. In particular, digital markets can only be effectively regulated if they are tailored to the consumer demand side reality (e.g. multi-homing, switching by users).¹²⁶ The reason is that a large-scale empirical study indicates that there may be significant levels of multihoming and switching among users of online platform services while many regulatory activities on competition are based on general assumptions regarding the absence of substantial multihoming and switching among online platforms.¹²⁷

Under Article 17² of the Competition Law, the GNCA is entitled to carry out a market inquiry to investigate the situation in relevant markets and assess the competitive environment therein. Georgia has not initiated any market inquiry in digital markets, except for online hotel booking market. Moreover, as mentioned in Chapter I, it failed to investigate the alleged abuse of dominance by Yandex even though local competitors were complaining that Yandex was engaged in exclusionary practices through predatory pricing. Arguably, had the GNCA initiated a market inquiry in the ride-sharing platforms market, it may have found the abusive practices of Yandex and its adverse impact on competition in Georgia.

Thus, the initial and most important step for addressing abuse of dominance in digital markets is to acquire a thorough understanding of the dynamics of digital markets in Georgia. Market inquiries are a great tool for this purpose. Notably, the engagement in this process of

¹²⁵ *ibid* 9.

¹²⁶ Akman (n 54) 51.

¹²⁷ *ibid* 43.

economists and technology field experts, together with legal experts, would be crucial.¹²⁸ Market inquiry into digital markets would reveal their features that distort or restrict competition (if any), particularly, the behavior of large online platforms, their impact on market functioning and corresponding consumer behavior. In relation to digital markets, the GNCA may need to follow the EU's approach and take into account the impacts of large online platforms' practices on business users (in addition to end users) for identification of the features of market dynamics that may distort competition in digital markets.¹²⁹ Notably, market inquiries should be conducted on a continuous basis to catch all the changes in market dynamics that require intervention from the competition authorities in Georgia. Based on the above findings, Georgia should use market inquiries as a tool to understand the dynamics of relevant markets in Georgia, which will lead to the implementation of an effective competition framework, that is not just a legal transplant of the EU competition law but is tailored to the reality of Georgia.

5. Ex-ante Regulation or Guidelines

As discussed in Chapter I, Georgian competition law does not contain any provisions specifically applicable to digital markets, nor have any *ex-ante* regulations been adopted. Therefore, taking into account Georgia's obligation to harmonize its legislation with EU law, Georgia may need to implement the DMA, an *ex-ante* tool adopted by the EU for effectively combating abuse of dominance in digital markets. The question, however, is how EU law, including the DMA, should be implemented in the domestic setting.

¹²⁸ For example, the UK Digital Competition Expert Panel emphasized their need to have staff with "significant skills and knowhow in data science, digital systems, and behavioural insights, as well as the core skills in competition, economics and regulation". See Digital Competition Expert Panel, *Unlocking Digital Competition: Report of the Digital Competition Expert Panel* (2019) 81 <<https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel>> accessed 30 May 2023.

¹²⁹ Directorate-General for Competition (European Commission) and others (n 60) 3.

Implementation does not only mean the transposition of relevant provisions of EU law in Georgian legislation.¹³⁰ Implementation requires compliance and enforcement of such norms,¹³¹ which in turn meets the objectives of the EU legislation.¹³² It is vital to gain a deep understanding of the situation and the law's impact in a specific jurisdiction in order to make implementation successful.¹³³ Otherwise, if the law does not reflect the socio-economic and political needs of the particular jurisdiction and the country is not capable of effectively enforcing such law, implementation of the law will be considered to be failed.¹³⁴ Specifically, the competition law should be adopted in accordance with the answers to the questions: Who is harmed by which practices in the country, what can be done to prevent harm, and what is the cost of such prevention?¹³⁵ Developing countries may be tempted to follow the pretested laws of mature jurisdictions because of their long history and developed case law, making it easy and less costly for the national competition authorities of developing countries to correctly interpret, implement and enforce the competition law.¹³⁶ However, such pretested laws, designed for developed economies, will most likely not have the same effects on developing economies. Therefore, if and to what extent the DMA should be implemented in Georgian law will depend on the socioeconomic needs of Georgia and the impact the DMA may have on the Georgian digital market.

Most developing countries, including Georgia, have young competition authorities with limited resources. Therefore, a case-by-case investigation under the existing competition law,

¹³⁰ Ulf Sverdrup, 'Implementation' in Paolo Graziano and Maarten P Vink (eds), *Europeanization: New Research Agendas* (Palgrave Macmillan UK 2008) 197 <https://doi.org/10.1057/9780230584525_15> accessed 30 May 2023.

¹³¹ *ibid.*

¹³² Christoph Knill, 'European Policies: The Impact of National Administrative Traditions' (1998) 18 *Journal of Public Policy* 1, 2.

¹³³ Bojana Hajdini and Gentjan Skara, 'Lost in Implementation: EU Law Application in Albanian Legal System' (2017) 19 *Journal of Legal Studies* 43, 59.

¹³⁴ *ibid.*

¹³⁵ Fox (n 105) 224.

¹³⁶ Gal and Fox (n 12) 7.

especially, against tech giants with limited local presence may be quite burdensome for the GNCA, if doable at all. As stated in Section 2.1 of Chapter I, even in the EU, the DMA was adopted as an *ex-ante* tool to avoid time and resource intensive *ex-post* investigations by the EU Commission in addressing the conduct of tech giants. Developing countries with limited resources and less developed practices in antitrust enforcement may need *ex-ante* regulation even more to avoid concentration of the market and entrenching dominance of one digital platform in the market.¹³⁷ This is because global reputable companies tend to comply with domestic legal requirements when entering a particular market. Thus, adopting *ex-ante* regulations addressing 'gatekeepers' would somewhat prevent anticompetitive conduct on the part of digital giants, even though it may be a practical difficulty for young and small competition authorities to take action against these companies if they violate such *ex-ante* regulations.

Based on the foregoing, the GNCA's limited resources and the difficulty of pursuing tech giants without a presence in Georgia make it prudent to adopt *ex-ante* regulation in the country. However, it should be taken into account that access to large online platforms which are used by many Georgian businesses for advertising/selling their product is as important as maintaining fair competition in such digital markets. Thus, copy-pasting *ex-ante* regulation of developed jurisdictions, especially the DMA, may have an adverse effect on Georgian markets. In particular, stringent requirements copied from the EU imposing prohibitions/obligations on large digital platforms that are disproportionate to their actual impact on competition and consumers in Georgia may result in a loss of efficiencies of local businesses using these platforms for reaching their customers, as well as disincentivize investments on the part of tech

¹³⁷ Digital platforms' features increase the likelihood of one digital platform gaining a significant amount of market power; See 'Stigler Committee on Digital Platforms, Final Report' (2019) 3 <<https://www.chicagobooth.edu/research/stigler/news-and-media/committee-on-digital-platforms-final-report>> accessed 13 May 2023.

giants. For example, the GNCA has concluded upon investigation that Booking.com MFN clauses did not have any adverse effects on competition. If Georgia copies the text of the DMA, it will prohibit the application of not only “wide” but also “narrow” MFN clauses. However, such *ex-ante* regulation is not necessary in Georgia’s reality and it will be a form of overregulation, being one step forward to making Georgia a less investment and business-friendly country. The same assessments need to be made by the GNCA in relation to abuse of dominance cases to adapt the DMA provisions to the specifics of Georgian markets and avoid overregulation.

Turning to the actual situation in Georgian digital markets discussed in Chapter I, the e-commerce market is not developed. The statistics provided do not give a sufficient basis to believe that one online marketplace will acquire significant market power in the nearest future and will have significant influence over competition and consumers. However, this can only be determined after examining the market dynamics. As for the social networks and search engine platforms, since Facebook and Google have dominant positions in the Georgian markets and are actively used by Georgian end-users, as well as Georgian companies for advertising their products, the GNCA should conduct the market inquiry in these markets as well to understand the implications of their dominance on local competitors and consumers (especially, in terms of use of data). For these purposes, the relevant practices of other jurisdictions should be taken into consideration.¹³⁸ As a result, if market inquiries reveal that the impact of large digital platforms on Georgian market competition and consumers is insignificant, it may be better to avoid *ex-ante* restrictions and allow for efficiency defenses for

¹³⁸ See World Bank (n 4) 28. For example, German Facebook case on inadequate data processing (Bundeskartellamt, Decision of 6 February 2019 - B6-22/16 regarding which preliminary ruling of CoJ is requested), *Google Search (Shopping)* (n 75), German case against Amazon regarding the general terms of business for sellers on Amazon marketplace (Bundeskartellamt, Decision of 17 July 2019 - B2-88/18). Developing countries have also taken actions against global tech giants, e.g. self-preferencing practice was addressed by the Indian competition authority in online search and advertising markets (*Matrimony.com v Google* [2018] Competition Commission of India 07/2012).

large tech companies to not disincentivize entering and/or investing in Georgia. In such a case, the GNCA will be able to use its limited resources for tackling anticompetitive conduct in other markets that are more developed in Georgia and the risk of failure of those markets is higher. This approach also maintains balance between ensuring fair competition in digital markets and the efficiency of local businesses/incentives of tech giants to invest.

On the other hand, in case the market inquiries reveal the significant impact of large tech companies on Georgian markets, tackling which will be difficult for the GNCA through *ex-post* enforcement, Georgia will need to maintain effective laws ensuring fair competition. Considering the limited resources of the GNCA, adopting *ex-ante* regulation should be considered the best way in such a case. Thus, taking into account the obligation under the Association Agreement to harmonize Georgian law with EU law, the DMA should be a starting point when working on the adoption of *ex-ante* regulation to tackle the abuse of dominance in digital markets. This is also because the DMA was adopted based on existing case law whereby the abusive conduct was established. However, in the process of implementation, DMA provisions should be modified in accordance with the situation in Georgian digital markets. In particular, *ex-ante* regulation should be adopted based on market inquiries that reveal the dynamics of relevant markets, the potential of acquiring dominance by players and respective conduct that may harm competition in Georgia, as well as their actual impact on competition and consumers in Georgia. In other words, *ex-ante* regulation should catch those platforms, activities of which have or may have significant harm to competition and consumers in digital markets, and prohibit such platforms from engaging in such conduct *ex-ante*. In addition, it should be noted that the adoption of regulation requires lengthy proceedings of legislative changes and strong advocacy with the legislative bodies¹³⁹ as well as all the stakeholders (large

¹³⁹ UNCTAD Secretariat (n 117) 12.

businesses as well as SMEs, consumers, other regulatory bodies, etc.) to ensure the effective implementation of the law.¹⁴⁰

As an alternative, developing countries may prefer issuing guidelines related to anticompetitive practices in digital markets since legislative amendments are lengthy proceedings, requiring market studies, and research and enforcement experience.¹⁴¹ Thus, as a softer approach, the issuance of guidelines that provide an overview of how the GNCA approaches anticompetitive practices, factors to be considered when assessing dominant position and abuse, as well as practices that are likely to constitute abuse by competition authorities, may provide a great starting point for monitoring abuses of dominance in digital markets. As a starting point, the GNCA should add the relevant EU practices related to digital markets to the Guidelines on the Application of Article 6 of the Competition Law¹⁴² which overviews the abuse of dominance-related practices of the EU Commission and CJEU. This would work as a ‘soft law’ in Georgia since the businesses tend to comply with the guidelines of competition authorities that provide the practices likely to be deemed as anti-competitive. To this end, based on the findings of market studies, the GNCA should decide whether to spend its resources on reforming the law or issuing guidelines and conducting *ex-post* investigations under the existing competition laws.

To summarize, Georgia should decide whether to adopt *ex-ante* regulation or develop guidelines based on its resources, specifics of its economy¹⁴³ and characteristics of the local markets revealed under the market inquiries. In particular, if market inquiries demonstrate that global tech companies have insignificant impacts on the domestic market, the GNCA may prefer to only issue guidelines that require less effort and time, and focus their limited resources

¹⁴⁰ Hajdini and Skara (n 133) 57–58.

¹⁴¹ UNCTAD Secretariat (n 117) 13.

¹⁴² Georgian National Competition Agency (n 81).

¹⁴³ UNCTAD Secretariat (n 117) 13.

on other markets, dynamics of which pose a greater threat to competition and consumers in Georgia. However, since the business models of these online platforms may change over time, the GNCA should continuously monitor markets to determine whether any changes in market dynamics require more stringent regulation and/or enforcement measures. To make this process easier, the GNCA should cooperate with its counterparts in developed economies and remain vigilant of international investigations in other jurisdictions to identify the conduct of digital platforms under investigation that may have a similar impact in relevant local markets.

CONCLUSION

This paper demonstrates that digital markets in Georgia are not significantly developed. Even though internet access has improved in the last few years, access to the technology needed for internet access and digital illiteracy remain important barriers to the development of digital markets. In light of these problems, the population in Georgia is vulnerable to data exploitation by large online platforms, such as Facebook and Google. Thus, enhancing digital literacy should be part of the competition policy in Georgia. In addition, there is the possibility that Google may engage in other practices, including self-preferencing or differential treatment of business users, that could leave certain users at a disadvantage and limit consumer choice. In terms of online marketplaces, statistics indicate that e-commerce is not widely used in Georgia and that the dominance of one platform is unlikely. This is because four foreign platforms together dominate the Georgian online marketplace market, while Georgian online marketplaces have been gradually strengthening their positions. However, statistics also show that e-commerce has been steadily developing in Georgia and is likely to continue to grow in the future. Therefore, considering that online platforms are widely used by local companies for selling/advertising their products, the GNCA should be keeping a close eye on the dynamics of the e-commerce and online advertising markets to instantly identify any alarming changes in such markets that would distort competition. Notably, the ride-sharing platform market in Georgia is already problematic, since Yandex was accused of charging predatory prices. The GNCA, therefore, has a compelling reason for studying such a market.

As an initial step, the GNCA should conduct market inquiries in digital markets to understand the dynamics and actual impacts of large online platforms on consumers and competition in Georgian digital markets. For this purpose, the GNCA should be equipped with a larger and more highly qualified staff with legal, economic, and technical expertise in order to effectively

combat the abuse of dominance by digital players. After the GNCA gains a thorough understanding of the competitive situation in digital markets through market inquiries, it will be able to decide whether to use its limited resources to adopt *ex-ante* regulation on digital markets. In the absence of evidence of the anticompetitive effects of large online platforms on Georgian markets, the GNCA should issue guidelines specifying the characteristics of the digital markets to be taken into account when defining the relevant market and dominant position, along with a list of conduct that is highly likely to be deemed anti-competitive by the GNCA. This would give guidance to the business users and will save time and resources for the GNCA required for the lengthy and complex process of legislative reforms. On the other hand, if the market inquiries reveal that large online platforms adversely affect competition and consumers in digital markets and tackling such abuses will be practically challenging for the GNCA through *ex-post* enforcement, an *ex-ante* regulation based on the DMA would be a better option. However, in the latter scenario, it is important to modify the DMA provisions according to the socio-economic needs of Georgia and its digital market dynamics. Due to the fact that local businesses use these platforms to sell/advertise their products, as well as provide Georgian consumers with a greater selection of products at low prices, Georgia needs to avoid unnecessary restrictions in order not to disincentivize tech giants from investing in or entering the Georgian market that would in turn adversely affect Georgia's goal of economic development. The latter is likely to happen if Georgia adopts stringent restrictions and regulations that are disproportionate to the existing or potential harm that Georgian markets may suffer. Therefore, if Georgia proceeds with the adoption of the *ex-ante* regulation based on the DMA, such regulation should be tailored to the socio-economic needs of Georgia and address the specifics of Georgian digital markets.

BIBLIOGRAPHY

Legislation and Soft Law

Georgian Legislation and Soft Law:

Constitution of Georgia 1995

Law of Georgia on Competition 2012

Law of Georgia on the Protection of Consumer Rights 2022

Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part (adopted on 27 June 2014, entered into force on 1 July 2016)

Georgian Competition Policy Strategy, approved by Decree No.1551 of the Government of Georgia, available only in Georgian, at: <https://matsne.gov.ge/ka/document/view/2267631?publication=0>

Georgian National Competition Agency, 'Guidelines on Definition of Provisions of the Article 6 of Georgian Law on Competition on the Basis of EU Executive and Judicial Practice' (2018) <<https://gnca.gov.ge//index.php?m=351&lng=geo>> accessed 30 May 2023

EU Legislation and Soft Law:

Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L 265/1

Commission Notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5

Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7

Communication from the Commission - Amendments to Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2023] OJ C 116/01

Legislation and Soft Law of Other Jurisdictions:

Competition Act of South Africa 1998

German Competition Act 1958

Case Law

Georgian Case Law:

Booking.com case, Georgian National Competition Agency, Order No. 05, January 09, 2016

Globalagro case, Georgian National Competition Agency, Order #148, October 12, 2015

Ltd “Giganti Security” and Ltd “Security Company Tigonis” v the Parliament of Georgia and the Minister of Internal Affairs of Georgia [2018] Constitutional Court of Georgia N2/11/747

LTD “Russenergосervice”, LTD “Patara Kakhi”, JSC “Gorgota”, Givi Abalaki’s Individual Company “Farmer” and LTD “Energiа” v the Parliament of Georgia and the Ministry of Energy of Georgia [2008] Constitutional Court of Georgia N1/2/411

EU Case Law:

European Commission, Case AT.39740 - Google Search (Shopping)

European Commission, Case AT.40099 Google Android

European Commission, Case AT40153 - E-book MFNs and related matters (Amazon)

Hoffmann-La Roche v Commission (Case C-85/76) [1979] ECR I-461

Microsoft Corp v Commission of the European Communities (Case T-201/04) [2007] ECR II-3601

United Brands v Commission (Case C-27/76) [1978] ECR I-207

Case Law of Other Jurisdictions:

BGH, Judgment of 18 May 2021 – KVR 54/20

Bundeskartellamt, Decision of 17 July 2019 - B2-88/18

Bundeskartellamt, Decision of 6 February 2019 - B6-22/16

Competition Commission of India, Matrimony.com v Google [2018] 07/2012

Books & Articles

Akman P, ‘A Web of Paradoxes: Empirical Evidence on Online Platform Users and Implications for Competition and Regulation in Digital Markets’ (2022) 16 Virginia Law and Business Review 217

Buthlezi T and Hodge J, ‘Competition Policy in the Digital Economy: A Developing Country Perspective’ (2019) 15 Competition Law International 201

First H, 'Digital Platforms and Competition Policy in Developing Countries' (2021) 2 Concurrences 1 <<https://www.concurrences.com/en/review/issues/no-2-2021/article-3751/100660>> accessed 10 June 2023

Fox EM, 'Remedies and the Courage of Convictions in a Globalized World: How Globalization Corrupts Relief American Antitrust Institute Symposium: Thinking Creatively about Remedies' (2005) 80 Tulane Law Review 571

——, 'Economic Development, Poverty, and Antitrust: The Other Path' (2007) 13 Southwestern Journal of Law and Trade in the Americas 211

Fox EM and Gal M, 'Drafting Competition Law for Developing Jurisdictions: Learning from Experience' in Michal S Gal and others (eds), *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (Edward Elgar Publishing 2015)

Hajdini B and Skara G, 'Lost in Implementation: EU Law Application in Albanian Legal System' (2017) 19 Journal of Legal Studies 43

Japaridze L and others, *Georgian Competition Law* (Liana Japaridze and Ketu Zukakishvili eds, 1st edn, New Vision University Press 2019)

Japaridze L and Szyszczak E, 'Competition Developments in Georgia: Approximating to the EU Regime' (2022) 1 Concurrences 1 <<https://www.concurrences.com/en/review/issues/no-1-2022/international/liana-japaridze>> accessed 1 April 2023

Kikilashvili M, 'Georgia: Reality and Future Perspectives of the Sharing Economy Development' in Andrzej Klimczuk, Vida Česnuityte and Gabriela Avram (eds), *The Collaborative Economy in Action: European Perspectives* (University of Limerick 2021)

Knill C, 'European Policies: The Impact of National Administrative Traditions' (1998) 18 Journal of Public Policy 1

OECD, *Fostering Business Development and Digitalisation in Georgia* (OECD Publishing 2022)

Petit N, 'The Proposed Digital Markets Act (DMA): A Legal and Policy Review' (2021) 12 Journal of European Competition Law & Practice 529

Sverdrup U, 'Implementation' in Paolo Graziano and Maarten P Vink (eds), *Europeanization: New Research Agendas* (Palgrave Macmillan UK 2008) <https://doi.org/10.1057/9780230584525_15> accessed 30 May 2023

Reports

Bernatt M, 'Competition Law and the Digital Economy: Poland' (2019) <<https://papers.ssrn.com/abstract=3431641>> accessed 11 May 2023

Competition Commission of South Africa, 'Competition in the Digital Economy' (2020) <<http://www.compcom.co.za/wp-content/uploads/2021/03/Digital-Markets-Paper-2021-002-1.pdf>> accessed 11 May 2023

——, ‘Media and Digital Platforms Market Inquiry – Terms of Reference’ (2023) <<https://www.compcom.co.za/media-and-digital-platforms-market-inquiry/>> accessed 11 May 2023

——, ‘Online Intermediation Platforms Market Inquiry – Provisional Summary Report’ (2022) <<https://www.compcom.co.za/wp-content/uploads/2022/07/OIPMI-Provisional-Summary-Report.pdf>> accessed 16 May 2023

——, ‘Online Intermediation Platforms Market Inquiry – Statement of Issues’ (2021) <https://www.compcom.co.za/wp-content/uploads/2021/05/OIPMI-Statement-of-Issues_May-2021.pdf> accessed 11 May 2023

——, ‘Online Intermediation Platforms Market Inquiry – Terms of Reference’ (2021) <https://www.compcom.co.za/wp-content/uploads/2021/04/44432_09-04_EconomicDevDepartment.pdf> accessed 11 May 2023

Crampton P, ‘Striking the Right Balance between Competition and Regulation: The Key Is Learning from Our Mistakes’ (OECD 2002)

Digital Competition Expert Panel, *Unlocking Digital Competition: Report of the Digital Competition Expert Panel* (2019) <<https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel>> accessed 30 May 2023

Directorate-General for Competition (European Commission) and others, *Competition Policy for the Digital Era* (Publications Office of the European Union 2019) <<https://data.europa.eu/doi/10.2763/407537>> accessed 10 April 2023

Galt & Taggart, ‘E-Commerce in Georgia’ (2021) <https://api.galtandtaggart.com/sites/default/files/2021-07/report/e-commerce-in-georgia_july-2021_eng.pdf> accessed 6 April 2023

OECD, ‘Abuse of Dominance in Digital Markets’ (2020) <<https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf>> accessed 3 May 2023

——, ‘Rethinking Antitrust Tools for Multi-Sided Platforms’ (2018) <<https://www.oecd.org/daf/competition/Rethinking-antitrust-tools-for-multi-sided-platforms-2018.pdf>> accessed 6 May 2023

——, ‘The Evolving Concept of Market Power in the Digital Economy, OECD Competition Policy Roundtable Background Note’ (2022) <<https://www.oecd.org/daf/competition/the-evolving-concept-of-market-power-in-the-digital-economy-2022.pdf>> accessed 9 June 2023

‘Stigler Committee on Digital Platforms, Final Report’ (2019) <<https://www.chicagobooth.edu/research/stigler/news-and-media/committee-on-digital-platforms-final-report>> accessed 13 May 2023

UNCTAD Secretariat, ‘Competition Law, Policy and Regulation in the Digital Era’ (2021) <https://unctad.org/system/files/official-document/ciclpd57_en.pdf> accessed 5 June 2023

World Bank, ‘Antitrust and Digital Platforms: An Analysis of Global Patterns and Approaches by Competition Authorities. Equitable Growth, Finance and Institutions Insight – Trade,

Investment and Competitiveness (2021) <<http://hdl.handle.net/10986/36364>> accessed 13 May 2023

Other Resources

Akman P, 'We Can't Tackle Platform Competition Issues without Increasing Digital Literacy' (*The Digital Economy*, 3 June 2021) <<https://www.weforum.org/agenda/2021/06/platform-competition-digital-literacy/>> accessed 30 May 2023

Alberski M and Szymanek S, 'Most Popular Online Trading Platform In Poland Fined For Abusive Practices Towards Both Business Users And Consumers' (*Mondaq*, 25 January 2023) <<https://www.mondaq.com/antitrust-eu-competition-/1274624/most-popular-online-trading-platform-in-poland-fined-for-abusive-practices-towards-both-business-users-and-consumers>> accessed 13 May 2023

Bagley A, 'Moldova Kicks off First-Ever Digital Markets Probe' (*Global Competition Review*, 27 January 2023) <<https://globalcompetitionreview.com/article/moldova-kicks-first-ever-digital-markets-probe>> accessed 27 May 2023

Benidze V, 'Small and Medium-Sized Enterprises in a Globalizing Business Environment: Importance and Challenges of E-Commerce Adoption', *The 2nd International Scientific Conference: Challenges of Globalization in Economics and Business* (2017)

'Bolt Food Is Already in Batumi!' (*Marketer*, 2021) <<https://www.marketer.ge/bolt-food-batumi/>> accessed 15 April 2023

'Bundeskartellamt Obtains Far-Reaching Improvements in the Terms of Business for Sellers on Amazon's Online Marketplaces' (*Bundeskartellamt*, 17 July 2019) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/17_07_2019_Amazon.html> accessed 31 May 2023

Caucasus Research Resource Centers, 'Caucasus Barometer 2019 Georgia' <<https://caucasusbarometer.org/en/cb2019ge/COMPABL/>> accessed 14 April 2023

'ECommerce' (*Georgia - Country Commercial Guide*, 15 August 2022) <<https://www.trade.gov/country-commercial-guides/georgia-ecommerce>> accessed 15 April 2023

'Ensuring Open, Competitive and Fair Digital Markets' (*UNCTAD / Prosperity for All*, 12 July 2021) <<https://unctad.org/news/ensuring-open-competitive-and-fair-digital-markets>> accessed 30 May 2023

'ESkills' (*EU4Digital*) <<https://eufordigital.eu/thematic-area/eskills/>> accessed 15 April 2023

'Georgian SMEs Master E-Commerce Skills to Enter New Markets' (*EU4Business*, 27 August 2020) <<https://eu4business.ge/en/news/georgian-smes-master-e-commerce-skills-to-enter-new-markets/>> accessed 18 April 2023

Government of Georgia, 'Program for 2021-2024 Towards Building a European State' (2021) <<https://www.gov.ge/wp-content/uploads/2021/10/programa-20.02.2021.pdf>> accessed 11 April 2023

Harris J, 'Seven Elements of Digital Literacy for Adult Learners' (*Tech Tips*, 10 September 2020) <<https://edtech.worlded.org/seven-elements-of-digital-literacy-for-adult-learners/>> accessed 14 April 2023

'History of Competition Policy Enforcement in Georgia' (*Georgian National Competition Agency*) <<https://gnca.gov.ge//index.php?m=347&lng=eng>> accessed 10 June 2023

'How Many Citizens Had Basic Digital Skills in 2021?' (*Eurostat*, 30 March 2022) <<https://ec.europa.eu/eurostat/web/products-eurostat-news/-/ddn-20220330-1>> accessed 7 May 2023

International Telecommunication Union, 'Digital Trends in Europe 2021: ICT Trends and Developments in Europe, 2017-2020' (2021) <https://www.itu.int/hub/publication/d-ind-dig_trends_eur-01-2021/> accessed 14 April 2023

ISSET, 'Electronic Commerce' <<https://www.mediator.iset-pi.ge/data-ecommerce>> accessed 18 April 2023

Liparteliani N, 'Georgian Taxi Firms Receiving 70% Fewer Calls as Yandex Taxi Enters Georgian Market' (*Georgia Today*, 12 December 2016) <<http://gtarchive.georgiatoday.ge/news/5377/Georgian-Taxi-Firms-Receiving-70%25-Fewer-Calls-as-Yandex-Taxi-Enters-Georgian-Market>> accessed 10 June 2023

Lush E, 'How to Use Taxis in Tbilisi: Essential Tips, Common Issues & 3 Best Taxi Apps Compared' (*Wander-Lush*, 15 April 2023) <<https://wander-lush.org/taxi-tbilisi/>> accessed 15 April 2023

Metskhvarishvili S, 'Competition Agency Does Not Plan to Study the Yandex Taxi Case' (*Business Media Georgia*, 11 July 2017) <<https://bm.ge/ka/article/konkurenciis-saagento-yandex-taqsis-sakitxis-sheswavlas-ar-gegmavs/12761>> accessed 15 April 2023

National Statistics Office of Georgia, 'Information and Communication Technologies Usage in Enterprises - National Statistics Office of Georgia' <<https://www.geostat.ge/en/modules/categories/105/information-and-communication-technologies-usage-in-enterprises>> accessed 6 April 2023

—, 'Information and Communication Technologies Usage in Households - National Statistics Office of Georgia' <<https://www.geostat.ge/en/modules/categories/106/information-and-communication-technologies-usage-in-households>> accessed 6 April 2023

'Search Engine Market Share Georgia' (*StatCounter Global Stats*) <<https://gs.statcounter.com/search-engine-market-share/all/georgia/>> accessed 13 April 2023

'Social Media Stats Georgia' (*StatCounter Global Stats*) <<https://gs.statcounter.com/social-media-stats/all/georgia/>> accessed 13 April 2023

'The European Union and Georgia' (*Factsheet: The EU and Georgia*, June 2022) <https://ec.europa.eu/commission/presscorner/detail/en/FS_22_3922> accessed 11 April 2023