THE EU DIGITAL MARKETS ACT AND THE WTO NON-DISCRIMINATION POLICY: AN IMPEDIMENT FOR DEVELOPING NATIONS

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Abstract

This paper examines the compatibility of the European Union's (EU) Digital Markets Act (DMA) with the non-discrimination principles under World Trade Organization (WTO) law and explores the potential implications of similar legislation for developing countries, with a focus on India. The aim is to provide insights into the regulation of Big Tech companies in an increasingly competitive global landscape from the perspectives of competition and trade law. The DMA imposes specific obligations on platform service providers to regulate the behaviour of digital platforms and ensure fair competition within the EU digital market. However, concerns have been raised regarding its compatibility with WTO rules on non-discrimination. This paper analyses the discrepancies between the DMA and WTO principles and investigates allegations of protectionism towards European companies to determine whether such concerns are substantiated. Furthermore, this paper considers whether an ex-ante regulatory approach, as exemplified by the DMA, is suitable for countries like India and other developing nations. To do so, it examines the current anti-trust regulation mechanism in India that heavily relies on ex-post actions for Big Tech regulation and explores the precedents set forth by the Competition Commission of India. Additionally, the paper assesses the potential implications of implementing similar legislation in developing countries, particularly on their economies. By critically evaluating the DMA's compatibility with WTO non-discrimination principles and its applicability to developing countries, this paper contributes to the ongoing discourse on the regulation of Big Tech and its global impact. EU is known for their timely legislative proposals, often setting the pace for other nations, as evidenced by influential regulations such as the General Data Protection Regulation (GDPR), these legislations often have a global impact and influence how many countries draft their own laws. Hence, it becomes imperative to analyse them to see if they fit one's own country's needs.

Keywords: Competition law, Digital markets Act, Gatekeeper, World Trade Organization, Big Tech, Indian Economy, India, Competition Commission of India.

Introduction

'Digitalization is transforming our economies and societies at breakneck speed. It is creating opportunities and challenges in equal measure and requires us to rethink everything from the way we work to the way we govern. This includes ensuring that our regulatory frameworks are fit for the digital age, so that we can harness the power of technology to drive progress and improve people's lives, while also guarding against its potential negative effects because while we may have new technology, but we don't have new values. Dignity, integrity, humanity, equality - that is the same'[1].

- Closing words by Margrethe Vestager, the Executive Vice President of the European Commission for A Europe Fit for the Digital Age at Lisbon Web Summit on November 5, 2019[2].

The aim of competition laws is to promote and protect competition in markets by preventing anti-competitive practices, such as monopolies, cartels, and abuses of market power. The goal is to make certain that customers have access to a multitude of goods and services at competitive rates and that businesses have an equal opportunity to stand out, grow and innovate. Through this, competition laws seek to balance the interests of consumers and businesses, and to promote economic efficiency, growth, and innovation.

Digitization has transformed markets and created new challenges for competition law. The rise of digital platforms, such as Google, Facebook, and Amazon, has fundamentally changed the way that businesses compete and interact with consumers. These platforms have vast amounts of data and network effects that allow them to dominate their markets and limit competition. Digitization has also enabled new forms of anti-competitive practices, such as price discrimination, data discrimination, and algorithmic collusion[3]. These practices can harm consumers and stifle innovation, and traditional competition laws may not be well-suited to address them. As a result, competition law authorities around the world are grappling with how to adapt their laws, introducing policy changes, writing reports and enforcement practices in the digital age. They are exploring new theories and enforcement tools, such as data portability,

[1] Anna O'Hare, *The highlights from Web Summit 2019*, WEB SUMMIT (Nov. 7, 2019), https://websummit.com/blog/highlights-web-summit-2019.
[2] Ibid.
[3] Geoffrey Parker et al., *Digital Platforms and Antitrust*, SSRN Electronic Journal, 9-10 (2020).

interoperability, and algorithmic auditing, to promote fair competition and protect consumers in digital markets. Diverse suggestions have been put forward on how to tackle these challenges, ranging from enforcing current competition rules with improved efficiency, modifying them to better suit the digital environment, or introducing new regulations that prohibit major digital platforms from engaging in certain activities. The EU's Digital Markets Act and sudden surge in ex-post regulations on big tech by the Competition Commission of India along with contemplation around framing of a legislation to tackle the challenges posed by Big Tech are just a few examples of this ongoing effort to update competition law for the digital age.

This piece concerns the European Commission's Digital Markets Act *(hereinafter called as the DMA)* which aims to classify certain platform service providers as 'gatekeepers' and impose specific obligations on them to regulate the behaviour of digital platforms and ensure fair competition in the EU digital market[4]. The DMA seeks to address issues such as platform dominance, unfair business practices, and lack of competition in the digital sector. This statute has come into application from May 2023 and has been met with various concerns about potential discrimination in terms of its compatibility with World Trade Organization *(hereinafter referred to as 'WTO')* rules on non-discrimination, as the majority of affected entities are estimated to be from the United States. This piece aims to address two primary research questions. It seeks to analyse the critical characteristics of the DMA that provoke concerns under trade laws and assess how they could be addressed within the scope of relevant WTO provisions on non-discrimination. Further, the piece also analyses whether such regulations could work for developing countries like India in light of the ongoing discussions surrounding the formation of a legislation. Considering new age regulations by EU generally act as precedents for the world to amend their laws, it is interesting to see what a similar strategy might imply for a developing country like India. To blend into the larger picture, the piece concludes with a brief discussion of how the United States might react to the proposed measure, considering that most of the firms impacted by the proposed legislation are based in the United States.

The History

Different jurisdictions are considering ex-ante regulations in order to combat different competition and anti-trust issues and to handle giant digital platforms' anti-competitive

[4] Digital Markets Act, 2022 (European Union).

practises that may not be sufficiently addressed by ex post competition law enforcement. The most cutting-edge of these regulation strategies is the DMA proposal, which was presented by the European Commission. The act went into effect on 1 November 2022 and has been applicable beginning from 2 May 2023 post which many tech giants have time till 3rd July 2023 to inform the government about their fulfilment of the 'gatekeeper criteria' as highlighted in the Act. Further, by September 6, 2023, the Commission assigns gatekeeper status to companies based on the information they provide and by March 6, 2024, gatekeepers are required to adhere to the corresponding obligations outlined in the DMA.

The Objectives of DMA

The DMA identifies technology driven platforms that provide core platform services like online intermediation services; online search engines; online social networking services; video-sharing platform services; number-independent interpersonal communication services; operating systems; cloud computing services; advertising services; web browsers; virtual assistant as gatekeepers based on three-fold criteria. Firstly, a company must achieve an annual turnover surpassing €7.5 billion within the European Economic Area (EEA) while providing a core platform service in at least three EU Member States. Secondly, the number of users plays a crucial role, with the requirement being that the company offers a core platform service to more than 45 million monthly active end users situated in the EU, along with over 10,000 yearly active business users established within the EU. Lastly, the company should demonstrate an entrenched and durable position by meeting the first and second criteria consistently over the past three years. These criteria collectively serve as the basis for determining whether a company qualifies as a gatekeeper.

The DMA has established regulations to prevent gatekeepers from engaging in unfair practices. These regulations comprise a set of requirements and restrictions, including ensuring interoperability among messaging services and prohibiting gatekeepers from promoting their own services among many other detailed regulations. This contrasts with past events, such as Google's promotion of its Google Shopping site, which resulted in accusations of favouritism[5]. The DMA aims to provide a level playing field for all entities on large platforms. Gatekeepers are subject to the obligations delineated in Article 5 and 6 of the DMA with regards to the

[5] Leo Kelion, *Google Hit with Record EU Fine over Shopping Service,* BBC NEWS (June, 2017), https://www.bbc.com/news/technology-40406542.

central platform services they provide[6]. On 6 September 2023, the EU plans to release a list[7] of gatekeepers, which may feature large tech companies such as Amazon, Apple, Google, Meta, and Microsoft. However, as some tech giants have lobbied against the DMA, the EU anticipates a legal fight. While some people believe that the DMA may hinder innovation, others suggest that dialogue and changes could mitigate these concerns.

Potential Usefulness

An ex-ante regulation like the DMA is deemed useful for a multitude of reasons. The primary reason could be the increasing concentration of digital markets with a few large multinational corporations dominating the discourse and enjoying overarching market power. This concentration of power has the potential to lead to anticompetitive behaviour and limit consumer choice, stifle innovation and harm small competitors consisting of Small and Medium Sized enterprises at large.

Secondly, these digital platforms have access to large amount of data about their users that could be used in multitude of ways. Data breaches, use and protection of data is paramount in the current digital ecosystem. Margrethe Vestager in the Lisbon Web Summit also highlighted that – when it comes to browsing the internet, it is not you searching google, it is google searching you[8]. Given the fact that, we leave traces of information on the internet whenever we access it, how this information is used and the regulations surrounding it become really relevant.

Regulations like the DMA Act can establish rules to ensure that user data is protected, and that companies are held accountable for any misuse of data and such regulation might enhance the transparency and accountability of gatekeeper platforms by requiring clear and accessible information about their practices, algorithms, and data use. Thirdly, digital markets are global, and regulations in one country or region can have spillover effects on other countries. By establishing common rules for digital markets, regulations like the DMA Act can help promote a level playing field for businesses across borders in the whole of European Union. However, there are also concerns about the potential unintended consequences of such regulations, particularly for smaller businesses. For example, compliance costs may disproportionately

[6] Supra note 4.
[7] Press release, *DMA: rules for digital gatekeepers to ensure open markets start to apply,* EUROPEAN COMMISSION (May 2, 2023), https://digital-markets-act.ec.europa.eu/dma-rules-digital-gatekeepers-ensure-open-markets-start-apply-2023-05-02_en.
[8] Anna O'Hare, *The highlights from Web Summit 2019*, WEB SUMMIT (Nov. 7, 2019), https://websummit.com/blog/highlights-web-summit-2019.

affect smaller companies, while regulations that favour domestic businesses could violate international trade rules.

Compatibility of DMA with Non-Discrimination Principles under WTO Law

The WTO's fundamental premise of non-discrimination requires member states to treat all other members equally. The General Agreement on Tariffs and Trade (GATT)[9] and the General Agreement on Trade in Services (GATS)[10] are two important WTO agreements that contain this principle. The GATT and GATS reflects non-discrimination in two ways: national treatment (NT) and most-favourable-nation (MFN) treatment. According to the MFN treatment concept, WTO members must provide all other members the same treatment when it comes to tariffs and other trade restrictions. The National Treatment principle requires WTO members to treat imported products and services equally with domestically produced goods and services. The GATS, which governs trade in services, also obliges WTO members to uphold the non-discrimination principle by giving MFN and national treatment to the services sector and by ensuring that any policies affecting the sector are implemented in a non-discriminatory manner.

The GATS Article XVII[11] elaborates on the idea of National Treatment and states that WTO members must treat services and service suppliers of any other Member with treatment no less favourable than it accords to its own like services and service suppliers for sectors it has made commitments for in its respective schedules. If a claim is made under Article XVII, it must be supported by evidence that the services in question are included in the member's schedule, that any restrictions apply, that the measure affects the supply of services, and that it treats the services or service providers less favourably than like domestic services or service providers. The DMA's requirements for gatekeepers could have an impact on the availability of essential platform services. These rules forbid specific commercial operations, prescribe guidelines for behaviour, and could raise the supply cost for these platforms. 'According to the Commission's impact assessment, each gatekeeper's annual compliance cost is estimated to be EUR 1.41 million. In the event of noncompliance and repeated non-compliance, the Commission has the power to levy fines ranging from 10-20% of total worldwide turnover'[12]. Thus, if an unfavourable treatment is accorded these services could be covered under the national treatment obligations prescribed under the GATS.

[9] General Agreement on Tariffs and Trade (GATT), 1947.
[10] General Agreement on Tariffs in Services (GATS), 1995.
[11] General Agreement on Tariffs in Services (GATS), 1995; art. XVII
[12] *The Digital Markets Act - New Regulation for Big Tech in Europe*, WILLKIE COMPLIANCE CONCOURSE (Oct. 24, 2022), https://complianceconcourse.willkie.com/articles/insights-2022-20221024-thedigitalmarketsact/.

In the end, as laid down under GATS Article XVII:3 it must be remembered that the treatment of services and service providers—whether they are formally same or distinct—must not change the terms of competition in a way that favours like domestic services or providers. The DMA does not distinguish between domestic and foreign service providers when determining which companies qualify as gatekeepers based on quantitative standards. However, while the quantitative assignment is fairly transparent, it is to be noted that, even if an entity does not meet the quantitative requirements they could be categorised as a gatekeeper based on a qualitative criterion which is completely subjective and often a closed-door decision. This lack of transparency raises concerns about potential protectionism and bias towards European companies over their American counterparts. Twelve businesses, of which 10 are based in the US, fit the **Internal Market and Consumer Protection Committee** gatekeeper requirements, according to recent research that looked at 22 businesses[13]. Yet, many US businesses will not fit the criteria of a gatekeeper. It is important to note that GATT Article III:4 has also exposed discrepancies in circumstances where just some imported items are subject to less favourable treatment than comparable local products in terms of regulations[14]. Thus, even if some companies are subject to discrimination, it is enough to hold the regulation incompatible.

From this context, it is also crucial to identify the scope of 'like services' under GATS Article XVII[15]. The question of whether services or service providers located above or below the threshold of a gatekeeper, should be viewed as 'like' services or service providers is crucial. According to the panel in China-Electronic Payment Services[16] 'like' services are those that are engaged in competitive behaviour with one another. If this justification is accepted, it would be important to find out whether end users of these tech firms view these platform services as interchangeable. Further cases such as United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services[17] and China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audio-visual Entertainment Products[18] have highlighted that in determining the scope of 'like services' under GATS the factors considered are the nature, mode of supply, and end-use of the services to conclude that they

[13] Mario Mariniello & Catarina Martins, *Which Platforms Will Be Caught by the Digital Markets Act? The 'Gatekeeper' Dilemma*, BRUEGEL (Dec., 2021), https://www.bruegel.org/blog-post/which-platforms-will-be-caught-digital-markets-act-gatekeeper-dilemma.
[14] General Agreement on Tariffs and Trade (GATT), 1947; art. III:3
[15] General Agreement on Tariffs in Services (GATS), 1995; art. XVII
[16] China: Electronic Payment Services, (2013) WT/DS413/10 (WTO).
[17] United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services, (2007) WT/DS285/RW (WTO).
[18] China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audio-visual Entertainment Products, (2012) WT/DS363/19 (WTO).

were 'like services'. In addition to that, things like the extent to which services they fulfil the same needs or wants shall also be considered. Based on this analogy, same services by different platforms could fall under the category of 'like services' thus, satisfying the criteria for the national treatment principle to be applicable to them. Thus, EU shall have to treat like services for EU and outside EU companies in the same way to avoid allegations under WTO law.

The Appellate body in Argentina-Financial Services[19] and EC-Bananas III[20] have explained that a measure's 'objectives and consequences' are not relevant when assessing its compatibility with GATS Article XVII as we are not concerned with the goals of an objective unless they are for public morals and other policy objectives. If a measure provides discriminatory treatment, its objective is of no value of consideration. Leaving the commission's aim aside, the compatibility of DMA with these rules may be questioned if the gatekeeper criteria's end thresholds are chosen in a way that prevents international and non-US entities from being identified as gatekeepers and favours the local EU entities.

Additionally, GATS Article XIV[21] enables member states to take actions that are required to fulfil certain policy and security goals, such as upholding public morality or keeping order, as well as to ensure adherence to rules or laws that are not in conflict with the GATS. The EU must show that the DMA's goal of ensuring fairness and contestability in digital markets is consistent with the legal objectives outlined in Article XIV in order to claim this defence.

Along with the aforementioned, the measure must also clear the 'necessity test' to ensure that a measure is not applied in an arbitrary manner and whether any better alternatives existed. In order to ascertain the same, the structure of the operation, the statements by government officials and the statutory test must be scrutinised to understand the intention and the necessity behind this ex-ante regulation. If this point is considered, the statement made by various officials could make great sense. 'According to reports, a member of the European Parliament and the DMA's rapporteur, said that as the measure under DMA focused on the largest companies, there was no need to add a European gatekeeper solely to appease the US President'[22]. Such statements could be scrutinized to understand the explicit intention behind such a regulation in light of its non-compatibility with trade laws.

[19] Argentina-Financial Services, (2016) WT/DS453/12) (WTO).
[20] EC-Bananas III, (2008) WT/DS27/98 (WTO).
[21] General Agreement on Tariffs in Services (GATS), 1995; art. XIV
[22] Javier Espinoza & James Politi, *US warns EU against anti-American tech policy*, FINANCIAL TIMES (June, 2021), https://www.ft.com/content/2036d7e9-daa2-445d-8f88-6fcee745a259.

Further, the measure must also adhere to the guidelines of GATS Article XIV's Chapeau i.e., the introductory clause, which states that it cannot be a covert restriction under Article XIV on trade in services or an arbitrary or unreasonable form of discrimination between nations with similar conditions. In conclusion, the DMA must meet the requirements of necessity and non-discrimination, and the EU must demonstrate that it is consistent with the policy goals outlined in Article XIV of the GATS.

An Impediment for Developing Countries

The Competition Act of India and emerging Anti-trust issues.

In the Indian context, on February 6 a committee named **Committee on Digital Competition Law (CDCL)** was set up[23] on the instructions of the Ministry of Corporate Affairs, India after receiving recommendations from the Parliamentary Standing Committee on Finance's ('hereinafter called as the standing committee') 53rd Report on 'Anti-competitive Practices by Big Tech Companies' in December 2022[24]. This committee is now set up to examine the need for a separate legislation on competition in digital markets essentially an ex-antre regulation through a new 'Digital Competition Act'. This committee has been bestowed with the responsibility to check what other countries are doing and find the best international practices to regulate Big Tech and concerns associated with it, check whether ex-ante regulations are a good idea by reference to the Digital Markets Act and the Digital Services Act of the EU. However, many authorities like the Asia Internet Coalition (AIC)[25] have called an ex-ante regulation for India – regressive, absolutist and overly prescription and not fit for its needs. While there have been numerous arguments against the implementation of such an ex-ante regulation in India, two questions that need answering are whether the existing anti-trust adjudication process in India is sufficient to meet India's anti-trust requirement and whether the need and benefit derived from this ex-ante legislation in India is predicted to be outweighed by its costs. For the same, we will look at whether, a regulation like the DMA proposed by the European Union may be suitable for developing economies, like India.

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[23] Soumyarendra Barik, *Centre sets up committee to prepare draft digital competition law,* INDIAN EXPRESS (Feb., 2023), https://indianexpress.com/article/technology/centre-sets-up-committee-to-prepare-draft-digital-competition-law-8428005/.

[24] *Standing Committee Report Summary Anti-Competitive Practices by Big Tech Companies*, PRS LEGISLATIVE RESEARCH (Dec. 29, 2022), https://prsindia.org/files/policy/policy_committee_reports/Report_Summary-Anti-Competitive_Practices_by_Big_Tech_Companies.pdf.

[25] *Asia Internet Coalition (AIC) Statement on 53rd Report on the Standing Committee on Finance on Anti-Competitive Practices by Big Tech Companies, India*, ASIAN INTERNET COALITION (Jan. 6, 2023), https://aicasia.org/policy-advocacy/india-asia-internet-coalition-aic-statement-on-53rd-report-on-the-standing-committee-on-finance-on-anti-competitive-practices-by-big-tech-companies.

If an in-depth inference to the Competition Act of India[26] is drawn it can be reasonable argued that the three basic provisions of the Act provided under Section 3 that covers anti-competitive agreements, Section 4 that covers abuse of dominant position and Section 5 that covers combinations can and have been sufficiently utilised by the Competition Commission of India *(hereinafter called as the CCI)* to deliver judgements pertaining to successful regulation of digital markets and variety of issues associated with them.

The Standing Committee[27] has identified several major issues with the current Competition Act regarding its ability to address concerns in digital markets. These issues include the lack of provisions addressing anti-steering practices, where platforms prevent business users from directing consumers to cheaper or more attractive alternatives outside the platform by providing better and cheaper alternative offers. Another concern is self-preferencing or platform neutrality, where platforms favour their own services or subsidiaries while also competing on the same platform. Bundling and tying practices, where app store operators bind developers to exclusive agreements, removing competition from the market, are also problematic. Data usage is another issue, with dominant platforms leveraging their position to exploit consumer preference data or collecting and storing large amounts of data for consumer profiling and gaining an unfair competitive advantage. Pricing and deep discounting tactics employed by platforms can result in service providers losing control over the pricing of their services. Exclusive tie-ups with brands restrict other market participants from selling certain products on the platform. Search and ranking preferencing can lead to biased search results favouring sponsored products or orders fulfilled by the marketplace itself. Platforms restricting the installation or operation of third-party applications limit competition and innovation. Finally, advertising policies that leverage consumer data through artificial intelligence and machine learning for targeted advertising raise concerns about privacy and fairness. The standing committee argues that addressing these issues in a separate legislation would promote fair competition, innovation, and consumer choice in digital markets, creating a level playing field for businesses.

However, if a thorough inspection of the Competition Act is made it can be argued that section 3, 4 and 5 which include in them provisions addressing vertical anti-competitive agreements, denial or market access, refusal to deal, limiting technical or scientific development relating to

[26] The Competition Act, Acts of Parliament, 2002 (India).
[27] *Supra* note 24.

goods or services, Tie-in arrangements, etc, conclusively cover all the regulations necessary to deal with digital markets. Further, Section 5 of the Competition Act mandates advance notification to the CCI for acquisitions crossing specified thresholds. The Competition (Amendment) Bill, 2022[28], introduces 'deal value' thresholds to scrutinize high-value digital deals and ensure that companies with less turnover do not escape the obligations.

A Precedential review

The CCI has been a proactive body that has investigated over 30 cases involving digital companies in the last decade dealing with cases involving big giants.

In the case of XYZ v. Alphabet Inc and Others[29], the CCI found that Google, as a dominant player in the market, abused its position by imposing unfair and discriminatory conditions on app developers. One such condition was the mandatory use of Google Play's Billing System (GPBS) for paid app downloads and in-app purchases. This forced app developers to exclusively use GPBS, excluding other payment gateways like PayPal and Razor Pay. The CCI determined that this mandatory imposition of GPBS restricted competition and hindered the use of other payment gateways. As a result, the CCI imposed a financial penalty on Google and directed it to cease such practices. Google appealed the CCI's decision, but the appeals were unsuccessful. Similarly, the CCI initiated an investigation into Apple[30] for engaging in similar conduct, including the prohibition of third-party app stores from being listed on its App Store. In another case, Umar Javeed and Others v. Google LLC and Another[31], the CCI found Google guilty of self-preferencing. This refers to Google pre-installing its own applications and giving them preferential placement on smart mobile devices. The CCI ruled that Google's actions limited the choices of Original Equipment Manufacturers (OEMs) by dictating which Google apps should be pre-installed and their placement on the devices. Additionally, Google prevented users from uninstalling these pre-installed apps. The CCI ordered Google to remove these restrictions and imposed a monetary penalty on the company. Google challenged the CCI's decision on the merits and requested a stay on the imposed remedies, but both the National Company Law Appellate Tribunal (NCLAT) and the Supreme Court rejected Google's application for an interim stay. Consequently, Google announced significant changes to its Android OS business model in compliance with the CCI's directives. This case dealt with the

[28] The Competition (Amendment) Bill, 2022, Bill No. 185 of 2022 (India).
[29] *XYZ v. Alphabet Inc. and Others* CCI, (2022) Case No. 07 of 2020 (India).
[30] *Together We Fight Society v. Apple Inc.* CCI, (2021) Case No. 24 of 2021 (India).
[31] *Umar Javeed v. Google LLC and Others* CCI, (2022) Case No. 39 of 2018 (India).

strategy of self-preferencing. In a previous case, Matrimony.com Limited v. Google and Others[32], the CCI found Google's conduct to be in violation of Section 4 of the Competition Act. One aspect of the violation was searching bias, which involved prominently placing Google's Flights Unit on the search results page. As a remedy, the CCI directed Google to include a disclaimer indicating that the 'search flights' link led to Google's Flights page and not the results from other third-party service providers and imposed a fine.

Regarding bundling and tying, in Umar Javeed and Others v. Google LLC and Another[33], the CCI found Google to have abused its dominant position. One aspect of this abuse was the bundling of the Play Store with Google Search, Google Chrome, and YouTube. The CCI ordered Google to stop such tying practices. Similarly, the CCI initiated an investigation into Apple for allegedly tying its distribution service and payment processing service for in-app purchases, as well as tying its app store to the use of its in-app payment solution.

The CCI also initiated an investigation into WhatsApp and Meta (formerly Facebook) in the case of In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users. The investigation focused on alleged abuses of dominance related to data collection and utilising practices that is likely to harm competition[34].

In FHRAI and Others v. MakeMyTrip and Others[35], the CCI found that MakeMyTrip (MMT) and GoIbibo (collectively referred to as MMT-Go) violated the Competition Act through their wide price parity clauses, exclusivity conditions with hotel partners, and misrepresentation of information to users. Additionally, the CCI found an exclusionary agreement between MMT-Go and Oravel Stays (OYO) to have resulted in denial of market access to FabHotels and Treebo hotels through delisting. The CCI ordered MMT-Go to modify its agreements with hotels, remove parity obligations and exclusivity conditions, and provide fair and transparent access to its platform. Furthermore, the CCI imposed penalties on MMT-Go and OYO for violating the Competition Act.

Along with the aforementioned, the CCI also has the power to give interim orders while investigations are pending to address the concerns of those being affected by anti-competitive

[32] *Matrimony.com Limited v. Google LLC and Others* CCI, (2018) Case No. 07 and 30 of 2012 (India).
[33] *Umar Javeed v. Google LLC and Others* CCI, (2022) Case No. 39 of 2018 (India).
[34] *In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users* CCI, (2021) Suo Moto Case No. 01 of 2021.
[35] *Federation of Hotel and Restaurant Associations of India and Another v. MakeMyTrip India Private Limited and Others* CCI, (2022) Case No. 14 of 2019 (India).

practices. Further Section 49 also gives it powers to be an advocate of competition law in India and thereby, conduct market studies and publish reports.

The CCI's actions and initiatives demonstrate its commitment to addressing anti-competitive conduct in digital markets, including anti-steering provisions, self-preferencing, deep discounting, exclusive tie-ups, and bundling and tying practices. By taking such measures, the CCI aims to promote competition and prevent market distortions, reducing the need for additional legislation specifically targeting competition issues in India's digital markets and through these instances, it can be conclusively concluded that an ex-ante regulation is not per-se necessary for India.

In addition to the Competition Act being sufficient to tackle competition law issues arising out of digital markets, there are several other reasons why an ex-ante regulation might not be fit for India and many other developing countries around the world. For instance, provisions like the DMA, which aim to regulate the behaviour of large tech companies, would not address the specific challenges faced by developing economies. These challenges include the need for investment in digital infrastructure, access to technology, and digital literacy. Thus, while dealing with competition regulation in developing countries it is paramount to note that rather than concentrating only on regulating tech businesses, developing economies need more assistance and investment in creating digital infrastructure and raising digital literacy. Secondly, it is important to be mindful about how such legislation may affect India's digital sector, which is mostly dominated by emerging start-ups and Small and Medium Enterprises. Many digital businesses in India are startups or small businesses that may not have the resources to comply with the regulatory requirements that come with such a regulation. This could stifle innovation and limit the growth of digital businesses in India. Instead, the policymakers should focus on supporting and promoting the growth of small and medium-sized enterprises (SMEs) in the digital sector in developing economies. Further, it is paramount to understand that the EU and developing economies have different priorities when it comes to digital regulation. While the EU is more focused on protecting competition and consumers, developing economies are more concerned with promoting growth and development. Therefore, digital regulation should be tailored to the specific challenges and opportunities facing each region.

The DMA is also highly criticised for its one-size-fits-all strict approach when it comes to discerning the ‘Gatekeeper criteria’ to different business models. Articles 5, 6, and 7 of the DMA contain a set of rules that ban certain behaviours without considering their specific

context. These rules are called 'per se' rules[36], and they do not require any proof of harmful effects to be outlawed. While this approach can make it easier to enforce the law, it also means that some conduct might be banned even if it is not actually harmful. Conversely, some harmful behaviours might not be recognized as such. This inflexible approach to regulation could be seen as unfair to gatekeepers with different business models especially for SME's which do not result in anti-competitive measures per se**.** Incorporating such similar stance for Inda might actually prove detrimental where conduct that does not have anti-competitive effects is wrongly labelled as anti-competitive. An ex-ante regime operates based on predefined rules rather than focusing on the actual impact of the conduct. Consequently, digital businesses may not be able to emphasize the positive effects their actions have on consumers or competition when being assessed. This becomes particularly relevant because there are instances where the CCI refrained from condemning allegedly abusive conduct that actually fostered competition in digital markets.

In the case of Harshita Chawla v. WhatsApp and Others[37], an informant accused WhatsApp of engaging in anti-competitive bundling by integrating WhatsApp Pay with its messaging services. However, after considering WhatsApp's arguments, the CCI concluded that WhatsApp Pay was an optional feature that required separate registration and could not be considered an imposition or coercion. The CCI also agreed with WhatsApp's stance that WhatsApp Pay faced competition from established players like Google and Amazon, and its entry would not harm competition. The CCI adopted a nuanced approach, allowing WhatsApp a hearing during the preliminary stage and considering the potential effects of the alleged conduct, ultimately determining that no investigation was necessary. In Baglekar Akash Kumar v. Google LLC and Others[38], the CCI dismissed allegations of abuse of dominance by Google concerning the integration of Google Meet with Gmail. The CCI considered Google's submissions, which highlighted that user had the choice to use either app with their full functionalities without being obliged to use the other. The CCI also noted that while the Meet tab was incorporated into the Gmail app, Gmail did not force users to exclusively use Meet, and consumers were free to use Meet or any other video conferencing app.

[36] Miguel Máximo dos Santos, *The Digital Markets Act will enter into force today: an overview*, SERVULO PUBLICATIONS (Nov., 2022), https://www.servulo.com/en/knowledge/The-Digital-Markets-Act-will-enter-into-force-today-an-overview/8097/.
[37] *Harshita Chawla v. WhatsApp Inc.* and Another CCI, (2020) Case No. 15 of 2020 (India).
[38] *Baglekar Akash Kumar v. Google LLC and Others* CCI, (2021) Case No. 39 of 2020 (India).

These cases demonstrate how digital markets have flourished when the CCI has examined potentially abusive conduct ex-post (after it has occurred) and allowed businesses to showcase the efficiencies arising from their actions, leading to decisions that intervention is unnecessary. An ex-ante framework may not provide this protection to businesses, making it difficult for them to defend their actions, provide objective justifications, and highlight the efficiencies resulting from their conduct. Consequently, there is a higher likelihood that an ex-ante approach could stifle innovation, competition, and consumer choice. Without such protection, digital players in India may hesitate to innovate and produce products that benefit consumers due to fear of violating the law.

Further, while the DMA may be suitable for European Union's unique circumstances and is enacted after decade of decisions by its judiciary that highlighted the need for such regulation in its context, replicating the same may not be the right approach for developing economies like India and an ex-post measure might provide more relevance here. Policymakers should consider the specific needs of developing economies when formulating digital regulation and focus on supporting digital infrastructure development and SME growth rather than solely on regulating large tech companies. Replicating a regulation like that of DMA could hinder India's or any other developing countries growth to a great extent and policy makers should not take inspiration from the act to build on India's competition and anti-trust regime.

Conclusion

The efficacy of the DMA regulation is contingent upon its implementation and ability to achieve its intended objectives. Policymakers must carefully balance the potential benefits of such regulations against their associated costs and unintended consequences under trade laws. The response of the US government to the DMA is of particular interest, given that the primary companies affected are from the US. The solution available to the US here would vary significantly to the case against the Digital Services Tax's (DST) discriminatory nature given the lack of intergovernmental and diplomatic negotiations to apprise competition rules, as was the case with income tax rules in DST[39] because negotiations in competition law measures involving various countries and organizations might prove detrimental as opposed to tax negotiations which are often bilateral and matters of national sovereignty. The US could also

[39] U.S. Department of the Treasury, *Joint Statement from the United States, Austria, France, Italy, Spain, and the United Kingdom, Regarding a Compromise on a Transitional Approach to Existing Unilateral Measures During the Interim Period Before Pillar 1 is in Effect* (2021), https://home.treasury.gov/news/press-releases/jy0419.

seek measures under the WTO dispute settlement mechanism claiming a discrimination against their services. Nevertheless, as more jurisdictions consider implementing comparable ex-ante directions for digital platforms, they will undoubtedly monitor any challenges to the DMA closely as well as the actions took by various countries in response to the DMA regulating their services. However, it is important that different countries adopt a careful and analytical approach while replicating a regulation like DMA and conduct a thorough analysis of there pre-existing competition policies before jumping to legislative trends that might backfire and stifle innovation.