LARGE PLATFORMS IN THE EU AND INDIA

Comparative Analysis between the European Digital Markets Act and the Indian Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules

-Pratiksha Ashok[1]

Abstract

The EU is set to implement the Digital Markets Act 2020(DMA), which seeks to regulate large players in the digital market. The DMA intends to protect consumer welfare and restore a level playing field in the digital markets sector by regulating 'gatekeepers'. Gatekeepers are platforms that significantly impact the internet market, serving as a gateway for businesses and end-users and having a durable position in the market. Though the list of gatekeepers is not released, it is clear from the explanations that they refer to big tech companies of Amazon, Facebook, Google, Apple, and Microsoft.

On the other hand, in February 2021, India enacted path-breaking legislation in the form of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021(IT Rules). These Rules regulate all intermediaries, including social media, on-demand and significant social media intermediaries. The Rules did not state what significant social media intermediaries were and gave the power to the Central Government to notify the same. On the same day, the Central Government notified that a social media intermediary would be considered a significant social media intermediary if they have fifty lahks (5 million) users in India.

Two crucial differences are observed. Firstly, India's legislation covers all social media intermediaries, including significant social media intermediaries. The IT Rules state obligations for all intermediaries and additional obligations for significant social media intermediaries. They also recognise the role and impact of other (non-significant) social media intermediaries. In contrast, the DMA applies only to gatekeeper platforms that perform core platform services, which include

[1]Pratiksha is a Researcher for the 'Platform Regulation and Operations in the Sharing Economy' Project and a Ph.D. Student, Faculty of Law, UC Louvain, Belgium. pratiksha.ashok@uclouvain.be.

social media services. Secondly, the DMA defines the gatekeepers based on certain obligations such as the significant impact on the internal market, durable position, number of users, entry barriers, and structural market characteristics. This definition contrasts the IT Rules, as the subsequent notification prescribes a threshold of users.

These two differences highlight the distinct approaches to regulating online players in different jurisdictions. This research intends to compare the DMA and the IT Rules in-depth and the scope of such legislation. The reasoning for and against the stated differences will be explained in this first step- the EU regulating only gatekeepers and the IT Rules concerning all intermediaries. This research does not attempt to answer whether a specific system is better than the other- but to stimulate academic discussion into different systems and view different regulatory systems under a critical magnifying glass.

Key Words: Digital Markets Act, Information Technology (Intermediary Guidelines) Rules, Large Platforms, Significant social media intermediaries, Brussels Effect.

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1. Introduction

'With great power comes great responsibility.' Though popularised by the Spiderman movies and the Marvel franchise, this ancient adage from the Sword of Damocles and various religious writings proves more accurate with the burgeoning of online platforms.[2] With changes in internet technology, infrastructure, innovation, needs of people and the Covid-19 crisis have altered how we view and use the internet.

Large platforms are in the eye of the storm facing obligations under various legislations- tax, labour, data, consumer protection, competition and now platform-specific legislation. These large platforms possess power arising from their market share, usage by consumers, collection and use of data, and algorithmic processing to generate value and contribute to turnover. The starting point is to outline the nature of large platforms, i.e., what and who are these large platforms, to understand the extent of the power of such platforms and their responsibilities

It would be insufficient to do this in a single jurisdiction due to the multinational operations of platforms. Thus, this research enlists comparative research methods to analyse the Digital Markets Act(DMA) in the EU and the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules(IT Rules) in India that define large platforms.[3]

2. Research question and Methodology

The European Union(EU) and India have set their sights on regulating large platforms. This research seeks to investigate how the differences in society have affected the objective and the framing of the legislation in the EU and India

[2] The thematic and often-quoted phrase 'with great power comes great responsibility' is attributed to the character Uncle Ben in comic books published by Marvel Comics featuring Spider-Man.
[3] Proposal for a regulation on contestable and fair markets in the digital sector (Digital Markets Act) 2020 (COM(2020) 842 final 2020/0374 (COD)); The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. 2021.

This research adopts a conceptual comparative method to highlight the difference in the concepts of large platforms in the EU and India and a common-core comparative method to delve into the legislation on large platforms. The reason for choosing the DMA and the IT Rules is because the *tertium comparationis* concerns legislating large platforms. Though the means and the journey may differ, the end of legislating and regulating large platforms is similar, hence warranting this comparison. This paper also uses the Brussels effect theory to analyse the *de facto* or *de jure* impact of EU legislation on India.

3. Comparative Study Between EU And India

Platform transactions and impacts are not limited to a specific jurisdiction, with the global expanse of platforms and the emergence of large platforms. An author once wrote, *'...Big and messy: hundreds of millions of voters from vastly different backgrounds are bound to hold widely divergent views. Concerns at local and state levels often trump national ones, and national affairs can appear as an amalgam of assorted local rivalries.'*[4] This description can be used to describe the EU or India perfectly. The differences and the similarities between these two powers in the west and east have led to studying their vastly different yet similar legal systems.

These similarities and differences portray different positions of the platform economy and the ways of approaching the issues that may arise. The differences are what make it essential to understand different points of view.

This paper undertakes the risks of a comparative study in two jurisdictions with different legal systems of the European Union (EU) and India. The EU and India have enacted specific legislation about electronic transactions.

The EU's E-Commerce Directive and India's Information Technology (IT) Act were introduced in the early 2000s and recognised electronic commerce transactions.[5] Various amendments and sector-specific developments have expanded the e-commerce legislative environment. E-commerce transactions have developed leaps and bounds, and innovation has led to certain platforms being ubiquitous.

The E-commerce Directive is the foundation for all electronic commerce transactions. With changes in the e-commerce environment, e-commerce legislation is being revamped under the

[4] 'Power Shifts | The Economist' Anu Bradford, 'The Brussels Effect' in Anu Bradford, *The Brussels Effect* (Oxford University Press 2020); Anu Bradford, *The Brussels Effect How the European Union Rules the World* (Oxford University Press 2020).

[5] Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) 2000 (OJ L 178, 1772000); The Information Technology Act, 2000 (Act No 21 of 2000).The EU's E-Commerce Directive came into force on 8 June 2000 and India's Information Technology Act came into force on 9 June 2000.

Digital Services Act (DSA) and the Digital Markets Act (DMA).[6] In India application of e-commerce law to platforms led to the passing of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules (IT Rules).[7]

The DMA was submitted by the European Commission to the European Parliament and to the Council of the European Union on 15 December 2020. On 24 March 2022, the European Parliament reached an agreement on the DMA, setting it to be enacted by the member states. This proposal is not expected to be implemented until 2023, as it has to be approved by the European Parliament and the Council. The IT Rules came into effect on 25 February 2021, and intermediaries had until 25 May 2021 to comply with the provisions under these rules.

Comparing these two specific pieces of legislation stems from understanding the laws used in two similar yet different jurisdictions of the EU and India- a developed and rapidly developing nation that face challenges posed by large online platforms. These unions have chosen to legislate the actions of these platforms.

Though the laws have a territorial scope of application, i.e., within the EU and the EEA or India, the implications could be international due to the nature of global platforms.

Though, on the surface, these legislations cover platforms and large platforms, the nuances of these legislations are crucial to note their objective and scope of application.

The DMA applied to large platforms termed gatekeeper platforms.[8] The DMA is to be enacted to create a healthy competitive environment for platforms.[9] The DMA intends to ensure a higher degree of competition in the European Digital Markets by preventing large companies from abusing their market power and allowing new players to enter the market.[10] According to the

[6] Proposal for a regulation For Digital Services (Digital Services Act) and amending Directive 2000/31/EC 2020 (COM(2020) 825 final 2020/0361 (COD)); Proposal for a regulation on contestable and fair markets in the digital sector (Digital Markets Act).
[7] The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.
[8] 'Ex Ante Regulation in Digital Markets – Background Note' (OECD 2021) Chapter 2, Page 8. Marc Bourreau and Alexandre de Streel, 'Digital Conglomerates and EU Competition Policy'
[9] Proposal for a regulation on contestable and fair markets in the digital sector (Digital Markets Act) Recital 4 and Recital 5.
[10] ibid Article 1(5)(6) .

European Commission, the main objective of this regulation is to regulate the behaviour of the Big Tech firms within the European Single Market and beyond.[11] The Commission aims to guarantee a fair level of competition, i.e., a level playing field in the highly concentrated digital European markets, which a winner often characterises takes all configurations.[12]

On the other hand, enacting the IT rules in India was to curb the spread of misinformation and fake news. In 2018, the Parliament of India admitted a motion on the 'Misuse of social media platforms and spreading of fake news'. The Ministry of Electronics and Information Technology made a detailed statement about the 'resolve of the Government to strengthen the legal framework and make the social media platforms accountable under the law.'[13]

Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules (IT Rules) were drafted to prevent the spreading of fake news, curb obscene information on the internet, prevent misuse of social media platforms, and provide security to platform users. [14]

With these different objectives in mind, the material scope of the DMA and the IT Rules are platforms or intermediaries. Intending to regulate platforms, the EU, the DSA dealing with all platforms, the DMA dealing with gatekeeper platforms, and the IT Rules dealing with all intermediaries providing additional due diligence provisions to significant social media intermediaries. This core difference changes the application of the provisions of these enacted legislations, keeping in mind the activities of specific platforms.

[11] 'Communication from the Commission- A Digital Single Market Strategy for Europe' COM(2015) 192 final, {SWD(2015) 100 final}.
[12] Proposal for a regulation on contestable and fair markets in the digital sector (Digital Markets Act) Recital 51.
[13] 'Draft Intermediary Guidelines, 2018' (Ministry of Electronics and Information Technology).
[14] The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.

4. Digital Markets Act

With the rapid expansion of internet use, the European Commission set up a framework to remove cross-border obstacles in online services in the internet market. The E-Commerce Directive came into force to ensure the free movement online within the EU.[15] The Directive harmonised rules on issues such as the transparency and information requirements for online service providers, commercial communications, and electronic contracts and limitations of liability of intermediary service providers. The Directive provisions transparency and reduces information asymmetry by providing the service recipient information about the transaction.[16] The E-commerce Directive is the groundwork for all electronic commerce transactions.[17]

Innovation in the digital sphere has skyrocketed, and legislative developments are attempting to keep pace. Between 2014 and 2019, the EU released legislative proposals on the Digital Single Market.[18] These proposals were to adapt the European legislation to the current challenges while ensuring the free movement of persons and capital.[19] These legislative developments contribute to the enforcement of long-term strategies in the European digital sector.[20] In December 2020, the European Commission released a legislative proposal to protect consumer welfare and restore a level playing field in the European Union's digital market- the Digital Markets Act (DMA).[21]

The Digital Markets Act (DMA) is a legislative proposal under consideration by the European Commission.[22] The DMA intends to ensure a higher degree of competition in the European Digital Markets by preventing large companies from abusing their market power and

[15] Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).
[16] Ibid Article 5, Article 6, Article 10.
[17] Ibid Article 5, Article 6, Article 10.
[18] 'Communication from the Commission- A Digital Single Market Strategy for Europe' (n 11).
[19] ibid.
[20] Massimo Motta and Martin Peitz, 'Intervention Triggers and Underlying Theories of Harm' in Massimo Motta, Martin Peitz and Heike Schweitzer (eds), *Market Investigations* (1st edn, Cambridge University Press 2022) <https://www.cambridge.org/core/product/identifier/9781009072007%23CN-bp-2/type/book_part>.
[21] Proposal for a regulation on contestable and fair markets in the digital sector (Digital Markets Act) Recital 51.
[22] ibid.

allowing new players to enter the market, i.e., gatekeeper platforms.[23] Gatekeepers are those platforms that have a significant impact on the internet market, serving as a gateway for businesses and end-users and having a durable position in the market. Though the list of gatekeepers is not released, it is clear from the explanations that they refer to big technology companies of 'GAFAM'- Google, Amazon, Facebook, Apple and Microsoft.[24]

[23] ibid Recital 5.

[24] 'Microsoft Response to Digital Services Act Consultation Proposal for Ex Ante Regulation of Gatekeeper Platforms'; De Streel Alexandre and others, 'Digital Markets Act- Making Economic Regulation of Platforms Fit for the Digital Age' (Centre on Regulation in Europe).

5. Information Technology Rules

The information technology law in India was framed in light of the United Nations Commission on International Trade Law (UNCITRAL) Model Law of Electronic Commerce.[25] The Model Law enumerated the fundamental principles of modern electronic commerce law. It serves as the document on that countries could base, draft, evaluate, and amend their laws.[26] India enacted the Information Technology (IT) Act based on these Model Laws.[27] The IT Act was the first legislation in India to recognise transactions carried out by electronic data interchange and e-communication, e-commerce and validation e-contracts.[28] Under the IT Act, the Central Government released the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules (IT Rules), creating *lex specialis* for intermediaries.[29]

The Ministry of Electronics and Information Technology prepared the draft Information Technology (Intermediary Guidelines) Rules 2018 to replace the 2011 rules. The 2011 IT Rules provided disclosures about privacy policies and user agreements and not to harm their users.[30] The 2018 rules sought to address the misuse of social media platforms spreading fake news, curb obscene information on the internet, prevent misuse of social media platforms, and provide security to the users.

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[25] 'United Nations Commission On International Trade Law- Model Law on Electronic Commerce with Guide to Enactment, 1996'.

[26] 'UNCITRAL Model Law on Electronic Commerce (1996) with Additional Article 5 Bis as Adopted in 1998 | United Nations Commission On International Trade Law' <https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_commerce>. The principle of non-discrimination ensures that a document would not be denied legal effect, validity or enforceability solely on the grounds that it is in electronic form. The principle of technological neutrality mandates the adoption of provisions that are neutral with respect to technology used. In light of the rapid technological advances, neutral rules aim at accommodating any future development without further legislative work. The functional equivalence principle lays out criteria under which electronic communications may be considered equivalent to paper-based communications. Madhurima Khosla and Harish Kumar, 'Growth of E-Commerce in India: An Analytical Review of Literature' (2017) 19 IOSR Journal of Business and Management 91. 'UNCITRAL Model Law on Electronic Commerce (1996) with Additional Article 5 Bis as Adopted in 1998 | United Nations Commission On International Trade Law'.

[27] The Information Technology Act, 2000.

[28] ibid Sec.10A.- Validity of contracts formed through electronic means. Where in a contract formation, the communication of proposals, the acceptance of proposals, the revocation of proposals and acceptances, as the case may be, are expressed in electronic form or by means of an electronic record, such contract shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used for that purpose.

[29] The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.

[30] Information Technology (Intermediaries Guidelines) Rules, 2011.

In 2021, India enacted the Information Technology (Intermediary Guidelines and Digital Media Ethics Code)Rules (IT Rules), the path-breaking legislation regulating intermediaries in e-commerce transactions.[31] These Rules regulate all intermediaries, including social media, on-demand and significant social media intermediaries. The IT Rules address the due diligence by intermediaries and grievance redressal mechanisms, due diligence by significant intermediaries, a code of ethics concerning digital media, and a self-regulating mechanism by intermediaries themselves of an independent association consisting of these intermediaries.[32]

[31] The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.
[32] ibid Part II and Part III. Kanika Satyan, 'E-Commerce and Consumer Rights: Applicability of Consumer Protection Laws in Online Transactions in India' <https://ssrn.com/abstract=2626027>.

6. Comparison Between DMA and IT Rules Concerning Large Platforms

6.1. The Material Scope of Application

The DMA applies to core platform services offered by gatekeeper platforms.[33] The provider of a core platform service is a gatekeeper if they have a significant impact on the internal market; they operate a core platform service that serves as an essential gateway for business users to reach end-users. They enjoy an entrenched and durable position in their operations, or it is foreseeable that they will enjoy such a position in the near future.[34] These core platform services mean online search engines, intermediation services, social networks, video-sharing platforms, communication platforms, operating systems, cloud services and advertising services.[35]

The IT Rules apply to all intermediaries and providers specific rules for significant social media intermediaries.[36] Under the Information Technology Act, an intermediary with respect to any particular electronic message means any person who, on behalf of another person, receives, stores or transmits that message or provides any service with respect to that message.[37] The Intermediary Rule defines a social media intermediary as an intermediary which primarily or solely enables online interactions between two or more users and allows them to create, upload, share, disseminate, modify or access information using its services.[38] Further, to be categorised as a significant social media intermediary means a social media intermediary having a number of registered users in India above such a threshold as notified by the Central Government.[39]

6.2. Declaration of Large Platforms

[33] Proposal for a regulation on contestable and fair markets in the digital sector (Digital Markets Act) Article 1(2), Explanatory Memorandum- 1- Contect of the Proposal.
[34] ibid Chapter II- Article 3(1)- Designation of Gatekeepers.
[35] ibid Article 2(2)- Core Platform Services. Each of the above-mentioned services are defined under the DMA.
[36] The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. Rule 3 and 4.
[37] The Information Technology Act, 2000 Section 2(w)- Intermediary.
[38] The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. Rule 2(1)(w)- Social Media Intermediary.
[39] ibid Rule 2(1)(v)- Significant Social Media Intermediary.

The first criterion to determine a gatekeeper platform is conducting a core platform service.[40] A core platform service can be designated as a gatekeeper platform under the DMA in three ways- where they meet the criteria under the act and are declared as gatekeeper platforms, where the Commission determines that they are gatekeeper platforms and where the Commission can review their decision and change their status regarding a core platform service.

The DMA sets out specific quantitative and qualitative criteria required to be satisfied by core platform services to be declared as gatekeeper platforms.

- The undertaking to which the core platform service(s) belongs has an annual EEA turnover equal to or above EUR 6.5 billion in the last three financial years or has an average market capitalisation of EUR 65 billion or higher and provides a core platform service in at least three Member States.[41]
- It operates a core platform service as an important gateway for business users to reach end-users. The criteria are supposed to be met when the core platform service has more than 45 million monthly active end users established or located in the Union and more than 10.000 yearly active business users established in the Union in the last financial year.[42]
- It enjoys an entrenched and durable position in its operations, or it is foreseeable that it will enjoy such a position in the near future.[43]

As it satisfies these thresholds, a core platform service is to notify the Commission of the relevant information. This self-declaration places the onus on the providers of core platform services to determine whether they meet the criteria under the DMA and declare themselves to be gatekeeper platforms.[44]

Additionally, the Commission can also declare certain core platform services as gatekeeper platforms that do not meet the quantitative and qualitative criteria. The Commission is to conduct

[40] Proposal for a regulation on contestable and fair markets in the digital sector (Digital Markets Act) 2 Article 2(2)- Core Platform Service, Explanatory Memorandum- Context of the proposal- Reasons for and objectives of the proposal.
[41] Proposal for a regulation on contestable and fair markets in the digital sector (Digital Markets Act) Recital 17, Article 3(2)(a).
[42] ibid Recital 20, Article 3(2)(b); Alexandre and others (n 24) Page 35-45.
[43] Proposal for a regulation on contestable and fair markets in the digital sector (Digital Markets Act) Recital 21, Article 3(2)(c). Alexandre and others (n 25) Page 35-45.
[44] ibid Recital 23, Article 3(3). Alexandre and others (n 25) Page 35-45.

an impact assessment considering the size, including turnover and market capitalisation, operations and position of the provider of core platform services; the number of business users depending on the core platform service to reach end-users, and the number of end-users; entry barriers derived from network effects and data-driven advantages, in particular in relation to the provider's access to and collection of personal and non-personal data or analytics capabilities; scale and scope affect the provider benefits from, including with regard to data; business user or end-user lock-in; and other structural market characteristics to determine whether a core platform service is a gatekeeper platform.[45]

Further, the Commission may reconsider, amend or repeal at any moment a decision adopted to declare a core platform serves as a gatekeeper platform when there has been a substantial change in any of the facts on which the decision was based or when the decision was based on incomplete, incorrect or misleading information provided by the undertakings.[46]

Under Indian law, significant social media intermediaries are determined under the IT Rules.[47] The Rules did not state what significant social media intermediaries were and gave the power to the Central Government to notify the same. [48] The Central Government notified that a social media intermediary would be considered a significant social media intermediary if they have fifty lahks (5 million) users in India.[49] This criterion is the only requirement for a social media intermediary to be considered a significant social media intermediary.

7. The Brussels Effect

[45] ibid Recital 25, Article 3(6).
[46] ibid Recital 30, Article 4.
[47] The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. Rule 2(1)(v)- Significant Social Media Intermediary.
[48] ibid Rule 2(1)(v)- Significant Social Media Intermediary.
[49] Ministry of Electronics and Information Technology Notification 2021 (SO 942(E)).

As theorised by Anu Bradford in her book, the Brussels Effect, the influential effect of legislation from the EU is undeniable. It incentivised changes in products offered in several non-EU countries (a de facto Brussels Effect) and influenced regulation adopted by other jurisdictions (a de jure Brussels Effect).[50] Through the Brussels Effect, regulated entities within the EU, entities that were not subject to such EU regulations, end up complying with EU laws even outside the EU for a variety of reasons.[51] One of the examples discussed in the article and the book 'Brussels Effect' is the impact of the GDPR.[52] The GDPR applies to all companies processing personal data of 'data subjects,' i.e., persons residing in the EU whose personal data is being collected, held, or processed, regardless of the company's location or where the data processing takes place. The GDPR thus also applies to controllers or processors not established in the EU, as long as these actors offer goods or services to EU residents or monitor behaviour occurring within the EU.[53]

This paper investigates whether there has been a defacto or a *de jure* Brussels effect of the Digital Markets Act. The impact of these legislations can be *de facto*, where companies voluntarily comply with the EU regulations in a non-EU jurisdiction without the legislations of those jurisdictions requiring them to do so. A *de facto* Brussels Effect occurs if firms stay in the EU market and sell EU-compliant products worldwide. Jurisdictions also can *de jure* follow EU regulations by drafting their own sovereign national legislations based on and drawn from the EU legislation.

However, this paper argues that there has been a unique Brussels effect with a national flavour. Through the comparative analysis is clear that there are some common threats to regulating large platforms, the impact of the DMA acts to regulate gatekeeper platforms and create a level playing field, and the IT Guidelines are specific to significant social media intermediaries.

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[50] Anu Bradford, 'The Brussels Effect' (2020) 107 Northwestern University Law Review 25; Anu Bradford, *The Brussels Effect How the European Union Rules the World* (Oxford University Press 2020).
[51] *Id.* at 10.
[52] Anu Bradford, *The Brussels Effect*, 107 NORTH-WESTERN UNIVERSITY LAW REVIEW 25, 22 (2020); ANU BRADFORD, THE BRUSSELS EFFECT HOW THE EUROPEAN UNION RULES THE WORLD 131 (2020) Chapter 5.
[53] Regulation 2016/679/EU on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), *supra* note 2 Article 5- Principles relating to Processing Data; Article 4(7), 4(8)- Data controller and Processor. Note that the term data controller has similar meanings under the data protection laws of Japan and Korea.

The unique aspect of this Brussels effect on large platforms in the EU and India is that, based on the theoretical understanding of the Brussels effect, it is not the *de facto* Brussels effect. However, it is a *de jure* Brussels effect, in the comprehension that the Indian legislation has taken one of the flavor of the EU legislation and made it its own. It is not the same legislative thought process of achieving a level playing field or regulating content. The Indian regulation is said to have a flavour of the Brussels effect by regulating platforms.

Considering the Brussels effect is only one aspect of differences in legislation. The takeaway from this paper is that large platforms across the globe are being regulated. The reasoning may be based on national necessities, but the rise of the large platforms and their regulation are becoming the norm of the day.

8. The Means to the End of Regulating Large Platforms

Firstly, The DMA applied to gatekeeper platforms as discussed above. However, the DMA does not apply to other (non-gatekeeper) platforms. The Digital Services Act (DSA) recognises the particular impact of online platforms on the economy and society.[54] It sets a higher standard of transparency and accountability on how the providers of such platforms moderate content, advertising, and algorithmic processes.[55] The DSA introduces new obligations on intermediary services to disclose to regulators how their algorithms work, how decisions to remove content are taken, and how advertisers target users.[56] Intermediary services need to provide information on restrictions they impose in relation to their service in their terms and conditions, including information on policies, procedures, measures and tools used for content moderation and algorithmic decision-making.[57]

The IT Rules apply to all intermediaries. The rules provide guidelines and a code of ethics to be complied with by all intermediaries and additional compliance obligations to significant social media intermediaries.[58] Though enacted to curb the spread of fake news and misinformation, these rules apply to all intermediaries. All intermediaries have to provide information about their privacy policies, data use, removal of information, termination of users' and access and establish grievance redressal mechanisms.[59]

Secondly, gatekeeper platforms have not been listed. However, they include core platform services of online search engines, online intermediation services, social networks, video-sharing

[54] Proposal for a regulation For Digital Services (Digital Services Act) and amending Directive 2000/31/EC. Christoph Busch and Vanessa Mak, 'Putting the Digital Services Act in Context: Bridging the Gap between EU Consumer Law and Platform Regulation' [2021] Journal of European Consumer and Market Law.

[55] Proposal for a regulation For Digital Services (Digital Services Act) and amending Directive 2000/31/EC Explanatory Memorandum; 'The Digital Services Act Proposal- BEUC Position Paper' (2021) BEUC-X-2021-032; 'Shaping Europe's Digital Future- Making the Digital Revolution Work for Global Sustainability.' (16 September 2020).

[56] Proposal for a regulation For Digital Services (Digital Services Act) and amending Directive 2000/31/EC Recitals 57, 58, 60, 62, 64 and 99; Article 12, Article 54 and Article 57.

[57] ibid Article 12- Terms and Conditions. 'Regulation of News Recommenders in the Digital Services Act: Empowering David against the Very Large Online Goliath' (*Internet Policy Review*); Samuel Stolton, 'Commission Mulls Restrictions on Platform Data Use in Digital Services Act' (*www.euractiv.com*); 'EU: Regulation of Recommender Systems in the Digital Services Act' (*ARTICLE 19*).

[58] The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. Rule 3 and 4.

[59] ibid Rule 3(1)- Due Diligence by an Intermediary, Rule 3(2)- Grievance redressal mechanism of intermediary .

platforms, communication platforms, operating systems, cloud services, and advertising services provided by platforms.[60] The gatekeeper platforms sought to be targeted big technology companies of 'GAFAM'- Google, Amazon, Facebook, Apple and Microsoft. Though other platforms could satisfy the thresholds under the DMA, these platforms are likely to be the main subjects of the Act.

Similarly, though the central government has specified the threshold limits under the IT rules, there is no list of significant social media intermediaries. However, from the objectives of these rules, it can be deduced that they apply to platforms like Facebook, including WhatsApp and Instagram, Twitter, Telegram, WeChat, Google, Apple, Microsoft and any intermediary that enables the creation, uploading, sharing and dissemination, modification or access to information.[61]

In May 2021, WhatsApp filed a case in the Delhi High Court seeking the non-application of the significant social media intermediary rules to WhatsApp and argued that the application would violate people's right to privacy by requiring copies of information to be stored on the application.[62] The Delhi High Court also directed Twitter to provide details of its compliance with the IT rules in response to a petition that stated that the platform had not complied with the Rules. The Court stated that Twitter is to abide by these rules and appoint Chief Compliance Officer, Resident Grievance Officer and Nodal Contact Person.[63] Google has sought interim relief against its search engine being classified as a significant social media intermediary under the purview of IT Rules. In its plea to the Delhi High Court, the global technology giant asked that a previous ruling directing it to remove objectionable content from its search results globally.[64]

[60] Proposal for a regulation on contestable and fair markets in the digital sector (Digital Markets Act) 2 Article 2(2)- Core Platform Service, Explanatory Memorandum- Context of the proposal- Reasons for and objectives of the proposal.
[61] 'Digital Intermediary Guidelines Evoke a Wave of Litigation in India' (*Managing Intellectual Property*); 'An Update On India's Information Technology (Intermediary Guidelines And Digital Media Ethics Code) Rules, 2021 - Media, Telecoms, IT, Entertainment - India'.
[62] 'Delhi High Court Issues Notice in WhatsApp Plea against IT Rules, 2021 Provision on Tracing First Originator' (*Bar and Bench - Indian Legal news*).
[63] 'Delhi High Court Directs Twitter to Take down Five Tweets of Audrey Truschke against Vikram Sampath' (*Bar and Bench - Indian Legal news*).
[64] 'Google India IT Rules: Google Says India's New IT Rules Not Applicable to Its Search Engine - The Economic Times'.

In petitions before the Bombay High Court and the Madras High Court, the petitioners challenged the constitutional validity of the code of ethics and the guidelines of these Rules.[65] The petitioners argue that these Rules are the responsibility of platforms to regulate the information disseminated on the platform that could bring about a chilling effect regarding the right to freedom of speech and expression of writers/editors/publishers. The petitions were transferred to the Supreme Court of India to interpret the constitutional validity of the IT Rules.

The cases before the Courts in India stand as an example of how unclear provisions of the law enable improper interpretations of its provisions. Arguments placed by platforms in the non-application of the Rules and questioning the constitutional validity of these provisions indicate the ambiguity in the rules. The judgements of these cases are eagerly awaited as they could provide further clarity in legislation and would lead to reduced ambiguity in interpretation.

[65] *Nikhil Mangesh Wagle vs Union Of India* High Court of Bombay WPL-14172 & PILl-14204 od 2021 17; *Digital News Publishers Association and Mukund Padmanabhan vs Union of India and Other Connected Matters* High Court of Madras W.P.Nos.13055 and 12515 of 202.

9. Conclusion

Certain similarities and differences are highlighted from the above comparison of the understanding of large platforms- gatekeepers and significant social media intermediaries.

The EU includes a range of core platform services that gatekeeper platforms can perform. In contrast, significant social media intermediaries are limited to performing social media intermediation services in India.

In the EU, the focus is on various quantitative and qualitative aspects; however, the focus is solely on registered users in India. The Commission has vast powers to determine other platforms as gatekeepers, and in India, the threshold can be amended by the Central Government,

The difference in the objective of creating a healthy competitive environment and a level playing field and the curbing of fake news has led to the creation of differential approaches towards regulating large platforms.

As these concepts are different, the obligation that would be placed upon them would also differ. The DMA deals with more core platform services in comparison to the significant social media intermediaries focused on by the IT Rules. The differences in the ambit covered by the legislation also impact the obligations placed on the gatekeeper platforms and significant social media intermediaries. For example, financial contributions towards rankings are to be disclosed only by significant social media intermediaries. In contrast, ranking transparency obligations are to be adhered to by gatekeeper platforms under the DMA and by all platforms under the ambit of the DSA.

The comparative study raises various questions of whether the ambit of these legislations is too broad, narrow, creates watertight compartmentalisation of platforms or creates a generic law?; whether the EU law is wise in covering certain large platforms, focusing on big technology companies or should their ambit be broader?; whether the Indian law's obligations are restrictive on platforms rights and the rights of privacy of Indian Citizens?

These various questions can be answered by looking into the aim of the enactment of the legislation- achieving a level playing field and a competitive market or reducing the spread of fake

news. The Brussels effect theory also analysed the potential impact of the EU legislation on India. However, the basis for the regulation is not the same. This research did not attempt and did not provide answers if a specific system is better than the other- but to stimulate academic discussion into different systems and view different regulatory systems under a critical magnifying glass. It would be appropriate to state whether certain legislation is appropriately or inappropriately drafted.

However, from this comparison, it can be comprehended that although gatekeeper platforms and significant social media intermediaries regulate similar platforms, their objective of regulation is different. While the EU could be wary of resistance from large platforms in implementing and enforcing these rules, India could also attempt to provide broader legislation covering other intermediaries. It would be fascinating to observe the potential impact of the Draft National E-Commerce Policy, which would revamp India's E-Commerce Policy.[66]

The journey to regulating large platforms in the EU has been with the objective of securing healthy competition and consumer welfare; however, the objective behind the IT Rules, focusing on social media intermediaries, has been to curb fake news spread through India. Nonetheless, the large platforms, whether they may be called gatekeeper platforms or significant social media intermediaries, are being regulated to ensure that users are protected.

The DMA is on the precipice of being enacted. The world is set to awake to a new standard of protection set by the EU. Platforms and consumers would be impacted by new legislation. The stage is set for the reactions of various stakeholders to the Act. The EU and India are unions of power in the world, and the impact of their legislation sends ripple waves across the globe. Large platforms are a cause of concern, with economies across the globe calling for awakening to their actions.

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