



# REGULATING COMPETITION IN DIGITAL MARKETS

POLICY  
BRIEF

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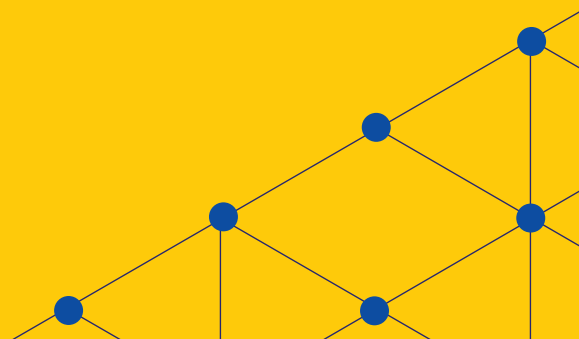
## Abstract

Inspired by antitrust cases that have exposed anti-competitive practices in digital markets and judicial pronouncements that have contributed to the development of rules for pro-competitive conduct, a slew of new legislations is being enacted and proposed globally to regulate competition in digital markets, driven by the principle of ‘competition law through regulation’. This brief discusses ongoing debates around regulating digital markets in the context of their unique challenges, especially their enduring positions across markets. Various jurisdictions have adopted different approaches to ensure fair competition and prevent market distortions in digital markets, ranging from expanding the scope of existing tools available to competition regulators, to contemplating and legislating ex-ante regulation. India’s Draft Digital Competition Bill, 2024, which was released alongside the Report of the Committee on Digital Competition Law, also recommends an ex-ante regulatory mechanism for digital markets to safeguard competition. This brief discusses the Bill and outlines the arguments for and against ex-ante regulations in India. The brief largely favours India exploring ex-ante regulations. However, rather than blanket regulations applied across diverse markets, it argues for market inquiries into each of the Core Digital Services of a Systemically Significant Digital Enterprise, so that differential obligations are curated based on the nature of the market. That said, the identified remedial obligations should be self-executing and compliance-driven, with deterrent penalties, minimising the need for continuous monitoring and onerous investigative procedures.

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# Regulating Competition in Digital Markets

## 1. Introduction

According to the State of India's Digital Economy (SIDE) Report, 2024,<sup>1</sup> India is the third-largest digitalised country in the world, behind the US and China. India has the second largest global network of internet users, with over 800 million users as of 2023, and has witnessed a substantial increase in the adoption of online services such as e-commerce, digital health, and digital education; as of 2023, there is an estimated 182.6 million e-commerce, 309 million digital health, and 160.2 million online education users in India.<sup>2</sup> Business connectivity to the internet has also increased in the post-COVID period, with an estimated 1.5-2.5 million Micro, Small and Medium Enterprises (MSMEs) selling online and expected to double by 2027.<sup>3</sup> The rising share of e-commerce in Tier 2 and Tier 3 cities reflects the mass scaling of digital markets in India.

While platform-centric digital markets offer unparalleled opportunities for innovation, efficiency, and economic growth, they also present unique challenges for competition policy and regulation. Businesses in these markets are premised on exploiting the interdependent interests of several groups of users. While platforms improve information flow, bring buyers and sellers together, reduce search cost for consumers, and minimise transaction costs, their business models depend on data being collected from users. Moreover, the 'ownership' of this

data does not rely on a properly defined property regime. The inherent bigness of these businesses allows them to operate across markets and create walled garden "ecosystems" that result in power asymmetries, particularly between the platforms and their users.<sup>4</sup> The key concerns around these business models include exploitative business practices, unequal bargaining power, and exclusionary behaviours of platforms.

Policymakers and regulators around the world are grappling with how best to ensure fair competition while minimising distortions in digital markets. In the MCX-NSE case of 2009,<sup>5</sup> the Competition Commission of India (CCI) dealt with the regulation of platform markets and elaborated on the concept of network effects. A subsequent series of cases involving e-commerce (2014),<sup>6</sup> cab aggregators (2015),<sup>7</sup> and app stores (2021)<sup>8</sup> have aided the understanding of anti-competitive practices (ACPs) in India. In a slew of recent final orders, the CCI showed a red card to digital companies for not playing fair in the market. India now joins a league of nations that have recognised strong antitrust enforcement as an essential component of the overall public policy design governing these companies. CCI, in its orders (with some cases still under investigation), questioned the rules of engagement between the platforms and their users. These rules, apart from being exploitative on account of the unequal bargaining power enjoyed by these platforms relative to businesses, also exclude competitors.<sup>9</sup>

- 1 Mishra, D., Kedia, M., Reddy A., Ramnath, K., & Manish, M. (2024). *State of India's digital economy (SIDE) report 2024*. IPCIDE, Indian Council for Research on International Economic Relations (ICRIER). [https://icrier.org/pdf/State\\_of\\_India\\_Digital\\_Economy\\_Report\\_2024.pdf](https://icrier.org/pdf/State_of_India_Digital_Economy_Report_2024.pdf)
- 2 Mishra, D., Kedia, M., Reddy A., Ramnath, K., & Manish, M. (2024). *State of India's digital economy (SIDE) report 2024*. IPCIDE, Indian Council for Research on International Economic Relations (ICRIER). [https://icrier.org/pdf/State\\_of\\_India\\_Digital\\_Economy\\_Report\\_2024.pdf](https://icrier.org/pdf/State_of_India_Digital_Economy_Report_2024.pdf)
- 3 Rao, A. (2023, August 29). Online retail to have 6 million MSME merchants by 2027. *Trade Promotion Council of India*. <https://www.tpci.in/indiabusinesstrade/blogs/online-retail-to-have-6-million-msme-merchants-by-2027/#:~:text=The%20MSME%20sector%20in%20India,6%20million%20online%20MSME%20retailers>
- 4 Malik, P. (2024). *Competition issues in digital markets*. IPCIDE. Retrieved April 11, 2024, from [https://icrier.org/pdf/IPCIDE-Policy\\_Brief\\_5.pdf](https://icrier.org/pdf/IPCIDE-Policy_Brief_5.pdf)
- 5 MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd. & Ors., Case No. 13 of 2009 (CCI).
- 6 Mohit Manglani v. M/s Flipkart India Pvt. Ltd. & Ors. (2014) and Mr. Ashish Ahuja v. Snapdeal.com through Mr. Kunal Bahl, CEO & Ors. (2014).
- 7 Meru Travel Solutions Pvt. Ltd. v Uber India Systems Pvt. Ltd. & Ors. (2015).
- 8 Together We Fight Society v. Apple Inc. (2021) SCC Online CCI 62
- 9 Malik, P. (2022, November 4). Protecting competition in the digital space. *Financial Express*.

In December 2022, the Parliamentary Standing Committee on Finance (PSCF) presented the 53rd Report on Anti-Competitive Practices<sup>10</sup> before the Lok Sabha, in which it identified ten main ACPs exhibited by large digital enterprises and made recommendations to strengthen India's competition regulation framework to deal with the peculiarities of digital markets.<sup>11</sup>

On the basis of the recommendations of the PSCF, the Ministry of Corporate Affairs constituted a Committee on Digital Competition Law (CDCL), which released its report alongside the draft Digital Competition Bill (DCB) on 12 March 2024.<sup>12</sup> The report recommends instituting an *ex-ante* framework to complement the regulator's existing *ex-post* powers—a significant step forward in facilitating the orderly growth of India's digital ecosystem. Acknowledging the unintended consequences of an *ex-ante* framework, the CDCL proposed narrowing the scope of the DCB to a set of pre-identified Core Digital Services (CDS). It also recommended that the CCI should increase its technical capacity for the early detection and disposal of cases. However, the view on *ex-ante* regulations remains divided, not just in India but across the world.

This policy brief provides a comprehensive overview of ongoing discussions about the merits and drawbacks of *ex-ante* regulations for digital markets. Drawing on international developments, stakeholder perspectives,<sup>13</sup> and expert analysis, the brief aims to provide insights and recommendations for policymakers navigating the complex regulatory landscape in India.

## 2. Global Developments

The competition law in most countries employs *ex-post* enforcement to address anti-competitive behaviour in traditional markets. However, regulators worldwide are struggling to effectively apply these laws to address competition issues in digital markets. Over the years, competition law has transformed from being the guardian of markets to a servant of consumer welfare. The focus of investigations has shifted from proof that infringement is anti-competitive to a demonstration of why and how such infringement contributes to consumer welfare.<sup>14</sup>

In digital markets, traditional antitrust principles regarding the definition of markets (many of which are zero-priced), assessment of dominance, definition of consumers, and assessment of behaviour are being continuously challenged. Novel theories of harm go beyond the static assessment of these markets to incorporate the economics of multi-sided markets. However, case-by-case constraints impede the redressal of similar conducts that are creating anti-competitive harm, not only within an ecosystem but across monopolistic and oligopolistic ecosystems. Therefore, there is need for delegating “greater flexibility to regulators to put the principles of agile regulation into practice, allowing more to be done through decisions, guidance and rules rather than legislation”.<sup>15</sup> The proposals for *ex-ante* legislations have to be viewed in this context, with regulators being equipped with the power to devise agile rules and regulations.

Competition authorities have been debating about the optimal approach to regulate digital

10 Ministry of Corporate Affairs. (2022). *Anti-competitive practices by big tech companies*. Retrieved April 11, 2024, from [https://loksabhadocs.nic.in/lssccommittee/Finance/17\\_Finance\\_53.pdf](https://loksabhadocs.nic.in/lssccommittee/Finance/17_Finance_53.pdf)

11 ICRIER Prusur Centre for Internet and Digital Economy's (IPCIDE) policy brief, titled “Competition Issues in Digital Markets”, provides a comprehensive analysis of ACPs in digital markets along with examining the theories of harm as identified in the orders of the CCI, their impact on market dynamics, and proposed remedies. See Malik, P. (2024). *Competition issues in digital markets*. IPCIDE. Retrieved April 11, 2024, from [https://icrier.org/pdf/IPCIDE-Policy\\_Brief\\_5.pdf](https://icrier.org/pdf/IPCIDE-Policy_Brief_5.pdf)

12 Ministry of Corporate Affairs. (2024). *Report of the Committee on Digital Competition Law*. Retrieved April 11, 2024, from <https://www.mca.gov.in/bin/dms/getdocument?mids=gzGtvSkE3zIVhAuBe2pbow%253D%253D&type=open>

13 All stakeholder perspectives draw from IPCIDE, NASSCOM, and ADBI, “Regulating Competition in Digital Markets,” (closed-door roundtable), February 27, 2024, [https://icrier.org/ipcide\\_events/roundtable-on-regulating-competition-in-digital-markets/](https://icrier.org/ipcide_events/roundtable-on-regulating-competition-in-digital-markets/)

14 Andriychuk, O. (2023). EU digital competition law: The socio-legal foundations. In *The Cambridge yearbook of European legal studies* (pp. 1-24). <https://doi.org/10.1017/cel.2023.12>

15 Rec 1.8, *Final Report of the UK Taskforce on Innovation, Growth and Regulatory Reform*, May 2021.

markets; on the one hand is the adoption of an *ex-ante* framework that proposes pre-emptive measures to address anti-competitive behaviour, and on the other hand is an *ex-post* framework that focuses on enforcement actions on a case-by-case basis. However, some countries are working with a third, in-between approach.

The EU was among the first jurisdictions to overhaul its approach into an *ex-ante* framework through the implementation of the Platform to Business Rules, 2019 (P2BR)<sup>16</sup> and the Digital Markets Act, 2022 (DMA). The latter regulates unfair trade practices by dominant digital players (referred to as “gatekeepers”), allowing for swift and effective intervention in markets.<sup>17</sup> While the DMA has been criticised for potentially discouraging innovation and raising unintended costs, its effectiveness will hinge upon its implementation. With designated gatekeepers required to comply with the Act from March 2024 onwards, the impact of the Act will start to become evident.<sup>18</sup> The EU had proposed a ‘new competition tool’ (NCT) in 2020,<sup>19</sup> which had been touted as a novel solution positioned between *ex-post* law and the *ex-ante* framework. However, with the enactment of the DMA, the NCT was abandoned in June 2023.<sup>20</sup>

The UK embodied EU’s regulatory slant, albeit with certain modifications. The UK’s Digital Markets, Competition and Consumer Bill, 2023 proposed to grant the Digital Markets Unit

(DMU) with the authority to establish bespoke codes of conduct for designated firms. In contrast to the EU’s standardised approach of imposing equal obligations on all gatekeepers, the UK’s legislation promotes collaboration between regulators and firms to curate tailored solutions, i.e., firms are empowered to engage with the DMU in order to determine their conduct requirements and account for business-model specificities.<sup>21</sup> Additionally, the UK’s Competition and Markets Authority (CMA) has the power to initiate market studies and investigations, which can result in remedial action against certain market participants. In 2023, the CMA initiated market studies of railway catering services, road fuel, and housebuilding.<sup>22</sup> South Africa has also made extensive use of inquiries (under the Competition Act, 1998) to identify market features that adversely affect competition in digital markets such as in search, travel, online food delivery, and e-commerce, and extended context-specific recommendations.<sup>23</sup> For instance, Booking.com was required to undertake remedial actions to improve the visibility and performance of enterprises owned by persons from traditionally discriminated communities on its platform.<sup>24</sup>

In the US, the Federal Trade Commission scrutinises anti-competitive conduct on a case-by-case basis and also has the power to initiate market inquiries. Proposals such as the American Innovation and Choice Online Bill,<sup>25</sup> which aimed to introduce *ex-ante* regulations, did not

16 P2BR aims to create a transparent and fair business environment, especially for smaller businesses relying on search engines and online platforms for their activities by, inter alia, providing a dispute settlement mechanism. See *Regulation - 2019/1150 - EN - p2b regulation - EUR-Lex*. (2019, June 20). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019R1150>

17 Ibáñez Colomo, P. (2021). The draft Digital Markets Act: A legal and institutional analysis. *Journal of European Competition Law & Practice*, 12(7), 561-575. Retrieved April 11, 2024, from <https://academic.oup.com/jelap/article/12/7/561/6357803>

18 Burton, C., Buffier, B., Carroll, D., Fol, R., Sehwan, R. Y., & Signoret, L. D. (2022, October 13). *Formal publication of the DMA and timelines for compliance*. Wilson Sonsini. <https://www.wsg.com/en/insights/formal-publication-of-the-dma-and-timelines-for-compliance.html>

19 Proposed to empower the European Commission to initiate market investigations (independent of any established infringement of competition rules) into perceived structural competition problems, with the ability to impose market-wide remedies on companies. See Schweitzer, H. (2020). *The new competition tool: Its institutional set up and procedural design*. European Commission, Publications Office. <https://doi.org/10.2763/060011>

20 European Commission. (n.d.). *Single market — new complementary tool to strengthen competition enforcement*. [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-Single-Market-new-complementary-tool-to-strengthen-competition-enforcement\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-Single-Market-new-complementary-tool-to-strengthen-competition-enforcement_en)

21 Sidley Austin LLP. (2023, April 27). *New UK digital markets regime: Key differences with the EU Digital Markets Act*. <https://www.sidley.com/en/insights/newsupdates/2023/04/new-uk-digital-markets-regime-key-differences-with-the-eu-digital-markets-act>

22 Herbert Smith Freehills LLP. (2023, December 13). *A year in market studies*. <https://hsfnotes.com/crt/2023/12/13/a-year-in-market-studies/>

23 The Competition Commission South Africa. (2022). *Online intermediation platforms market inquiry provisional summary report*. <https://www.compcom.co.za/wp-content/uploads/2022/07/OIPMI-Provisional-Summary-Report.pdf>

24 The Competition Commission South Africa. (2023). *Online intermediation platforms market inquiry*. [https://www.compcom.co.za/wp-content/uploads/2023/07/CC\\_OIPMI-Final-Report.pdf](https://www.compcom.co.za/wp-content/uploads/2023/07/CC_OIPMI-Final-Report.pdf)

25 Draft American Innovation and Choice Online Act. (2023). <https://www.congress.gov/bill/117th-congress/senate-bill/2992/text>

receive widespread support because it was argued that its purpose was not to serve consumers but to penalise certain US tech businesses for engaging in anti-competitive behaviour (such as self-preferencing), which may not always be detrimental to the market or consumers.<sup>26</sup> Likewise, in Brazil, a Bill contemplating the regulation of digital markets and which bore considerable resemblance to the EU's DMA was proposed in October 2022.<sup>27</sup>

Notably, Australia has embraced a blended regulatory framework. While ex-post competition enforcement is undertaken under the Competition and Consumer Act, a 2021 amendment imposed service-specific ex-ante regulation on digital platforms to address the disparity between Australian news businesses and “designated digital platform corporations”, which benefit from a significant bargaining power imbalance.<sup>28</sup> Canada initiated a public consultation in 2019 to assess the adequacy of its domestic competition law in regulating digital markets.<sup>29</sup> The Competition Bureau of Canada advocated against ex-ante regulations, emphasising that market size alone is not an issue under the existing law unless it has been established that a dominant firm has

taken advantage of its privileged position to harm competition.<sup>30</sup>

In the Asia Pacific, South Korea was one of the first countries to address app-store monopolies; a 2021 amendment to the Telecommunications Business Act barred app market operators from forcing certain payment systems on mobile app development companies.<sup>31</sup> There are also ongoing discussions around introducing a DMA-style Bill.<sup>32</sup>

In Japan, the Act on Improving Transparency and Fairness of Digital Platforms (TFDPA), enacted in 2021, adopted a “co-regulatory approach”, allowing the government to create a general framework for promoting transparency by digital platforms while leaving its implementation up to each operator, with a provision for government oversight.<sup>33</sup> Currently, the Act is only applicable to online mall and app store operators. The Japanese Government is also mulling a legislation to stimulate competition in four digital spaces: app stores and payments, search engines, browsers, and operating systems.<sup>34</sup> These developments echo broader global trends of re-evaluating regulatory frameworks in the digital space.

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26 Disruptive Competition Project. (2023, January 12). *AICOA's failure and the future of competition policy in Congress*. Retrieved April 11, 2024, from <https://www.project-disco.org/competition/010623-aicoas-failure-and-the-future-of-competition-policy-in-congress/>

27 Bill 2768/2022. Dispõe sobre a organização, o funcionamento e a operação das plataformas digitais que oferecem serviços ao público brasileiro e dá outras providências. <https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2337417>

28 Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021. (2021). Retrieved April 11, 2024, from <https://www.accc.gov.au/system/files/Final%20legislation%20as%20passed%20by%20both%20houses.pdf>

29 Senator of Canada. (2021, October 27). *Consultation invitation - Examining the Canadian Competition Act in the digital era*. <https://sencanada.ca/media/368379/letter-pdf.pdf>

30 Competition Bureau of Canada. (2022, February 8). *Examining the Canadian Competition Act in the digital era*. Retrieved April 11, 2024, from <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-advice/interventions-competition-bureau/examining-canadian-competition-act-digital-era#sec09>

31 The Library of Congress. (2021, September 16). *South Korea: Amended Telecommunications Business Act will ban app payment monopolies*. <https://www.loc.gov/item/global-legal-monitor/2021-09-16/south-korea-amended-telecommunications-business-act-will-ban-app-payment-monopolies/#:~:text=On%20August%2031%2C%202021%2C%20the%20South%20Korean%20National,have%20the%20choice%20to%20use%20other%20payment%20systems>

32 Jung, Y., & Lee, H. (2023, October 23). *Tracking ancestry: KFTC guidelines on online platforms*. PYMNTS.com. Retrieved April 11, 2024, from [https://www.pymnts.com/cpi\\_posts/tracking-ancestry-kftc-guidelines-on-online-platforms/](https://www.pymnts.com/cpi_posts/tracking-ancestry-kftc-guidelines-on-online-platforms/)

33 Clifford Chance. (n.d.). *Japan's digital platform regulations*. <https://www.cliffordchance.com/insights/resources/blogs/talking-tech/en/articles/2021/08/japan-s-digital-platform-regulations.html>

34 Yasoshima, R., & Nagao, R. (2023, December 27). *Japan to crack down on Apple and Google app store monopolies*. *Nikkei Asia*. Retrieved April 11, 2024, from <https://asia.nikkei.com/Business/Technology/Japan-to-crack-down-on-Apple-and-Google-app-store-monopolies>

**Table 1: Summary of Existing and Proposed Legislations**

	<b>Ex-ante Approach</b>	<b>Ex-post Approach</b>	<b>Mixed Approach</b>
<b>Definition</b>	Imposes obligations to prevent competition harms	Addresses competition harms retrospectively through restorative measures or penalties	Leverages existing laws to respond to digital markets challenges; may include remedial action through market studies, sector- or service-specific obligations, etc.
<b>Existing Legislations</b>	- Digital Markets Act, 2022 (European Union)	- Sherman Act, 1890; Clayton Act, 1914; Federal Trade Commission Act, 1914 (United States) - Competition Act, R.S.C. 1985 (Canada) - Law No. 12,529 (Brazil) - Competition Act, 2002 (India)	- Enterprise Act, 2002; Competition Act, 1998 (United Kingdom) - Competition Act, 1998 (South Africa) - Competition and Consumer Act, 2010 (Australia) - Telecommunications Business Act (South Korea) - The Act on Improving Transparency and Fairness of Digital Platforms (Japan)
<b>Proposed Legislations</b>	- American Innovation and Choice Online Bill, 2023 (United States) - Bill 2768/2022 (Brazil) - Draft Digital Competition Bill, 2024 (India) - Platform Competition Promotion Act (South Korea)		- Digital Markets, Competition and Consumer Bill, 2023 (United Kingdom)

Global approaches to the regulation of digital markets are evolving. Several countries are re-assessing the efficacy of their existing approaches for regulating digital markets. While only the EU has adopted full-scale ex-ante regulations, many countries have borrowed elements from both ex-ante and ex-post frameworks to address the dynamic nature of digital markets and their emerging harms.

### 3. Regulating Competition in Digital Markets

Proposals for regulating competition in digital markets originated from an increasing disenchantment with traditional competition law, as investigations were too slow and narrow, and remedy powers too weak, for competition authorities to effectively create the overarching market framework that is required in these markets.<sup>35</sup> The debate around appropriate regulatory approaches for digital markets is multifaceted, with proponents and critics of

regulation offering compelling arguments and competing visions for the future of competition policy in the digital age.

The impediments to fair competition in digital marketplaces stem not only from classic categories of antitrust concerns (i.e., tying, leveraging, foreclosure, denial of market access, and loss of potential competition) but also from data-driven and platform-based business models. There is a deluge of data that promotes business models based on data collected from users. The addition of a data flow to an existing stock of data non-linearly alters the utility of the total pool of data. An extreme form of increasing returns may have profound implications for the typology of market competition.

The EU’s well-known view, posited by the panel of experts established by the European Commission, contends that traditional competition tools focus on the abuse of dominance in a single relevant market, whereas digital platforms often act

35 Fletcher, A. (2023). International pro-competition regulation of digital platforms: healthy experimentation or dangerous fragmentation?. *Oxford Review of Economic Policy*, 39(1), 12-33. <https://doi.org/10.1093/oxrep/grac047>



as intermediaries between several markets by leveraging data advantages.<sup>36</sup> The complexity of these markets slows down the impact of corrective action emanating from traditional regulatory responses, which may be outdated and ineffective in restoring market competition in digital industries after the harm has occurred. Ex-ante regulations can also improve market contestability by enabling access to and use of data—both constraints that are currently impeding market access.<sup>37</sup>

Arguably, ex-ante regulation can also free up regulatory capacity by transferring the legal duty of ensuring compliance to enterprises, enabling them to focus on addressing the violation of prohibited conduct. It also grants freedom from legal and economic constraints imposed by traditional competition law, empowering the regulator to take assertive administrative action.<sup>38</sup> By prohibiting certain anti-competitive behaviour, ex-ante regulation can also lead to regulatory efficacy and resource optimisation. For instance, the European Commission<sup>39</sup> opened a formal antitrust investigation into Microsoft's bundling of its Teams software (a cloud-based communication and collaboration tool) with the Microsoft 365 and Office 365 suites for business customers. Teams was bundled with the business suite purchase, and users did not have the option to integrate rival workplace communication systems like Slack or Zoom in their Microsoft 365 and Office 365 suites. While the EU is yet to arrive at a decision, Microsoft,

in order to avoid antitrust scrutiny, announced that it will unbundle Teams from the Microsoft 365 and Office 365 suites for business customers in the EU and that Microsoft 365 subscriptions without Teams will be available for purchase at a lower price.<sup>40</sup> They also announced plans to improve their documentation on interoperability to allow consumers to integrate other options like Slack or Zoom with their existing products like Exchange and Outlook.<sup>41</sup> Prohibiting tying and bundling through ex-ante regulation would have eliminated the need for this investigative process.

Despite the potential merits of ex-ante regulation, this approach continues to face significant criticism on grounds of its perceived limitations and consequences. Studies have shown that markets that are subject to ex-ante rules, which impose predetermined operational processes and standards, tend to negatively impact investments and innovation.<sup>42</sup> Concerns about regulation stifling innovation have also been a prominent feature of this debate. While the choice between regulation and innovation is often presented as a binary, it is regarded as a false choice by some scholars.<sup>43,44</sup> In this context, focusing on comprehensive institutional and legal reforms, rather than doing away with regulation altogether, can enable companies in digital markets to innovate and thrive.<sup>45</sup> Consequently, determining the nature of these regulations can be left to individual jurisdictions, allowing for customisation and individualisation according to their specific contexts.

36 Cabral, L., Haucap, J., Parker, G., Petropoulos, G., Valletti, T., & Van Alstyne, M. (2021, February 9). *The EU Digital Markets Act: A report from a panel of economic experts*. Publications Office of the European Union. Retrieved April 11, 2024, from [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3783436](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3783436)

37 Barman, N. (2023, June 29). Shaping the future of digital markets: The importance of ex-ante regulations. *The Leaflet*. Retrieved April 11, 2024, from <https://theleaflet.in/shaping-the-future-of-digital-markets-the-importance-of-ex-ante-regulations/>; Also see Section 9 of the Draft Digital Competition Bill, 2024.

38 Ibáñez Colomo, P. (2021). The draft Digital Markets Act: A legal and institutional analysis. *Journal of European Competition Law & Practice*, 12(7), 561-575. Retrieved April 11, 2024, from <https://academic.oup.com/jeclop/article/12/7/561/6357803>

39 European Commission. (2023, July 27). *Antitrust: Commission opens investigation into possible anticompetitive practices by Microsoft regarding Teams* [Press release]. Retrieved April 11, 2024, from [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_3991](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3991)

40 Warren, T. (2023, August 31). Microsoft is unbundling Teams from Office in Europe to address regulator concerns. *The Verge*. <https://www.theverge.com/2023/8/31/23853517/microsoft-teams-unbundling-europe>

41 Warren, T. (2023, August 31). Microsoft is unbundling Teams from Office in Europe to address regulator concerns. *The Verge*. <https://www.theverge.com/2023/8/31/23853517/microsoft-teams-unbundling-europe>

42 Lee-Makiyama, H., & Gopalakrishnan, B. N. (2020). *Economic costs of ex ante regulations*. ECIPE. Retrieved April 11, 2024, from <https://ecipe.org/publications/ex-ante/>

43 Bradford, A. (2024). The false choice between digital regulation and innovation. *Northwestern University Law Review*, 118(2). [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4753107&utm\\_source=pocket\\_saves](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4753107&utm_source=pocket_saves)

44 von Thun, M. (2024, March 12). 3. *To innovate or to regulate? The false dichotomy at the heart of Europe's industrial approach*. AI Now Institute. <https://ainowinstitute.org/publication/to-innovate-or-to-regulate-the-false-dichotomy>

45 Bradford, A. (2024). The false choice between digital regulation and innovation. *Northwestern University Law Review*, 118(2). [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4753107&utm\\_source=pocket\\_saves](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4753107&utm_source=pocket_saves)

## Report of the Committee on Digital Competition Law

The CDCL report concludes that India's current ex-post framework under the competition law is not conducive to the swift and opportune redressal of anti-competitive behaviour of digital enterprises and that there is a need for the formulation of a Digital Competition Bill that will empower the CCI to regulate large digital enterprises. The Bill, if passed, will supplement the Competition Act, 2002.

The ex-ante provisions in the Bill will be applicable to a pre-identified list of Core Digital Services (CDS) that are susceptible to market concentration.<sup>46,47</sup> The list is open to timely updates by the Central Government to help regulation keep pace with the rapid developments in digital markets. The Bill designates enterprises with a "significant presence" in the CDS as Systemically Significant Digital Enterprises (SSDEs) and requires such entities to self-report to the CCI.

According to the Bill, SSDEs should operate in a fair, non-discriminatory, and transparent manner with end users and business users. The Bill prohibits them from pursuing anti-competitive conduct some of which were identified in the Anti-Competitive Practices by Big Tech Companies report by the Parliamentary Standing Committee on Finance.<sup>48</sup> The Bill requires an SSDE to comply with a principle-based framework of ex-ante obligations aimed

at curbing anti-competitive practices.<sup>49</sup> Due to the varied nature of digital markets, the CCI will specify different conduct requirements and obligations for each CDS through a regulation.<sup>50</sup> Depending on certain factors, the SSDEs may also be subject to differential obligations. Section 38 of the Bill allows the Central Government the power to grant exemptions to enterprises based on certain criteria. The processes of inquiry, investigation, appeals, settlements, and commitments under the Bill are largely similar to those in the Competition Act, 2002.

Critics of the Bill argue that mandating user consent for data usage may have a negative effect on the revenue of MSMEs that rely on targeted advertising of digital intermediaries to access markets.<sup>51,52</sup> Increasing the compliance burden of enterprises is also a concern, with the government and regulators contemplating multiple simultaneous legislations to regulate the digital market.<sup>53</sup> Stakeholders also point to the CCI's successful prosecution of digital businesses such as Google, MakeMyTrip, Goibibo, and Oyo for anti-competitive behaviour in the absence of an ex-ante legislation as indicative of the regulator's capability to extend the Competition Act to address such conduct.<sup>54</sup> Since the ex-ante framework is yet to be well-tested in other jurisdictions, there are apprehensions around its implications for India, with additional misgivings arising from the fact that all jurisdictions that are currently contemplating ex-ante legislations are developed economies.

46 Ministry of Corporate Affairs. (2024). *Report of the Committee on Digital Competition Law*. Retrieved April 11, 2024, from <https://www.mca.gov.in/bin/dms/getdocument?mids=gzGtvSkE3zIVhAuBe2pbow%253D%253D&type=open>

47 The current list includes (i) online search engines; (ii) online social networking services; (iii) video-sharing platform services; (iv) interpersonal communications services; (v) operating systems; (vi) web browsers; (vii) cloud services; (viii) advertising services; and (ix) online intermediation services. See Schedule 1, Draft Digital Competition Bill, 2024.

48 The report identified ten anti-competitive practices: (i) anti-steering provisions; (ii) platform neutrality/self-preferencing; (iii) adjacency/bundling and tying; (iv) data usage (use of non-public data); (v) pricing/deep discounting; (vi) exclusive tie-ups; (vii) search and ranking preferencing; (viii) restricting third-party applications; (ix) advertising policies; and (x) acquisitions and mergers. **The Draft Bill, however, does not address the issue of mergers and acquisitions.**

49 Ministry of Corporate Affairs. (2024). *Report of the Committee on Digital Competition Law*. Retrieved April 11, 2024, from <https://www.mca.gov.in/bin/dms/getdocument?mids=gzGtvSkE3zIVhAuBe2pbow%253D%253D&type=open>

50 Section 7, Draft Digital Competition Bill, 2024

51 Bal, M. (2024, March 18). The Draft Digital Competition Bill 2024 wields a sledgehammer where a scalpel is required. *The Print*. Retrieved April 11, 2024, from <https://theprint.in/opinion/the-draft-digital-competition-bill-2024-wields-a-sledgehammer-where-a-scalpel-is-required/2004444/>

52 Goldfarb, A. (2014). What is different about online advertising? *Review of Industrial Organization*, 44(2), 115-129. <http://www.jstor.org/stable/43550450>

53 Bhatia, G. R., & Gupta, M. (2023, January 20). India's digital competition act. *Mondaq.com*. Retrieved April 11, 2024, from <https://www.mondaq.com/india/antitrust-eu-competition-/1271904/indias-digital-competition-act>

54 Shahi, G., & Vishwanath, T. S. (2024, March 19). A separate digital competition law isn't required. *Hindu BusinessLine*. Retrieved April 11, 2024, from <https://www.thehindubusinessline.com/opinion/a-separate-digital-competition-law-isnt-required/article67969563.ece>

Supporters of ex-ante legislation claim that digital markets can become more contestable compared to ex-post regulation.<sup>55</sup> Experts contend that, although ex-post regulatory actions can mitigate some anti-competitive harms, they cannot prevent the shift of market structures that result from certain types of conduct exhibited by large digital platforms. Therefore, prompt action in the form of ex-ante regulation may be required to rectify and prevent anti-competitive conduct.<sup>56</sup> Traditional competition law has also been found lacking, with case-specificity and procedural guarantees causing delays in the adoption of decisions, imposition of excessive demands on authorities and claimants through substantive standards in the process of establishing infringement, and remedies that fall short of fully restoring the competitive process.<sup>57,58</sup> Largely, the view on ex-ante regulation remains divided.

#### 4. Conclusion

The last decade has been witness to attempts by regulators and legislations to catch up with technology. The rapid pace of innovation, coupled with the slow process of investigation and appeals of anti-competitive practices in the digital space, has often created irreparable harm such as market consolidation and the erosion of societal trust in large digital enterprises. It is argued that harmful anti-competitive behaviours by large digital enterprises should be subject to regulation. The ex-ante regulation of such conduct is likely to prevent abuse of dominance by shifting the onus of compliance on enterprises, thus freeing the regulator to deal with the determining the violation of law. How did regulatory philosophy arrive at this conclusion? How did the normative and methodological foundations of competition

policy shift so dramatically that there arises a need to combine the elements of traditional competition law and sector-specific regulation? As documented in this policy brief, several jurisdictions are contemplating some form of regulation.

The preamble to the proposed Digital Competition Law reads that “An Act, to identify systemically significant digital enterprises and their associate digital enterprises, and to regulate their practices in the provision of core digital services, keeping in view the principles of **contestability, fairness and transparency**” [emphasis supplied]. Clearly, these objectives cannot be achieved by competition law alone, as fairness and exploitative conduct obligations are limited to dominant enterprises in the current scheme of the Act. The protection of fairness and contestability in relation to Core Digital Services is independent of the protection of the competitive process. In fact, the objective of fairness appears to be driven by an attempt to rebalance the conditions of competition for creating a level playing field. Moreover, regulation may play a significant role in the inclusion of transparency regarding various aspects of platform design and rules of engagement with business and end users, including the ways in which private data is used to distort competition between business users. The idea that competition is self-discovering and should only be protected—never proactively shaped or promoted—is deeply embedded in the normative non-interventionist narrative.<sup>59</sup> However, the last few years of competition law enforcement in digital markets has forced policymakers to envision a competition policy that extends beyond market protection to encompass a fair and contestable market design.

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55 Sahoo, M. S., & Yadav, A. (2022, December 19). Gatekeepers of digital markets. *Business Standard*. Retrieved April 11, 2024, from [https://www.business-standard.com/article/opinion/gatekeepers-of-digital-markets-122121901253\\_1.html](https://www.business-standard.com/article/opinion/gatekeepers-of-digital-markets-122121901253_1.html)

56 Srivats, K. R. (2023, April 10). Digital start-ups pitch for separate competition law with ex-ante regulatory framework. *Hindu BusinessLine*. Retrieved April 11, 2024, from <https://www.thehindubusinessline.com/info-tech/digital-start-ups-pitch-for-separate-competition-law-with-ex-ante-regulatory-framework/article66719744.ece>

57 Ibáñez Colomo, P. (2021). The draft Digital Markets Act: A legal and institutional analysis. *Journal of European Competition Law & Practice*, 12(7), 561-575. Retrieved April 11, 2024, from <https://academic.oup.com/jeclap/article/12/7/561/6357803>

58 Uberoi, N. K. (2024, March 10). Don't fix it if it's not broken. *Financial Express*. Retrieved April 11, 2024, from <https://www.financialexpress.com/opinion/dont-fix-it-if-its-not-broken/3420558/>

59 Andriychuk, O. (2023). EU digital competition law: The socio-legal foundations. In *The Cambridge yearbook of European legal studies* (pp. 1-24). <https://doi.org/10.1017/cel.2023.12>

India's approach to ex-ante regulation, if adopted, needs to be tailored to its market realities. While looking to other jurisdictions for inspiration is a well-established practice in law, special consideration should be given to Indian market specificities. DMA-type regulation applies to firms with very diverse business models that operate in complex, fast-moving markets that may not always be well understood. Although many of the rules in the DMA are inspired by recent or ongoing antitrust cases, it is closer to regimes such as banking supervision, which necessitates constant market monitoring. Rather than blanket regulations that cut across diverse markets, it is proposed that regulations for each of the Core Digital Services of the identified SSDEs are informed by market inquiries. This would allow for differential and individualised

obligations that are curated based on the nature of the market. Having said that, the remedial obligations identified should be self-executing and compliance-driven, backed by deterrent penalties, thus minimising the need for continuous monitoring and onerous investigative procedures.

Last but not least, the processes and procedures in the Bill regarding investigations, inquiries, appeals, settlements, and commitments borrow heavily from the notoriously lengthy procedures of the Competition Act, 2002. With the need for timely and speedy redressal in digital markets driving the conception of the Digital Competition Bill, this policy brief recommends that the processes for tackling issues in digital markets need to be streamlined.



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