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Rules Before Wrongs: The Turn to Ex-Ante Regulation of Digital Markets in the European Union, the United States, and India

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ABSTRACT

Competition law has always worked after the event. It waits for conduct, then judges it. That habit is now under strain, because digital markets tend to settle on a single winner long before a case can be brought and decided, and a judgment that comes years too late restores little. In response, several jurisdictions have begun to write rules in advance for the largest platforms, prohibiting a defined list of practices without any prior proof of dominance or abuse. This article compares three answers to the same pressure. The European Union has committed to the new model through the Digital Markets Act, whose obligations bind six designated gatekeepers and whose first fines fell in 2025. The United States has kept faith with the older method, litigating hard against Google and Amazon while its legislature debated and then shelved an ex-ante statute. India has occupied the middle ground: it strengthened its existing law in 2023, drafted a Digital Competition Bill closely modelled on the European instrument, and then, on a parliamentary committee's advice, set the draft aside for reconsideration. The article argues that the sounder course is not to choose between the two methods but to pair them, adding narrow forward-looking duties on top of, rather than in place of, ordinary competition law, and it reads the Indian experience against that yardstick.

Keywords: Digital Markets Act, ex-ante regulation, gatekeepers, Digital Competition Bill 2024, Competition Act 2002, digital platforms

I. INTRODUCTION

For well over a century the method of competition law has been retrospective. An enforcer or a rival points to conduct already committed, gathers proof, fixes the relevant market, establishes power within it, and asks a tribunal to condemn what has happened. The method assumes that markets right themselves slowly enough that a later judgment can still do good. Digital

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platforms unsettle that assumption. Where network effects and data advantages compound, a market tends to tip towards one intermediary, and once it has tipped the position is stubborn. By the time a case has wound through investigation, hearing, and appeal, the harm it set out to prevent may already be beyond repair.

The reaction has been to reach for a different tool. Rather than wait to punish an abuse, an ex-ante regime lays down in advance the things a designated firm may not do, moving the centre of gravity from adjudication towards rule-making. The idea did not appear from nowhere; a run of expert reports across several countries reached much the same diagnosis, that the economics of digital markets called for a purpose-built response.¹ This article follows the idea through three legal orders. Part 2 sets out the case for acting in advance. Parts 3 to 5 examine the European, American, and Indian responses. Part 6 compares them and Part 7 offers suggestions for India.

II. WHY WAIT? THE CASE FOR ACTING IN ADVANCE

The argument for ex-ante regulation begins with a set of complaints about the older method as applied to platforms. One is simply about time. Competition proceedings are slow, and the market they examine is fast; defining the market, proving dominance, and showing abuse each call for heavy economic evidence, and appeals can stretch the reckoning over years, during which the network effects at issue keep working to entrench the incumbent. Another complaint is about fit. Doctrines shaped for ordinary trade, the recoupment rule of predatory-pricing law among them, sit awkwardly on multi-sided platforms whose harm may lie in the long tipping of a market rather than in any immediate movement of price. A third is about remedy. Even a win tends to yield relief that comes late and reaches little, since structural orders are hard to obtain and behavioural ones hard to police.

Regulating in advance is meant to answer each complaint. Fixing duties beforehand removes the need to relitigate market and dominance in every case; attaching those duties to a designated class of firms swaps a contested economic inquiry for a workable status test; and acting prospectively bites before entrenchment rather than after it. The price of these gains is a loss of the case-by-case nuance that adjudication allows, and a real risk that a broad rule will catch conduct that was doing no harm. That trade-off is the recurring theme of the comparison that follows.

¹ See JACQUES CREMER, YVES-ALEXANDRE DE MONTJOYE & HEIKE SCHWEITZER, COMPETITION POLICY FOR THE DIGITAL ERA (2019); DIGITAL COMPETITION EXPERT PANEL, UNLOCKING DIGITAL COMPETITION (2019); STIGLER COMMITTEE ON DIGITAL PLATFORMS, FINAL REPORT (2019).

It helps to be clear about what the technique is not. It is not utility-style price control, nor a standing supervision of a firm's commercial choices. It picks out a short list of practices, self-preferencing, tying, the mining of business-user data, and the blocking of alternative routes to the customer, that theory and experience mark as characteristically harmful in the hands of an entrenched intermediary, and it forbids them ahead of time for firms above a threshold. In content the prohibitions are largely borrowed from abuse-of-dominance law; the novelty is procedural, in dispensing with proof of dominance and effect case by case. Keeping that distinction in view is essential to judging whether, and in what form, the technique is worth adopting.

The diagnostic core of the argument deserves to be stated plainly, because it explains why so many observers have reached for a new tool at all. In many digital services quality rises with the volume of data the provider holds: better data yields a better product, the better product draws more users, and more users yield still more data. That loop, working alongside direct and indirect network effects, gives digital markets their pronounced tendency to tip and their resistance to later correction. Enforcement that intervenes only once a firm has crossed the line into dominance and committed an abuse is, by design, a step behind a dynamic that builds advantage steadily and continuously. It is this insight, that durable advantage gathers before and outlasts any single identifiable wrong, that most powerfully drives the case for acting in advance, and it recurs in one form or another across each of the systems examined below.

III. THE EUROPEAN UNION: A CODE FOR GATEKEEPERS

A. Origins and purpose

Europe has gone furthest. The Digital Markets Act, in force from 2022 and applicable from 2023, is the most developed attempt yet to govern digital gatekeepers by binding forward-looking rules.² Its declared aim is to keep markets in the digital sector contestable and fair, and it is cast deliberately as a companion to Article 102 of the Treaty on the Functioning of the European Union rather than a replacement for it; the two run in parallel, the Regulation supplying prophylactic rules and the Treaty keeping its residual role against abuse of dominance.³ Alongside it sits the Digital Services Act, which addresses content and platform responsibility, the pair together amounting to a thorough re-regulation of the online sphere.⁴

² Regulation 2022/1925, of the European Parliament and of the Council of 14 September 2022 on Contestable and Fair Markets in the Digital Sector (Digital Markets Act), 2022 O.J. (L 265) 1 [hereinafter DMA]. The Regulation entered into force on 1 November 2022 and applied from 2 May 2023. Id. art. 54.

³ Consolidated Version of the Treaty on the Functioning of the European Union art. 102, 2016 O.J. (C 202) 47.

⁴ Regulation 2022/2065, of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services (Digital Services Act), 2022 O.J. (L 277) 1.

B. Who is caught, and for what

Everything in the Regulation turns on the gatekeeper. Instead of a case-specific finding of dominance, it designates as gatekeepers those undertakings that run a core platform service, carry significant weight in the internal market, serve as an important gateway between business users and end users, and hold an entrenched and durable position; quantitative presumptions keyed to turnover, market value, and user numbers make the criteria operable.⁵ The core platform services are listed exhaustively and take in online intermediation, search, social networking, and operating systems, among others. On that basis the Commission designated six gatekeepers, Alphabet, Amazon, Apple, ByteDance, Meta, and Microsoft, in September 2023.⁶

The appeal of this design is that it replaces a contested economic inquiry with a test that can be applied with some predictability. A firm either meets the thresholds or it does not, and the obligations attach on designation. The cost is a degree of rough justice, since thresholds are imperfect proxies for the concern beneath them, and the Regulation accordingly allows both rebuttal of the presumption and designation of firms that fall outside the numbers yet satisfy the qualitative test.

C. The obligations and their bite

Gatekeepers carry the catalogue of duties in Articles 5 and 6.⁷ They may not prefer their own products in ranking, and they may not combine personal data across their services without consent. They must allow a measure of interoperability and must not stop business users from steering customers to offers made off the platform. The anti-steering and anti-tying rules matter most for online retail and app distribution, striking at the mechanisms by which gatekeepers have set the terms of access to their own platforms.

The enforcement design has teeth. Infringement can draw fines of up to a tenth of worldwide turnover, and up to a fifth for repeated breach, with structural relief available where non-compliance is systematic.⁸ The Commission tested the design first by opening formal non-compliance investigations against several gatekeepers in March 2024, and then decisively in April 2025, when it imposed its first fines, five hundred million euros on Apple over anti-steering restrictions and two hundred million on Meta over its consent-or-pay model.⁹ That

⁵ DMA, *supra* note 2, arts. 2-3 (defining core platform services and the gatekeeper designation criteria).

⁶ Press Release, European Comm'n, Digital Markets Act: Commission Designates Six Gatekeepers (Sept. 6, 2023); see DMA, *supra* note 2, art. 3.

⁷ DMA, *supra* note 2, arts. 5-6.

⁸ *Id.* arts. 30-31.

⁹ Press Release, European Comm'n, Commission Opens Non-Compliance Investigations Against Alphabet, Apple and Meta Under the Digital Markets Act (Mar. 25, 2024); Press Release, European Comm'n, Commission Finds Apple and Meta in Breach of the Digital Markets Act (Apr. 23, 2025) (imposing fines of EUR 500 million on Apple

those penalties came within two years of the Regulation taking effect, against the many years a comparable Article 102 case would consume, is the clearest illustration of the temporal advantage that justifies the whole approach.

It would be a mistake to read the European turn as an abandonment of ordinary competition law. The Digital Markets Act does not repeal the concept of dominance so much as route around it for a defined set of firms and practices; Article 102 continues to govern everything the Regulation does not reach, and the Commission has been at pains to keep both instruments in play. Nor does the Regulation dispense with judgment altogether, for the qualitative limb of designation, and the possibility of rebuttal, preserve a residue of the very inquiry the status test was meant to displace. The lesson for jurisdictions watching from outside is that the ex-ante model, even in its most ambitious form, works as a supplement to the older law rather than a substitute for it.

IV. THE UNITED STATES: STAYING WITH THE OLD METHOD

A. The statutory inheritance

The United States has held to enforcement after the event. Its foundations remain the Sherman Act, which forbids restraints of trade and monopolisation, supported by the Clayton Act and the Federal Trade Commission Act on mergers, exclusive dealing, and unfair methods of competition.¹⁰ These are old statutes written in broad terms, and their content has been supplied by the courts case by case. The model puts its trust in adjudication; it names no regulated firms in advance and lays down no standing conduct rules of the European kind.

Doctrine has made that inheritance harder to wield against platforms. In *Ohio v. American Express* the Supreme Court held that, in a two-sided transaction market, a plaintiff must show a net anticompetitive effect across both sides, raising the evidentiary bar in exactly the settings where concern runs highest.¹¹ Taken with the recoupment rule of predatory-pricing law, the decision shows how American doctrine, refined under the consumer-welfare banner, has tended to lift rather than lower the obstacles to platform enforcement. It is against that background that the American argument over acting in advance must be read.

B. Enforcement by lawsuit

and EUR 200 million on Meta).

¹⁰ Sherman Act, 15 U.S.C. §§ 1-2; Clayton Act, 15 U.S.C. §§ 12-27; Federal Trade Commission Act, 15 U.S.C. § 45.

¹¹ *Ohio v. Am. Express Co.*, 585 U.S. 529 (2018).

What energy the American model has shown lately has come through litigation, not legislation. In *United States v. Google LLC* the District Court for the District of Columbia held in 2024 that Google had unlawfully maintained a monopoly in general search, chiefly through exclusive default-placement deals, in breach of Section 2.¹² The remedies opinion of September 2025 refused the Government's request to break off the Chrome browser, settling instead for conduct restrictions, limits on exclusive agreements, and data-sharing under the eye of a technical oversight committee.¹³ The episode shows both the reach and the limits of enforcement after the event: liability was made out, but the relief was measured and behavioural, and it arrived only after years of litigation, in a market the court itself acknowledged was being reshaped by generative artificial intelligence.

The Federal Trade Commission's suit against Amazon, filed in 2023 and listed for trial in 2027, likewise proceeds by ordinary adjudication rather than by rule.¹⁴ The revised merger guidelines of 2023 signalled a firmer stance towards digital consolidation, with attention to entrenchment and to multi-sided markets, but they too remain within the retrospective tradition, enforcing existing prohibitions through litigation and guidance rather than imposing duties in advance on a named class of firms.¹⁵

C. The road not taken

America has not been indifferent to the new model. After a long congressional inquiry into competition in digital markets, a package of bills arrived in 2021 that would have laid European-style duties on the largest platforms, chief among them the American Innovation and Choice Online Act, aimed at self-preferencing, and the Open App Markets Act, aimed at app distribution.¹⁶ Despite bipartisan sponsorship and favourable committee votes, the legislation never reached the floor, and the project stalled. The American position is therefore better described as an impasse than a rejection: vigorous enforcement has carried on while the statute its own enforcers urged went unpassed. The contrast with Brussels is pointed. Where Europe legislated and then enforced, Washington litigated while its legislature deliberated and, in the end, declined to act.

The American failure to legislate repays a moment's reflection, because it was not for want of analysis or of political will in the usual sense. The congressional inquiry had been exhaustive,

¹² *United States v. Google LLC*, No. 20-cv-3010 (APM) (D.D.C. Aug. 5, 2024) (memorandum opinion on liability).

¹³ *United States v. Google LLC*, No. 20-cv-3010 (APM) (D.D.C. Sept. 2, 2025) (memorandum opinion on remedies) (declining to order divestiture of the Chrome browser).

¹⁴ *Complaint, FTC v. Amazon.com, Inc.*, No. 2:23-cv-01495 (W.D. Wash. filed Sept. 26, 2023).

¹⁵ U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, MERGER GUIDELINES (2023).

¹⁶ American Innovation and Choice Online Act, S. 2992, 117th Cong. (2021); Open App Markets Act, S. 2710, 117th Cong. (2021).

the bills enjoyed sponsors from both parties, and the enforcement agencies were led by figures openly sympathetic to the ex-ante idea. What defeated the project was a combination of intensive lobbying, unease about the breadth of the proposed duties, and a constitutional culture that instinctively prefers judicial elaboration of open-ended standards to detailed legislative command in the economic sphere. The upshot is a system that has chosen, by default rather than by decision, to let the courts carry the whole weight of adapting a nineteenth-century statute to a twenty-first-century economy.

V. INDIA: HALFWAY ACROSS

A. The existing law and the 2023 reforms

India's regime rests on the Competition Act, 2002, a statute of the retrospective kind whose central provisions forbid anti-competitive agreements under Section 3 and abuse of dominance under Section 4.¹⁷ As in Europe and America, Section 4 makes liability depend on a finding of dominance reached through a multi-factor inquiry. The Competition (Amendment) Act, 2023 brought the regime up to date, adding a deal-value threshold for merger notification, aimed at acquisitions of young digital rivals that had slipped past the older turnover and asset tests, together with settlement and commitment procedures to speed contested cases along.¹⁸ These reforms sharpened the retrospective toolkit; they did not give it the forward-looking, designation-based duties that mark the new model.

It is worth pausing on what the 2023 reforms did and did not achieve, since they frame the case for going further. By capturing acquisitions through a deal-value threshold, the amendment closed a gap that had allowed established firms to absorb nascent rivals below the notification radar, and the new settlement and commitment procedures promised faster resolution of contested matters. Yet each of these changes operates within the retrospective logic of the Act; they make the existing machinery quicker and more complete without altering its basic posture of judging conduct after it occurs. The ambition of the draft Bill was to supply what the amendment could not, a set of duties that bind before harm rather than after it.

B. The study and the committee

Two documents pushed India towards acting in advance. The first was the Competition Commission's market study on e-commerce, which named deep discounting, platform neutrality, and exclusive tie-ups as recurring worries and recommended greater transparency

¹⁷ The Competition Act, 2002, No. 12 of 2003, §§ 3-4 (India).

¹⁸ The Competition (Amendment) Act, 2023, No. 9 of 2023 (India).

and self-regulation.¹⁹ The second, and the weightier, was the Parliamentary Standing Committee on Finance's report on the practices of large technology companies, which catalogued self-preferencing, bundling, data usage, and exclusive tie-ins, and urged India to adopt an ex-ante framework trained on systemically important digital intermediaries.²⁰ That the push came from a parliamentary committee rather than from the competition authority is itself significant, reflecting a political judgment that the general provisions of the Act were unequal to the digital problem.

C. The committee on digital competition and the draft Bill

The Ministry of Corporate Affairs then set up a Committee on Digital Competition Law, which reported in 2024 and appended a draft Digital Competition Bill.²¹ The Bill's design is plainly European in inspiration. It would let the Commission designate certain undertakings as systemically significant digital enterprises in respect of listed core digital services, using quantitative thresholds of financial strength and user reach alongside a qualitative test, with the listed services, search, social networking, intermediation, operating systems, tracking the European catalogue. Designated enterprises would carry duties closely modelled on the Digital Markets Act, barring self-preferencing, anti-steering, and the use of non-public business-user data to compete with the very users who generate it, backed by penalties of up to a tenth of global turnover.

The resemblance is deliberate, for both instruments swap a case-specific dominance inquiry for a status-based designation and both impose their rules ahead of any proven abuse. Transplanting a European instrument into Indian soil is not straightforward, however. The Regulation was built for a mature market dominated by a few foreign gatekeepers; India's digital economy also contains a lively home-grown start-up sector, whose members feared that broadly drawn duties might snare growing Indian firms and, perversely, shelter the incumbents the rules were meant to check. Voiced forcefully in consultation, that fear shaped the political fate of the draft.

D. Second thoughts

Resistance duly followed. After a further round of consultation the Parliamentary Standing Committee on Finance examined the draft and, in a 2025 report, recommended that it be withdrawn and comprehensively redrafted, citing the breadth of its reach, the rigidity of its

¹⁹ COMPETITION COMM'N OF INDIA, MARKET STUDY ON E-COMMERCE IN INDIA: KEY FINDINGS AND OBSERVATIONS (2020).

²⁰ STANDING COMMITTEE ON FINANCE, ANTI-COMPETITIVE PRACTICES BY BIG TECH COMPANIES (Lok Sabha 2022).

²¹ COMMITTEE ON DIGITAL COMPETITION LAW, REPORT OF THE COMMITTEE ON DIGITAL COMPETITION LAW (2024) (appending the Draft Digital Competition Bill, 2024).

duties, the danger to innovation and foreign investment, and thresholds ill-suited to Indian conditions.²² The Bill has accordingly not been enacted, and the ex-ante framework remains, at the time of writing, a proposal under review rather than a law in force. India thus sits genuinely halfway across: it has drawn an ex-ante design, exposed it to legislative scrutiny, and paused to recalibrate, a sequence unlike both the European enactment and the American impasse. Whether the outcome is a narrower redraft or a decision to lean on the amended Act supplemented by targeted intervention will set the course of Indian digital competition law for a decade.

A note of caution qualifies the European success story. The first fines, though historic, were modest against the statutory ceiling and against the turnover of the firms concerned, and they were levied for infringements of comparatively short duration. Some read this restraint as prudence in a young regime finding its feet; others read it as a sign that even a purpose-built instrument struggles to move at the speed of the market it governs. Both readings carry a warning for the imitator: enacting forward-looking rules is one thing, enforcing them with the promptness and severity that justified their adoption is another, and the gap between the two is where much of the model's promise will be tested.

VI. WEIGHING THE THREE

Laid side by side, the three offer three answers to one problem. Europe has enacted a full ex-ante regime and begun to enforce it. America has kept a vigorous retrospective model while failing to pass the forward-looking law its own institutions proposed. India has designed such a law, borrowed largely from Europe, and deferred it for further thought. Read together, the trajectories show a broad agreement that enforcement after the event is not enough for digital markets, joined to sharp disagreement about the cure.

Two lessons stand out. The first concerns sequence. Europe's experience suggests that the two methods are companions, not substitutes; the Digital Markets Act was framed to run beside Article 102, and the Commission has pressed Treaty cases in parallel with its new powers. A well-made regime need not choose between rule and judgment, but may keep both, reserving forward-looking duties for a narrow class of entrenched gatekeepers while leaving ordinary enforcement to govern the wider market. The second concerns calibration. The breadth that makes a rule easy to administer is also its chief danger, as the Indian committee saw when it faulted the draft for thresholds too loosely drawn. The task for any jurisdiction is to designate

²² STANDING COMMITTEE ON FINANCE, REPORT ON THE DRAFT DIGITAL COMPETITION BILL, 2024 (Lok Sabha 2025) (recommending that the Bill be withdrawn and comprehensively redrafted).

narrowly enough to spare firms that hold no gatekeeper power, yet widely enough to catch the intermediaries whose entrenchment the regime exists to address.

A third lesson concerns the hazards of transplanting a model between economies of unlike shape. The European Regulation was tuned for a market whose gatekeepers are large, foreign, and firmly settled; a developing economy with a substantial home-grown start-up sector faces a different balance of interests and risks, and a mechanical import of European thresholds may misfire. The Indian debate has usefully surfaced that concern, and it counsels tailoring any forward-looking regime to the competitive facts of the country adopting it rather than borrowing it wholesale.

One further consideration, too often left out of these debates, is institutional capacity. Regulating in advance loads a heavy analytical and supervisory burden onto the regulator, which must monitor compliance, interpret open-textured duties, and revise its rules as technology moves. The European Commission has built specialist teams to run the Digital Markets Act and has still been pressed on the pace of enforcement. For a jurisdiction weighing a similar regime the question is not only whether forward-looking rules are wise in principle but whether the authority charged with them has the expertise, the staff, and the independence to administer them credibly. A regime that outruns the capacity of its enforcer risks producing uncertainty without contestability, and any redrafted Indian instrument ought to come with a matching investment in the Commission's analytical strength.

India's hesitation, seen in this light, is neither timidity nor drift but a recognisable stage in a difficult policy choice. The country has the advantage of legislating late, with the European instrument already in operation and its early enforcement available to study, and with the American impasse as a warning against expecting the courts to do everything. It also carries a distinctive concern that neither Europe nor America shares to the same degree, namely the protection of a large domestic start-up sector whose interests do not always align with those of the foreign incumbents the rules would principally target. A redraft that keeps the forward-looking architecture while narrowing its reach, and that coordinates with the data-protection regime now taking shape, would let India capture the benefits of the new model without importing its risks wholesale.

VII. CONCLUSION AND SUGGESTIONS

The comparison yields a guarded conclusion. That enforcement after the event, on its own, is inadequate for the governance of digital markets now commands wide agreement across the three jurisdictions; the disagreement is about the remedy, not the diagnosis. Europe has shown

that a targeted forward-looking regime, running beside ordinary competition law, can be enacted and enforced. America has shown that retrospective enforcement can still achieve real outcomes without such a statute, and also that legislating one is politically hard. India stands between the two, having designed a regime and then paused to reconsider it.

For India, three suggestions follow. The forward-looking framework should be conceived as a companion to the Competition Act, 2002, not a replacement, so that designation-based duties sit atop the existing prohibitions rather than supplanting them. The designation criteria should be tuned with care to Indian conditions, using thresholds that catch genuinely entrenched intermediaries while sparing the many digital firms that compete hard without gatekeeper power; the committee's misgivings on this point are well taken and should steer the redraft. And the duties themselves should be confined to conduct, self-preferencing, anti-steering, and the exploitation of business-user data, where the harm is well understood and the danger of catching innocent behaviour is low. A regime cut to that pattern would let India take the gains of acting in advance while keeping the flexibility of case-by-case enforcement, and it would bear out the premise of the whole comparison: that digital markets are best governed not by a choice between rule and judgment but by their careful combination.
