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EX-ANTE REGULATION VS. INNOVATION DYNAMICS: A CRITICAL ANALYSIS OF SYSTEMICALLY SIGNIFICANT DIGITAL ENTERPRISES (SSDES) UNDER INDIA'S DRAFT DIGITAL COMPETITION BILL

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Abstract

India's competition law has, since the Competition Act 2002 came into force, rested on an ex-post model: the Competition Commission of India (CCI) intervenes only after an anti-competitive agreement under Section 3 or an abuse of dominance under Section 4 has been established through a full, effects-based inquiry. The Draft Digital Competition Bill 2024, released alongside the Report of the Committee on Digital Competition Law, proposed a decisive departure from that model by allowing the CCI to designate large platforms as Systemically Significant Digital Enterprises (SSDEs) and to subject them to a list of behavioural obligations in advance of any proven harm, most notably a prohibition on self-preferencing. The draft was withdrawn in 2025 after intense opposition, but a recalibrated version is now being prepared on the basis of a government-commissioned market study, which makes this a critical moment to evaluate the design choices at stake.

This paper asks whether SSDE designation risks chilling platform innovation, or whether it is a necessary tool to curb self-preferencing that ex-post enforcement has failed to address in time. Drawing on doctrinal analysis of Sections 3 and 4, the CCI's major digital cases, the text of the Draft Bill, the European Union's Digital Markets Act (DMA) and the economic literature on competition and innovation, the paper argues that the dichotomy is a false one. The evidence from India's own enforcement record shows that ex-post tools are too slow for markets that tip, but the evidence from the DMA's early years shows that rigid, uniform obligations impose real costs on product design and launch decisions. The paper concludes that India should adopt a calibrated model: narrow and nationality-neutral designation, a rebuttable presumption against self-preferencing with a structured objective-justification defence, participative compliance, and built-in review and sunset mechanisms, delivered through a specialised digital markets unit within the CCI.

1. Introduction

Few areas of economic law have changed as quickly in the past decade as the regulation of digital platforms. A handful of firms now operate the search engines, app stores, operating systems, marketplaces and messaging services through which most Indians access the internet, and many of those firms also compete with the businesses that depend on their platforms. That dual role, as both referee and player, sits at the heart of the policy debate. When a search engine ranks its own vertical services above those of rivals, or an app store requires developers to use its own billing system while exempting its own apps, the conduct may harm competition long before any traditional legal standard can be satisfied.¹

India's response has unfolded in stages. In December 2022, the Parliamentary Standing Committee on Finance recommended a dedicated digital competition law and the identification of large platforms for advance regulation.² The Ministry of Corporate Affairs (MCA) then constituted the Committee on Digital Competition Law (CDCL) in February 2023, and in March 2024 it published its report together with a Draft Digital Competition Bill 2024 (the 'Draft Bill').³ The Draft Bill proposed that the CCI designate certain firms as SSDEs and impose obligations on them before any anti-competitive effect was proven. Following strong opposition from both global technology firms and leading Indian platforms, the government withdrew the draft in 2025 and committed to first conducting a market study.⁴ Reporting in 2026 indicates, however, that the government remains committed to the core ex-ante framework and is using the study, conducted by the Management Development Institute, Gurgaon, to recalibrate the thresholds for designation, with a revised bill possible as early as the Winter Session of Parliament in December 2026.⁵

This paper addresses the core legal dilemma that the revised bill must resolve. The shift from the ex-post enforcement of Sections 3 and 4 of the Competition Act 2002 to ex-ante behavioural

¹On the referee-and-player problem in platform markets, see Lina M. Khan, 'Amazon's Antitrust Paradox' (2017) 126 Yale Law Journal 710, 780–83; and Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, *Competition Policy for the Digital Era* (European Commission 2019) 7–8.

²Standing Committee on Finance (2022–23), *Fifty-Third Report: Anti-Competitive Practices by Big Tech Companies* (Lok Sabha Secretariat, December 2022). The Standing Committee used the label 'Systemically Important Digital Intermediaries'. The Draft Bill adopted the term 'Systemically Significant Digital Enterprises' (SSDEs), which this paper uses throughout; the terms 'SIDE' and 'gatekeeper' are sometimes used informally to describe the same category of firm.

³Ministry of Corporate Affairs, *Report of the Committee on Digital Competition Law* (27 February 2024, released 12 March 2024), including the Draft Digital Competition Bill 2024 at Annexure.

⁴'Govt to withdraw draft Digital Competition Bill', *Financial Express* (2025); see also Anush Ganesh, Mohit Yadav and Gaurav Pathak, 'The Indian Draft Digital Competition Bill and Report: A Critical Perspective' (2025) *Indian Law Review*, DOI: 10.1080/24730580.2025.2506958.

⁵Computer & Communications Industry Association, *India's Digital Competition Bill* (Policy Brief, August 2026); 'Digital competition regulation to target only Big Tech', *Financial Express* (27 July 2026); 'Digital Competition Bill explained', *Business Standard* (28 July 2026).

obligations is a shift in the burden and timing of legal intervention. Supporters argue that it is the only way to stop practices such as self-preferencing before markets tip irreversibly. Critics argue that it replaces evidence with presumption, punishes firms for size rather than conduct, and deters the very investment in new products that has made digital markets valuable to consumers. The research questions are therefore: first, whether the existing ex-post framework is adequate for digital markets; second, whether designating large firms as SSDEs and subjecting them to uniform obligations is likely to chill innovation; third, whether an ex-ante prohibition on self-preferencing is a necessary and proportionate tool; and fourth, how a revised bill should be designed to capture the benefits of ex-ante regulation while minimising its costs. The methodology is doctrinal and comparative, supplemented by a review of the economic literature. Part 2 sets out the conceptual distinction between ex-post and ex-ante regulation and explains the economic features of digital markets that motivate the shift. Part 3 examines the limits of Sections 3 and 4 through the CCI's major digital cases. Part 4 analyses the architecture of the Draft Bill and its subsequent recalibration. Part 5 uses the EU Digital Markets Act (DMA) as a comparative benchmark, with reference to the United Kingdom and Germany. Part 6 evaluates the innovation critique, and Part 7 analyses self-preferencing as the central test case. Part 8 identifies design flaws in the Draft Bill, and Part 9 sets out recommendations. Part 10 concludes.

2. Conceptual Foundations: Ex-Post Enforcement and Ex-Ante Regulation

2.1 Two Models of Intervention

Ex-post competition enforcement is reactive and case-specific. The authority defines a relevant market, establishes whether the firm holds a dominant position or has entered into a restrictive agreement, and then assesses whether the conduct in question has caused, or is likely to cause, an appreciable adverse effect on competition. The legal standard is flexible, because the same conduct can be harmful in one setting and beneficial in another, and the firm is entitled to show that its conduct is justified. The price of that flexibility is time and uncertainty: investigations require extensive economic evidence and are routinely followed by years of appeals.

Ex-ante regulation reverses that sequence. The legislature or regulator identifies in advance a category of firms and a list of practices that are presumed harmful when engaged in by those firms, and imposes obligations that apply from the moment of designation. The firm does not need to be found dominant in a narrowly defined market, and the authority does not need to prove effects in each case. Ex-ante regulation is familiar in sectors such as telecommunications, electricity and banking, where structural features such as natural monopoly or systemic risk

justify continuous oversight.⁶ The novelty of digital competition laws is that they apply this logic to a set of private platforms that are not natural monopolies in the classical sense, but which are argued to have acquired durable and entrenched positions.

The choice between the two models is fundamentally a choice about error costs. An ex-post regime risks false negatives: harmful conduct that goes unremedied, or is remedied only after the market has tipped. An ex-ante regime risks false positives: beneficial conduct that is prohibited because it falls within a category that is usually, but not always, harmful.⁷ Which risk is greater depends on the features of the markets concerned and on the precision with which the obligations are drafted.

2.2 Economic Features of Digital Markets

Several features of digital platform markets explain why policymakers worldwide have concluded that ex-post enforcement alone is insufficient. The first is network effects. Many platforms are multi-sided, connecting users with advertisers, sellers, developers or drivers, and the value of the platform to each group rises with the size of the other.⁸ Strong network effects can cause a market to ‘tip’ to a single dominant provider, after which competition for the market gives way to an entrenched position that is hard to challenge.

The second feature is economies of scale and scope in data. Data gathered in one service can improve products in another, which allows large ecosystems to enter adjacent markets with advantages that standalone rivals cannot match. The third is the conglomerate structure of the largest firms, which control interlocking services such as operating systems, app stores, browsers, search and advertising, and can use their position in one to benefit another. The fourth is behavioural: default settings and choice architecture strongly shape user behaviour, so that pre-installation and default placement can be worth more than product quality.⁹

These features have two implications for legal design. First, the window in which intervention can preserve competition is short; once a market tips, remedies imposed years later may be unable to restore contestability. Second, the features that create market power, such as

⁶On the traditional rationale for sectoral ex-ante regulation, see Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (2nd edn, Oxford University Press 2012) ch 15.

⁷The error-cost framework derives from Frank H. Easterbrook, ‘The Limits of Antitrust’ (1984) 63 Texas Law Review 1. For its application to digital platforms, see Geoffrey A. Manne and Joshua D. Wright, ‘Innovation and the Limits of Antitrust’ (2010) 6 Journal of Competition Law and Economics 153.

⁸Jean-Charles Rochet and Jean Tirole, ‘Platform Competition in Two-Sided Markets’ (2003) 1 Journal of the European Economic Association 990; David S. Evans and Richard Schmalensee, *Matchmakers: The New Economics of Multisided Platforms* (Harvard Business Review Press 2016).

⁹Jason Furman and others, *Unlocking Digital Competition: Report of the Digital Competition Expert Panel* (HM Treasury, March 2019) 32–40; Stigler Committee on Digital Platforms, *Final Report* (University of Chicago Booth School of Business, 2019) 34–41.

integration across services, are often the same features that generate efficiencies for consumers. This duality is the reason the innovation debate is so difficult to resolve.

2.3 Self-Preferencing Defined

Self-preferencing describes conduct in which a vertically integrated platform treats its own products or services more favourably than those of third parties that rely on the platform. Examples include ranking a platform's own comparison shopping service above those of rivals, giving a marketplace's private-label goods privileged placement, pre-installing first-party apps, or requiring third-party developers to use the platform's payment system while exempting the platform's own apps. The concern is that the platform uses control over an essential gateway to extend its position into a neighbouring market, not because its product is better but because it controls the means of access.¹⁰

Self-preferencing is not, however, inherently harmful. Vertical integration often lowers costs, allows coordinated product design, and improves user experience. A smartphone maker that integrates its own maps application, or a search engine that displays a weather box instead of a list of links, may be offering a product that users prefer. The legal question is therefore not whether self-preferencing occurs, but under what conditions it should be presumed unlawful, and whether the firm should be able to justify it.

3. The Limits of Ex-Post Enforcement under Sections 3 and 4

3.1 Section 3 and Platform Agreements

Section 3 of the Competition Act prohibits agreements that cause or are likely to cause an appreciable adverse effect on competition in India. Horizontal agreements of the kinds listed in Section 3(3) are presumed to have such an effect, while vertical agreements under Section 3(4), including tie-in arrangements, exclusive supply and distribution, refusal to deal and resale price maintenance, are assessed under a rule of reason using the factors in Section 19(3).¹¹

Section 3(4) has been the main vehicle for challenges to platform contracts with business users. In the online travel case, the CCI found that wide price-parity and room-availability parity obligations imposed by MakeMyTrip on hotel partners, together with arrangements with OYO, contravened the Act, and imposed penalties of approximately ₹223.48 crore on MakeMyTrip and Goibibo and ₹168.88 crore on OYO.¹² In the e-commerce context, the CCI ordered an

¹⁰Pablo Ibáñez Colomo, 'Self-Preferencing: Yet Another Epithet in Need of Limiting Principles' (2020) 43 World Competition 417.

¹¹Competition Act 2002, ss 3(1), 3(3), 3(4) and 19(3).

¹²*Federation of Hotel & Restaurant Associations of India v MakeMyTrip India Pvt Ltd*, CCI Case Nos 14 of 2019

investigation into Amazon and Flipkart on allegations of exclusive smartphone launches, deep discounting and preferential treatment of select sellers.¹³ The investigation was then stayed for more than a year while the platforms challenged it before the Karnataka High Court, which ultimately upheld the order; the Supreme Court declined to interfere in August 2021.¹⁴

These cases illustrate a structural limit of Section 3. It is designed for agreements, and much platform conduct is unilateral: the design of a ranking algorithm, a default setting, or a technical restriction is not an agreement in any meaningful sense. Even where a contractual term is involved, the rule-of-reason analysis under Section 19(3) requires evidence of actual or likely effects, which is slow to gather in markets where business users fear retaliation and are reluctant to give evidence against the platform on which they depend.

3.2 Section 4 and Abuse of Dominance

Section 4 prohibits the abuse of a dominant position, including the imposition of unfair or discriminatory conditions or prices, limiting technical or scientific development, denial of market access, imposing supplementary obligations unconnected with the subject of a contract, and using dominance in one market to enter or protect another.¹⁵ Dominance is assessed by reference to the factors in Section 19(4), including market share, size and resources, economic power, vertical integration, dependence of consumers and entry barriers, within a relevant market defined under Section 19(5) to (7).

Section 4 has been the principal tool in India's major Big Tech cases, and its record is mixed. In *Matrimony.com v Google*, the CCI found that Google had abused its dominance in online general web search, including by placing its commercial flight search unit in a prominent position in search results, and imposed a penalty of ₹135.86 crore.¹⁶ The information had been filed in 2012; the final order came six years later, by which time the search interface and the relevant markets had changed considerably.

In the Android case, the CCI found in October 2022 that Google had abused its dominance in the licensable smartphone operating system and app store markets through mandatory pre-installation of the Google Mobile Services suite, anti-fragmentation obligations, and revenue-

and 01 of 2020 (Order of 19 October 2022).

¹³*Delhi Vyapar Mahasangh v Flipkart Internet Pvt Ltd*, CCI Case No 40 of 2019 (Order under s 26(1) of 13 January 2020).

¹⁴*Amazon Seller Services Pvt Ltd v Competition Commission of India*, Karnataka High Court (Division Bench), judgment of 23 July 2021; special leave petitions dismissed by the Supreme Court (9 August 2021).

¹⁵Competition Act 2002, s 4(2)(a)–(e).

¹⁶*Matrimony.com Ltd v Google LLC*, CCI Case Nos 07 and 30 of 2012 (Order of 8 February 2018).

sharing arrangements tied to search exclusivity, and imposed a penalty of ₹1,337.76 crore.¹⁷ The National Company Law Appellate Tribunal (NCLAT) upheld the penalty in March 2023 but set aside four of the ten remedial directions, and the matter is pending before the Supreme Court.¹⁸ In a parallel case, the CCI found that Google's requirement that developers use the Google Play Billing System for paid apps and in-app purchases, while its own apps such as YouTube were not subject to the same requirement, was discriminatory, and imposed a penalty of ₹936.44 crore.¹⁹ In March 2025, the NCLAT upheld the core finding of abuse under Section 4(2)(a)(i) but reduced the penalty to ₹216.69 crore, holding that it should have been calculated on Play Store-related revenue, and set aside some of the CCI's behavioural directions; appeals by Google, the CCI and an industry body are pending before the Supreme Court.²⁰

The WhatsApp privacy policy case shows a different limit, namely the boundary between competition law and other regulatory fields. In November 2024 the CCI found that WhatsApp's 2021 policy update, which made data sharing with other Meta companies a condition of continued use, was an abuse of dominance; it imposed a penalty of ₹213.14 crore and directed that WhatsApp not share user data with Meta companies for advertising purposes for five years.²¹ In November 2025, the NCLAT upheld the penalty and the finding that the policy was coercive, but set aside the five-year ban and the finding that Meta had leveraged its position in messaging to protect its position in display advertising, with reports noting the Tribunal's view that matters of data protection lay outside the CCI's remit.²²

3.3 Diagnosing the Problem: Time, Remedies and Evidence

Three lessons emerge from these cases. The first concerns time. Each of the major cases took between four and six years from information to final order, followed by further years of appeal. In fast-moving markets, the conduct that prompted the case may have achieved its competitive effect, or been superseded, before a remedy is imposed. The second concerns remedies. Even where the CCI's findings on abuse survive appeal, behavioural directions are frequently

¹⁷Umar Javeed v Google LLC, CCI Case No 39 of 2018 (Order of 20 October 2022).

¹⁸Google LLC v Competition Commission of India, NCLAT, Competition Appeal (AT) No 01 of 2023 (29 March 2023).

¹⁹In Re: XYZ v Alphabet Inc, CCI Case Nos 07 of 2020, 14 of 2021 and 35 of 2021 (Order of 25 October 2022).

²⁰NCLAT, Judgment of 28 March 2025 in Google's appeal against the Play Store billing order; see 'NCLAT upholds CCI ruling against Google in Play Store case, reduces penalty to Rs 216 cr', PTI (28 March 2025); 'SC to hear Google, CCI, ADIF appeals against NCLAT ruling in Play Store antitrust case', exchange4media (9 August 2025).

²¹In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users, CCI Suo Motu Case No 01 of 2021 (Order of 18 November 2024).

²²NCLAT, Judgment of 4 November 2025 in Meta Platforms Inc v Competition Commission of India; see 'NCLAT quashes CCI's WhatsApp-Meta data ban, upholds ₹213 crore penalty', Business Standard (4 November 2025).

diluted, and remedies designed for one point in time struggle to keep pace with constantly evolving products. The third concerns evidence. Proving dominance requires defining a relevant market, which is notoriously difficult for multi-sided, zero-price services, and proving abuse requires a theory of harm that can withstand appellate scrutiny.

The Competition (Amendment) Act 2023 addressed some of these problems. It introduced a settlement and commitment mechanism to resolve abuse cases more quickly, a deal-value threshold for merger control to capture acquisitions of high-value start-ups with little turnover, and the power to calculate penalties on global turnover.²³ These reforms improve the ex-post toolkit, but they do not change its basic character: intervention still depends on a finding of dominance and an effects-based assessment, conducted case by case. It was this residual gap, rather than any absence of legal power, that the CDCL identified as the justification for a new law.²⁴

4. The Draft Digital Competition Bill 2024: Architecture and Trajectory

4.1 Scope: Core Digital Services

The Draft Bill applied only to a list of ‘Core Digital Services’ in its First Schedule: online search engines, online social networking services, video-sharing platform services, interpersonal communications services, operating systems, web browsers, cloud services, advertising services and online intermediation services.²⁵ The list closely tracks the ‘core platform services’ of the DMA. Its breadth is significant: ‘online intermediation services’ covers marketplaces, food delivery, ride-hailing, travel and many other business models, which is why domestic platforms viewed the Draft Bill as directed at them as much as at foreign firms.

4.2 Designation of SSDEs

An enterprise providing a Core Digital Service could be designated an SSDE in two ways. Under the quantitative route, it would qualify if it met a ‘significant financial strength’ test and a ‘significant spread’ test. The financial test was satisfied by any one of the following in any of the preceding three financial years: turnover in India of at least ₹4,000 crore; global turnover of at least USD 30 billion; gross merchandise value in India of at least ₹16,000 crore; or global market capitalisation of at least USD 75 billion. The spread test required at least one crore end

²³Competition (Amendment) Act 2023 (Act 9 of 2023), inserting inter alia ss 48A and 48B and amending ss 5 and 27 of the Competition Act 2002.

²⁴*Report of the Committee on Digital Competition Law* (n 3).

²⁵Draft Digital Competition Bill 2024, First Schedule.

users or ten thousand business users in India.²⁶ Firms meeting the thresholds would be required to notify the CCI, and could argue that they should not be designated despite meeting them. Under the qualitative route, the CCI could designate an enterprise that did not meet the thresholds, on the basis of factors including the volume of commerce, size and resources, number of users, network effects, data advantages, vertical integration, and entry barriers.²⁷ The Draft Bill also allowed the CCI to designate group entities involved in providing the service as ‘Associate Digital Enterprises’, which would be subject to the same obligations.²⁸ The thresholds were criticised from two directions. Some argued that they were too low and would capture growing Indian firms; others argued that the global market capitalisation route meant a foreign firm could be designated on the basis of its worldwide value even if its Indian operations were modest. The qualitative route attracted particular concern, because it gave the CCI a broad discretion that could bring almost any significant platform within scope.

4.3 Obligations

Once designated, an SSDE would be required to operate in a fair, non-discriminatory and transparent manner, and would be subject to specific obligations set out in the Draft Bill and elaborated through CCI regulations that could vary by type of service. The principal obligations addressed self-preferencing; the use of non-public data generated by business users on the platform; restrictions on the use of third-party applications and on changing defaults; anti-steering, meaning restrictions on business users communicating with or directing end users to offers outside the platform; and tying and bundling of products that are not strictly necessary for the core service.²⁹ The prohibition on self-preferencing directly targeted practices of the kind addressed in *Matrimony.com* and the Play Store billing case: favouring the SSDE’s own products, or those of related parties, over third parties offering similar services.

The Draft Bill also contained an important structural choice, borrowed partly from the United Kingdom: the CCI was given power to specify conduct requirements through regulations tailored to each Core Digital Service, rather than imposing an identical list on every firm.³⁰ In principle, this offered flexibility. In practice, critics noted that the core prohibitions were set in the statute itself, and that there was no general defence of objective justification or efficiency comparable to that available under Section 4.

²⁶Draft Digital Competition Bill 2024, cl 3(2); *Report of the Committee on Digital Competition Law* (n 3).

²⁷Draft Digital Competition Bill 2024, cl 3(3).

²⁸*ibid* cl 4.

²⁹Draft Digital Competition Bill 2024, ch III; *Report of the Committee on Digital Competition Law* (n 3).

³⁰Ganesh, Yadav and Pathak (n 4).

4.4 Enforcement and Penalties

The Draft Bill entrusted enforcement to the CCI, gave it powers of inquiry similar to those under the Competition Act, and provided for penalties of up to ten per cent of global turnover for contravention of obligations, with lower penalties for failure to notify or for providing incorrect information.³¹ Appeals were to lie to the NCLAT. The Draft Bill was intended to sit alongside the Competition Act rather than replace it, so that conduct falling outside the obligations could still be challenged under Sections 3 and 4.

4.5 Withdrawal and Recalibration

The response to the Draft Bill was notable for the alignment of interests it produced. Global technology firms and their industry associations argued that the obligations would raise costs, compromise security and deter investment. Several leading Indian platforms, including food-delivery and hospitality companies, also opposed it, arguing that ex-ante obligations would burden growing domestic firms and curb innovation.³² At the same time, groups representing start-ups and app developers that depend on large platforms supported stronger rules.

Following this opposition, the government withdrew the draft in 2025 and commissioned a market study. Reporting in 2026 suggests that the study, which began in mid-2026 and is expected to conclude around October 2026, has focused on recalibrating the designation thresholds rather than revisiting the case for ex-ante regulation as such. Industry questionnaires reportedly test substantially higher thresholds for Indian turnover, gross merchandise value and user numbers, while retaining the global turnover and market capitalisation filters.³³ If adopted, these changes would narrow the designated group to the very largest firms, which are predominantly foreign. This raises a separate issue, considered in Part 8, about whether thresholds calibrated with an eye to nationality are consistent with the principle of competitive neutrality and with India's trade commitments.

5. The EU Digital Markets Act as a Comparative Benchmark

5.1 Design of the DMA

The DMA, adopted in 2022 and applicable from May 2023, is the most developed ex-ante regime and the clearest model for the Indian Draft Bill.³⁴ It applies to 'gatekeepers' that provide

³¹Draft Digital Competition Bill 2024, provisions on penalties and appeals.

³²'Digital competition law: Large internet firms not in favour of ex-ante regulations', *Economic Times* (March 2024); CCIA, *India's Digital Competition Bill* (n 5) 2.

³³CCIA, *India's Digital Competition Bill* (n 5) 2–3; 'Digital competition regulation to target only Big Tech' (n 5).

³⁴Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable

one or more core platform services. Under Article 3, an undertaking is presumed to be a gatekeeper if it has annual turnover in the European Economic Area of at least €7.5 billion in each of the last three financial years or an average market capitalisation of at least €75 billion, provides a core platform service in at least three Member States, and has at least 45 million monthly active end users and 10,000 yearly active business users in the EU. The undertaking may rebut the presumption only with arguments that call into question the quantitative criteria, and the Commission may also designate firms below the thresholds after a market investigation.³⁵

The obligations are set out in Articles 5, 6 and 7. Article 5 contains obligations that apply directly, such as the prohibition on combining personal data across services without consent and the prohibition on preventing business users from offering different terms through other channels. Article 6 contains obligations ‘susceptible of being further specified’, including the prohibition in Article 6(5) on treating the gatekeeper’s own products and services more favourably in ranking, indexing and crawling than similar third-party products, and obligations relating to uninstallation, defaults, interoperability, data portability and access to app stores.³⁶ Article 8 allows the Commission to specify measures for compliance through regulatory dialogue. Fines can reach ten per cent of global turnover, and twenty per cent for repeated infringements, and systematic non-compliance can lead to behavioural or structural remedies.³⁷ The DMA does not provide a general efficiency defence. Its only exceptions are suspension in exceptional circumstances where compliance would endanger the economic viability of the gatekeeper’s operations in the EU, and exemption on grounds of public health or public security.³⁸ Integrity and security justifications are recognised only within particular obligations, such as those concerning sideloading and interoperability, and must be strictly necessary and proportionate.

5.2 The Enforcement Experience

The Commission designated six gatekeepers in September 2023, later adding Booking, and the obligations became binding in March 2024. In April 2025 it adopted its first non-compliance decisions, fining Apple €500 million for anti-steering restrictions in the App Store and Meta €200 million for its ‘consent or pay’ advertising model; both firms have challenged the

and fair markets in the digital sector (Digital Markets Act) [2022] OJ L265/1.

³⁵DMA, arts 3(1), 3(2), 3(5) and 3(8), and art 17.

³⁶DMA, arts 5, 6(2)–6(12) and 7.

³⁷DMA, arts 8, 18 and 30.

³⁸DMA, arts 9 and 10.

decisions in court.³⁹ The Commission's annual report published in May 2026 described the period as one in which enforcement moved from institutional set-up to tangible outcomes, while also recording the first removal of a core platform service from a designation decision.⁴⁰ At the same time, the European Parliament has criticised the fines as too modest to deter, illustrating that even a mature ex-ante regime remains politically contested.⁴¹

The DMA's experience also offers evidence relevant to the innovation debate. Several firms have delayed or withheld product launches in the EU, citing regulatory uncertainty. In June 2024, Apple announced that certain features, including Apple Intelligence, iPhone Mirroring and SharePlay Screen Sharing, would not launch in the EU on schedule because of concerns that interoperability requirements could compromise privacy and security; Apple Intelligence was launched in the EU some months later.⁴² Such decisions are difficult to interpret: they may reflect genuine compliance difficulties, or strategic signalling designed to influence enforcement. Either way, they show that ex-ante rules can affect the timing and availability of new products in the regulated jurisdiction, a consideration that matters for a fast-growing market such as India.

5.3 Alternative Models: The United Kingdom and Germany

The DMA is not the only model. Germany's Section 19a of the Act against Restraints of Competition, introduced in 2021, allows the Bundeskartellamt to designate firms of 'paramount significance for competition across markets' and then to prohibit specific practices, including self-preferencing, through individual decisions; crucially, the firm may show that its conduct is objectively justified.⁴³ The United Kingdom's Digital Markets, Competition and Consumers Act 2024 empowers the Competition and Markets Authority to designate firms with 'strategic market status' in respect of specific digital activities, after an investigation, and to impose bespoke conduct requirements and pro-competition interventions; it includes a countervailing benefits exemption.⁴⁴ The CMA made its first designations in October 2025, covering Google's

³⁹European Commission, 'Commission finds Apple and Meta in breach of the Digital Markets Act' (Press Release, 23 April 2025); Noerr, 'EU digital competition law: first fines imposed on Gatekeepers' (28 January 2026).

⁴⁰European Commission, *Annual Report on the Digital Markets Act* (21 May 2026), as summarised in 'The EU Commission publishes its annual report on the implementation and enforcement of the Digital Markets Act', *Concurrences* (May 2026).

⁴¹'Brussels split over Big Tech crackdown as Parliament demands tougher enforcement', *EU Perspectives* (May 2026).

⁴²Apple, statement reported in 'Apple says it won't roll out AI features in Europe due to EU regulation', *Reuters* (21 June 2024).

⁴³Gesetz gegen Wettbewerbsbeschränkungen, § 19a (as amended by the GWB Digitalisation Act, in force 19 January 2021).

⁴⁴Digital Markets, Competition and Consumers Act 2024 (UK), pts 1 and 2, especially ss 2, 19–21 and 29.

general search and the mobile platforms of Apple and Google.

These models represent a middle path. They retain the speed advantages of designation and the ability to impose obligations without proving harm in each case, but they tailor obligations to the firm and activity concerned and allow a structured justification. The Indian Draft Bill borrowed the UK's idea of service-specific regulations but kept the DMA's statutory list of obligations and its lack of a general justification defence, a hybrid that arguably captures the rigidity of the DMA without the safeguards of the UK model.

6. The Innovation Critique: Does SSDE Designation Chill Innovation?

6.1 The Theoretical Debate

The relationship between market structure and innovation has been debated since Joseph Schumpeter argued that large firms with market power are the main engines of innovation, because they can fund research and appropriate its returns.⁴⁵ Kenneth Arrow countered that a monopolist has weaker incentives to innovate than a competitive firm, because it already earns profits from the existing technology and gains less from replacing it.⁴⁶ Modern empirical work suggests an inverted-U relationship: innovation tends to rise with competition from low levels, but may fall where competition is so intense that it erodes the returns to innovation.⁴⁷ Carl Shapiro's synthesis emphasises contestability (the prospect of gaining or losing future sales), appropriability, and the synergies from combining complementary assets as the principles that determine innovation incentives.⁴⁸

Applied to digital platforms, this literature suggests that the innovation question has two sides. Ex-ante obligations may reduce the designated firm's incentive to innovate by limiting its ability to appropriate returns from integrated products and by requiring it to share data or interoperate with rivals. But the same obligations may increase the incentives of everyone else, including complementors and potential entrants, by improving their prospects of reaching users. The net effect depends on which group's innovation is more valuable and more responsive to the change.

⁴⁵Joseph A. Schumpeter, *Capitalism, Socialism and Democracy* (Harper & Brothers 1942) ch VII.

⁴⁶Kenneth J. Arrow, 'Economic Welfare and the Allocation of Resources for Invention' in *The Rate and Direction of Inventive Activity* (Princeton University Press 1962) 609.

⁴⁷Philippe Aghion, Nick Bloom, Richard Blundell, Rachel Griffith and Peter Howitt, 'Competition and Innovation: An Inverted-U Relationship' (2005) 120 *Quarterly Journal of Economics* 701.

⁴⁸Carl Shapiro, 'Competition and Innovation: Did Arrow Hit the Bull's Eye?' in Josh Lerner and Scott Stern (eds), *The Rate and Direction of Inventive Activity Revisited* (University of Chicago Press 2012) 361.

6.2 Effects on Designated Firms

Critics of the Draft Bill identify several channels through which designation might chill innovation by SSDEs. The first is the cost of compliance, including technical redesign, legal review of every new feature, and reporting obligations. The second is uncertainty: broadly drafted prohibitions on self-preferencing and tying can make it unclear whether integrating a new feature into an existing service, such as adding a generative AI assistant to a search engine or an operating system, is permitted. The third is reduced appropriability: data-sharing and interoperability obligations can require firms to give rivals access to assets that they have invested heavily to create.⁴⁹

There is substance to these concerns, but they should not be overstated. The largest platforms have strong incentives to continue innovating because they face competition from one another across adjacent markets, and the Indian market is too large and too fast-growing for them to forgo. Moreover, much of the conduct targeted by ex-ante rules, such as anti-steering clauses or discriminatory billing requirements, is not itself innovative; it is a means of protecting the returns from existing positions. The real risk lies at the margin, in genuinely novel integrated products whose legality is uncertain. That risk is a function of drafting rather than of designation as such, and can be reduced by clear rules, guidance and a justification mechanism.

6.3 Effects on Complementors and Entrants

The other side of the ledger is innovation by firms that depend on platforms. Empirical studies of platform entry into complementor markets provide evidence on this question. A study of Amazon's entry into product categories previously served by third-party sellers found that Amazon was more likely to target successful product spaces and that affected sellers subsequently reduced their growth efforts on the platform.⁵⁰ Research on the mobile app market similarly found that the threat of platform-owner entry led affected developers to shift innovation effort away from threatened categories.⁵¹ Related work on 'kill zones' suggests that the prospect of acquisition or imitation by an incumbent can reduce venture capital investment in start-ups operating in adjacent spaces.⁵²

⁴⁹CCIA, *India's Digital Competition Bill* (n 5) 4; Information Technology and Innovation Foundation, comments on the Draft Digital Competition Bill (May 2024).

⁵⁰Feng Zhu and Qihong Liu, 'Competing with Complementors: An Empirical Look at Amazon.com' (2018) 39 *Strategic Management Journal* 2618.

⁵¹Wen Wen and Feng Zhu, 'Threat of Platform-Owner Entry and Complementor Responses: Evidence from the Mobile App Market' (2019) 40 *Strategic Management Journal* 1336.

⁵²Sai Krishna Kamepalli, Raghuram Rajan and Luigi Zingales, 'Kill Zone' (NBER Working Paper No 27146, 2020); see also Colleen Cunningham, Florian Ederer and Song Ma, 'Killer Acquisitions' (2021) 129 *Journal of Political Economy* 649.

This evidence suggests that self-preferencing and related conduct can chill innovation as much as regulation can. If developers and sellers expect that a platform will favour its own competing product whenever a category becomes profitable, they will invest less in that category. A well-designed ex-ante rule can protect innovation incentives at the edges of the ecosystem, where much of the novel experimentation in India's start-up economy takes place. The innovation debate is therefore not a choice between innovation and regulation, but a choice about whose innovation the law should prioritise and how to protect it at the least cost.

6.4 The Indian Context

Three features of the Indian context bear on this analysis. First, India has one of the world's largest and fastest-growing start-up ecosystems, and many Indian firms build on platforms controlled by global firms, particularly mobile operating systems and app stores. The Play Store billing dispute, in which developers including matrimonial and audio platforms contested Google's billing requirements and saw their apps briefly delisted in 2024, illustrates the dependence of Indian businesses on gateways they do not control.⁵³

Second, India has pursued an alternative path to contestability through digital public infrastructure, such as the Unified Payments Interface and the Open Network for Digital Commerce, which create open, interoperable layers on which private firms compete. This suggests that ex-ante regulation is not the only available tool, and that its design should complement rather than duplicate these initiatives.

Third, the Indian digital economy includes large domestic platforms that are dominant in particular verticals, such as food delivery, quick commerce and travel. Their opposition to the Draft Bill shows that the relevant divide is between incumbents and challengers, not between foreign and domestic firms. Any calibration of thresholds that shields domestic incumbents would therefore leave unaddressed precisely the kind of conduct, such as platform favouritism towards affiliated sellers or restaurants, that has generated complaints from Indian small businesses.

7. Self-Preferencing: A Necessary Tool or an Over-Inclusive Prohibition?

7.1 The Case for an Ex-Ante Rule

The case for an ex-ante prohibition on self-preferencing rests on the experience of ex-post enforcement. In the European *Google Shopping* case, the Commission found in 2017 that

⁵³NCLAT cuts CCI's penalty on Google in Play Store case to INR 216 cr', *Inc42* (March 2025), describing the delisting of apps of Indian publishers in 2024 and the CCI's subsequent inquiry.

Google had abused its dominance by favouring its own comparison shopping service in general search results; the General Court upheld the decision in 2021 and the Court of Justice confirmed it in September 2024, more than fourteen years after the investigation began.⁵⁴ By then, many of the comparison shopping services that had complained had exited the market. In India, the *Matrimony.com* order took six years and addressed a search interface that had already changed. The Play Store billing case shows that discriminatory treatment, in that case exempting the platform's own apps from a requirement imposed on rivals, can persist for years while litigation continues.

An ex-ante rule offers three advantages. It provides speed, because the obligation applies from designation. It provides clarity, because firms know in advance what is prohibited. And it shifts the burden of complex evidence, because the authority need not prove dominance in a narrow market and an effect in each case. For practices that are frequently harmful when engaged in by gatekeepers, and rarely essential to efficiency, these advantages are significant.

7.2 The Case Against a Rigid Prohibition

The difficulty is that self-preferencing is not a single practice but a family of practices with very different effects. Integrating a first-party map into search results, displaying a platform's own product as one of several options, offering a private-label product at a lower price, and technically degrading a rival's access to an operating system are all forms of self-preferencing, yet they range from clearly beneficial to clearly harmful. Scholars have warned that the term risks becoming an epithet that substitutes for analysis, and that a general duty of equal treatment could require platforms to abandon integrated products that consumers value.⁵⁵

The European Commission's approach to Amazon illustrates the possibility of a more targeted response. In 2022 it accepted commitments under which Amazon agreed not to use non-public data of independent sellers for its retail business and to treat all sellers equally when determining eligibility for the 'Buy Box' and its Prime programme.⁵⁶ These commitments addressed specific mechanisms of harm rather than prohibiting self-preferencing in the abstract, and they preserved Amazon's ability to sell its own products. The Indian Draft Bill's formulation, which prohibited favouring the SSDE's own products over those of third parties

⁵⁴Case AT.39740 *Google Search (Shopping)*, Commission Decision of 27 June 2017; Case T-612/17 *Google and Alphabet v Commission* EU:T:2021:763; Case C-48/22 P *Google and Alphabet v Commission* EU:C:2024:726.

⁵⁵Ibáñez Colomo (n 10); Nicolas Petit, *Big Tech and the Digital Economy: The Moligopoly Scenario* (Oxford University Press 2020) 230–35.

⁵⁶Cases AT.40462 *Amazon Marketplace* and AT.40703 *Amazon Buy Box*, Commission Decision of 20 December 2022 accepting commitments.

without a general justification, risks being broader than necessary.

7.3 Towards a Structured Standard

A better approach is to treat self-preferencing as subject to a rebuttable presumption. Under such a standard, a designated firm that treats its own products more favourably than those of third parties in ranking, access, data, interoperability or terms of dealing would be presumed to contravene the obligation. The firm could rebut the presumption by demonstrating, with evidence, that the differential treatment is necessary to achieve a legitimate objective such as security, privacy or a demonstrable improvement in quality, that the benefits are passed on to users, and that no less restrictive alternative is available. The burden of proof would lie with the firm, preserving much of the speed and clarity of an ex-ante rule, while allowing genuinely beneficial integration to proceed.

This approach reconciles the two sides of the innovation debate. It protects complementors from the most harmful forms of self-preferencing, such as the discriminatory billing practices at issue in the Play Store case, while giving designated firms a defined route to launch integrated innovations. It also aligns the Indian regime more closely with the German and UK models, which have been described as more proportionate than the DMA, and with the consumer-welfare orientation of India's existing competition law.

8. Critical Assessment of the Draft Bill's Design

8.1 The Absence of an Efficiency Defence

The most significant weakness of the Draft Bill is the absence of a general objective-justification or efficiency defence. Sections 3 and 4 of the Competition Act are effects-based and, in the case of Section 19(3), expressly recognise benefits to consumers and improvements in production and distribution. A regime that imposes obligations on designated firms without any such defence departs from that tradition and increases the risk of false positives. A structured defence with a reversed burden of proof, as proposed above, would correct this without undermining the regime's effectiveness.

8.2 Thresholds, Discretion and Competitive Neutrality

The designation criteria raise two problems. The first is the qualitative route, which gives the CCI wide discretion to designate firms below the thresholds on the basis of open-ended factors. Some flexibility is necessary to prevent firms from avoiding designation by structuring their businesses, but the Draft Bill provided limited guidance on how the factors were to be weighed.

The second problem, emerging from the recalibration, is the risk that thresholds will be set with the aim of capturing foreign firms while excluding domestic ones. Such an approach would be vulnerable to challenge under Article 14 of the Constitution if the classification lacks an intelligible differentia rationally connected to the object of the law, and could raise questions under India's national treatment commitments in services trade.⁵⁷ More fundamentally, it would undermine the regime's legitimacy: competition law protects the competitive process, not competitors of a particular nationality. Thresholds should be set by reference to evidence of entrenched gatekeeper power in the Indian market, applied neutrally.

8.3 Institutional Capacity

Ex-ante regulation is resource-intensive. It requires continuous monitoring, technical expertise in software and data engineering, and ongoing dialogue with designated firms. The European Commission has deployed a dedicated, multidisciplinary team for DMA enforcement, and still faces criticism over the pace of its work. The CCI already handles a substantial caseload under the Competition Act, including the expanded merger regime introduced by the 2023 amendments. Without a dedicated digital markets unit with technical staff, statutory timelines and adequate funding, the regime risks either under-enforcement or enforcement that is ill-informed.⁵⁸

8.4 Regulatory Overlap

The WhatsApp case demonstrates the risk of overlap between competition law and data protection. The Digital Personal Data Protection Act 2023 establishes a separate regulator and consent framework, and the NCLAT's judgment indicates that remedies grounded in data protection concerns may be beyond the CCI's competence.⁵⁹ The Draft Bill's obligations on data use and combination overlap with the DPDP Act, and its obligations on platforms overlap with intermediary rules under the Information Technology Act 2000 and with sectoral regimes in payments and telecommunications. A revised bill should include formal coordination mechanisms, such as mandatory consultation and memoranda of understanding between the CCI, the Data Protection Board and sectoral regulators, to prevent inconsistent obligations.

⁵⁷Constitution of India, art 14; General Agreement on Trade in Services, art XVII; see CCIA, *India's Digital Competition Bill* (n 5) 3.

⁵⁸The Standing Committee on Finance (n 2) recommended a specialised digital markets unit within the CCI to build technical capacity for digital enforcement.

⁵⁹Digital Personal Data Protection Act 2023 (Act 22 of 2023); NCLAT judgment in the WhatsApp case (n 22).

8.5 Judicial Review and Due Process

The NCLAT's record of upholding findings of abuse while diluting remedies and penalties suggests that appellate scrutiny will play a decisive role in any ex-ante regime. If designation decisions and regulations made under the new law are challenged as routinely as abuse findings have been, the speed advantage of ex-ante regulation will be lost. The revised bill should therefore specify clear standards of review, require reasoned designation decisions after consultation, and provide for expedited appeals with statutory time limits. Procedural fairness at the front end, including access to the evidence and an opportunity to respond, will reduce the scope for challenges at the back end.

8.6 The Reach of Associate Digital Enterprise Provisions

The power to designate group entities as Associate Digital Enterprises is intended to prevent firms from evading obligations through corporate structuring. But as drafted it could extend obligations to group companies that are not themselves involved in the conduct of concern, including entities in unrelated lines of business. The provision should be confined to entities that are directly involved in providing, or that benefit from, the Core Digital Service in respect of which the SSDE is designated.

9. Recommendations: Towards a Calibrated Ex-Ante Model

The analysis above suggests that India should neither abandon ex-ante regulation nor adopt the DMA wholesale. The following design principles are recommended for the revised bill.

First, scope should be narrow and evidence-based. The list of Core Digital Services should be confined to services in which the market study finds evidence of entrenched gatekeeper power and dependence of business users, such as mobile operating systems, app stores, general search and possibly large online marketplaces, rather than the full DMA list. Additional services could be added by notification after a market investigation.

Second, designation should be nationality-neutral and transparent. Thresholds should be set by reference to the scale of operations in India, combining turnover or gross merchandise value with user numbers, and should apply equally to domestic and foreign firms. The qualitative route should be retained but structured, requiring a market investigation, a reasoned decision and consultation with the firm before designation.

Third, obligations should combine a short statutory core with tailored conduct requirements. The statute should set out a limited number of core prohibitions addressing practices consistently shown to be harmful, such as discriminatory access conditions, anti-steering and

the use of non-public business-user data in competition with those users. Further obligations should be specified through regulations tailored to each Core Digital Service, following public consultation.

Fourth, self-preferencing should be governed by a rebuttable presumption with a structured objective-justification defence. The burden should lie on the designated firm to show necessity, user benefit and the absence of a less restrictive alternative, and the CCI should be required to decide on a justification within a fixed period.

Fifth, compliance should be participative. Designated firms should be required to submit compliance reports and engage in a regulatory dialogue with the CCI, along the lines of Article 8 of the DMA. A notification procedure for significant new integrated features, under which the CCI could raise concerns within a short window, would give firms legal certainty and reduce the risk that uncertainty deters launches in India.

Sixth, the regime should include review and sunset mechanisms. Designations should be reviewed periodically and lifted where conditions no longer apply, and the law as a whole should be subject to a statutory review after five years, assessing its effects on competition, innovation and investment on the basis of published evidence.

Seventh, institutional capacity and coordination should be secured. The CCI should establish a dedicated digital markets unit with technical expertise, and the statute should require coordination with the Data Protection Board, the Reserve Bank of India, the Telecom Regulatory Authority of India and the Ministry of Electronics and Information Technology where obligations overlap.

Eighth, the ex-post toolkit should be retained and strengthened in parallel. Sections 3 and 4, together with the settlement and commitment procedures introduced in 2023, will remain essential for firms and conduct outside the scope of the new law, and the CCI's greater use of interim measures under Section 33 in digital cases could reduce the time problem identified in Part 3 even without new legislation.

10. Conclusion

The debate over India's Digital Competition Bill is often framed as a choice between regulation and innovation. This paper has argued that the framing is misleading. India's own enforcement record under Sections 3 and 4 shows that ex-post tools are too slow to address conduct such as self-preferencing in markets that tip, and empirical evidence on platform entry shows that such conduct can itself chill innovation by the developers, sellers and start-ups that depend on large platforms. At the same time, the early experience of the DMA shows that broad, uniform

obligations without a justification mechanism can affect product design and launch decisions, and the withdrawal of the 2024 draft shows that a regime perceived as over-inclusive will struggle to command political support.

The way forward lies in calibration. A revised bill that designates a small number of genuine gatekeepers on a nationality-neutral basis, imposes a limited core of clear obligations supplemented by tailored requirements, treats self-preferencing through a rebuttable presumption with a structured defence, and builds in dialogue, review and coordination would capture the main benefits of ex-ante regulation while limiting its costs. Such a regime would not chill innovation; it would redirect the law's protection towards the competitive process through which innovation occurs. As the market study concludes and the government prepares a revised bill, the central challenge for Indian policymakers is to resist both the temptation to copy the DMA and the temptation to tailor the law to particular firms, and instead to design a regime grounded in evidence about Indian digital markets.

