

Comments of the International Center for Law & Economics

On the Report of the Committee on Digital Competition Law

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A year after it was created by the Government of India's Ministry of Corporate Affairs to examine the need for a separate law on competition in digital markets, India's Committee on Digital Competition Law (CDCL) in February both published its report¹ recommending adoption of such rules and submitted the draft Digital Competition Act (DCA), which is virtually identical to the European Union's Digital Markets Act (DMA).²

The EU has touted its new regulation as essential to ensure "fairness and contestability" in digital markets. And since it entered into force early last month,³ the DMA has imposed strict pre-emptive rules on so-called digital "gatekeepers,"⁴ a cohort of mostly American tech giants like Google, Amazon, Apple, Meta, and Microsoft.

But despite the impressive public-relations campaign⁵ that the DMA's proponents have been able to mount internationally, India should be wary of reflexively importing these ready-made and putatively infallible solutions that promise to "fix" the world's most successful digital platforms at little or no cost.

I. Not So Fast

The first question India should ask itself is *why*?⁶ Echoing the European Commission, the CDCL argues that strict *ex-ante* rules are needed because competition-law investigations in digital markets are too time-consuming. But this could be a feature, not a bug, of competition law. Digital markets often involve novel business models and zero or low-price products, meaning that there is nearly always a plausible pro-competitive explanation for the impugned conduct.

When designing rules and presumptions in a world of imperfect information, the general theme is that, as confidence in public harm goes up, the evidentiary burden must go down. This is why antitrust law tilts the field in the enforcer's favor in cases involving practices that are known to always, or almost always, be harmful. But none of the conduct covered by the DCA falls into this category. Unlike with, say, price-fixing cartels or territorial divisions, there is currently no consensus that the practices the DMA would prohibit are generally harmful or anticompetitive.

¹ *Report of the Committee on Digital Competition Law*, GOVERNMENT OF INDIA MINISTRY OF CORPORATE AFFAIRS (Feb. 27, 2024), <https://www.mca.gov.in/bin/dms/getdocument?mcls=gzGtvSkE3zIVhAuBe2pbow%253D%253D&type=open>.

² Regulation (EU) 2022/1925 of the European Parliament and of the Council, on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (Text with EEA relevance), OFFICIAL JOURNAL OF THE EUROPEAN UNION, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R1925>.

³ Press Release, *Designated Gatekeepers Must Now Comply With All Obligations Under the Digital Markets Act*, EUROPEAN COMMISSION (Mar. 7, 2024), https://digital-markets-act.ec.europa.eu/designated-gatekeepers-must-now-comply-all-obligations-under-digital-markets-act-2024-03-07_en.

⁴ Press Release, *Digital Markets Act: Commission Designates Six Gatekeepers*, EUROPEAN COMMISSION (Sep. 6, 2023), https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4328.

⁵ Press Release, *Cade and European Commission Discuss Collaboration on Digital Market Agenda* MINISTÉRIO DA JUSTIÇA E SEGURANÇA PÚBLICA (Mar. 29, 2023), <https://www.gov.br/cade/en/matters/news/cade-and-european-commission-discuss-collaboration-on-digital-market-agenda>.

⁶ *Summary of Remarks by Jean Tirole*, ANALYSIS GROUP (Sep. 27, 2018), available at https://www.analysisgroup.com/globalassets/uploadedimages/content/insights/ag_features/summary-of-remarks-by-jean-tirole_english.pdf.

To the contrary, when assessing a self-preferencing case against Google in 2018, the Competition Commission of India (CCI) found important consumer benefits⁷ that outweighed any inconveniences they may impose on competitors.

By imposing *per se* rules with no scope for consumer-welfare or efficiency exemptions, the DCA could capture swaths of procompetitive conduct. This is a steep—and possibly irrational—price to pay for administrative expediency. Rather than adopt a “speed-at-all-costs” approach, India should design its rules to minimize error costs and ensure the system’s overall efficiency.

II. The Costs of Ignoring Cost-Benefit Analysis

But this cannot be done, or it cannot be done rationally, unless India is crystal clear about what the costs and benefits of digital-competition regulation are. As things stand, it is unclear whether this question has been given sufficient thought.

For one, the DCA’s goals do not seem to align well with competition law. While competition law protects competition for the ultimate benefit of consumers, the DCA—like the DMA—is concerned with aiding rivals, rather than benefiting consumers. Unmooring digital competition regulation from consumer welfare is ill-advised. It opens the enforcer to aggressive rent seeking by private parties with a vested interest in never being satisfied,⁸ who may demand far-reaching product-design changes that don’t jibe with what consumers—*i.e.*, the public at-large—actually want.

Indeed, when the system’s lodestar shifts from benefiting consumers to facilitating competitors, there is a risk that the only tangible measure of the law’s success will be the extent to which rivals are satisfied⁹ with gatekeepers’ product-design changes, and their relative market-share fluctuations. Sure enough, the European Commission recently cited stakeholders’ dissatisfaction¹⁰ as one of the primary reasons to launch five DMA noncompliance investigations, mere weeks after the law’s entry into force. In the DCA’s case, the Central Government’s ability to control CCI decisions further exacerbates the risk of capture and political decision making.

While digital-competition regulation’s expected benefits remain unclear and difficult to measure, there are at least three concrete types of costs that India can, and should, consider.

First, there is the cost of harming consumers and diminishing innovation. Mounting evidence from the EU demonstrates this to be a very real risk. For example, Meta’s Threads was delayed¹¹

⁷ Geoffrey A. Manne, *Google’s India Case and a Return to Consumer-Focused Antitrust*, TRUTH ON THE MARKET (Feb. 8, 2018), <https://truthonthemarket.com/2018/02/08/return-to-consumer-focused-antitrust-in-india>.

⁸ Adam Kovacevich, *The Digital Markets Act’s “Statler & Waldorf” Problem*, Chamber of Progress, MEDIUM (Mar. 7, 2024), <https://medium.com/chamber-of-progress/the-digital-markets-acts-statler-waldorf-problem-2c9b6786bb55>.

⁹ *Id.*

¹⁰ *Remarks by Executive-Vice President Vestager and Commissioner Breton on the Opening of Non-Compliance Investigations Under the Digital Markets Act*, EUROPEAN COMMISSION (Mar. 25, 2024), https://ec.europa.eu/commission/presscorner/detail/en/speech_24_1702.

¹¹ Makena Kelly, *Here’s Why Threads Is Delayed in Europe*, THE VERGE (Jul. 10, 2023), <https://www.theverge.com/23789754/threads-meta-twitter-eu-dma-digital-markets>.

in the EU block due to uncertainties about compliance with the DMA. The same happened with Gemini, Google's AI program.¹² Some product functionalities have also been degraded. For instance, in order to comply with the DMA's strict self-preferencing prohibitions, maps that appear in Google's search results no longer link to Google Maps, much to the chagrin of European users.¹³

Google has also been forced to remove¹⁴ features like hotel bookings and reviews from its search results. Until it can accommodate competitors who offer similar services (assuming that is even possible), these specialized search results will remain buried several clicks away from users' general searches. Not only is this inconvenient for consumers, but it has important ramifications for business users.

Early estimates suggest that clicks from Google ads to hotel websites decreased by 17.6%¹⁵ as a result of the DMA. Meanwhile, on iOS, rivals like Meta¹⁶ and Epic Games¹⁷ are finding it harder than they expected to offer competing app stores or payment services. At least some of this is due to the reality that offering safe online services is a costly endeavour. Apple reviews millions of apps every year¹⁸ to weed out bad actors, and replicating this business is easier said than done. In other words, the DMA is falling short even on its own terms.

In other cases, consumers are likely to be saddled with a litany of pointless choices, as well as changes in product design that undermine user experience. For example, the European Commission appears to believe that the best way to ensure that Apple doesn't favor its own browser on iOS is by requiring consumers to sift through 12 browser offerings¹⁹ presented on a choice screen.²⁰ But consumers haven't asked for this "choice." The simple explanation for the policy's failure is that, despite the DMA's insistence to the contrary, users were always free to choose their preferred browser.

Supporters of digital-competition regulation will no doubt retort that India should also consider the costs of inaction. This is certainly true. But it should do so against the background of the existing legal framework, not a hypothetical legal and regulatory vacuum. Digital platforms are

¹² Andrew Grush, *Did You Know Google Gemini Isn't Available in Europe Yet?*, ANDROID AUTHORITY (Dec. 7, 2023), <https://www.androidauthority.com/did-you-know-google-gemini-isnt-available-in-europe-yet-3392451>.

¹³ Edith Hancock, *'Severe Pain in the Butt': EU's Digital Competition Rules Make New Enemies on the Internet*, POLITICO (Mar. 25, 2024), <https://www.politico.eu/article/european-union-digital-markets-act-google-search-malicious-compliance>.

¹⁴ Oliver Bethell, *An Update on Our Preparations for the DMA*, GOOGLE BLOG (Jan. 17, 2024), <https://blog.google/around-the-globe/google-europe/an-update-on-our-preparations-for-the-dma>.

¹⁵ Mirai, LINKEDIN (Apr. 17, 2024), <https://www.linkedin.com/feed/update/urn:li:activity:7161330551709138945>.

¹⁶ Alex Heath, *Meta Says Apple Has Made It 'Very Difficult' To Build Rival App Stores in the EU*, THE VERGE (Feb. 2, 2024), <https://www.theverge.com/2024/2/1/24058572/zuckerberg-meta-apple-app-store-iphone-eu-sideload>.

¹⁷ *Id.*

¹⁸ 2022 App Store Transparency Report, APPLE INC. (2023), available at <https://www.apple.com/legal/more-resources/docs/2022-App-Store-Transparency-Report.pdf>.

¹⁹ *About the Browser Choice Screen in iOS 17*, APPLE DEVELOPER, (Feb. 2024), <https://developer.apple.com/support/browser-choice-screen>.

²⁰ *Remarks by Executive-Vice President Vestager and Commissioner Breton on the Opening of Non-Compliance Investigations Under the Digital Markets Act*, EUROPEAN COMMISSION, https://ec.europa.eu/commission/presscorner/detail/en/speech_24_1702.

already subject to general (and fully functional) competition law, as well as to a range of other sector-specific regulations.

For instance, Amazon and Flipkart are precluded by India's foreign-direct-investment (FDI) policy from offering first-party sales²¹ to end-users on their e-commerce platforms. In addition, the CCI has launched several investigations of digital-platform conduct that would presumably be caught by the DCA, including by Google,²² Amazon,²³ Meta,²⁴ Apple,²⁵ and Flipkart.²⁶

The facile dichotomy made between digital-competition regulation and "the digital wild west"²⁷ is essentially a red herring. Nobody is saying that digital platforms should be above the law. Rather, the question is whether a special competition law is necessary and justified considering the costs such a law would engender, as well as the availability of other legal and regulatory instruments to tackle the same conduct.

This is particularly the case when these legal and regulatory instruments incorporate time-honed analytical tools, heuristics, and procedural safeguards. In 2019, India's Competition Law Review Committee²⁸ concluded that a special law was unnecessary. In a report titled "Competition Policy for the Digital Era,"²⁹ a panel of experts retained by the European Commission reached the same conclusion.

Complicating the question further still is that the DCA would mark a paradigm shift for Indian competition policy. In 2000, the Raghavan Committee Report was crucial in aligning Indian competition law with international best practices, including by moving analysis away from blunt structural presumptions and toward the careful observance of economic effects. As such, it paved the way for the 2002 Competition Act—a milestone of Indian law.

²¹ Saheli Roy Choudhury, *If You Hold Amazon Shares, Here's What You Need to Know About India's E-Commerce Law*, CNBC (Feb. 4, 2019), <https://www.cnbc.com/2019/02/05/amazon-how-india-ecommerce-law-will-affect-the-retailer.html>.

²² Press Release, *CCI Imposes a Monetary Penalty of Rs.1337.76 Crore on Google for Anti-Competitive Practices in Relation to Android Mobile Devices*, COMPETITION COMMISSION OF INDIA (Oct. 20, 2022), <https://www.cci.gov.in/antitrust/press-release/details/261/0>; *CCI Orders Probe Into Google's Play Store Billing Policies*, THE ECONOMIC TIMES, (Sep. 7, 2023), <https://economictimes.indiatimes.com/tech/startups/competition-watchdog-orders-probe-into-googles-play-store-billing-policies/articleshow/108528079.cms>.

²³ *Why Competition Commission of India Is Investigating Amazon*, OUTLOOK, (May. 1, 2022), <https://business.outlookindia.com/news/explained-why-is-competition-commission-of-india-probing-amazon-news-194362>.

²⁴ *HC Dismisses Facebook India's Plea Challenging CCI Probe Into Whatsapp's 2021 Privacy Policy*, THE ECONOMIC TIMES (Sep. 7, 2023), <https://economictimes.indiatimes.com/tech/technology/women-participation-in-tech-roles-in-non-tech-sectors-to-grow-by-24-3-by-2027-report/articleshow/109374509.cms>.

²⁵ Case No. 24 of 2021, Competition Commission of India, (Dec. 31, 2021), <https://www.cci.gov.in/antitrust/orders/details/32/0>.

²⁶ *Supra* note 23.

²⁷ Anne C. Witt, *The Digital Markets Act: Regulating the Wild West*, 60(3) COMMON MARKET LAW REVIEW 625 (2023).

²⁸ *Report of Competition Law Review Committee*, INDIAN ECONOMIC SERVICE (Jul. 2019), available at <https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf>.

²⁹ Jacques Crémer, Yves-Alexandre de Montjoye, & Heike Schweitzer, *Competition Policy for the Digital Era*, EUROPEAN COMMISSION DIRECTORATE-GENERAL FOR COMPETITION (2019), <https://data.europa.eu/doi/10.2763/407537>.

The DCA, by contrast, would overturn these advancements to target companies based on size, obviating any effects analysis. This would amount to taking Indian competition law back to the era of the Monopolies and Restrictive Trade Practices Act of 1969 (MRTP). Again, is the hodgepodge of products and services known collectively as “digital markets” sufficiently unique to warrant such a drastic deviation from well-established antitrust doctrine?

The third group of costs that the government must consider are the DCA’s enforcement costs. The five DMA noncompliance investigations launched recently by the European Commission have served to dispel the once-common belief that the law would be “self-executing”³⁰ and that its enforcement would be collaborative, rather than adversarial. With just 80 dedicated staff,³¹ many believe the Commission is understaffed³² to enforce the DMA (initially, the most optimistic officials asked for 220 full-time employees).³³ If the EU—a sprawling regulatory superstate³⁴—struggles to find the capacity to deploy digital-competition rules, can India expect to fare any better?

Enforcing the DCA would require expertise in a range of fields, including competition law, data privacy and security, telecommunications, and consumer protection, among others. Either India can produce these new experts, or it will have to siphon them from somewhere else. This raises the question of opportunity costs. Assuming that India even can build a team to enforce the DCA, the government would also need to be reasonably certain that, given the significant overlaps in expertise, these resources wouldn’t yield better returns if allocated elsewhere—such as, for example, in the fight against cartels or other more obviously nefarious conduct.

In short, if the government cannot answer the question of how much the Indian public stands to gain for every Rupee of public money invested into enforcing the DCA, it should go back to the drawing board and either redesign or drop the DCA altogether.

III. India Is Not Europe

When deciding whether to adopt digital-competition rules, India should consider its own interests and play to its strengths. These need not be the same as Europe’s and, indeed, it would be surprising if they were. Despite the European Commission’s insistence to the contrary, the DMA is not a law that enshrines general or universal economic truths. It is, and always has been,

³⁰ *Strengthening the Digital Markets Act and Its Enforcement*, BUNDESMINISTERIUM FÜR WIRTSCHAFT UND KLIMASCHUTZ (Sep. 7, 2021), available at <https://www.bmwk.de/Redaktion/DE/Downloads/XYZ/zweites-gemeinsames-positionspapier-der-friends-of-an-effective-digital-markets-act.pdf>.

³¹ Meghan McCarty Carino, *A New EU Law Aims to Tame Tech Giants. But Enforcing It Could Turn out to Be Tricky* MARKETPLACE (Mar. 7, 2024), <https://www.marketplace.org/2024/03/07/a-new-eu-law-aims-to-tame-tech-giants-but-enforcing-it-could-turn-out-to-be-tricky>.

³² *Id.*

³³ Luca Bertuzzi & Molly Killeen, *Digital Brief: DSA Fourth Trilogue, DMA Diverging Views, France’s Fine for Google*, EURACTIV (Apr. 1, 2022), <https://www.euractiv.com/section/digital/news/digital-brief-dsa-fourth-trilogue-dma-diverging-views-frances-fine-for-google>.

³⁴ Anu Bradford, *The Brussels Effect: The Rise of a Regulatory Superstate in Europe*, COLUMBIA LAW SCHOOL (Jan. 8, 2013), <https://www.law.columbia.edu/news/archive/brussels-effect-rise-regulatory-superstate-europe>.

an industrial policy tool,³⁵ designed to align with the EU's strengths, weaknesses, and strategic priorities. One cannot just assume that these idiosyncrasies translate into the Indian context.

As International Center for Law & Economics President Geoffrey Manne has written,³⁶ promotion of investment in the infrastructure required to facilitate economic growth and provision of a secure environment for ongoing innovation are both crucial to the success of developing markets like India's. Securing these conditions demands dynamic and flexible competition policymaking.

For young, rapidly growing industries like e-commerce and other digital markets, it is essential to attract consistent investment and industry know-how in order to ensure that such markets are able to innovate and evolve to meet consumer demand. India has already witnessed a few leading platforms help build the necessary infrastructure during the nascent stages of sectoral development; continued investment along these lines will be essential to ensure continued consumer benefits.

In the above context, emulating the EU's DMA approach could be a catastrophic mistake. Indian digital platforms are still not as mature as the EU's, and a copy and paste of the DMA may prove unfit for the particular attributes of India's market. The DCA could potentially capture many Indian companies. Paytm, Zomato, Ola Cabs, Nykaa, AllTheRooms, Squeaky, FlipCarK, MakeMyTrip, and Meesho (among others) are some of the companies that could be stifled by this new regulatory straitjacket.

This would not only harm India's competitiveness, but would also deny consumers important benefits. Despite India's remarkable economic growth over the last decade, it remains underserved by the most powerful consumer and business technologies, relative to its peers in Europe and North America. The priority should be to continue to attract and nurture investment, not to impose regulations that may further slow the deployment of critical infrastructure.

Indeed, this also raises the question of whether the EU's objectives with the DMA are even ones that India would want to emulate. While the DMA's effects are likely to be varied, it is clear that one major impetus for the law is distributional: to ensure that platform users earn a "fair share" of the benefits they generate. Such an approach could backfire, however, as using competition policy to reduce profits may simply lead to less innovation and significantly reduced benefits for the very consumers it is supposed to help. This risk is significantly magnified in India, where the primary need is to ensure the introduction and maintenance of innovative technology, rather than fine tuning the precise distribution of its rewards.

³⁵ Lazar Radic, *Gatekeeping, the DMA, and the Future of Competition Regulation*, TRUTH ON THE MARKET (Nov. 8, 2023), <https://truthonthemarket.com/2023/11/08/gatekeeping-the-dma-and-the-future-of-competition-regulation>.

³⁶ Geoffrey A. Manne, *European Union's Digital Markets Act Not Suitable for Developing Economies, Including India*, THE TIMES OF INDIA (Feb. 14, 2023), <https://timesofindia.indiatimes.com/blogs/voices/european-unions-digital-markets-act-not-suitable-for-developing-economies-including-india>.

A DMA-like approach could imperil the domestic innovation that has been the backbone of initiatives like Digital India³⁷ and Startup India.³⁸ Implementation of a DMA-like regime would discourage growing companies that may not be able to cope with the increased compliance burden. It would also impose enormous regulatory burdens on the government and great uncertainty for businesses, as a DMA-like regime would require the government to define and quantify competitive benchmarks for industries that have not yet even grown out of their nascent stages. At a crucial juncture when India is seen as an investment-friendly nation,³⁹ implementation of a DMA-like regime could create significant roadblocks to investment—all without any obligation on the part of the government to ensure that consumers benefit.

This is because *ex-ante* regimes impose preemptive constraints on digital platforms, with no consideration of possible efficiencies that benefit consumers. While competition enforcement in general may tend to promote innovation, jurisdictions that do not allow for efficiency defenses tend to produce relatively less innovation, as careful, case-by-case competition enforcement is replaced with preemptive prohibitions that impede experimentation.

Regulation of digital markets that have yet to reach full maturity is bound to create a more restrictive environment that will harm economic growth, technological advancement, and investment. For India, it is crucial that a nuanced approach is taken to ensure that digital markets can sustain their momentum, without being bogged down by various and unnecessary compliance requirements that are likely to do more harm than good.

IV. Conclusion

In a multi-polar world, developing countries can no longer be expected to mechanically adopt the laws and regulations demanded of them by senior partners to trade agreements and international organizations. Nor should they blindly defer to foreign legislatures, who may (and likely do) have vastly different interests and priorities than their own.

Nobody is denying that the EU has provided many useful legal and regulatory blueprints in the past, many of which work just as well abroad as they do at home. But based on what we know so far, the DMA is not poised to become one of them. It is overly stringent, ignores efficiencies, is indifferent about effects on consumers, incorporates few procedural safeguards, is lukewarm on cost-benefit analysis, and risks subverting well-established competition-law principles. These notably include that the law should ultimately protect competition, not competitors.

Rather than instinctively playing catch up, India could ask the hard questions that the EU eschewed for the sake of a quick political victory against popular bogeymen. What is this law trying to achieve? What are the DCA's supposed benefits? What are its potential costs? Do

³⁷ *Digital India*, COMMON SERVICES CENTRE (Apr. 18, 2024), <https://csc.gov.in/digitalIndia>.

³⁸ *Startup India*, GOVERNMENT OF INDIA (Apr. 16, 2024), <https://www.startupindia.gov.in>.

³⁹ *Invest India*, GOVERNMENT OF INDIA (Mar. 20, 2024), <https://www.investindia.gov.in/why-india>.

those benefits outweigh those costs? If the answer to these questions is ambivalent or negative, India's digital future may well lay elsewhere.