

CONTEXTUALIZING INTERNATIONAL COMPETITION LAW REFORMS

FINDING A UNANIMOUS INTERNATIONAL APPROACH

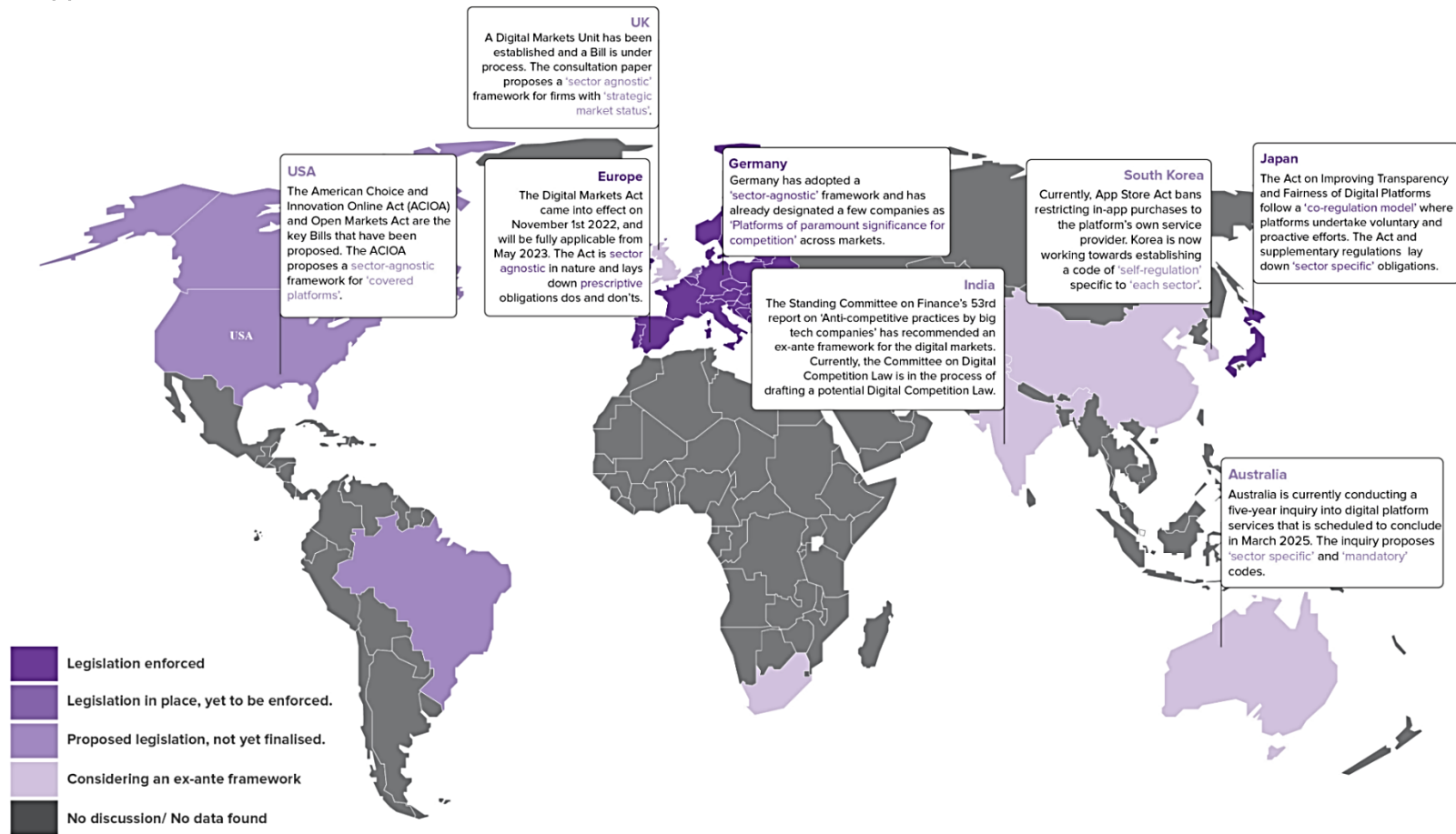
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INTRODUCTION

The PSCF’s recommendations took several cues from ‘gatekeeper’ regulations adopted under the European Union (EU)’s Digital Markets Act (DMA). However, several other jurisdictions, in their attempt to address competition issues in digital markets, are contemplating or have arrived at vastly different solutions. This primer provides an overview of these competition law developments and develops a taxonomy of approaches.

Snapshot of Approaches:



Categorizing Existing International Approaches

Sector agnostic and sector approaches of ex-ante competition laws	
Country	Explanation
Sector Agnostic	
European Union	The Digital Markets Act (DMA) introduces obligations, including prohibitions, that apply on gatekeepers engaged in providing certain core platform services, without accounting for sectoral nuances.
Japan	The new act implemented to introduce digital frameworks is applicable on a set of digital platform providers, irrespective of their specific business models.
United States	Similar to the DMA, the American Innovation and Choice Online Act (AICOA) regulates practices by the largest online platforms, without necessarily accounting for the sectors differences in their models.
Germany	The German law states that it shall regulate entities of 'paramount significance', regardless of the sectors they are present in.
Sector Specific	
United Kingdom	The new law states that the regulator should designate 'conduct requirements' on the designated companies in relation to a relevant digital activity. The practice would allow to look into sector-specific nuances of the company's operations.
South Korea	The country's updated law specifically sought to govern anti-steering provisions in app store markets. Notably, it regulates only the relationship between app store owners and app developers.
Australia	The law in the country is still at a consultation stage. However, interim reports and consultations by the government have centered on specific sectors, rather than discussing digital markets as a whole.

Presumptive and evidence-based approaches of ex-ante competition laws	
Country	Explanation
Presumptive	
European Union	The DMA prescribes a clear list of dos and don'ts that apply on important digital platforms, termed as 'gatekeepers'. There is no obligation on the regulator to lay out the evidence that necessitates imposition of the list of obligations.
Germany	The updated German law imposes a set of prohibitions on undertakings of paramount significance, and does not provide for a necessity to establish these obligations through evidence or consultations.
Japan	The Act on Improving Transparency and Fairness of Digital Platforms suggests a set of obligations to disclose and ensure fairness in its commercial dealings, without necessarily analyzing the need for these obligations.
Evidence Based	
South Korea	The law regulating anti-steering in app markets provides for an intensive fact-finding survey on app market operations, which shall look at the financial status and operations of undertakings.
United States	The AICOA, while prescribing a list of unlawful conduct that is prohibited by covered platforms, also mentions that the same shall be demonstrated by a preponderance of evidence. However, the manner of establishing this preponderance is not clear.
United Kingdom	Before imposing conduct requirements, the regulator needs to carry out a public consultation on the same. The consultation should enable the regulator to review inputs and evidence from multiple stakeholders.

Points to consider: There is no unanimously adopted approach to pre-emptive competition frameworks. Rather, evidence suggests a multitude of alternate approaches and regulatory choices. For example, while some frameworks case general obligations upon all companies across-sectors, others may involve targeted obligations for specific sectors such as digital advertising. Similarly, whereas some frameworks enable presumptive interventions, others require detailed investigations and evidence analysis. In any event, most of the approaches discussed above are yet be implemented. Given the absence of any evidence as to the effectiveness of the various choices, the CDCL should independently verify the need for a new pre-emptive framework through a cost-benefit analysis.

KEY TAKEAWAYS

- There is no global consensus on the issue of issuing additional regulations digital firms. A variety of approaches (presumptive/evidence-based, sector-specific/sector-agnostic) are currently being explored across jurisdictions – each of which remain in pre-implementation stages.
- Given the lack of evidence of the effectiveness of new presumptive frameworks, India should devote additional resources to evaluating its policy objectives, the trade-offs associated with various regulatory proposals, and ultimately arrive at an India-specific approach – which is balanced, and benefits the entire digital industry.
- The CDCL should consider independently verify the need for a new pre-emptive framework through a cost-benefit analysis.

