

ASSESSING THE IMPERATIVE FOR AN EX-ANTE COMPETITION REGIME IN INDIA: A CRITICAL JUXTAPOSITION WITH OECD PRINCIPLES

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ABSTRACT

The Standing Committee's 53rd Report on Anti-Competitive Practices by Big Tech Companies has emerged as a matter of debate and deliberation among stakeholders and experts. The debate unfolds with the lack of alignment of the report with the best regulatory standards, which evolved over some time under international jurisprudence, the most distinguished one being the regulatory paradigm elucidated by the Organisation for Economic Cooperation and Development (OECD). These recommended guidelines mainly set ten quintessential standards that any ideal skeleton of a regulatory blueprint should concur with. Keeping this fact in sight, it becomes imperative to scrutinise the committee's recent recommendation in light of the benchmark set by the OECD to ascertain alignment with international best practices. Although the digital sector appears highly competitive post-COVID, with major platforms vying for dominance and economic recovery, this perceived contest often obscures the reality that entrenched big tech players employ anti-competitive practices to entrench their primacy, particularly to the detriment of smaller firms, as recognised by recent global and OECD analyses. Inspired by jurisdictions such as the European Union and the United States, India has embarked on its ex-ante expedition with little acknowledgement of the obstacles and uncertainties ahead. The paper delves into the intricacies that the proposed ex-ante regime is likely to reap with little concurrence with the OECD best practices and enumerates the best recourses in the interest of the country's digital ecosystem. Additionally, it explores alternative mechanisms that facilitate swift enforcement of regulations to mitigate the risks posed by rapidly evolving digital markets.

Keywords: OECD, anti-competitive, market dominance, ex-ante, Big Tech.

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INTRODUCTION

Between 2014 and 2019, India's digital economy grew at a rate 2.4 times that of the overall economy, driven primarily by the contributions of a few Big Tech companies across sectors.¹ However, this success has raised concerns in India and globally about potential anti-competitive market harm from the concentrated digital economy structure, where companies act as intermediaries and service providers.²

Acknowledging these concerns, competition regulators worldwide, including in the European Union (EU),³ the United States (US),⁴ Australia,⁵ South Africa,⁶ and the United Kingdom (UK),⁷ have not only contemplated but, in several cases, already enacted or commenced enforcement of bespoke digital competition frameworks to address issues in digital markets. In India, the Parliamentary Standing Committee of Finance initiated scrutiny of anti-competitive practices (hereinafter 'ACPs') by Big Tech companies in April 2022, resulting in the submission of the 53rd Report, commonly known as the Big Tech Report, in December 2022.⁸ The Report highlights the unique challenges posed by digital markets, such as network effects, data-driven market dominance, and the risk of permanent monopolies, and identifies widespread concerns around unfair practices by dominant digital intermediaries. To address

¹ DK Srivastava, 'How digital transformation will help India accelerate its growth in the coming years' (*EY Deutschland*, 25 April 2023) <www.ey.com/en_in/tax/economy-watch/how-digital-transformation-will-help-india-accelerate-its-growth-in-the-coming-years> accessed 29 December 2023.

² OECD, 'Chapter 4: The digital economy, new business models and key features' (*OECD iLibrary*, 2014) <www.oecd-ilibrary.org/the-digital-economy-new-business-models-and-key-features_5jxv8zhcfzf5.pdf?itemId=/content/> accessed 29 December 2023.

³ 'European regulators crack down on Big Tech' (*Reuters*, 5 October 2023) <www.reuters.com/technology/european-regulators-crack-down-big-tech-2023-10-03/> accessed 28 December 2023.

⁴ Daniel S Bitton and others, 'United States: E-Commerce and Big Data Merger Control' (*Global Competition Review*, 25 November 2022) <www.globalcompetitionreview.com/guide/digital-markets-guide/second-edition/article/united-states-e-commerce-and-big-data-merger-control> accessed 29 December 2023.

⁵ 'Australian regulator calls for new competition laws for digital platforms' (*Reuters*, 28 November 2023) <www.reuters.com/technology/australian-regulator-calls-new-competition-laws-digital-platforms-2023-11-27/> accessed 21 December 2023

⁶ Helanya Fourie and others, 'Regulatory ambiguity and policy uncertainty in South Africa's telecommunications sector' (*Economic Research Southern Africa*, January 2018) <www.econrsa.org/wp-content/uploads/2022/06/working_paper_729.pdf> accessed 30 December 2023.

⁷ Ryan Browne, 'UK regulator holding up Microsoft's Activision deal set to get new powers to rein in Big Tech' (*CNBC*, 25 April 2023) <www.cnbc.com/2023/04/25/uk-competition-regulator-to-get-new-powers-to-rein-in-big-tech-firms.html> accessed 26 December 2023.

⁸ Department Related Parliamentary Standing Committee on Finance, *53rd Report on Anti-Competitive Practices by Big Tech Companies* (Lok Sabha) <www.loksabhadocs.nic.in/lsscommittee/Finance/17_Finance_53.pdf> accessed 22 December 2023.

these issues proactively, the Report proposes the enactment of a Digital Competition Act (hereinafter 'DCA') designed to enable ex-ante regulation, focusing on designating certain platforms as 'Systemically Important Digital Intermediaries' (hereinafter 'SIDI's) based on criteria like market power and reach. These SIDI's would be subject to obligations including a mandatory code of conduct, transparency requirements, and oversight mechanisms to curb anti-competitive conduct. Drawing inspiration from international models, particularly the EU's Digital Markets Act (hereinafter 'DMA'), the proposed DCA aims to safeguard competitive digital ecosystems in India by empowering regulators to intervene before harm occurs, ensuring a level playing field for all participants in the digital economy.

In the context of India's existing regulatory framework, the Competition Commission of India ("CCI") regulates competition in digital markets under the Competition Act, 2002.⁹ While the Competition Act, 2002, addresses digital ACPs, the Report perceived a need for a specific evaluation of competition within digital markets. Hence, on February 6, 2023, the Ministry of Corporate Affairs (hereinafter 'MCA') established the Committee on Digital Competition Law (hereinafter 'CDCL') to review competition frameworks, study global best practices, analyze leading players' practices, propose a new DCA, scrutinize potential mergers and acquisitions, regulate internal policies related to advertising, data, and search, and, most importantly, adopt an ex-ante framework for designated Big Tech companies.¹⁰

Despite ongoing discussions for an ex-ante regime, balancing the need for regulation with the efficiency of open markets becomes essential. India has a history of advancing deregulation and market openness,¹¹ and any new framework should be carefully tailored to promote healthy competition without hindering the growth of the digital economy. Here arises a need to juxtapose and evaluate the necessity for ex-ante regulations against established global principles or ex-ante regulations, such as the 10 principles for an ex-ante regime by the OECD.¹² While India is not a member of the OECD, the country's digital market intersects

⁹ Competition Act 2002, Preamble.

¹⁰ Bhoomika Agarwal, 'Event Report: Future of Competition Policy in Digital Markets' (*The Dialogue*, 10 March 2023) <www.thedialogue.co/event-report-future-of-competition-policy-in-digital-markets/> accessed 21 December 2023.

¹¹ Nayar BR, 'Opening up and Openness of Indian Economy' (2001) 37 EPW 37 <www.jstor.org/stable/4411116> accessed 19 December 2023.

¹² John Taladay, 'The Ten Principles of Ex Ante Competition Regulation - PYMNTS.com' (PYMNTS.com, 2 November 2022) <www.pymnts.com/cpi_posts/the-ten-principles-of-ex-ante-competition-regulation/> accessed 25 December 2023.

with global digital platforms and economies. Though non-binding on India, these OECD standards shape the global regulatory discourse. Aligning our own regulatory framework with these principles would alleviate the risk of over or under-regulation and help India engage more seamlessly with international competition law and digital trade. This article analyses the policy initiative of the MCA with the OECD principles to understand the sufficiency of the existing regime, assess the benefits versus potential costs of ex-ante regulation, and provide recommendations on whether additional regulation is necessary for the evolving landscape of India's digital markets.

WHAT ARE EX-ANTE REGULATIONS?

Ex-ante, meaning 'before the event' in Latin, refers to regulations designed to predict events beforehand and proactively address market issues by shaping stakeholder behaviour through regulatory measures.¹³ While traditionally used in utility sectors, *ex-ante* regulation is now globally emerging in the context of Big Tech platforms.¹⁴

The member nations of the EU,¹⁵ such as Germany,¹⁶ have well-established systems for ex-ante regulations. The UK is still deliberating on adopting ex-ante regulations and most recently presented a new draft ex-ante regime for Big Tech companies.¹⁷

In the Americas, the US is addressing modern challenges in the technology sector through various measures.¹⁸ These include potential changes to existing regulations, such as amending

¹³ Intergovernmental Group of Experts on Competition Law and Policy, *Competition law, policy and regulation in the digital era* (TD/B/C.I/CLP/57, UNCTAD, 28 April 2021) <www.unctad.org/system/files/official-document/cicldp57_en.pdf> accessed 20 December 2023.

¹⁴ Directorate for Financial and Enterprise Affairs Competition Committee 'Ex-Ante Regulation and Competition in Digital Markets-Note by BIAC' (OECD, 24 November 2021) <[www.oecd.org/document/DAF/COMP/WD\(2021\)79/en/pdf](http://www.oecd.org/document/DAF/COMP/WD(2021)79/en/pdf)> accessed 14 December 2023.

¹⁵ Meredith Pickford, 'In Defence Of Competition Law: Addressing The European Commission's Proposals For Ex Ante Regulation Of Online Platforms, Including In Particular Prohibiting Self-Preferencing By Search Platforms' (*Monckton Chambers*) <www.files.monckton.com/wp-content/uploads/2020/11/Paper-on-EU-Proposals-for-Ex-Ante-Regulation-of-Digital-Platforms.pdf> accessed 19 December 2023.

¹⁶ Tobias Pesch, 'The new German competition enforcement act – a true paradigm shift?' (*White & Case LLP International Law Firm*, 10 August 2023) <www.whitecase.com/insight-alert/new-german-competition-enforcement-act-true-paradigm-shift> accessed 19 December 2023.

¹⁷ 'How does the new UK ex ante regime for big tech compare with the EU Digital Markets Act?' (*Cullen International*) <www.cullen-international.com/news/2023/05/How-does-the-new-UK-ex-ante-regime-for-big-tech-compare-with-the-EU-Digital-Markets-Act.html> accessed 12 December 2023.

¹⁸ Camino Kavanagh, 'New Tech, New Threats, and New Governance Challenges: An Opportunity to Craft Smarter Responses?' (*Carnegie Endowment for International Peace*, 28 August 2021)

the Horizontal and Vertical Merger Guidelines¹⁹ and introducing new legislation like the American Innovation and Choice Online Act.²⁰ This Act aims to prevent self-preferencing, discriminatory conduct, use of non-public data, and more by large online platforms. Canada's Competition Bureau is also considering comprehensive amendments to its legislation to address digital market concerns.²¹

In Asia, the Taiwan Fair Trade Commission is exploring amendments to its legal framework to address competition issues arising from novel business models in the digital economy.²² South Korea, in 2022, opted for a "pro-market approach" and chose self-regulation, contrasting with its formal regulatory stance in 2021.²³

The experiences of these jurisdictions highlight that each country chooses laws and regulations that align with its specific needs and the competitiveness of its digital economy. Notably, considerable time and effort, spanning several years, are invested in examining, assessing, and formulating frameworks that align with each country's economic objectives. A similar trajectory can be anticipated for the proposed Indian regime.

JUXTAPOSING THE INDIAN APPROACH WITH OECD PRINCIPLES

The OECD is a preeminent international organisation that establishes widely recognised guidelines and standards for economic policy, encompassing sophisticated frameworks for

<https://www.carnegieendowment.org/2019/08/28/new-tech-new-threats-and-new-governance-challenges-opportunity-to-craft-smarter-responses-pub-79736> accessed 20 December 2023.

¹⁹ 'Vertical Merger Guidelines, U.S. Department of Justice & The Federal Trade Commission' (30 June 2020) https://www.ftc.gov/system/files/documents/public_statements/1580003/vertical_merger_guidelines_6-30-20.pdf accessed 14 December 2023.

²⁰ 'Federal Trade Commission and Justice Department Release 2023 Merger Guidelines' (*Federal Trade Commission*, 18 December 2023) <https://www.ftc.gov/news-events/news/press-releases/2023/12/federal-trade-commission-justice-department-release-2023-merger-guidelines> accessed 29 December 2023.

²¹ Angelica Dino, 'Competition Bureau of Canada recommends changes to modernize Competition Act' (*Canadian Lawyer*, 28 March 2023) <https://www.canadianlawyermag.com/practice-areas/corporate-commercial/competition-bureau-of-canada-recommends-changes-to-modernize-competition-act/374750> accessed 29 December 2023.

²² 'The TFTC released the "White Paper on Competition Policy in the Digital Economy"' (*Taiwan Fair Trade Commission*) <https://www.ftc.gov.tw/internet/english/doc/docDetail.aspx?uid=179&docid=17352> accessed 27 December 2023.

²³ Hong Ki Kim and Kee Won Shin, 'South Korea: KFTC boosts antitrust laws with stronger regulation and pivotal amendments' (*Global Competition Review*, 10 March 2023) <https://www.globalcompetitionreview.com/review/the-asia-pacific-antitrust-review/2023/article/south-korea-kftc-boosts-antitrust-laws-stronger-regulation-and-pivotal-amendments> accessed 29 December 2023.

effective competition regulation and market oversight. It has developed the Ten Principles of Ex-Ante Competition Regulation, which emphasise the necessity for clarity in policy objectives, proportionality in regulatory measures, alignment among stakeholders, and the careful consideration of alternative regulatory tools.²⁴ These principles serve as a benchmark to mitigate common pitfalls in regulatory design, ensuring that oversight mechanisms promote competitive markets while minimising unintended consequences. Leveraging these principles can assist Indian policymakers in crafting balanced, evidence-based ex-ante regulatory frameworks tailored to the complexities of emerging digital market challenges.

A. NECESSITY OF INTRODUCTION: DO EX-ANTE REGULATIONS SERVE WELL-IDENTIFIED POLICY GOALS?

The first OECD principle emphasises understanding the “why” of the regulation and identification of the policy goals driving it.²⁵ Clearly defined policy goals serve as a unifying guide in regulation to align stakeholders, provide benchmarks for effectiveness, and recognise alternative tools over ex-ante regulation as more effective for specific issues.²⁶

In the context of India, the demand for ex-ante regulations arises from observed ACPs in how Big Tech operates in the market.²⁷ However, the overarching goal of the Competition Act²⁸ continues to remain relevant for digital markets and to address the competition issues identified by the CDCL, as also reflected in the CLCR’s comments in the Report.²⁹ Even though the tide is high in favour of bringing in ex-ante regulations, juxtaposing major issues with existing provisions of the Competition Act presents a different picture.

a) ANTI-STEERING PROVISIONS

²⁴ John Taladay, ‘The Ten Principles of Ex Ante Competition Regulation - PYMNTS.com’ (*PYMNTS.com*, 2 November 2022) <www.pymnts.com/cpi_posts/the-ten-principles-of-ex-ante-competition-regulation/> accessed 25 December 2023.

²⁵ *ibid.*

²⁶ *ibid.*

²⁷ Department Related Parliamentary Standing Committee on Finance, *53rd Report on Anti-Competitive Practices by Big Tech Companies* (Lok Sabha) <www.loksabhadocs.nic.in/lsscommittee/Finance/17_Finance_53.pdf> accessed 22 December 2023.

²⁸ Competition Act 2002, ss 3, 4, 5.

²⁹ Department Related Parliamentary Standing Committee on Finance, *53rd Report on Anti-Competitive Practices by Big Tech Companies* (Lok Sabha) para 1.22 <www.loksabhadocs.nic.in/lsscommittee/Finance/17_Finance_53.pdf> accessed 22 December 2023.

Where a platform restricts business users from guiding consumers to offers outside the platform, provisions regarding imposing unfair or discriminatory conditions or prices³⁰ and denial of market access³¹ of the Competition Act becomes relevant. For instance, CCI found Google guilty of abusing its dominant position by imposing the use of Google Play's Billing System for paid app downloads and in-app purchases over other payment gateways.³² Google was slapped with a monetary penalty of INR 937 crores, and subsequently failed to obtain a stay from the National Company Law Appellate Tribunal (NCLAT). This compelled a subsequent compliance announcement, which underscored the severity of CCI's directives on behavioural remedies.

b) BUNDLING AND TYING

This entails compelling developers to exclusively utilise app store operators' services to eradicate market competition. Relevant provisions of the Competition Act pertain to concluding contracts contingent on accepting unrelated supplementary obligations,³³ and tie-in arrangements³⁴ under the Competition Act.

To illustrate, CCI has pursued several cases against Google for ACPs. In one such instance, CCI found Google guilty of abusing its dominant position by tying the Play Store with Google Search, Google Chrome, and YouTube.³⁵ It is also currently being investigated for allegedly compelling device manufacturers to pre-install the complete suite of Google apps, restricting their choice.³⁶ Apart from Google, Apple is also under the radar of the CCI for allegedly tying its distribution and payment processing services for in-app purchases, along with linking its app store to the use of its in-app payment solution.³⁷

c) THIRD-PARTY APP RESTRICTION

³⁰ Competition Act 2002, s 4(2)(a).

³¹ Competition Act 2002, s 4(2)(c).

³² *XYZ v Alphabet Inc and Others* CCI Case No 07 of 2020 (25 October 2022).

³³ Competition Act 2002, ss 4(2)(a), 4(2)(d).

³⁴ Competition Act 2002, s 3(4)(a).

³⁵ *Umar Javeed and Others v Google LLC and Another* CCI Case No 39 of 2018 (20 October 2022).

³⁶ *Kshitiz Arya and Another v Google LLC and Others* CCI Case No 19 of 2020 (22 June 2021).

³⁷ *Together We Fight Society v Apple Inc* CCI Case No 24 of 2021 (31 December 2021).

This involves limitations on the installation or operation of third-party applications, and the relevant provisions include limiting technical or scientific development relating to goods or services³⁸ and refusal to deal.³⁹ For instance, CCI is currently investigating Apple for its practice of prohibiting third-party app stores from being listed on its App Store.⁴⁰

d) TIE-UPS

Exclusive tie-ups involve agreements for the exclusive sale of a brand's products on a platform. These find a place in the Competition Act under provisions relating to predatory pricing,⁴¹ limiting production,⁴² and tie-in arrangements.⁴³ For instance, in 2022, CCI found MakeMyTrip and GoIbibo in violation of the Competition Act for ACPs, including price parity clauses and exclusivity with hotel partners.⁴⁴ An exclusionary agreement with OYO resulted in a penalty of INR 223.48 crores on MakeMyTrip and INR 168.88 crores on OYO. However, their appeals are pending before the NCLAT currently. Recently, CCI has also initiated investigations into Zomato and Swiggy,⁴⁵ and Amazon and Flipkart⁴⁶ for instances of exclusive tie-ups.

e) PLATFORM NEUTRALITY

To avoid self-preferencing and maintaining platform neutrality, the platform must refrain from favoring its own services or subsidiaries when both providing the platform and competing on

³⁸ Competition Act 2002, ss 4(2)(a), 4(2)(b).

³⁹ Competition Act 2002, ss 4(2)(c), 4(2)(e), 3(4)(d).

⁴⁰ *Together We Fight Society v Apple Inc* CCI Case No. 24 of 2021 (31 December 2021).

⁴¹ Competition Act 2002, s 4(2)(a).

⁴² Competition Act 2002, s 4(2)(c).

⁴³ Competition Act 2002, s 3(4).

⁴⁴ *Federation of Hotel and Restaurant Associations of India and Another v MakeMyTrip India Private Limited and Others* CCI Case No 14 of 2019 (19 October 2022).

⁴⁵ *National Restaurant Association of India v Zomato Limited and Others* CCI Case No 16 of 2021 (4 April 2022).

⁴⁶ *Delhi Vyapar Mahasangh v Flipkart Internet Private Limited and Another* CCI Case No 40 of 2019 (13 January 2020).

it. The Competition Act covers these aspects through provisions governing the protection of another relevant market⁴⁷ and vertical anti-competitive agreements.⁴⁸

In one recent instance, CCI found Google guilty of abusing its dominant position through practices of app pre-installation and imposed a penalty of INR 1337.6 crores.⁴⁹ On dismissal of its appeal by the NCLAT, Google submitted and announced changes in its business model to facilitate compliance. In another case, CCI fined Google INR 135.86 crores for search bias. While the appeal lies pending before the NCLAT, the efficiency of actions by CCI is evident.⁵⁰

f) DATA USAGE

This involves leading platforms leveraging their position and utilising consumer preference data or collecting and storing large amounts of data for consumer profiling. It is regulated through various aspects under the abuse of dominant position, including predatory pricing,⁵¹ limiting access,⁵² and denial of market share.⁵³ A perfect example of this is the ongoing investigations by CCI into WhatsApp's 2021 privacy policy for alleged abuse of their dominance related to data practices.⁵⁴

g) DEEP DISCOUNTING

When platforms engage in misleading sales and markdowns that undermine control of service providers over final prices, the predatory pricing provision becomes applicable.⁵⁵ For instance, CCI initiated an investigation into alleged deep discounting by Flipkart and Amazon recently.⁵⁶

h) SEARCH PREFERENCING

⁴⁷ Competition Act 2002, ss 4(2)(a), 4(2)(e).

⁴⁸ Competition Act 2002, s 3(4).

⁴⁹ *Umar Javeed and Others v Google LLC and Another* CCI Case No 39 of 2018 (20 October 2022).

⁵⁰ *Matrimony.com Limited v Google LLC and Others* CCI Case No 07 and 30 of 2012 (8 February 2018).

⁵¹ Competition Act 2002, s 4(2)(a).

⁵² Competition Act 2002, s 4(2)(c).

⁵³ Competition Act 2002, s 4(2)(e).

⁵⁴ *In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users* CCI Suo Moto Case No 01 of 2021 (24 March 2021).

⁵⁵ Competition Act 2002, s 4(2)(a).

⁵⁶ *Delhi Vyapar Mahasangh v Flipkart Internet Private Limited and Another* CCI Case No 40 of 2019 (13 January 2020).

This involves search bias favouring sponsored products or orders fulfilled by the marketplace itself. These were restricted for violating predatory pricing,⁵⁷ denying market access⁵⁸ and restricting another relevant market.⁵⁹ For instance, CCI found Google guilty of search bias and contravening the Competition Act by assigning predetermined fixed positions to universal search results until 2010.⁶⁰ As a response, CCI prohibited Google from fixing such positions in the future.

i) ADVERTISING POLICIES

This involves formulating policies utilising consumer data through artificial intelligence and machine learning for cost-effective targeted advertising. It is considered anti-competitive for predatory pricing,⁶¹ denying market access⁶² and restricting another relevant market.⁶³ CCI's investigation into WhatsApp's data practices to examine whether the data sharing provision may have exclusionary effects in the display advertising market exemplifies the application of these provisions.⁶⁴

j) DIGITAL MARKET TIP

The rapid tipping of digital markets which results in the emergence of one or two dominant players in a short timeframe has remedy under CCI's powers to implement interim measures to prevent short-term harms in cases until the completion of the investigation.⁶⁵ For instance, MakeMyTrip and GoIbibo were recently instructed during the ongoing CCI investigation to re-list hotels previously excluded due to an agreement with OYO.⁶⁶

⁵⁷ Competition Act 2002, s 4(2)(a).

⁵⁸ Competition Act 2002, s 4(2)(c).

⁵⁹ Competition Act 2002, s 4(2)(e).

⁶⁰ *Matrimony.com Limited v Google LLC and Others* CCI Case No 07 and 30 of 2012 (8 February 2018).

⁶¹ Competition Act 2002, s 4(2)(a).

⁶² Competition Act 2002, s 4(2)(c).

⁶³ Competition Act 2002, s 4(2)(e).

⁶⁴ *In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users* CCI Suo Moto Case No 01 of 2021 (24 March 2021).

⁶⁵ Competition Act 2002, s 33.

⁶⁶ *Federation of Hotel and Restaurant Associations of India and Another v MakeMyTrip India Private Limited and Others* CCI Case No 14 of 2019 (19 October 2022).

k) MERGERS AND ACQUISITIONS

Acquisitions, mergers, and amalgamations exceeding specified thresholds must be pre-notified to CCI under the Competition Act, with CCI assessing whether the transaction leads to or is likely to lead to an Appreciable Adverse Effect on Competition.⁶⁷ Furthermore, the Competition (Amendment) Act, 2023, introduces 'deal value' thresholds aimed at scrutinising high-value deals, particularly within the digital space, that might otherwise escape CCI scrutiny due to the involved parties having limited assets and low turnover in India. This amendment is expected to address the concerns raised by the CDCL's regarding mergers and acquisitions.

WHETHER THE COMPETITION ACT IS SUFFICIENT TO DEAL WITH THE PERSISTING CONCERNS?

The Competition Act empowers CCI to investigate and enforce remedies on digital platforms, leading to a decade of addressing issues akin to those outlined by the CDCL and implementing effective solutions on major digital platforms. Furthermore, the Competition Act empowers CCI to undertake advocacy efforts to promote competition.⁶⁸ Utilising its authority, CCI conducted a 2020 e-commerce market study to identify concerns similar to those in the Report and clarified its approach to addressing these through a case-by-case evaluation under the existing Competition Act.⁶⁹ Additionally, in 2021, a discussion paper on competition issues in blockchain technology was published, cautioning stakeholders to avoid enforcement action in their conduct with smart contracts.⁷⁰

In addition to CCI's decisional practices in digital markets, reports suggest that CCI is establishing a dedicated internal Digital Markets Unit (hereinafter 'DMU') given the increasing complexity and quantum of cases in the digital sector.⁷¹ The DMU will enlist specialists in digital markets, including data scientists and algorithm experts, to oversee the national digital

⁶⁷ Competition Act 2002, s 5.

⁶⁸ Competition Act 2002, s 49.

⁶⁹ Competition Commission of India, 'Market Study on E-Commerce in India: Key Findings and Observations' (8 January 2020) <www.cci.gov.in/economics-research/market-studies/details/18/6> accessed 21 December 2023.

⁷⁰ EY-CCI, 'Discussion paper on blockchain technology and competition' (April 2021) <www.awards.concurrences.com/IMG/pdf/blockchain.pdf?73703/bdec1671e964c3d0663628b6a37b49541df9bb0b029ee83e5db35b32580a682f> accessed 15 December 2023.

⁷¹ Sarvesh Mathi, 'CCI establishes Digital Markets and Data Unit (DMDU) to tackle competition concern in Digital Markets' (*MediaNama*, 28 July 2023) <www.medianama.com/2023/07/223-cci-establishes-digital-markets-and-data-unit/> accessed 21 December 2023.

app ecosystem, acting as a central hub for collaboration with stakeholders from industry, academia, regulators, and the government.⁷²

DOES A NEW ACT SEEM ABSOLUTELY NECESSARY?

The above analysis of CCI's decisional practices reveals that the existing competition regime is well-equipped to address competition concerns in digital markets promptly and effectively. Legal precedents coupled with CCI's proactive advocacy initiatives underscore CCI's capability to effectively address abusive conduct in digital markets, including those highlighted in the Report. In light of this, the need for new legislation to regulate competition in India's digital markets diminishes.

B. EQUIPPED WITH A SOUND LEGAL BASIS: WHETHER EX-ANTE REGULATIONS SUIT THE INDIAN RULE OF LAW

Regulatory action in the digital realm should be firmly anchored in the rule of law, requiring due authorisation for any regulatory body.⁷³ Ex-ante regulations must align with existing legal obligations and fundamental legislative principles, such as certainty and proportionality.⁷⁴

India can do well by observing the presence of sound ex-ante systems in other nations, for instance, Germany.⁷⁵ Germany implemented ex-ante regulation through the 10th amendment to the German Act against Restraints of Competition, employing a qualitative approach for designating platforms as 'undertakings with Paramount Cross-Market Significance' (PCMS).⁷⁶ Germany's Federal Cartel Office designates PCMS Power based on various market factors and tailors obligations, including prohibiting self-preferencing and abusive data strategies, under German legislation. The most important to take into note is that Germany's ex-ante regime is

⁷² Jaideep Shenoy, 'CI in talks with technical experts to understand self-learning algorithms b/w digital players' *The Times of India* (11 May 2018) <www.timesofindia.indiatimes.com/india/cci-in-talks-with-technical-experts-to-understand-self-learning-algorithms-b/w-digital-players/articleshow/64128708.cms?from=md> accessed 17 December 2023.

⁷³ John Taladay, 'The Ten Principles of Ex Ante Competition Regulation - PYMNTS.com' (PYMNTS.com, 2 November 2022) <www.pymnts.com/cpi_posts/the-ten-principles-of-ex-ante-competition-regulation/> accessed 25 December 2023.

⁷⁴ *ibid.*

⁷⁵ Tobias Pesch, 'The new German competition enforcement act – a true paradigm shift?' (White & Case LLP International Law Firm, 10 August 2023) <www.whitecase.com/insight-alert/new-german-competition-enforcement-act-true-paradigm-shift> accessed 19 December 2023.

⁷⁶ Act against Restraints on Competition (GWB) 1958.

established on core principles of cost-effectiveness and proportionality,⁷⁷ and was adopted after due analysis of its alignment to the German Rule of Law.⁷⁸

C. EQUIPPED WITH A SOUND EMPIRICAL BASIS: BRINGING FORTH THE FACTS

Regulations in emerging technology industries must be grounded in empirical analysis, considering the unique dynamics of these sectors where traditional market structures may not be applicable.⁷⁹ The EU has been at the forefront of introducing ex-ante legislation, such as the DMA, to regulate large digital platforms.⁸⁰ The DMA, in effect since 2022 after a two-year impact assessment, designates online platforms as 'gatekeepers' based on turnover, market valuation, and the provision of core platform services across multiple EU member states.⁸¹ Gatekeepers face proscriptions to ensure fair competition under the European Commission's regulation. This strategy is innovative and suitable to the economic stage EU has reached.⁸²

Examining India's reflection on these principles in light of its unique position in the geo-economic landscape reveals beneficial aspects for India's digital economy arising from the presence of Big Tech apart from antitrust concerns.⁸³ While the government seems committed to addressing the digital competition issues through an ex-ante regime, taking the complete picture into account becomes essential to know whether this proposal truly holds for a country like India.

⁷⁷ *ibid* s 97(1).

⁷⁸ Sigrid Quack and Marie-Laure Djelic, 'Adaptation, Recombination and Reinforcement: The Story Of Antitrust And Competition Law In Germany And Europe' in Streeck Wolfgang and Thelen Kathleen (eds), *Beyond Continuity: Institutional Change in Advanced Political Economies* (Oxford University Press, 10 March 2005).

⁷⁹ John Taladay, 'The Ten Principles of Ex Ante Competition Regulation - PYMNTS.com' (*PYMNTS.com*, 2 November 2022) <www.pymnts.com/cpi_posts/the-ten-principles-of-ex-ante-competition-regulation/> accessed 25 December 2023.

⁸⁰ Meredith Pickford, 'In Defence Of Competition Law: Addressing The European Commission's Proposals For Ex Ante Regulation Of Online Platforms, Including In Particular Prohibiting Self-Preferencing By Search Platforms' (*Monckton Chambers*) <www.files.monckton.com/wp-content/uploads/2020/11/Paper-on-EU-Proposals-for-Ex-Ante-Regulation-of-Digital-Platforms.pdf> accessed 19 December 2023.

⁸¹ *ibid*.

⁸² *ibid*.

⁸³ Jigar Gandhi, 'How Technology is Transforming India's Economy' (*Schroders global*, 6 September 2023) <www.schroders.com/en/global/individual/insights/how-technology-is-transforming-india-s-economy/> accessed 26 December 2023.

a) A BLIND EMULATION OF INTERNATIONAL TRENDS

Big Tech companies, though instrumental in contributing to economic growth, have faced global scrutiny due to concerns about market dominance and tactics that could impede fair competition. Since many nations have adopted an ex-ante competition regime,⁸⁴ India faces similar pressure to harmonise regulations and consumer protection standards with international trends. To align India's regulatory efforts with international initiatives, the Report lays down a premise that appears highly theoretical in asserting the necessity for ex-ante regulations. Throughout, the Report emphasises the urgency for action due to CCI investigations on digital entities, yet it lacks empirical analysis of competition economics supported by hard statistics.

Effective regulation should be rooted in two key principles: empirical analysis and an impact-based assessment, both requiring stakeholder and public consultation.⁸⁵ Currently, it seems that India's Report lacks enough of both. The apparent motivation to bring the chase seems solely to emulate foreign precedents without consideration of a robust foundation. While the CDCL references legal precedents involving data acquisitions by major players like Google and Facebook, the adequacy of their analysis to support such a significant step as implementing ex-ante regulations remains subject to debate.⁸⁶

b) THE “FALSE POSITIVE” EFFECT

An ex-ante regime runs on rule-based restrictions rather than effects-based restrictions that may prevent digital businesses from highlighting consumer benefits or positive effects that counter competition concerns during the assessment of their conduct.⁸⁷ Regulating the digital sector ex-ante could mislabel conduct as anti-competitive when it does not lead to such effects, giving rise to potential "false positives."⁸⁸

⁸⁴ ‘Summary of Discussion of the Roundtable on Ex Ante Regulation and Competition in Digital Markets’ (OECD, 11 October 2022) <[www.oecd.org/document/DAF/COMP/M\(2021\)2/ANN3/FINAL/en/pdf](http://www.oecd.org/document/DAF/COMP/M(2021)2/ANN3/FINAL/en/pdf)> accessed 19 December 2023.

⁸⁵ John Taladay, ‘The Ten Principles of Ex Ante Competition Regulation - PYMNTS.com’ (PYMNTS.com, 2 November 2022) <www.pymnts.com/cpi_posts/the-ten-principles-of-ex-ante-competition-regulation/> accessed 25 December 2023.

⁸⁶ Department Related Parliamentary Standing Committee on Finance, *53rd Report on Anti-Competitive Practices by Big Tech Companies* (Lok Sabha) <www.loksabhadocs.nic.in/lsscommittee/Finance/17_Finance_53.pdf> accessed 22 December 2023.

⁸⁷ Rob Frieden, ‘Ex Ante Versus Ex Post Approaches To Network Neutrality: A Comparative Assessment’ (2015) 30(2) Berkeley Technology Law Journal 1561 <www.btlj.org/data/articles2015/vol30/30_2/1561-1612_Frieden.pdf> accessed 12 December 2023.

⁸⁸ *ibid.*

This becomes especially pertinent considering instances where CCI refrained from condemning allegedly abusive conduct, demonstrating that CCI's examination of such conduct ex-post allows businesses to highlight efficiencies and decide that intervention is unnecessary. For instance, in a 2017 case, CCI *prima facie* dismissed the abuse of dominance allegations related to WhatsApp's 2016 privacy policy, appreciating WhatsApp's privacy features which included the ability to 'opt-out' of sharing account information with Facebook and end-to-end encryption of user messages.⁸⁹ In another case involving alleged anti-competitive bundling with WhatsApp's messaging services through its payment feature integration, CCI considered WhatsApp Pay as optional and non-coercive, causing no adverse impact on competition.⁹⁰ Numerous other precedents, involving Uber,⁹¹ Google,⁹² and Urbanclap,⁹³ highlight instances where CCI reasoned practices seemingly anti-competitive as reasonable in light of external factors. An ex-ante framework may lack the same protection, potentially chilling innovation, competition, and consumer choice, as businesses may fear violating the law without the opportunity to provide objective justifications for their conduct.

D. PRODUCING BENEFITS THAT JUSTIFY ITS EFFECTS ACROSS SOCIETY

Regulators should assess costs and benefits, prioritise stakeholder and public consultation, quantify impacts, improve regulatory quality, encourage compliance, and minimise enforcement costs in regulatory proposals.⁹⁴ This aligns with the goal of creating net consumer benefits, emphasising "competition rather than competitors," and underscores the importance of a balanced approach in rapidly evolving sectors, cautioning against premature ex-ante regulation that may hinder growth, innovation, and investment.⁹⁵

⁸⁹ *Shri Vinod Kumar Gupta v WhatsApp Inc* CCI Case No 99 of 2016 (1 June 2017).

⁹⁰ *Harshita Chawla v WhatsApp Inc and Another* CCI Case No 15 of 2020 (18 August 2020).

⁹¹ *Meru Travel Solutions Private Limited v Uber India Systems Private Limited and Others* CCI Case No 81 of 2015 (22 December 2015); *Meru Travel Solutions Private Limited v Uber India Systems Private Limited* CCI Case No 95 of 2015 (14 July 2021).

⁹² *Baglekar Akash Kumar v Google LLC and Others* CCI Case No 39 of 2020 (29 January 2021).

⁹³ *Prachi Agarwal v Urbanclap Technologies India Private Limited* CCI Case No 30 of 2020 (24 March 2021).

⁹⁴ John Taladay, 'The Ten Principles of Ex Ante Competition Regulation - PYMNTS.com' (PYMNTS.com, 2 November 2022) <www.pymnts.com/cpi_posts/the-ten-principles-of-ex-ante-competition-regulation/> accessed 25 December 2023.

⁹⁵ Prof Alain Strowel and Prof Wouter Vergote, 'Digital Platforms: To Regulate or Not To Regulate?' (European Commission) <www.ec.europa.eu/information_society/newsroom/image/document/2016-7/uclouvain_et_universit_saint_louis_14044.pdf> accessed 12 December 2023.

a) THINKING FOR INDIA FIRST

India's strong presence in global startup and unicorn numbers reflects remarkable growth in digital markets, driven by government initiatives like the Jan Dhan-Aadhar-Mobile (JAM) trinity,⁹⁶ UPI,⁹⁷ and ONDC.⁹⁸ The government should refrain from introducing new legislation that may disrupt these evolving homegrown initiatives, which have expanded digital access, fostered a level playing field, and injected fresh competition into the nascent digital ecosystem supporting startups in India. Furthermore, SIDI companies have significantly enhanced customer experiences in India, contributing substantial value to consumers and supporting businesses, yet might get trampled under the ex-ante regulatory regime. While effective regulation is a consideration, including ex-ante measures, there is no urgent need for a law akin to the EU's DMA at this juncture. Policymakers must weigh the risks of deviating from traditional competition law and the costs associated with entering a new era of sectoral regulation.

b) A MISPLACED ‘BIG IS BAD’ MATRIX

Identifying SIDIs through criteria like revenues, market capitalisation, and user numbers echoes past legislation like the Monopolies and Restrictive Trade Practices (MRTP) Act, 1969.⁹⁹ However, modern competition jurisprudence, embodied in the Competition Act, prioritises preventing abuse of dominance over penalising sheer size, addressing past criticisms of restricting business expansion based on market share thresholds. The CDCL's recommendation, akin to the ideology of the MRTP Act, proposes enacting the DMA with mathematical criteria like revenues, market capitalisation, and active users to identify top companies with potential negative influences on competitive conduct.¹⁰⁰ Contrary to modern competition principles, imposing broad ex-ante obligations based on size may overlook the diverse ways digital platforms compete and innovate, failing to capture the nuances of competition and innovation, with potential harm to consumers and stifling innovation in digital

⁹⁶ ‘Leveraging the Power of JAM: Jan Dhan, Aadhar and Mobile’ (*PMIndia*) <www.pmindia.gov.in/en/government_tr_rec/leveraging-the-power-of-jam-jan-dhan-aadhar-and-mobile/> accessed 29 December 2023.

⁹⁷ ‘Unified Payments Interface (UPI)’ (*Cashless India*) <www.cashlessindia.gov.in/upi.html> accessed 29 December 2023.

⁹⁸ ‘ONDC | Open Network for Digital Commerce’ (*ONDC*) <www.ondc.org/> accessed 14 December 2023.

⁹⁹ Monopolies and Restrictive Trade Practices (MRTP) Act 1969.

¹⁰⁰ Department Related Parliamentary Standing Committee on Finance, *53rd Report on Anti-Competitive Practices by Big Tech Companies (Lok Sabha)* <www.loksabhadocs.nic.in/lsscommittee/Finance/17_Finance_53.pdf> accessed 22 December 2023.

markets. This prompts a crucial question: is the initiation of ex-ante regulations a regression to 'Big is Bad'?

E. PRODUCING BENEFITS THAT JUSTIFY ITS COSTS

While ex-ante regulation is seen as a cost-effective approach, it's crucial to assess overall economic costs and burdens carefully.¹⁰¹ The ongoing debate on ex-ante regulation, particularly in developing economies, requires careful consideration due to the significant administrative challenges requiring substantial resources, technical expertise, knowledge, and skill.¹⁰² If India determines the necessity of ex-ante regulation in the digital economy, it must enhance its enforcement capacities and capabilities. The Report also does not address the inflexible nature of ex-ante regulations. Ex-ante regulation, being less attuned to the dynamics of digital markets, carries a higher risk of error costs.¹⁰³ Evidently, ex-ante regulations are likely a costlier affair for India.

F. PROMOTING INNOVATION THROUGH A GLOBAL MARKET: ARE WE LIKELY TO ACHIEVE THIS?

Governments, recognising innovation as a crucial economic driver, should craft regulations that incentivise innovation, emphasising the need for cross-jurisdictional alignment to preserve and promote innovation in digital markets.¹⁰⁴ Overly complex or burdensome regulatory regimes may deter potential innovators from entering or expanding in a jurisdiction.¹⁰⁵ Ex-ante regulations can maintain competition but also create barriers by increasing uncertainty and development costs, distorting the global technology market. An ex-ante approach will bring India no closer to better global access.

¹⁰¹ John Taladay, 'The Ten Principles of Ex Ante Competition Regulation - PYMNTS.com' (*PYMNTS.com*, 2 November 2022) <www.pymnts.com/cpi_posts/the-ten-principles-of-ex-ante-competition-regulation/> accessed 25 December 2023.

¹⁰² Hosuk Lee-Makiyama and Badri Narayanan Gopalakrishnan, 'Economic Costs of Ex ante Regulations' (*ECIPE*) <www.ecipe.org/publications/ex-ante/> accessed 16 December 2023.

¹⁰³ Directorate for Financial and Enterprise Affairs Competition Committee 'Ex-Ante Regulation and Competition in Digital Markets-Note by BIAC' (*OECD*, 24 November 2021) <[www.one.oecd.org/document/DAF/COMP/WD\(2021\)79/en/pdf](http://www.one.oecd.org/document/DAF/COMP/WD(2021)79/en/pdf)> accessed 14 December 2023.

¹⁰⁴ John Taladay, 'The Ten Principles of Ex Ante Competition Regulation - PYMNTS.com' (*PYMNTS.com*, 2 November 2022) <www.pymnts.com/cpi_posts/the-ten-principles-of-ex-ante-competition-regulation/> accessed 25 December 2023.

¹⁰⁵ Chris Edwards, 'Entrepreneurs and Regulations: Removing State and Local Barriers to New Businesses' (*Cato Institute*, 5 May 2021) <www.cato.org/policy-analysis/entrepreneurs-regulations-removing-state-local-barriers-new-businesses> accessed 29 December 2023.

a) REGIMENTED GLOBAL SCENARIO

Although the CDCL recommends specialised legislation for ex-ante regulation in the digital sector to align with developments in the EU, the US, and the UK, it overlooks the ongoing absence of local and global consensus regarding the merits of such legislation, creating a paradox for India.

The EU's DMA has drawn global criticism, with concerns voiced by the OECD Competition Committee Chair, over its potential to stifle competition and innovation in the digital ecosystem under the guise of protecting it due to perceived inflexibility and questionable impact on expediting antitrust proceedings.¹⁰⁶ The CDCL also overlooks legislation's long transition and implementation period like the DMA.

Similarly, in the US, the American Innovation and Choice Online Act¹⁰⁷ and the Open App Market Act¹⁰⁸ have encountered challenges in garnering widespread congressional support due to unintended consequences of ex-ante regulation on consumers, growth, and innovation, it is likely to have.

Evidently, there is a dearth of concrete evidence supporting the necessity and efficacy of this new and experimental model in delivering the claimed benefits.¹⁰⁹ The CDCL should have considered that the introduction of overarching ex-ante regulation by individual nations, in the absence of a global consensus, could lead to a proliferation of conflicting legal positions. This scenario would disproportionately affect India's digital landscape, extend its repercussions globally, and adversely impact local players' access to a global consumer base.

G. ENSURING COMPETITIVE NEUTRALITY: DOES THE PROPOSED FRAMEWORK OVERLOOK IT?

In executing any regulatory reforms in the digital market, it is vital to contemplate whether such reforms aid competitive neutrality. The principle of competitive neutrality, as elaborated

¹⁰⁶ KR Srivats, 'Digital markets: Need an overarching architecture of co-operation among competition authorities' *The Hindu BusinessLine* (11 March 2023) <www.thehindubusinessline.com/info-tech/digital-markets-need-an-overarching-architecture-of-co-operation-among-competition-authorities/article66607358.ece> accessed 29 December 2023.

¹⁰⁷ American Innovation and Choice Online Act 2021.

¹⁰⁸ Open App Markets Act 2021.

¹⁰⁹ Daniel Beard and Jack Williams, 'The pitfalls of preventing discrimination through ex ante regulation' (*Chillin' Competition*) <www.chillingcompetition.com/2020/09/04/the-pitfalls-of-preventing-discrimination-through-ex-ante-regulation-by-daniel-beard-and-jack-williams/> accessed 29 December 2023.

under the OECD guidelines, dictates that all competitors should be subject to the same regulatory framework and be treated alike which in turn promotes fair competition and optimal market outcomes.¹¹⁰

Though on paper, the Report advocates regulating the digital tycoons through ex-ante measures and aims to further this agenda of competitive neutrality by scrutinising certain ACPs, such as those discussed above, the reality seems quite converse.¹¹¹ The current ex-post competitive regime effectively addresses ACPs by Big Tech companies through regulation of anti-competitive agreements¹¹² and abuse of dominant position.¹¹³ The regime's deterring and compensatory nature has encouraged platforms to keep their antitrust strides in check and prevented them from extracting undue advantage of their dominant position in the market against harming smaller platforms.¹¹⁴ Consequently, it has significantly leveled the playing field for both large and small digital platforms.

In any competitive regime, the economic stake of small-scale entities is generally at greater peril than dominant players. In this regard, one school of thought would suggest that it would be productive to detect and resolve such discriminatory measures at the first and initial stage through ex-ante (as adopted in the EU), which would prevent economic turmoil that can hamper business activities of such small-scale platforms. However, qualifies as a one-sided perspective. The present regime has actively come to the rescue of such brick-and-mortar platforms and provided them with speedy redressal of grievances and monetary compensation. For Instance, CCI found Google guilty of abusing its dominant position, particularly through practices like pre-installation and premium placement of its applications. It imposed a monetary penalty of INR 1337.6 crores on Google for such abuse.¹¹⁵

¹¹⁰ John Taladay, 'The Ten Principles of Ex Ante Competition Regulation - PYMNTS.com' (PYMNTS.com, 2 November 2022) <www.pymnts.com/cpi_posts/the-ten-principles-of-ex-ante-competition-regulation/> accessed 25 December 2023.

¹¹¹ Department Related Parliamentary Standing Committee on Finance, *53rd Report on Anti-Competitive Practices by Big Tech Companies* (Lok Sabha) <www.loksabhadocs.nic.in/lsscommittee/Finance/17_Finance_53.pdf> accessed 22 December 2023.

¹¹² Competition Act 2002, s 3.

¹¹³ Competition Act 2002, s 4.

¹¹⁴ Anisha Chand and Tanveer Verma, 'Section 48A of the Amended Competition Act – A "Settlement" on Quicksand?' (*Competition Policy International*, 4 April 2023) <www.pymnts.com/cpi-posts/section-48a-of-the-amended-competition-act-a-settlement-on-quicksand/> accessed 25 December 2023.

¹¹⁵ *Umar Javeed and Others v Google LLC and Another CCI Case No 39 of 2018 (20 October 2022)*.

Thus, the assertion that only an ex-ante framework can reap the benefits of competitive neutrality is just one side of the coin. To uphold competitive neutrality, the current ex-post framework is well-equipped to monitor the conduct of such Big Tech companies and prevent them from meddling with the prospects of brick-and-mortar sellers competing in a free market. It appears as a callow move as it is likely to burden the already existing legislative jurisprudence, causing duplicity of regulations when the only requisite for affirmative results is the effective implementation of the present regime.

a) EU'S DIGITAL MARKETS ACT: A BOON OR BANE FOR COMPETITIVE NEUTRALITY?

It would be quite erroneous to derive inspiration from the EU's DMA as it opposes the practice of competitive neutrality.¹¹⁶ Though on text, the legislation guarantees safeguards against ACPs on all platforms. An implied bias persists in its basic structure, with greater safeguards to the local EU digital platforms, deterring major US companies from entering their local market and driving out local players. Hence, it hampers the prospects of a free competitive regime rather than to foster it.¹¹⁷

b) SELECTIVE APPLICATION OF THE PROPOSED REGULATIONS

Additionally, talks were in a move that public digital platforms such as IRCTC and UDAI would be excluded from the ambits of the proposed framework for digital platforms.¹¹⁸ No clarification would stand to justify such selective application, more so when the present competition regime of ex-post measures made no such discrimination based on public/state ownership and on multiple occasions called into question the conduct of state-run companies like Coal India and Indian Railway.

H. VOUCHING FOR A CLEAR, CERTAIN AND PRACTICAL FRAMEWORK FOR USERS

¹¹⁶ Zach Meyers, 'No Pain No Gain? The Digital Markets' (*Centre for European Reforms*, 10 January 2022) <www.cer.eu/publications/archive/policy-brief/2022/no-pain-no-gain-digital-markets-act> accessed 15 December 2023.

¹¹⁷ Gary Shapiro, 'Europe's DMA Weakens American Companies - and its own' (*LinkedIn*, 13 September 2023) <www.linkedin.com/pulse/europe-dma-weakens-american-companies-its-own-gary-shapiro> accessed 18 December 2023.

¹¹⁸ KR Srivats, 'Big Move. Draft Digital Competition Law may exclude government digital gatekeeper platforms' (*The Hindu BusinessLine* (8 June 2023)

<www.thehindubusinessline.com/economy/policy/draft-digital-competition-law-may-exclude-government-digital-gatekeeper-platforms/article66945016.ece> accessed 18 December 2023.

As per the OECD guidelines, the most fundamental rule that lawmakers need to abide by while drafting a regulatory policy is to ascertain that its framework is clear, certain, practical for users and further the end of a robust competitive environment.¹¹⁹ Though the suggested framework has laid down the groundwork for ex-ante enforcements, certain critical aspects remain unaddressed. The suggested framework fails to consider “how” a company will be categorised as a digital or a non-digital entity for regulation. The Report theoretically categorises SIDIs as a ‘gatekeeper’ whose position in the market is likely to impact the entry of new players in the market. At the regulation drafting stage, policymakers should bear in mind the imperativeness of quantitative and qualitative norms that would differentiate a digital entity from a non-digital one based on factors such as the ratio of digital to physical sales, data volumes, etc.

a) LESSONS FROM THE EU AND THE US

Much can be learned from the regulations in place in the EU and the USA as provide for a comprehensive categorisation of a company as a ‘gatekeeper.’ In the EU, categorisation is based on annual turnovers and market capitalisation, ‘core platform services’ performance, and the minimum of 45 million monthly active end users and at least 10,000 yearly business users in the EU.¹²⁰

The US follows a stricter benchmark in this regard. It lays down a minimum requirement of 50,000,000 United States-based monthly active users on the online platform or 100,000 US-based monthly active business users on the online platform. Further, it provides for categorisation based on annual sales and average market capitalisation greater than \$550,000,000,000.¹²¹

It is confounding how a group of competent lawmen forgot to elaborate on the most crucial aspect of any law in the Report, i.e., determining the target group or parties whom the law would govern. One-word definitions won’t suffice, considering the diversity in classifications of entities available in the market.

¹¹⁹ John Taladay, ‘The Ten Principles of Ex Ante Competition Regulation - PYMNTS.com’ (*PYMNTS.com*, 2 November 2022) <www.pymnts.com/cpi_posts/the-ten-principles-of-ex-ante-competition-regulation/> accessed 25 December 2023.

¹²⁰ ‘Digital Markets Act: Commission designates 6 gatekeepers’ (*European Commission*, 6 September 2023) <www.ec.europa.eu/commission/presscorner/detail/en/ip_23_4328> accessed 23 December 2023.

¹²¹ Xiaolan Fu, Elvis Avenyo and Pervez Ghauri, ‘Digital platforms and development: a survey of the literature’ (2021) 11 Innovation and Development 303 <www.tandfonline.com/doi/pdf/10.1080/2157930X.2021.1975361> accessed 25 December 2023.

I. ENSURING TRANSPARENCY AND DATA PROTECTION: A COMPROMISE FOR THE GREATER GOOD?

Another OECD principle worth considering is that policymakers should ensure transparency concerning data and further deliberate on safeguards to prevent its misuse. Regulations that give way to transparency, clarity, and innovation are often the driving force for fairness and contestability.¹²² The proposed framework calls for clarification regarding the nature of the information a platform is bound to disclose for being subjected to pre-regulations. Would it be limited to information surrounding mere technical business operations, or would it require the disclosure of personal data of users subscribed to that platform?

The CDCL was deemed to comprise prominent experts in the field of competition and antitrust but has faltered in recognizing the importance of regulations that, on the one hand, inspire public confidence by upholding strong encryption of their personal data and information and, on the other incline platforms to disclose information and data with faith that their privileged business information would not be subjected to misuse by exploiters. The lack of acknowledgment of transparency and privacy concerns is aggravated in the backdrop of the government actively promoting stringent safeguards for protecting personal data and information through laws such as the Digital Personal Data Protection Act (DPDPA), 2023.¹²³ The lack of deliberation regarding such transparency and data protection concerns runs contrary to international best practices and raises questions about the intent of the introduction of such a law.

a) HYPOCRITICAL STAND OF SMALLER PLATFORMS

Some smaller platforms believe that the disclosure of certain valuable information by a dominant player concerning its operations could be used by it to harness a competitive edge and drive the wheels of innovation to one's advantage.¹²⁴ This hypocritical stance of certain platforms is not sustainable. On the one hand, they criticise the dominant approach of Big Tech companies; on the other, they wish to derive business benefits by harnessing confidential

¹²² John Taladay, 'The Ten Principles of Ex Ante Competition Regulation - PYMNTS.com' (PYMNTS.com, 2 November 2022) <www.pymnts.com/cpi_posts/the-ten-principles-of-ex-ante-competition-regulation/> accessed 25 December 2023.

¹²³ Digital Personal Data Protection Act 2023.

¹²⁴ Prado and Tiago S, 'Safeguarding Competition in Digital Markets: A Comparative Analysis of Emerging Policy and Regulatory Regimes' (2022) Quello Centre Working Paper No. 5/2022 <www.papers.ssrn.com/sol3/papers.cfm?abstract_id=4137588#paper-citations-widget> accessed 25 December 2023.

information disclosed as per the regulatory requirements. Hence, a fair and ethical approach to handling valuable information becomes essential in India for building trust among users and competitors, fostering healthy competition, and promoting sustained innovation in the business landscape.

J. CONFLICT WITH OTHER REGULATIONS AND POLICIES

Another pertinent principle of the OECD calls for caution that regulatory reform should stand independent of other existing laws and avoid any overlaps.¹²⁵ Though India did not have an ex-ante law regulating digital markets, ACPs were scanned as per the present ex-post regime. It is not the first time that the government has taken the initiative to regulate the conduct of Big Tech companies through legislation and regulations. CCI is already dealing with most of the ACPs recognised in the Report on a case-to-case basis as per the rules of the present regime.¹²⁶

Some instances of ex-ante applications also come through, where e-commerce players in India face ex-ante obligations under the Foreign Direct Investment Policy,¹²⁷ Consumer Protection Act,¹²⁸ and Competition Act.¹²⁹ The FDI Policy mandated fair practices, ensuring price parity, and prohibits exclusive selling mandates. The Consumer Protection Act prevent price manipulation, discrimination, and unfair trade practices. An ex-ante competition regime might conflict with the DPDPA,¹³⁰ which requires lawful, transparent, and fair use of data. The DPDPA mandates collecting only necessary personal data for a specific purpose.¹³¹ Furthermore, the Consumer Protection (E-commerce) Rules, 2020,¹³² and the Telecommunications Act, 2023,¹³³ seek to prohibit self-preferencing and a few other practices

¹²⁵ John Taladay, ‘The Ten Principles of Ex Ante Competition Regulation - PYMNTS.com’ (*PYMNTS.com*, 2 November 2022) <www.pymnts.com/cpi_posts/the-ten-principles-of-ex-ante-competition-regulation/> accessed 25 December 2023.

¹²⁶ Bhoomika Agarwal, ‘Event Report: Future of Competition Policy in Digital Markets’ (*The Dialogue*, 10 March 2023) <www.thedialogue.co/event-report-future-of-competition-policy-in-digital-markets/> accessed 21 December 2023.

¹²⁷ Foreign Direct Investment (FDI) policy 2023.

¹²⁸ Consumer Protection Act 2019.

¹²⁹ Competition Act 2002.

¹³⁰ Digital Personal Data Protection Act 2023.

¹³¹ Digital Personal Data Protection Act 2023.

¹³² Consumer Protection (E-commerce) Rules 2020.

¹³³ Telecommunications Act 2023.

that an ex-ante framework seeks to regulate, including deep-discounting, data manipulation to control prices, manipulating search results and listing their sellers.¹³⁴ Simultaneous application of multiple laws in the ex-ante domain is likely to cause conflicts.

The impending Digital India Act, set to replace the Information Technology (IT) Act, 2000,¹³⁵ may introduce further complexities, potentially leading to enforcement overlaps, forum shopping, and regulatory arbitrage. Striking a balance is essential to avoid over-regulation, leading to complexities, increased costs, and potential disincentives for tech companies to innovate. Ensuring consistency and avoiding overlaps with other legislations is crucial for legal certainty among regulators and tech companies, reducing the likelihood of disputes and litigation.

It is apparent from the above elucidation that digital giants have previously been under the radar and made subject to penalties as per existing legal standards. The proposed framework of the CDCL is likely to create overlaps and conflicts with the existing regulations and laws governing the conduct of such digital platforms, running contrary to the OECD's principle. It would cause a mismatch in the application of the currently enforced myriads of laws and complicate the process of interpretation, making the disposal of cases an excessive practice.

In the EU, for instance, the DMA has been enacted to run complementary rather than contradict the GDPR as per which digital platforms were initially regulated, at least on paper, and lack overlapping provisions with other laws regulating the digital ecosystem.¹³⁶ However, the Indian government is likely to call for a more stringent application of the regulations with little flexibility to the states for its selective application. It can be anticipated that an ex-ante regime might not work for the Indian subcontinent as it does for Europe.

a) A DISINCENTIVE FOR PLAYERS TO ENTER THE MARKET

The proposed ex-ante regulations are likely to create apprehensions in the minds of Big Techs entering a market due to the fear of being subjected to stringent regulations and disclosure

¹³⁴ Bhoomika Agarwal, 'Event Report: Future of Competition Policy in Digital Markets' (*The Dialogue*, 10 March 2023) <www.thedialogue.co/event-report-future-of-competition-policy-in-digital-markets/> accessed 21 December 2023.

¹³⁵ Information Technology Act 2000.

¹³⁶ Damien Geradin, Konstantina Bania and Theano Karanikoti, 'The interplay between the Digital Markets Act and the General Data Protection Regulation' (SSRN 16 September 2022) <www.papers.ssrn.com/sol3/papers.cfm?abstract_id=4203907> accessed 16 December 2023.

requirements. These regulations should not be camouflaged to promote the interest of domestic tech companies, which would hamper and prevent foreign competitors from exploring their potential markets. Though it would serve domestic interests, investments in the nation would be hampered in the long run.

It has not been long since it regained its economic muscle after COVID-19. Regulations scaring off Big Tech are likely to hamper major economic incentives for the country, more so when they contribute substantially to its GDP. Today, these digital platforms account for almost 11 percent of the Indian GDP, and it is expected to account for one-fifth of the Indian GDP by the year 2026.¹³⁷

All these considerations become even more relevant when major companies have finally started looking forward to establishing their assembling and manufacturing units in India. For instance, TATA recently contracted with Apple to manufacture and assemble iPhones for domestic and international markets.¹³⁸

b) IS THE DMA OF THE EU INVESTMENT-FRIENDLY?

When we talk about regulatory measures being investment-friendly and conceding with international trade principles, even the DMA in the EU is lagging in this aspect. Though the DMA of the EU has served as an example of excellence in the effective implementation of its DMA framework, it vouches for an anti-US policy which would make it difficult for the tech giants of the US, mainly the GAFAM companies (Google, Amazon, and Facebook, Apple and Microsoft) to access European markets. This was primarily done to make European companies scale and become more competitive globally. This violates the EU's WTO obligations in

¹³⁷ 'Digital economy to contribute 20% of India's GDP by 2026: MoS IT Rajeev Chandrasekhar' *The Economic Times* (7 December 2023) <www.economictimes.indiatimes.com/tech/technology/digital-economy-to-contribute-20-pc-of-indias-gdp-by-2026-union-minister-chandrasekhar/articleshow/105808056.cms> accessed 20 December 2023.

¹³⁸ 'Tata Group set to build one of the largest iPhone assembly plants in India' *Times of India* (8 December 2023) <www.timesofindia.indiatimes.com/gadgets-news/tata-group-set-to-build-one-of-the-largest-iphone-assembly-plant-in-india-location-jobs-to-be-created-and-other-details/articleshow/105833560.cms> accessed 27 December 2023.

furtherance of promoting trade and investment.¹³⁹ Thus, on this front, it violates the guidelines laid down by the OECD regarding regulatory mechanisms.¹⁴⁰

c) A SOFT OR A HARD LAW?

Soft laws are more likely to help a country's economy boom as per circumstances and evolution as opposed to hard legislation. Soft laws have a low negotiation cost, ascertaining more flexibility with changing circumstances and making cooperative agreements possible¹⁴¹.

For instance, the Chinese framework is designed to promote a fair and transparent regulatory environment for technology companies, while also ensuring that the rights of these companies are protected. It has established a legal framework that enables technology companies to challenge the imposition of certain measures. This framework also provides review options for companies that wish to challenge any such measures. This approach has helped to foster a thriving technology sector in China, which has become a global leader in the industry. Moreover, in the EU, states have the liberty to adopt their independent and distinct laws, with the DMA as a parent law, to suit their digital environment¹⁴².

As these regulations are at their scents stage of evolution, coupled with little success evidence in other jurisdictions and the dynamic nature of the digital ecosystem, India needs a soft-handed approach to respond to market changes and align its practice with promising global standards as they unfold.

¹³⁹ 'The EU Digital Markets Act: Targets Discrimination Against U.S. Companies in Violation of WTO Commitments and Threatens the Re-Set of Trade Multilateralism and of Trans-Atlantic Relations' (*King & Spalding*, 8 June 2021) <www.kslaw.com/attachments/000/008/860/original/EU_Digital_Markets_Act_-_Trade_law_and_systemic_implications_8_June_2021.pdf?1624300896> accessed 22 December 2023.

¹⁴⁰ John Taladay, 'The Ten Principles of Ex Ante Competition Regulation - PYMNTS.com' (*PYMNTS.com*, 2 November 2022) <www.pymnts.com/cpi_posts/the-ten-principles-of-ex-ante-competition-regulation/> accessed 25 December 2023.

¹⁴¹ Polly Botsford, 'From Soft Law to the Hard Edge of Business' (*International Bar Association*, 27 September 2023) <www.ibanet.org/From-soft-law-to-the-hard-edge-of-business> accessed 12 December 2023.

¹⁴² Susan Ning, Rouhan Zhang and Weimen Wu, 'The Latest Steps Towards a More Robust Enforcement Framework for Anti-Monopoly' (*GCR*, 8 December 2023) <www.globalcompetitionreview.com/guide/digital-markets-guide/third-edition/article/china-the-latest-steps-towards-more-robust-enforcement-framework-anti-monopoly> accessed 27 December 2023.

ANALYSIS AND THE WAY FORWARD

The Report's discussion on the necessity of a dedicated ex-ante framework for India appears to raise optimistic expectations for the nation's competitive landscape by ensuring the early detection of ACPs and preventing Big Tech digital platforms from unfairly leveraging their dominant position in the market. However, more deliberations are required to appropriately weigh the pros and cons of such a massive regulatory change, even more so when the present ex-post mechanism has shown competence to absorb major ACPs of dominant players.

Firstly, the reasoning that small and local platforms are more financially secure in an ex-ante regime due to the negation of unnecessary costs of litigation¹⁴³ against dominant players seems a rather shallow argument to be sustainable as CCI has actively imposed penalties and compensatory liabilities on such players to safeguard the interest of the smaller platforms who were affected by their ACPs. Hence, through the imposition of damages, the smaller platforms have been successful in making good of the financial or reputational damage as a result of an anti-competitive tactic. Moving forward, a case-to-case analysis should be the way to go instead of a general application of the on all prospective SIDIs. This would allow platforms to justify any pro-competitive cause, if any, arising out of their conduct.

Secondly, as for the lackadaisical mechanism of CCI for disposing of anti-competitive cases under the present regime, the government is already planning to effectively implement the amended Competition Act,¹⁴⁴ which will affirmatively impact intervention by CCI and encourage and ensure time-bound disposal of cases.¹⁴⁵ CCI's incoming DMU will further provide India with a special unit for regulating ACPs in digital markets.¹⁴⁶ This DMU will largely diminish the need to overregulate such digital platforms and allow them a fair opportunity to establish their presence in the market.

¹⁴³ Indrajeet Sircar, 'Don't impose ex-ante rules on digital platforms' *The Hindu BusinessLine* (4 November 2022) <www.thehindubusinessline.com/opinion/dont-impose-ex-ante-rules-on-digital-platforms/article66097370.ece> accessed 27 December 2023.

¹⁴⁴ Competition Act 2002, s 5.

¹⁴⁵ 'The Competition (Amendment) Act 2023 Salient Features' (*Competition Commission of India*, 11 April 2023) <www.cci.gov.in/images/publications_booklet/en/competition-amendment-act-2023-salient-features1684831868.pdf> accessed 24 December 2023.

¹⁴⁶ Sarvesh Mathi, 'CCI establishes Digital Markets and Data Unit (DMDU) to tackle competition concern in Digital Markets' (*MediaNama*, 28 July 2023) <www.medianama.com/2023/07/223-cci-establishes-digital-markets-and-data-unit/> accessed 21 December 2023.

Thirdly, implementing ex-ante provisions often requires significant resources.¹⁴⁷ The costs associated with compliance, enforcement, and administration at the initial stage can be substantial, potentially diverting resources that can be efficiently used to strengthen the current competition regime. It is likely to lead to over-regulation of the digital platforms, more so when, in addition to the present Competition Act¹⁴⁸ regulating such platforms, ancillary laws, such as the IT Act¹⁴⁹ and the DPDPA,¹⁵⁰ are already in place to regulate their conduct in the markets. Further, the government has been proactively amending these laws to regulate such significant players in the market.

Fourthly, if one has even skimmed through the report, one cannot lose sight of the composition of the CDCL. It lacks the support and chairmanship of experts and specialists in the field who would be academically well-equipped to make recommendations. Careful consideration is paramount, and effective consultation holds the key for an ex-ante regime to be both feasible and successful. This would further preserve competitiveness in the digital space and promote growth and innovation in India's budding digital sector.

Fifthly, implementing a digital law in a jurisdiction solely because it seems to be successfully implemented in another jurisdiction is not a prudent decision. In most countries such as the US¹⁵¹, Germany,¹⁵² China¹⁵³, and the EU¹⁵⁴ that have frequently employed ex-ante regulations, such a law has encountered backlash from multiple stakeholders. Talking economics, when such stakeholders play a pivotal role in regulating and contributing to the country's economic

¹⁴⁷ Hosuk Lee-Makiyama and Badri Narayanan Gopalakrishnan, 'Economic Costs of Ex ante Regulations' (ECIPE) <www.ecipe.org/publications/ex-ante/> accessed 16 December 2023.

¹⁴⁸ Competition Act 2002.

¹⁴⁹ Information Technology Act 2000.

¹⁵⁰ Digital Personal Data Protection Act 2023.

¹⁵¹ 'America's empire is digital & dangerous: But US risks backlash as it weaponises the internet' *The Times of India* (30 September 2023) <www.timesofindia.indiatimes.com/blogs/toi-editorials/americas-empire-is-digital-dangerous-but-us-risks-backlash-as-it-weaponises-the-internet/> accessed 15 December 2023.

¹⁵² 'Ex-Ante Regulation and Competition in Digital Markets – Note by Germany' (OECD, 22 November 2021) <[www.oecd.org/document/DAF/COMP/WD\(2021\)61/en/pdf](http://www.oecd.org/document/DAF/COMP/WD(2021)61/en/pdf)> accessed 17 December 2023.

¹⁵³ Sandra Marco Colino, 'The case against Alibaba in China and its wider policy repercussions' (2022) 10(1) Journal of Antitrust Enforcement 217 <www.academic.oup.com/antitrust/article/10/1/217/6530164> accessed 20 December 2023.

¹⁵⁴ Samuel Stolton, 'EU braces for Big Tech's legal backlash against new digital rulebook' (*Politico*, 10 August 2022) <www.politico.eu/article/eu-brace-legal-assault-against-digital-clampdown/> accessed 24 December 2023.

development, a legislative policy targeting such a group should be drawn cautiously¹⁵⁵. A law's effective enforcement does not equate to its acceptance by most stakeholders. The Report has been criticized by several stakeholders in the sector due to its stringent and inflexible application¹⁵⁶. It is important to consider the perspective of such stakeholders, more so when such stakeholders are the primary drivers of economic growth and prosperity.

Sixthly, while the Report and others may have presented compelling reasons for enforcing ex-ante regulation in digital markets, adopting a wait-and-watch approach appears prudent for now. India's unique position allows for market-driven solutions to address market problems. Policymakers must thoughtfully analyse these valuable insights for the potential implications of such legislation on digital economy stakeholders. Furthermore, observing the real experiences of other jurisdictions, especially of those with a geo-economic position similar to India's, implementing ex-ante competition laws will provide valuable insights to examine the effectiveness of an ex-ante law in tackling ACPs. For instance, both the EU and the US offer valuable lessons in understanding the market power problem in the digital economy. However, due to the absence of large-scale digital public infrastructure, these jurisdictions provide "insignificant lessons" on how to remedy it. India must keep an eye out for developments of ex-ante regimes in other developing countries in its neighbourhood to learn before doing.

Seventhly, most jurisdictions have only recently introduced ex-ante laws while some have taken initiatives to relax their previously stringent regimes. For instance, EU enacted its law only recently in 2022.¹⁵⁷ Similarly, Japan enacted its Act on Improving Transparency and Fairness of Digital Platforms of Japan, which came into effect in February 2021.¹⁵⁸ There were also talks in motion in October 2024 that China is likely to relax its ex-ante rules for cross-border

¹⁵⁵ 'Who are the stakeholders in economic development? (*Denver South*, 9 August 2018) <www.denver-south.com/who-are-the-stakeholders-in-economic-development> accessed 21 December 2023.

¹⁵⁶ Bhoomika Agarwal, 'Event Report: Future of Competition Policy in Digital Markets' (*The Dialogue*, 10 March 2023) <www.thedialogue.co/event-report-future-of-competition-policy-in-digital-markets> accessed 21 December 2023.

¹⁵⁷ Bill Batchelor and others, 'EU Digital Markets Act Enter into Force on November 1, Creating New Regulatory Regime for Large Tech Platforms' (*Skadden*, 12 October 2022) <www.skadden.com/insights/publications/2022/10/eu-digital-markets-act-enters-into-force> accessed 26 December 2023.

¹⁵⁸ 'New Regulation of Digital Platforms in Japan' (*O'Melveny*, 1 April 2021) <www.omm.com/insights/alerts-publications/new-regulation-of-digital-platforms-in-japan> accessed 15 December 2023.

transactions.¹⁵⁹ Additionally, most nations such as South Korea,¹⁶⁰ Australia,¹⁶¹ and the UK¹⁶² only have drafts and working papers in hand. The discussion about the necessity and effectiveness of setting rules and regulations before a certain event occurs, called ex-ante regulation, is still ongoing, especially in developing economies as there exists no direct evidence of its success.¹⁶³ Evidently, a clear case demanding the necessity for ex-ante regulations in India's digital markets cannot be made out.

Lastly, India's digital economy has the potential to become inclusive, efficient, and robust. However, the country mustn't rush into adopting "plug-and-play" solutions from other jurisdictions. Doing so could prove detrimental to India's own goals and ambitions. Instead, a careful and thoughtful approach should be taken to ensure that the solutions implemented are tailored to India's unique needs and challenges. By doing this, India can create a digital economy that benefits all and helps propel the country's digital market landscape forward.

¹⁵⁹ Edward Webre and Minning Wie, 'China Is Expected to Relax its Ex Ante Regulation on the Cross-border Data Transfers' (*Lexology*, 6 October 2023) <www.lexology.com/library/detail.aspx?g=750fc58b-3e22-4ba2-b354-49ece993caa8> accessed 23 December 2023.

¹⁶⁰ Ryan IL Kang, Kee Won Shin and Hwjin Choi, 'Recent developments in Korea's digital platform regulations' (*Lexology*, 20 November 2023) <www.lexology.com/library/detail.aspx?g=429ef418-d69b-4839-9a25-75568619be68> accessed 22 December 2023.

¹⁶¹ Aaron Mathew and Michael Stojnovic, 'Playing Catchup – Australia's Proposal to Regulate Digital Assets' (*Bird & Bird*, 4 December 2023) <www.twobirds.com/en/insights/2023/australia/playing-catchup-australias-proposal-to-regulate-digital-assets#:~:text=The%20Australian%20Government%20proposes%20an,a%20%E2%80%9Cdigital%20asset%20platform%E2%80%9D.> accessed 14 December 2023.

¹⁶² 'The UK's draft Digital Markets, Competition and Consumer Bill' (*TaylorWessing*, 3 July 2023) <www.taylorwessing.com/en/interface/2023/the-uks-draft-digital-markets-competition-and-consumers-bill> accessed 16 December 2023.

¹⁶³ Bhoomika Agarwal, 'Event Report: Future of Competition Policy in Digital Markets' (*The Dialogue*, 10 March 2023) <www.thedialogue.co/event-report-future-of-competition-policy-in-digital-markets/> accessed 21 December 2023.