

**IMPLICATIONS OF THE GLOBALIZING DIGITAL RETAILING ON COMPETITION
AND CONSUMER PROTECTION IN COMESA COUNTRIES**

By

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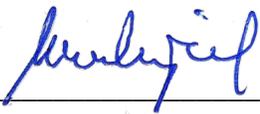
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DEDICATION

I dedicate this dissertation to my family with a special gratitude to my guardians who supported me in my education journey particularly, Sister Lilian Nzaro and Uncle Disan Tumusiime for the financial support during my undergraduate studies. Without their support I would never have made it to this level. Most of all, I give special thanks to my wonderful wife Doreen and children—Mercy, Precious, Prosper and Praise for being supportive and bearing with me whenever I was busy all through the entire doctorate program.

DECLARATION

The work described in this dissertation was conducted at the Swiss School of Business and Management between May 2021 and June 2023. I declare that this dissertation is my work and was done with no collaboration. The ideas, opinions and conclusions therein are my own apart from the areas where a specific reference to the work of others has been made. This dissertation has not been submitted previously, in part or in whole, to any university or institution for any academic qualification. The length of this dissertation is 82 pages, it contains 4 figures and approximately 29,539 words including appendices and references.

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ABSTRACT

IMPLICATIONS OF THE GLOBALIZING DIGITAL RETAILING ON COMPETITION AND CONSUMER PROTECTION IN COMESA COUNTRIES

Digital retailing is among the major factors contributing to globalization of markets with a potential of boosting trade flows and transforming developing countries into global players. Despite this potential, developing countries are faced with digital retail competition and consumer protection related constraints which constrain competitiveness, efficient operations of the markets, full utilization of the technologies and optimizing consumer welfare. This situation is further exacerbated by the powerful global players whose practices with cross border effects cannot be easily addressed by countries due to jurisdictional limitations.

This dissertation therefore sought to identify the challenges faced by the countries in the Common Market for Eastern and Southern Africa (COMESA), policy options and implementation approaches needed to address cross border effects of digital retail to promote effective competition and ensure consumer welfare while harnessing the potential of ecommerce. This research followed a comprehensive literature review, formulation of a conceptual framework and research questions, collection of data from experts in selected COMESA countries using questionnaires and face-to-face interviews and conducting systematic data analysis to generate conclusions and recommendations.

The findings reveal that digital retail, aided by technology including complex algorithms and artificial intelligence, entails specific characteristics which enable platforms to gain economies of scale and scope, market power, winner-takes-all effects, network effects, lock-in effects and ability to operate in multiple or multisided markets which may enhance market concentration and

encourage practices with adverse effects on the market ecosystem. Further, the study reveals that COMESA countries are faced with digital retail associated anticompetitive practices and conducts that lower consumer welfare particularly in merger control, detection of cartels, vertical restraints, abuse of market power along with other unilateral restraints and consumer protection concerns. Furthermore, the study establishes that existing laws of COMESA countries are limited in scope to effectively address digital retail specific concerns, especially conducts that increase concentration, reduce contestation, or diminish consumer welfare.

This dissertation concludes that COMESA countries may need to enhance their institutional and legal framework, including the regional law to effectively regulate digital retail, address jurisdictional limitations and cross border effects on the Market.

Table of Contents

DEDICATION.....	III
DECLARATION.....	IV
ACKNOWLEDGEMENTS	V
ABSTRACT.....	VI
IMPLICATIONS OF THE GLOBALIZING DIGITAL RETAILING ON COMPETITION AND CONSUMER PROTECTION IN COMESA COUNTRIES	
LIST OF FIGURES	X
LIST OF ABBREVIATIONS	XI
CHAPTER I INTRODUCTION	1
1.1 Introduction.....	1
1.2 Research Problem	3
1.3 Delimitations.....	5
1.4 Purpose of Research.....	6
1.5 Significance of the Study	8
1.6 Research Questions.....	8
1.7 Limitations of the Study.....	9
1.8 Assumptions.....	10
1.9 Definition of Terms.....	10
CHAPTER II LITERATURE REVIEW.....	15
2.1 Theoretical Framework.....	15
2.1.1 The Potential of Digital Retailing.....	15
2.1.2 The Need for Effective Competition and Consumer Protection Policies on Ecommerce.....	19
2.1.3 The Need for a Harmonized Regional Digital Retail Policy	21
2.1.4 Competition and Consumer Protection Legal Framework in COMESA Countries	24
2.2 General Competition Law Enforcement Challenges in Digital Retail	25
2.2.1 General Challenges on Conduct Assessment.....	25
2.3 Competition Restraints in Digital Retail Markets.....	33
2.3.1 Merger Control Concerns	33
2.3.2 Cartels: Hardcore, Hub-and-Spoke and Tacit Cartels.....	37
2.3.3 Online Vertical restraints	38
2.3.4 Unilateral restraints.....	44
2.4 Consumer Challenges Specific to Ecommerce	56
2.5 Summary and Conclusive remarks on literature review	59
CHAPTER III METHODOLOGY	64
3.1 Scope and Coverage.....	64
3.2 Overview of the Research Problem	64
3.3 Operationalization of the Theoretical Constructs	65

3.4	Research Purpose and Questions	66
3.5	Research Design.....	72
3.6	Population and Sampling	73
3.7	Participant Selection	73
3.8	Instrumentation	75
3.9	Data Collection Procedure	75
3.9.1	Data Collection	75
3.9.2	Validity and Reliability.....	77
3.9.3	Ethical considerations	77
3.10	Data Analysis.....	78
3.11	Research Design Limitations	78
3.12	Conclusion	79
CHAPTER IV FINDINGS OF THE STUDY		80
4.1	Introduction.....	80
4.2	Digital retail competition and consumer protection challenges faced by the COMESA Member States.	81
4.2.1	General Competition Concerns in COMESA Countries	81
4.2.1	Consumer Protection concerns in COMESA Countries	99
4.3	Adequacy of the existing legal and institutional policy framework in COMESA to address digital retail anticompetitive and consumer exploitative conducts.	108
4.4	Whether an individual Member State of COMESA can adequately address cross-border digital retail concerns on competition and consumer protection.....	117
4.5	Policy measures needed at the regional level to aggregate market power and resources in addressing competition and consumer protection concerns on detail retail.	120
4.6	Summary of findings.....	122
4.7	Conclusion	124
CHAPTER V DISCUSSION.....		125
5.1	Discussion of Results.....	125
CHAPTER VI CONCLUSIONS AND RECOMMENDATIONS.....		133
6.1	Summary	133
6.2	Implications.....	134
6.3	Recommendations for Future Research	137
6.4	Conclusion	138
REFERENCES.....		140

LIST OF FIGURES

Figure 1: Graphical Representation of the Research Design	72
Figure 2: Graphical Representation of the results on Digital Retail Competition and Consumer Protection Policy Challenges.	81
Figure 3: General Competition and Consumer Protection Concerns in Digital Retail.	82
Figure 4: Graphical Representation of the results in respect to specific Areas of Concern. ...	83

LIST OF ABBREVIATIONS

Abbreviation	Full name
CCC	COMESA Competition Commission
COMESA	Common Market for Eastern and Southern Africa
COVID19	Coronavirus Disease 2019
EC	European Commission
EU	European Union
IOS	iPhone Operating System
MFN	Most Favoured Nation
OECD	Organization of Economic Cooperation and Development
PC	Personal Computer
MAP	Minimum advertised price
RPM	Resale Price Maintenance
SNNIP	Small but Significant Non-transitory Increase in Prices
SSNDQ	Small but Significant Non-transitory Decrease in Quality
SSNIC	Small but Significant Non-transitory Increase in Cost
TFEU	Treat on the Functioning of the European Union
UNCTAD	United Nations Conference on Trade and Development
USA	United States of America
USFTC	United States Fair Trading Commission

CHAPTER I

INTRODUCTION

1.1 Introduction

Digital retailing has become one of the major factors contributing to globalization of markets with a substantial impact on trade and consumer welfare at the national, regional as well as multilateral levels. Digital innovations are transforming the global economy with the promise of boosting global trade flows from developing countries (World Trade Organization, 2021). As highlighted by Nabbose and Iftikhar (2019), online businesses allow digital retail businesses to attain higher returns on investment and is impacting brick-and-mortar retail competitiveness.

Several scholars have advanced various definitions for digital retail, a term which in some circles is used interchangeably with other phrases such as e-retail, digital trade, ecommerce platforms and online retailing. According to González and Jouanjean (2017), digital retail encompasses digitally enabled transactions in trade in goods and services which can be either digitally or physically delivered to the consumer. Gurupandi and Abipriya (2019), define e-retail as “the process of selling the goods and services in electronic media particularly the internet”. According to Jain and Werth (2019), digital retail can be understood as retail built around or using different digital technologies. According to Dennis, Fenech and Merrilees (2004), e-retailing is the “sale of goods and services on the internet or other electronic channels for individual consumers”. Burt and Sparks (2003) define e-retailing as a business to consumer form of ecommerce. Based on these various definitions, it can be concluded that digital retailing includes all e-commerce and related activities that ultimately result in transactions with the consumer, whether delivery is done digitally or physically.

Ecommerce has a very big potential to transform developing countries into global market players as it makes it easy and cheap to market, buy and sell goods or services and transmit funds over an electronic network to any part of the world (Terzi, 2016).

However, digital retail base in developing countries remains relatively low with the Middle East and Africa contributing about less than one percent of the global digital sales. The weak performance of Africa, where almost all nations are developing countries, may be attributed to weak institutional and legal regime, limited resources and skills, inadequate infrastructure, small markets that cannot attract digital retail global players, limited access to internet, inadequate mechanisms for settling cross-border disputes, inadequacy of appropriate financial payment systems, inadequate logistics networks, high establishment costs and jurisdictional limitations in regulating ecommerce (Alwahaishi & Amine, 2015).

Digitalization has introduced new competition challenges in retail and reinforced traditional competitive forces. It has also introduced new threats and vulnerabilities to both consumers and retailers which are becoming a great concern for the public and the relevant authorities (Mäenpää and Korhonen, 2015).

Such challenges along with inadequate market size, make it difficult for an individual developing country to apply policies to effectively address competition and consumer protection related challenges. Thus, there may be need for developing countries such as those under the Common Market for Eastern and Southern Africa (COMESA) to utilize integrated regional market arrangements by establishing multijurisdictional policies to effectively deal with the transboundary effect of ecommerce.

COMESA is an inter-governmental organization with membership of 21 Member States in the Eastern and Southern African Region. Under the Treaty Establishing the Common Market for Eastern and Southern Africa (“the Treaty”), 1994, Member States agreed to co-operate in attaining sustainable growth and development; promoting joint development in all economic sectors; creating an enabling environment for foreign, cross border and domestic investment; promoting peace, security and stability in the region; strengthening the relations between COMESA and the rest of the world; and contributing towards the establishment and realization of the objectives of the African Economic Community. COMESA has a population of over 583 million and a Gross Domestic Product of \$805 billion. Geographically, COMESA covers almost two thirds of the African Continent with an area of 12 million (sq km). Member States of COMESA are Burundi, Comoros, DR Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Somalia, Sudan, Eswatini, Tunisia, Uganda, Zambia, Zimbabwe (COMESA Secretariat, 2022).

This study therefore sought to identify digital related challenges faced by the countries in the Common Market for Eastern and Southern Africa (COMESA), policy options and implementation approaches needed to address cross border effects of digital retail to promote effective competition and ensure consumer welfare while harnessing the potential of ecommerce in the region.

1.2 Research Problem

Digital retail has become one of the major factors contributing to globalization of markets with a substantial impact on trade and consumer welfare in developing countries (World Trade Organization, 2021). Digital retail as an aggregator and a tool for conducting economic activities

online, has a very big potential to transform developing countries into global market players through enhanced productivity, increasing efficiencies and with limited or no role of intermediaries (Terzi, 2016).

Countries apply competition policy as a tool to preserve consumer and general welfare in the market by preventing practices that limit market entry or reduce the number of participants (Encaoua and Hollander, 2002). Enforcement of the competition policy helps countries to dismantle barriers to new business development and play a major role in improving the availability of goods and services and to empower the economically disadvantaged market players. As a complement to the competition policy, countries apply consumer protection policies from the demand side point of view with the same objective of ensuring consumer welfare by preventing practices of suppliers that erode consumer market confidence (Kovacic, 2007). The competition and consumer protection policies are applied in consideration that market forces alone cannot deliver the desired consumer and general welfare without government intervention to promote a well-functioning market with a strong competition on the supply side and a strong consumer base on the demand side (Armstrong, 2008).

However, COMESA Member States, all of them being developing countries, may find it difficult to apply competition and consumer protection policies to fully utilize its potential for digital retail while ensuring consumer welfare in the market. The challenges to effectiveness of the competition and consumer protection in developing countries include: inadequate infrastructure and logistical networks, weak institutional and legal regime, limited resources and skills, small markets that cannot attract new digital retail global players, limited access to internet, inadequacy of appropriate financial payment systems, inadequate logistics networks, high

establishment costs and jurisdictional limitations in regulating ecommerce (Alwahaishi & Amine, 2015).

The challenges are exacerbated by practices in foreign territories, where developing countries have no jurisdiction, but which have cross border impact on them. Such challenges along with inadequate market size, make it difficult for an individual developing country to apply policies to address effectively the specific competition concerns in digital retail such as winner-takes-all phenomenon; limitations on access to internet and data; delineation of the relevant market; resale price maintenance; parallel import; exclusive agreements; predatory pricing; collusive behavior and consumer protection concerns such as misleading information; high rate of cyber risk; frauds and data security; changes in product pricing; complexities in delivery and return policies; quality issues and unfair contract terms; among others.

There is little understanding however of whether COMESA countries are encountering digital retail competition and consumer protection related challenges and if so, which ones and what kind of specific policy options and implementation approaches do they need to adopt to address them.

1.3 Delimitations

Delimitations are boundaries set in the study which may affect the research in an important way, but which are under control of the researcher. Delimitations indicate to the reader how the researcher narrowed down the scope of the study; what was included and what was left out (Roberts, C.M., 2010). The delimitations applicable to this study are as follows:

- (a) The study did not target to identify the sectoral specific digital related challenges in COMESA Countries as this would result in the scope of the study to be so broad, requiring extensive resources and specific expertise which the researcher did not have.
- (b) The data collection was limited to five months and carried out from December 2022 to April 2023 to provide for time for the research to analyze the results and compile the dissertation, to meet the times lines for completion of the study.
- (c) The study involved the COMESA Competition Commission and national agencies responsible for competition and consumer protection of 7 COMESA countries out of the 21 Member States. Forty-two respondents from the 7 countries were purposefully involved in the study: thirty-two as online questionnaire respondents and 10 as participants in the face-to-face interviews. The study area was COMESA, a regional economic block comprising of 21 member states, where digital retail cross border effects on competition and consumer protection and related policy measures to address the concerns have not been studied, at least based on the available literature. The selection of the countries and the respondents was based on those that met the criteria highlighted in section 3.7 *Participant Selection*.

1.4 Purpose of Research

The main goal of the research is to identify and determine the specific policy options and implementation approaches that the countries in COMESA can adopt to address the multi-jurisdictional limitations on cross border effects of digital retail to promote effective competition and ensure consumer welfare in the region. The objective of the current study was to provide a comprehensive review of the literature, gather and assess the best practices and the related policy

challenges in the region in relation to competition and consumer protection in the digital market that COMESA countries need to address to optimize the potential of ecommerce. Particularly, the study had the following specific objectives:

- a) To identify the competition and consumer protection challenges in digital retail faced by the COMESA countries;
- b) To examine the adequacy of the existing legal and institutional policy framework in COMESA to address anticompetitive practices and consumer exploitative conducts in digital retail;
- c) To establish the effectiveness of the market assessment tools provided for under the existing competition and consumer protection legal framework to adequately detect, examine and address the digital retail competition and consumer protection within COMESA;
- d) To identify policies needed to address cross border digital retail concerns on competition and consumer protection, and;
- e) Recommend policy measures that should be adopted at the regional level to aggregate market power and resources in addressing competition and consumer protection concerns on detail retail.

1.5 Significance of the Study

The results of this study are valuable in informing the policies of COMESA and Member States to promote effective competition and ensure consumer protection in digital retail. Companies and consumers in COMESA shall also benefit from the results of such policies such as fair competition and consumer welfare gains. This dissertation also serves to create awareness to policy makers, companies and consumers on competition and consumer protection challenges, rights, and obligations each party has in digital retail.

1.6 Research Questions

To identify the specific policy options and implementation arrangements COMESA countries can adopt to address jurisdictional limitations and cross border challenges of digital retail on competition and consumer protection, this study sought to answer the following questions.

- a) What are the competition and consumer protection challenges in digital retail faced by the COMESA Member States?
- b) How adequate is the existing competition and consumer protection law and policy framework adequate to detect, examine and address the digital retail competition and consumer protection within COMESA?
- c) How feasible is it for an individual Member State of COMESA to adequately address cross border digital retail concerns on competition and consumer protection?
- d) What policy measures should be adopted at the regional level to aggregate market power and resources in addressing competition and consumer protection concerns on detail retail?

1.7 Limitations of the Study

Limitations are features that may negatively affect the generalization of the study which the researcher knows but has no control over them (Roberts, C.M., 2010). This study has the following limitations:

- a) The study used a sample of 7 out of 21 COMESA countries and involved 42 experts from purposely identified competition and consumer protection authorities and related organizations of the selected countries, which sample could affect the generalization of the results to every other COMESA country.
- b) The researcher also did not have the opportunity to ask the respondents to the questionnaires to clarify some of their responses. To mitigate the problem, the researcher sought views from the experts that participated in the face-to-face interviews to provide insights on some of the responses to the questionnaire that required further clarifications.
- c) The researcher, being an officer implementing competition and consumer protection laws, risked a research bias especially in data collection approach and analysis. To minimize this limitation, the researcher ensured not to try to qualify responses during the face-to-face interviews, and instead applied indirect questions to redirect and keep respondents on track. The researcher also ensured that all the responses were analyzed objectively to ensure that any confirmation bias is minimized.
- d) The researcher was also faced with logistical limitations including time and money to be able to access all the targeted countries. This was however minimized using online google forms to conduct an online survey and using the WhatsApp and zoom video platforms to conduct face-to-face interviews with the selected experts.

1.8 Assumptions

Assumptions are beliefs held by the researcher that are necessary to conduct the research, but which cannot be proven (Simon and Goes, 2013). In conducting this study, the following were assumed:

- a) The respondents in the study, being the officials from the COMESA Competition Commission and national authorities responsible for the enforcement of competition and consumer protection laws of the 7 out of 21 COMESA countries, are a representative sample of the experts available in the COMESA on the subject matter.
- b) The respondents, being from competition and consumer protection authorities, have been able to understand the questions and provide the most appropriate responses.
- c) The respondents provided honest responses based on their expertise and knowledge and the confidentiality assurance by the researcher.
- d) The respondents freely provided information based on the questions and assurances on anonymity and confidentiality provided to them.

1.9 Definition of Terms

The definition of terms supplements the background of the study, gives the reader insights on the critical concepts used in the study, differentiates between unrelated and related terms as well as providing the context on how concepts in the study were applied (Neha and Chetty, 2021). For

purposes of this dissertation, the following terms have the following meanings. All definitions not accompanied by a citation were developed by the researcher.

Algorithm: “A finite set of rules that gives a sequence of operations for solving a specific type of problem” (Knuth 1997).

Artificial intelligence System: “A machine-based system that is capable of influencing the environment by producing an output (predictions, recommendations or decisions) for a given set of objectives. It uses machine and/or human-based data and inputs to (i) perceive real and/or virtual environments; (ii) abstract these perceptions into models through analysis in an automated manner (e.g., with machine learning), or manually; and (iii) use model inference to formulate options for outcomes. AI systems are designed to operate with varying levels of autonomy.” (OECD, 2023).

Competition: The contest between firms as they strive to meet same consumer needs, win them over, make profits and attain growth (Jain, 2000)

Competition Policy: Government measures that directly affect the behavior of firms and the structure of the industry aimed at preserving and promoting competition to ensure efficient allocation of resources in the economy, increase supply of quality products to enhance consumer choices, maintain

affordable prices, enhance innovations, and ultimately enhance consumer welfare (CUTS, 2001).

Consumer: A person who purchases goods or services and uses them last in the value chain or any person that is the last user of the goods or services.

Consumer Protection Policy: Measures that target to empower consumers, protect their interests, enable them to exercise intelligently and efficiently their choices and promote efficient functioning of the market and ultimately attainment of consumer welfare (OECD, 2008).

Cross-leverage: “Understanding interrelationships, fostering synergies, and enhancing complementarities” (Ziakas, 2013). In the context of this dissertation, it refers to a situation where a firm synergizes the benefits in one market to enhance its operations in one or more of the other markets.

Digital Retail: All e-commerce and related activities that ultimately result in transactions with the consumer, whether delivery is done digitally or physically.

Digital Platforms: “digital resources that includes various services and content that will enable value creating and interactions between external partners, producers and customers” (Calissendorff and Lögdal, 2018)

Ecommerce: "Orders for goods or services which are made and confirmed electronically via the Internet (i.e., online) or via other electronic platforms (such as those operated by mobile network operators)" (OECD and OCDE, 2012).

Economic bloc: "A set of countries which engage in international trade together and are usually related through a free trade agreement or other association" (Ramirez, 2014).

Economies of Scope: Cost saving that "arise when the average cost of a single product is lowered by its joint production with other products in a multi-product firm" (McGee, 2014).

E-transactions: Electronic transaction- "the sale or purchase of goods or services, whether between businesses, households, individuals, governments, and other public or private organisations, conducted over computer mediated networks. The goods and services are ordered over those networks, but the payment and the ultimate delivery of the good or service may be conducted on or off-line" (OECD, 2022).

Global digital retail platforms: Oxford Dictionary defines Global as "relating to, or involving the whole world, worldwide". For the purpose of this dissertation, global digital retail platforms refer to online activities of the firms which ultimately result in transactions with the consumer, with a worldwide reach.

Multi-homing: “Participation in multiple platforms (or purchase multiple products) in order to reap maximal network benefits” (Choi, 2010).

Network Effects: A situation “where the value of a product or service to an individual user depends on the number of other users (DotEcon, 2015).

Third-party suppliers: Companies that use a platform of another operator as a marketplace to sell their goods or services to consumers.

Third-party service providers: Companies that supply services to a platform to facilitate an online transaction such as telecommunications or banks.

Unilateral Restraints: “Conduct by a firm that has substantial or monopoly/monopsony power in a market and uses that power to implement a strategy that is likely to harm competition” (University of Melbourne, 2016).

Vertical Restraints: “Restrictions of competition contained in vertical agreements. These agreements take place between firms operating at different levels of the production or distribution chain” (Marco, 2021).

CHAPTER II

LITERATURE REVIEW

2.1 Theoretical Framework

This section provides literature review of the related studies and works conducted on the potential of digital retail, its challenges and the associated possible policy remedies countries to promote competition and ensure consumer protection.

2.1.1 The Potential of Digital Retailing

Driven by the power of the internet to shrink the world into a global village, digital retailing has a very big potential to transform developing countries into global market players. Ecommerce as the information aggregator and a tool for conducting online economic activities, which traditionally were handled through brick-and-mortar, is boosting productivity, increasing efficiency of the procurement system, strengthening inventory controls, lowering retail transaction costs, and has facilitated elimination of intermediaries (Terzi, 2016).

The power and scope of the internet has enabled retail business to be conducted online in pursuit of the ecommerce benefits which are not obtainable in the traditional brick and mortar retail businesses. Such benefits include: the convenience to buy and sell online; online dual communications and ease in access to information; ease in product marketing; ease in the selection of products and comparison of prices; reduced transaction costs, readily available information; faster and convenient payments; better customer relations; flexible customization of products to customers; extendibility of the platforms to provide multiple services; faster access to global marketplace; ease in scaling up business and the ability to attain competitive advantage

through enhanced efficiencies and enterprise differentiation in the market; potential for producers and retailers to easily access global markets and earn higher incomes, and flexibility in meeting tailored customer needs (Okolie and Ojomo, 2020; Alwahaishi and Amine, 2015; Cardona, Duch-Brown and Martens, 2015; Doherty and Ellis-Chadwick, 2015; Lu, et al, 2015; and Wen, Chen and Hwang, 2001).

Ecommerce streamlines supply chains and significantly reduces distribution costs. It enables customers and suppliers to transact directly with each other and cuts out the middleman as in the case of travel agents for hotels or airlines and retailers for upstream suppliers thereby allowing selling directly to customers. It lowers barriers to entry and expansion to locations as it is certainly cheaper and faster to establish online than investing in a physical retail store given the reduced shelf space constraints, enabled stocking of a wider range of products and easier and faster introduction of new products. Ecommerce reduces search costs and makes it easier for consumers to locate products. Thus, it promotes niche product demand, eases collection of detailed consumer behavioral data and enables personalized shopping experience to the mutual benefits of the platforms and consumers (DotEcon, 2015).

According to Haucap and Stühmeier (2016), virtual location removes the barrier that traditionally is imposed on physical stores relating to expansion in space or geographically. According to Qi et al. (2020), cross-border ecommerce reduces transactions costs because of its ability to reduce compliance costs to domestic regulations and to cut off traditional international trade intermediaries, reduce logistical costs and lower product promotional costs for establishing in the foreign markets.

As a result of the enhanced efficiencies, global digital retail is rapidly growing with ecommerce sales constituting about 22.3% of the total worldwide retail trade recorded at US \$23.839 and growing at 27.6% in 2020 though this trend is expected to slow down in post COVID19 to an estimated rate of 20.8% in 2023 (EMarketer¹ 2021; 2022). McKinsey Global Institute research estimated that the internet could drive 10 percent of Africa's Growth Domestic Product by 2025 with the trend already transforming a number of sectors in the region, including banking, retail, power, health care, education and electronic payments systems thereby changing the business landscape (Bughin, Chironga and Desvaux, 2016).

However, Africa lags the rest of the world in terms of e-commerce readiness. Only four COMESA countries: Mauritius, Tunisia, Libya and Kenya with the ranking of 69, 77, 85, 88 respectively are in the top hundred countries globally while nine of the ten least prepared countries are in Africa and three of which are in COMESA (United Nations Conference on Trade and Development [UNCTAD], 2020)². There is, however, positive signs of progress in African. Over the last two decades the continent has recorded the highest growth globally in internet access, moving from 2.1% in 2005 to 24.4% in 2018 (Tempest, 2020). Available report shows that internet penetration in Africa stood at 43% compared to 64.2% global average as of December 2020 (Statista³, 2022). According to Statista report⁴, the number of online shoppers in Africa increased to 281 million with the number of e-commerce users projected to reach over

¹ Refer to Insider Intelligence: Global Ecommerce Update 2021 on <https://www.emarketer.com/content/global-ecommerce-update-2021> and Worldwide Ecommerce Forecast Update 2022 on <https://www.insiderintelligence.com/content/worldwide-ecommerce-forecast-update-2022>

² Refer to UNCTAD B2C E-Commerce Index 2020: Spotlight on Latin America and the Caribbean on https://unctad.org/system/files/official-document/tn_unctad_ict4d17_en.pdf and Fast-tracking implementation of eTrade Readiness Assessments on https://unctad.org/system/files/official-document/dtlstict2020d9_en.pdf

³ See the report on Internet penetration in Africa 2020 by Statista available at: <https://www.statista.com/statistics/1176654/internet-penetration-rate-africa-compared-to-global-average/>

⁴ See the report on number of online shoppers in Africa from 2017 to 2025 published by Statista on <https://www.statista.com/statistics/1190579/number-of-online-shoppers-in-africa/>

520 million by 2025 and the growth is attributed to mobile money transaction which are growing at the rate of 23% outpacing the global average of 21 in 2020.

It is further observed that despite the potential of digital economy to transform economies, digital retail base in developing countries remains relatively low due to competitiveness challenges including weak institutional frameworks, inadequate supportive infrastructure, limited market size, limited sector specific investments, skills and knowledge gaps and ineffective demand, among others, which make it difficult for an individual developing country to apply policies to effectively address related challenges (Alwahaishi & Amine, 2015).

Furthermore, it is observed that some of the beneficial effects of digital retail, may not be automatic especially to every investor because efficiency gains from supply chains along with the lowering of prices may lead to a greater competitive intensity and thus sellers may need to compete harder to win and retain business (DotEcon Ltd, 2015). It is also observed that while it may be easier for an online business to establish, it may face difficulties to attract formidable suppliers and consumers to grow and expand given that an online business needs to first gain a reputation and be trusted even more than it is needed for an offline business whose level of storefront investments are impressive enough to convey the seriousness of the investor and the business. An online business may, depending on the goods the retailer offers, also require investing in logistics system or secure services of third parties (Islas, 2012).

2.1.2 The Need for Effective Competition and Consumer Protection Policies on Ecommerce

Now more than ever, there is need to enhance cross border cooperation in handling ecommerce cross border effects on competition and consumer welfare. Cases involving foreign firms could become more common, and authorities may require not only extra-jurisdictional powers to investigate and enforce against foreign firms, but also close co-operation with authorities and governments in other jurisdictions to make effective use of these powers and ensure early intervention to address concentrated markets which result in strong first-mover advantages due to strong presence of network effects, that is, increased value of a product or service an individual user gets due to the increased number of other users. On the other hand, the policies should ensure that they do not stifle innovation and investment, putting into consideration the dynamic nature of markets which may give rise to market power. Such policies should enable the adoption of e-commerce amongst consumers and businesses through increasing trust and confidence in the market (DotEcon, 2015).

Online platforms as they evolve through stages of innovation, market entry, and outmaneuvering competition to stabilizing in the market, there is potential to produce a single dominant player with monopolistic powers, potential to engage in exclusive and exclusionary practices and, in some cases, with an ‘essential facility’ on which customers may find themselves locked-in whilst competitors who are increasingly dependent on it may be denied access. There is therefore need for establishment of measures that ensure openness, neutrality, and equal treatment to counterbalance benefits and concerns on competition and consumer protection in emarket places (Dontoglou, 2002).

Szmigielski (2017) highlights that in addressing anticompetitive effects of online selective and exclusive distribution, there is need for application of three types of regulations equivalent to those imposed on physical stores. The three regulations which already, are applied by the European Union (EU) include: (i) soft regulation covering legitimate conditions which a supplier can impose on the dealer in relation to the content on the website, delivery and return policies, provision of advice to customers, and stocking of products; (ii) strong regulations covering restrictions which, though not regarded as a hardcore restriction, may not be justifiably indispensable or may not grant fair share of benefits to consumers even where efficiency gains are established such as the general provision prohibiting the dealers from using independent third-party platforms; and (iii) extreme regulations covering hardcore restriction including conditions by dealers denying consumers located in a particular region access to their platforms or redirecting them or terminating their transactions, limiting distributors' proportion of Internet sales as opposed to setting minimum turnover, and imposing online prices higher than offline prices.

According to the OECD (2019), report on implications of e-commerce for competition policy⁵, there is need for specific policies and laws to ensure certainty and clarity on the scope of application of the law in e-commerce businesses. The report observes however that ecommerce specific legislation should maintain the flexibility of the competition rules and the possibility to revisit the ambit of the relevant prohibition as markets evolve given the fast-moving digital markets.

⁵ See the OECD, 2019 report on implications of E-Commerce for competition policy - Background Note

Furthermore, consumer protection laws should address consumer concerns and extend all the rights conferred to consumers of goods purchased offline to the online environment including protection on misleading and deceptive conduct, false representation and fair practice, safety of goods and services, unfair contract terms and guarantees or warranties in connection to title, acceptable quality, fitness to a particular purpose, goods to comply with description, goods to comply with sample, and implied guarantee as to price and repairs and spare parts (Azmi and Phuoc, 2020).

A specific Consumer Protection law may be required to condition online platforms to: process transaction free of errors, reveal to consumers and authorities their business contact details; ensure confidentiality and security of the platforms and payment system; cooperate in consumer dispute resolution mechanism; disclose conditions for utilization of consumer information and consumer liabilities in the transaction; reveal to consumer details of brokerage service providers including their benefits and liabilities in connection with the transaction; avoid engaging in deceptive and misleading conducts; avoid unduly shutting down of the platform or details on the platform to interfere with claims of the consumer; set out procedures for handling consumer orders during temporally shutdown; ensure timely resolution of consumer disputes, avoid unconscionable conduct and set procedures for investigation as set out for example in the specific laws of Korea (Sohn, 2016), India (Chawla and Kumar, 2021) and Malaysia (Lee and Lee, 2019).

2.1.3 The Need for a Harmonized Regional Digital Retail Policy

Digital retail is transboundary in nature with cross border effects. This along with inadequate market size and weak institutional capacities at the national level, makes it difficult for an

individual developing country to apply policies to effectively address related challenges. In addition, policies of different countries fragment the policy regime and act as a barrier to digital retail competitiveness in an economic bloc. Consequently, integrated, and powerful global players can ignore a policy measure of a developing country or choose to pull out of its market as they continue operating in other countries. For this reason, developing countries should establish regional competition authorities that aggregate the power and resources to create a credible threat to foreign firms and to effectively regulate cross-border transactions (Gal, 2009).

It is important to pursue international efforts through, among others, regional trade agreements given the borderless nature of the digital economy, and legal uncertainty, time wasting and the cost various laws across different target markets impose on e-traders (Lianos et al., 2019). A regional economic bloc provides an opportunity for a uniform legal regime on digital cross border trade thereby promoting trust, confidence, cybersecurity, and online consumer protection across the region (Bieron and Ahmed, 2012). Horna (2017) emphasizes the need for competition regimes in countries with less developed competition culture to focus on transnational and regional approaches because such economies tend have weak institutional and legal frameworks to deter multinational cross border ecommerce.

Cross border ecommerce presents jurisdictional challenges to courts to ably address consumer disputes especially in enforcing the judgements. There is therefore a need for guidelines for determining the cross-border nature and jurisdiction of law with a clear criterion to address cross-border transactions (Beek, D'aubrey, and Garzaniti 2016). According to Howells, Micklitz, and Wilhelmsson (2016), a single legal framework in an economic bloc allows courts of justice to issue a binding judgement to all Member States. A case in point is the EU where under

Regulation No 1215/2012 a judgement given in one member state is recognized in the other member states without any special procedure being required.

A harmonized policy and legal framework in economic bloc, eliminates fragmentation of legal regimes and allows firms to base their operations on one legal regime across all the countries in the region thereby reducing costs of compliance, increasing predictability and overall, improving compliance in the market. Fragmentation of the legal regime among countries puts at risk the scaling-up of start-ups and smaller businesses and creates legal uncertainty and higher regulatory burdens for participants in the platform economy and their ability to thrive in digital markets (Jebelli, 2021).

According to Lipimile and Gachuri (2005), a regional law is also favored because anticompetitive and consumer exploitative practices with cross border dimensions require a regional approach and cooperation to reduce the costs on the businesses that are subjected to parallel and poorly coordinated investigations. The need to address cross-border effects was actually part of the background to the adoption of the COMESA Competition Regulations, 2004 to regulate conducts within, or having an appreciable effect on trade between Member States in COMESA.

Howells, Micklitz, and Wilhelmsson (2016), observe that in the context of a regional economic bloc, harmonization of competition and consumer protection legal frameworks increases legal certainty for both consumers and businesses; enables them to rely on a clearly defined single regulatory framework on all aspects of unfair commercial practices across the region; eliminates the barriers stemming from the fragmentation of the rules and helps to achieve a uniform internal market.

Regional competition law enforcement can also fill the gaps caused by the lack of national laws and support the less experienced or resource constrained competition authorities in the region.

Regional organizations can bring together national experts for information and knowledge sharing and exchange of experiences, encouraging joint action, promote harmonized procedures, collaboration, and coordination initiatives (Moreira, 2021). According to OECD (2019), harmonization in consumer and data protection law is key in removing barriers to cross-border online sales and casts doubt on the extent to which domestic consumer protection laws can bind online retailers established in other jurisdictions.

2.1.4 Competition and Consumer Protection Legal Framework in COMESA Countries

Several Member States of COMESA have in place competition laws albeit with limited effectiveness in addressing the types of challenges faced in the digital economy. Member States with competition laws are Burundi, Comoros, DR Congo, Djibouti, Egypt, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Tunisia, Zambia, Zimbabwe (Brusick, 2018). Likewise, most of the Member States have in place consumer protection laws apart from Uganda, DR Congo, Eritrea, Burundi, Libya and Djibouti. A few Member States including Kenya, Zambia, Eswatini, Madagascar, Egypt, and Tunisia have in place online consumer protection laws but in general, there is still a need to strengthen ecommerce regulations on consumer protection, cybersecurity, e-transactions, as well as data issues, particularly when it comes to cross-border data flows within the region (Ismail, 2020).

COMESA is implementing a regional competition and consumer law on practices with cross border effect. The region adopted the COMESA Competition Regulations, 2004 (“the

Regulations”) which established the COMESA Competition Commission (CCC) with a mandate to enforce it. The CCC has registered progress in evaluating cross-border mergers, dealing with restrictive business practices and conducts that undermine consumer welfare affecting more than one country within its jurisdiction (Moreira, 2021).

The Regulations require notification and approval of mergers with a regional dimension, that is, involving at least one party operating in two or more Member States with a target undertaking operating in a Member State and not more than two thirds of the annual turnover in the region of each of the merging parties is achieved or held within one and same Member State (COMESA Merger Assessment Guidelines, 2014). The Regulations prohibit restrictive business practices or agreements which have as their object or effect the prevention, restriction, or distortion of competition or undermining consumer welfare within COMESA. In the context of consumer protection, the Regulations prohibit false or misleading representations; unconscionable conduct; supply of goods that are unsafe safe or defective (likely to cause injury, loss, or death) or which do not comply with information standards (Bowmans, 2017).

The COMESA Competition Regulations, save for its application to conducts with cross border effect, has a lot in common with national laws which, as highlighted by Ismail (2020) and Brusick (2018), have limitations to effectively address effects of cross border ecommerce.

2.2 General Competition Law Enforcement Challenges in Digital Retail

2.2.1 General Challenges on Conduct Assessment

Multisided Effect of Digital markets on Competition Policy: According to Haucap and Stühmeier (2016), users of multisided platforms may find it costly to multi-home from a

platform that has strong indirect effects with many users on both sides, that is, many buyers and sellers. The users on either side may be hooked on to the platform due to indirect network effects, that is, the presence of many users on the other side of the platform. The indirect network effects may increase concentration unless it is constrained by capacity limits, product differentiation and the potential for multi-homing, switching costs and charges of the platform.

Multisided platforms such as eBay, Uber, Google, and Apple connect different but interdependent users through intermediation and matchmaking to facilitate transaction and innovation (Abdelkafi et al., 2019). Such platforms play conglomerate functions in that they operate across multiple product segments including direct retail, online advertising, social networking and online search, hardware and software trading and some are also involved in traditional brick-and-mortar businesses, for example Amazon (OECD, 2019).

In addition, successful platforms tend to be active in several interlinked but separate markets and a dominant firm in one market may seek to extend or “leverage” its dominance in the adjacent market, by favoring its own products while discriminating against products of other trading partners. An example is Google which applied algorithms over a long period of time that methodically relegated the services of its competitors while giving its own comparison-shopping services a more prominent search position. The European Commission in 2017 found that Google’s conduct of manipulating its general search services to give eye catching prominence and advantage to its own comparison-shopping service over the services of its competitors

amounted to a violation of Article 102 TFEU and imposed a fine which was also upheld by the General Court⁶ of €2.42 billion (OECD, 2019).

Due to the interdependency in a two-sided market, a change in price on one side can result in demand changes on the other side. A good example is the case of a credit card which may not be used by many merchants if they establish that the network's fees of using a particular card exceed the benefits, they gain from accepting it. This may also result in fewer cardholders using the card because it is not generally accepted. There is therefore need for authorities to examine platform operations and conduct cost benefit analysis on both upstream and downstream market sides to achieve greater clarity on the potential impact of a harmful practice on one side in offsetting benefits on the other side (Frieden, 2017).

According to Frieden (2017), Market dominance may have significant and potentially adverse impacts on competition and consumers in situations where a firm leverages its dominance in one market to dominate other market segments. Thus, there is a need for authorities to consider the inter-relationship between a venture's successes in two or more markets, because dominance in two combined, or interdependent markets, may trigger new or greater risks for consumers. In addition to anticompetitive practices of internet-based service providers, greater harm can arise in the accrual of market power by combining dominance in two or more intermediary markets, for example Google's dominance in Internet search and advertising.

There is therefore a need to consider the role of data, vertical integration, and multi-sided platforms in creating distortions within online markets and ascertaining whether multinational

⁶ See Case file T-612/17 - Google and Alphabet v Commission (Google Shopping): <https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-11/cp210197en.pdf>

dominant firms are abusing their market power or creating barriers to entry in online markets (Goga and Paelo, 2019).

Limitation of Market Power Assessments in Digital Markets: Determining the relevant market is a prerequisite for the assessment of the effect of the anticompetitive behavior on product market and geographical market. In eCommerce, determination of the relevant market is challenged by the supra-national nature of online platforms and the fact that interchangeability or substitutability of the product, price and usage of the product may not be applicable due to the particularities of online transactions. Some factors such as low prices, the speed and continuous evolution of the products and the circumstances in which goods and services are marketed online, are different from the traditional brick and mortar businesses thus, raising potential difficulties of assessments (Dontoglou, 2002).

Moreover, as further explained by Dontoglou (2002), internet and ecommerce and its cross-border nature renders the location insignificant making it difficult to determine the geographical market in which the conditions of competition are sufficiently homogeneous. Determining the precise geographical location of the impact of an undertaking may be difficult, though it may be possible to establish an electronic environment in which the conditions of trade and competition are sufficiently homogeneous and distinctive from other online or offline environments. While it is true that it may be possible to undertake the bricks-and-mortar like assessments on online transactions given that not all stages of a transaction such as payment, delivery, customer service and warehousing are always online, the fact is that ecommerce widens geographical scope.

Further, it is difficult to accurately determine the scope of the market of an online platform because as cited by Parsheera, Shah, and Bose (2017), in connection with the conclusion of

United States District Court, Virginia, internet is a giant network which interconnects several smaller networks and not a place or location that can be defined with outer boundaries. Thus, the assessment of internet geographic market cannot be restricted to the users of a particular service considering that as many people have access to the internet and there are other means of accessing the same information or service supplied through the internet.

Determining market power of multisided online platforms may also pose difficulty because their price-cost mark-ups do not only depend on the elasticity of demand and marginal cost on one side of the market, but also on the price-cost mark-up charged on the other side as well the general cost of running the platform. The platform must account for the demand on both sides of the markets and the effects either side has on the other. In effect, a platform internalizes the indirect network externalities, and diminishes transaction costs between the two groups of users. Thus, a high price-cost margin of a platform does not necessarily indicate the existence of market power and a below-cost pricing does not necessarily imply predatory pricing because the costs charged are determined by the extra benefit users get from using the platform and not necessarily the cost of running the platform. Therefore, failure to consider these factors can lead to wrong conclusions (Thépot, 2013).

According to Haucap, and Stühmeier (2016), market definition and market power analyses that focus on a single side may define markets too narrowly and could lead to analytical errors because a price increase on one side of the market may not be analyzed in isolation of the other side. Thus, when measuring market power of a two-sided market, it may be necessary to compute price-cost margins while taking into account the elasticity of demand in all sides of the markets even though this may put high requirements on both data and estimation techniques.

Kaplow (2010) argues against putting emphasis on market definition and market shares instead of establishing readily demonstrable existence of anticompetitive effects within the market from which inference of market power can be made. Realizing such challenges, Graef (2015) underlines the need for reduced emphasis on market definition and market structure when assessing market power to increased focus on innovation and net effects considering that users do not base their demand for the platform only on price but also on the quality and benefits the service provides to them and that an innovation of one platform has a competition effect on another platform. Shelanski (2013) puts forward a similar view noting that digital platforms have characteristics that make it difficult to assess the effects without putting into consideration the innovation-based competition that occurs in such markets. Shelanski (2013) emphasizes that competition in online platforms is very often for the whole market through innovation, rather than for a share of the market through pricing.

According to Khan (2016), platform markets create incentives to pursue growth over profits by rationalizing predatory pricing and have the potential to undermine their competitors by exploiting information collected through the platforms in their capacities as intermediaries and controllers of the essential infrastructure on which their rivals depend. Thus, measuring consumer welfare basing on short-term effects on price and output fails to capture the structure of a firm's and its architectural market power in creating certain anticompetitive conflicts of interest; cross-leveraging market advantages across distinct lines of business; and incentivizing and permitting predatory conduct. Khan (2016) observes that while in many jurisdictions non-price effects are normally considered including reduction of product quality and variety or diminished innovation, such effects rarely drive enforcement actions especially in non-merger conducts as is the case for the impact on price, output, or productive efficiency.

Latham & Watkins (2021) observes the difficulty of applying the traditional Hypothetical Monopolist or Small but Significant Non-transitory Increase in Prices (SNNIP) test on ecommerce platforms considering that price is not always the only and main factor for profitability as this in multisided markets may be influenced by indirect network effects and suggests the adoption of other models, such as the small but significant non-transitory decrease in quality test (SSNDQ) or the small but significant non-transitory increase in cost test (SSNIC). Evans (2016) and Gürkaynak et al. (2017), hold the same view that it is important not to rely on the SSNIP test without putting into consideration the effects on other sides of the market. Considering that some platforms integrate services to diverse parties such as retailers, consumers, and advertisers, the platforms and their clients are interlinked and interdependent that a practice on one market side of the platform may influence the other side.

It is further observed that online markets are often concentrated because as a platform gains strong network effects, it can grow and make it more difficult for rival platforms to compete especially in a situation where switching between platforms is costly for users (both sellers and consumers) and difficult for them to do multihoming. Such platforms in a concentrated market are potentially capable of exercising market power and leveraging it into adjacent markets as highlighted in the conclusion by European Commission⁷ in 2017 that Goggle which is involved in many online markets and holds a strong position in the market for online search, abused its dominant position in online search by systematically favoring its own comparison-shopping product in its general search results pages (Cabral et al., 2021).

⁷ Refer to Google Shopping case AT.39740

Thus, the implications of network effects that characterize e-commerce platforms need to be taken into account when defining relevant markets, assessing market power (Kostecka-Jurczyk, 2021), looking at the impact of agreements and considering the counterfactual market developments in merger assessments (Parker, Petropoulos, and Van Alstyne, 2021). Therefore, as concluded by Gürkaynak et al. (2017), there may be need to look at the uniqueness of competition for platforms with strong network effects both in terms of the relevant counterfactual, and the potential benefits flowing from a conduct. For example, while a merger may enable a platform to take advantage of network effects to expand, in approving the merger, it may be important to put in place safeguards in the form of undertakings that could mitigate the competition concerns arising in highly concentrated markets.

Complex and intelligent algorithm: The complex and intelligent algorithm with the capacity to make autonomous decisions may pose antitrust enforcement challenges. Unlike the brick-and-mortar markets, e-commerce retailers can, while using autonomous and complex machine algorithms, easily gather data on competition, dynamically modify prices and make marketing strategies for their products as frequently as daily. Algorithms themselves may also make collusive decisions independent of any human decision making. In other words, the use of autonomous machines has increased the complexity of business behavior and is likely to make the antitrust regulator's task correspondingly complex. Thus, there is increased call by observers for change in the traditional antitrust laws to impose conduct standards and other affirmative obligations on the use of data and digital tools by firms in an effort to combat anticompetitive tendencies. It is also proposed to increase oversight of the digital sector, through dedicated agencies with enhanced technology to scrutinize innovation and data used by dominant firms (Coglianese and Lai, 2021).

While some observers contend that even with intelligent machines, individual liability will remain for any harm to the market, algorithms may be used to help implement illegal price fixing and could encourage coordinated equilibrium in markets, as highlighted in the findings of Competition and Markets Authority of United Kingdom. However, antitrust authorities have to be able to establish evidence of human involvement where machines or algorithms are identified as facilitators of anti-competitive conduct (Rab, 2019). Rab asserts that ultimately enforcers and businesses should be liable for the decisions or output of machines done even without human intervention.

2.3 Competition Restraints in Digital Retail Markets

Mangla et al. (2018) ; Brusick (2018) ; Anderson et al. (2018); Mancini (2019); and Gürkaynak, Durlu and Hagan (2013) identified digital retail related competition concerns to include limited access to data; difficulties in determination of the relevant market; difficulties in regulating mergers; cartels; abuse of market power characterized by, among others, resale price maintenance by existing global players, tying arrangements, bundling and exclusive agreements; predatory pricing including zero pricing; collusive behavior; refusal to deal; and loyalty rebates. These competition policy concerns can be grouped into four categories: Merger control concerns, cartels, unilateral restraints, and vertical restraints.

2.3.1 Merger Control Concerns

Competition policy is concerned with controlling mergers and acquisitions that can or are likely to substantially prevent or lessen competition putting into consideration the impact of the merger on the import competition; barrier to market entry, likelihood to gain market power,

countervailing market power and historical conducts; growth, innovations, and product differentiation; reduction on efficient competition; saving a failing firm and enhancing vertical integration (Mushtaq and Yuhui, 2020).

One of the challenges relating to merger control in digital retail is the turnover notification thresholds of merging parties. According to OECD (2021), background report, merger control rules with turnover-based thresholds are unsuitable to catch those transactions in the digital economy whose value lies in the number of users, the amount of data or the innovative business model of the target. Therefore, the new regulations under discussion aim to broaden or complement current merger control thresholds in order to allow the competition authority to be aware of any transaction entered into by designated firms.

While the threshold for notification of a merger is normally based on turnover of the merging firms, it may not apply for online platforms which in some cases may not have substantial revenues considering they have low, or zero sales as was the case of merger between DiDi and KuaiDi in China in 2015 despite that the merging parties had 99% ride-hailing market share. To address this limitation in digital markets, some jurisdictions have supplemented the turnover threshold with market share and transaction value threshold requirements (Zhou, 2021).

According to Zhou (2021), the other challenge associated with merger control in digital markets are limitations related to market definition to help confine the competition landscape of merging parties so as to analyze competition effects of merger in that market. Platforms offer products across multiple sectors and as such, the factor of substitutability that is normally considered in delineating the market of a particular product may not apply in digital markets, Where the platform is in multiple markets, limiting market share to specific product market may fail to

capture the competitors of the platform and to effectively determine the market power. As such, in the case of multi-purpose platforms, a balance may be necessary to define an entire market and assess the top five niche markets served on that platform. The challenge goes further when analyzing multisided platforms where assessment of one side of the platform may not effectively measure the level of competition considering that it may not capture effect of (i) non transaction platforms which refer their customers to conclude transactions with suppliers, (ii) the customers who bypass the platform and deal with the supplier and (ii) pressure of substitutes on competition on one side to the other side. Thus, ignoring the other side would narrow down the size of the relevant market and entail an erroneous competition analysis and therefore less importance should be attached to market definition in digital times, and attention should be switched to the substantive analysis.

According to Argentesi et al. (2021), network effects often make the structure of digital markets quite concentrated and create barriers to entry. Thus, there is a need to look at all sides of a market jointly, as choices made by the platform on them are interdependent. Martín-Laborda (2017) puts forward the same view and highlights that the existence of indirect networks effects in a two-sided market across groups of consumers provides conceivably more scope for mergers to generate transactional and productive efficiencies which should be considered in approving mergers. It is crucial for the policy framework to put into account the network effects and the interdependences between the different groups of users of the platform without necessary attaching more significance to market share.

Another concern in the assessment of mergers, as raised by Argentesi et al. (2021), is the post-merger situation as the incentive for incumbents to carry out pre-emptive buyouts; that is, “entry

buyout”—buying new entrants with the goal of reducing potential future competition or “killer acquisitions,” — acquiring with the objective of closing the activity of the acquired entity. As observed by Jenny (2021), some jurisdictions including the European Commission, conduct the counterfactual analysis to predict the likely evolution of the target in the absence of the merger to ascertain whether the target firm is a potential competitor of the acquiring platform or whether other potential entrants could materialize competition. Thus, there is a need for authorities to look beyond the characteristics or structure of the digital markets at the time of the merger and evaluate the dynamics of the ecosystems and platforms.

Merger assessment would also be concerned with minority shareholding to dampen competition. In some cases, businesses may use mergers and acquisitions as a strategy to consolidate their market share, eliminate potential threats or expand into new lines of business. Such practices, which are achieved through acquiring minority shareholding in a competing firm or interlocking directorates, can have negative effects on competition, either by reducing the shareholder’s incentives to compete or by facilitating collusion. Even where investors choose to adopt internal systems that help in avoiding conflicts of interest, say by placing different persons on the board of directors of the competing firms, certain business information may still flow from the nominated persons to the investors. In situations where the acquiring undertaking is in a dominant position and the acquisition would seriously endanger consumers’ freedom of action in the market, the acquisition could amount to an abuse of dominance (Parsheera, Shah, and Bose, 2017).

2.3.2 Cartels: Hardcore, Hub-and-Spoke and Tacit Cartels

Online businesses have improved market information transparency by providing flexibility and facilitating not only identification but also comparisons on product prices, quality, and usage, among others. However, market information transparency has also facilitated and eased shopping from different points by consumers and enabled retailers to effectively track the prices charged by their rivals and suppliers to monitor retail pricing to identify deep discounting, among others which may facilitate collusion between retailers whether explicitly or tacitly (OECD, 2019).

Greater price transparency may result in lower prices at the expense of quality and can facilitate the risk of collusion given that firms can easily monitor each other using robotic systems that collect key market data (Kalinić, Ranković, and Kalinić, 2019). In addition, as highlighted by Dontoglou (2002), ecommerce marketplaces enable joint purchases and selling by hitherto independent entities thereby posing a ground for potential coordination and anticompetitive practices.

According to Ezrachi and Stucke (2017), ecommerce may enable collusions to take place through algorithms which can facilitate the creation of overt cartels, hub-and-spoke cartels or even tacit cartels. Algorithms may facilitate competitor behavior to be coordinated even in situations where they are used by firms to unilaterally react to the market conditions. With the advent of machine learning, algorithms can help in studying the market structure including the competition and optimize the profit maximization of the firm without any human intervention or agreement as opposed to overt collusions where evidence can be established in relation to secret price-fixing, market-sharing or other hard-core conduct and easily handle such under the law. Lu,

et al (2015) highlight that online price information could facilitate collusion as it makes it easier for comparisons of prices between suppliers and for companies to collude and fix prices.

Lee (2018), stresses that uncovering ecommerce collusions may require complex technics that are specific to e-commerce markets and there may be need for authorities to establish institutional units similar to the Data Analytics Unit within the Australian Competition and Consumer Commission to investigative tools and uncover with sufficient evidence collusive behavior in ecommerce markets.

One of such prevalent collusions in ecommerce environment is the hub-and-spoke cartels which, as highlighted by Garrod, Harrington and Olczak (2021), can take place in the following three areas: when an upstream firm facilitates downstream firms to coordinate on higher prices; when a downstream intermediary facilitates upstream suppliers to coordinate on higher prices; and when a downstream firm facilitates upstream suppliers to exclude a downstream rival.

2.3.3 Online Vertical restraints

Vertical restraints refer to the restrictions of competition contained in agreements between companies operating at different levels of the production or distribution chain most commonly in the supply, distribution, production, purchase and sale of goods, and research and development agreements (Colino, 2021). According to OECD (2019), most vertical restraints that may raise anticompetitive concerns in digital retail, relate to conditions of the manufacturers to the retailers to limit entirely selling of their products online, or limit differentiation between offline and online sales channels.

The common vertical restraints in online commerce with significant potential to limit competition and consumer choices and stifle innovations include selective distribution schemes and Most Favoured Nation (MFN) provisions, bans on internet sales, limitations on use of certain tools including price comparison engines and retail price maintenance (RPM) (OECD, 2021 and Haucap and Stühmeier, 2016).

Exclusive or Selective Distribution Arrangements: Online businesses with market power, even those that are not necessarily dominant, in attempt to prevent free riding or to protect the brand value of the platform, may engage in practices that are harmful to competition and consumer welfare by protecting non-price dimensions of competition such as exclusive or selective distribution arrangements. Exclusive distribution arrangements, a situation where a supplier contracts and sells through a single distributor within a specific territory, have an effect of restricting intra-brand competition because they limit the wholesale outlets available to retailers or final retail outlets for consumers. Such contracts though are not normally considered as outright violation of competition laws because price is not the only factor nor is it always the main factor for effective competition (OECD, 2019).

Generally, exclusive distribution agreements which restricts active sales (where producers market, advertise and purposefully attract consumers) may be allowed provided they do not prevent distributors to make passive sales (through unsolicited orders from consumers who come to the suppliers on their own accord) outside the allocated territories or customers. In digital retail there may be a need to preserve the liberty of consumers to shop wherever they want to avoid jeopardizing the well-functioning of the market (OECD, 2013).

However, in some jurisdiction including EU exclusive distribution arrangements may be considered as outright violations, especially where a manufacturer or producer sets standards that a distributor must meet to be contracted if such standards do not cumulatively meet specified economic conditions: they must contribute to improvements in the production or distribution processes; fairly benefit consumers; be devoid of unnecessary restrictions and should not have the effect of restricting maintenance of sufficient competition (Iacobucci and Winter, 2016).

According to Colino (2021), however, increasingly there is shift on consideration that selective distribution would not be an outright violation of antitrust laws if resellers are chosen based on objective criteria, with a clear genuine relationship to the product and in a nondiscriminatory manner, though a total ban on internet sales in a selective distribution system would still be considered as an outright violation of the law.

In relation to the European Union, Colangelo and Torti (2018) highlight that selective distribution agreements may be compatible with the Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) if they meet three cumulative conditions: (i) the characteristics of the product in question necessitate such a network in order to preserve its quality or to ensure its proper use; (ii) resellers are chosen on the basis of objective criteria of a qualitative nature relating to the technical qualifications of the reseller and its staff and the suitability of its trading premises, laid down uniformly for all potential resellers and not applied in a discriminatory fashion; (iii) the selection criteria do not go beyond what is necessary, in accordance with the principle of proportionality.

Use of MFN Conditions: Online businesses may use MFN provisions in the agreements to condition suppliers to quote the same or lower prices on their platforms than those quoted on the

suppliers' own websites or on a wider scale, on third-party websites. Such MFN clauses may restrict the entry of low-cost retail platforms, facilitate collusion between either the suppliers or the platforms, present price reduction rigidities in the market especially where the clauses are applied on a large scale and reduce the incentives for platforms to engage in intra brand competition on the commission charged to suppliers or to compete on quality dimensions (European Union, 2020).

According to Gürkaynak et al. (2017), MFN clauses are considered anti-competitive because they have the potential to create price rigidity in the market as well as exclusionary effects on rivals and potential entrants. A good example, as cited by Javeed (2021), is the use of Most Favoured Nation (MFN) or price parity clauses by online intermediaries such as Amazon Marketplace, Apple and Amazon (e-books) and price comparison websites for motor insurance over which competition authorities in the US and Europe have made conclusions against the use of such clauses on grounds that they have the effect of increasing price uniformity in the market and reducing the scope for competition amongst online intermediaries. Ezrachi (2015) highlights that the absence of competition pressures due to such MFN clauses could limit innovation and investment by platforms and push the prices upwards.

It is also argued that platforms can still achieve the same efficiencies they pursue through MFNs provisions by implementing less restrictive measures for example through alternative remuneration models based on charging of a fixed or two-part tariff to suppliers using their platforms to avoid free-riding problem or by charging a service fee to consumers that use their platform to seek for information, instituting a pay for visualizations system and implementing

compensating platforms for sales conducted outside the platform or creating a premium model where consumers pay to access a premium service (OECD, 2019).

Online Bans: Online bans are used by suppliers to prohibit retailing on certain online platforms to protect the brand image of the supplier, combat the sale of counterfeit products, ensure adequate provision of customised after-sales services, minimize free-riding on existing distribution channels and promote customer service interaction which at times is lacking on some platforms. Outright ban on online sales is considered as outright anticompetitive practices while online marketplace bans which limit sales through third parties may not be considered as such because they do not restrict sales, nor do they aim at segmentation of the digital single market (Witt, 2016; and Colangelo and Torti, 2018).

On the other hand, it has been argued that such a ban may be considered restrictive depending on the precise nature of the restriction, the importance of online marketplaces as a sales channel in the sector concerned and the credibility of brand protection or free-riding claims, among others. Some authorities contend that while online sales bans may be legitimate for attaining efficiencies, such as protection of investments, ensuring provision of customized services and solving the problem of free riding, such efficiencies can typically be secured through less restrictive means (OECD, 2019).

It is also argued that though online bans are sometimes used by suppliers as a profit maximizing strategy and may not pose serious competition law violations, a combination of vertical restraints may aggravate their negative effect and further softening of price. Online bans may be used as a strategy to shield manufacturers products from the pressure of online competition thereby slowing the decrease in price often in favour of large retailers, limiting price competition and

making it hard for small retailers to enter and sell at competitive prices. Such bans may increase the costs of advertising and limit the chances for small retailers to raise their customer base and this situation may be worse when more important producers include similar restrictions in their distribution contracts (Ezrachi, 2017).

Resale Price Maintenance and Dual Pricing: Manufacturers may engage in: (i) resale price maintenance (RPM) by controlling or restricting the price, through the terms and conditions, at which retailers can sell their product or service and (ii) dual pricing by charging different wholesale prices for online sales as opposed to the prices for the same products sold through offline channels. While RPM and dual pricing can generate efficiencies in the marketing process, there is a risk of dampening inter-brand competition and facilitating horizontal collusion either between manufacturers or retailers. Cases of online RPMs and dual pricing may differ from those of bricks-and-mortar because of the increased online price transparency, which makes it easy to observe and compare prices and enables the manufacturer to readily detect and potentially punish any deviation from the prices or conditions that are imposed by the manufacturer. One such example of an online RPM is the practice of Foster, a division of ITW limited, to limit its online retailers to advertise the supply of commercial refrigeration products in the United Kingdom at a price below the minimum advertised price (MAP). In 2016, the Competition and Markets Authority⁸ concluded that the conduct of Foster restricted in practice the ability of resellers to determine their online sale prices at a price below the MAP and, as

⁸ See the decision of the Competition and Markets Authority, Online resale price maintenance in the commercial refrigeration sector, CE/9856/14, 24 May 2016 available at Refer to the <https://assets.publishing.service.gov.uk/media/575a8f5eed915d3d24000003/commercial-catering-equipment-non-confidential-decision.pdf>.

such, amounted to resale price maintenance (RPM) in respect of online sales of foster products (Turner, Reyna, and Fafchamps, 2022).

Restrictions on the Use of Price Comparison Tools: Price comparison tools enable consumers to identify the best prices and in so doing they increase price competition and market transparency. However, some suppliers prohibit retailers from using price comparison tools on grounds that such systems emphasize price competition at the expense of quality and other features and offerings of the supplier thereby diminishing the brand image. It is urged however that such prohibitions need to be regulated as they have a similar effect with resale price maintenance practices of keeping higher prices and denying consumers the ability to identify the most suitable prices on offer (OECD, 2019).

2.3.4 Unilateral restraints

Online marketplaces can gain monopolistic powers through (i) gaining strong network effects and become more valuable to attract more and more other users; (ii) gaining strong economies of scale and scope in that the cost of producing more or of expanding in other sectors decreases as the business expands; (iii) marginal costs reducing close to zero as the cost of servicing another consumer reduces close to zero; (iv) realizing high and increasing returns to the use of data in that the more data an online business controls, the better the business; and/or (v) having low distribution costs that allow for a global reach. An online business exhibiting these features may reach a tipping point where it will naturally tend towards a single dominant player and make it hard for new entrants who may not be able to enjoy such features (Bostoen, 2018).

Online platforms may abuse gained market power by unilaterally leveraging it into adjacent markets, implementing exclusive or selective distribution arrangements and engaging in other anticompetitive conducts. Unilateral constraints occur in a situation where a firm with a market power unilaterally engages in an anticompetitive conduct that can be construed as abuse of the market power. Though in digital economy a firm may not necessarily have a market power equivalent to that considered in the competition law, it may be large and economically powerful enough to raise anticompetitive concerns in cases where, such a firm, holds large quantity of consumer data; enjoys strong network effects; operates in multisided markets with conglomeration services; and implements customer lock in strategies including exclusive distribution contracts, loyalty programs and technological locks that prevent switching between platforms (OECD, 2019).

Adapting antitrust laws to the digital economy would therefore require reduced emphasis on market definition and market structure to innovation and social welfare risks of such online platforms. The different categories of unilateral abuse of dominance in connection to e-commerce markets, include exclusionary practices such as predatory pricing, refusal to deal or supply, tying or bundling, margin squeeze, limiting access to data, denying access to essential facilities, misuse of consumer data, self-preferencing, raising rivals' costs, geo-blocking, predatory pricing, dampening competition through takeovers, and exploitative abuses such as forced free riding, lock-in strategies, price discrimination and excessive pricing (OECD, 2020 and OECD, 2019).

Price discrimination: ecommerce markets involve in widespread personal data-collection and use of price-setting algorithms which enable platforms to collect consumer data, track their

shopping habits and use the data to personalize prices to discriminate between consumers by making them pay different prices for the same product from the same platform (Townley, Morrison and Yeung, 2017). Hindermann (2018) cites evidence of online price discrimination to include platforms such as cheaptickets.com, orbitz.com which discriminated customers based on whether they were logged in or had an account, price differences of 20% by steampowered.com when comparing users from Spain and Germany and Kindle e-books being sold at varied prices depending on whether a user was logged in or not. Townley, Morrison and Yeung (2017) stress that price discrimination practices may have the effect of weakening competition especially where search and switch costs are high. The authors highlight that price discrimination, excessive pricing or slotting though not matters that are generally taken as enforcement priority in most competition jurisdictions, there is evolving need to apply prohibitions in such conducts to ensure fairness and equality.

According to Javeed (2021), online marketplaces make it easier for businesses to utilize price discrimination tactics, such as customizing offers or prices based on consumer data. Increasingly digital platforms employ 'versioning,' where a product is provided in a basic or premium version thereby enabling pricing differently different types of customers. According to Angino (2020), digital platforms can employ dynamic pricing which may facilitate first degree price discrimination based on location, browsing, and purchasing histories and other private information of the customers. The author observes that even though price discrimination improves efficiency, it results in lower surplus for consumers, and it may play an active role as maker or facilitator of collusion.

Excessive pricing: Excessive pricing occurs when a dominant firm sets prices significantly and persistently higher than what had prevailed under viable competition (Duque, 2015.) or when a dominant firm sets a price appreciably higher than the competitive price (Ayata, 2020).

According to Woodcock (2020) a monopolist can improve its products so as to permit it to charge prices way above the costs, even after accounting for costs of research and development, and for the costs of providing investors with reasonable returns. In other words, excessive pricing relates to a price set so high that it exceeds the comparable competitive price and the cost incurred by the firm.

Digital markets however have created new market powers in that they usually operate on two-sided platforms with a high potential of distorting the markets through excessive prices. Even in zero price markets, the data which users provide as a condition to use the platforms can also be considered as excessive pricing, as observed in the decision of Bundeskartellamt⁹ prohibiting Facebook from combining user data from different sources, as the price paid and thus, excessive data requirements constituted excessive pricing (Shaiek, 2021).

It has been observed however that there are practical difficulties in measuring a competitive benchmark and identifying excessiveness, and that interventions could potentially disincentivize innovation and investment (Ayata, 2020). The peculiarities of digital markets characterized by close to zero marginal costs, leveraging between markets, winner takes all dynamics and zero-pricing make it hard to assess the existence of excessive pricing (Botta, 2021). In view of this, it

⁹See the announcement: Bundeskartellamt prohibits Facebook from combining user data from different sources. February 7, 2019, available in English at: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook_FA_Qs.pdf?__blob=publicationFile&v=4

is suggested that authorities should focus on addressing the underlying causes of the excessive prices such as the structural rigidities in supply leading to shortages (Basaran, 2021) or use of a price regulatory approach to curtail excessive pricing (Woodcock, 2020).

Margin Squeeze: According to Bostoen (2018) The conduct of margin squeeze occurs in a situation where the upstream price of a dominant firm compared to its price in the downstream market, does not allow even an equally efficient competitor to trade profitably in the downstream market on a lasting basis. Margin squeeze forecloses downstream competitors off the market, however efficient they are by squeezing their profit margins. In ecommerce margin squeeze might become a potential anticompetitive behavior especially in situations where an online platform extends its business activities into new vertically related market segments or where it competes at the retail level with third-party suppliers that access final consumers via its platform. Such online platforms may squeeze the profit margins of its downstream competitors, through the application of high access prices and low retail prices.

For example, as cited by Bostoen (2018), it is argued that Amazon squeezes the profitability of its suppliers by shipping freely its own products to customers and requiring the suppliers who sell from its platform to pay a fulfilment service fee to benefit from the same service. A similar argument is made against Apple for squeezing the profit margins of competitors by charging them a high percentage fee to sell music streaming apps through Apple Store, given that it is also involved in selling similar products.

Denying Access to essential facilities: This occurs in a situation where a firm denies access to an essential facility, such as an asset or infrastructure which a third-party needs access to supply

products or services, with the intent of extending market power to an adjacent market (Haucap and Stühmeier, 2016).

In prevailing situations of strong network effects, dynamic innovations and increasing returns to scale, successful ecommerce platforms may turn out to be essential facilities or to offer essential services while also enjoying a position of dominance (OECD, 2019). According to Javeed (2021), such a situation may pose a potential for refusal to deal mainly in three categories: (i) refusal of access to an online marketplace or price comparison tools that provide consumers with diverse retail offerings; (ii) refusal to access physical delivery networks, developed independently by larger e-commerce retailers which would allow lower cost delivery as a result of economies of scale; and (iii) refusal to access consumer data which would facilitate effective tailoring of retail offerings to specific customer preferences. However, as highlighted by Veljanovski (2022), and Sokol and Comerford (2016), in regulating access to essential facilities, care needs to be taken not to substantially decrease the return on investment, lessen the incentive for platforms to invest in economically beneficial facilities, affect legitimate privacy concerns and not to apply measures that may not necessarily enhance consumer welfare in the long term.

Limiting access to data: There may be data-driven network effects in cases where a platform facilitates data sharing, for example where people match their inherent data to others. There may also be data-driven switching costs where companies or consumers cannot easily extract historical data to address a particular need (Tucker, 2019). In some cases, undertakings may deny competitors access to essential data especially in cases where: the controlled data is a significant input into the service delivery, the provider relies on intellectual property law to protect its

dataset and deny access to other players, there are limited substitutes to service delivery, and it is unviable for competitors to self-collect data to build a competing dataset (Graef, 2015).

However, the extent to which limitations of access to data present competition concerns has been contested in some circles. For example, it is contended that online providers collect user data in order to improve the services they offer users and to monetize those services effectively, leading to offering valuable services to users at subsidized prices or even freely (Lerner, 2014). It is further argued that different services require different user data and due to multihoming, user data collected by online providers is non-rivalrous because none has explicit or de facto exclusivity over user data Lerner, 2014 and Tucker, 2019. Thus, in consideration of the benefits of large data and association anticompetition risks, it is important that actual assessment is done on a case-by-case basis, putting into consideration the special features of data while balancing the risks and immense benefits of the digital economy (Mäger and Neideck, 2018).

Predatory pricing: Predatory pricing occurs in a situation where a dominant firm voluntarily incurs losses with no other plausible reason except for excluding competitors (Mandrescu, 2022). In a two-sided market online marketplaces may, in the short term, enhance consumer welfare by offering a growing inventory of products and services at lower prices and with operational efficiencies, willingly forego the profits in exchange for increasing market share and scope. However, at some point consumers may lose out as a result of the loss of competition, increased accuracy in assessment of consumer price sensitivity, increased intrusive collection of customer consumption behavior and the brokering of collected data in largely unregulated ventures. In the long run, an online platform may realize that it has gained sufficient market position

impenetrable enough and comfortably start pursuing aggressive pricing and profitability (Frieden, 2017).

One example of predatory pricing and how ecommerce operators can use technology to get an unfair advantage over competitors, is the case of Amazon of foregoing profits through: loss-leading sales; practicing a strategy of undercutting and then acquiring rivals; and leveraging its market power from the retail to delivery sectors thereby enabling it to benefit from economies of scale and scope (Mitchell and Knox, 2021).

In order to address predatory anticompetitive concerns, there is need to replace the consumer welfare framework with an approach oriented around preserving a competitive process and market structure through the assessment of whether a company's structure creates anticompetitive conflicts of interest; whether it can cross-leverage market advantages across distinct lines of business; and whether the economics of online platform markets incentivizes predatory conduct (Khan, 2016).

A number of scholars have highlighted challenges related with detecting and enforcement of predatory pricing legislation on grounds that the marginal cost of adding additional users to a platform may be low and therefore allowing platforms to charge low prices (Hovenkamp, 2016). Moreover, digital platform may sustain low prices and chose not to raise prices after a very long time, instead raise prices of other unrelated products and they may not attempt to raise prices to recoup the losses since this could force price sensitive customers to revert to physical stores (Khan, 2016).

Similarly, the cost structure of online businesses characterized by high fixed costs and low variable costs is different from other traditional brick and mortar businesses and this allows them to apply innovative pricing strategies including low or free pricing without necessarily being predatory and thus the need for determining an appropriate standard for examining the pricing strategies of businesses with network effects (Parsheera, Shah and Bose, 2017). A firm may also price below cost on one side of the platform when the overall price level may still be above cost (Hovenkamp, 2019). In some other cases, the low prices on one side of the platform may be aimed at giving rise to network effects, rather than driving competitor companies out of the market (Colin et al., 2015).

Tying or bundling practices: Ecommerce platforms may engage in tying or bundling practices by way of requiring or incentivizing consumers to buy two or more distinct products together or as a combined sale package. Such practices even though they can enhance welfare efficiencies, they can harm competition especially when used to extend market power from one market segment to another thereby foreclosing competitors in the later (Hovenkamp, 2019 and Mandrescu, 2021). While such practices remain a concern in respect to abuse of dominance, challenges related to how to assess such practices in ecommerce have also been raised especially in situation of zero prices services or when tying is occurring on similar products (Mandrescu, 2021).

Misuse of consumer data: Online platforms may misuse the data they collect to the detriment of customers leading to loss of privacy or risk of data security breaches, particularly where it is used for unintended purposes including sharing it with third parties. This may also result not only in a greater risk of tacit collusion, but also in a greater prevalence of price discrimination.

Though such conducts may be difficult to detect as there may not be an agreement nor a concerted practice, they affect the efficiency of market outcomes (Kalinić, Ranković, and Kalinić, 2019).

According to DotEcon (2015), consumer data increasingly has become a valuable asset in e-commerce and needs to be factored into the assessment of market power because of its competition concerns similar to other market power concerns in relation to conglomerate mergers. To Dontoglou (2002), while the ease in the sharing data on internet such as prices, demand, volume of sales and quantities may be key in business development, it involves sharing of confidential business information which presents a risk of lessening surprises, bluff, business innovation and individual pace and may facilitate collusion and coordination to inhibit competition and to keep price upwards. Thus, there is need for clear guidelines on ecommerce horizontal information exchange, to ensure proper affluence of information and confidentiality.

Self-preferencing—Giving preferential treatment to own products and subsidiaries: Some online businesses can abuse their dominant positions by systematically favouring their own products, or services in downstream or related markets or products of their best paying suppliers. Whereas such a conduct may generate competitive gains including efficiencies related to the one-monopoly-profit theorem, technological interdependence, protecting goodwill and reputation, or economies of joint production or sale, it is argued that it is likely to eliminate effective competition in a downstream market and could have effects like those of margin squeeze and tying (De Sousa, 2020).

A common example has been the conduct google of abusing its dominant position by systematically favoring its comparison-shopping products in its general search results pages by

not applying to its own products the same penalties it applied to other comparison-shopping services, which meant that users did not necessarily see the most relevant comparison-shopping results in response to their queries. Such a conduct has a negative impact on consumers and disincentivizes innovations by the rivals in that however good their products might be, there is fear that they will not benefit from the same prominence as Google's product (Haucap and Stühmeier, 2016).

Raising Rivals' Costs: Platforms may engage in conducts that tend to increase competitors' costs and impede their competitiveness without necessarily benefiting consumers. Such conducts include forced free riding, winner takes it all conducts and lock-in practices.

Forced Free Riding: Forced free riding arises when a platform appropriates innovations of other firms that depend on it for access to consumers thereby discouraging future downstream innovation and raises intellectual property concerns. Unlike brick-and-mortar businesses, online platforms, even those that are not large enough and economically powerful, may hold market power to condition forced free riding to foreclose efficient competitors (Cantell, 2021). A platform may engage in a forced free riding practice by appropriating innovations of other firms which depend on it to access consumers. One example is the case of Google which was involved in scraping content from competitors or potential competitors of Google's search platform and using their content as own on its proprietary websites. The conduct has a foreclosing effect given that it renders the service in the appropriated content less attractive to the consumers and to advertisers (Shelanski, 2013).

Winner takes all practices: Online business are characterized by rapid technological changes, phenomena of increasing returns, benefits of behavioral data collected from users and most of all,

network effects which confer a massive first mover advantage on the businesses with ability to invest more capital and build scale at an early stage to continue expanding until other competitors, efficient or not, are forced to exit the market. Some online businesses such as Uber and Amazon implement a winner-takes- it-all like strategies by continually incurring losses over a long period through practices like deep discounting, cash back offers, and other schemes designed to attract new users and establish the network effect. Once the first few firms gain the benefits of network effects, the addition of new competitors, even under conditions of free entry, is not likely to change the market structure in any significant way and could even lead to a reduction in the overall surplus (Parsheera, Shah, and Bose, 2017).

Jung et al. (2021) concurs with the assertion that once a certain threshold is exceeded by a platform, it becomes enormously difficult for other firms to compete in the same segment. The authors assert that due to the strength of the network, all sides of the platform would have no incentive to move to a new platform with the same offering but with weak network effects.

According to Parsheera, Shah, and Bose (2017), such winner-takes- it-all practices may be beneficial to consumers in the short run but in the long run the market may eventually tip in favor of the inefficient operator that attracts more users based on subsidized rates and who may elevate the prices for consumers in the years to come in order to recoup the losses once other service providers, even the more innovative ones, exit the market. Further, such practices can result in an essential service provider gaining monopolistic market powers and thus applying the doctrine of essential facilities in such a context could make sense given the control such an online dominant player exercises over key infrastructure and services.

Lock in Strategies: A number of platforms, in order to gain market power, can implement customer lock in strategies to make it difficult and costly to switch. Such strategies include products that are incompatible between providers such as PC operating systems or IOS in relation to android, complexity of the platforms requiring more time to learn, inconveniencing to switch or difficult to transfer data between platforms and providing limited options for multihoming (Barwise, 2018).

Geo-blocking: Some online platforms may engage in geo-blocking, a practice of restricting or blocking consumers in particular countries or geographical bloc from accessing their services or buying their products. While some may block consumers on grounds that it is costly to transact with distant areas or in order to comply with the governing law, some operators can unjustifiably offer different prices and sales conditions for a given product or based on the consumer's geographic location, thus discriminating against customers from such locations (Kalinić, Ranković and Kalinić, 2019 and Zarra, 2016). An example of geo-blocking practice is the case of the European Commission against Valve¹⁰ for preventing gamers from activating certain PC video games purchased from sellers in eight Central and Eastern European Member States, where prices were generally lower than in other Member States (Besiekierska, 2021).

2.4 Consumer Challenges Specific to Ecommerce

There are risk factors that negatively affect consumers' welfare when purchasing online because of unfair trade practices by some of the platform operators. Gitari (2020) and Li et al. (2019) identified some of such risks to include excessive prices, limitation on verification of product

¹⁰See Press Release on 20.01.2021., Antitrust: Commission fines Valve and five publishers of PC video games € 7.8 million for "geo-blocking" practices.

performance, delivery challenges, customer service, product authentication difficulties, invasion of privacy and misuse of personal data, cyber security concerns, failures to guarantee product quality, misleading information, delivery challenges (including non-delivery, delays; non conformity to orders or specifications), legal jurisdiction limitations, absence of proper dispute settlement mechanisms, unknown expiry dates at the time of ordering; complexities in product returns; and digital payments failures.

Mangla et al. (2018) highlights that consumers face a number of risks when transacting online including: (i) Data Security relating to the risk of consumers data falling in wrong hands especially where they are required to share their names, contact details, bank details and other related information while purchasing goods or services; (ii) Digital payments failure: where the payment fails but the refund takes so long or at times it is not done. (iii) Failure to disclose product dates: consumers are sometimes unable verify online manufacturing and expiry dates before purchase; (iii) Delivery challenges: sometimes goods or services are not delivered within the timeframe given to the customer and other cases wrong products or defective products are delivered; (iv) Undisclosed Origin of the goods: sometimes the information regarding place of origin of the goods is not displayed at e-shopping platforms; (v) Quality issues: At times consumers receive counterfeit or replica goods instead of the original one; (vi) Unclear return and refund policies when actually this is key considering that consumers do not have an opportunity to touch and feel the product before purchase; and (v) Unclear or limited dispute redressal mechanism: consumers face several ambiguities between placing an order and receiving the final delivery which becomes even more complex in case of cross-border exchange.

According to Lianos et al. (2019), consumers may encounter a number of risks while conducting online transactions. Consumer may encounter: difficulties to know the identity and location of an online product provider; unfair commercial practices by the provider in form of aggressive marketing techniques, mis information and misleading advertising; unsolicited electronic commercial communications (spam) via emails, messenger services, social networks and text messages thereby infringing on consumer privacy; online payment security problems and misuse of personal information or data by the platforms; and difficulties to find a legislation with appropriate jurisdiction to govern the transaction contracts and protect their interest. Such contracts may also tend to be too long to read, provide for no cooling off period, contain complex and unfair terms and conditions, contain unclear dispute settlement processes and with no clarity on who between the supplier and the platform operator is the party to the contract thus rendering apportioning liability for non-performance or returning unsuitable products very difficult.

While recognizing the role of self or private regulation, limitations of over regulation, the pseudonymous nature of the networks and difficulties in identifying online conducts, Lianos et al. (2019) calls for principles-based regulations that rely on dynamic performance standards and a deeper interaction between regulators and online traders along with the technological designers and scaring up this approach to regional and global levels given the borderless nature of the digital economy.

Lawal & Ogbu (2015) emphasize that substandard payment methods, inability to examine products before purchase and online purchasing security as one of the main risks faced by online consumers in developing economies. According to Gitari (2020), there is need for an effective

legislative framework in developing countries to protect the rights of consumers especially on the risks associated with data privacy, inadequate dispute resolution system, failures by suppliers to disclose all relevant information on goods and services for verification purposes, non-conformity of goods and services to the required quality standards, inability to pre-inspect goods prior to transacting and fraud among other risks.

The OECD (2000) and the OECD (2016) provides guidelines and recommendations respectively to address ecommerce consumer risks including unfair business practices in advertising and marketing practices such as deceptive, misleading, fraudulent or unfair conduct; unclear information about online business operators on their identity, legal name, location details and contact details; obscure or in some cases lack of dispute resolution mechanisms; unfair terms and conditions in which facts and obligations key to effective conclusions of the transactions are misrepresented or disclaimed by the platforms; lack of transparency on the transaction processes including confirmations, actual prices, payment terms and terms of delivery; insecure payment mechanisms; unclear information about the goods or services especially on the functionality and interoperability features, technical requirements, limitations, precautions and conditions of use; and lack of protection of consumer data with no effective security measures to safeguard privacy and security of consumers.

2.5 Summary and Conclusive remarks on literature review

The literature revealed that digital retail has the potential to transform developing countries into the global economy because it is convenient faster, and it enhances productivity and efficiencies in marketing and distribution with even a worldwide scope. However, the literature also revealed that in addition to supply side constraints, countries are faced with competition and consumer

protection concerns some of which, though not specific to digital markets, are likely to be more prevalent in the sector and do pose new policy challenges. It is observed that in digital markets, a platform may become powerful enough to engage in unilateral or vertical anticompetitive conducts and influence the market even with no monopolist market share. It has also been observed that in digital there are concerns relating to pre-emptive mergers and cartels whose detection and assessment may not follow the traditional methods.

The literature revealed that addressing competition and consumer protection concerns in digital retail may require different and non-conventional approaches to detect, capture, and assess the conducts in view of the multisided effects, market power peculiarities, effects of algorithms, uniqueness in the cost structure, and the ability to leverage network effects on markets, ability to value and monetize data, gain economies of scale and scope, develop disruptive innovations, cross border effects, and consumer deceptive designs.

It has also been observed that digital markets tend to have low cost and different pricing structures than that of physical retailers and most retail platforms are characterized with interdependencies and cross leveraging between products and market sides. Therefore, there may be need for an appropriate legal framework that is supportive of innovative analyses to uncover and prevent conducts with effects on the market ecosystem and even nonrelated products.

It is indicated that, in relation to digital retail, it may be difficult to determine the relevant market in the assessment of the effect of the anticompetitive behavior on product market and geographical market. This is because digital platforms tend to be supra-national in nature, connecting to different networks with no clear outer boundaries, and operate in multiple markets thereby making it difficult to establish the geographical market with homogenous conditions and

to assess interchangeability or substitutability of the product, price and usage of the product to establish the product market. It is thus suggested that authorities should not rely on market share and market structure when dealing with some digital platforms but rather, they should also assess other competitiveness factors such as innovation and net effects.

It is further indicated that relying on the traditional SNNIP test in the assessment to determine the relevant market in digital retail without considering the specific characteristics of subsector such as the network effects, innovation effects on competition, the cost and pricing structure of a platform, interdependences between the targeted side and other sides of the platform. The lack of consideration of such characteristics may result in false positives—false conclusion that a misconduct exists, or in false negatives—false conclusions that a misconduct does not exist, because the price is not always the main factor for profitability of platforms. Therefore, there may be a need for authorities to consider the specific characteristics of the subsector in the assessment of market power including the application SSNDQ or SSNIC tests in determining the relevant market.

Furthermore, the literature has highlighted that cross border anticompetitive conducts and unfair trade practices against consumers involving global digital giants pose a greater enforcement challenge to an individual developing country and therefore, there may be need for countries to adopt and implement a harmonized policy and legal framework in an integrated arrangement to increase their economic power, eliminate fragmentation of legal regimes, reduce costs of compliance for the firms and compel overall compliance in the market. The need for a regional approach is further highlighted in consideration that individually, countries may not sufficiently address digital retail challenges with cross border dimension.

It has also been noted that the competition and consumer protection policies of COMESA and its Member States are applicable largely to the traditional brick and mortar business models and may not be so oriented to deal with challenges of new and disruptive technologies that characterize ecommerce business models and more so, with cross border effect. Therefore, there may be need for appropriate legal framework that enables authorities to apply technological assessments to detect online conducts including those which may be facilitated by intelligent machines or the algorithms or the unique business structure of digital markets and to provide clarity on the liability of harm of a conduct by multisided digital retail firms playing the intermediation and matchmaking roles.

In relation to consumer protection, the literature highlights the need for the policy framework on digital markets to provide the same level of protection extended to goods and services purchased offline on deceptive and exploitative conducts, information disclosure, supply of unsafe goods and services, unconscionable conduct, data privacy and security, unsolicited supply and to condition online platforms to provide clear consumer dispute resolution mechanism and state clearly the liabilities in the transaction.

It can therefore be concluded from the literature review that the work of the various scholars has focused on identifying the competition and consumer protection challenges of digital retail and possible solutions to mitigate the effects on the market. However, the work so far done has not been specific to COMESA nor has it provided the specific policy options and implementation arrangements member countries can adopt at the regional level to address multi-jurisdictional challenges of digital retail.

CHAPTER III

METHODOLOGY

3.1 Scope and Coverage

This section provides the conceptual framework which explains the issues studied and sets the base on the research strategies, designs structure and perspectives of conclusions that were made; the area of study; data collected and gathering techniques; methods and procedure of data analysis; validity of the research findings and ethical considerations.

3.2 Overview of the Research Problem

Digital retail aggregates economic activities online and has a potential to transform economies into the global market through enhanced productivity, increasing efficiencies and with limited or no role of intermediaries (Terzi, 2016). However due certain characteristics of digital retail, the subsector entails specific competition and consumer protection concerns that conceivably are more prevalent in the market which may require different and nonconventional approaches to detect, capture, assess and address the conducts. While the enforcement of the competition and consumer protection policies are meant to dismantle barriers to entry, enhance contestation and protect consumers, COMESA countries, as noted by Alwahaishi & Amine, 2015, may not optimize digital retail potential due to the challenges related to the subsector which are exacerbated by jurisdictional limitations on practices with cross border effects.

There is however little understanding owing to limited studies on COMESA on whether the member countries are encountering digital retail competition and consumer protection related

challenges and if so, which ones and what kind of specific policy options and implementation approaches do they need to adopt to address them.

Therefore, the main purpose of the research was to identify the challenges faced by the COMESA countries. policy options and implementation approaches needed to address cross border effects of digital retail to promote effective competition and ensure consumer welfare while harnessing the potential of ecommerce in the region. Specifically, the objectives of the study were to identify challenges faced by the COMESA countries; examine the adequacy of their existing legal and institutional policy framework in addressing the challenges; identify related policy reforms and recommend measures to address competition and consumer protection concerns in detail retail in COMESA countries and at regional level.

3.3 Operationalization of the Theoretical Constructs

To determine the implications of globalizing digital retailing on competition and consumer protection in COMESA countries, the researcher conducted an in-depth literature review on related challenges and the legal framework of the targeted countries, collected and analyzed different perspectives of the experts and policy implementors in the COMESA target countries.

To get answers to the research questions, the study applied qualitative research approach to seek the views of experts from authorities of the selected countries in the region, using questionnaires and face-to-face interviews to get their opinions on the challenges which the countries face, the efficacy of existing legal framework and reforms necessary to address the gaps. A qualitative approach was preferred because the study intended to collect non-numerical data to explore and get an understanding of the opinions or experiences of experts on digital retail challenges within

COMESA but did not plan to measure causation effects of valuables nor did it intend to attach any inferences or measure the significance to the results.

3.4 Research Purpose and Questions

To collect relevant data to the research problem and purpose of the study, it is crucial to provide a contextual framework to the research questions to define clearly the specific issues to be investigated to guide the researcher on the type of data to be collected, determine the users of the results and get the most relevant and reliable responses (Knight, Halkett and Cross, 2010). This section therefore provides the conceptual framework on the research questions.

(a) Does digital retail present competition and consumer protection policy challenges to COMESA countries?

The literature revealed that while most of the competition and consumer protection concerns relating to e-commerce markets may not be specific to the sector, some are likely to be more prevalent and others may require different and nonconventional approaches to detect, capture, and assess the conducts. The study, therefore, aimed at identifying the concerns that COMESA countries face, the implication to the policy framework and the different approaches required regulate and mitigate the challenges.

When it comes to digital markets, an individual company may be powerful enough to influence the market even when it is not in a monopolist position. As indicated in the OECD (2019) report, platforms attract many consumers and suppliers, they gain networks effects which tend to promote market concertation or even markets to tip, with resulting winner takes-it-all effects and

making it difficult for new firms to enter and compete due to high start-up costs, limitations on product differentiation, limitations of multi-homing, switching costs and charges of the platforms. Platforms which gain such market influence and power, present a challenge to the traditional enforcement tools as there may be need to put into the consideration the architectural structure of the platforms, power of influence on the market, ability to cross-leverage market advantages across distinct lines of business and the effect on incentivizing misconduct and disincentivizing innovation.

As observed by Frieden (2017) and OECD (2019), a platform operating in multisided markets can leverage its power in different sides of the market as they enjoy the benefits of having low cost and different pricing structures than that of physical retailers. This situation may be pertaining in COMESA considering that global powerful players are already operating within the region. COMESA countries, being developing countries, are characterized by high costs of doing business, infrastructure challenges and skill gaps which may make it difficult for domestic players in the region to compete with global platforms. Thus, there is a probable chance that global players may or are leveraging their market power in the region with significant and potentially adverse impacts on competition and consumers.

The core competition issues that commonly arise in digital retailing as elaborated by Mangla et al. (2018); Brusick (2018), may also happen or are happening within or having an effect in COMESA. For example, while the cases of margin squeeze by Uba or Amazon (Bostoen, 2018) or of self-preferencing by google (OECD, 2019) happened outside COMESA, the conducts possibly had the same effect to the region that was experienced in the EU, or the USA given that the very firms are operational in the region. Similarly, some of the digital retail consumer

protection concerns as identified by Azmi and Phuoc, 2020, may also be happening in COMESA.

As Kirsch and Weesner, 2006 stated, e-commerce is much more than just a catalyst for existing competition problems, it reveals existing problems but facilitates a new form of marketing which requires new rule making. The study therefore identified the digital retail related anticompetitive and consumer exploitative practices faced by COMESA countries and the related measures needed to address them.

(b) Is the existing competition and consumer protection law and policy framework adequate to detect, examine and address the digital retail competition and consumer protection within COMESA?

Digital retail entails specific characteristics which enable platforms to gain economies of scale and scope, market power and ability to engage in practices with adverse effect on the market ecosystem (Parker, Petropoulos, and Van Alstyne, 2020).

As proposed by Latham and Watkin (2021), Evans (2016) and Gürkaynak et al. (2017), relying on the traditional SNNIP test to assess market power in digital markets without considering the network effects, cost, pricing structure and the interdependences between the targeted side and other sides of the platform may result in false positives—false conclusion that a misconduct exist, or in false negatives—false conclusions that a misconduct does not exist, because the price is not always the main factor for profitability of platforms given that they tend to be influenced by network effects and therefore there may be need for applying in such markets SSNDQ or SSNIC tests. Therefore, the study assessed whether the existing tools applied by the COMESA

and the Member States include the SSDQ and SSNIC tests or any other equivalent that is applied as a stopgap measure for addressing the identified shortfalls of the SNNIP test on conducts of digital platforms.

For digital platforms which offer products across multiple sectors, limiting market share to specific product market may fail to capture the competitors of the platform and to effectively determine the market power (Zhou, 2021 and OECD 2021). As such, competition authorities may need to supplement turnover thresholds with market share and transaction values to capture and address conducts of undertakings that may not have adequate turnovers, but they are powerful enough to influence the market. The study assessed whether and how these situations are applicable in COMESA, put into consideration the existing legal framework and the assessment tools that are applied to delineate the market in the assessment of mergers and anti-competitive conducts.

Further, algorithms applied by platforms can facilitate cartels to happen, facilitate price fixing and discrimination against consumers even with limited or no human intervention or agreement and thus it requires complex technics to uncover the conducts that are machine driven (Townley, Morrison and Yeung, 2017; and Lee, 2018). In addition, the competition and consumer protection policies of most of developing countries in COMESA Member States were developed two or more decades ago and therefore they may not be so oriented to deal with challenges of new and disruptive technologies that characterize ecommerce business models and more so, cases with cross border effect (Ismail, 2020 and Brusick, 2018).

Therefore, the study sought to review of the existing legal framework of COMESA as the economic bloc and that of the targeted countries to establish appropriateness in addressing digital

retail concerns including whether authorities are legally enabled with tools to apply technological assessments to detect conducts which may be facilitated by intelligent machines or the algorithms or the unique business structure of digital markets and to provide clarity on the liability of harm of a conduct of multisided digital retail firms, operating as retailers or playing the intermediation and/or matchmaking roles.

In relation to the specific consumer protection issues, it is observed that the policy framework should provide to digital retail consumers, the same level of protection extended to goods and services purchased offline on all conducts and provide clear consumer dispute resolution mechanism with clearly stated liabilities in the transaction process (UNCTAD, 2017 and OECD, 2016). The study therefore examined whether the legal framework in the COMESA Countries provides to digital consumers the same legal protection afforded to offline consumers, establish the gap, if any, and measures in place to address it.

(c) Is a Member State of COMESA, unilaterally able to address cross border digital retail concerns on competition and consumer protection?

Cross border anticompetitive conducts and unfair trade practices against consumers involving global digital giants pose a greater enforcement challenge to developing countries (Alwahaishi & Amine, 2015). A powerful global company can even choose to ignore the regulation of a developing country, threaten, or choose to pull out of its market especially where the market is so small to threaten its turnovers (Gal, 2009). Thus, considering that COMESA countries are all developing countries, the study assessed the market influence of such global powers in their countries and review the efficacy of individual policy framework of each of the targeted

COMESA Member States to address conducts happening from outside their territories but having an effect in their country.

(d) What specific policy measures are required at the regional level to aggregate market power and resources to address competition and consumer protection concerns on detail retail?

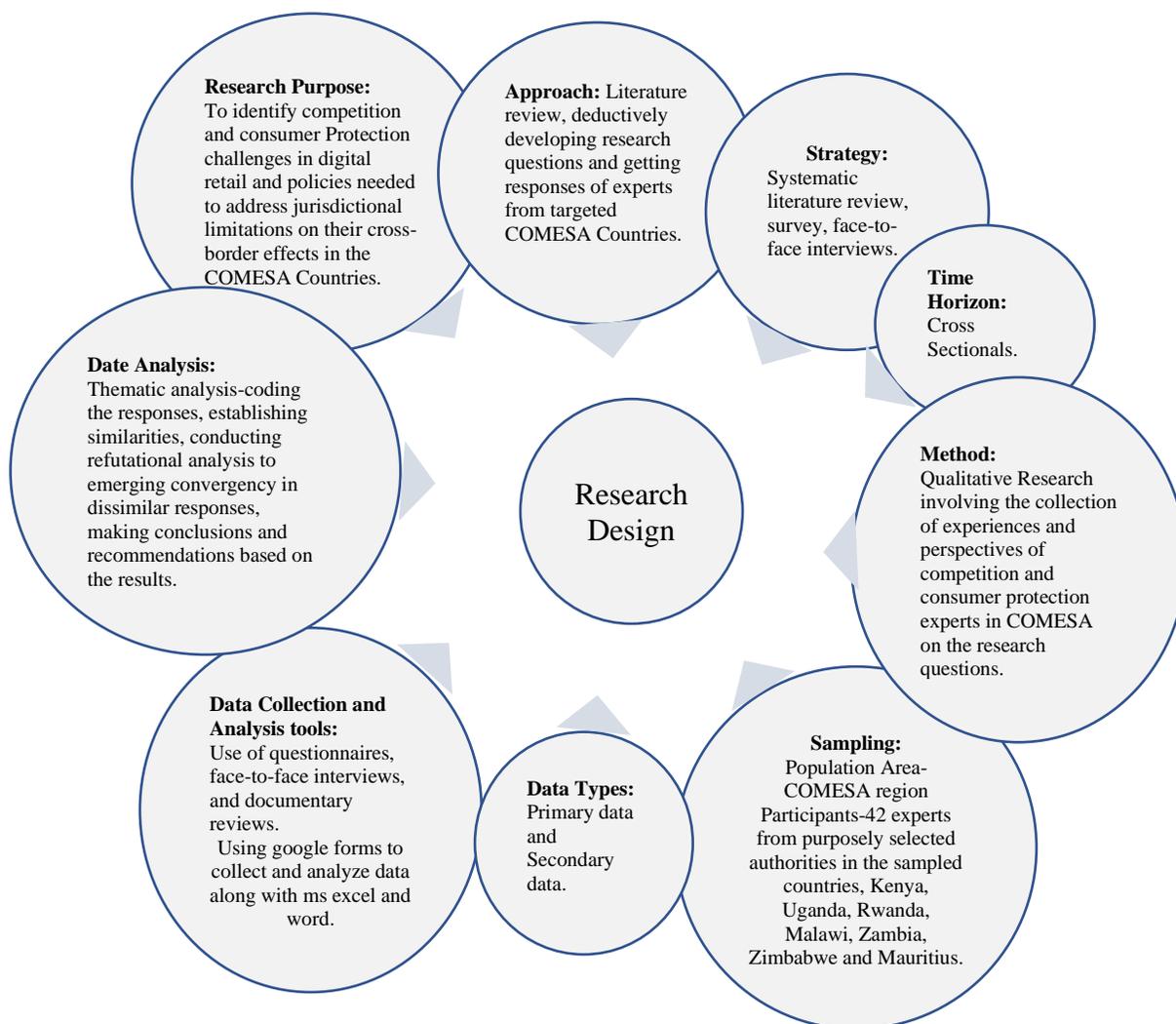
Developing countries need to have a regionally harmonized policy and legal framework that provides an integrated arrangement to increase and aggregate economic power of the member states, eliminate fragmentation of legal regimes, consolidates resources and expertise, effectively regulate cross-border transactions, reduce costs of compliance for the firms and compel overall compliance in the market, (Gal 2009; Lianos et al., 2019; and Jebelli, 2021). A regional framework helps to address cross border jurisdictional challenges faced by national authorities including courts especially in enforcing decisions and judgements (Lipimile & Gachuri 2005) and it facilitates information sharing, harmonizing of procedures and enables coordinated joint actions (Moreira, 2021).

COMESA already has in place regional law, the COMESA Competition Regulations, 2004, on competition and consumer protection. The study therefore assessed whether the COMESA Regulations are comprehensive enough to address digital retail cross border concerns and if not, whether any amendments may be necessary to achieve the desired legal framework at the regional level.

3.5 Research Design

A research design helps the researcher to make a choice on the approach to be followed and determine the relevancy of information to be obtained (Marczyk, DeMatteo, and Festinger, 2010). This study applied a qualitative research approach as the most reliable and applicable to the research purpose, methods, tools, and data analysis to achieve the research objectives and get valid, reliable, and relevant results. The research design that was followed is summarized in figure 1 below:

Figure 1: Graphical Representation of the Research Design



Source: Author

3.6 Population and Sampling

Sampling is a process through which study units are selected from a defined population to be studied (Alvi, 2016). This study relied on purposive sampling technic to determine the participants that can provide in-depth experiences about competition and consumer protection related challenges in digital retail. The study targeted experts from competition and consumer protection authorities as these were considered to have in-depth knowledge of the subject given their mandate and experience in regulating the market on the same subjects.

The area of the study is COMESA countries from which the researcher identified, and added to the pool of information, the challenges and the specific policy options which COMESA countries can adopt to promote effective competition and ensure consumer welfare while harnessing the potential of ecommerce in the region.

Due to time and financial constraints, the study was conducted in 7 countries as a sample of the COMESA region under study. The study targeted to get responses on the research questions from the COMESA Competition Commission and from 7 out 21 Member States of COMESA, that is, Uganda, Kenya, Zambia, Rwanda, Malawi, Mauritius and Zimbabwe.

3.7 Participant Selection

Experts from the sample of the 7 countries that were purposely selected in consideration of the limited costs to cover all COMESA countries and in view of the characteristics of these countries as a representation of the COMEA Member States as highlighted in the following reasons:

- a. Uganda currently does not have a comprehensive national competition and consumer protection legal framework though the country has in place sectoral laws with provisions on consumer protection. Thus, Uganda was used as a benchmark on the challenges posed by the digital retail to COMESA countries that do not have in place a national legal framework on competition and consumer protection.
- b. Zambia, Zimbabwe, Malawi, Mauritius and Kenya have in place established legal and institutional frameworks in place to handle the competition and consumer protection matters. They have been implementing the laws for more than two decades and therefore they have a wealth of experience in the subject matter. These two countries therefore provided more insights on the challenges that they have so far experienced in the implementation of the law amidst the advent of digital markets.
- c. Rwanda is in the initial stages of institutionalizing and implementing competition and consumer protection laws. Their laws are relatively less than a decade old and were therefore developed in the digital era. Thus, Rwanda represented perspectives of the countries that are beginning implementation to provide insights on measures they took to address competition and consumer protection concerns in digital retail.
- d. The COMESA Competition Commission is the regional body with the mandate to implement the COMESA Competition Regulations to prevent practices that have cross border effect in order to promote competition and protect consumers within the region (COMESA Competition Regulations, 2004). The Commission therefore provided experiences on managing cross-border matters and the challenges posed by digital retail at the regional level. The Commission also represents COMESA as a whole and therefore its experiences were construed to represent the interests of all the 21 Member States.

Four professional experts from each of the 7 competition and consumer protection authorities of the selected Member States and in the COMESA Competition Commission, responded to the questionnaires. In this regard the study targeted to get the views of experts of at least 32 questionnaire respondents from the targeted countries. The researcher held face-to-face interviews with at least 2 key experts from four out of 7 participating countries and the COMESA Competition Commission who provided their views on the issues raised in questionnaire and other matters arising from documentary review. In total, the study involved 42 experts.

3.8 Instrumentation

Primary data was collected using questionnaires and face to face interviews to get experiences and understanding of the respondents on the implications of digital retail to implementation of the competition and consumer protection policy and laws. The questionnaires were administered through online google forms. The researcher using ms excel worksheets and ms word applied thematic analysis to code the responses with similar and divergent views. Initial conclusions were based on questionnaire responses, and face-to-face interviews were held with purposely sampled experts to collaborate their views and experiences in digital retail. Secondary data was collected from publications by researchers and relevant authorities.

3.9 Data Collection Procedure

3.9.1 Data Collection

Primary and secondary data was collected to get a blend and comprehensive information from COMESA countries and the regional competition authority. Various methods of data collection

were deployed including structured questionnaires, face-to-face discussions, and documentary review. The principles set in the study helped the researcher to ensure transparency in the methods used, collect and analyse the data.

Primary Data: Primary data was collected through open-ended survey questionnaires and face to face interviews with experts on the subject matter in the targeted authorities and organizations. An open-ended survey questionnaire was developed, and responses solicited through google forms. The questionnaire was divided into three sections, the first one introducing the researcher and the study, the second one providing general information on how the researcher would deal with the respondents' information and third one with open ended questions on the subject.

The responses were collected and analyzed through google sheets, ms excel sheets and word. Following the analysis of the responses from the questionnaires, the researcher held individual face to face discussions with key experts from the authorities of the selected countries to discuss preliminary findings, probe and get professional insights in key issues of the study. Additional data was collected from the review of the laws and policies of COMESA and the Member States to establish the adequacy in addressing concerns in digital retail.

The researcher conducted in-depth reviews of the literature on competition and consumer protection policies of COMESA and the targeted Member States to establish the extent to which they are responsive to digital retail concerns especially as highlighted in the literature review. The outcome of the review was used to structure the questionnaires, assess the responses and to generate recommendations based on the findings.

Secondary Data: This was collected from the publications by the authorities and researchers on the laws and policies of COMESA countries, other countries, and regional economic blocs regarding digital retailing.

3.9.2 Validity and Reliability

To warrant consistency of the findings, the study ensured that the sampling procedures of the selected countries and respondents adequately represented the area of the study and issues under study. Further, the study applied triangulation approach in the collection of data by seeking responses through questionnaires and discussions, use of inversed questions to ensure consistency of the responses and ensured validation by providing an opportunity to the respondents to review the preliminary analysis of their responses. In addition, the study targeted respondents that are experts on competition and consumer protection matters.

3.9.3 Ethical considerations

The study applied research ethical principles to enhance integrity and validity of the results, protect human rights and dignity, and enhance collaboration with the stakeholders. In this regard, the study ensured that the participation of the respondents is voluntary and that they are properly informed about the study, their rights, anonymity and confidentiality commitments, measures to protect them from any legal or social harm, and commitments of the researcher not to engage in plagiarism or any research misconduct.

3.10 Data Analysis

Data analysis was conducted in a systematic process involving working with data, organizing and dividing it into small manageable parts. The study applied systematic strategy in assessing the data using coding and grouping responses into common and divergent themes; and constantly compared the data starting with reciprocal analysis by identifying similarities and differences in the data and then conducting refutational analysis by integrating data with dissimilar responses into emerging ideas. This process was repeated until the ideas were properly conceptualized as a finding.

3.11 Research Design Limitations

Data was planned to be collected from agencies with overall mandate to implement competition and consumer protection laws in the COMESA countries both at the national and regional level. Due to resource and time constraints, sectoral regulators were not targeted and as such, the research may not include sectoral specific experiences.

Further, the study relies on quality research as opposed to quantitative method and as such, it may not establish the magnitude of the challenges faced by the COMESA countries.

The researcher used a purposeful sampling procedure to determine the participants in the study. The researcher therefore relied on their judgment and personal experiences which exposed the study to personal biases, and subjective responses. However, the bias is minimized considering that the respondents are experts from authorities with the mandate to implement competition and

consumer protection laws, and therefore are knowledgeable on the subject and have a better understanding of the challenges in the market and the policy options needed to address them.

3.12 Conclusion

This dissertation relies on a qualitative research approach as the most appropriate method for collecting experiences and perspectives of experts on competition and consumer protection in COMESA countries. The study applies open-ended questionnaires and face-to-face interviews, to achieve appropriate responses from the experts. Using refutational analysis and identification of similarities through a coding process, the researcher grouped the responses and based on which, determined the findings, conclusions, and recommendations.

CHAPTER IV

FINDINGS OF THE STUDY

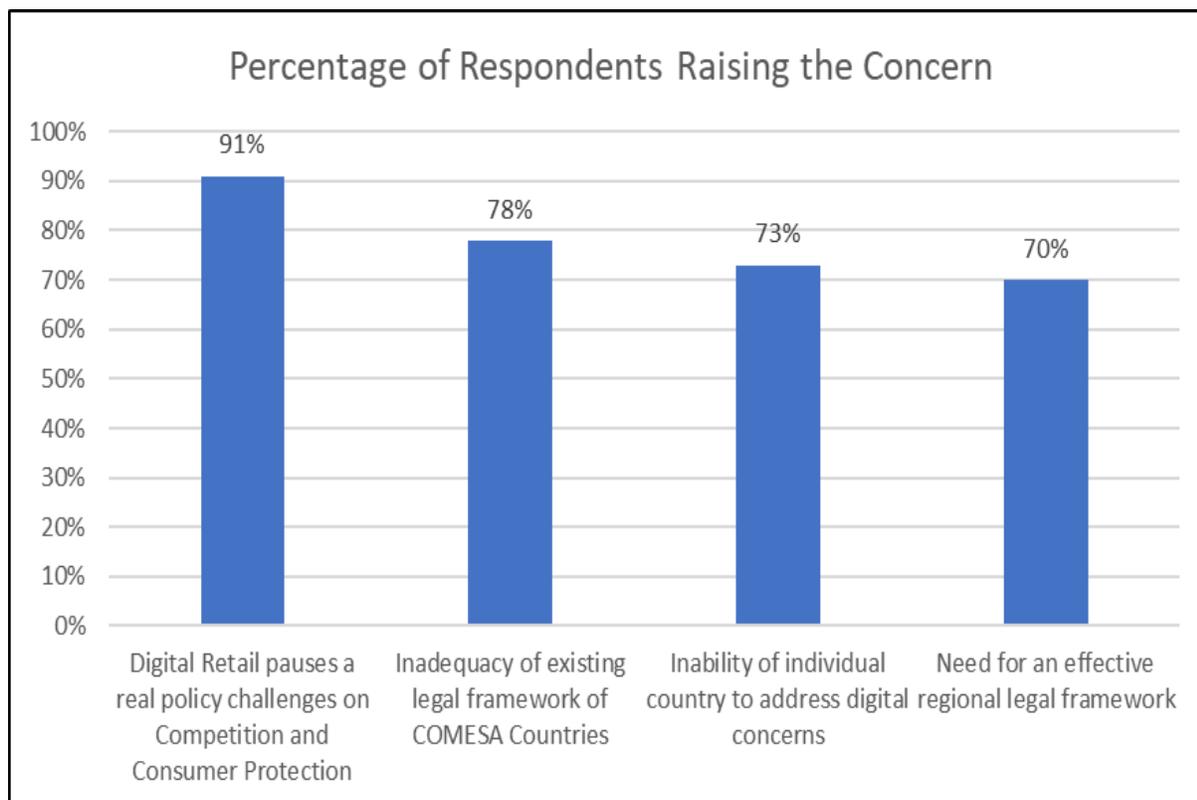
4.1 Introduction

This section provides the key findings of the study and specifically the analysis of the results of the primary data collected from experts using questionnaires and face-to-face interviews in the COMESA Competition Commission and the selected COMESA countries Uganda, Kenya, Zambia, Malawi, Mauritius, and Zimbabwe. The findings reflect the views, perspectives, and experiences of the 42 experts from the competition authorities, consumer protection agencies and other organizations in the targeted countries. To amplify the voices of the respondents, quotes of their observations, comments and recommendations have been used in this section. However, their identities are not revealed in view of the confidentiality and anonymity assurances that were given to them by the researcher.

This section is presented in four parts in order of the responses to the research questions as set in section 1.6. The first part presents the findings on competition and consumer protection challenges faced by the COMESA Member States in digital retail. The second part covers the findings on the adequacy of the existing laws and market assessment tools in detecting, examining, and addressing the digital retail challenges within COMESA. The third part covers the findings on the feasibility of an individual Member State of COMESA to address adequately cross-border digital retail concerns. The last part presents findings on the policy measures that should be adopted at the regional level to aggregate market power and resources in addressing competition and consumer protection concerns on detail retail.

4.2 Digital retail competition and consumer protection challenges faced by the COMESA Member States.

Figure 2: Graphical Representation of the results on Digital Retail Competition and Consumer Protection Policy Challenges.



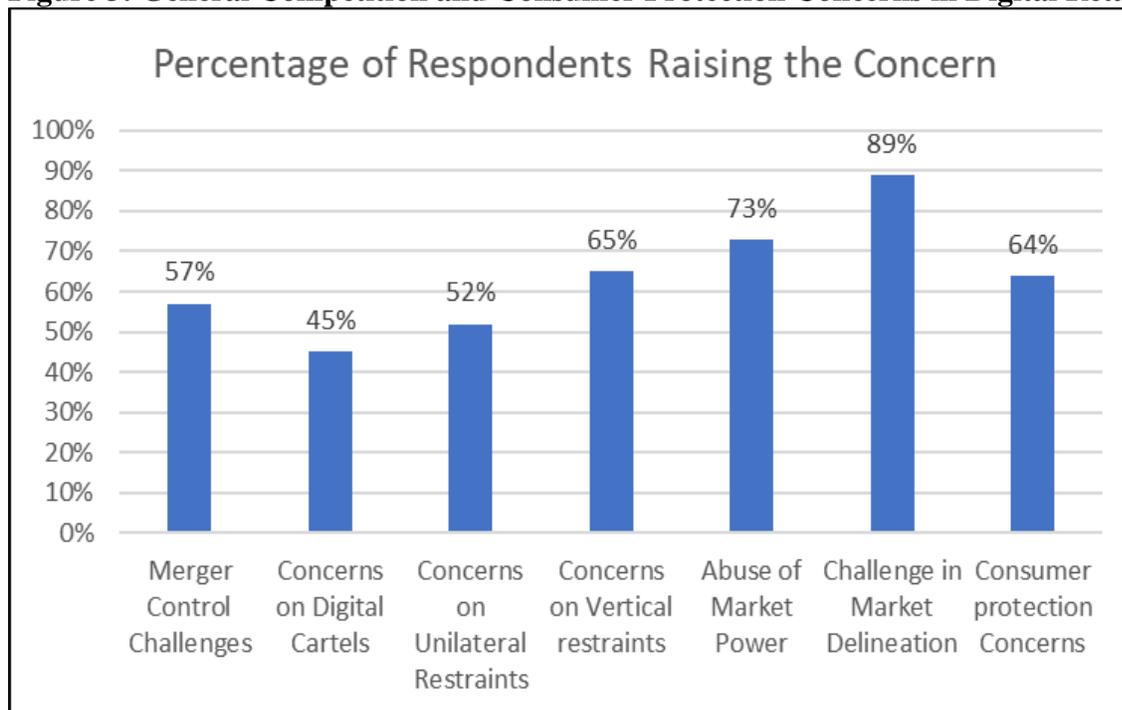
Source: Author

4.2.1 General Competition Concerns in COMESA Countries

As indicated in figure 2 above, 91% of the experts in COMESA believe that digital retail presents real competition and consumer protection challenges to government authorities with 78% highlighted the inadequacy of the legal framework, 73% observed the inability of an individual country to address digital concerns alone and 70% highlighted the need for an effective regional legal framework to address cross border effects in digital retail.

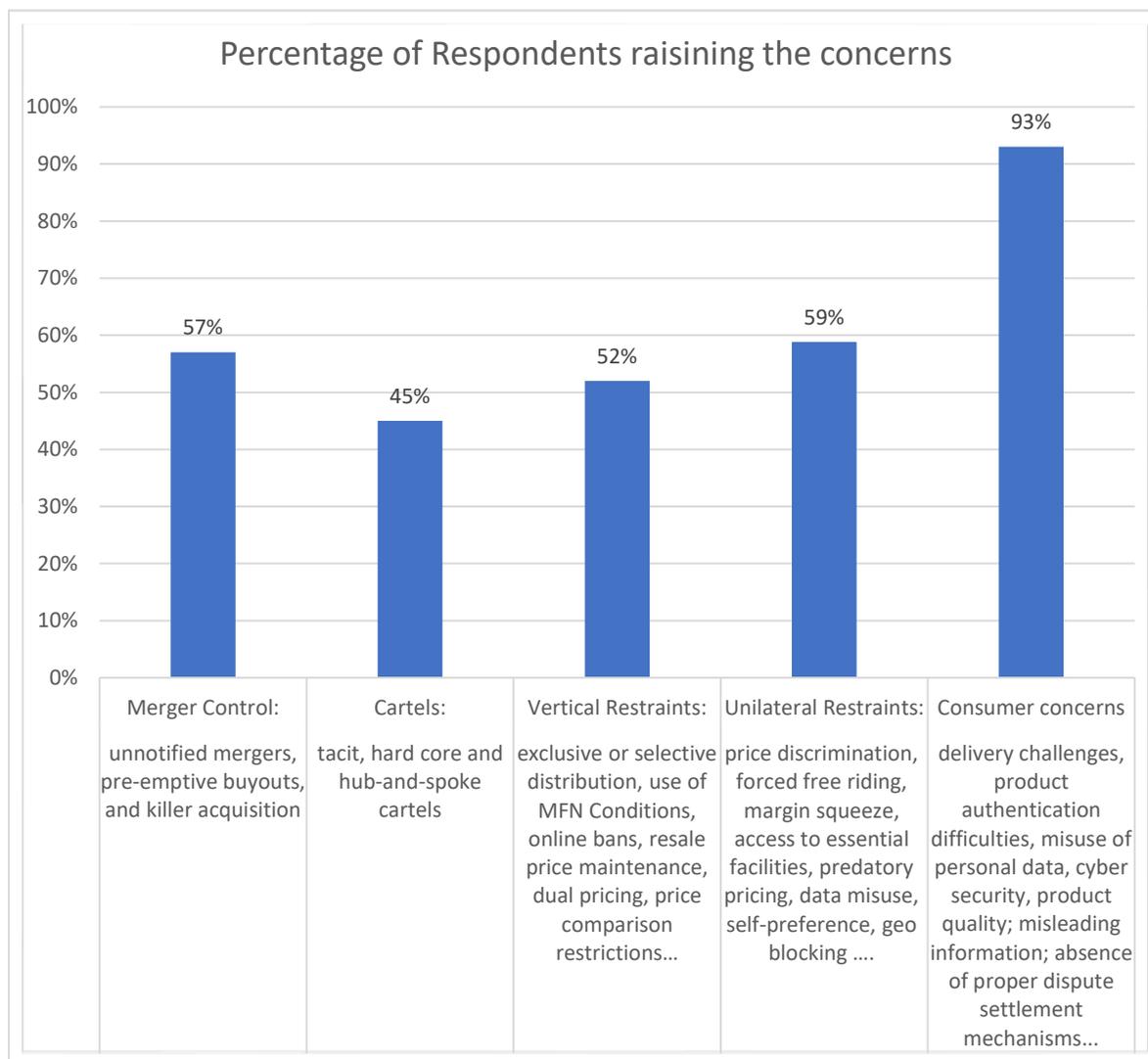
The respondents noted that digital retail platforms act as a new form of intermediaries with technological means and infrastructure on which several businesses depend on to reach out to so many suppliers and consumers: easily, quickly and across the geographical span. According to the respondents, several digital retail platforms operate in multiple markets and across the value chains, and therefore their effects may distort market balance in the COMESA countries even where they are not in a dominant position per se. “The platforms have the ability to apply default technologies to transact with different users at the same time, track market prices, conduct market comparisons and automatically adjustment price or even engage in other conducts with adverse effects on the market”, one of the respondents commented. According to the respondents, these capabilities are posing new challenges on consumer choice and generally on the forces of demand and supply, in different ways than in the physical markets and the existing policy framework.

Figure 3: General Competition and Consumer Protection Concerns in Digital Retail.



Source: Author

Figure 4: Graphical Representation of the results in respect to specific Areas of Concern.



Source: Author

4.2.1.1 Merger control challenges

As regards merger control, 57% of the responses (see also Figure 3 above) indicated that unnotified mergers, pre-emptive buyouts, and killer acquisition in digital markets are posing competition concerns in COMESA. The respondents expressed concerns that some of the mergers and acquisitions in digital retail have the effect of lessening competition and are a threat to innovations and startups in the COMESA countries. The respondents observed that while such conducts would

fall under the purview of the existing laws, the challenge posed by the digital retail is the onerous task imposed on the authorities to prove that an acquisition or merger may have the object of curtailing competition or may result in coordinated effects which may increase concentration and/or reduce contestation in the market. As observed by one of the respondents, “some recent digital retail mergers, including the acquisitions of Instagram, WhatsApp and Twitter by Meta were not notified in COMESA countries because of not meeting notification thresholds, even though they could have been harmful to competition in the market”.

4.2.1.2 Digital cartels related challenges

It was indicated in 45% of the respondents (see also Figure 3 above) that tacit cartels, hardcore cartels and hub-and-spoke in digital retail do also present regulatory complexities to the authorities in the COMESA countries. According to the respondents, certain features of digital platforms including increased price transparency, faster and easier information exchange along with the power to aggregate different products and competitors to one marketplace that are likely to facilitate collusion than is the case with offline retail where competitors supply independent of each other. As observed by one of the respondents, “suppliers on retail platforms with the ability to apply technology may, without having to engage each other, implement a uniform pricing structure with their competitors with no formal agreement”. An example of Uber was given that while the company controls a significant market share of taxi services in some of the COMESA countries, the taxi drivers who used to charge differently and independently, now they all accept a uniform price determined by Uber. To the respondents, while such an arrangement may have similar effects of a cartel, be it hardcore, tacit or even a hub and spoke, it may be hard to categorize it as a collusion because there is no direct coordination between the competitions i.e., the drivers.

In addition, the respondents noted that price transparency and market aggregation can facilitate tacit collusion and present competitive challenges to COMESA member states and other developing countries. According to the respondents, some of the digital retail platforms may be involved in tacit collusions to sustain higher prices with adverse effects on consumers. “For example, in the context of online bookings where prices are accessible to everyone, certain hotels or even the airlines operating in COMESA appear to have sustained similar and higher prices as their competitors”, one of the respondents commented.

Further, according to the respondents, regulation of cartels in digital platforms requires the use of complex algorithms, intensive information technology infrastructure and specialized human resources within the authorities. However, the investment levers are so high which has led to limited interventions within COMESA, as observed below by one of the respondents:

The investment levels and technologies required to establish and assess infringements relating to online cartels are not attainable by several authorities in COMESA and as a result, a number of digital collusions mostly the algorithm driven tacit cartels may remain unregulated in the region.

4.2.1.3 Abuse of Market Power

Abuse of market power in digital retail was highlighted in 73% of the respondents (see also Figure 3 above) noting that, while the global digital retail platforms are monopolizing the digital markets, some may be involved in unilateral conducts that have adverse effect on competition in COMESA countries even though enforcement has been slow because of the challenges

associated with applicability the existing laws (see also section 4.3 under *Limitations in the definition of Market Power*).

4.2.1.3.1 Unilateral restraints related concerns

Unilateral restraints were highlighted in 52% of the responses as one of the major digital retail challenges affecting COMESA countries (see also Figure 3 above). The most prevalent unilateral restraints in digital retail were highlighted in 59% of the responses (see Figure 4 above) as price discrimination, geo-blocking, price fixing, predatory pricing, tying and bundling, excessive pricing, self-preferencing, forced free riding, margin squeeze, access to essential facilities and access to data.

Price discrimination: The respondents observed that digital platforms can use the algorithms to charge their loyal customers higher prices and low prices to new consumers for the same goods and services, even if they all buy at the same time. Concerns were raised by the respondents that platforms are able to collect data from consumers including their lifestyle and use it to discriminate against them. “Certain platforms operating in COMESA, collect personal information including ones’ location, product preferences, expenditure trends and then use it to market or deny access to certain products or sell at a discriminatory price to the same consumer”, one of the respondents observed.

Further, some of the responds observed that price discrimination in digital platforms is facilitated by the different digital devices which help suppliers to track consumers’ lifestyle and then use the information to market tailored products at discriminatory prices. As observed by one of the respondents, “personal information is collected using digital devices such as a TV, watch, pen,

phone with embedded capabilities to track one's conversations, travel history or shopping behavior and customized to market certain products to the same person". According to the respondents, customized products may be done in a discriminatory manner in that the price could be higher or the quality lower than a similar product supplied to another consumer.

Further, the respondents observed that whereas such practices are not new, the digital market presents a challenge in that discrimination can happen so easily and go undetected. As one of the respondents observed, "consumers do not always have the opportunity to know whether or not the prices at which their colleagues were charged were the same, the purchase was at the same time or whether the product is exactly the same". According to the respondents, such dynamics also present challenges to investigation by the authorities who may not have appropriate technologies to detect the conduct.

Geo-blocking: The respondents observed that certain platforms operating in COMESA do exercise geo-blocking to discriminate between customers in a particular location by denying them access to a particular good or service. According to respondents, consumers in the COMESA region have reported cases where some of the platforms display the prices or products basing on the location of the consumer as indicated below by one of the respondents:

We received a complaint where a consumer attempted to buy a vehicle on of the online vehicle vending platforms. He was required to pay for the vehicle using the swift bank transfer system. However, his country was facing foreign exchange shortages and so he failed to get the dollars to pay for the vehicle. Luckily, his sister who was in another country agreed to help. He gave her the details of the vehicle for her to process the payment. However, when the sister visited the site, the price of the same vehicle for cost,

insurance and flight to Mombasa was lower than the price they were charging him for the same point of delivery.

Some of the respondents also stated that geo-blocking happens with some online platforms for hotel bookings in that certain rooms or the entire hotel may be unavailable depending on one's location. Geo blocking along with price discrimination was also raised against certain airlines that their online tickets tend to be more expensive if booked while in Africa than when in Europe for the same flight.

Furthermore, it was observed that whereas price discrimination and geo-blocking may not always be illegal, the way some of the platforms do it can be construed as anticompetitive and a consumer violation because, in some cases, there are no associated additional costs or legal compliance requirements to justify such a conduct.

Price fixing: Some of the respondents reported that, while such a conduct can be addressed within the existing laws, digital markets pose additional challenge with a risk of keeping the general market prices high especially where competitors use algorithms to assess prices on the various the platforms and then adjust theirs accordingly independent of human intervention. As observed by one of the respondents, “transparency and ease of access to the prices of the competitors, may result in machine driven price fixing and to keep prices higher than the competition level in the COMESA market”.

Predatory pricing: Concerns were raised by the respondents that there are some powerful platforms operating in COMESA whose prices are so low or even at zero thereby making it difficult for small and medium companies both the physical and digital ones to compete. As

observed by one of the respondents, “some of the prices charged by platforms like Amazon, google and uber appear be below costs and are impending contestation of small firms in COMESA”.

In addition, the respondents highlighted that predatory pricing in digital markets is difficult to assess using the existing legal framework because of the nature of the products, cost and markets structure of digital platforms which operate in multiple and multisided markets and are able to cross leverage the pricing structure either between the products, markets or even between suppliers. Such a situation presents complexity to proving predatory pricing as demonstrated below by one of the respondents:

It is a known fact that Uber charges very low prices compared to the fares of traditional taxi drivers. Tax drivers have often raised concerns that the pricing strategy of Uber is anticompetitive and could drive them out of business. However, the concerns have not been addressed because of the difficulties in proving that Uber is involved in predatory pricing. Uber, like other digital platforms, enjoys low-cost margins because it has so many users, both riders and drivers. Moreover, there are drivers willing to work with uber implying that the prices are profitable to them. On the other hand, however, the complaints of Uber drivers themselves that they are overcharged by Uber may also be an indicator that possibly the company under charges consumers and compensates for that by overcharging drivers. However, the actions of Uber against its own drivers cannot be used to prove that it is engaged in predatory pricing against its competitors because the law does not provide for cross leveraging as an indicator.

According to some of the respondents, the difficulty to prove predatory pricing is heightened further by the need to demonstrate the intention to eliminate rivals and then recoup the losses by imposing higher prices once it has gained dominance as required by the existing laws. The respondents observed that digital platforms which enjoy decreasing marginal costs due to network effects and economies of scale and scope, have the ability to charge low prices even over a long period without necessarily having the objective of eliminating rivals. “For example, Uber and google have for decades been charging very low prices for a time long enough to threaten even their own competitiveness, so when will they ever recoup the losses, if at all they are making losses anyway?” one of the respondents asked.

Tying and Bundling: It is observed by the respondents that tying and bundling in digital platforms are posing a new challenge to enforcement of the laws in the COMESA region. The respondents observed that the while in the traditional brick and mortar markets, tying and bundling happens where there are distinct and unrelated products, in digital markets it is easy for a platform to use technology to design unrelated products and tie them together to enhance its network effects and economies of scale and scope which however could have a foreclosing effect as indicated by one of the respondents as follows:

Take an example, one needs to have a device with either the android OS or iOS operating system to use an app on Google Play Store or Apple Store respectively. The apps on these stores could on their own have interoperability and compatibility capabilities to interface with either system. However, in my own opinion, Google and Apple are indirectly tying their operating systems to apps of the third parties and even their own devices.

According to the respondents, tying and bundling in the digital markets presents a burden on authorities in COMESA to apply technologies to prove that the tied products do not necessarily need to move together, and the conduct has the effect of foreclosing competitors or limiting consumer choices.

Excessive pricing: According to the respondents, excessive pricing is another challenge experienced in digital retail in the COMESA countries. It was emphasized by the respondents that whereas most of the users on digital platforms in the COMESA region are consumers, who normally would enjoy the low or free prices, they may be paying excessively with their data from which the platforms get even more value than would be competitive prices of their products. However, as one of the respondents observed, “it is not easy to determine the exact value of the data an individual exchanges in a particular transaction to establish whether or not it can be treated first as a price and second as an excessive price”.

Self-Preferencing: Some of the respondents reported that certain platforms which operate in COMESA are involved in self-preferencing practices with foreclosing effects to competitors that sell through the same platforms. “For example, on the search engines of certain platforms, it is their own products that pop up first. This forecloses other suppliers of similar products on the same platform”. Respondents further observed that the practice of self-preferencing on digital marketplaces is unfair because it reduces contestation of the suppliers which in turn limits the choices of the consumers as indicated below by one of the respondents:

At times the product listed last may be the best but, if the platform’s own products are displayed first, consumers may end selecting a product of lower quality than they would

have taken, thereby undermining consumers' welfare, and causing loss of sales to the suppliers of the best products.

Forced Free Riding: It was highlighted by some of the respondents that forced free riding is an issue that affects COMESA countries. Certain operators use algorithms to establish the first moving items on their platforms and they start marketing them under their private label or even produce and market similar products. The practice was reported to be affecting both physical and digital products. "Imagine a platform which serves as a marketplace, with strong network effects and is powerful enough to influence the market, producing and marketing a product similar to yours already on its platform, how do you compete?", one of the respondents asked. According to the respondents, the practice of forced free riding has the effect of appropriating innovations of third-party suppliers and foreclosing them from the market.

Margin Squeeze: It was reported by some of the respondents that certain platforms operating as marketplaces but also involved in downstream selling of products to consumers in COMESA are squeezing the margins of their competitors who sell on the same platforms. It was reported that the service fees paid to the platforms by third-party developers selling their apps on the marketplaces are so high and this squeezes off their profitability and competitiveness, as highlighted below by one of the respondents:

Let's consider Google play and Apple Store marketplaces on which, due to their strong network effects, the third-party suppliers rely to sell to consumers their digital books, music or video applications. The third-party suppliers are charged a service fee ranging from 10% to 30% on the subscriptions for apps sold through these platforms. However, the same platforms compete with the third-party suppliers because they also sell similar

products and at times at very prices. In other words, as marketplaces, these platforms operate as upstream players and, as suppliers of apps, they are direct competitors with their third-party suppliers in the downstream market. This means that a start-up company would find it difficult to price and sell profitably with the same platform which, on one hand, targets to take 30% of its sales and, on the other hand, sells cheaply a similar product on the same platform.

Access to data as an essential facility: Respondents argued that platforms accumulate a lot of data from consumers and then use the same data through lock-in strategies to keep the same consumers, gain network effects and foreclose their competitors. However, according to the respondents, some of that data is commonly needed by all the platforms to function properly and legally in the market.

According to the respondents, the well established platforms which over the years have developed proprietary technologies for data collection and processing, may use the volume and quality of the data gathered from consumers to impede new players from entering the market or small-scale operators from competing. Therefore, it is important to limit the power of first mover platforms to deny competitors access to data when at the same time, they are implementing lock-in strategies, for example, to limit multihoming. “In COMESA, where majority of the firms are small scale players, access to data is key because, individually, they may not raise the requisite data to gain strong network effects and be competitive in the short and medium term”, one of the respondents observed.

It was observed that it is not economically feasible, in the short run, to collect the necessary data or to replicate the marketplaces because it takes time and requires a higher level of investment

and advanced computer programming which most start-ups in COMESA do not have. “The fact that the rich platforms like Facebook, Twitter and Amazon still rely on Apple Store and Google Play Store, means that is not cheap, easy or feasible to develop alternative operating systems to most, if not all, startups in COMESA”, one of the respondents commented.

Further, some of the respondents observed that while the claims on intellectual rights and security of their systems may be genuine, they should not be used as an excuse to deny compatibility of the systems, interoperability of data or access to data because the same companies are already implementing similar interfaces with their suppliers and therefore, they already have a certain level of safeguards in place.

To the respondents, a platform implementing a marketplace with strong network effects, and which is not easily replicated, should be categorized as an essential facility because where it engages in denying access to data, because the practice may have the effect of foreclosing competitors especially the small and medium companies. Thus, the respondents called for competition laws in COMESA to be reviewed to provide that where it is established that a platform with strong network effects cannot easily or feasibly be replicated in the medium term, once it accumulates a certain form of data to some threshold, it should be treated as an essential facility, as recommended below by one of the respondents:

COMESA should review the Regulations to provide that once a platform with strong network effects, collects consumer data to a certain threshold, the data shall be treated as an essential facility and must be made available, on request, to businesses especially starts-up that may not be able to compete if they were to start from scratch.

4.2.1.4 Vertical restraints related concerns.

In the context of vertical restraints in digital retail, it was highlighted in 65% of the respondents as one of the major challenges affecting COMESA countries (see Figure 3 above) with 52% of the responses (see Figure 4 above) indicating that the specific concerns include exclusive and selective distribution, use of MFN conditions, lock-in strategies, resale price maintenance and dual pricing, online bans and price comparison restrictions. The respondents observed that whereas traditional practices such as resale price maintenance could be better handled using the existing laws, emerging conducts in digital retail may not easily be addressed. “Digital retail conducts like MFN conditions, price comparison restrictions and online bans are emerging challenges affecting competition in market and enforcement of the law in the COMESA countries”, one of respondents observed.

MFN Conditions: Some of the respondents noted that MFN conditions in digital markets have the effect of limiting entry and competitiveness of the small-scale companies in COMESA that wish to sell their products through the platforms. “Certain platforms condition third-party suppliers to sell on any other platform at either the same price or higher than that they sale on their marketplaces”, one of the respondents observed. According to the respondents, such MFN conditions in digital markets have the effect of keeping prices higher because they can be applied to many suppliers at the same time. “Where such a practice involves a platform with market power, it may also reduce consumer surplus on top of lessening competitiveness of small-scale companies”, a respondent observed.

Lock-in strategies: In connection to lock-in effects, it was reported by some of the respondents that certain global digital retail platforms are implementing user lock-in strategies such as loyalty

schemes to limit multihoming through discounts or incentivized membership schemes; personalized services; and technological lock-ins. “For example, it is costly to switch or do multihoming between Play Store and Apple Store because Google and Apple have locked-in users to their platforms by limiting the usage of apps to their operating systems”, a respondent commented. According to the respondents, this practice limits consumer choices even for better products and gives market power to the implementing platforms which may in turn limit to entry or competitiveness of digital startups in COMESA because they cannot compete with the global players.

Resale Price Maintenance and Dual Pricing: Some of the respondents reported that, while resale price maintenance can be addressed within the existing laws, digital markets pose additional challenges use algorithms to assess market prices of the platforms of the competitors that are implementing the conditions of the manufacturer and then adjust their prices accordingly. “With automated machine-driven business strategies, resale price maintenance conditions by manufacturers to online platforms or even by platform to their retailers, may facilitate machine driven price fixing to keep prices higher than the competition level” one of the respondents commented. On the other hand, the respondents observed that monitoring and uncovering dual pricing also presents a challenge to COMESA countries due to limitations of monitoring the offline and online prices, comparing the related cost and the timelines involved in order to establish the misconduct. Further, the respondents observed that it effectively enforcement the law on such conducts, requires the authorities more resources, than they may be able to raise, to apply technologies and employ information technology experts to be able to detect the infringement.

Exclusive and selective distribution: The respondents were concerned that the current market structure in digital retail, distorts the territorial architecture that traditionally was used to allow or disallow exclusive or selective distribution in the physical markets and that if the sector is not well regulated, such conducts could reverse the gains of COMESA countries to form the region into one common market. The respondents were particularly concerned with the application of exclusive or selective distribution arrangements on passive sales made outside the territory of a distributor because this has benefits of deterring differential pricing between territories and may not directly impose competition pressures to the distributor in question.

The respondents raised concerns that the exclusive and selective distribution agreements engaged in by manufactures or the platforms may segment the national markets which in effect would reduce intra brand competition and inter-state competition between distributors and as a result, undermine the free movement goods across the COMESA countries. In addition, as raised by one of the respondents, “where exclusive distribution or selective distribution involves the global retail platforms, it could facilitate possible collusion between suppliers and result in foreclosures of new producers who must develop their own distributions channels because the existing ones are locked out”. Further, the respondents noted that, with increased transparency in digital markets, it is beneficial to allow distributors to sell across the COMESA region to facilitate deepening integration and increasing competition in COMESA to the benefit of the consumers in the region since it will make it difficult for them to sell at different prices in the different member states.

It was further noted by the respondents that effective application of law to exclusive and selective distribution agreements in digital retail would be hard to achieve given the thin

difference between passive and active sales in digital markets. “The fact that digital platforms are designed to be accessed by anyone anywhere, makes it difficult to determine whether it is the platforms that actively attract consumers, or it is the consumers who passively reach out to them” one of the respondents observed.

In the context of exclusive distribution, the respondents indicated that in the COMESA countries exclusive distribution arrangements are observed in digital market especially with the online pay TVs and other distributors of digital products such as books, music and videos. Regarding selective distribution, the respondents indicated that the arrangements observed in the COMESA countries include internet sale bans, restrictions on using keywords that are linked to the trademark of the supplier in the search engines on the major third-party platforms so as not to reduce the raking of the supplier, conditions to online platforms to have physical stores which in essence eliminates use of exclusive online distribution system and conditions which limit selling to end users.

Online bans: The respondents observed the increase in practices relating to online sale bans which could hurt especially small and medium digital retail platforms and consumers in the COMESA countries because of the limitations on using the fastest, efficient, and profitable channel of distribution which may also limit choices available to the consumers and access to competitive prices.

Price comparison restrictions: The respondents noted that the issue of price comparison restrictions is a concern in COMESA Countries because it hinders retailers from competing and can limit the growth of the small and medium enterprises who may not be able to offer and

compete on their best prices using online platforms as the most convenient and effective means of reaching out to consumers.

4.2.1 Consumer Protection concerns in COMESA Countries

The consumer protection concerns on digital retail in the COMESA countries were highlighted in 64% of the responses as: excessive prices; delivery challenges; customer service; product authentication difficulties; and misuse of personal data; invasion of privacy and cyber security concerns; low product quality; misleading information and designs; delivery challenges (including non-delivery, delays; non conformity to specified orders); absence of proper dispute settlement mechanisms; complexities in product returns; losses due to poor packaging, digital payments failures; lack of clarity on the obligation third-party service providers and complex non-negotiable terms and conditions.

Excessive data exchange value: It was observed by the respondents that platforms derive profitable monetary value from the consumer data they collect and are thus willing to offer free or cheap services to consumers in exchange for their data which they monetize either by selling it or earning revenue through adverts. However, according to the respondents (see also *Excessive pricing* under section 4.2.1.3.1), it is not easy to determine the exchange value of the information, to ascertain whether or not consumers are not giving more than they get from the platforms. One of the respondents summarizes the challenge of excessive pricing as a consumer exploitative conduct in digital platforms as follows:

Although this trend is commonly observed, the theory of harm may not easily be applied to excessive pricing in digital retail because in this market prices change rapidly and, in

some cases, consumers end up paying more than the price advertised. It is also not easy to quantify the value of personal information exchanged during the transaction.

It was also observed by the respondents that while data may be useless unless it is repurposed to be economically meaningful, it is still an asset which platforms target and extract from consumers to gain network effects and the economies of scale and scope or even to monetize and generate revenues. The respondents therefore observed the importance of ensuring that consumers are allowed to exercise their rights and give consent on what their data is used for by the platforms and the terms for which it used, as recommended below by one of the respondents:

Platforms should request consumers to provide outright informed consent on the purpose of the data they collect from them and how it will be used. Such a request should be prominently displayed to the consumer on the platform and should not be hidden inside the terms and conditions which are not even easily understood by an average consumer.

The consent should not be presumed or provided through pre-ticked or default designs.

Limitations to online product verification: According to the respondents, consumers face limitations to verify the product and confirm performance online. It was observed, as commented by one of the respondents, that “unlike in the brick-and-mortar stores where a consumer can physically verify a product or even seek clarifications from a salesperson, there is no human being to interact with on the platform”. It was further highlighted that one of the reasons for increased consumer complaints relates to the limited interaction between vendors and customers to provide confirmation on the performance of the products they purchase online.

Invasion of privacy and Cyber Security: The respondents reported there are increased consumer concerns on cyber security and threats that are attributed to the practice of businesses of compromising personal information which they correct from consumers or even selling it to non-well intentioned third parties. According to the respondents, there have been reports of victims of cybercrimes in COMESA countries whose cases could not even be addressed because the criminals involved are based in foreign countries. One of the respondents wondering how the criminals get consumer contacts commented as follows:

One wonders where cyber criminals get the contacts, it must be from the businesses that collect personal data including the online platforms. We receive a lot of complaints from consumers who have been victims of cybercriminals including scammers; fake computer antivirus notifications or even actual viruses; fraud through unsolicited calls or emails; and job fraudsters. There are even cases where scammers defraud people basing on their online surfing or purchase history implying that criminals can track consumer operations on some platforms.

Absence of proper dispute settlement mechanisms: According to the respondents, several platforms operating in the COMESA region such as Amazon, Alibaba, eBay, Walmart, Target and Netflix are based abroad, and this presents to consumers a challenge to getting redress whenever they are aggrieved. According to the respondents, consumers find it difficult to engage with such platforms or even the relevant authorities to get redress whenever they are faced with delays in delivery of the products purchased, supply of a defective product or a payment failure. In this regard, the respondents called for the laws to be amended to afford consumers the right to

lodge complaints in the countries in which they place orders, as indicated by one of the respondents below:

When consumers have a problem with a product purchased on Amazon or Alibaba, should they lodge the complaint in USA, China, or in the country in which the order was made? To me, the moment a platform starts offering products in Uganda, Kenya or Zambia that should be considered as legal presence, whether it is physically present or not. Consumers based in these countries who purchase products from such a platform should be able to lodge a complaint in their countries where the orders were made and get redress even when the supplier has no local offices in that country.

Respondents further observed that some operators do not have on their platforms effective dispute settlement. Some of them use only emails, complaint forms or artificial voice machines to receive complaints with no person-to-person communication to the consumer. According to the respondents, this poses challenges to the consumers as they are not able to communicate with a person to explain their issues nor are they able to track progress of their complaints, receive satisfactory feedback or get redress to their concerns.

Product return challenges: The respondents indicated the lack of physical presence in the countries heightens the challenge on dispute settlement. Consumers find it expensive and inconveniencing to return overseas a product that is delivered defective, or which does not conform to the specifications of the consumers. Consequently, “a consumer is either forced to forego a defective product and lose money or to use it as is to minimize the loss”, one of the respondents commented. It was also observed that at times, losses arise because a consumer may be technically challenged with how to use a product, but then is unable to get after-sales services

from the suppliers because they have no presence in the country. In this regard respondents called for the laws to be amended to obligate platforms to have local offices to handle consumer concerns, as long as they make sells in the COMESA region.

Unfair terms and conditions: The respondents indicated that certain digital marketplaces operating in COMESA have on their platforms terms and conditions which tend to undermine consumer rights and, in some cases, are unenforceable. Examples of such provisions were given as failure to disclose actual legal names of the platform operator, failure to guarantee the completeness and accuracy of the information provided on their platform and the availability of the platform itself into the foreseeable future, disclaimers on liability on the condition of goods purchased through their platforms and unfair return policies. According to the respondents such provisions can disenfranchise aggrieved consumers wishing to take legal action against the concerned platform.

It was observed by the respondents, some of the digital platforms, which sell even their own products to consumers, include provisions in the terms and conditions that they do not guarantee the accuracy of the information, or the condition of the goods being sold displayed or marketed on those platforms. To the respondents, such disclaimers apply not only to the products of the third-party suppliers but also to the products sold by the platform itself and the information posted on that platform in general.

According to the respondents, consumers trust that platforms undertake due diligence on whatever is displayed in their marketplaces, and therefore the failure to guarantee information or condition of the products on their platforms, is misleading and unconscionable. "Failure to grantee information on the platform, may leave consumers misled and stranded, with limited

action to take especially where the products received are of poor quality”, one of the respondents observed.

In addition, it was observed that certain digital retail platforms have in their terms and conditions liability disclaimers on the condition and quality of the products sold on their marketplaces.

According to the respondents, digital platforms that engage and conclude transactions with consumers should not include such disclaimers as highlighted below by one of the respondents:

When a product supplied by a third-party is sold by the platform, who should be responsible for the quality and the fitness of purpose of the product? For example, when I book a hotel through booking.com, or a cab through Uber? Who is responsible for my booking? To me, it should be both booking.com and the hotel or uber and the vehicle supplier in the case of a cab. Yes, both the platforms and the service provider should all be responsible for my bookings because, I believe, there is an agent-principal relationship the platform has with the supplier on one hand, and with the consumer on the other. The platform, therefore, as is for the service provider, must ensure that what the consumer orders is what is received and must take responsibility when the opposite happens. This kind of relationship should be defined in the law.

It was further indicated that there have been cases where some of the platforms have not included their legal names in their terms and conditions, making it difficult for consumers to identify the other party to the contract. “Certain platforms do not even provide their legal names in their standard contracts which makes it difficult for a consumer to identify the entity to take to court” one of the respondents commented.

Losses due to payment failures: The respondents noted that, in some cases, online payments fail to go through even after the money is deducted from consumers' bank accounts. However, consumers find it difficult to recover their money especially where the bank is not in position to recall the payment and the platform cannot deliver the product on grounds that the payment was not received. Some of the respondents reported to have personally lost money in similar circumstances as indicated below:

You attempt to purchase an item online, but the payment does not go through even after the money is deducted from your account and then you are told by the bank that it is not possible to reverse the transaction or that it will be costly to do so. Personally, I went through this recently, I made a payment for an item I was purchasing from India. I think the bank account names did match and the payment failed. I called the bank, and they were like yes, we can reverse the transaction and refund your money but at a cost, so are you ready to pay for it? I had to say yes, because I had to get my money back, but in the process, I lost about 15% of the amount I had spent on the failed transaction.

Relatedly, respondents raised concerns on the responsibility of third-party payment service providers. They observed that in most cases online transactions involve other third-party service providers such as banks and telecommunication companies, who while they facilitate payment for the transaction, they do not seem to take responsibility in case of payment failures. One of the respondents provided a case of an online consumer who attempted to make a payment using the mobile money application to transfer funds from his bank account to the supplier. The payment went through, but the supplier turned out to be a scammer and so no delivery was made. While the bank account of the consumer was debited, neither the bank nor the telecommunication

company was useful to help the consumer recover the money. They both referred the consumer to resolve the issue with the scam supplier and in the end, the consumer lost out. A respondent questioning the responsibility of the third-party service providers observed as follows:

There is lack of clarity on the obligations of the banks or telecommunication companies that facilitate payments for online transactions. I believe that even in cross border transactions, such transaction facilitators have the ability to trace the payment and even identify the recipients. However, it is not fair for them to wash off their hands and leave the consumer to suffer. The laws should therefore provide clarity on their responsibilities and obligations towards consumers in cross-border transactions.

Losses due to poor packaging: The respondents raised concerns regarding the poor packaging of items shopped online, especially from abroad, which at times leads to delivery of damaged products. This causes losses to the consumer as highlighted below by one of the respondents:

For example, there was a case of a consumer who purchased a wall clock on digital retail platform but on delivery, she noted that the clock was wrapped by the supplier in a soft packaging material and not properly secured for shipment. Upon examining the clock, she established that its glass cover had a crack. However, she could not return the clock because of the high costs involved; so, she suffered the loss.

Delayed deliveries: Some of the respondents indicated that consumers in their markets have complained that items ordered online, at times, take so long to be delivered and, in some cases, the delivery is done long after the purpose of the item is overtaken by events. "The biggest culprits are the domestic platforms that rely on supplying goods imported from overseas or the

platforms which are based abroad but have not established proper logistics and transport mechanism to deliver to various countries”, one the respondents observed.

Misleading information and designs: It was indicated by some of the respondents that there are increased reports about certain websites, apps and other platforms which use designs to trick consumers into engaging in activities or transactions that they do not intend to do. “Some platforms are so frustrating, they are deceptive, time wasting, and trick consumers to spend money unwillingly by playing on someone’s psychology”, one of the respondents remarked. Some of such designs were summarized by one of the respondents as follows:

Some of the designs are used to sneak items into the shopping carts, hide the full charges and fees, limit price comparisons, disguise adverts in the main content or involve bait and switch adverts. Others create diversionary popups which interfere with consumer surfing activities by either hiding information and enforcing pre-selection or even those which are hard to cancel. There are even designs which make it easy to subscribe into a service but difficult to unsubscribe at the end of the period even on a free trial arrangement and some make consumers feel guilty for opting in or out of the subscription. Such designs are misleading, time wasting and lead consumers to losing money or spending on products or services they would not otherwise purchase.

Furthermore, the respondents indicated that certain digital marketplaces display products in a manner that is so attractive than they are normally displayed on the shelves in a physical store and sometimes with somewhat appealing but false product information. This leads to consumers opting to make orders but only to receive goods that are not exactly what they intended to buy as observed below by some of the respondents:

The presentations online make consumers believe that they are buying superior goods than those in the physical stores, but consumers have reported cases where the products received were inferior and not fit for purpose. This problem arises because the goods displayed cannot be physically checked or verified, which makes it difficult for a consumer to reject a product that is delivered different from what was ordered.

Consumers cannot even test the product online before purchasing it, yet some of the defects cannot be detected without testing the product.

You can see a nice dress with the size, color and design that match your test but when you order for it, what gets delivered is either not the color you ordered, or it's not your size or it is just not fit for purpose. But such problems are bound to come up because there are no fitting dress rooms on the platforms and some of the sites do not even reveal the country applicable to the size indicated on the item and as we know, the US size is different from the same size of Europe or China.

4.3 Adequacy of the existing legal and institutional policy framework in COMESA to address digital retail anticompetitive and consumer exploitative conducts.

It was highlighted in 93% of the responses that certain conducts affecting competition and consumers in digital retail pose new challenges to the policy, legal and institutional framework in the COMESA countries which are different from those of physical retail transactions. The respondents cited the major challenges to include jurisdictional limitations, threat to competitiveness of small and medium firms in the region, inadequate applicability of the existing laws and fragmented legal framework.

Jurisdictional limitations: It was observed in 83% of the responses that COMESA countries face jurisdictional challenges in enforcing the competition and consumer protection law on digital retail companies and third-party suppliers that are based abroad. The major challenge highlighted in the study is that the existing laws have no extra territorial scope of application. Thus, it is difficult to apply domestic laws to suppliers that are not physically present in the country or within the region. The complexity of enforcing the law in a foreign country was observed by one of the respondents as follows:

There are complexities with applying the national law against foreign based suppliers because the law has no locus standi (legitimacy or legality) in a foreign country. Thus, the entity with no physical presence in the country may not easily be subjected to the law of the land even where it is served with a notice of investigation. It is even possible for such a global digital platform to circumvent or ignore national laws if its business interests are not likely to be significantly impacted by the case. In addition, pursuing a litigation in a foreign country involves very high legal costs, the authorities in that country may not cooperate and a judgement secured in a foreign territory may not be enforceable domestically.

Inadequacy of the existing legal and institutional framework: It was highlighted in 78% of the respondents that the existing laws in COMESA countries including the market assessment tools are inadequate to: detect, examine, enforce, and address certain digital retail conducts such as autonomous cartels, failure to notify mergers, abuse of market power and consumer protection violations.

Complexities with regulating Autonomous Cartels: The respondents observed that the current legal framework in COMESA may not be able to address autonomous algorithms and transparency driven cartels in which there is no proof of involvement of any human being. In addition, it was highlighted that the authorities in COMESA may not have the resources, advanced technologies and the experts required to apply the necessary assessments.

Limitations in the definition of Market Power: According to the respondents, digital retail platforms are leveraging on their network effects, economies of scale and scope and the ability to collect diverse data and power to engage in multiple or multisided markets to enjoy cross market externalities such as lower marginal costs and flexible pricing structure and get keeper advantages of limiting multi-homing by increasing switching costs. To the respondents, this enabled digital platforms like Facebook, google search engine, Google play store, Apple store, Amazon or Alibaba to achieve significant market power to influence the market even where they do not hold the dominance position as defined in the existing competition laws.

According to the experts, determining dominance becomes complicated where a platform is cross leveraging the effects in one side of the market or in one market to gain benefits on the other side or in the adjacent market, as observed below by one of the respondents:

It is difficult to determine the dominance of the digital retails firms which operate in multiple markets and across the ecosystem, sell at very low or even zero prices and operate across borders. In such a situation, it may not be feasible to confirm that a platform is in a dominant position because the SNNIP may not be applicable and its market share will be so low due to low prices, the relevant product market may not be

suitable because of cross market effects and the geographical market will not be easily delineated to a specific location.

The respondents further noted that while under traditional law, the assessment of the effect of a conduct of a firm is based on its market power to influence the market, the formation and structure of digital platform is different from the traditional brick and mortar firms. It was observed by the respondents that digital platforms operate in multisided markets and across value chains and have a different cost structure that allows them to sell at very low or even zero prices in one market and recoup from other areas. As such and as one respondent observed, “even where some platforms do not possess the requisite market shares, they are able to utilize their sizes, network effects, lock-in effects and technology to influence the market in COMESA”.

Further, the respondents noted that the technologies of the platforms are rapidly and continuously changing which enables them to consolidate their networks effects and scope and as a result, the authorities too have to constantly implement different strategies and update the laws to effectively regulate the subsector.

Inapplicable merger control and abuse of market power thresholds: It was highlighted by the respondents that the merger notification regimes and market power assessments are based on turnover thresholds and market shares respectively as provided for under the existing competition laws in most of the COMESA countries. However, turnover and market share, at times, may not be applicable to a digital retail platform which operates in multiple markets or multisided markets, charging zero prices to a certain group of users and wielding enough market power like that of a dominant player.

As a result, the respondents contended that there are certain platforms which operate in COMESA with low mergers notification thresholds and low requisite market shares but holding a market power position enough to influence competition. Consequently, COMESA authorities, both at national and regional level, have not enforced notification on several mergers that have taken place involving the global digital retail platforms including the Facebook-Instagram in 2012, Facebook-WhatsApp in 2014, Meta-Twitter in 2022 or even the stalled Microsoft-Activism in 2023. In addition, certain conducts that involve abuse of market power by such platforms have also not been handled within the region.

The respondents, thus called for COMESA Member States to start discussions to review the thresholds for merger notification and abuse of market power to include the value of data that is collected by the platforms and number of users in addition to turnovers, as recommended below by one of the respondents:

In digital economies, we need to start thinking about the value of data. For example, if you see a start-up in Kenya with a large customer base being bought at \$500m, when it does not even generate any significant revenues from the consumers, it should be a signal that it is the number of users, consumer data or both that are being traded. The power of a platform derived from the data collected from users and the related network effects to influence and even control the market should also be examined. COMESA countries need to go beyond the market shares and turnovers when measuring market operations and power in digital Markets. It is important that COMESA countries start discussions on the significance of the number of platform users and the value and power a platform derives from consumer data to control the market.

Delineating the relevant market: The challenge of market delineation in digital retail was observed in 89% of the respondents who highlighted that digital retail presents difficulties in defining both the relevant product market or geographical market and in categorizing service providers as either upstream or downstream players in the process of establishing the infringement of the law.

It was observed by the respondents that the theory of harm on abuse of market power to limit competition cannot be adequately applied to digital retail because of the limitation of the definition of the relevant market under the existing laws focuses on the effects a conduct has to the goods or services in question and their related substitutes but not on the other non-related products, which tends to be the case in digital retail. According to the respondents, digital retail platforms can have effects in cross markets and even on noncompetitors in the various markets, as observed below by one of the respondents:

Digital retail platforms have the ability to operate in multisided and multiple markets in that their conducts can affect even suppliers and consumers of non-related products. For example, a platform like google store holds a single market power over several but independent products (apps, games, magazine, movies, music, TV programs, books) and in both sides of the markets. Google, using its android operating system and the Play Store, has significant global control over (i) producers' ability to access users of the products, (ii) access of the users to the products, and (iii) the type of devices required to use the products. Thus, a single conduct of google say of increasing Play Store user charges can lead to increased prices of several products across different markets and affect different consumers and suppliers, all at once.

According to the respondents, while such conducts with cross markets effects would have the impact of dampening the price and reducing competition in the suppliers of similar goods, they fall out the scope of the definition of relevant market in the existing laws and may not be effectively addressed until the laws are amended to capture such practices.

In addition, 39% of the respondents highlighted the inadequacy of the SNNIP test in the digital markets because of the multisided nature of the platforms, zero pricing and ability to operate or even control the market ecosystem. “The SNNIP test itself, as currently applied, is not applicable to zero prices because it is not practical to measure the effect of a small change in price when there no initial price”, one of the respondents observed.

The application of SSNDQ and SSNIC were also considered as a challenge with 82% of the respondents highlighting that these are not specifically provided for in their respective laws and there is limited technical capacity in the institutions to apply them in the assessments. The respondents indicated that the existing laws do not provide for measuring the market power of a company basing on the effect of changes in product quality and characteristics, changes in production costs or the role and value of data, which elements have a significant influence on competition in the digital markets. It was however noted, as commented by one of the respondents that “even if such issues were provided for in the law, they may still be difficult to implement because of the limitations to quantifying the value of data collected by the platforms or changes in quality or costs”.

The definition of the price was also highlighted by the respondents as a challenge noting that whereas suppliers in digital retail have devised other means of exchange, to include personal data, the existing laws still consider the price to be the amount of money that is required and

paid in exchange for a good or service. This, as observed by one of the respondents, “has made it difficult for authorities in COMESA to capture and regulate conducts of platforms like WhatsApp, Twitter, Facebook and google play store which operate at zero prices within the region”.

Threat on local firms: It was highlight by 80% of the respondents that the global digital retail platforms have already gained strong network effects and economies of scale and scope which give them the edge to out compete both the physical and digital startups in the COMESA region. As observed by one of the respondents, “a global digital retail platform with diversified components, has the potential to make it difficult for other players in COMESA, especially the startups to operate competitively”.

Fragmented legal framework: The respondents highlighted the challenge of fragmented legal framework which affects effects regulations on the market. It was observed that some of the COMESA countries have tried to address certain competition and consumer protection digital retail concerns by including related provisions in cyberlaws, as referred to by the respondents, on digital transaction, cyber security, and computer misuse. The respondents observed however that in their countries, the implementors of the cyberlaws are not the traditional competition and consumer protection authorities nor are they given any roles in the enforcement process. This creates a coordination problem and a challenge to addressing comprehensively digital retail competition and consumer protection related violations especially those that are mainstay of the competition and consumer protection authorities as regards mergers, cartels, abuse of dominance and other restrictive business practices, misleading conducts, unconscionable conducts, and sale of unsafe or defective products.

It was further observed that some of the COMESA countries do not even have competition or consumer protection laws and where they exist, they are not harmonized on the scope of application. It was also noted that a number of the Member States have not domesticated or even harmonized their laws with the regional law. According to the respondents this has led to a fragmented policy regime with the region.

Furthermore, it was observed that in most of the laws of the COMESA countries, there are no clear institutional coordination mechanism provided to address issues that have cross cutting effects which would help in not only mitigating the gaps in the individual laws, but also in eliminating haphazard interventions. These observations are summarized by one of the respondents as follows:

The cyberlaws in our country, and I believe generally within the COMESA region, are not implemented by the competition and consumer authority and there are no specific provisions on how to handle cross cutting matters. Further, cyberlaws do not provide for the procedure of investigating and determining infringements as is the case in the mainstream competition and consumer protection laws. This constrains the process of accessing and confirming the occurrence of a breach. Thus, there is a need for a legal process to be provided either in the regulations or rules, otherwise it may be difficult for the sectoral authorities to enforce the laws, even where the conduct is clearly indicated as an offence in the law.

The respondents therefore called for measures to ensure harmonization of the laws, enhancement of institutional arrangements and cooperations on cross-cutting matters. It was

observed that certain digital platforms operate across different markets and sectors, and thus their conducts also affect different laws. "The legal framework should therefore force institutional cooperation on cross cutting matters and if necessary, they should all be collapsed under one roof like in the US where USFTC is mandated to implement several laws with related matters" one of the respondents recommended.

4.4 Whether an individual Member State of COMESA can adequately address cross-border digital retail concerns on competition and consumer protection.

It was highlighted in 73% of the respondents that individually, COMESA countries cannot adequately address digital retail concerns on competition and consumer protection because, while digital retail conducts entail cross border effects, the countries are faced with jurisdictional limitations; unharmonized and fragmented laws across the region; lack of cross border cooperation and coordination frameworks, limitations in inter-state information sharing; small markets with limited power over global digital retail platforms and limited financial and human resource capacities.

The respondents highlighted that many of the digital platforms operating within their markets are based in countries outside their national boundaries or even COMESA, and that the competition and consumer protection authorities in the member countries or the COMESA Competition Commission have no extra territorial jurisdiction. According to the respondents, this situation constrains enforcement of the laws especially where the anticompetitive or consumer infringement conduct by the undertaking is done in a foreign country or in cases where the law governing the contract, or the transaction is of the foreign country. One of the respondents noted

that in such cases, “even where there is a domestic effect of the conduct on the market or the aggrieved consumer is within the country, the local laws may not apply to address the concern holistically”.

In addition, the respondents also observed the lack of regional or international collaboration and sharing of information frameworks on conducts with cross border effect in digital retail which causes jurisdictional dilemma since the state's power is only at national level, as observed by one of the respondents:

It is difficult for individual member states to effectively address cross border digital retail concerns because national laws have no power to regulate entities across borders nor do they establish binding mechanism for cross border collaboration and information sharing. This limits the effective conclusion of an investigation as our legal framework cannot be applied in other jurisdictions.

The lack of competition and consumer protection laws in some of some countries and the existence of unharmonized legal framework in other countries was further highlighted as a limitation for an individual country to be able to address competition and consumer protection challenges in digital retail, as observed below by one of the respondents:

The lack of the relevant laws in some countries and the unharmonized legal framework within the region has led to haphazard and ineffective interventions that cannot effectively address the issues within COMESA because when a conduct is addressed in one country, it persists in another country and its effects will still be felt in the region due to the free trade area arrangement between the countries.

Further, the respondents noted that most of the COMESA countries, individually, constitute small markets that cannot influence or affect the business interests of the global digital platforms. In the regard, as observed by one of the respondents, “platforms like Amazon, Alibaba, Ebay, Google Play Store and Apple Store may even ignore a notice of investigation issued by one of the COMESA countries, because they do not derive significant revenue from that market”. The respondents, however, observed that the COMESA countries as a combined group may pose substantial authority to the global platforms.

In view of these challenges, respondents called for enhancement of the regional legal framework to address jurisdictional limitations, enhance coordination and operate as a one stop center with consolidated resources to address the issues as noted below by one of the respondents:

National laws cannot successfully regulate cross border digital platforms because they do not have the gravitas to compel for example Facebook, Google or amazon to comply. Even if one country managed to do so, with the regime in the other countries being different, the practice with cross border effects may persist in the region. It is COMESA or the African Continental Free Trade Area that may salvage this situation. COMESA needs to come up with one regional framework that provides for ex ante and post ante regulatory regime and around which all member states would have one position. Regional law should provide that when a platform has a certain number of traffic, once it raises a minimum threshold of consumers, it will be considered to have certain powers and must provide certain guarantees.

4.5 Policy measures needed at the regional level to aggregate market power and resources in addressing competition and consumer protection concerns on detail retail.

Policy measures that should be adopted at the regional level to aggregate market power and resources in addressing competition and consumer protection concerns on detail retail were highlighted in 70% of the respondents with a specific call for the review of both the national and regional laws to enhance cooperation and coordination frameworks, capture anti-competitive and consumer protection conducts specific to digital retail, provide for a regional approach to enforcement, provide for joint investigations, enhance capacity for enforcement and advocacy, enhance information sharing, harmonize the laws among COMESA countries and provide for jurisdiction over foreign based operators.

The respondents noted that digital markets are so dynamic and there may be need to review the regional law to address the new and emerging challenges including ‘thresholds for notification and assessment mergers, definition of market and thresholds for dominance, the value of data in a digital transactions and consumer related areas including provision of accurate information on the platforms, fair terms and conditions including return policies, clarity on who is the liable supplier to the consumer, among others. The need to update the regional law to address the current challenges was emphasized as highlighted below by one of the respondents:

Some sections in the COMESA Competition Regulation had not envisaged the changing legal jurisprudence and immerging digital specific challenges and therefore it

needs to be amended to enable the law to capture immerging anticompetitive conducts and consumer exploitative practices prevailing in the sub sector.

Further, the respondents called for the amendments of the regional law to give the COMESA Competition Commission enforcement powers even in situations where the contravention affects two or more members whether or not there is an effect on trade between member states, as highlighted below by one of the respondents:

Digital retail has cross border effects which may not in turn affect the trade between COMESA member states but which, however, cannot easily be addressed at the country level due to the powerful nature of the platforms and jurisdiction limitations. Take for example the Amazon or Google Play Store, may have anticompetitive or consumer exploitative effects to members states but without any direct impact on the trade between the countries. Thus, the regional law should be amended to provide for intervention on extra territorial effects on two or more countries, even where trade between them is not directly affected.

Furthermore, the respondents called for the law regional law to be amended to require digital market players to have a physical presence in the jurisdictions in which they generate turnovers or engage in consumer transactions to enable effective enforcement in the region. As observed by one respondent, “there is need for deliberate provision in the law that will specifically require physical presence of digital retailers to enable the regional authority to enforce compliance by the undertakings irrespective of their base of operation”.

The respondents further emphasized that the amendment of the regional should also provide for information sharing among the member states, involvement of the affected member states in the investigators, involvement of consumer protection association and ensuring greater collaboration of these organizations. “The COMESA Competition Regulations should be amended to enhance information sharing between the member states, provide for joint investigations, greater collaboration of these organizations and enforcement frameworks in digital retail”, one of the respondents recommended.

4.6 Summary of findings

The study sought to collect experiences and perspectives of experts to identify the relevant challenges faced by the COMESA countries; examine the adequacy of their existing legal and institutional policy framework, assess the effectiveness of the market assessment tools; and recommend the policy measures that can be adopted at the regional to address competition and consumer protection concerns with cross border effects in detail retail.

The results have revealed that COMESA countries, like the rest of the world as reflected in the literature review, are faced with digital retail challenges on competition and consumer protection. Notably, the countries are faced with competition concerns relating to, among others: (i) merger control: pre-emptive buyouts, and killer acquisition; (ii) detection of cartels: tacit cartels and hardcore cartels; (iii) abuse of market power and unilateral restraints: difficulties in relevant market delineation, price discrimination, excessive pricing, forced free riding, margin squeeze, access to essential facilities, access to data, predatory pricing, data misuse, self-preferencing and geo-blocking and, (iv) vertical restraints: exclusive or selective distribution, use of MFN conditions, online bans, resale price maintenance, dual pricing, and price comparison restrictions.

The study revealed also that COMESA countries are facing consumer protection concerns in digital retail with a specific highlight of excessive prices; limitation on online verification of product performance; delivery challenges; customer service; product authentication difficulties; invasion of privacy and misuse of personal data; cyber security concerns; product quality; misleading information; delivery challenges; absence of proper dispute settlement mechanisms; complexities in product returns; digital payments failures; and complex non-negotiable terms and conditions.

The findings further reveal that in addition to the above concerns, digital retail poses new legal challenges which are different from those of physical retail transactions in the COMESA countries with a specific highlight of inadequate applicability of the existing laws to digital retail; complexities related to applying the law to extra territorial manufactures and suppliers with no local presence; limitations in the definition of market power and market delineation for digital platforms with strong network effects and operating in multisided or multiple markets; and high legal costs to pursue cases. In addition, it is established that the existing legal framework is unharmonized and fragmented across the region and there are limitations in inter-state information sharing along with limited financial and human resource capacities within the enforcement authorities.

Lastly, the study reveals that due to cross border effects and jurisdictional limitations, an individual country cannot effectively address the identified concerns. Thus, in addition to reviewing their national laws, there is a need to review and enhance the regional law to aggregate power and resources in addressing competition and consumer protection cross border concerns in detail retail.

4.7 Conclusion

As highlighted in the literature review, the findings have revealed that COMESA countries, like the rest of world, are faced with competition and consumer protection challenges in digital retails and that both the national and regional laws need to be enhanced to address the specifics concerns in the subsector. The next chapter provides a detailed discussion on the implication of the findings.

CHAPTER V

DISCUSSION

5.1 Discussion of Results

The findings as presented in Chapter IV provided the perspectives of the experts in COMESA countries specifically from COMESA Competition Commission and authorities of 7 countries of the 21 member states on the implications of the globalizing digital retailing on competition and consumer protection in their countries. This chapter discusses the results and the possible interventions to address the identified challenges.

5.2 Discussion on the specific digital retail competition and consumer protection challenges faced by the COMESA Member States

The findings of study are consistent with the literature particularly with the perspectives of Brusick (2018) and Anderson et al. (2018); Mancini (2019); and Gürkaynak, Durlu and Hagan (2013) that digital retail poses competition and consumer protection challenges to various countries and that reveal that COMESA countries are not exception, in respect to difficulties relating to market determination; merger notification and assessments; cartels; determination of market powers and abuse of dominance, vertical restraints, unilateral restraints and consumer protection violations.

In the context of competition, it is clear from the study that COMESA countries and the region as a whole are faced with digital retail challenges relating to merger control, cartels, vertical restraints, and abuse of market powers along with other unilateral restraints. The situation is heightened by the specific nature of digital retail's ability to apply innovative technologies with

complex algorithms which enable them to gain network effects, strong economies of scale, acquire and benefit from large and diverse data. These unique characteristics enable the platforms to operate across markets or even control the ecosystem and make it not only awfully difficult for new firms to enter the market or even to be outcompeted by the existing players but also easy for them to engage in conducts that have anticompetitive or consumer welfare reducing effects that are difficult to regulate using the conventional legal and policy frameworks. It can be noted however that such powerful operators, if not properly regulated, may limit competition and exploit consumers which in turn may reduce incentives for innovation, diminish productivity and reduce consumer welfare.

Regarding consumer protection, the results indicate that there are certain specific challenges in digital retail faced by COMESA countries that undermine consumer rights which include: infringing terms and conditions; failure to guarantee value for money, misleading and unconscionable conducts, data security and abuse; limitations on return of goods, online payment challenges and inapplicability of the domestical law.

5.3 Discussion on the adequacy of the existing legal and institutional policy framework in COMESA to address digital retail anticompetitive and consumer exploitative conducts.

The results from the primary data are consisted with the literature review which showed that despite the potential of digital retail to transform developing countries into the global economy efficient means to access global markets and earn higher incomes, as emphasized by Terzi, (2016), Okolie & Ojomo, (2020) and Alwahaishi & Amine, (2015), competitiveness challenges continue to pose a challenge to harnessing the potential of digital retail (Alwahaishi & Amine, 2015). The results show that COMESA countries, all of which being developing countries, are

faced with fragmented and weak institutional and legal frameworks which affect effective promotion of competition and protection of consumers in digital retail in the region.

The study findings are consistent with the literature review particularly with the perspective of Alwahaishi & Amine, 2015, that, while most of the competition and consumer protection concerns relating to e-commerce markets may not be specific to the sector, some are likely to be more prevalent in these markets and may require different and nonconventional approaches to detect, capture, and assess in view of the multisided effects, market power peculiarities, effects of algorithms, uniqueness in the cost structure, and the ability to leverage on network effects, ability to value and monetize data, gain economies of scale and scope and develop disruptive innovations.

As highlighted by the respondents, the existing mainstream competition and consumer protection laws are not designed to address some of the above concerns specific to digital retail. A review of the laws of the some of the COMESA countries (Kenya, Zambia, Rwanda, Malawi and Zimbabwe)¹¹ and the regional law of COMESA¹², reveals that the laws are crafted in the traditional manner to regulate offline players on anticompetitive effects and protect consumers with a focus on the conduct of undertakings against either their competitors, consumers, or the players along the value chain of their businesses. However, as highlighted by the respondent, the laws are limited in scope to address some of the anti-competitive or unfair practices of a digital retail platform using its innovative power to gain strong network effects and economies of scale

¹¹ Kenya Competition act, 2010 as amended; Competition and Consumer Protection Act, 2010 of Zambia; Law N°36/2012 OF 21/09/2012 Relating to Competition and Consumer Protection of Rwanda; Competition and Fair-Trading Act, 1998 of Malawi; Consumer Protection Act, 2003 of Malawi; Competition Act Chapter 14:28 of Zimbabwe and Consumer Protection Act [Chapter 14:44] Act 5/2019 of Zimbabwe.

¹² COMESA Competition Regulations, 2014

and scope, operate in multiple or multisided markets and adversely affect businesspersons and consumers that are not necessarily in its value chain or even cause adverse impact to the entire market ecosystem.

Furthermore, the study establishes that enforcement of existing laws of the COMESA countries is largely ex post and may not effectively promote contestability, fairness, innovation, transparency and prevent injury on the market in a timely manner especially on digital retail. It is observed that some of the practices may require ex ante interventions especially merger control; self-preferencing; tying and bundling; MFN and parity agreements; and exclusionary practices including data access, portability, and interoperability. To address this gap, COMESA countries may consider adopting new ex ante regulations to prevent harm before it occurs as done by other jurisdictions such as German¹³, US¹⁴, EU¹⁵, United and Kingdom¹⁶.

Additionally, it is clear from the respondents that the existing laws do not provide for an expansive definition of abuse of market power in digital markets which in many ways manifests differently from the dominance in the offline markets. The tools provided for in the laws cannot be used to effectively assess market delineation as they mainly focus on market shares, price, and one sided market operations which is not always the case for digital retail platforms which, as indicated by Hovenkamp, 2016, at times do operate in multiple and multisided markets giving them the ability to cross leverage costs between products and markets by selling some products at very low or even zero prices in one market and the subsidizing with higher prices in other

¹³ Refer to Competition Act, 10th Amendment.

¹⁴ Refer to platform Competition and Opportunity Act of 2021, Ending Platform Monopolies Act, 2021-2022 and Augmenting Compatibility and Competition by Enabling Service Switching Act of 2021

¹⁵ Refer to Digital Markets Act, Regulation (EU) 2022/1925

¹⁶ Refer to UK Digital Markets Taskforce and Competition and Markets Authority

markets. This situation presents difficulties to determine the market share or even to apply SNNIP tests as substitutability and price change effects may not always be applicable and the other tools that may be relevant to digital retail markets such as SSNDQ, SSNIC are not provided for in most of the existing laws in COMESA. Moreover, it may be difficult to apply the existing laws to determine the market share without putting into consideration, as indicated by Mäger and Neideck, 2018, the power of network effects, the value of data to the platforms, lock-in-effects and general structure of the platform. Such limitations constrain the abilities of the authorities to effectively regulate abuse of market power and apply merger control regime on the digital markets.

Moreso, technical and human capacity challenges in the mandated authorities were also highlighted as one of the major constraints to conducting comprehensive assessments in digital retail especially in relation to merger control, determining the relevant market, detecting cartels, access to data for evidence and verifying the complex algorithms.

In the context of consumer protection, the results indicate that there is need for the laws to require digital operators to provide legal means to investigate and inspect algorithms where it so requires and regulate unjustifiable disclaimers on liability in connection with the quality or condition of goods. COMESA countries may need to borrow a leaf from the laws of some other

jurisdictions including USA¹⁷, EU¹⁸, Korea¹⁹, Singapore²⁰, China²¹, and India²² which have established specific laws to address such concerns and enhance protection of consumers in digital retail in their respective markets.

It is noted that while cyber laws of the COMESA countries²³ would have the effect of protecting consumers and the market, they do not entail the guarantees and empowerment that the mainstream competition and consumer laws normally provide to the market and the consumers. For example, the existing cyber laws of the COMESA countries do not layout the procedures which any aggrieved undertaking or consumer can follow to get redress or even have the anti-competitive or the unfair trade practice addressed. They also do not provide for indicators of occurrence and procedures to be followed to investigate the conduct. It may be difficult, therefore, for the authorities implementing such laws to detect and investigate the conduct without proper procedures to be followed.

¹⁷ Federal Trade Commission Improvements Act of 1980, Restore Online Shoppers' Confidence Act of 2010, Child Online Protection Act of 1998, Consumer review fairness Act of 2023, Telemarketing and Consumer Fraud and Abuse Prevention Act of 2013, Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, and Fraud and Scam Reduction Act of 2022,

¹⁸ Directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts, Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) and Directive 2019/771 of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC

¹⁹ Consumer Protection in Electronic Commerce of Korea 2002 as amend in 2016.

²⁰ The Consumer Protection (Fair Trading) Act 2003

²¹ People's Republic of China Law on Protection of the Rights and Interests of Consumers, 1993 as amended in 2009 and 2013.

²² Consumer Protection (E-Commerce) Rules, 2020 of India

²³ The Electronic Communications and Transactions Act, 2021 of Zambia, Electronic Transactions and Cyber Security Act, 2016 of Malawi, The Electronics Transactions Act, 2011 of Uganda, Computer misuse act, 2011 of Uganda, Data Protection and Privacy Act, 2019, of Uganda, Computer Misuse and Cybercrimes Act 2028, of Kenya, Electronic Communications and Transactions Act 2014 of Kenya and the Law Governing Information and communication Technologies, n°24/2016 of 18/06/2016, of Rwanda.

5.4 Discussion on whether an individual COMESA country can adequately address cross border digital retail concerns on competition and consumer protection.

Having laws that are different in scope and jurisdictional coverage creates a fragmented regulatory regime within COMESA and as highlighted by Jebelli, 2021, it may create uncertainty, increase costs of compliance, and involve gaps that may be exploited by the platform operators. In addition, the results highlight that individual COMESA countries may not be able to effectively address digital retail concerns due to jurisdictional limitations on cross-border effects. Thus, and as proposed by the respondents, there is need for an effective regional law to ensure uniform regulation across the region, consolidate resources in the regional authority and empower it with sufficient mandate to enforce the law on digital retail with clear remedies for noncompliance and clear institutional coordination mechanisms, tools, and human resource capacities.

5.5 Discussion on the policy measures needed at the regional level to aggregate market power and resources in addressing competition and consumer protection concerns on detail retail.

As advanced by Gal, 2009, the results clearly highlight the need for policy measures to be adopted at the regional level to aggregate market power and resources to address competition and consumer protection jurisdictional concerns. It can be observed from the results that there is need for reviewing the regional and national laws to address digital specific concerns, particularly to:

- Enhance the cooperation and coordination frameworks with regional and national competition and consumer protection regulators,

- Adopt a specific regional regulation or amend the COMESA Competition Regulations and guidelines to capture anti-competitive and consumer protection conducts specific to digital retail covering both ex and post ante effects,
- Define market power in relation to digital markets putting into consideration the cost structure of the platforms, the value data to the platforms, network effects, lock-in effects, and the effects of operating in multiple or across markets, among others,
- Regulate abuse of market power even in circumstances where market share is not applicable; incorporate tools to easily identify contravention in the digital markets with a focus on those with cross border effects,
- Capture cartels that might be computer driven,
- Capture mergers that may have their object or effect of killing or preventing competition,
- Provide for joint investigations in all affected countries,
- Enhance capacity by developing a continuous training program for case handlers to build capacity for enforcement and advocacy,
- Enhance information sharing with all national competition authorities,
- Provide for harmonization of the laws among COMESA countries,
- Require digital market players to have physical presence in their jurisdiction if they are generating turnover from it or at least have a regional office, and
- Equip and retool the regional authority to be able to conduct complex investigations in digital markets.

CHAPTER VI

CONCLUSIONS AND RECOMMENDATIONS

6.1 Summary

The study has revealed that digital retail entails specific characteristics which enable digital platforms to gain market power, winner-takes-all abilities while leveraging on network effects, lock-in effects and economies of scale and scope. It is observed that such characteristics can facilitate market concentration and reduce contestation with far reaching effects on the market ecosystem especially where a digital platform is operating in multiple or multisided markets or across the market ecosystem.

The study has further revealed that COMESA Countries are faced with anticompetitive practices and conducts that lower consumer welfare in digital retail with a specific highlight of (i) merger control challenges due to multisided nature of platform, challenges in market delineation, limitation of applying thresholds and practices such as killer acquisitions and preemptive buyouts; (ii) difficulties in detecting cartels (hardcore, hub-and-spoke and tacit cartels) due to use of complex algorithms and increased transparency; (iii) vertical restraints: exclusive and selective distribution models, RPM and dual pricing, online sales bans, online marketplace bans, price comparison tool bans and MFN clauses; (iv) Unilateral conduct: Abuse of market power, limitations on market definition and measuring market power, predatory pricing, Refusal to deal, tying or bundling, margin squeeze, forced free-riding, discriminatory leveraging and exploitative practices; and (v) consumer protection concerns including misleading conduct, unfair terms, security and misuse of personal data, fraud and scams, limitation on returns, payment concerns, non-disclosure of key information, and misleading designs, among others.

The study has also established that the existing mainstream laws and tools of the COMESA countries on competition and consumer protection do not provide for needed ex ante interventions and they are not effective in addressing the specific digital retail concerns especially in relation to the definition of abuse of market; application of the necessary market tests and market share assessments in the delineation of the relevant market, jurisdictional limitations, and conducts which reinforce barriers to entry and hinder contestation.

The study further establishes that some of the COMESA countries that have tried to regulate competition and consumer concerns in digital markets, have included relevant provisions mainly in the digital transaction laws which are implemented by agencies under the Ministries of Communication and Information Technology and not the authorities that are traditionally mandated to encourage and promote competition and/or ensure consumer protection in the country. This poses not only coordination and dual mandates challenges, but it also limits comprehensive interventions considering that the overarching provisions with clear mechanism for detection, reporting and investigation of related conducts are entrenched in the traditional competition and consumer protection laws. It is further noted that even the digital transaction laws are also not comprehensive enough to address the concerns specific to digital markets and therefore certain conducts may go unregulated with far reaching negative effects on the market.

6.2 Implications

COMESA countries, all being developing countries, may need to pay attention to the specific challenges in digital retail because of the platforms' ability to leverage on digital technologies, gain market power and engage in conducts that can affect the entire market ecosystem which, if not well regulated, may pose greater challenges to competitiveness and growth of markets and

survival of domestic startups, both online and offline. This situation, if not addressed, may hinder contestation, and aggravate the plight of domestic firms who are already faced with other constraints relating to institutional, infrastructure and small markets limitations.

It can be observed, as highlighted by Knudsen et al, 202, that increased digitalization can fundamentally alter market structures by heightening entry barriers, changing the key competitive parameters in a market, and paving way for the creation of new rivals and new substitutes. Therefore, if such challenges are not addressed, COMESA countries may risk having powerful global companies to enter in their market and leverage their market power to limit entry and competitiveness of domestic companies; both digital and brick-and-mortar firms in addition to reducing consumer welfare in the region.

The existing laws may need to be reviewed to capture the specific characteristics and harms of digital retail to broaden the scope and incorporate the relevant tools which can be used to effectively assess and regulate the subsector. Institutional strengthening and enhanced collaboration and coordination are vital if the countries are to achieve effective regulation of the digital markets.

The existence of the COMESA Competition Regulations, 2004 is a plus to COMESA in as far as addressing cross-border effects and jurisdictional limitations of the member countries is concerned. However, there may be need for the Regulations to be reviewed also to provide for effective management of the digital retail concerns with cross-border dimension.

In general, there is need to review the laws, both at the national and regional levels, to provide for clear definitions, scope, relevant and specific provisions, and tools on digital retail with a view to:

- Addressing conducts that affect the entire market ecosystem focusing on practices that reinforce barriers to entry, pose multisided effects and reduce contestation thereby increasing market concentration,
- Expounding on the definitions of market power, relevant markets and abuse of market power and in determining abuse of market power, provide for the application of other tests such as SSNDQ and SSNIC on top of SNNIP test, other consideration such as network effects, value of data through monetization, innovation effects on competition, the cost and pricing structure of a platform and the effects of interdependences between the targeted side and other sides of the platform,
- Providing for ex ante interventions to prevent harm by the powerful firms before it occurs,
- Strengthening the law to capture explicitly anticompetitive conducts that are specific to digital retail in relation to merger control, cartels, horizontal and vertical restraints,
- Strengthening the law to capture consumer protection violations that are specific to digital retail in relation to misleading information, unfair terms and conditions, security and misuse of personal data, fraud and scams, limitation on returns, payment concerns, non-disclosure of key information, and misleading designs, among others,

- Strengthening institutional capacity to provide for mechanism to detect and analyze practices driven by digital technologies through the application of complex algorithms and artificial intelligent programs, and
- Providing for inter institutional coordination both at the domestic and regional level to ensure comprehensive interventions and eliminate fragmentation that can be exploited by the undertaking in the market.

6.3 Recommendations for Future Research

Due to resource and time constraints, data was collected in agencies with the overall mandate of implementing competition and consumer protection laws in the COMESA countries, both at the national and regional level, and as such, the findings do not include sector specific concerns.

There is a need therefore for further research to identify the specific sectoral digital retail challenges which COMESA countries may be experiencing.

Further, the study collected and analyzed perspectives of experts in competition and consumer protection authorities in COMESA and did not target to establish the magnitude of the impact of the identified challenges to the market. Further research can study the extent to which the market, companies and consumers in COMESA countries are affected by the concerns highlighted in the study.

Lastly, human resource capacity gaps in the institutions were highlighted in the responses as one of the key challenges to assessing competition and consumer protection practices in digital retail. Knowledge gaps on the subject were in fact exhibited in the responses as one of the factors that prevented a few of the respondents from providing information on some of the questions. The

study, however, was not able to identify the specific human resource gaps existing in the agencies. Further research could study this matter.

6.4 Conclusion

The main objective of the study was to determine the specific policy options and implementation approaches that COMESA countries can adopt to address the multi-jurisdictional limitations of digital retail to promote effective competition and ensure consumer welfare in the region by conducting a comprehensive review of the literature, collecting, and assessing data on the challenges and recommend policies to address them. To achieve this objective, the study sought to identify the relevant challenges faced by the COMESA countries; examine the adequacy of the existing legal and institutional policy framework including the effectiveness of the market assessment tools; and recommend the policy measures that can be adopted at the regional level to address competition and consumer protection concerns with cross border effects in detail retail.

The study has provided a comprehensive review of the literature on digital retail challenges on competition and consumer protection which revealed that digital retail entails specific characteristics that enable platforms to gain market power, winner-takes-all effects by leveraging on network effects, lock-in effects and economies of scale and scope. It is observed that these characteristics can lead to not only to increased market concentration but also operator market power with far reaching effects on the market ecosystem especially where a digital platform is operating in multiple or multisided markets. The study has also highlighted the competition and consumer protection challenges associated with digital retail and driven by technology through the use of artificial intelligence and complex algorithms.

The results from data collection identified and confirmed that COMESA countries face digital retail competition and consumer protection concerns. Based on the findings, recommendations to address such challenges were generated. It is therefore the hope of the researcher that the study will advance knowledge and contribute to related works in academia, businesses, consumers, and policy makers.

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APPENDIX A
SURVEY COVER LETTER

To:.....

Date.....

Dear Sir/Madam

REQUEST TO FILL A QUESTIONNAIRE ON THE IMPLICATIONS OF THE GLOBALIZING DIGITAL RETAILING ON COMPETITION AND CONSUMER PROTECTION IN COMESA COUNTRIES

It is with great pleasure that I Steven Kamukama invites you to participate as a respondent in the study on the above subject. I am conducting this study to write my dissertation in fulfilment of the requirements for the Degree of Doctor of Business Administration by the Swiss School of Business and Management.

The main goal of this research is to establish competition and consumer protection policy options that countries in COMESA can adopt to address digital retail related challenges to optimize the potential of ecommerce.

I undertake to apply ethical principles to protect your rights, anonymity, and confidentiality from any legal or social harm. Further, I will not plagiarize or engage in conduct that may jeopardize your integrity and status.

This is, therefore, to request you to freely participate in the research by filling in the questionnaire on the link provided and submit online. In case you want to withdraw from the research at any time, you are free to do so without having to make any justifications. Your email is needed to enable me share with you the results of the study. Your email will be kept confidential and used only for the purposes stated herein.

Your response will be highly appreciated.

Regards


Steven Kamukama
Researcher

To:.....

Date.....

Dear Sir/Madam

REQUEST TO PARTICIPATE IN A FACE-TO-FACE INTERVIEW ON THE IMPLICATIONS OF THE GLOBALIZING DIGITAL RETAILING ON COMPETITION AND CONSUMER PROTECTION IN COMESA COUNTRIES

It is with great pleasure that I Steven Kamukama invites you to participate as a respondent in the study on the above subject. I am conducting this study to write my dissertation in fulfilment of the requirements for the Degree of Doctor of Business Administration by the Swiss School of Business and Management.

The main goal of this research is to establish the competition and consumer protection policy options that countries in COMESA can adopt to address digital retail related challenges to optimize the potential of ecommerce.

I undertake to apply ethical principles to protect your rights, anonymity, and confidentiality from any legal or social harm. Further, I will not plagiarize or engage in conduct that may jeopardize your integrity and status.

This is, therefore, to request you to freely participate in the face-to-face interview with the researcher on the subject. In case you want to withdraw from the research at any time, you are free to do so without having to make any justifications. Your email is needed to enable me share with you the results of the study. Your email will be kept confidential and used only for the purposes stated herein.

Your response will be highly appreciated.

Regards


Steven Kamukama
Researcher

APPENDIX B

INFORMED CONSENT: SAMPLE LETTER

To:.....

Date.....

.....

Dear Sir/Madam

**CONSENT TO PARTICIPATE AS RESPONDENT IN THE STUDY ON THE
IMPLICATIONS OF THE GLOBALIZING DIGITAL RETAILING ON COMPETITION
AND CONSUMER PROTECTION IN COMESA COUNTRIES**

I provides my consent to participate as a respondent in the study on the above subject.

I understand that goal of this research is to establish the competition and consumer protection policy options that countries in COMESA can adopt to address digital retail related challenges to optimize the potential of ecommerce.

I have been assured that the researcher will apply ethical principles to protect my rights, anonymity, and confidentiality from any legal or social harm and that he will not plagiarize or engage in conduct that may jeopardize my integrity and status.

I have also been assured that in case I want to withdraw from the research at any time, I am free to do so without having to make any justifications. Further I have been assured that my email will be kept confidential and used only for the purposes sharing with me the results of the study.

.....

Name of the Respondent
Respondent

APPENDIX C

INTERVIEW GUIDING QUESTIONS

IMPLICATIONS OF THE GLOBALIZING DIGITAL RETAILING ON COMPETITION AND CONSUMER PROTECTION IN COMESA COUNTRIES

Section 1: Competition and Consumer Protection Concerns in Digital Retail

This section assesses whether your country or COMESA as a region is faced with abuse of market power, other anti-competitive practices and consumer violations by digital platforms and the measures in place or needed to address such concerns.

1. Which merger control issues are you faced with in your jurisdiction?
2. Which cartel issues in digital retail markets do you experience in your jurisdiction?
3. Which vertical digital retail restraints do you consider prevent in the market under your jurisdiction?
4. Which unilateral digital retail restraints do you consider prevent in the market under your jurisdiction?
5. What digital retail consumer protection concerns do you experience in digital retail and which ones are so prevent in the market under your jurisdiction?
6. The competition and consumer protection digital retail concerns highlighted above, what new legal challenges do they pose different from those of physical retail transactions in your jurisdiction?

7. Which jurisdictional challenges does your country face in enforcing the law on the above competition and consumer protection in digital retail?

Section 2: Efficacy of the Legal and Policy Framework and Assessment Tools to Address Competition and Consumer Protection Concerns of Digital Retail

This section assesses whether your country or region has in place adequate legal and policy framework to address competition and consumer protection concerns relating to digital retail.

8. What competition and consumer protection legal and policy concerns does digital retail pose to your country or COMESA Member States in general?
9. What aspects of the existing legal framework and the market assessment tools do you believe are inadequate to detect, examine, enforce, and address the digital retail competition and consumer protection within your jurisdiction?
10. In assessing market power of a digital retail platform, how does your organization put into consideration network effects, cost, pricing structure, interdependence of multiple sided platforms?
11. How feasible is it under your law to apply to digital platform market power tests such as Small but Significant Non-transitory Increase in Prices (SNNIP), Small but significant non-transitory decrease in quality test (SSNDQ), Small but significant non-transitory increase in cost test (SSNIC)?
12. Which consideration does your organization have regarding the number of subscribers or the monetization of data in the assessment of market power?

13. How has your organisation handled any multi sided digital platforms with strong network effects and significant market power trying to leverage their power into adjacent markets in your jurisdiction?
14. Digital platform while using autonomous and complex machine algorithms can easily gather data on competition, dynamically and frequently modify prices, make marketing strategies for their products as frequently as daily and may also make collusive decisions independent of any human decision making, how is the law under your jurisdiction applicable to such situations?
15. In your opinion, how does the legal framework of your country provide digital consumers, the same level of protection afforded to offline consumers?

Section 3: Policy needs to deal with cross border digital retail concerns on competition and consumer protection.

This section assesses whether an individual COMESA Member State can adequately deal with digital retail cross border concerns on competition and consumer protection and whether, there is a need for a regional policy framework.

16. In your own opinion, how is it difficult for any individual Member State of COMESA to effectively address cross border digital retail concerns on competition and consumer protection?
17. What would you say about the adequacy of the regional COMESA Competition Regulations in addressing cross border concerns in digital retail?

18. What specific policy measures would you recommend for adoption at the COMESA level to aggregate market power and resources to address competition and consumer protection cross border effects in detail retail?