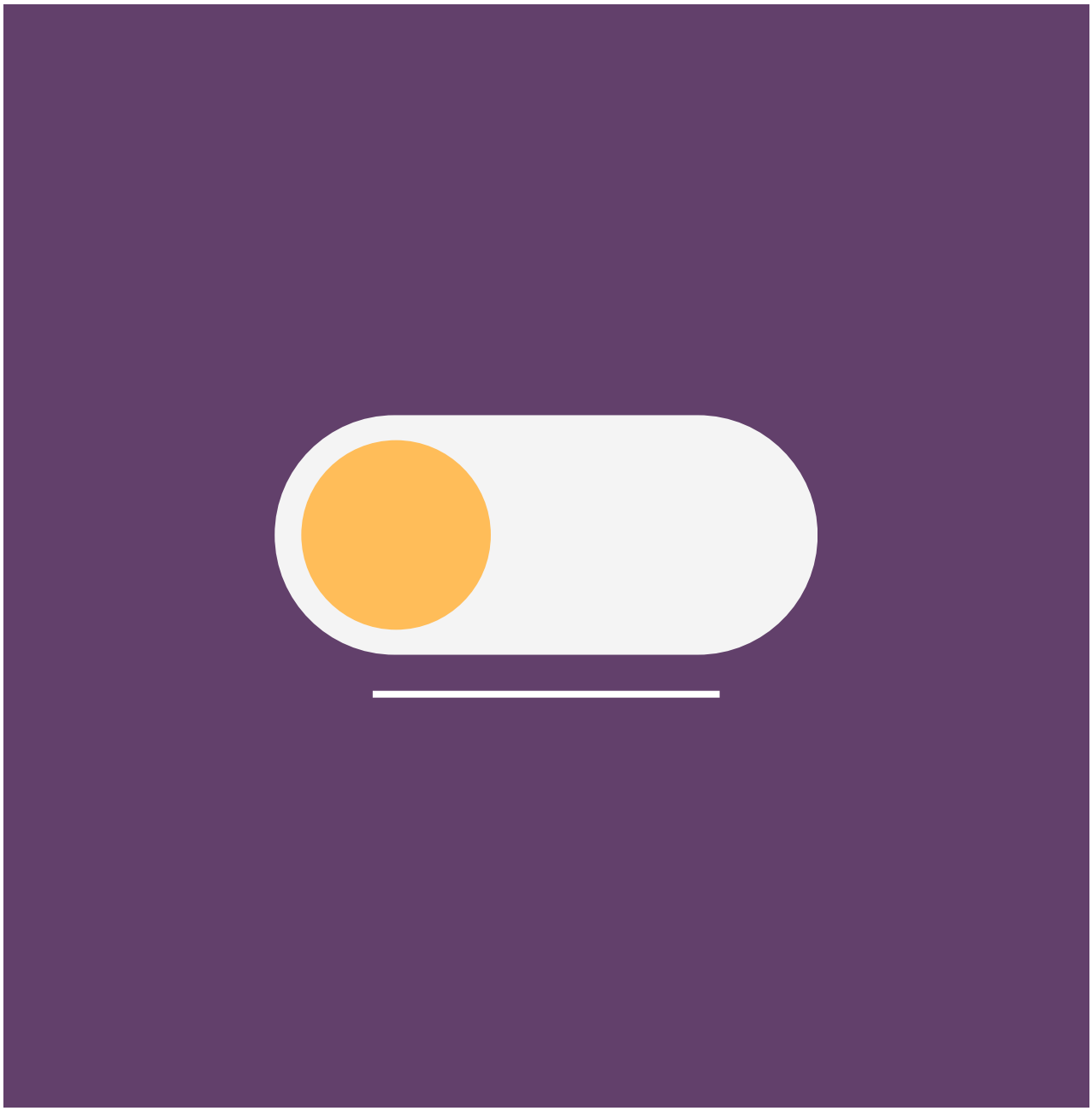
sarvada



EXAMINING THE DIGITAL COMPETITION BILL 2024

CONTENTS

EXECUTIVE SUMMARY

India stands at the forefront of a digital revolution, with an unprecedented expansion in its digital markets. To navigate this dynamic landscape, the **Digital Competition Bill, 2024** ("**DCB**") emerges as a pioneering legislative effort, poised to reshape the regulatory framework.

The Report of the Committee on Digital Competition Law indicates that the reasoning behind introduction of an ex-ante framework in India is two-fold,

- rising concern about entrenched market power of few players in digital platform markets,
- lack of effectiveness in terms of timely enforcement of the existing competition law enforcement alone.

It is expected that enforcement of an ex-ante law will offer relatively smaller players a fair market turf for competition, devoid of unfair advantages from dominant players, which will foster innovation, lowers entry barriers, and cultivate a dynamic business ecosystem, empowering them to flourish and fuel economic growth.

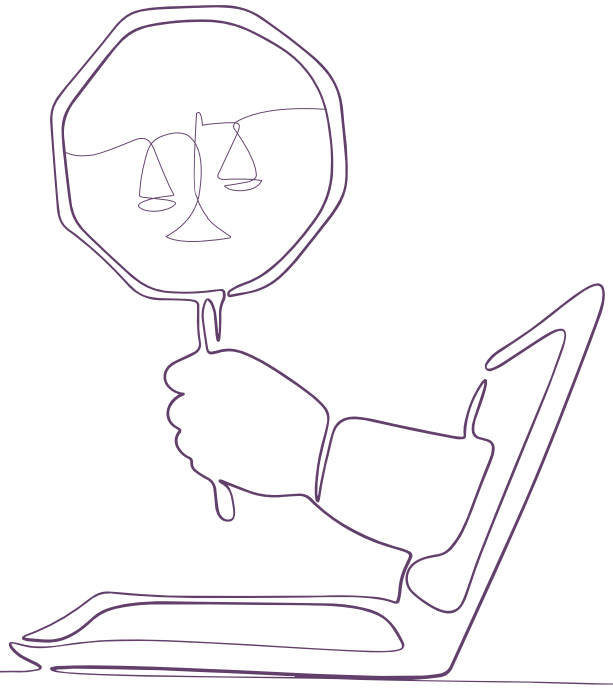
However, along with appreciation of the legislative attempt, there are also numerous concerns. Some view the ex-ante framework as excessive regulation that could potentially restrict innovation and impact consumer products and services negatively. Others have expressed concerns about the bill imposing a significant compliance burden on entities, with stringent obligations that do not adequately acknowledge the potential pro-competitive benefits. While the concerns may prima facie sound compelling, the issue with these concerns is the failure to acknowledge the distinctive nature and economics of digital markets, including the rapid evolution and complex dynamics, or the critical importance of timely intervention in addressing potential issues. It is clearly evident by numerous cases that despite an active competition law enforcement, digital markets have spawned entities of unparalleled size and significance, and their power continues to increase over time, making them susceptible to anti-competitive conducts.

Thus, the fundamental rationale behind the implementation of an ex-ante framework is to confront the hegemony wielded by a handful of major digital platforms that have entrenched themselves in the position of market dominance. It does not seek to regulate markets where healthy competition already exists, nor does it impose additional compliance burden on relatively smaller entities. It aims to mandate certain prohibitive and mandatory conducts for large platforms, *(which should have been self-adhered to under the **Competition Act, 2002** under the **FRAND** terms)* in order to foster a free and open market conducive to innovation and growth.

In this context, it is particular to note that under the **Digital Markets Act** ("**DMA**"), the **European Commission** ("**EC**") has recognized anti-competitive practices similar to **DCB** and has subsequently recognized six digital gatekeepers. These gatekeepers submitted their compliance reports, as obligated, however, the European Commission opened non-compliance investigations into Alphabet, Apple, Meta and Amazon. This demonstrates how streamlined approach to enforcement can be achieved with a channel for due process.

The practices observed in the West serve as a stark example for India, highlighting areas where attention is required and further fortifies the need for ex ante framework in India. The very fact that the **EC** could launch a review of non-compliance was because they have incorporated the ex-ante framework in their laws. A corollary in under the existing laws will consume a lot of time *(for example, initiation of non-compliance proceeding under **S. 42 of Competition Act, 2002** only after a final order under **S.27 of Competition Act, 2002**)*. The fulfillment of the ex-ante framework's objectives hinges on the designated entities adhering to compliance not just in words, but also in actions and principles.

The present paper attempts to underscore **DCB**'s critical role in shaping the future of India's digital markets, while highlighting the concerns for having a streamlined and focused approach, given the constrained resources of the regulator. It also attempts to provide alternate rationale for the critics of the law while appreciating the legitimate concerns of the market.



1 INTRODUCTION

In the recent years, India has emerged as one of the largest and most rapidly expanding digital markets worldwide. To stay aligned with the evolving market dynamics, the legislature has been actively introducing developments in the regulatory apparatus. In the same lines, the Report of the Committee on **Digital Competition Law** ("**CDCL Report**") was released by the Ministry of Corporate Affairs on **March 12th, 2024**, sparking widespread debate on whether Indian digital markets require new legislation.

A. SETTING THE OBJECTIVE

1. The prospect of increased governmental intervention has stirred the market conditions bombarding the internet with numerous views on questions such as ***why do we need a new law for digital markets? Or what distinguishes digital markets from traditional brick-and-mortar markets? Or why are we specifically focusing on digital markets when there exist many anti-competitive markets? Or how are traditional tools of regulatory scrutiny inefficient for the digital market?*** Additionally, there are concerns about how the added compliance burden will benefit the growth of Indian tech and consumer welfare, and whether, instead of jumping on the bandwagon, India should have prioritized strengthening its existing ex-post mechanisms.

2. The paper is an attempt to objectively examine the **DCB** and contribute to the ongoing discussion. Before delving into the merits of **DCB**, the aim is to look into the objective behind introduction of the new legislation, the position of smaller players in the Indian digital markets and deliberate on whether there are any shortcomings within the current antitrust toolkit which necessitate a comprehensive overhaul of the competition law to slay the Big Tech leviathan.

3. There is no doubt in the transformative potential of the internet, from fostering innovation to expanding economic opportunities, digital ecosystems have offered numerous benefits. The digital market has itself evidenced that in free and open markets, the burst of innovation resulted in Facebook replacing MySpace in early 2000s or Google search taking over the prominence of Yahoo search and so on. Therefore, the markets have been operating ever since with the ideology that the system must be fair and equitable to ensure a win-win situation for all stakeholders involved. If this balance is disrupted and the system benefits only a select few, the old risk of concentration and its associated problems will emerge.

4. It has been seen that currently certain digital platforms control the access to critical aspects of digital markets, where they serve as "enablers" of innovation by providing common interfaces through which businesses can connect their products to critical masses of consumers.[1] Therefore, despite an active competition law enforcement in place, the dependence of end users and business users and subsequent expansion in recent years has led to "winner takes all" scenarios, spawning entities of unparalleled size and significance, whose power continues to increase over time.

---

[1] Tim Wu, Taking Innovation Seriously: Antitrust Enforcement If Innovation Mattered Most, 78 ANTITRUST L.J. 313, 321 (2012)

5. Numerous global antitrust cases indicate that these multi-sided digital platforms impose rules and institutions that reach beyond the pure matching service and shape the functioning of the marketplace and, potentially, the relationship between the various platform sides, e.g. by regulating access to and exclusion from the platform, by regulating the way in which sellers can present their offers, the data and APIs they can access, setting up grading systems, etc. *For instance*, Apple App Store and Google Play Store impose rules that shape the marketplace or Facebook's control over its news feed algorithm, determining how content is prioritized. Therefore, we are currently dealing with digital platform bottleneck monopolists whose rule-setting and "market design" dictate the nature of competition. As the saying goes, absolute power corrupts absolutely, these gatekeepers/enablers are prone to anti-competitive conducts (evidenced by the various ongoing investigations across jurisdictions) leading to unfairness, arbitrariness, and opacity, thus, necessitating intervention to ensure a level playing field.

B. SCHEME OF THE PRESENT LAW AND THE NEED FOR NEW

6. **The Competition Act, 2002 ("2002 Act")** represents the ex-post mechanism, where the **Competition Commission of India** ("**CCI**"/ "Commission") steps in after anti-competitive conduct has already occurred. While suitable for conventional markets, this framework is becoming less pertinent in today's swiftly evolving digital sphere. This was recognized in **Parliamentary Committee Report** in **December 2022** emphasizing on the importance of bringing an ex-ante enforcement mechanism to complement the present ex-post enforcement,[2] followed by the **CDCL Report** and the **DCB** in **March 2024.**

7. The **DCB** aims to regulate digital enterprises with a significant presence in providing certain core digital services in India, called as **Systemically Significant Digital Enterprises ("SSDE"),** and their group enterprises providing 'core digital services' as **Associate Digital Enterprises("ADE").** The **DCB** requires self-evaluation by enterprises to determine whether the thresholds are met, and to report the evaluation to the **CCI,** post which they are required to adhere to certain obligations.

8. It is particular to note that along with principles of fairness and contestability from the traditional competition law, an additional principle of the **DCB** is "transparency". Although it is not denied that transparency is an inherit feature of fairness, an express mention by the legislatures re-emphasizes the need of transparency in digital markets. The lack of information and understanding of the

[2] 53rd Standing Committee on Finance, Anti-Competitive Practices by Big Tech Companies (2022).

drivers of digital markets is also a key reason for the introduction of ex ante regulations, which has been duly recognized in the **DCB.**

9. It is crucial to highlight here that the primary aim of **DCB** is to regulate **SSDE**s and to prevent them from certain codified anti-competitive conducts. The regulation is not designed to intervene in markets where multiple players operate without any one entity holding significant power. Hence, concerns that players in competitive markets will be impacted are unfounded.

C. LAYOUT OF THE PAPER

10. With the foregoing background and principles in mind, we procced with:

(i) **Part II** which aims to understand the peculiar characteristics of digital markets, what sets them apart from the traditional markets and why despite the existence of ex-post regulations, competition within digital markets has not fostered the growth of smaller entities.

(ii) **Part III** seeks to examine global trends in competition law, as the pages reveal the dominance of a select few large digital enterprises in every digital market. These entities have a history of antitrust violations, prompting growing concern among competition authorities worldwide. By analyzing the approaches taken by various jurisdictions and their underlying rationale, we gain valuable insights into safeguarding the ethos of competition law.

(iii) **Part IV** examines the necessity of implementing an ex-ante framework in India, exploring the shortcomings of the existing ex-post framework concerning digital markets. It provides a comparative analysis of current anti-competitive practices, highlighting the need for mandatory and prohibitory obligations on **SSDE**s.

(iv) **Part V** addresses concerns regarding the **DCB**, specifically focusing on issues such as the lower quantitative threshold and the Competition Commission of India's resource constraints. It also stresses on the streamlined approach and need to narrow down the list of core digital services for a regulatory start. These concerns are crucial to address as they could potentially undermine the objectives of the **DCB**. It emphasizes the importance of the committee taking these factors into consideration before the law is enacted.

(v) **Part VI** strives to address and alleviate the concerns voiced by critics, offering comprehensive explanations and rebuttals to address any perceived shortcomings.

2

CHARACTERISTICS OF **DIGITAL MARKETS**

We are creating a world that all may enter without privilege or prejudice accorded by race, economic power, military force, or station of birth.

– JOHN PERRY BARLOW

11. Going back to the early days of the internet, it was envisioned as a tool to create a fairer world with a promise that distributed computing and communication networks would offer equal access to digital information and economic opportunities for everyone.[3] John Perry Barlow's statement is prime evidence of the same, where he despises government intervention on the pretext of cyberspace being "*the new home of mind*" and internet being a "*world that all may enter without privilege or prejudice accorded by race, economic power, military force, or station of birth*"[4] Ironically, the platform dynamics have led to a concentration of economic and social activity in a small number of large and powerful companies. With the unique features of digital markets, dependence on platforms results in customer lock-in and winner-take-all outcomes, hindering healthy competition, thus necessitating appropriate regulations, as has been described below.

12. The **multi-sided digital platforms** provide services for multiple users that interact through the platform and comprise an interdependent network ecosystem. *For example*, Google offers search services to users and advertising opportunities to businesses aiming to reach these users. Similarly, Google and Apple provide operating systems and app stores that allow developers to provide apps to users. Facebook and Twitter serve as platforms for user communication and for advertisers to deliver targeted ads.

13. These platforms **leverage network effects**, where an increase in the user base enhances the platform's value to businesses and other users. For instance, in the case of e-commerce platforms, wherein the number of consumers increase as the number of sellers providing different and more variety of goods increase, which consequently choose the platform to sell products because of access to more consumers. This positive feedback loop is a consequence of the interdependence of the different sides of the market on each other in a multi-sided market.

14. Such positive feedback loop leads to the entrenchment of a dominant entity's power. Consumers in the market collectively may choose to adopt a specific firm's product or technology, potentially resulting in market tipping which grants the chosen firm a monopolistic advantage, making it challenging for competitors to enter the market or compete effectively. This results in winner-take-all market outcomes. Thus, digital markets often tip quickly, and one or two winners or leading players emerge in a short span of time.

---

[3] A. Gawer. Digital platforms and ecosystems: remarks on the dominant organizational forms of the digital age. INNOVATION, Volume 24 Issue 1, August 2021, Pages110-124. [1] https://doi.org/10.1080/14479338.2021.1965888

[4] John Perry Barlow, A Declaration of the Independence of Cyberspace, Accessible at: A Declaration of the Independence of Cyberspace | Electronic Frontier Foundation (eff.org)

15. With such strong network effects in play, users' factor in financial costs and the potential loss of data when contemplating a **switch to an alternative good or service.** Therefore, a breakthrough change is essential to capture user attention, which requires substantial resources or else the users prefer to stick to a platform.

16. This complexity poses challenges for antitrust enforcement. What might appear to be dominance in the platform's core product market (e.g., search or social networking) may translate indirectly, into pricing power in the revenue-generating market (e.g., advertising) or leveraging in some other related market. For instance, the **NCLAT** has recognized that Google's monetization model is based on cross-subsidization of various services. The data and traffic from multiple apps and services and the entire Android eco-system is funneled into Google Search which is monetized through advertisements.[5] These problems are not intractable, but the interdependency of the different market sides of a platform can make it much harder to determine what the "relevant market" is for competition enforcement and what the competitive effects of conduct might be.[6]

17. This is further exasperated by **economies of scale**, i.e., the larger the platform, the greater the barriers to entry into the market, making it increasingly challenging for new or existing players to compete with the platform's strength. In digital markets, there's a phenomenon of increasing returns to scale, wherein as firms grow larger, their returns also increase, often with marginal costs decreasing rapidly. Conversely, in traditional physical markets, there's a tendency towards diminishing returns to scale, i.e., as a business entity expands, its returns initially increase up to a point of maximum efficiency or equilibrium, after which further growth leads to decreasing returns. This distinction underscores the unique dynamics and economics of digital versus traditional marketplaces.

18. Similarly, customer information is always valuable for a business, however, it is even more so for digital platforms as **a)** over the time, market leaders' **data advantage eclipses the offerings of newer platforms in terms of quality and data-driven personalization**, and smaller entrants face challenges in attaining users and user data, **b)** privileged data from one market may be, **used by a leading platform in another market to gain competitive advantage**, **c)** Leverage their vast data sets to **analyze consumer trends and monetize this knowledge in multiple ways**, including competing with their own business users by internally developing products and services that align with proven consumer demand. This further leads to the position of the leading platform getting entrenched.

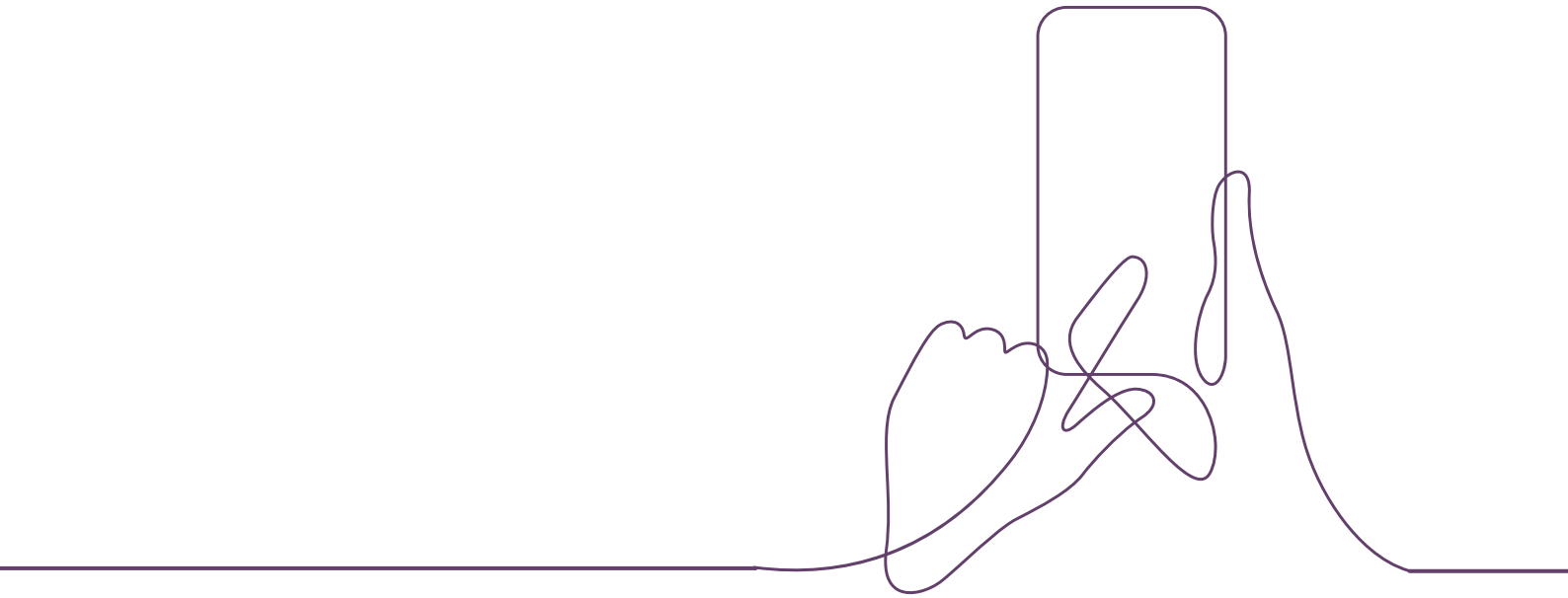
---

[5] Google LLV. And Anr. v. Competition Commission of India and Ors., Competition Appeal (AT) No.01 of 2023, Para 210, 211.

[6] Howard A. Shelanski, Information, Innovation, and Competition Policy for the Internet, 161 U. Pa. L. Rev. 1663 (2013), Available at: https://www.jstor.org/stable/23527815

19. A cumulative consequence of these characteristics will be the presence of "**economies of scope**", which favour the **development of the ecosystems.** The firms compete to draw consumers into more or less comprehensive ecosystems by steering demand towards products and services that belong to the ecosystem. They can do so by offering better quality products and services due to interoperability with the rest of the ecosystem (**APIs**) or due to the vast data, either personal or aggregate, which they have accumulated within the ecosystem. Finally, and more controversially, they can steer demand through nudges, biased rankings, use of default settings, etc. Where this type of competition is observed, a classical definition of markets for products or services may fail to capture a firm's strategy, as firms essentially compete for access points to consumers. [7]

20. Therefore, once a player secures a significantly large user base for its product, that product establishes itself as the industry norm, making it exceedingly difficult for competitors to challenge its market position. Subsequent competition often revolves around the residual left by the dominant player and this market power can then extend from one market to others as well. Consequently, the competitive dynamics in digital markets differ significantly from those in traditional brick-and-mortar retail, resulting in a unique set of challenges specific to digital markets, which further highlights the need for ex-ante regulations.



[7] European Commission, Directorate-General for Competition, Montjoye, Y., Schweitzer, H., Crémer, J., Competition policy for the digital era, Publications Office, 2019, https://data.europa.eu/doi/10.2763/407537

3

LESSONS FROM **GLOBAL EX-ANTE FRAMEWORKS**

Across jurisdictions such as Australia, the UK, the EU, the US, Canada, and Germany, a common thread emerges: the recognition of the need for proactive regulatory frameworks to address the challenges posed by dominant digital platforms.

A. AUSTRALIA

21. Australia has significantly transformed its digital competition law, shifting from an ex-post regulatory framework under the **Competition and Consumer Act (CCA)** to a proactive ex-ante model with the **2021 Bargaining Code.**[8] The **ACCC's** extensive inquiries, including the **2019 Digital Platforms Inquiry**[9] (**DPI**) and the ongoing **Digital Platform Services Inquiry**[10] (**DPSI**), highlighted issues like the bargaining power imbalance, unfair trading practices, and substantial consumer harm. These findings necessitated a more immediate and preventative regulatory approach. Consequently, the ex-ante framework aims to address power imbalances, ensure fair competition, and promote transparency in digital markets.

Media Bargaining Power Imbalance

22. Media companies face significant challenges in securing fair deals due to their weaker bargaining power when negotiating with dominant digital platforms like Google and Facebook.[11] These tech giants control the majority of online traffic [12] and advertising revenue[13] in Australia, leaving traditional media companies with little leverage to negotiate better terms. Dominant platforms profit significantly from media content, using it to boost user engagement and advertising revenues while inadequately compensating the creators, intensifying the power asymmetry and resulting in an unequal distribution of income.[14]

[8] Act No.21 of 2021, Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021.

[9] ACCC Digital platforms Inquiry - Final Report (July 2019).

[10] Digital platform services inquiry 2020-25 (Ongoing).

[11] In March 2020, News Corporation announced the closure of 60 community newspaper titles, despite a significant increase in news consumption by Australians during this period. See: The Sydney Morning Herald, 'News Corp demands government action on tech giants as it halts suburban titles' (April 2020).

[12] In 2018, Google Search accounted for 90% of search traffic from Australian desktop users and over 98% from mobile users. Facebook has the largest social media user base in Australia, with approximately 17 million monthly users in 2019, representing about 84% of Australian adults. See: Pg. 42, ACCC Digital platforms Inquiry - Final Report (July 2019).

[13] Google and Facebook receive nearly two thirds of all online advertising revenue in Australia and this share is growing. See: Pg. 40, ACCC Digital platforms Inquiry - Final Report (July 2019).

[14] Google and Facebook receive nearly two thirds of all online advertising revenue in Australia and this share is growing. See: Chapter 6, ACCC Digital platforms Inquiry - Final Report (July 2019).

Inadequacies of Ex Post Regulations

23. The opaque nature of digital platforms makes detecting breaches challenging, necessitating extensive data collection and proactive monitoring to build a robust evidence base for timely interventions.[15] Moreover, current laws relied on market participants to report anti-competitive conduct, which was difficult given the 'black box' operations of digital platforms. This reliance meant some anti-competitive practices went undetected. There's a public benefit in reporting conduct that might not immediately breach competition laws but has the potential to do so. Dedicating resources specifically to the digital sector aims to address these gaps and prevent anti-competitive behavior from becoming entrenched.[16]

Analysing Regulatory Approach

24. **Australia's Treasury Laws Amendment** (News Media and Digital Platforms Mandatory Bargaining Code) **Act 2021**, commonly referred to as the **News Media Bargaining Code (Bargaining Code),** establishes an ex-ante framework aimed at correcting the imbalance in bargaining power between media companies and major digital platforms. It designates corporations as 'Designated Digital Platform Corporations' based on their bargaining power imbalance and contribution to the Australian news industry's sustainability.[17] The Code employs a "final offer" arbitration model, incorporates non-discrimination clauses, and mandates recognition of original news content and notification of algorithm changes.

25. The Bargaining Code, in contrast to **DCB**, focuses on maintaining the sustainability of only the News Media sector. It is a mandatory code that sets out the minimum standards for dealing between news media businesses and digital platforms. This includes requirements for negotiation,[18] mediation,[19] and arbitration[20] processes. The code is legally enforceable and aims to ensure that news media businesses are fairly compensated for the content they generate.

---

[15] See Section 3.3.3 at Pg. 138, ACCC Digital platforms Inquiry - Final Report (July 2019).

[16] See Section 3.3.3 at Pg. 139, ACCC Digital platforms Inquiry - Final Report (July 2019).

[17] Section 52E(1), Bargaining Code 2021.

[18] Section 52ZH mandates that all bargaining parties must negotiate in good faith on each core bargaining issue.

[19] Under Section 52ZIA, each bargaining party is required to participate in mediation if an agreement on each core bargaining issue has not been reached within three months or if the parties agree to mediation.

[20] Division 7 delineates the requirements and standards for arbitration concerning remuneration issues, including the establishment of a register of arbitrators (Section 52ZK) and the obligation for each party to participate in good faith (Section 52ZS).

26. The Code incorporates non-discrimination clause, preventing digital platforms from altering the display, ranking, or access of news content in ways that disadvantage the participating news businesses.[21] This is similar in essence to the fair and transparent obligations and restriction of self-preferencing obligations under the **DCB.** The code further mandates that if a designated digital platform plans to change its algorithm with the primary purpose of altering content distribution, and this change is likely to significantly affect referral traffic to the news content of registered news businesses, the platform must notify these businesses.[22] While the **DCB** emphasizes the guiding principle of fair and transparent dealing rather than such explicit requirements[23] , **SSDEs** can draw inspiration from Australia's code to adhere to transparency principles.

27. The Bargaining Code appears to have stimulated digital giants like Google and Meta to engage with a diverse array of news publishers, spanning both large and small entities across metropolitan and regional areas. These agreements, some pre-empting the code's implementation, have established a framework for licensing negotiations that seek to rebalance the dynamics between platforms and news publishers.[24]

B. UNITED KINGDOM

28. The UK introduced the **Digital Markets, Competition and Consumers Act (DMCCA)**, joining other jurisdictions in implementing stricter ex-ante regulations for the digital economy. This legislation was prompted by studies revealing excessive market concentration, particularly among major players like Google, Amazon, Facebook, and Apple (**GAFA**). It addresses the inadequacy of existing laws in regulating dynamic digital markets by focusing on establishing a pro-competitive regime, including the designation of entities with strategic market status and the modification of existing mechanisms to better fit digital markets.

Excessive Concentration in Digital Markets

29. The Furham Report[25] was the inception of ex-ante regulation in UK, it flagged the issue of excessive concentration in online search, social media, digital advertising, mobile operating system and app store, online marketplace, and

[21] Division 5, Section 52ZC, Bargaining Code 2021.

[22] Section 52S, Bargaining Code 2021.

[23] Section 10, Digital Competition Bil, 2024.

[24] Department of Treasury (Australia Government), 'News Media and Digital Platforms Mandatory Bargaining Code - The Code's first year of operation'(December 2022)

[25] Unlocking digital competition: Report of the Digital Competition Expert Panel (March, 2019).

high-technology consumer hardware markets.[26] The digital economy as a whole is also concentrated with limited competition between small subset of players.[27] The report highlighted potential consumers harm due to limited competition such as reduced innovation, higher prices, reduced quality, etc. which necessitate robust regulatory intervention.[28]

Inadequacy of Existing Legal Framework

30. As per the Furham Report[29], CMA's Market Study[30] and other prominent reports[31], the deeply entrenched market power of powerful digital firms makes the existing laws nugatory. The existing laws allow enforcement against individual practices and concerns, but are redundant against market concerns emanating out of entrenched market power itself.[32] Further, digital markets are fast-moving and possess wide-ranging, complex and rapidly evolving problems. These issues require tailored responses in the form of a separate legislation employing an ex-ante regulatory approach.[33]

Analysing Regulatory Approach

31. The **DMCCA** aims to tackle the entrenched market power of Big Tech through an ex-ante regulatory approach. Key provisions include the establishment of a pro-competition regime allowing the designation of tech firms with strategic market status, enhanced investigation powers enabling effective evidence gathering, expanded territorial jurisdiction for investigating anti-competitive practices, broader merger control thresholds, and fines for non-compliance with investigative measures and remedies. Additionally, the Act includes provisions to uphold consumer welfare and enforce fines through administrative proceedings.

32. **DMCCA** allows **CMA** to impose tailored codes of conduct[34] for certain entities having a strategic market status, to expose such companies to pro-competitive interventions,[35] and imposes a strict merger reporting requirement.[36] DCB also allows the Commission to issue specific conduct requirements for

[26] Ibid, paras 1.45-1.60.

[27] Ibid, paras 1.61-1.65.

[28] See pg. 6, Response to the CMA's market study into online platforms and digital advertising (November, 2020)

[29] See para 2.18 et seq., Unlocking digital competition: Report of the Digital Competition Expert Panel (March, 2019).)

[30] See pg. 5, Online platforms and digital advertising (July 2020).

[31] See Stigler Committee on Digital Platforms Final Report (2019).

[32] See para 2.11, Advice of the Digital Markets Taskforce (December, 2020).

[33] Ibid.

[34] Section 225, Digital Markets, Competition and Consumers Act.

[35] Ibid, Section 46, Digital Markets, Competition and Consumers Act.

[36] Ibid, Section 58, Digital Markets, Competition and Consumers Act.

Core Digital Services (CDSs).[37] Additionally, the **DMCCA** has enhanced the evidence-gathering powers during investigation under the Act.[38] These powers include, *inter alia*, the ability to call in any relevant person for interview[39] and the ability to impose duty on third-parties to preserve pertinent evidence.[40] This was already present under the **Competition Act, 2002** and has been brought in under the **DCB** as well with **Section 21.**

33. Further, while both **DCB** and **DMCCA** aim to uphold consumer welfare, the **DMCCA** explicitly includes provisions for consumer welfare and administrative proceedings, whereas the **DCB** emphasizes the overarching goals of promoting competition and transparency without detailing specific mechanisms for consumer welfare enforcement.

C. EUROPEAN UNION (EU)

34. The EU's approach to digital competition law has transformed with the introduction of the **Digital Markets Act (DMA)**, shifting from a traditional ex post regulatory model to a proactive ex ante framework. The **DMA** forms part of the EU's "**Europe fit for Digital Age**" program, a comprehensive regulatory initiative addressing various aspects of the digital space.[41] The Act is enacted to address the adverse effects of certain behaviors by digital "gatekeepers," platforms with significant market impact, acting as critical gateways between businesses and consumers and often controlling entire platform ecosystems.[42]

Inadequacies of Ex Post Regulations

35. Competition Policy for the Digital Era (Special Advisors' Report), 2019: The report emphasized that the traditional frameworks of competition law were not fully equipped to handle the unique challenges posed by digital markets, where extreme returns to scale, network externalities, and the centrality of data could entrench incumbents and stifle competition.[43] It called for a rethinking of competition law application, including adjustments to the standard of proof and a shift away from rigid market definitions towards a focus on anticompetitive

[37] Section 7(3), Digital Competition Bill, 2024

[38] The Digital Markets, Competition and Consumer Bill Passes: A New Era Begins (May, 2024).

[39] Section 72, Digital Markets, Competition and Consumers Act.

[40] Section 80, Digital Markets, Competition and Consumers Act.

[41] European Commission, 'A Europe fit for the digital age'.

[42] European Commission, 'Europe fit for the Digital Age: Commission proposes new rules for digital platforms' (December 2020).

[43] See: Chapter 2, 'Competition Policy for the Digital Era' (European Commission, 2019).

strategies and theories of harm. Additionally, it suggested increased scrutiny of mergers and acquisitions by dominant digital platforms, particularly those involving innovative startups, to prevent "killer acquisitions."[44]

Significant Imbalances in Digital Markets

36. *EU Observatory on the Online Platform Economy: Final Report:*[45] The Expert Group's observation on Platform Power highlighted significant imbalances between digital platforms and their business users, noting that traditional economic indicators like market power were insufficient to capture the extent of platform control. Platforms exerted influence beyond market dynamics, directly impacting consumers and society at large.[46] These platforms increasingly acted as gatekeepers of public interests, influencing democracy and human rights. As the platform economy's impact grew, EU policy needed to prioritize issues such as innovation, healthcare, and democracy. Thus, these observations suggested the necessity for proactive measures to ensure fair competition.

37. *European Commission's Impact Assessment (2020):* The dominance of a few online platforms, entrenched within their ecosystems, raises concerns due to their control over digital markets. These gatekeepers mediate most transactions between consumers and businesses. This has led to three primary issues:

(i) limited competition and contestability within platform markets,

(ii) unfair treatment of business users, and

(iii) fragmented regulation and oversight across these markets.[47]

These problems are driven by market failures that preclude self-correction, as digital markets reinforce entry barriers, leading to imbalanced bargaining power and dependence among businesses. These challenges undermine competition, resulting in inefficient market outcomes such as higher prices, lower quality, and reduced innovation and choice, ultimately impacting consumers negatively.[48]

[44] See: Pg. 124, 'Competition Policy for the Digital Era' (European Commission, 2019).

[45] European Commission, 'Final reports of the EU Observatory on the online platform economy' (February 2021).

[46] See: Pg.3, 'Uncovering blind spots in the policy debate on platform power: Final Report' (February 2021).

[47] European Commission, 'Impact assessment of the Digital Markets Act' (December 2020).

[48] Ibid.

Key Antitrust Cases Prompting Change

38. **Google Shopping Case (2017):** The Commission fined Google **€2.42 billion** for abusing its dominance as a search engine to favor its own comparison shopping service, illustrating how dominant platforms can manipulate search results to disadvantage competitors.[49] This case revealed several challenges in digital markets, such as the lengthy resolution[50] of antitrust cases, the inadequacy of ex post enforcement in fast-paced markets, and the need for preventive measures through an ex ante approach.

39. **Google Android Case (2018):** The Commission fined Google **€4.34 billion** for imposing illegal restrictions on Android device manufacturers and mobile network operators to maintain its dominance in general internet search and the related search advertising revenues. This decision highlighted that Google's conduct stifled competition during the critical shift from desktop to mobile internet use, depriving businesses and consumers of choices, innovation, and leading to higher prices.[51] The case underscored the challenges of timely intervention in fast-moving digital markets and suggested that an ex ante approach could more effectively prevent the entrenchment of market power and ensure fair competition.[52]

Analysing Regulatory Approach

40. The **DMA** provides obligations for gatekeepers include compliance with designated obligations for each core platform service, such as restrictions on processing personal data for online advertising services without end user consent and ensuring fair treatment of business users in offering products or services through third-party online intermediation services. Gatekeepers are also mandated to allow business users to communicate and promote offers freely, provide access to content through business users' software applications, and refrain from restricting users' ability to raise compliance issues with relevant authorities.[53]

[49] Case AT. 39740 - Google Search (Shopping).

[50] The Google Shopping Case, which began with the European Commission's investigation, took approximately seven years to reach a decision.

[51] Case AT. 40099 - Google Android.

[52] Case T-604/18; Also See: 'EU General Court confirms landmark Google Android decision with strong signal for tougher antitrust enforcement in digital ecosystems'(Lexology, 2022).

[53] Article 5,6 Digital Markets Act [REGULATION (EU) 2022/1925].

41. Additionally, gatekeepers must enable end users to uninstall software applications and change default settings easily, while also ensuring interoperability with third-party software applications and services. Furthermore, gatekeepers are required to provide access to performance measuring tools and data portability for end users and business users, as well as fair and non-discriminatory access to ranking data for third-party online search engines. These obligations aim to promote fair competition, protect user rights, and ensure transparency and accountability in digital markets.[54]

42. The **DMA** has driven major tech firms to significantly alter their products, services, and user policies to ensure compliance, especially after the Commission designated the first set of gatekeepers under the act.[55] Google has taken steps to enhance user autonomy by requesting consent for personalized data sharing and providing options to unlink services within Google Accounts. It also allows users to select their default search engine or browser during new device setups and is testing a **Data Portability API** to facilitate easier data transfers. Additionally, it has intensified efforts to combat political misinformation on its platforms.[56] YouTube, owned by Google, will introduce content labels for AI-generated material, further enhancing transparency.[57]

D. UNITED STATES

43. In recent years, the United States has advanced competition law to address the growing dominance of major tech companies. A **2019 House Judiciary Committee** investigation, culminating in a **2022** report, revealed significant anti-competitive practices by these tech giants, such as self-preferencing and exclusionary tactics. This led to key legislative measures, including the **American Innovation and Choice Online Act**, the **Ending Platform Monopolies Act**, and the **Open App Markets Act**, aimed at enhancing regulatory oversight, preventing discriminatory practices, and promoting fair competition in digital markets.

[54] Ibid

[55] See: European Commission, 'Digital Markets Act: Commission designates six gatekeepers' (September 2023).

[56] Google, 'Complying with the Digital Markets Act' (March, 2024).

[57] The Financial Express, 'Youtube Unveils A New Tool For Disclosure Of Synthetic Media Usage By Creators' (September 2023).

Excessive Power Concentration in Digital Markets

44. Amid the growing influence of large digital companies, the **House Judiciary Committee** conducted an investigation in **2019** and published its report titled "**Investigation of Competition in Digital Markets**" in **2022**. The report focuses on four major technology companies: Amazon, Apple, Facebook (Meta), and Google (Alphabet). It concludes that each of these companies holds monopoly power in their respective markets, with Amazon dominating the online retail and e-commerce market, and Apple exercising significant control over the mobile operating system market through iOS. Facebook commands substantial power in the social networking market, while Google holds a dominant position in the online search and advertising market.[58]

Self Preferencing & Exclusionary Tactics

45. The report identifies several anti-competitive practices employed by these companies. All four engage in self-preferencing, favoring their own products or services over those of competitors. *For example*, Amazon prefers its private-label products in search results, and Apple prioritizes its own apps and services within the App Store. Facebook copies, acquires, or eliminates competitive threats, and Google prioritizes its own services in search results. Additionally, these companies use exclusionary tactics to maintain their dominance: Amazon leverages data from third-party sellers to launch competing products, Apple implements restrictive App Store policies, Facebook acquires competitors to neutralize threats, and Google bundles its services to stifle competition.[59]

Key Antitrust Cases/Investigations Prompting Change

46. *FTC v. Meta (2021)*: The **FTC** alleges that Meta achieved a monopoly in the social networking market through anti-competitive acquisitions, particularly Instagram and WhatsApp. This dominance allows them to stifle competition and harm consumers. The **FTC** seeks to force Meta to divest (sell off) Instagram and WhatsApp, essentially breaking up the company to promote competition.[60] This case underscores the need for stronger regulations to enable timely intervention. By the time the **FTC** filed its initial complaint, Meta had already established a powerful position, potentially making it harder to unwind the effects of its acquisitions.

[58] See: Chapter V, 'Investigation of Competition in Digital Markets', (US Congress, 2022).
[59] Ibid
[60] FTC v. Facebook, Inc., No. 1:20-cv-03590-JEB.

Analysing Regulatory Approach

47. Recognizing the need to enhance regulation of large digital platforms, the **House Judiciary Committee** and both **Houses of Congress** have approved the following key legislations:

(i) **The American Innovation and Choice Online Act (AICO)** [61] aims to curb discriminatory practices by large digital platforms designated as "Covered Platforms." It prohibits actions such as self-preferencing,[62] anti-competitive tying and bundling,[63] misuse of non-public data,[64] and creating impediments to data portability.[65] The obligations apply for ten years, and violators can face penalties **up to 15%** of their total US revenue or **30%** of their revenue in any affected business line. The Act allows exceptions if the conduct does not harm competition, complies with laws, protects user privacy, or enhances consumer welfare. **The Federal Trade Commission (FTC)** is tasked with enforcement through a newly established **Bureau of Digital Markets.**

(ii) **The Ending Platform Monopolies Act (EPM)**[66] addresses conflicts of interest by prohibiting Covered Platforms from owning or controlling a business other than their platform if it leads to preferential treatment of their own products or services. This includes banning private labeling and granting preferential treatment to their own business lines.[67] The **EPMA** applies for ten years and violations are treated as unfair competition under the **Federal Trade Commission Act (FTCA)**, with severe penalties for offenders. The **FTC** can also initiate civil actions to enforce compliance.[68]

(iii) **The Open App Markets Act (OAM)**[69] sets out prohibited practices for companies that own or control app stores with over 50 million users in the US.[70] It bans the mandatory use of the platform's in-app payment systems[71], requiring better pricing terms for app distribution[72], and prohibits taking punitive actions against developers using alternative payment systems.[73] The **OAMA** mandates fair access to operating system interfaces and development tools. Exceptions are allowed for actions necessary for user privacy, security, and compliance with laws. Developers can sue for damages or injunctive relief[74], and the **FTC** can file civil actions to enforce the Act.

---

[61] American Innovation and Choice Online Act, 117th Congress (2021-2022).
[62] AICO, Sections 2(a) read with 2(f)(2)(D).
[63] AICO, Section S 2(b)(2).
[64] AICO, Section 2(b)(3).
[65] AICO, Section 2(b)(4).
[66] Ending Platform Monopolies Act, 117th Congress (2021-2022).
[67] EPM, Section 2.
[68] EPM, Section 3(d).
[69] The Open App Markets Act, 117th Congress (2021-2022).
[70] OAM, Section 2(3).
[71] OAM, Section 3(a)(1).
[72] OAM, Section 3(a)(2).
[73] OAM, Section 3(a)(3).
[74] OAM, Section 3(a)(4).

E. OTHER NOTABLE DEVELOPMENTS

48. To protect the media, the Canadian parliament has passed the **Online New Act, Bill C-18**, an ex-ante framework to compel large digital platforms (Google) and social media (Facebook) to fairly pay for news contents of media companies. Such ex-ante regulation has benefitted the market and its stakeholders, as Google has agreed to pay the media companies in the range of $100 million for news content.[75] Canada has also introduced **Online Streaming Act, Bill C-11**, which will only be applicable on entities earning more than $10 million by offering broadcasting content in Canada.[76] Such broadcasting entities will have to register for online streaming services, and are obligated to support Canadian programmes, like music and TV shows.[77]

49. Germany amended its competition act to incorporate ex ante framework to prevent dominant entities to abuse their power. From the past experience of dealing with Facebook's data gathering practices and Booking.Com's imposition of unfair conditions (MFNs and Price Parity clauses) on its business users, Germany felt that ex post framework was not sufficient to deal with issues arising in digital market. The ex-ante framework would interject dominant digital entities before they could indulge into anti-competitive practices. This amendment was necessary to maintain fair play in the digital market as it will provide opportunities to all big and small players equally, promote new entrants and protect existing players, bar dominant digital entities from withholding or inadequately disclosing information, etc. The **10th Amendment**, in particular, introduced measures to protect entities engaging with companies possessing 'relative market power' and authorized the **FCO** to grant compensation to dependent companies for providing data access.[78] After this ex ante framework was enforced, the German Competition Authority has initiated designation proceedings against Facebook, Amazon, Google and Apple.[79]

50. Across jurisdictions such as Australia, the UK, the EU, the US, Canada, and Germany, a common thread emerges: the recognition of the need for proactive regulatory frameworks to address the challenges posed by dominant digital platforms. These frameworks, whether it's Australia's Bargaining Code, the UK's **DMCCA**, the EU's **DMA**, or the US's legislative measures, share common goals of

---

[75] Federal government reaches deal with Google on Online News Act, https://www.cbc.ca/news/politics/google-online-news-act-1.7043330.

[76] Registration for online streaming services, https://crtc.gc.ca/eng/industr/modern/registr.htm.

[77] Canada's Online Streaming Act (Bill C-11) explained, https://www.expressvpn.com/blog/canadas-online-streaming-act-bill-c-11-explained/.

[78] Federal Ministry for Economic Affairs and Energy, 'A new competition framework for the digital economy: Report by the Commission 'Competition Law 4.0'' (September 2019).

[79] OECD, Ex Ante Regulation and Competition in Digital Markets.

correcting power imbalances, ensuring fair competition, protecting consumer interests, and promoting transparency in digital markets.

51. Australia's approach, for instance, focuses on rebalancing bargaining power between media companies and digital platforms, highlighting the importance of fair compensation for content creators. Meanwhile, the UK's **DMCCA** aims to tackle excessive market concentration by designating strategic market status to tech firms and enhancing investigation powers to gather evidence effectively. Similarly, the EU's **DMA** targets gatekeeper platforms, recognizing their significant market impact and the need for interventions to ensure fair competition and protect user rights. In contrast, the US's legislative measures like the **American Innovation and Choice Online Act** and the **Ending Platform Monopolies Act** address issues such as self-preferencing, exclusionary tactics, and conflicts of interest among large digital platforms. Moreover, developments in Canada and Germany, including the **Online News Act** and amendments to competition laws, reflect a global trend towards ex-ante regulatory approaches to prevent anti-competitive practices and promote fair play in digital markets.

52. This collective experience underscores the inadequacy of traditional ex-post regulatory models in addressing the unique challenges of digital markets, prompting jurisdictions worldwide to develop comprehensive regulatory frameworks swiftly. Thus, the absence of regulations ensuring fairness and the competitiveness of services offered by digital marketplaces is not unique to India. Recently, global attention has intensified on this matter, prompting jurisdictions worldwide to swiftly develop regulatory frameworks to tackle unfair practices by dominant platforms.

4

NEED FOR **EX-ANTE FRAMEWORK** IN **INDIAN COMPETITION REGIME**

If the conduct of an entity is not based on the merits, eliminating such anti-competitive behaviour at the earliest assumes utmost importance, because any remedy at a later stage will be too little and too late as the service providers, can be potentially eliminated.

I. INEFFECTIVENESS OF THE EX-POST FRAMEWORK TO DEAL WITH DIGITAL MARKETS

53. The rationale behind why the **Competition Act, 2002** failed to curb the expansion of tech giants lies in the unpreparedness of existing legal frameworks to address the distinctive challenges posed by the technology sector, such as lack of information and understanding of the drivers of digital market or lack of clarity on the implications of the business practices in zero-price markets, or balancing of consumer welfare and innovation, etc.

54. Initially crafted to tackle cartels and dominance in traditional markets, the Competition Act primarily relies on outdated legal mechanisms, which are ill-equipped to grapple with the intricacies of a digital economy shaped by data-driven dynamics, network effects, the prevalence of free products, and deep product integration.

55. Defining the relevant market is an evidence-based task where the **CCI** evaluates a digital enterprise's strength by assessing available substitutes in a specific geographical market. As stated above, digital platforms are inherently multi-sided, offering distinct but related services to both consumers and businesses. Thus, determining the relevant market for such multi-sided platforms in a transaction is a time-consuming process. Similarly, contrary to traditional markets, key pricing strategy for platforms consists in subsidizing the participation of one side and recovering the loss on the other side.

56. It is not denied that the recent investigations into the digital markets have brought more clarity to these concepts, however, it is still struggling to keep pace with the rapidly evolving landscape of digital markets, thereby limiting its efficacy in curbing the unchecked market power wielded by tech giants.

57. It must be emphasized that the prolonged legal disputes between antitrust authorities in India and large platforms underscore the limitations of relying solely on ex-post, antitrust remedies to promote competition in the platform economy.[80] Generally, the competition law enforcement in the digital sphere has been too complex, too slow, and at times too specific, related to very particular misconducts to protect effective competition in these markets or lacking the remedial measures necessary to preserve and restore the benefits of a competitive market to consumers.[81]

---

[80] Para 2.5, CDCL Report.

[81] Marsden, P. and R. Podszun (2020), Restoring Balance to Digital Competition - Sensible Rules, Effective Enforcement, Konrad-Adenauer-Stiftung, 7cb5ab1a-a5c2-54f0-3dcd-db6ef7fd9c78 (kas.de).

58. The **DCB** represents a significant shift in regulatory approach by eliminating the need to demonstrate the relevant market and dominance when addressing anti-competitive conducts. Instead, the focus is exclusively on abusive practices, streamlining enforcement and reducing complexity. The codification of specific abuses provides clearer guidelines for both regulators and businesses, reducing ambiguity and enhancing predictability in enforcement actions.

59. Moreover, by narrowing the scope for defenses, which as the **CDCL Report** states will statutorily coded,[82] the **DCB** aims to curtail lengthy legal battles and expedite the resolution of cases. The reduced need for extensive market analysis and the clearer definition of prohibited practices, the limited grounds of exemptions, allow for more efficient use of regulatory resources. This efficiency is crucial in the fast-paced digital market, where prolonged proceedings can render regulatory actions obsolete by the time they are concluded.

60. The **CCI**'s observation that if the conduct of an entity is not based on the merits, eliminating such anti-competitive behaviour at the earliest assumes utmost importance, because any remedy at a later stage will be too little and too late as the service providers, can be potentially eliminated[83] is particularly important.

61. It is crucial that all stakeholders are afforded the opportunity to compete based on merit and receive fair consideration to participate in digital commerce. The aforementioned characteristics favorably attract a large customer base, making the presence of service providers on these platforms essential. However, this influence on the market and the supreme bargaining power can potentially elevate a gatekeeper platform to the status of a de facto regulator. And such platforms may dictate market rules without facing democratic oversight or market discipline, a situation that the **DCB** aims to avoid by introducing an ex-ante framework.

[82] Para 3.45, CDCL Report.

[83] Federation of Hotel & Restaurant Associations of India and Anr. v. MakeMyTrip India Pvt. Ltd., Case No. 14 of 2019.

II. PERSISTENT ANTI-COMPETITIVE CONDUCTS IN DIGITAL MARKETS

62. It is pertinent to note here that there are obligations imposed on enterprises with market power as recognized under **Sections 3 and 4 of the Competition Act**, and it is imperative that such entities refrain from engaging in anti-competitive practices and offer goods/services on **FRAND** terms. Although the law remains in place, the extensive investigations and lengthy inquiry timelines required to determine violations of obligations for practices can significantly impact market dynamics. Considering the position of gatekeepers, their anti-competitive behavior will ipso facto cause appreciable adverse effect on competition, necessitating the introduction of an ex-ante framework. This also refutes any contention that ex-ante framework is a compliance burden for the **SSDEs.** These obligations were to be adhered to under the ex-post framework as well. The only challenge encountered was in recognizing violations and providing remedies, and the ex-ante framework addresses this gap, as evident below:

OBLIGATION	PRESENT CIRCUMSTANCES NECESSITATING THE OBLIGATION
Fair & Transparent Dealing *Requires **SSDEs** to operate equitably and transparently with both end users and business users.*[84]	**(i)** Various platforms, such as app stores, impose unreasonable and exorbitant fees, charging high commissions that hinder smaller players' ability to compete.[85] **(ii)** Platforms engage in discriminatory practices, favoring certain businesses over others, which creates an uneven playing field. E-marketplaces, often vertically integrated, control key digital infrastructure parameters like search rankings and user reviews, prioritizing their own products or those of commission-paying business users, disadvantaging third-party competitors.[86] **(iii)** Non-transparent listing criteria and advertising policies allow platforms to incentivize business users to enter exclusive deals for better visibility.

[84] Section 10, Digital Competition Bill, 2024.
[85] Epic Games, Inc. v. Google LLC, 3:20-cv-05671; AT.40437 - Apple - App Store Practices (music streaming).
[86] CCI E-Commerce Market Study, Page 21.

OBLIGATION	PRESENT CIRCUMSTANCES NECESSITATING THE OBLIGATION
	Business users who do not enter such deals are pushed down in search rankings, driving them out of the market.
Self - Preferencing *Prohibits **SSDEs** from favoring their own products, services, or business lines over those of third-party business users on the Core Digital Service.*[87]	**(i)** Search results manipulation involves giving preferential ranking or more prominent display to certain content in search results pages.[88] **(ii)** Preferential treatment to customers using an adjacent first-party product occurs when a first-party service at one level of intermediation favors customers who use its own first-party product.[89] **(iii)** Preferential access to platform features refers to withholding or limiting third-party access to application programming interfaces (**APIs**) and other features of an operating system.[90] **(iv)** Usually, the agreements are such that a percent of gross value of sales is shared with the aggregators, therefore, there is an economic incentive to create more leads in favour of such players.[91]
Anti-steering *Anti-steering Prevents **SSDEs** from restricting business users' communication with end users, except when necessary for the provision of the Core Digital Service.*[92]	**(i)** Apple and Google's respective terms and conditions prohibit app developers informing consumers about any alternative payment options other than the app marketplaces' respective **IAP** systems. These restrictions prevent app developers from steering consumers off-app (for example, by providing a hyperlink for consumers which takes them to a website) and from informing consumers that an alternative payment option exists.[93]

[87] Section 11, Digital Competition Bill, 2024.
[88] Case AT.39740 Google Search (Shopping), 27 June 2017; Case AT.40703 Amazon - Buy Box, March 2023.
[89] Case AT.40703 Amazon - Buy Box, March 2023; Google Adtech, Decision 21-D-11 of June 07, 2021.
[90] Case No. 39 of 2018, October 2022; Case AT.40452 Apple - Mobile payments, June 2020.
[91] CCI E-commerce Market Study, page 20, 21
[92] Section 14, Digital Competition Bill, 2024.
[93] Australia Competition and Consumer Commission's Interim Report on digital platform services inquiry (March 2021)

OBLIGATION	PRESENT CIRCUMSTANCES NECESSITATING THE OBLIGATION
	Epic Games and Spotify's actions highlighted concerns over Apple's dominance and control within the App Store ecosystem, particularly regarding payment systems and restrictions on informing users about alternative payment methods.[94]
Restricting third-party applications ***SSDEs*** *must allow end users and business users to access and utilize third-party applications or software on their Core Digital Services without hindrance.*[95]	(i) In **2021**, **CCI** took note of Apple's control over its App Store as the sole channel for app distribution to iOS consumers, effectively preventing third-party app stores from listing their services. Apple's guidelines and agreements expressly prohibited the creation of interfaces similar to the App Store or storefronts for other applications, thereby restricting market access for potential app distributors and app store developers. These restrictions were found (Prima Facie) to deny market access.[96]
Data Usage ***SSDEs*** *are restricted from using non-public data of business users to compete with them and must obtain consent before intermixing personal data collected from different services or permitting its usage by third parties.*[97]	(i) **SSDEs** have access to vast amounts of data collected through their core platform services and other digital services, allowing them to leverage consumer preference data to gain a competitive advantage and entrench their market position. This strategic use of data acts as a significant barrier for new entrants. (ii) In the food aggregator market case,[98] it was highlighted that the incumbent players collect data from customers and tailor their offerings based on past purchases. This utilization of data not only enhances their market standing but also deters new competitors.

[94] Epic Games, Inc. v. Apple Inc., 4:20-cv-05640.
[95] Section 13, Digital Competition Bill, 2024.
[96] Together We Fight Society v. Apple Inc. & Another. Case No, 24/2021.
[97] Section 12, Digital Competition Bill, 2024.
[98] See, the CCI's order in National Restaurant Association of India v. Zomato Limited, Case No. 16 of 2021.

OBLIGATION	PRESENT CIRCUMSTANCES NECESSITATING THE OBLIGATION
Tying and Bundling *Prohibits **SSDEs** from mandating additional products or services alongside the Core Digital Service, unless essential to service provision.* [99]	(i) Google is tying app pre-installation or access to Google services with its dominant Android operating system, potentially harming competition and user choice.[100]

III. EMPHASIS ON ANTI-CIRCUMVENTION PROVISIONS

63. On **06.09.2023**, the **European Commission** ("**EC**") designated for the first time six gatekeepers - Alphabet, Amazon, Apple, ByteDance, Meta, Microsoft - under the **Digital Markets Act** ("**DMA**").[101] These digital platforms were designated because they were found to provide an "*important gateway between businesses and consumers in relation to core platform services*". Following their designation, gatekeepers were given six months to comply with the full list of do's and don'ts under the **DMA**, offering more choice and more freedom to end users and business users of the gatekeepers' services. The EC was to monitor the effective implementation of and compliance with these obligations.

64. After their designation, the changes proposed by gatekeepers like Apple and Google received severe criticism from all stakeholders. To elucidate, consider the following obligations under **DMA**:

I. DMA requires gatekeeper operating systems to allow users to use third-party apps and app stores *(Similar to **Section 13, DCB**)*

A. Google claims that it already does so through Android as "*Android users have always been free to download third-party apps and app stores to their devices, and third-party apps and app stores can be preinstalled on Android devices through agreements with Android manufacturers. Apps can also be sideloaded by users via the internet onto an Android device.*" [102]

[99] Section 15, Digital Competition Bill, 2024.

[100] Competition Appeal AT No. 01 of 2023.

[101] Available at https://ec.europa.eu/commission/presscorner/detail/en/IP_23_4328.

[102] Available at https://blog.google/around-the-globe/google-europe/complying-with-the-digital-markets-act.

However, in reality preinstallation and sideloading of third-party apps and app stores is not possible because:

(i) Google already has pre-existing agreements with device manufacturers such as **Mobile Application Distribution Agreement (MADA)** and **Revenue Sharing Agreements (RSA)** requiring all Google services to be preinstalled, creating a bias and limiting space for competitors. In any case, no other competing independent app developer has the same negotiating and bargaining power as Google so as to sign preinstallation agreements with multiple device manufacturers.

(ii) Similarly, sideloading is a long and technically labour-intensive process for downloading apps. Besides, Google generates and repeatedly flashes warning and danger signs when end-users try to download an app, which further disincentivizes users from doing so.

B. As far as Apple is concerned, it announced changes to iOS that appear to rather frustrate the goals of contestability and fairness.

(i) These changes allow alternative apps stores to install their products on iOS devices and to install their store's apps on iOS devices. However, Apple also requires new app stores to provide a stand-by letter of credit from an A-rated financial institution—something which would be impossible for startups to do.

(ii) Moreover, as made clear in its guidance for developers, Apple requires users to "*download an alternative marketplace app from the marketplace developer's website*." Apple's own App Store is where most people would go to discover and download new apps. Hence, not making rival app stores available in Apple's own App Store, makes it harder for users to find such rivals.

(iii) Apple says these changes will allow so-called "sideloading." But its initial guidance seemed to allow just downloading of apps from an approved app store, not directly from a developer's website. On March 12, Apple clarified that it would allow authorized developers to distribute their apps directly from their website, through software that will be made available "later in the spring." [103]

[103] Available at https://developer.apple.com/news/.

II. DMA requires gatekeeper app stores to allow the use of alternative payment systems[104] and to apply fair, reasonable, and non-discriminatory access to the store:[105] *(Similar to **Section 14, DCB**)*

A. In this regard, Google launched the **User Choice Billing System ("UCB")** which reduces its existing commission by **4%** i.e., from **15-30%** under **Google Play Billing System ("GPBS")** to now **11-26%** for processing in-app payments.

(i) In this regard it is particular to note the observation of the **Competition Commission of South Africa** at Para 170 in its Online Intermediation Platforms Market Inquiry Final Report where on **UCB** it states that "*whereas the objective was to provide competition for the store's IAP billing and reduce the commission fees, the implementation has not realised this objective. This is because the application stores continue to add their own commission fees to those transactions, less the **[3-4]%** cost saving on transaction processing to third parties.*" Therefore, **UCB** is no compliance but a hogwash and maneuvering of policies.

B. Apple has a similar mandatory fee structure. Under its proposed compliance with **DMA,** the new business terms for iOS apps in the EU have three elements:[106]

(i) *Reduced commission* — iOS apps on the App Store will pay a reduced commission of either **10 percent** (for the vast majority of developers, and subscriptions following their first year) or **17 percent** on transactions for digital goods and services.

(ii) *Payment processing fee* — iOS apps on the App Store can use the App Store's payment processing for an **additional 3 percent fee**. Developers can use a payment service provider within their app or link users to their website to process payments for no additional fee to Apple.

(iii) *Core Technology Fee* — iOS apps distributed from the App Store and/or an alternative app marketplace will pay **€0.50** for each first annual install per year over a 1 million threshold.

65. The proposed compliances under **DMA** changes only appear to open the walled gardens manned by the gatekeepers without actually affecting their dominance or allowing meaningful choice to app developers and users. They are akin to Hobson's choice since either the app developers can adopt the new options (which are impractical and unworkable) or continue with the original stipulations (which were already onerous to begin with).

[104] DMA, Article 5(7).

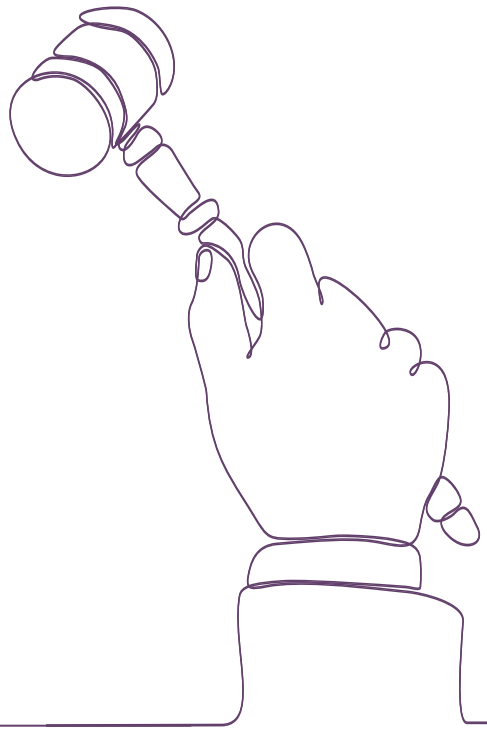
[105] DMA, Article 6(12).

[106] Available at https://www.apple.com/newsroom/2024/01/apple-announces-changes-to-ios-safari-and-the-app-store-in-the-european-union/.

66. In what can only be termed as sticking to the bold letter of the law, exactly six months after the designation of gatekeepers, the EC opened non compliance investigations under **DMA** into Alphabet's rules on steering in Google Play and self-preferencing on Google Search, Apple's rules on steering in the App Store and the choice screen for Safari and Meta's "pay or consent model".[107] The **EC** also launched investigatory steps relating to Apple's new fee structure for alternative app stores and Amazon's ranking practices on its marketplace.[108]

67. The above conduct illustrates the ongoing efforts of gatekeepers to evade legal obligations by manipulating their policies. **Achieving the goals of the ex-ante framework relies on these gatekeepers' commitment to compliance, emphasizing action over mere words and principles.** Therefore, it is crucial to emphasize the anti-circumvention principle in the **DCB**, enabling swift recognition and elimination of any such attempts.

68. Considering the significant economic influence of gatekeepers, it is crucial to ensure effective application of obligations without circumvention. Therefore, the DCB should encompass all gatekeeper practices, regardless of their form, be it contractual, commercial, technical, or otherwise, so long as they align with the types of practices covered by the obligations.[109] This principle has been recognized under **Section 5** and **Section 8** of **the DCB.** However, as it is said, the "*bite of the law is in its enforcement*", implementing the provision with full force will undoubtedly yield favorable results.



[107] Available at https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1689.
[108] Ibid.
[109] Recital 70, Digital Markets Act, 2022.

5 POINTS OF CONCERN IN **DIGITAL COMPETITION BILL**

The success of the **DCB** hinges almost entirely on its monitoring and enforcement mechanisms.

Need to reconsider Quantitative thresholds

69. The crafting of thresholds within the ex-ante law must prioritize the protection of small emerging players to ensure the law's effectiveness. Failing to do so would undermine the core objective of introducing such legislation. By implementing thresholds that are sensitive to the size and scale of different players within the market, the law can successfully foster competition and innovation while avoiding hindrances for smaller businesses.

70. The quantitative threshold is mentioned under **Section 3(2)** of the **DCB**, however, it is recommended that these thresholds consider the market reality and then reach a limit. **Section 3(2((b)(i))** suggests the threshold for end users as "*the core digital service provided by the enterprise has at least one crore end users*."

71. **The CDCL Report** at Para 3.19 correctly notes that under **Digital Markets Act**, European Union has considered 10% of their entire population to reach 45 Million end users as a criteria for a gatekeeper, however, the Committee has put a limit of 1 Crore end users in India. Given India's size, GDP and population, the threshold benchmark should be much higher than the **DMA** in Europe. It is humbly submitted that it is not denied that there is a vast difference in internet penetration in India and in EU however it should be noted that India even with a penetration rate of **52.4%** has 751.5 million internet users at the start of **2024**. Even if 10% of such internet users are considered as a threshold, it would reach to 7.5 Crore users. It is humbly submitted that in view of the same, such a threshold should be recalculated by the Committee.

72. Similarly, the criteria for business users are "*the core digital service provided by the enterprise has at least ten thousand business users*". This threshold will be seen with another criterion as well, however, "ten thousand users" in the preceding three financial years for an entity operating in digital space appears to be disproportionate, and risks encompassing a large number of entities, contrary to the intended scope of the law. The Committee should consider the population of the country and the growth rate of digital markets before setting such thresholds.

73. Moreover, considering the Central Government's three-year window for reevaluating the threshold criteria[110] , substantial harm to the market could transpire during this interval. Hence, it is imperative for the legislation to adopt a robust initial position, underscoring the intolerance towards any prospective anti-competitive behaviours.

[110] Section 3(4), Digital Competition Bill, 2024.

Limited resources with the Competition Commission of India

74. The inquiry framework under the **DCB** is somewhat similar to the **Competition Act**, although with stricter timelines, the risk of lengthy procedures still remains. Enforcing two laws simultaneously may overwhelm the Commission. Therefore, it is proposed to establish a specialized unit within the Commission dedicated to matters.

75. The success of the **DCB** hinges almost entirely on its monitoring and enforcement mechanisms. As an ex-ante, intervention-based legislation, its ability to achieve its intended goals will be determined by the strength of these mechanisms.

76. The Committee has observed that India does not need a separate entity since the **CCI** has already established a **Digital Markets and Data Unit (DMDU)**[111] However, the **DMDU** does not enforce regulations, it serves as a research and engagement wing. Additionally, as of now there is no update on the working or the recruitment of **DMDU**. It is agreed that **DMDU** is also crucial for the **DCB's** effective operation given the unique and evolving nature of digital markets, studies will be required, for instance the cloud computing markets are particularly nascent and would require specific study into the anti-competitive conducts to protect innovation and prohibit overregulation. However, for enforcement a separate wing within the Commission is a must.

77. **CCI** will have to monitor whether entities that are falling within thresholds have not applied for designation or if qualitative criteria are met, make the several sub-legislations mentioned- therefore there is need for a body that is well-versed in the digital market sector and acts swiftly to ensure compliance with the law. In the UK, the **Digital Markets Unit (DMU)** within the **CMA** is dedicated to enforcing digital market regulations, including granting Significant Market Status and enforcing codes of conduct.[112] UK is making significant investments to build the capacity of **DMU** to be able to perform its responsibilities.[113]

78. **CDCL Report** states due to the distinct regulatory interventions of the **Competition Act** and the **DCB**, the **CCI** should retain the authority to pursue digital enterprises under both statutes simultaneously. However, they emphasized the need to avoid disproportionate penalties in parallel proceedings for the same conduct. Recognizing the CCI's expertise, the Committee noted that the CCI can rationalize penalties and issue guidelines under both laws. Consequently, any overlaps in proceedings and penalties should be resolved by the CCI on a case-by-case basis. However, the approach may fail due to conflicts of interest, resource constraints, and the need for specialized expertise in ex-ante regulation.

[111] Para 3.56, CDCL Report.
[112] UK Government, 'Digital Markets Unit" (April 2021).
[113] In 2021, the CMA allocated £4.80 million to establish the DMU, followed by £6.26 million in 2022 to develop the DMU further. The CMA also increased its personnel from 786 individuals in 2021-22 to 813 in 2022-23, partly owing to the growth of the DMU. See: 'Shaping the digital competition law' (Financial Express, June 2024).

A separate unit would ensure focused oversight, prevent overlaps, and provide clear, consistent guidelines, ultimately leading to more effective regulation of digital markets.

Re-consideration on the delineation of core digital services

79. The intent of the ex-ante law is to create an axiomatic assumption for gatekeepers' position in the defined market and impose a defined code of conduct to allay the market concerns. However, for this, it is imperative to be cautious to lay down accurate and scientific definition of core digital services in **Schedule 1**, rather than having a generalized definition. As learnt from historical case example at the **CCI**, sectors such as online search engines, operating systems, web browsers, etc. may be a core digital service. However, certain areas like cloud services which are unchartered for the regulator in the Indian market, it may not be wise to burden the sector with unnecessary regulations at nascent stage.

80. The enforcement priorities should be more focused at the beginning, and deal with sectors which have shown tendencies to create barriers to entry. Thus, it may be argued that list of core digital service for the initiation of regulations as per **Schedule 1** may be more tailored, specific, provide unambiguous definition and not a broad definition and should be based on case studies. In any case, the law gives the power to amend the list of core digital services should the need arise in future for any inclusion.

6

WHY CRITICS OF EX-ANTE FRAMEWORK ARE **UNFOUNDED**

Certain doubts and uncertainties have surfaced regarding the **DCB** which merit a response to illustrate that such concerns are unfounded and should be dismissed.

I. CONSUMER CHOICE OF BETTER PRODUCTS OR SERVICES WILL BE AFFECTED

81. There is an apprehension that ex-ante regulation could potentially stifle innovation by imposing burdensome regulations on tech companies. This could lead to unintended consequences, such as reduced consumer choice and higher prices. However, the reality proves evidence to the contrary.

82. The **CCI** in the Play Store case found in its inquiry that consumer benefit was deteriorating when Google charged exorbitant commissions of **15-30%** for imposing its mandatory **Google Play Billing System**, as the app developers either had to absorb the increased cost (and thus would be left with less resources to improve/innovate their offerings) or pass on the increased cost to the consumers.[114] Either way, the market was suffering. It is relevant to mention that it is a fact that in-app subscriptions are more expensive on Apple because of its exorbitant commissions which are passed on to the consumer.[115]

83. *Consider another example:* if dominant platforms are prevented from tying and bundling of services, these services can be offered by other players. The services offered by the platform will not be affected and if they are indeed essential or beneficial, the users will continue to use them. *For instance*, introduction of Whatsapp Pay, Whatsapp did not offer the new service by mandatorily tying it with the existing services.[116] Even the introduction of Google Meet along with Gmail by Google, where the Commission has noted that users of Gmail are not forced to necessarily use Google Meet, and there does not appear to be any adverse consequences on the users of Gmail for not using Google Meet, and Gmail user at his/ her 'free will' can use any of the competing video conferencing apps.[117]

84. There is undeniable potential for platforms to innovate and introduce new goods or services without resorting to tying or forcing them upon users. Thus, allowing competition will give the platform a reason to compete on price and quality in the provision of such services. If the doors of competition are closed in the first place, then there is no scope for improving the quality or price of service. If service is so good, then entities will purchase. But without giving others a chance to compete at providing those services, it cannot be said that the dominant platform's services are the best.

---

[114] Order dt. 25.10.2022 in Case No. 07 of 2020, Para 273.

[115] See https://www.forbes.com/sites/shaharziv/2020/07/08/heres-why-your-apple-app-store-purchases-may-be-a-ripoff/?sh=45db10162007.

[116] Case No. 15 of 2020.

[117] Case No. 39 of 2020.

85. Competition is like fuel for progress. It drives companies to be better. But imagine if some players block the field. How can anyone prove they're the best without a fair fight? It's like claiming victory before the game even starts.

86. Additionally, the welfare of consumers depends on the innate motivation of these platforms to innovate, which is jeopardized when genuine competition is lacking. It is recognized that while innovation has fueled the prosperity of these firms, their present tactics impede the rise of future disruptive innovators. If antitrust regulations remain inactive, consumers will ultimately bear the consequences.[118]

II. CONSIDERATION OF ALTERNATIVE INTERVENTION APPROACHES OR SELF-REGULATORY MECHANISMS INSTEAD OF EX-ANTE FRAMEWORK

87. There are various historical failures in different sectors which show that self-regulation fails for big tech due to conflicts of interest, collective action problems, moral hazard, among various reasons.[119] The simple question to answer when considering such an alternative is, to what extent leaders of the dominant digital platforms have the will to continue their efforts to self-regulate and govern their platforms and ecosystems more tightly, even if these efforts harm revenues and profits in the short term. It is not wrong to state that without strong incentives to maintain the common good, self-regulation is unlikely to succeed.

88. Additionally, in a multi-sided market, where businesses collaborate across the value chain to deliver services, inconsistencies in the policy frameworks of self-regulated players can create friction within the market. This situation opens opportunities for one dominant entity in the supply chain to arbitrarily steer policy enforcement according to its own interests. Therefore, effective regulatory oversight and mandates are essential for the market to operate smoothly and fairly.

89. The **DCB** introduces the need for external regulation to address these challenges and ensure accountability, highlighting the necessity of combining self-regulation with credible threats of government oversight. The time has come to acknowledge that, much as it might have been worth trying, self-regulation did not work, therefore *Dura lex, sed lex*.

---

[118] The Yale Law Journal - Forum: Antitrust's High-Tech Exceptionalism

[119] Cusumano, Michael A., Annabelle Gawer, and David B. Yoffie. "Can Self-Regulation Save Digital Platforms?" Industrial and Corporate Change 30, no. 5 (October 2021): 1259–1285, Available at: Can self-regulation save digital platforms? | Industrial and Corporate Change | Oxford Academic (oup.com)

III. EX ANTE REGULATION IS A CASE OF EXCESSIVE OR OVERREGULATION

90. The purpose of regulation is not to prevent monopolies (as under the **Monopolies and Restrictive Trade Practices Act**) but to protect competition by ensuring that the incentives to compete continue to exist. *For instance*, the landmark antitrust decision against Microsoft by the European Commission[120] in 2007 subjected Microsoft to a number of technical restrictions to prevent anticompetitive practices such as tying and bundling of services. At the time, other technology players that have achieved dominant status today such as Meta and Google, which were nascent players. As of today, these new players are giving stiff competition to Microsoft and this has been made possible due to appropriate regulatory intervention at the right time. Microsoft did not get disrupted due to excessive regulation but because of upstart and technological supremacy of other companies, and also their continuous endeavor for innovation.

In fact, the blogpost of Mr. Sundar Pichai in 2009[121] mentioned the ill effects of tying by Microsoft and how such tying effected the market. Consequently, due to intervention of **EC,** various companies including Google thrived. Thus, regulation is required for proper competition so that walled gardens do not thrive and proper innovation happens.

91. The notion that future disruption and displacement of existing dominant players is likely to come from innovative players and not appropriate regulatory interventions, ignores the key features of digital economy. The peculiarities of digital market such as network effects, tipping effect and economies of scale do not allow new players to innovate because dominant players tend to gatekeep access to technology, critical mass of users etc. Hence, innovation will be possible if innovation is allowed in the ecosystem, not if dominant players created walled gardens.

92. The entire aim and objective of competition law is perfect competition (as has been enunciated by the Supreme Court in the case of *Competition Commission of India v. Steel Authority of India Limited*). Thus, such *ex ante* laws are required to promote innovation in the market and regulate the conduct of large gatekeepers.

---

[120] Case T-201/04, Microsoft Corp. v Commission of the European Communities.

[121] Browser powered by user choice, Tuesday February 24, 2009 blogpost by Sundar Pichai, https://publicpolicy.googleblog.com/2009/02/browsers-powered-by-user-choice.html.

93. While the competition laws address that anomaly, they are too slow to respond in complex technical sectors. By the time an order is passed, the dominant player has gained an edge – as in the case of Google. Thus, in this context, there is an urgent need for ex-ante legislation to prevent market failures and mitigate possible anti-competitive conduct. Moreover, ample studies and ongoing investigations have documented that these set of anti-competitive behaviors by large digital platforms do not contribute to efficiency. There is sufficient empirical evidence supporting this argument, and it is not drawn out of thin air.

94. Hence, *ex ante* regulation is not a case of excessive regulation but that of efficient regulation to allow competition on merits. Therefore, implementing ex-ante regulations in India serves multiple purposes, including ensuring fairness, contestability and innovation in digital markets. It addresses concerns about market power, exploitative practices and imbalances of bargaining power, while also fostering transparency and encouraging disruptive innovation.[122]

95. The **DCB** incorporates an agile principle-based framework that lays down the broad contours of each anti-competitive practice and the particulars of additional ex-ante obligations would be stipulated through regulations for each Core Digital Service. The **CDCL Report** at Para 3.37 and 3.38 particularly notes that such regulations would be made through a consultative process by taking the views of all stakeholders involved, including market players of all sizes, business users and end users, representatives of civil society and the various ministries that regulate the Indian digital economy. Therefore, it is agreed that certain core digital services require specific discussions due to enforcement priorities set by the **CCI**, such as the cloud-computing service, the **DCB** empowers the **CCI** to come out with appropriate regulations for each core digital service.[123]

96. Instead, it is pertinent to point here that while recognizing the uniqueness of each service is crucial, it is imperative to ensure that the anti-competitive practices identified as problematic are not diluted for any service. Consistency in addressing these practices across all digital services is essential to maintain fairness and competitiveness in the digital market.

---

[122] https://theleaflet.in/shaping-the-future-of-digital-markets-the-importance-of-ex-ante-regulations/

[123] Section 7(3), Digital Competition Bill, 2024.

IV. WIDE-WORDED DEFINITION OF END USERS AND BUSINESS USERS

97. The only issue highlighted with the above contention is that the definition of end users and business users is typically different from the "active end users" and "active business users" used in the **DMA**. Firstly, the criterion for the addition of "active" are general and self-explanatory in nature such as for active end users, signed-in or logged-in environments are considered to minimize duplication, and are averaged throughout the majority of the financial year; active business users are determined per distinct business account associated with core platform services. Secondly, **Section 3(6)** states that End Users and Business Users for each Core Digital Service shall be identified and calculated in the manner as may be specified by sub-legislations, as stated in **Section 49(2)(b) of DCB.**

V. NO NEED FOR QUALITATIVE THRESHOLDS WHEN QUANTITATIVE THRESHOLDS ARE PRESENT

98. It is not unknown that platforms in digital markets have been willing to forego profits for growth undercutting the central premise of contemporary predatory pricing doctrine, which assumes that predation is irrational precisely because firms prioritize profits over growth. In this way, their strategy has enabled them to use predatory pricing tactics without triggering the scrutiny of predatory pricing laws.[124] Killer acquisitions in digital markets are a prime example as to why mere quantitative thresholds are not enough to recognize adverse effects. While quantitative thresholds offer numerical benchmarks for assessing anti-competitive behavior, qualitative thresholds consider the specific nature and impact of a company's actions within the market. This holistic approach helps regulators better understand the nuances of digital markets and the potential effects of certain practices, leading to more effective and targeted regulatory interventions.

[124] Lina Khan, 'Amazon's Antitrust Paradox' (2018) 126(3) Yale Law Journal https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5785&context=ylj accessed 01 May 2024.

VI. CDCL'S FAILURE TO CONSIDER THE PRO-COMPETITIVE BENEFITS OF OBLIGATIONS

99. As stated above, the critics have not considered Para 3.38 of the **CDCL Report** which notes that the **Draft DCB** incorporates an agile principle-based framework that lays down the broad contours of each anti-competitive practice and the particulars of such ex-ante obligations will be stipulated through regulations for each Core Digital Service, as is visible through **Section 7(3) of DCB.** Reading **Section 49(2)(g) of the DCB with Section 49(4)** it is visible that the Commission may while drafting such regulations, consult any statutory authority, government body or other entities. Therefore, it is expected that when the **CDCL Report** Para 3.36 and 3.37 considers the presence of pro-competitive benefits of certain conduct, the Commission would reflect the same in its regulations to uphold the objective of **DCB.**

VII. THE COMMISSION SHOULD CONSIDER THE RELEVANT TURNOVER RATHER THAN THE GLOBAL TURNOVER WHEN IMPOSING PENALTIES

100. It is not unknown that despite Big Tech facing billions in fines for alleged competition law violations over the past decade, these penalties have failed to foster market openness and competition. For Big Tech, fines are simply viewed as an operating cost, and given the enormous profits of these companies, no fine is large enough to outweigh the benefits of disregarding the law.[125] Therefore, smaller fines are in no way a deterrent to anticompetitive conduct.

101. Furthermore, as businesses expand globally and services become interconnected, with various business inputs blending together, such as the data may originate from any corner of the world and contribute to the overall economic entity's success. Therefore, fines are envisioned to be determined based on global turnover to serve as a potent deterrent.

[125] Javier Espinoza, "Big Tech Faces Billions in Fines for Alleged Competition Law Violations," FINANCIAL TIMES (April 10, 2024, accessed May 17, 2024). Why Big Tech fines do not work (ft.com)

VIII. CONCERNS ON REGULATORY COMITY WITH RESPECT TO OVERLAPPING MANDATES

102. The **CDCL Report** in itself has noted the overlapping mandates of the **DCB** with various laws, however, it is not new for two laws to have different obligations for an entity. For instance, with the **Digital Personal Data Protect Act, 2023 ("DPDPA")** in play, payment aggregators are obligated to follow the obligations under this as well as the guidelines as issued by the Reserve Bank of India.

103. Firstly, **Section 22 and 23 of the DCB** has introduced provisions for reference by the Commission and to the Commission which covers the query of the critics, Secondly the decisional practice of the Commission indicates that it does not interfere with obligations under separate laws.[126] Thirdly, concerns of overlaps with **DPDPA** does not take into consideration how the importance of data protection as a parameter of competition has been increasing considered during the last years.[127]

104. Lastly, the test of two laws co-existing is of repugnancy, i.e. two laws can co-exist if there are no inconsistencies, and the user can seek remedies in both the laws.[128] The legislature while enacting a law has complete knowledge of the existing laws, the **CDCL Report** has already dealt with this concern and has reached a reasoned conclusion, therefore leaving no merit to the contentions.

IX. NEGLECTING TO CONSIDER THE SPECIFIC CHARACTERISTICS OF INDIAN MARKETS AND RELYING TOO HEAVILY ON STRATEGIES BORROWED FROM EUROPEAN UNION

105. The first thing to note is that the proposal for ex ante regulation is not coming out of nowhere but is based on empirical evidence. As the **CDCL Report**[129] itself notes, a vast number of cases pertaining to digital enterprises have been raised before the **CCI**. But out of these cases, investigation has only been conducted in a handful of cases and finality has not been reached in any case after final adjudication by the Supreme Court due to the time-consuming and labor-intensive process of filing appeals.

---

[126] (Combination Registration No. C-2018/05/571, Para 12.
[127] Case M.7127-Facebook/WhatsApp.
[128] Basti Sugar Mills Co. Ltd. v. State of U.P., (1979) 2 SCC 88
[129] Para 2.5, 2.6, CDCL Report.

106. The **CCI** has issued several orders against tech companies for breaking the law regarding vertical agreements and abuse of dominance. However, these orders have only been made after the fact, meaning that the **CCI** has to go through a lengthy process including detailed procedures and economic analysis to determine if the law has been broken. This delays the correction of the market, which goes against the intended purpose of the law.

107. Hence, a legislative loophole exists in terms of securing justice delivery through effective implementation of the **Competition Act**. This loophole is sought to be remedied by the **Digital Competition Bill, 2024.** Furthermore, the proposed measures are derived from cases and case studies conducted by the **CCI** and post comprehensive examination of market harm.

108. Additionally, it is noteworthy that when a strict market-driven model, like USA, is contemplation on implementation of sufficient regulations to address concerns related to Big Tech, India, with its longstanding commitment to rights, can consider inspiration from a rights-driven approach. India has a history of intervening to safeguard individual rights, uphold democratic structures, and ensure equitable distribution of benefits. Furthermore, contrary to claims that the adoption of the **DCB** is influenced by the "**Brussels Effect**", India has ample evidence that regulatory changes were necessary to combat anti-competitive practices within the territory. The intervention reflect a deep-seated belief that markets will not, left to their own devices, yield optimal outcomes and that government intervention is needed to preserve and strengthen rights of consumers.[130]

[130] Anu Bradford, DIGITAL EMPIRES-THE GLOBAL BATTLE TO REGULATE TECHNOLOGY, Pg 127. Also see Order dt. 15.03.2024 in Case No. 37 of 2022, Para 30.

7 CONLCUSION

Antitrust is greedy.

— **PROF. HERBERT HOVENKAMP**

109. Professor Herbert Hovenkamp has correctly said that "*antitrust is greedy*."[131] It wants not only efficiency in end products, but efficiency in the competitive process that brings them about. The **DCB** by establishing rules and guidelines upfront, seeks to promote a competitive market environment where innovation thrives, consumers have choices, and businesses can compete fairly. This anticipatory strategy aligns with the nature of antitrust, aiming to optimize competition not just in outcomes but throughout the entire market process, fostering long-term economic efficiency and consumer welfare.

110. To certain observers, the scale of **SSDEs** merely reflects their achievements. Factors such as continuous innovation, prioritizing customer satisfaction, and benefiting from network effects and economies of scale have led to their expansion and improvement of products for Indian consumers. However, this growth can create hurdles for smaller players, who must engage with these dominant firms to access consumers, often under unfavorable conditions. This limited choice negatively impacts consumers by limiting product availability, increasing prices, and dampening incentives for innovation due to the dominant platforms' profit appropriation. Therefore, considering the peculiar characteristics of digital markets, an ex-ante framework is necessitated to preserve competition on its merits.

111. The **DCB** has been introduced with a similar objective. Apart from timeliness and effectiveness of such enforcement, the measures also aim to address structural features of digital markets that may prevent entry and expansion by new players, i.e. both supporting competition in the market and competition for the market. The swift act of the legislature in recognizing the gaps in enforcement and effectiveness of the ex-post laws and introduction of an ex-ante framework is appreciated and commendable. The following suggestions might be considered by the **Ministry of Corporate Affairs** on introduction of the law:

(i) The crafting of thresholds within the ex-ante law must prioritize the protection of small emerging players to ensure the law's effectiveness. Failing to do so would undermine the core objective of introducing such legislation.

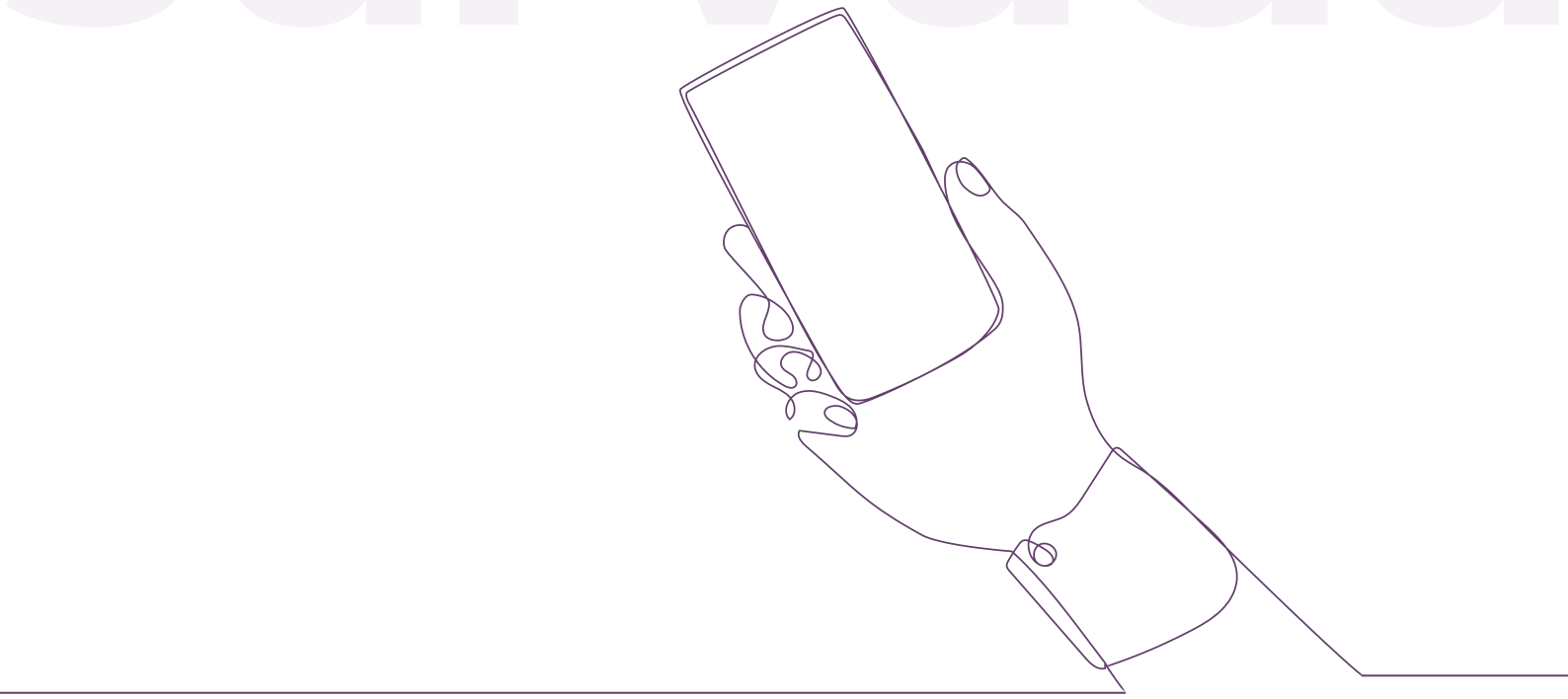
(ii) There is no doubt that the contribution by **DMDU** is crucial for the **DCB**'s effective operation, however, for enforcement a separate wing within the Commission is a must as the ex-ante framework thrives on timely intervention.

(iii) Given the substantial economic power of the **SSDEs**, it is important that the obligations are applied effectively and are not circumvented. To that end, the law should apply to any practice by a gatekeeper, irrespective of its form.

---

[131] Herbert Hovenkamp, The Antitrust Enterprise: Principle and Execution 285 (2005).

(iv) **Section 7(3) of the Digital Competition Bill** grants the Competition Commission of India the authority to regulate each digital service separately. Recognizing the uniqueness of each service is crucial. However, it is imperative to ensure that the anti-competitive practices identified as problematic are not diluted for any service. Consistency in addressing these practices across all digital services is essential to maintain fairness and competitiveness in the digital market.



THANKYOU!

Please feel free to reach out to **Abir Roy** (abir@sarvada.co.in), Co-Founder & Advocate , **Vivek Pandey** (vivek.p@sarvada.co.in), Advocate and **Aman Shankar** (aman@sarvada.co.in), Advocate for additional information or queries.