INDIA'S DIGITAL COMPETETION POLICY FROM EX-POST TO EX- ANTE

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1. Introduction

Artificial intelligence (AI) is employed to process large volumes of data for the purpose of calculations, forecasts, and predictions. Consequently, AI executes rapid and accurate calculations and predictions to facilitate crucial decision-making. Furthermore, advancements in technology are facilitating the creation of machines that possess the cognitive ability to generate and innovate, akin to human beings. At present, AI robot technology lacks the capability to engage in intricate cognitive processes and apply principles, a capability that will be enhanced by the upcoming advancements in artificial intelligence (AI) technology, namely in the development of AAI humanoids.

AI inventions developed by artificial intelligence (AI) systems have the potential to provide virtual outcomes that can be applied to the human world through the use of AI tools. The global private markets are being transformed by technological innovation, and advancements in digital technology have created new possibilities for private firms to engage in subtle and evasive types of anticompetitive behaviour. AI decision-making technology automates many undertakings involving learning and devising solutions in a number of business processes and virtually every industrial setting.

The advent of digital technology has significantly heightened the issue of consumer protection, particularly in relation to privacy. This is mostly attributed to the increased quantity and convenience with which personal data is gathered, stored, and disseminated through technology, so placing consumers in a vulnerable position. Data has emerged as a novel component of manufacturing output, serving as a catalyst for economic growth, expediting the dissemination of knowledge, and enhancing resource allocation. It is imperative to consider that knowledge serves as the foundation for novel inventions that yield efficacy and sustain competitive advantages.

The advent of artificial intelligence (AI) is reshaping industries and transforming the global economy. As algorithms and machine learning models become increasingly sophisticated, businesses are deploying AI-driven technologies to optimize processes, analyse vast datasets, and gain unparalleled competitive advantages. However, AI's profound impact on markets raises a

critical question: How can antitrust law, also known as competition law, effectively safeguard fair competition in the age of artificial intelligence?

Traditional antitrust doctrines, designed to address competition concerns in conventional markets, may struggle to keep pace with the unique challenges posed by AI. The ability of AI algorithms to collude without explicit human agreement, the role of data as a key asset in establishing market power, and the potential for AI to exacerbate existing inequalities, all demand a re-examination of established antitrust principles.

There is a contention that an algorithm has the potential to enhance efficiency and promote competition by functioning as a series of operations that convert an input into an output. Algorithmic tasks are characterised by a clear and straightforward approach to the solution, and they include the use of algorithms. Furthermore, as a result of the lack of transparency in algorithms, it is necessary to provide information on AI algorithms. Algorithms are of significant importance in the business model of platforms like Facebook and TikTok, as well as in the sharing economy, which includes companies like Uber and Airbnb, and in the realm of video games, among others. Algorithms assist organisations in monitoring, preventing, and detecting anticompetitive behaviours by leveraging the extensive knowledge and expertise available in this field.

1.1 The purpose of Antitrust laws

The field of antitrust law establishes the regulations governing market capitalism. Furthermore, antitrust law serves as the persistent overseer of market dominance and therefore the legal framework that controls unless it is replaced by more specific competition regulations. Antitrust law promotes the principles of a free market, but privacy regulations disrupt the free market in order to safeguard consumer interests. The antitrust landscape is being transformed by the growing global and digital economy. In addition, antitrust legislation does not explicitly define in advance the specific actions that a corporation is allowed or prohibited from taking. Instead, it chooses to assess a company's adherence to a broad command to avoid impeding market production after the fact.

Furthermore, antitrust law operates on a

"standards-based" basis, wherein the parameters of its standards are delineated by courts that maintain political independence. Moreover, antitrust legislation addresses the grievances that give rise to negative market outcomes, such as a dearth of competition, rather than solely addressing the manifestations of less competition through elevated prices and compromised quality. It is important to acknowledge that regulation diminishes the influence of antitrust laws. Consequently, when the government establishes regulations regarding price or output, market forces cease to exert control, resulting in the disregard of antitrust measures. Therefore, in the event that an industry undergoes deregulation or is excluded from the regulatory framework, antitrust laws assume the role of the remaining regulatory authority.

Laws incorporate society's values, which means that when values are at odds with each other, the law recognises the combination that is thought to best describe the controlled matter. Any type of law involves interpretation when its content is unstipulated in an individual case of its application in order the general wording to apply in the specific events of an action.

Antitrust legislation serves to promote equitable competition. Antitrust laws, also known as competition laws, are legislative measures enacted by the governments around the world with the aim of safeguarding consumers against exploitative economic activities. Furthermore, antitrust and competition laws worldwide are swiftly progressing, presenting firms with novel dangers and obstacles in staying abreast of the intricate and evolving regulations. In relation to customers, competition provides items of superior quality at the most affordable rates, while the efficient allocation of society's resources occurs when enterprises operate within the framework of a competitive market. The primary objective of antitrust and competition legislation is to safeguard the advantages of a competitive market from being compromised by activities that hinder competition. Conversely, the weakening of antitrust regulations towards permitting vertical price and nonprice limitations has effectively authorised the practice of outsourcing labour, misclassification, and the gig economy.

This implies that dominant corporations, with access to a broader array of

lucrative business models, now wield more influence and authority over workers than they previously did.

Therefore, antitrust regulations enable the amplification of influence by the most dominant participants in the economy rather than forbidding monopolies.

1.2 The Indian Framework

The burgeoning landscape of artificial intelligence (AI) in India presents both immense opportunities and significant challenges for competition law. This sub-chapter will explore the current legal framework in India, focusing on the Competition Act, 2002 (the Act), and its capacity to address potential anti-competitive behaviours arising from AI-powered technologies.

The Competition Act, 2002, serves as the cornerstone of India's antitrust regime. Enacted to foster competition and protect Indian markets from anti-competitive practices, the Act prohibits agreements causing an appreciable adverse effect on competition (AAEC) within India, abuse of dominant positions by enterprises, and acquisitions that could lead to AAEC.

The Act's preamble explicitly outlines its objectives:

- To prevent practices having adverse effect on competition.
- To promote and sustain competition in markets.
- To protect the interests of consumers and ensure freedom of choice.
- To facilitate effective functioning of the market economy.

The Act establishes a three-pronged approach to safeguard competition:

- **Prohibition of Anti-Competitive Agreements (Section 3):** This section prohibits agreements between enterprises that cause, or are likely to cause, AAEC in India. The Act outlines specific types of agreements presumed to be anti-competitive, including price fixing, market allocation, and bid rigging.
- **Regulation of Abuse of Dominant Position (Section 4):** The Act prohibits an enterprise in a dominant position from indulging in any practice that operates against the interests of consumers or competitors. This includes practices like predatory

pricing, denial of market access, and unfair conditions imposed in contracts.

- **Control of Combinations (Sections 5 & 6):** The Act regulates mergers acquisitions, and amalgamations that could lead to AAEC in relevant markets. The Competition Commission of India (CCI) has the authority to scrutinize such combinations and can even block them if deemed detrimental to competition.

While the Competition Act provides a robust framework for antitrust enforcement, the emergence of AI presents unique challenges:

- **Algorithmic Collusion:** The Act's focus on intentional collusion between firms might not effectively address situations where AI systems tacitly collude, demanding adaptations to identify such practices.
- **Data as a Competitive Asset:** The Act doesn't explicitly address the dominance arising from control of vast datasets, a crucial competitive advantage in the AI era.
- **Transparency and Explainability:** Opaque AI algorithms can make it difficult for the CCI to understand the rationale behind a company's potentially anti-competitive behaviour.

Although the CCI has been active against big tech companies and has initiated numerous enquiries, imposed severe penalties and ordered corrective actions in a plethora of cases in accordance with the existing competition principles, as well as embarking on conducting an ongoing market research on the impact of AI on businesses, questions have been raised over whether such action actually result in effective regulation, timely market correction and consumer welfare.

As the digital economy has grown and data has become a more valuable and significant resource, the data practices of companies are being scrutinized by governments.[8] Therefore, there is a greater need for a regulatory body to be armed to teeth with respect to emerging technology. The CCI has dealt with a plethora of matters, ranging from beer cartels, tyre cartels, complaints from Bharti Airtel against Jio as well as the Ola-Uber case. The issue of AI however is a special case since there are still no prescribed parameters, or “relevant

market" as is provided for under Section 2(s) of the Competition Act, 2002.

2. Research Methodology

2.2.Rationale for the Research

This research is critically important for several reasons:

- Safeguarding Competition: Understanding the specific ways in which AI and Big Data can distort competition is essential for designing antitrust frameworks that effectively promote fair markets and protect consumer well-being.
- Fostering Innovation: Regulatory approaches that strike the right balance between addressing anti-competitive conduct and allowing AI-driven innovation will be crucial for continued economic growth in the technology sector.
- International Cooperation: Examining the strengths and weaknesses of different regulatory models can inform the development of global standards and best practices, facilitating coordination among antitrust authorities in regulating multinational Big Tech firms.
- Informing Policymakers: This research aims to provide insights for legislators in India and other nations seeking to create antitrust laws best suited for the AI era.

2.2.Research Objectives

a. To critically analyze how traditional antitrust doctrines and enforcement mechanisms struggle to address the unique competition concerns arising from the intersection of AI and Big Data.
b. To explore the role of data as a key driver of market power and the implications for competition policy, examining potential abuse of dominance associated with Big Data companies.
c. To conduct a comparative analysis of diverse international regulatory responses to the antitrust challenges posed by AI and Big Data, identifying common themes and divergent approaches.
d. To examine India's evolving antitrust landscape, analyzing the existing legal framework's effectiveness and exploring the potential impact of the proposed Digital Competition Act in addressing the challenges of the AI era.

2.3.Research Questions

• How can the concept of 'relevant markets' be redefined to assess competition in platform-based, AI-driven economies?

• What new approaches are needed to measure consumer harm when digital services are offered 'for free' and the primary value exchange involves data?

• How can antitrust law address the potential for algorithmic collusion, and what measures

can promote algorithmic transparency and accountability?

• To what extent can international cooperation among antitrust authorities enhance the effectiveness of enforcement actions against Big Tech companies?

• What are the specific challenges faced by the Competition Commission of India (CCI) in regulating digital markets, and how might the Digital Competition Act strengthen its ability to address these issues?

2.3.Hypotheses

Pre-emptive regulations targeting specific anti-competitive practices by 'gatekeeper' platforms, such as those in the EU's Digital Markets Act, might promote fair competition in the AI era more than solely relying on case-by-case enforcement.

2.4.India and DCB

The world is moving towards a digital age, and one of the important aspects of this new economic environment is digital marketing. In the current digital economy, products are sold online, enabling communication between vendors and buyers. This phenomenon is thought to be a major force behind success since it affects consumer welfare, productivity, and innovation. "Big Tech" corporations like Google, Amazon, Facebook, Microsoft, and Apple have grown as a result of digitization, and there is a need for anti-trust measures to secure the small player's position in the digital market. Anti-competitive activities have resulted in fines for Microsoft, Google, and Meta Platforms all over the globe to stop unfair business activities and to keep the technology sector fair. In 2018, Google paid a $5.1 billion fine for breaking EU antitrust laws. The European Data Protection Board fined Facebook's parent firm Meta Platforms $1.3 billion for breaking EU data privacy laws.

With India's digital economy predicted to grow to over $1 trillion in 2025–2026, experts in competition law are debating whether a distinct law for digital competition is required. India's law experts are divided on whether it is premature to introduce a separate law to prevent Big Tech's anti-competitive conduct in digital markets, making it difficult to establish a clear direction for the Bill. It seems doubtful that the Digital Markets Act (DMA) of the European Union will serve as the sole model for India's proposed digital competition law but many people are speculating that DMA will serve as the foundation for Indian law. The current shift results from legal experts' reluctance to apply EU regulations to India because of the disparities in internet penetration, market preferences, and overall development stages between India and the EU.

The regulatory structure for competition issues in India follows the "**ex-post**" approach where regulator acts as an umpire of the game i.e. the Competition Commission of India (**"CCI"**) can only take action against an entity once an anti-competition practice has been established. However, under the "**ex-ante**" framework regulator set the rules of the game. Companies will have to implement mechanisms to prevent abusive anti-competition practices. The legal experts are divided on the question of whether India needs a separate digital competition law with ex- ante regulation or not. The legislature frame must rule that secures the future of start-ups in India and the position of digital news publishers. Navigating Challenges: A Close Examination of the Google-CCI Case and Issues in India's Digital Market Industry

3. Navigating Challenges: A Close Examination of the Google-CCI Case and Issues in India's Digital Market Industry

Large tech firms frequently purchase smaller competitors because of their financial ability. Numerous tech start-ups in India are acquiring technologies and top talent, that later are being acquired by big IT companies. However, this puts the smaller players in jeopardy. Not only are mergers and acquisitions problematic, but these companies' dominant positions in the digital market also pose serious issues. For instance, Google made its initial public offering (IPO) on August 19, 2004, and after 20 years and over 256 acquisitions, now nobody looks something up on the internet but they Google it. The giant's market dominance created an unquestionable presence that is preventing the smaller market players from expanding. The Google-CCI Case, popularly known as the **"Android Case,"** took place last year. The CCI penalised Google Rs. 1337.76 crores for its anti-competitive actions and abusive tactics inside the Android mobile device ecosystem. In addition, the CCI issued 10 non-monetary directives against the tech giant.[1] The dispute started when Mr Umar Javeed, Ms Sukarma Thapar, and Mr Aaqib Jabeed revealed regarding the Competition Act, 2002 (henceforth referred to as the "Act"), claiming that Google LLC and Google India Private Limited (collectively, "Google") had violated various sections of the Act.[2] It was alleged that Android was purportedly an open-source mobile operating system that anybody could develop and utilise without restriction.

[1] Google LLC and Another v. Competition Commission of India Through its Secretary and Others, 2023 SCC OnLine NCLAT 147

[2] *Id §*3 (ii)

The source code for Android is available through the Android Open-Source Project (AOSP)[3], and it is covered by a basic license. Google is the developer of the Android operating system, which powers the smartphones and tablets sold in India. Additionally, Google provides a range of services and apps through Google Mobile Services (GMS).[4] To obtain any portion of GMS in devices manufactured, sold, exported, or marketed in India, Google mandates that tablet and smartphone manufacturers only pre-install Google's apps or services. Additionally, Google bundles or integrates other Google services and apps—like YouTube, Google Search, Chrome, and others—with other Google services, apps, and/or APIs.

Google forbids Indian manufacturers of tablets and smartphones from creating and marketing "Android forks," or customized versions of Android meant for use on other hardware. These actions make it more difficult for consumers to obtain mobile device operating alternatives, perhaps improved versions of the Android operating system and more difficult for competitors to create or enter the market with their mobile apps and services.

The CCI held the opinion that Google had abused its dominant position in the market. Google even refuted this claim when, in its contract, it forbade smartphone manufacturers from developing apps based on these open codes, citing the apparent lack of Google control over such apps.[5]The entire purpose of Android was to give users the freedom to use the code and develop software based on it. The general public and smartphone makers do not benefit from the need to install Google apps on smartphones.

Installing such an app would suggest that smartphone manufacturers are both restricting the number of apps available and paying for unnecessary apps. For instance, Samsung, one of the biggest smartphone manufacturers in the nation, has its app store called the Samsung Galaxy Apps Store, but not many people use it because Google Play Store installation is required. Additionally, customers have even fewer options because these apps can be uninstalled.

3.1. India's Digital Landscape: Assessing the Current Landscape and Future Implications of the Digital and Competition Bill

During international discussions on a

[3] *Id §* 4 & 8.
[4] *Id §* 5.
[5] *Id §* 94.

new ex-ante framework to regulate competition in digital markets, the Hon'ble Parliamentary Standing Committee of Finance started looking into the anti-competitive practices of large tech companies on April 28, 2022. In December 2022, the committee submitted its report on these practices. The Big Tech Report, which came out in December 2022,[6] recommended enacting a new Digital Competition Act, setting up a specialized Digital Markets Unit inside the Competition Commission of India, and adopting an ex-ante framework for particular large tech companies.[7]

The Hon'ble Ministry of Corporate Affairs (MCA) established the Committee on Digital Competition Law (CDCL) to look into a number of areas related to competition in digital markets, such as the effectiveness of the current framework for competition in these markets, the need for an ex-ante framework, an analysis of global best practices, a study of alternative regulatory frameworks, a look at dominant players' practices, and other related matters.[8] In March 2024, CDCL presented its findings and the Draft Digital Competition Bill, 2024, to the Indian Parliament. The Big Tech Report's recommendation was adopted by the bill. The need to evaluate their behavior in quick- moving markets and ex ante to avert irreversible harm led to the proposals for ex-ante regulation. Market players who significantly affect the digital ecosystem are subject to a regulatory framework that includes mandated codes of conduct, enhanced intervention, and thorough disclosures, as per the Big Tech Report and the DCA bill.[9] These players must also be designated as "Significant Systemically Important Digital Enterprises" (SSDEs)[10] subjecting them to predefined obligations such as prohibitions on self-preferencing and anti-steering practices.

i) Draft Digital Competition Bill- The Future of Regulatory Frameworks for the Digital Market:

- The Committee on Digital Competition Law was established to assess the necessity of an ex- ante competition framework for digital markets in India. In its report, released on March 12, 2024, the Committee also put forth a draft Bill to implement its

[6] Standing Committee on Finance, Anti- Competition Practices by Big Tech Companies, §13, pg 38-39
[7] *Id §14,* pg 3.
[8] *Id §14,* pg 39.
[9] Standing Committee on Finance, Anti- Competition Practices by Big Tech Companies, *§1-2,* pg 31-32.
[10] Report of the Digital Competition Law, pg 17

recommendations. The key points of the Committee's observations and recommendations are as follows:

- The Committee observed that the current ex-post approach under the Competition Act, 2002, which addresses issues after they occur, does not provide timely solutions for anti-competitive conduct by digital companies. It highlighted that this framework might be inadequate to prevent markets from irreversibly tipping in favor of large digital enterprises, resulting in their permanent dominance. The Committee recommended the enactment of a December 2022,[11] recommended enacting a new Digital Competition Act, setting up a specialized Digital Markets Unit inside the Competition Commission of India, and adopting an ex-ante framework for particular large tech companies.[12]

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[11] Standing Committee on Finance, Anti- Competition Practices by Big Tech Companies, *§*13, pg 38-39
[12] *Id §14,* pg 3.
[13] *Id §14,* pg 39.
[14] Standing Committee on Finance, Anti- Competition Practices by Big Tech Companies, *§1-2,* pg 31-32.
[15] Report of the Digital Competition Law, pg 17

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Digital Competition Act to empower the Competition Commission of India (CCI) to selectively regulate significant digital enterprises in an ex-ante manner, meaning intervention before an event occurs.[16] This proposed legislation should focus on regulating enterprises that have a substantial presence and influence in the Indian digital market.

- Committee noted that certain characteristics of digital markets enable digital enterprises to rapidly gain significant influence. These characteristics include:

  (i) the collection of user data, which allows large, established companies to enter related markets;

  (ii) network effects, where the value of a service increases with the number of users; and

  (iii) economies of scale, which allow incumbents to offer digital services at lower costs compared to new entrants.

  The Committee recommended identifying entities that provide specific core digital services, such as search engines, social networking services, operating systems, and web browsers, as SSDEs for ex-ante regulation due to their susceptibility to market concentration.[17]

[16] *Id,* pg 91.

[17] *Id,* pg 97.

- The Committee proposed using both quantitative thresholds and qualitative criteria to classify enterprises as SSDEs. The quantitative threshold could be based on a dual test of:

  (i) significant financial strength, assessed through parameters such as turnover, gross merchandise value, and market capitalization, and

  (ii) significant spread, determined by the number of business and end users of the core digital service in India. Digital enterprises meeting these thresholds would be required to report to the CCI, which would then designate them as SSDEs.

  The Committee acknowledged that the quantitative threshold might not capture all digital enterprises with significant presence in Indian markets, so it also recommended using qualitative criteria, such as the enterprise's resources and the volume of data it has aggregated, to designate SSDEs.[18]

  The Committee recognized that compliance might be required from multiple digital enterprises within a group that are involved in providing a core digital service. It recommended that notifying enterprises identify all other group enterprises engaged in providing a core digital service, which would then be designated as Associate Digital Enterprises ("ADEs") under the proposed framework.[19]

- The draft Digital Competition Bill, 2024, as suggested by the Committee, prohibits SSDEs from engaging in certain practices, including:

  (i) favoring their own products and services or those of related parties,

  (ii) using non-public data of business users operating on their core digital service to compete with those users,

  (iii) restricting users from utilizing third-party applications on their core digital services, and

  (iv) requiring or incentivizing users of a core digital service to use other products or services offered by the SSDE.

[18] *Id,* pg 99.

[19] *Id,* pg 106.

The regulations may permit differential obligations for various SSDEs and ADEs, depending on factors like business models and user base.[20]

- The draft Bill grants the Director General, appointed under the 2002 Act, the authority to investigate any violations when directed by the CCI. The Committee recommended that the CCI enhance its technical capacity, including within the Director General's office, for early detection and resolution of cases. It also suggested the establishment of a separate bench of the National Company Law Appellate Tribunal for the timely disposal of appeals.[21]

- The 2002 Act provides for behavioral remedies and substantial monetary penalties to address anti-competitive practices. Noting that the central government has decriminalized various corporate offenses to promote ease of doing business, the Committee recommended that violations under the draft Bill be addressed through civil penalties. For calculating the ceiling on penalties, the Committee proposed using the global turnover of enterprises and recommended capping the penalty at 10% of the global turnover of SSDEs.[22]

3.2. Global Regulatory Landscape: A Comprehensive Analysis of Market Governance Frameworks Worldwide

3.3. The Digital Market Act- EU's Regulation for Fair Competition:

The European Union introduced the Digital Market Act ("**DMA**") in 2022 to regulate large digital platforms. The European Council designates these platforms as 'Gatekeepers', operating specific core platform services. Once designated as gatekeepers, these platforms must adhere to specific prescriptions.[23] The DMA entered into force on 1 November 2022 with a six-month built-in buffer period before it became applicable (i.e. by May 2023).[24]

DMA establishes regulations for

[20] *Id,* pg 108.
[21] *Id,* pg 115.
[22] *Id,* pg 120
[23] European Commission "Question and answers: Digital Market Act: Ensuring fair and open digital markets", pg.2, (2023)
[24] *Id.*

digital sector "gatekeepers"—platforms that have a big influence on the internal market and let companies connect with consumers. These platforms can serve as private regulators and obstacles that separate companies from customers. Preventing unfair circumstances and guaranteeing the openness of significant digital services are the goals of the Act. Allowing end users to download alternate app stores, stopping software installation by default, offering pricing and advertising performance data, enabling developers to use different in-app payment systems, and enabling users to download alternate app stores are just a few of the changes. Standardized regulations throughout the single market will promote creativity, expansion, and rivalry, making it easier for smaller platforms, start-ups, and small and medium-sized businesses to develop.

For businesses that are identified by the Regulation as "gatekeepers" and are essential to the internal market, the DMA is applicable. Online search engines, social networking services, app stores, messaging services, virtual assistants, web browsers, operating systems, and online intermediation services are just a few of the basic platform services that these businesses are required to act as gatekeepers for.

Three primary factors, according to the DMA, define a company's inclusion in its purview: a scale that affects the internal market, ownership of a significant entry point for business users to reach final customers, and a solid and established position. A business must have an average market capitalization of at least €75 billion, have generated an annual turnover in the European Economic Area (EEA) of €7.5 billion or more during the previous three fiscal years, and offer a core platform service in at least three Member States. Additionally, in the most recent fiscal year, the corporation had to have more than 45 million monthly active end users and 10,000 annual active business users in the EU.[25]

3.4. Challenges with EU's DMA:

Concerns over the DMA have been voiced by independent analysts and private sector stakeholders due to its arbitrary criteria and possible negative

[25] European Commission "Keynote Speech: Digital Competition- European Digital Competition Day", pg. 5, (2023)

economic impacts that could outweigh its benefits for competition. Tech behemoths in the United States that reach the gatekeeper threshold will have to pay an estimated €1.41 million annually for each platform in compliance fees, which might be higher for smaller tech firms. Certain requirements, like the one mandating search engine services to reveal the order in which they rank results for a particular query, may force gatekeepers to divulge confidential knowledge and experience that is vital to their ability to compete.[26]Private sector players point out that the DMA's qualitative and quantitative standards may hinder the establishment of new companies and discourage EU digitization. The thresholds may also affect innovation since they might force a big corporation that is already established into the gatekeeper category and impose

DMA duties, which could discourage the company from creating new, creative services. While some businesses might find this trade-off worthwhile, others might not.[27]Concerns have been expressed by the non-profit organization Allied for Start-ups in Belgium regarding the overly strict ban on purchases for noncompliant gatekeepers, which may impede the start-up process. The group feels that the tech ecosystem benefits from the relative freedom that tech giants have to buy promising start-ups, and that the DMA may curtail this. According to a study by a Danish consultant, European SMEs who depend on cloud services may find it more difficult to compete internationally if gatekeepers forbid merging personal data from different providers. This would lower the value of cloud computing services. Article 4 of the DMA has been revised by the European Parliament to mandate that the commission keep an eye on gatekeepers and release an annual report detailing their effects on business users, especially SMEs and end users. Despite concerns expressed by US tech firms operating in Europe, the European Parliament passed the DMA with 642 votes in favour and only 8 votes against. Allied for Start- ups and other EU consumer protection organisations continue to support the law. According to 79% of French and German SMEs surveyed recently, internet giants should be subject to stricter regulations around the use of personal data. Even US corporations, like as Microsot. and Mozilla, have applauded the DMA regulations, maybe because they want to see their rivals suffer more.[28]

[26] *Id.*
[27] March Wiigers, Robin Struijlaart, Joost Dibbits, Digital Competition Law in Europe, pg 37, (Wolters Kluwer) (2023)
[28] *Id.*

and Mozilla, have applauded the DMA regulations, maybe because they want to see their rivals suffer more.[29]

3.5. Regulations around the Globe:

Germany, an EU member state, has implemented its ex-ante regulation, the 10th amendment to the German Act against Restraints of Competition (GWB Digitalisation Act / German Legislation). To designate platforms as "undertakings with Paramount Cross-Market Significance" (PCMS),[21] this legislation offers a qualitative method. Following designation, responsibilities are specifically customised for every platform, enabling parties to provide statements. Unlike the DMA's narrow appeal scope, Germany permits parties to appeal both PCMS designation and ban rulings. Germany is in favour of tailored remediation, as are France and the Netherlands, to avoid taking on undue commitments that would impede innovation.[30]

The United Kingdom ("UK") introduced on 21st December 2023 "The Digital Markets, Competition and Consumers Bill" which aims to create a pro-competition regime for digital markets, addressing the market power of tech firms and providing the Competition and Markets Authority (CMA) with tools to drive dynamic markets and prevent harmful practices. The Central Market Authority will have the power and accountability to govern the new regime, with the Digital Markets Unit (DMU) making daily decisions. The CMA Board or a committee will make strategic decisions, while the CMA Board retains ultimate responsibility and is directly accountable to Parliament.[31]

Australia's competition and consumer regulator, has introduced a framework similar to the UK for large digital platforms, 'Designated Digital Platforms' (DDP)[32], based on qualitative and quantitative criteria, following a five-year inquiry into digital platform services. Despite the proposed framework's lack of reference to appeals, the Australian regulator proposed framework for digital platform service providers (DDPs) is currently silent on appeals because it does not include a specific code of conduct for these services post-

[29] *Id.*
[30] GWB Digitalisation Act, Article 18 (3a) Federal Law Gazette, (2023) (Germany.)
[31] The Digital Markets, Competition and Consumer Bill (Bill 003 of 2023-24), House of Lords, (2023) (UK)
[32] Australian Commission and Consumer Commission, "September 2023 interim report", pg 114. (2023)

designation,[33] which should allow flexibility in tailoring obligations to changing competition issues.[34]

Despite being at the forefront of formal regulation in 2021, South Korea has embraced a 'pro- market stance' in 2022.[35]The chairman of the Korean Fair-Trade Commission (KFTC) has promised not to impose needless rules unless they are proven useless or fail. In 2022, the KFTC prioritized its existing enforcement power over enacting new regulations, resulting in no under-enforcement issues and registering over 70 infringement cases in its database from January to October 2022, demonstrating the effectiveness of its approach.[36]The United States is proposing reforms to the current framework, such as modifying the Horizontal and Vertical Merger Guidelines, as well as new laws to address modern technology sector concerns. Other jurisdictions evaluate their digital economies' competitiveness before deciding on the best law or regulation. They have dedicated significant time to investigating, evaluating, and developing suitable frameworks to guide their economic goals, demonstrating a comprehensive approach to addressing their needs.

3.6. Is there any optimal framework for the Indian digital market?

The development of digital India, which has greatly benefitted the economy by facilitating company expansion and consumer convenience, must not be hampered by India's regulations governing the digital market. However, as more and more companies enter and grow in the digital space, digital marketplaces are coming up against intense rivalry. Good regulation requires impact-based evaluation and empirical analysis, requiring extensive stakeholder and public input. Ex-ante regulation should be applied cautiously due to its wide-ranging effects. The CDCL deserves recognition for its efforts in interacting and consulting with stakeholders. The Competition (Amendment) Act of 2023, the Personal Data Protection Bill, and the Digital India Act of 2023 are legislative initiatives that could impact big tech, emphasizing the need for caution due to the permanent drawbacks of excessive regulation. Excessive regulation can lead to

[33] *Id* pg. 119
[34] *Id* pg. 120-121
[35] Guidelines for Review for Abuse of Dominance and Unfair Trade Practices by Online Platform, KFTC, (2023) (Korea)
[36] Lee *supra* notes 26.

complexity and increased costs, potentially deterring tech companies from innovation. To reduce disagreements and legal action, it's crucial to maintain coherence and prevent overlaps with other laws, providing more legal certainty for regulators and IT businesses.

The antitrust field will be greatly impacted by the impending changes to digital market competition regulations, and the coming years will be critical for watching how ex-ante regulation affects the expansion of India's digital economy. India should not follow any ex- ante regulation from the foreign jurisdiction because firstly; their ex-ante regulations are being

formed by examining particular companies and their operations; yet, because new participants may have distinct business models and an impact on the market, it might be difficult to create a law that applies to them, secondly: Ex-ante rules have never been tried or tested before Ex- ante hasn't been put to the test or tried. Even though the EU's Digital Markets Act is a prime example of ex-ante regulation, it will not even be implemented until 2024. We have yet to witness the advantages of ex-ante in other jurisdictions, and it will be challenging for India to enact regulations on those terms without first observing the consequences.

4. Insights and Perspectives: Examining Ex-Ante Regulations in the Indian Digital Market Landscape

The Indian competition landscape has evolved significantly over the years, primarily driven by the Competition Act, which aims to protect the process of competition rather than specific competitors. The Act relies heavily on the consumer welfare standard, which seeks to ensure that the competitive process remains fair and unencumbered, benefiting consumers through better choices and innovation. However, as the digital economy rapidly expands, there is a growing debate on whether the existing legal framework is sufficient to regulate new-age digital markets or if a targeted law, such as the proposed Digital Competition Bill, is necessary.

The CCI is tasked with determining whether an organization has a dominant position in a relevant market in accordance with the present Competition Act. This procedure entails defining the pertinent market, which is a difficult assignment

frequently. In order to evade being accused of abusing their clients' power, legal professionals and economic counsellors often try to enlarge the scope of relevant markets. The problem is that many industries, especially in the digital economy, have distinct market leaders, which makes it harder for newcomers or smaller firms to establish a presence. In light of this, the question of whether the current framework actually creates a level playing field or whether a new, focused regulation is required to handle the particular difficulties presented by the digital economy emerges.

The Digital Competition Bill's proponents contend that the new legislation is required to combat particular practices that are common in digital markets. The Digital Competition Bill seeks to regulate particular behaviours that potentially impair competition and consumer welfare in digital markets, in contrast to traditional competition law, which is primarily concerned with safeguarding the competitive process. For instance, the Bill aims to stop practices that are becoming more prevalent in the digital marketplace, such as self-preferencing, anti-steering tactics, and the improper use of public data for targeted advertising. These actions, which are frequently displayed by major digital platforms, have the potential to reduce consumer choice and impede competition, which makes targeted regulation necessary.

Critics counter that this is not the intent of antitrust law; rather, they believe that the Digital Competition Bill changes the emphasis from safeguarding the competitive process to protecting particular companies. Abuse of power is already covered by the current Competition Act, albeit more ex-post—that is, after the fact as opposed to beforehand. Long-term investigations and overworked courts are frequently the cause of the delays in resolving these problems. Therefore, rather than passing new legislation, it could be better to build a legislative structure that guarantees prompt investigations and decisions, perhaps by creating specialized competition benches or re-establishing a specialized competition appellate tribunal. Without the need for a whole new regulatory framework, such actions could speed up the resolution of competition issues, particularly those involving participants in the digital economy.

There are further concerns about the

Digital Competition Bill's overlap with the current Competition Act considering its impending adoption. The Bill suggests legislation that would subject SSDEs to certain duties, like forbidding anti-steering and self-preferring measures. But there's the possibility that these duties will result in double fines for the same actions under the new law and the Competition Act. Because of the overlap, there may be legal ambiguity and a chance that innovation will be stifled as businesses become unduly cautious in an attempt to avoid fines, which would hurt their ability to compete. The fact that the draft Bill only partially adopts the DMA's framework—particularly with regard to exclusions for specific gatekeepers—is a serious cause for worry. The EU's DMA recognizes that not all gatekeepers present the same level of competitive danger and permits exemptions depending on particular quantitative and qualitative factors. However, the absence of a thorough exemption framework in the Indian Bill may lead to an excessive level of regulation of businesses that have little bearing on competition. A strategy like this could hinder innovation and expansion, especially for businesses that serve various industries, like ride-hailing services and food delivery. A more refined strategy with a clearly defined exemption mechanism could stop restrictions from being applied indiscriminately to businesses that don't represent serious dangers to the market.

Another point of criticism with the Bill is its omission of laws pertaining to killer acquisitions, which are defined as the purchase of a competitor with the intention of eliminating future competition. Although the deal value barrier in the current Competition Act helps to address some problems, it might be too high to account for all acquisitions that could be detrimental. The new Bill's lack of specific prohibitions regarding killer purchases may create a regulatory vacuum that would enable established businesses to use strategic acquisitions to crush upstart competitors. The new rule may involve stricter monitoring of acquisitions to counter this, especially in the digital sector where market reach and data value frequently surpass traditional financial measurements.

In conclusion, the proposed Digital Competition Bill raises serious concerns about legal overlap, potential overregulation, and the exclusion of important issues like killer acquisitions, even as it aims to address the particular challenges of the digital economy. The emphasis should be on improving the current framework for competition to guarantee prompt and efficient enforcement, as opposed to enacting a new law that would make matters worse. The discussion surrounding the Bill highlights the need for a reasonable strategy that safeguards the market system without impeding innovation or placing needless restrictions on companies.

4.1. How ex-ante regulations will affect Indian companies:

Significant discussion has been generated by the proposed Digital Competition Bill, especially in light of the possible compliance difficulties and the possibility that it will stifle innovation in India's digital economy. The country is striving to become a global leader in technology and innovation by advancing its Digital India Vision. However, the introduction of ex-ante rules, which aim to prevent anti-competitive practices before they happen, raises important questions about how these rules will affect start-ups and the larger business ecosystem. This measure is based on the DMA of the European Union and includes heavy penalties (up to 10% of worldwide sales) along with presumed criteria. It's uncertain, though, if such a method could be effective in the Indian context. India has a reputation for its inventiveness, in contrast to Europe, and any laws passed there ought to consider the particularities of the country's digital economy rather than just copying foreign models.

Any legislation pertaining to India's aspirations to become a developed nation must be compatible with broader national objectives, such spurring innovation, inviting in investment, and producing jobs. With a sector- or service-specific approach that considers the level of

competition in each market, the law should be flexible and nuanced. To determine whether the proposed law actually serves the interests of consumers, a consumer benefit test may prove to be an effective instrument. Furthermore, a comprehensive legal analysis is required to comprehend the possible consequences of the legislation, particularly with regard to the regulatory organizations entrusted with enforcing it.

It is unclear how widely the ex-ante approach would be applied or how much of a burden it will put on smaller firms, who might find themselves subject to onerous regulations even in the absence of proof of anti-competitive behaviour. This can make compliance more expensive and take funds away from innovation, which could stunt the expansion of start-ups and MSMEs—which are essential to India's economic growth and job creation.

Moreover, this bill's concentration of power within the CCI raises the possibility of arbitrary and overly discretionary decision-making. To avoid such results, the legislation must have precise instructions, impartial evaluations, and strong checks and balances. Sustaining stakeholder confidence will depend critically on how equitable and uniform the regulatory system is, especially in the ever-changing digital market.

It could be beneficial to re-evaluate the ex-ante part and concentrate on customizing laws to the unique requirements of various digital economy sectors. A more focused strategy, supported by empirical data and market research, may be more effective in helping India achieve its objectives of promoting innovation and building a level playing field for digital marketplaces. In the end, any new laws should support India's goal of leading the world in technology while making sure that the requirements of new companies and start-ups are sufficiently met and that innovation is not unintentionally inhibited.

4.2. Alternative to ex-ante regulations:

4.2.1. The market faces two issues:

stickiness in power markets and delays in competition authority administration. To address these issues, market dynamics must be eased. When data becomes an issue, data mobility becomes necessary. It might need to be resolved if we are to say that technological expertise is an issue. The issue is one of the markets, and the market, not the government, must find a method to fix it.

4.2.2. The committee and panel are concentrating on the innovation activities of the EU, but it's crucial to consider the efforts of other nations, such as South Korea and Japan, which have also been promoting innovation by recognizing problems and finding solutions rather than taking a broad approach.

4.2.3. A new Commitment and Settlement structure, implemented by the Indian government, allows corporations to engage in negotiations with the CCI if they are discovered to be involved in anticompetitive agreements or abuses of dominance. The Competition Act's Commitment and Settlement provisions should be given a few years to evolve in the Indian context. Consumer benefit is an important consideration in the assessment of competition law. The consumer advantage against the model's problems can be discussed during commitment and settlement talks, but ex-ante conversations impose needless limitations. This method guarantees a fair assessment.

4.2.4. Since the Competition Commission is unable to manage and oversee a large number of enterprises, the DMU was created to detect anti-competitive and non-competitive practices, which the CCI can then act against.

5.Conclusion

Ex-post and ex-ante regulations each have benefits and drawbacks, and as India is a complicated legal system, one form of regulation would not work for its business. The goal of the act is to strike a balance between the convenience of doing business and a fair market. As things are, an Indian committee has recommended a structure akin to that of the EU, USA, and UK, but it is essential to consider that India, a developing nation, is competing with international businesses by utilizing its start-up ecosystem and digital economy. However, given the widespread

criticism of these ex-ante laws, it might not be suitable to implement equivalent ex-ante legislation to the Digital Markets Act in the EU and the Open Markets App in the USA.

India needs to consider its particular circumstances because relying just on these laws could place the country in a disadvantageous situation. In addition to the need to control anti- competitive behavior, policy-making initiatives should consider the advantages that the public derives from the products and services provided by large tech companies as well as

the high cost of overly restrictive laws, which may stifle innovation and impede the expansion of both domestic and international businesses. Ex-ante regulations should be delayed in India since more experienced agencies haven't tested them in industrialized nations. Precaution is better than cure, it ought to postpone and take advantage of the lessons learned by other regions that have implemented ex-ante regulation. Digital marketplace ex-ante competition laws may create a conflicting legal framework that results in forum shopping, regulatory arbitrage, and enforcement overlaps, particularly when the activity is subject to both ex-ante and ex-post.