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EX-ANTE COMPETITION REGULATION OF DIGITAL MARKETS: RETHINKING REGULATORY AUTONOMY UNDER THE GATS NON-DISCRIMINATION OBLIGATION

Abstract

In light of the growing complexities of data-driven digital markets, traditional *ex-post* competition laws are often insufficient, prompting many jurisdictions to adopt *ex-ante* regulatory frameworks. This paper examines the compatibility of *ex-ante* competition regulations, such as the European Union's Digital Markets Act (DMA), with the General Agreement on Trade in Services (GATS), focusing on the potential violation of national treatment and most-favoured-nation obligations. The paper critiques the Appellate Body's narrow approach in *Argentina-Financial Services*, which limits the consideration of regulatory intent in the GATS non-discrimination analysis. It advocates for a broader approach that integrates regulatory purpose in assessing 'likeness' and 'less favourable treatment'. The paper concludes that such a perspective would ensure that *ex-ante* competition regulations, like the DMA, can be justified under GATS without undermining fair competition, while allowing states to regulate digital markets effectively.

JEL Classification: F13; K21.

SUMMARY

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and Effects Test under the GATS 'Likeness' Analysis – 5.1.3 Nature and Extent of Competitive Relationship: Can the Regulatory Context Play a Role? – 5.1.4 Exploring Approaches to Integrate the Regulatory Purpose under the 'Competitive Likeness' Test - 5.2 The 'Less Favourable Treatment' Test under GATS: How Relevant is the Regulatory Context? – 5.2.1 Resurgence of the Aim and Effects Test under the 'Less Favourable Treatment' Analysis? – 5.2.2 The AB Ruling in *Argentina-Financial Services*: A Shift Toward Formalism – 6. Conclusion.

1 Introduction

Regulating data-driven digital markets has presented significant challenges for competition authorities, highlighting the need for *ex-ante* regulation alongside traditional *ex-post* competition law enforcement. Digital markets differ from traditional ones due to their reliance on user data, network effects, and economies of scale, which allow dominant firms to strengthen their market position and suppress competition. The traditional *ex-post* competition law framework, which addresses anti-competitive behaviour only after it occurs, is often too slow and insufficient to address the fast-paced dynamics of digital markets. This has led to a shift toward *ex-ante* regulation, where preemptive measures are taken to prevent anti-competitive practices and ensure fair competition before harm occurs. Various jurisdictions are adopting or considering such regulations to address these complexities effectively.

A frontrunner in *ex-ante* competition regulation is the European Union's (EU) Digital Markets Act (DMA). Introduced in 2022, the DMA targets large digital platforms identified as Gatekeepers and imposes *ex-ante* obligations to prevent anti-competitive behaviour before it occurs. By establishing these preemptive obligations, the DMA seeks to promote fair competition in digital markets, addressing concerns about market dominance and the slow response of traditional *ex-post* competition laws. Meanwhile, other jurisdictions are also experimenting with the *ex-ante* competition regulation of digital markets. Countries like Germany, South Korea, Australia, Canada, Japan, and the United Kingdom have already implemented such laws, while China, India, and the United States (US), among others, are exploring similar initiatives.

However, large US tech corporations, particularly the Big Tech companies, have voiced strong opposition to the adoption of *ex-ante* competition regulations, both within the US and in other jurisdictions. They have criticised regulations like the DMA as potential violations of the World Trade Organisation's (WTO) non-discrimination obligation, contending that its provisions unfairly target US-based digital firms. According to these corporations, the DMA's qualitative and quantitative thresholds for designating Gatekeepers disproportionately capture major US tech companies, while largely excluding digital firms from the EU and other countries. This, they argue, places US firms at a competitive disadvantage by subjecting them to strict *ex-ante* obligations, while competitors from the EU and other WTO Members remain regulated under the comparatively lenient *ex-post* competition framework.

Given this background, this paper examines whether *ex-ante* competition regulations constitute *de facto* discrimination under the General Agreement on Trade in Services (GATS). Specifically, it analyses the consistency of these regulations with the national treatment (NT) and most-favoured-nation (MFN) obligations under GATS. Using the DMA as a case study, the paper revisits the central debate on whether and to what extent the regulatory context of a measure should be considered in assessing 'likeness' and 'less favourable treatment' under Articles II and XVII of GATS. This analysis is particularly relevant when such measures cannot be justified under the closed list of regulatory justifications under the GATS general exceptions clause, which do not account for the complexities of digital markets.

This issue has gained renewed attention following the Appellate Body's (AB) decision in *Argentina-Financial Services*, the most recent case addressing regulatory autonomy under the GATS non-discrimination obligation. In this ruling, the AB significantly limited the consideration of regulatory intent in GATS non-discrimination analysis. This marks a departure from both prevailing scholarly perspectives and the WTO's evolving jurisprudence, which had been moving towards recognising the regulatory purpose behind measures under the non-discrimination analysis. It has far-reaching implications for modern regulatory frameworks, particularly *ex-ante* competition laws.

This paper critiques the AB's position, arguing for the inclusion of regulatory intent either in the 'likeness' assessment or the evaluation of 'less favourable treatment'. Accordingly, we examine other interpretive approaches to the 'likeness' and 'less favourable treatment' analyses that provide greater deference to regulatory objectives. Such approaches, we contend, would preserve the policy space states require to implement measures addressing the intricate challenges of the digital economy.

The paper is organised as follows. Section 2 explores the rationale for *ex-ante* competition regulations in data-driven digital markets, emphasising the inadequacy of traditional *ex-post* competition law in addressing the unique challenges of these markets. Section 3 examines the criticisms by the US big tech lobby against *ex-ante* regulations on the grounds that they amount to *de facto* discrimination under the GATS framework. Section 4 outlines the legal framework for assessing whether *ex-ante* regulations, like the DMA, comply with MFN and NT obligations under GATS. It also highlights the greater role of regulatory context in GATS compared to the General Agreement on Tariffs and Trade (GATT). Section 5 investigates whether the regulatory intent behind *ex-ante* measures can shape the interpretation of 'likeness' and 'less favourable treatment' under the GATS non-discrimination provisions, particularly for *de facto* discrimination, by revisiting WTO jurisprudence on the aim and effects test and reflecting on the AB's reasoning in *Argentina-Financial Services*. Finally, Section 6 concludes.

2 Rationale for *Ex-Ante* Competition Regulation of Data-Driven Digital Markets

Regulating data-driven digital markets has presented substantial challenges for competition authorities worldwide, sparking an active debate on the potential role of *ex-ante* regulation in complementing *ex-post* enforcement of competition law.[1]

This section explores the rationale behind adopting *ex-ante* regulation for digital markets and examines the legislative developments in various jurisdictions to address these challenges.

2.1 Data Dynamics: Traditional Markets versus Digital Markets

In the context of digital markets, data has emerged as a critical strategic asset.[2] Digital firms collect vast amounts of user data through interactions on their platforms, which they leverage to gain valuable insights.[3] This results in a complex reality where services that appear 'free' entail an implicit price where users effectively pay with their personal data. This is markedly different from traditional markets where monetary transactions dominate.[4]

Dominant firms use the data under their control to enhance their services, leverage targeted advertising, and deliver personalised user experiences, which creates substantial competitive advantages for them over new entrants.[5] Such strategies not only suppress competition, but also reinforce market dominance.[6] The following discussion explores how the interplay of data-driven feedback loops, network effects, and lock-in effects creates a self-reinforcing or virtuous cycle that solidifies platform dominance in the digital economy.

A key factor in this self-reinforcing cycle is the ability of data-rich firms to continuously improve their services based on data-driven feedback loops.[7] The **user feedback loop enables firms to leverage** a large user base to gather more data, improve service quality,

[1] OECD, '*Ex Ante* Regulation in Digital Markets – Background Note by the Secretariat' (2021) <https://one.oecd.org/document/DAF/COMP(2021)15/en/pdf> accessed 12 January 2025.
[2] Damien Geradin and Dimitrios Katsifis, 'Strengthening Effective Antitrust Enforcement in Digital Platform Markets' (2021) 18(2) European Competition Journal 365-66.
[3] Ibid.
[4] Laura Veldkamp, 'Valuing Data as an Asset' (2023) 27(5) *Review of Finance* 1545-1562; Dan Ciuriak, 'The Economics of Data: Implications for a Data-Driven Economy' (*Centre for International Governance Innovation*, 2020) <https://www.cigionline.org/articles/economics-data-implications-data-driven-economy/> accessed 16 November 2024.
[5] Markus Spiekermann, 'Data Marketplaces: Trends and Monetisation of Data Goods' (2019) 54(4) Intereconomics - Review of European Economic Policy 208-216.
[6] Andres V Lerner, 'The Role of 'Big Data' in Online Platform Competition' (*SSRN*, 2014) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2482780#:~:text=Lerner-,Andres,Lerner&text=At%20issue%20is%20whether%20the,and%20more%20aggressive%20antitrust%20intervention.> accessed 15 January 2025.
[7] Andrei Hagiu and Julian Wright, 'Data-Enabled Learning, Network Effects and Competitive Advantage' (2023) 54(4) The RAND Journal of Economics 1.

and attract even more users.[8] The **monetisation feedback loop** allows intermediaries to profit from aggregated user data for targeted advertising, generating additional revenue to reinvest in service quality, which in turn attracts further users.[9] These self-reinforcing feedback mechanisms create a strong competitive advantage, making it increasingly difficult for new entrants to challenge incumbents, especially when combined with network effects and lock-in effects, as discussed below.

N**etwork effects** refer to the greater value a user gains from a service as more people use it.[10] For example, in the context of digital markets, the value of an e-marketplace to a consumer grows as the number of sellers on the platform increases, and *vice versa*. These dynamics create significant barriers to market entry, as newcomers must not only replicate existing service quality, but also counteract the entrenched network advantages of their more established counterparts.[11]

While network effects draw users to large platforms, lock-in effects make it difficult for them to leave incumbent platforms in favour of new entrants. Lock-in arises from high switching costs that discourage users from migrating to competing platforms.[12] These costs stem from both data-based and non-data-based mechanisms. For instance, Google Chrome enhances convenience by collecting browsing data to personalize content, storing recommended passwords, and offering autofill functionalities. Additionally, its interface design, including tab management and synchronisation features, foster user familiarity and efficiency, further discouraging switching.[13] These elements reinforce the competitive advantage of the incumbent by locking users into a single ecosystem.

In sum, the self-reinforcing nature of data-driven feedback loops, network effects and lock-in effects create a virtuous cycle of platform entrenchment. This is exacerbated by the vital role played by economies of scale in digital markets.[14] Economies of scale refer to decreased per-unit production costs as the quantity of goods or services produced increases.[15] While economies of scale are common across industries, the effect is more pronounced in digital services.[16] In the latter, the cost of serving an additional user or increasing usage by existing users is minimal.[17] A digital enterprise can generate revenue

[8] Lerner (n 6) 3-19; D Daniel Sokol and Roisin Comerford 'Antitrust and Regulating Big Data' (2016) 23 (1129) George Mason Law Review 1147-48.
[9] Ibid.; OECD, 'Big Data: Bringing Competition Policy to the Digital Era' (2016) <https://web-archive.oecd.org/temp/2022-02-21/414870-big-data-bringing-competition-policy-to-the-digital-era.htm> accessed 18 November 2024.
[10] Geradin and Katsifis (n 2) 363-64.
[11] Andrei Hagiu and Julian Wright, 'When Data Creates Competitive Advantage' (*Harvard Business Review*, 2020) <https://hbr.org/2020/01/when-data-creates-competitive-advantage> accessed 18 November 2024.
[12] Emanuele Giovannetti and Paolo Siciliani, 'Platform Competition and Incumbency Advantage under Heterogenous Lock-in Effects' (2023) 63(1) Information Economics and Policy 1-2.
[13] Jiawei Zhang, 'The Paradox of Data Portability and Lock-In Effects' (2023) 36(2) Harvard Journal of Law & Technology 667-668.
[14] Geradin and Katsifis (n 2) 363.
[15] George J Stigler, 'The Economies of Scale' (1958) 1 The Journal of Law & Economics 54-71.
[16] Sten Thore, 'Economies of Scale in the Digital Industry' in Pedro Conceição and others (eds), *Knowledge for Inclusive Development* (Greenwood Publishing Group 2002).
[17] Geradin and Katsifis (n 2) 363.

through subscriptions, usage fees, or commissions without significantly increasing costs. Even if the service is free, the enterprise still gains valuable user data, which can be monetised or used to enhance the service.[18]

The intersection of these elements leads to the phenomenon described as 'winner-takes-most' markets.[19] Here, competition stretches beyond mere product features or pricing. Instead, the competition centres on establishing dominance within the market.[20] Such dynamics often culminate in market concentration, with one or a few firms overshadowing the landscape. Even when a digital firm does not meet legal definitions of dominance, its influence can be so profound that it behaves like a dominant player.[21]

2.2 Limitations of *Ex Post* Competition Law in Data-Driven Digital Markets

Competition law traditionally operates on an *ex-post* framework, where interventions occur only after anti-competitive behaviour has been identified.[22] This approach, designed in a pre-digital era, struggles to keep pace with the unique complexities of digital markets.

As mentioned, digital markets diverge significantly from traditional markets. They are characterised by features such as multi-sided platforms,[23] lock-in effects, network effects, zero-price services, and significant access to consumer data.[24] These characteristics complicate the delineation of relevant markets and the assessment of dominance among digital entities. As a result, incumbents can consolidate their market positions, allowing even non-dominant digital enterprises to exert considerable market influence and evade regulatory scrutiny.[25]

Second, the complexity of delineating the 'relevant market' and assessing the dominance of digital enterprises in the said market adds substantially to the time taken to redress complaints against such enterprises.[26] The present *ex-post* framework of competition law is not designed to facilitate timely and speedy redressal of anti-

[18] Richard A Posner, 'Antitrust in the New Economy' (2000) John M. Olin Program in Law and Economics Working Paper No. 106.
[19] Cyrille Schwellnus and others, 'Labour Share Developments Over the Past Two Decades: The Role of Technological Progress, Globalisation and "Winner-Takes-Most" Dynamics' (2018) OECD Economics Department Working Paper No. 1503; OECD, 'The Evolving Concept of Market Power in the Digital Economy – Note by Brazil' (2022) <https://one.oecd.org/document/DAF/COMP/WD(2022)31/en/pdf> accessed 15 January 2025.
[20] International Monetary Fund, 'World Economic Outlook: Growth Slowdown, Precarious Recovery' (*IMF Report*, 2019) 55-57.
[21] Lina Khan, 'Amazon's Antitrust Paradox' (2018) 126(3) Yale Law Journal 710-805.
[22] Michael G Jacobides and Ioannis Lianos, 'Ecosystems and Competition Law in Theory and Practice' (2021) 30(5) Industrial and Corporate Change 119-1229.
[23] Michael A Cusumano, 'The Evolution of Research on Industry Platforms' (2022) 8(1) Academy of Management Discoveries 7-14.
[24] OECD (n 9).
[25] Alok Prasanna Kumar and Manjushree RM, 'Data, Democracy and Dominance: Exploring a New Antitrust Framework for Digital Platforms' in Centre for Communication Governance (ed), *The Future of Democracy in the Shadow of Big and Emerging Tech* (National Law University Delhi Press 2021) <https://ccgdelhi.s3.ap-south-1.amazonaws.com/uploads/the-future-of-democracy-in-the-shadow-of-big-and-emerging-tech-ccg-248.pdf> accessed 20 November 2024.
[26] Geradin and Katsifis (n 2) 372.

competitive conduct by digital enterprises, given the extensive fact-finding and a tiered adjudicatory process involved in *ex-post* enforcement proceedings. Moreover, *ex-post* enforcement does not always lead to optimal restoration of competition in evolving and fast-paced markets. Investigations into incumbent players under *ex-post* competition law, which begin *after a* contravention has occurred, are resource-intensive and time-consuming.[27] Meanwhile, the market may irreversibly tip in favour of the incumbent and consequently drive out competitors.[28] The harm thus caused is irremediable *ex post facto*. Moreover, *ex-post* competition investigations are limited to the narrow claims made in each specific case.[29] As such, they may not effectively address repeated conduct by the same digital enterprise or similar conduct by different enterprises.

Given these considerations, regulators across several jurisdictions have come to the conclusion that the powers of competition authorities under the *ex-post* model may fall short in facilitating the early detection and intervention necessary to prevent irreparable harm in digital markets.[30] As a response, many jurisdictions have either adopted or are contemplating introducing *ex-ante* regulations to complement *ex-post* competition enforcement.[31] The rationale driving this shift is that the benefits associated with proactive monitoring and intervention in digital markets will likely outweigh the risks of over-regulation inherent in the *ex-ante* approach.[32]

2.3 Emergence of *Ex Ante* Competition Regulations across Jurisdictions

Ex-ante regulation of digital markets entails a framework that preemptively addresses potential anti-competitive behaviours and structural inefficiencies before they manifest. In contrast to *ex-post* enforcement—which responds after a violation has occurred—*ex-ante* regulation imposes specific obligations and prohibitions on dominant digital platforms. It seeks to complement the *ex-post* enforcement of competition law by effectively setting the groundwork to mitigate risks associated with monopolistic practices and market distortions in advance.

The EU's DMA represents a pioneering effort in *ex-ante* competition regulation. Similarly, other jurisdictions have either implemented or are in the process of introducing

[27] Congressional Research Service, 'Regulating Big Tech: CRS Legal Products for the 118th Congress' (2024) <https://crsreports.congress.gov/product/pdf/LSB/LSB10889> accessed 20 November 2024.
[28] Nicolas Petit, 'The Proposed Digital Markets Act (DMA): A Legal and Policy Review' (2021) 12(7) Journal of European Competition Law & Practice 529-541.
[29] Geradin and Katsifis (n 2) 372-73.
[30] UNCTAD, 'Global Competition Law and Policy Approaches to Digital Markets' (Report of the United Nations Conference on Trade and Development, 2024) <https://unctad.org/system/files/official-document/ditcclp2023d7_en.pdf> accessed 15 January 2025.
[31] See, for example, the European Union's Digital Markets Act (2022); the United Kingdom's Digital Markets, Competition and Consumers Act (2024); South Korea's App Store Act (2021); Australia's News Media and Digital Platforms Mandatory Bargaining Code (2021); and Canada's Online News Act (2023).
[32] Congressional Research Service (n 27).

such legislation. Germany,[33] South Korea,[34] Australia,[35] Canada,[36] Japan,[37] United Kingdom,[38] have already enacted ex-ante competition laws, while countries like China,[39] India,[40] and the US,[41] among others, are considering similar measures.

In what follows, Section 2.3.1 delves into the substantive features of the EU *ex-ante* regulation, the DMA, to understand its overall design and architecture for *ex-ante* regulation, followed by Section 2.3.2, which presents a summary overview of *ex-ante* regulations that have been implemented or are under consideration in other jurisdictions.

2.3.1 Overview of the EU's DMA

In 2022, the EU enacted the DMA, establishing itself as the first jurisdiction to implement a framework of *ex-ante* regulation for digital markets, designed to work alongside its existing *ex-post* competition law under Articles 101 and 102 of the Treaty on the Functioning of the European Union. The adoption of the DMA was motivated by several factors, notably the protracted timelines associated with *ex-post* investigations and the tendency of digital markets to inherently favour large incumbents, leading to a risk of irreversible market tipping.[42]

2.3.1.1 Scope of Application and Designation of Gatekeepers under the DMA

The DMA applies exclusively to large entities identified as 'Gatekeepers'.[43] To qualify for Gatekeeper status, an entity must offer at least one of the eight specified 'core platform services' outlined in the DMA. These services include online intermediation, online search engines, video-sharing platforms, virtual assistants, social networking, communication platforms, advertising services, operating systems and cloud services.[44] Furthermore, the European Commission (EC) retains the authority to integrate emerging digital services into this framework following a market investigation.[45]

[33] The Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen* - GWB) (2021).
[34] The Telecommunications Business Act (2021).
[35] Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act (2021).
[36] Online News Act (2023).
[37] Act on Promotion of Competition for Specified Smartphone Software (2024); and Act on Improving Transparency and Fairness of Digital Platforms (2021).
[38] Digital Markets, Competition and Consumers Act (2024).
[39] The Draft Classification Guidelines (2021); and Draft Responsibility Guidelines (2021).
[40] Digital Competition Bill (2024).
[41] American Innovation and Choice Online Act (2022); Open App Markets Act (2022); and Ending Platform Monopolies Act (2021).
[42] Petit (n 28) 529.
[43] See, Article 3(1) of Digital Markets Act (2022) (DMA). For an overview of the DMA, see, Nicolas Petit (n 28); and Jorg Hoffmann, Liza Hermann, and Lukas Kestler, 'Gatekeeper's Potential Privilege – The Need to Limit DMA Centralization' (2024) 12(1) Journal of Antitrust Enforcement 126-147.
[44] Article 2(2) DMA.
[45] Article 19(1) DMA.

The DMA establishes two pathways for designating an entity as a 'Gatekeeper': the first involves meeting specific quantitative thresholds outlined in the regulation,[46] while the second allows for designation via the EC's residual authority.[47] To determine Gatekeeper status, a comprehensive assessment of both qualitative and quantitative criteria as outlined in the DMA is necessary.

For an entity to qualify as a Gatekeeper under the DMA, it must meet three specific qualitative criteria:

i. It must exert a significant influence on the internal market of the EU,
ii. It must operate a core platform service that acts as a critical gateway for business users to reach end users, and
iii. It must maintain an entrenched and durable position competitive position in its operations, or it must be likely to attain such a position in the near future.[48]

For greater clarity, the DMA specifies that the qualitative thresholds above are deemed satisfied if the quantitative thresholds below are met.

i. An entity is presumed to have a significant impact if it operates the same core platform service (e.g., search engines, social networking, or online marketplaces) in at least three EU member states and has an annual turnover of at least **€7.5 billion** in the European Economic Area in the last three financial years, or a market capitalisation of at least **€75 billion** in the last financial year.[49]
ii. A service qualifies as a critical gateway between business users and end users if it serves at least 45 million monthly active end users (approximately 10% of the EU population) and 10,000 yearly active business users in the EU.[50]
iii. An entity is presumed to have an entrenched and durable position in the market if it consistently meets the above thresholds for active users and business users over the past three financial years.[51]

2.3.1.2 *Ex-Ante* Obligations under the DMA

The DMA imposes *ex-ante* obligations on Gatekeepers, including both prohibitions and mandatory requirements, concerning the core platform services specified in the designation decision.[52]

The DMA prohibits Gatekeepers from *i)* bundling or tying core platform services,[53] *ii)* restricting users from switching[54] or changing preinstalled default services,[55] *iii)* imposing

[46] Article 3(3) DMA.
[47] Article 3(8) DMA.
[48] Article 3(1) DMA.
[49] Article 3(2)(a) DMA.
[50] Article 3(2)(b) DMA.
[51] Article 3(2)(c) DMA.
[52] Article 5 DMA.
[53] Articles 5(7) and 5(8) DMA.
[54] Article 6(6) DMA.
[55] Article 6(4) DMA.

platform parity clauses,[56] and *iv)* engaging in self-preferencing practices.[57] Further, Gatekeepers are restricted from processing or cross-using data obtained through their core platform unless they meet notice and consent requirements under the EU's General Data Protection Regulation.[58] The DMA also prohibits Gatekeepers from using non-publicly available data generated by or provided by business users while using their core platform services.[59]

In addition to the prohibited conduct above, the DMA mandates Gatekeepers to ensure third-party software interoperability with their operating systems (OS) and provide free, effective interoperability for third-party hardware and software providers using core platform services.[60] This includes parity in how third-party and Gatekeeper features interact with the OS or virtual assistants. Further, Gatekeepers are required to adopt transparent, fair, and non-discriminatory practices in relation to self-preferencing.[61] They must also allow users to uninstall default software easily, except when such services are essential to the OS or device functionality.[62]

The DMA also requires Gatekeepers to provide end users with free technical tools to port data generated through core platform services.[63] Business users must also receive free, continuous, real-time, and high-quality access to all data generated using the Gatekeeper's core platform service.[64] Further, to reduce data concentration in online search markets, Gatekeepers' search engines must offer third-party search engines anonymised access to ranking, query, click, and view data on fair, reasonable, and non-discriminatory terms.[65]

Finally, the DMA establishes obligations for Gatekeepers who offer number-independent interpersonal communication services (NIICS).[66] Gatekeepers must ensure the interoperability of basic NIICS functionalities with EU third-party providers by providing the required technical interface free of charge. Additionally, the DMA specifies a phased timeline for implementing interoperability across different NIICS features.[67]

2.3.2 Overview of *Ex-Ante* Competition Regulation in Other Jurisdictions

The adoption of the DMA positions the EU as a leader in *ex-ante* competition regulation for digital markets. However, other jurisdictions are also adopting or exploring similar

[56] Article 5(3) DMA.
[57] Article 6(5) DMA.
[58] Article 5(2) DMA.
[59] Article 6(2) DMA.
[60] Article 6(4) DMA.
[61] Article 6(7) DMA.
[62] Article 6(5) DMA.
[63] Article 6(9) DMA.
[64] Article 6(10) DMA.
[65] Article 6(11) DMA.
[66] Article 7 DMA.
[67] Article 7(2) DMA.

regulations. Table 1 outlines countries that have implemented *ex-ante* regulations, while Table 2 highlights the key features of legislative proposals in countries considering such measures.

Table 1: Overview of *Ex Ante* Competition Regulations Adopted in Various Countries

Country	Scope of Application	Nature of *Ex-Ante* Obligations
Germany	Name of Legislation: The 10th Amendment to the German Competition Act, also known as the *Gesetz gegen Wettbewerbsbeschränkungen* (GWB) Act (2021). Digital Firms covered by the Legislation: Companies which *i)* have no competitors, *ii)* are not exposed any substantial competition; or *iii)* have a 'paramount market position in relation to its competitors' (Section 18(1)). This determination may be based on a non-exhaustive set of criteria, including the entity's relative market power, financial strength, access to competitively sensitive data, and its influence on the business activities of third parties (Section 18(3)).	Prohibited Conduct: The German competition authority may prevent companies from engaging in certain anticompetitive behaviours, including abuse of dominant position (Section 19(1)), self-preferencing (Section 19a(2)(1)), hindering competitors' market access through exclusive pre-installation, integration, or advertising restrictions (Section 19a(2)(2)), expanding the dominant position to a new market (Section 19a(2)(3)), using competitively sensitive data in a way that raises barriers to market entry (Section 19a(2)(4)), impeding interoperability (Section 19a(2)(5)), providing insufficient information about their services (Section 19a(2)(6)), or demanding benefits for handling the offers of another undertaking which are disproportionate to the reasons (Section 19a(2)(7)) (See also Sections 20 and 21).

South Korea	Name of Legislation: Amendment to the Telecommunications Business Act, also known as the 'App-Store Act', 2021. Digital Firms covered by the Legislation: The Act aims to promote increased competition in the app market by regulating the conduct of app market business operators as defined in Article 2(13).	Prohibited Conduct: This legislation prohibits app market business operators from abusing their dominant position in the market by *i)* forcing app developers to use the firms' own payment systems (Article 50(9)), *ii)* unfairly delaying the review of mobile content (Article 50(10)), and *iii)* unfairly deleting mobile content from the app market (Article 50(11)). Obligatory Conduct: An app market business operator must prevent damage to users and protect their rights by implementing measures like specifying settlement of payment and refund for mobile contacts in the app's terms of use (Section 22-9(1)).
Australia	Name of Legislation: Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act, 2021. Digital Firms covered by the Legislation: The Act aims to ensure fair remuneration by 'designated' digital platforms to news businesses for their content. The designation of digital platforms is determined based on *i)* whether there is a significant bargaining power imbalance between Australian news businesses and the digital platform or service, and *ii)*	Obligatory Conduct: In case voluntary agreement regarding remuneration cannot be reached with designated digital platforms, registered news businesses have the right to proceed under the Act for bargaining and mediation (Division 6, Section 52ZD to Section 52ZJ) followed by arbitration (Division 7, Section 52ZK to Section ZZE). Designated digital platforms also have a general obligation to *i)* notify news businesses in advance regarding algorithmic

	whether the digital platform has made a significant contribution to the sustainability of the Australian news industry through, *inter alia,* voluntary agreements to remunerate news businesses for their content (Section 52E(3)).	changes (Division 4, Section 52S), *ii)* share information with the entity generating news content relating to user interactions (Division 4, Section 52R), and *iii)* refrain from differentiation between news organisations due to their participation or non-participation under the Act (Division 5, Section 52ZC).
Canada	Name of Legislation: The Online News Act, 2023. Digital Firms covered by the Legislation: This Act applies to 'digital news intermediaries', or companies that operate social media platforms or search engines in Canada where there is a 'significant bargaining power imbalance' between its operator and news business. Factors considered in making this determination include: *i)* the size of the intermediary or operator; *ii)* whether the market for the intermediary gives the operator a strategic advantage over new businesses; and *iii)* whether the intermediary occupies a prominent market position (Section 6).	Prohibited Conduct: A digital news intermediary must not discriminate, show undue preference, or disadvantage eligible Canadian news businesses (Section 51). Obligatory Conduct: The Act aims to ensure that digital news intermediaries designated under the Act fairly compensate news businesses when their content is made available on their services. Platforms must first attempt to reach voluntary commercial agreements with news businesses. If negotiations fail, the parties must follow the bargaining process provided under the Act (Section 18-44).
Japan	Name of Legislation: The Act on Improving Transparency and Fairness of Digital Platforms, 2021.	Obligatory Conduct: Specified digital platforms are required to disclose certain information to both user providers and general users. For user

	Digital Firms covered by the Legislation: This Act designates 'specified digital platforms' whose transparency and fairness must be significantly improved, based on thresholds such as total revenue from sale of goods and services, number of users, or other indicators (Article 4(1)).	providers, platforms must provide details on, among other things, fees charged for goods or services and disclose the criteria used for ranking displayed information, including any sponsored rankings (Article 5(2)(i)). For general users, platforms must, among other things, outline the criteria for ranked results, clearly indicate sponsored rankings, and disclose the terms and conditions related to acquiring or using data on user searches, views, and purchases (Article 5(2)(ii)).
United Kingdom	Name of Legislation: Digital Markets, Competition and Consumers Act, 2024. Digital Firms covered by the Legislation: The Competition and Markets Authority (CMA) may designate an undertaking as having 'strategic market status' (SMS) if it is *i)* linked to the United Kingdom (Section 4), *ii)* has substantial and entrenched market power (Section 5), and *iii)* has a position of strategic significance in respect of the digital activity (Section 6). There is also a turnover threshold for a business to be designated as an SMS, and this must exceed £25 billion in global turnover in the relevant period,	Prohibited Conduct: The CMA has the power to impose conduct requirements on SMS entities under Chapter 3 of the Act. These include the prohibition of discriminatory terms, conditions, or policies against certain users (Section 20(3)(a)), self-preferencing (20(3)(b)), behaviour that enhances its market power or reinforces its strategic significance (Section 20(3)(c)), bundling and tying (Section 20(3)(d)), restricting interoperability (Section 20(3)(e)), limiting how users or potential users engage in relevant digital activities (Section 20(3)(f)),using data unfairly (Section 20(3)(g)), and restricting the ability to use

	or £1 billion of UK turnover in the relevant period (Section 7).	products from other undertakings (Section 20(3)(h)). Obligatory Conduct: SMS entities are required to adhere to specific conduct requirements, including engaging in fair trade on reasonable terms (Section 20(2)(a)), establishing effective procedures for handling complaints and disputes with users or potential users (Section 20(2)(b)), and providing clear, accurate, and easily accessible information about relevant digital activities (Section 20(2)(c)). Additionally, SMS entities must give users or potential users explanations and reasonable notice before implementing changes to a digital activity, particularly those with a material impact (Section 20(2)(d)). Furthermore, they must present users with options or default settings in a way that enables informed and effective decision-making (Section 20(2)(e)).

Table 2: Overview of Countries Contemplating the Adoption of *Ex-Ante* Competition Regulation

Country	Scope of Application	Nature of *Ex-Ante* Obligations
China	Name of Proposal: The Draft Classification Guidelines and Draft Responsibilities Guidelines, 2021. Digital Firms covered by the Proposal: The Draft Classification Guidelines categorise platforms based on number of users, businesses offered, market valuation, and ability to affect sellers' ability to reach their consumers. On the basis of this classification system super platforms are subject to the special obligations detailed in the Draft Responsibilities Guidelines. The criteria for designating a super platform include: *i)* at least 500 million annual active users in China in the preceding year; *ii)* engagement in at least two types of platform business; *iii)* a market value of at least RMB 1 trillion at the end of the previous year; and *iv)* a strong ability to restrict merchants from contacting users (Article 3.3).	Prohibited Conduct: Super platforms are prohibited from using non-public data in the absence of legitimate reasons (Article 1(1)), using tied-in services of a related platform (Article 1(2)), and self-preferencing (Article 2). Obligatory Conduct: Super platforms to promote interoperability of services among other platform operators (Article 3), adhere to principles of fairness (Article 2), ensure strong data protection (Article 4), implement compliance mechanisms (Article 5), conduct risk-assessments (Article 6 and 7), be subject to an independent audit (Article 8), use their resources to promote innovation (Article 9) and prevent crime and illegal activity on their platform (Article 10-14).
India	Name of Proposal: Digital Competition Bill, 2024. Digital Firms covered by the Proposal: The proposal	Prohibited Conduct: The draft proposal prohibits SSDEs from engaging in practices like unfair, discriminatory and non-

	proposes the *ex-ante* regulation of entities susceptible to market concentration, called Systemically Significant Digital Enterprises (SSDEs), like search engines, social networking services, operating systems and web browsers. The committee recommends using quantitative and qualitative thresholds to identify SSDEs. The quantitative criteria include an entity's significant financial strength based on factors like turnover, gross merchandise value, and market capitalisation, as well as significant spread based on the number of businesses and end users in India. The qualitative criteria include an entity's resources and volume of aggregated data (Section 3).	transparent dealing (Section 10), self-preferencing (Section 11), using non-public data of business users to compete with them (Section 12(1)), using or sharing users' personal data across services or with third parties without their consent (Section 12(2)), restricting users from using third-party applications (Section 13), preventing business users from contacting customers, promoting offers, or directing them to other services, unless such restrictions are essential to its core services (Section 14), and tying and bundling (Section 15).
United States of America	Name of Proposal: The American Innovation and Choice Online Act, 2022 Digital Firms covered by the Proposal: This proposal, if enacted, would cover online platforms with *i)* at least 50 million monthly active US-based users, or 100,000 US-based monthly active business users at any point during the 12 preceding months; *ii)* owned or controlled by an entity with annual sales exceeding $550 billion, or average market capitalization exceeding $550	Prohibited Conduct: The proposed legislation prohibits 10 categories of conduct, including self-preferencing (Section 3(a)(1)) and Section 3(a)(9)), limiting a competitor's products, services, or business from competing on the platform in a way that significantly harms competition (Section 3(a)(2)), discriminating in the application of their terms of service among similarly situated business users, harming competition (Section 3(a)(3)), restricting

	billion, or at least 1 billion worldwide monthly active users in the preceding 12 months; and *iii)* is a "critical trading partner" for the sale or provision of any product or service offered on or directly related to the platform (Section 2(a)(5)(B)).	interoperability (Section 3(a)(4)), tying and bundling (Section 3(a)(5)), using non-public data generated by users (Section 3(a)(6)), restricting a business user from accessing data it generates on such platforms or data that platform users generate by interacting with a business user's products or services (Section 3(a)(7)), app pre-installation and steering (Section 3(a)(8)), and retaliation against users for raising good faith concerns (Section 3(a)(10)).
	Name of Proposal: The Open App Markets Act, 2022 Digital Firms covered by the Proposal: The proposal aims to prevent prominent app-store operators from engaging in anti-competitive practices in app markets. This legislation would apply to a 'covered company', which is defined as any person that owns or controls an app store for which users in the United States exceed 50,000,000 (Section 2(3)).	Prohibited Conduct: The proposed legislation aims to protect a competitive app market by prohibiting covered companies from certain types of conduct, including self-preferencing (Section 3(e)), exclusivity and tying with respect to in-app payment systems (Section 3(a)), interference with legitimate business communications (Section 3(b)), use of non-public business information derived from a third-party app for the purpose of competing with that app (Section 3(c), impeding interoperability (Section 3(d)), and self-preferencing in search (Section 3(e)).

		Obligatory Conduct: Covered Companies shall provide developers timely, equivalent access to OS interfaces, development information, and hardware/software features (Section 3(f)).

3 *Ex-Ante* Competition Regulations and Concerns over Potential Violation of the GATS Non-Discrimination Obligation: An Overview

The National Foreign Trade Council (NFTC), a prominent US business association advocating for open international trade and tax policies, has raised concerns with the US Trade Representative (USTR) regarding the potential violation of the WTO's non-discrimination obligation by *ex-ante* competition regulations.[68] Representing a broad spectrum of industries engaged in global commerce, the NFTC includes influential players

[68] National Foreign Trade Council, 'Comments Regarding the Compilation of the National Trade Estimate Report on Foreign Trade Barriers' (2024) USTR-2024-0015 8 ('NFTC Report 2024'); King & Spalding, 'The EU Digital Markets Act: Targets Discrimination Against U.S. Companies in Violation of WTO Commitments and Threatens the Re-Set of Trade Multilateralism and Trans-Atlantic Relations' (*KS Law*, 8 June 2021) <https://www.kslaw.com/attachments/000/008/860/original/EU_Digital_Markets_Act_-_Trade_law_and_systemic_implications_8_June_2021.pdf?1624300896> accessed 17 January 2025; Meredith Broadbent, 'The Digital Services Act, the Digital Markets Act, and the New Competition Tool: European Initiatives to Hobble U.S. Tech Companies' (*The Centre for Strategic and International Studies*, 10 November 2020) <https://www.csis.org/analysis/digital-services-act-digital-markets-act-and-new-competition-tool> accessed 17 January 2025; Daniel Rangel and others, '"Digital Trade" Doublespeak: Big Tech's Hijack of Trade Lingo to Attack Anti-Monopoly and Competition Policies' (*Rethink Trade, American Economic Liberties Project*, November 2022) <https://rethinktrade.org/wp-content/uploads/2022/11/20221101-AELP-DocLayout-v7.pdf> accessed 17 January 2025.

in the US tech industry. Notably, Big Tech companies such as Amazon, Google, Meta, and Microsoft serve on the NFTC's board of directors.[69] With their substantial financial and organisational resources, Big Tech exerts significant influence over the NFTC's advocacy priorities, often steering them toward defending their commercial interests.[70]

This influence is evident in the NFTC's approach to *ex-ante* competition regulations. Despite the US contemplating similar regulations domestically, Big Tech has successfully lobbied the NFTC to frame such regulations in other jurisdictions as potential violations of the WTO non-discrimination obligation.[71] At the same time, Big Tech continues to oppose the introduction of *ex-ante* competition regulations within the US itself.[72] The NFTC report highlights concerns about *ex-ante* regulations in countries such as India, Turkey, and Brazil, with particular emphasis on the EU's DMA.[73] The report argues that the DMA disproportionately targets US-based digital firms, violating the EU's WTO obligations by imposing stricter requirements on them compared to their non-US counterparts.

Ex-ante competition regulations, as previously discussed, aim to address potential distortions in digital markets by preemptively regulating certain platforms and digital service providers. The DMA, for instance, identifies Gatekeepers based on specific qualitative and quantitative thresholds, including their size, economic influence, intermediary role, and entrenched market position.[74] Once designated, Gatekeepers are subject to obligations designed to prevent anti-competitive practices, such as bundling services, enforcing platform parity clauses, or engaging in self-preferencing. They must also ensure fair access to data, enhance interoperability, and reduce data concentration.[75] In contrast, companies not classified as Gatekeepers are regulated under an *ex-post* framework, which applies enforcement measures only after anti-competitive conduct has been identified. This dual framework subjects Gatekeepers to more stringent,

[69] National Foreign Trade Council, 'Board of Directors' <https://www.nftc.org/about/board-of-directors/> accessed 17 January 2025.
[70] Rangel and others (n 68) 1; Tony Romm, 'Amazon, Facebook, Other Tech Giants Spent Roughly $65 Million to Lobby Washington Last Year' (*The Washington Post*, 22 January 2021) <https://www.washingtonpost.com/technology/2021/01/22/amazon-facebook-google-lobbying-2020/?itid=lk_inline_manual_10> accessed 17 January 2025; Tony Romm, 'Tech Giants Led By Amazon, Facebook and Google Spent Nearly Half a Billion on Lobbying over the Past Decade, New Data Shows' (*The Washington Post*, 22 January 2020) <https://www.washingtonpost.com/technology/2020/01/22/amazon-facebook-google-lobbying-2019/?itid=lk_interstitial_manual_17> accessed 17 January 2025.
[71] Rangel and others (n 68).
[71] National Foreign Trade Council (n 69).
[72] Anna Edgerton and Emily Birnbaum, 'Big Tech Spent $95 million trying to kill Congress' Most Aggressive Oversight Bill in Years. It's Looking Like It Worked' (*Fortune*, 6 September 2022) <https://fortune.com/2022/09/06/big-tech-spent-95-million-congress-oversight-bill/> accessed 17 January 2025; Kent Walker, 'The Harmful Consequences of Congress's Anti-Tech Bills' (*Google Blog*, 18 January 2022) <https://blog.google/outreach-initiatives/public-policy/the-harmful-consequences-of-congresss-anti-tech-bills/> accessed 17 January 2025.
[73] NFTC Report 2024 (n 68).
[74] See, Section 2.3.1.
[75] See, Section 2.3.1.

preemptive obligations while other firms remain subject to less intrusive, case-by-case enforcement.

The NFTC report asserts that these thresholds disproportionately affect US companies while exempting many EU and other non-US platforms from similar obligations.[76] Although the DMA appears origin-neutral, commentators note that its criteria for Gatekeeper designation result in *de facto* discrimination.[77] In this view, US-based firms are far more likely to be subjected to the DMA's onerous *ex-ante* obligations, while EU and other foreign platforms largely fall under the more lenient *ex-post* competition framework.

Commentators supporting the NFTC's position argue that *ex-ante* competition regulations violate the GATS.[78] To be covered by the GATS, a measure must be adopted by a WTO Member that impacts trade in services.[79] *Ex-ante* regulations are legal instruments adopted by governments, making them 'measures by Members' under Article I.1(3)(a) and Article XXVIII(a) of the GATS. The next step is to determine whether these measures fall under any of the modes of supply specified in Article I:2. The AB report in *US-Gambling*[80] and academic literature[81] suggest that digital services fall under Mode 1 (cross-border supply) and Mode 2 (consumption abroad). Thus, since *ex-ante* regulations affect the competitive conditions for digital services under Modes 1 and 2, they qualify as measures *affecting* trade in services under Article I:1 of the GATS.

The USTR has acknowledged the above concerns in the National Trade Estimate (NTE) Report, which assesses significant obstacles to US exports of goods and services. In both the 2022[82] and 2023[83] NTE Reports, the USTR recognised the DMA as a potential barrier to digital trade. However, the 2024 NTE Report marked a notable shift by excluding the DMA from its list of potential trade barriers. This change reflects a broader policy shift under the Biden administration, which has placed more emphasis on respecting the regulatory priorities of US trade partners rather than solely focusing on defending the interests of US-based companies.[84]

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[76] NFTC Report 2024 (n 68) 8. See also, Coalition of Services Industries, 'Comments for the National Trade Estimate Report on Foreign Trade Barriers Docket Number USTR-2021-0016' (2021) 21.
[77] King & Spalding (n 68); Broadbent (n 68); Rangel and others (n 68).
[78] Ibid.
[79] General Agreement on Trade in Services [1995] (GATS), Article I:1.
[80] WTO, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Report of the Appellate Body (7 April 2005) WT/DS285/AB/R.
[81] Arvin Kristopher Razon, 'Liberalising Blockchain: An Application of the GATS Digital Trade Framework' (2019) 20 Melbourne Journal of International Law 13-15; Usman Ahmed, Brian Bieron and Gary Horlick 'Mode 1, Mode 2, or Mode 10: How Should Internet Services Be Classified in the Global Agreement on Trade in Service?' (*BU School of Law International Law Journal*, 24 November 2015) <https://www.bu.edu/ilj/2015/11/24/mode-1-mode-2-or-mode-10-how-should-internet-services-be-classified-in-the-global-agreement-on-trade-in-service/#_ftn1> accessed 19 November 2024.
[82] United States Trade Representative, '2022 National Trade Estimate Report on Foreign Trade Barriers' (2022) 217 ('NTE Report 2022').
[83] United States Trade Representative, '2023 National Trade Estimate Report on Foreign Trade Barriers' (2023) 173-74 ('NTE Report 2023').
[84] United States Trade Representative, '2024 National Trade Estimate Report on Foreign Trade Barriers' (2024) 1; Simon Lester, 'Katherine Tai on Online Business Models and Digital Regulation' (*International Economic Law and Policy Blog*, 18 March 2024) <https://ielp.worldtradelaw.net/2024/03/katherine-tai-on-online-business-models-and-digital-

The exclusion of the DMA from the 2024 report has drawn significant criticism from the NFTC, which contends that the USTR has not fulfilled its statutory obligation to identify and analyse all major trade barriers affecting US digital firms, regardless of the policy justifications put forth by other countries.[85] Accordingly, the NFTC has submitted comments urging the USTR to include the DMA in the 2025 NTE Report as a potential barrier to digital trade for US firms.[86]

In addition to the DMA, the USTR also identified *ex-ante* competition regulations in other jurisdictions, such as South Korea's App Stores Law[87], Australia's News Media Bargaining Code[88] and Germany's GWB Digitisation Act[89] under the NTE Reports during the period 2021 to 2023, to finally drop these claims under the 2024 NTE Report. As the USTR begins drafting the 2025 NTE report, it remains to be seen whether the Trump administration will reconsider its position on *ex-ante* regulations like the DMA and reinstate it as a potential trade barrier in the digital economy. Recent developments indicate a more confrontational approach, with President Trump signing a memorandum directing scrutiny of the EU's DMA, warning that such regulations dictate how American companies operate within the EU.[90]

4 Approach to Assessing the Consistency of *Ex-Ante* Competition Regulations with the Non-Discrimination Obligation under GATS

As countries explore various forms of *ex-ante* competition regulations to address the abuse of market dominance by large digital platforms, it is crucial that the GATS does not unduly constrain this policy space. The primary objective of such regulations in digital markets is to tackle the unique challenges posed by data-driven platforms and to overcome the limitations of traditional *ex-post* competition enforcement. Countries must retain the flexibility to experiment with regulatory frameworks to ensure fair competition in their digital markets, provided such measures are not protectionist. This aligns with the principle of embedded liberalism, which underpins the WTO framework.

Accordingly, our analysis of the GATS compatibility of *ex-ante* competition regulations focuses on the extent to which countries can justify the regulatory intent behind these

regulation.html> accessed 20 November 2024; Thibault Denamiel, John Strezewski and William Alan Reinsch, 'The Trade Winds are Turning: Insights into the 2024 National Trade Estimate' (*Centre for Strategic and International Studies,* 5 April 2024) <https://www.csis.org/analysis/trade-winds-are-turning-insights-2024-national-trade-estimate#:~:text=It%20instructs%20USTR%20to%20identify,Organization%20Joint%20Statement%20Initiative%20negotiations> accessed 20 November 2024.

[85] NFTC Report (2024) (n 68).

[86] Ibid.

[87] United States Trade Representative, '2021 National Trade Estimate Report on Foreign Trade Barriers' (2021) 333; NTE Report 2022 (n 82) 327.

[88] NTE Report 2022 (n 82) 37; NTE Report 2023 (n 83) 27.

[89] NTE Report 2023 (n 83) 173-4.

[90] Foo Yun Chee, 'US Demands EU Antitrust Chief Clarify Rules Reining in Big Tech' (*Reuters,* 24 February 2025) <https://www.reuters.com/technology/us-demands-eu-antitrust-chief-clarify-rules-reining-big-tech-2025-02-23/?utm_source=chatgpt.com> accessed 25 February 2025.

measures as aimed at fostering fair competition in domestic digital markets, so long as they remain non-protectionist. To explore this further, our analysis focuses specifically on the DMA as a case study. The DMA is widely regarded as a frontrunner in the *ex-ante* regulation of digital markets and has influenced similar initiatives globally.[91] By using the DMA as the focal point, we examine how its regulatory objective of curbing anti-competitive practices by Gatekeepers interacts with the GATS non-discrimination obligation.

As we explore subsequently in this paper, the integration of regulatory intent within the framework of the GATS non-discrimination obligation has long been a subject of debate among trade scholars. Many argue that the unique characteristics of trade in services necessitate greater deference to regulatory autonomy when interpreting the GATS non-discrimination obligation. However, the AB's last ruling on this issue in *Argentina – Financial Services* significantly narrowed the policy space for justifying regulatory intent under the GATS non-discrimination obligation. By adopting an overly formalistic approach, the AB has made it more challenging for countries to defend measures like the DMA under the non-discrimination obligation. While critical of this AB report, we explore alternative approaches from scholarly literature to incorporate regulatory context into the interpretation of the GATS non-discrimination obligation. Doing so would enable countries to better justify legislations like the DMA aimed at regulating the digital economy.

To this end, Section 4 begins by outlining the broad framework of the GATS non-discrimination obligation, focusing on the MFN and NT principles. It then examines whether the DMA would amount to *de facto* discrimination under the GATS. Following this, we address the challenges of defending the DMA under the GATS general exceptions clause. Finally, we argue for integrating the regulatory context into the analysis of either the 'likeness' test or the 'less favourable treatment' test under the GATS MFN and NT obligations. This approach would allow countries pursuing *ex-ante* competition regulations like the DMA to justify their measures aimed at fostering a level-playing-field in the digital economy.

4.1 The Non-Discrimination Obligation and General Exceptions Clause under GATS: An Overview

The GATS non-discrimination obligation is rooted in the principles of MFN and NT under the GATT, 1947. These principles ensure fairness in international trade by requiring Members to provide equal treatment to all trading partners (under MFN treatment) and avoid discrimination between domestic and foreign services and service suppliers (under

[91] Lilla Nóra Kiss, 'The Brussels Effect: How the EU's Digital Markets Act Projects European Influence' (*Information Technology & Innovation Foundation*, 7 March 2024) <https://itif.org/publications/2024/03/07/the-brussels-effect-how-the-digital-markets-act-projects-european-influence/?utm_source=chatgpt.com> accessed 17 January 2025.

NT). These obligations include both *de jure* and *de facto* forms of discrimination and are subject to the general exceptions under Article XIV, which allow Members to justify measures taken in pursuit of legitimate regulatory objectives.

The MFN obligation is covered under Article II of the GATS. It requires WTO Members to provide services and service suppliers from any Member with 'treatment that is no less favourable' than the treatment given to 'like' services and service suppliers from any other country. This obligation applies immediately and unconditionally, ensuring that no Member is disadvantaged in comparison to others in terms of market access or regulatory treatment.

Under the GATS, MFN treatment generally applies across all service sectors. However, pursuant to Article II:2 of the GATS and the 'Annex on Article II Exemptions', Members were permitted to exempt specific measures or service sectors from MFN obligations when the agreement was concluded. Another carve out of the GATS MFN obligation is the waiver for least developed countries (LDCs), adopted during the 2001 Ministerial Conference.[92] This is similar to the enabling clause under the GATT in that it allows preferential treatment, but only for LDC services and service suppliers.[93]

The NT obligation is covered under Article XVII of the GATS. It requires WTO Members to treat services and service suppliers of other Members no less favourably than their own like services and service suppliers. In contrast to the MFN obligation, the NT obligation under GATS applies only to service sectors and modes of supply explicitly included in a Member's Schedule of Specific Commitments.[94] This scheduling framework introduces a flexible and progressive approach to trade liberalisation within the WTO. Using a positive-list approach, Members can individually specify the sectors and modes of supply for which they undertake NT commitments, allowing them to tailor their obligations to align with their domestic policy objectives and developmental priorities.[95] This implies that in the context of *ex-ante* competition regulations, the NT obligation would only extend to those sectors and modes of supply that Members have included in their Schedule of Specific Commitments.

Another issue relevant from the perspective of *ex-ante* competition regulations is whether a commitment made by a WTO Member in a traditional sector can extend to similar services delivered digitally. The AB in *China - Publications and Audiovisual Products* addressed this by adopting an evolutionary interpretation of GATS Schedules, holding that generic terms in a Member's Schedule can evolve with technological

[92] The Fourth WTO Ministerial Conference (Doha, 9-14 November 2001).

[93] As a side note, other exceptions to the GATS MFN obligation include Article III:3 concerning frontier towns, Article VII concerning mutual recognition agreements and Article V concerning economic integration agreements like regional and preferential trade agreements.

[94] WTO, 'Schedules of Specific Commitments and Lists of Article II Exemptions' <https://www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm> accessed 17 January 2025; Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organisation* (Cambridge University Press, 2017) 525 ff.

[95] Van den Bossche and Zdouc (n 94).

developments.[96] It ruled that China's NT commitment for sound recording also applied to digital sound recording.[97] While the broader principle of technological neutrality under GATS remains debated,[98] the AB clarified that sufficiently generic terms in a Member's Schedule can extend to digital services.

This reasoning is equally applicable to distribution services.[99] If a Member's Schedule includes a generic commitment for 'distribution services', it could extend to e-commerce platforms like Amazon. The core function of distribution services—facilitating the movement of goods to consumers—remains consistent across traditional and digital modes. Thus, commitments that are not explicitly limited to physical methods could be interpreted to include digital channels. This would require Members to treat foreign e-commerce platforms like Amazon no less favourably than 'like' domestic competitors, ensuring that WTO rules adapt to the realities of the digital economy.

Furthermore, the GATS non-discrimination obligation encompasses both *de jure* (or 'in law') discrimination and *de facto* (or 'in fact') discrimination.[100] To elaborate, a measure is considered *de jure* discriminatory when the text of the law, regulation, or policy clearly treats the service or service provider from one WTO Member less favourably than that from another. On the other hand, a measure may still constitute *de facto* discrimination if, despite appearing origin-neutral, its application in practice results in unequal treatment between the services or service providers of different WTO Members, thereby favouring one over the other.[101]

Finally, the MFN and NT obligations are subject to the general exceptions under Article XIV of the GATS. This provision allows Members to justify violations of the MFN and NT obligations in pursuit of a narrowly defined and exhaustive list of legitimate regulatory objectives.[102] These exceptions are subject to the *chapeau* to Article XIV, which guards against protectionist regulatory measures that 'constitute a means of arbitrary or unjustifiable discrimination' or 'a disguised restriction on trade in services'.

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[96] WTO, *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, Report of the Appellate Body (21 December 2009) WT/DS363/AB/R, 396.
[97] Ibid., 364.
[98] Ines Willemyns, *Digital Services in International Trade Law* (Cambridge University Press 2021) chapter 4.
[99] WTO, 'Distribution Services' <https://www.wto.org/english/tratop_e/serv_e/distribution_e/distribution_e.htm> accessed 17 January 2025.
[100] WTO, *European Communities – Regime for the Importation, Sale, and Distribution of Bananas*, Report of the Appellate Body (9 September 1997) WT/DS27/AB/R, 234. See also, WTO, *Argentina-Measures Relating to Trade in Goods and Services*, Report of the Appellate Body (14 April 2016) WT/DS453/AB/R, 6.105. Notably, paragraphs 2 and 3 of Article XVII of the GATS explicitly include *de facto* discrimination under the NT obligation by clarifying that both 'formally identical' or 'formally different' treatment could modify the conditions of competition, resulting in 'less favourable treatment'. Natens explains that the clarification contained under these paragraphs is a codification of the GATT 1994 jurisprudence on 'less favourable treatment' and the same interpretation extends to Article II of the GATS in relation to MFN. See, Bregt Natens, *Regulatory Autonomy and International Trade in Services: The EU Under GATS and RTAs* (Edward Elgar Publishing, 2016) 125-127.
[101] For a difference between *de jure* and *de facto* discrimination see, Van den Bossche and Zdouc (n 94) 309.
[102] Van den Bossche and Zdouc (n 94) 325-388 and 339-411.

Based on the above discussion, the legal elements of the MFN and NT obligations under the GATS can be outlined as follows. *First*, it is essential to determine whether the measure in question constitutes *de jure* or *de facto* discrimination. *Second*, the 'likeness' of the services and service suppliers has to be examined, with GATS jurisprudence indicating a presumption of 'likeness' in cases of *de jure* discrimination, i.e., in instances where distinction between services and service suppliers is based exclusively on origin.[103] The *third* element requires an assessment of whether there is 'less favourable treatment' by comparing the treatment accorded to like services and service suppliers. Finally, the MFN and NT obligations are subject to the general exceptions under Article XIV of the GATS. Together, these elements provide the framework for evaluating the compatibility of a measure with the MFN and NT obligations under the GATS.

Against this backdrop, the subsequent analysis uses the DMA as a case study to evaluate the GATS compatibility of *ex-ante* competition regulations.

4.2 *De facto* discrimination and the DMA

The first step in assessing the GATS compatibility of the DMA is to determine whether it constitutes a *de facto* or *de jure* form of discrimination. As outlined earlier, the NFTC argues that *ex-ante* regulations, like the DMA, are facially origin-neutral, as they do not explicitly target US firms. For example, the DMA does not exclusively designate core platform service suppliers from the US as Gatekeepers. Hence, the DMA does not result in *de jure* discrimination. However, the NFTC holds that the thresholds for designating Gatekeepers under the Act disproportionately impact US firms while excluding digital platforms from the EU and other jurisdictions.[104] This creates *de facto* discrimination, with US firms facing more stringent *ex-ante* obligations under the DMA, while non-US firms are subject to less rigorous *ex-post* competition law.

It is worth noting that in 2023, the EC designated six tech giants—Alphabet, Amazon, Apple, ByteDance, Meta, and Microsoft—as Gatekeepers under the DMA.[105] In 2024, Apple's iPadOS and Booking were also designated as Gatekeepers.[106] This brings the total number of core platform services subject to the DMA's regulations to 24. Strikingly, five of these companies are of US origin—Alphabet, Amazon, Apple, Meta, and Microsoft—while ByteDance is based in China and Booking is of Dutch origin. The question that follows is whether such a designation can amount to *de facto* discrimination under the GATS.

[103] WTO, *Argentina – Financial Services* (n 100) 6.38-6.41.
[104] NFTC Report (2024) (n 68) 8.
[105] European Commission, 'Gatekeepers' <https://digital-markets-act.ec.europa.eu/gatekeepers_en#:~:text=On%206%20September%202023%20the,those%20gatekeepers%20have%20been%20designated.&text=Alphabet%20Inc.,Apple%20Inc.&text=ByteDance%20Ltd.,Meta%20Platforms%2C%20Inc> accessed 20 November 2024.
[106] Ibid.

Notably, WTO jurisprudence confirms that both the MFN and NT obligations under the GATS include *de facto* discrimination within their scope.[107] Thus, the key issue is determining if a measure results in *de facto* discrimination. So far, scholars have distinguished two approaches to determining *de facto* discrimination under WTO law: *i)* the asymmetric impact test, and *ii)* the diagonal test.[108] Under the asymmetric impact test, *de facto* discrimination occurs when a measure affects a greater proportion or number of imports from a specific group more negatively than it impacts 'like' domestic services and service suppliers (under NT) or services and service suppliers from another Member (under MFN treatment). On the other hand, under the diagonal test, *de facto* discrimination is considered to exist if even a small number—potentially just a few (or even one)—of the imported services and service suppliers are treated less favourably than any of the services and service suppliers from the domestic industry (under NT) or any other Member (under MFN treatment).

Building on Ehring's example, assume, for instance, a hypothetical situation where 100 domestic services/ service suppliers stand vis-à-vis 100 imported 'like' services/ service suppliers.[109] Under the asymmetric impact test, *de facto* discrimination in the context of NT occurs if more or a higher percentage of imported services/ service suppliers are negatively affected compared to domestic services/ service suppliers. For example, if 6 (=6%) digital firms from the US providing a certain core platform service (eg. social networking services) listed under the DMA are designated as Gatekeepers compared to 3 (=3%) EU digital firms providing the same service, it would result in *de facto* discrimination. On the other hand, under a more stringent interpretation of the diagonal test, a measure will qualify as *de facto* discriminatory if it treats even one imported service/ service supplier less favourably in comparison to one domestic service/ service supplier, regardless of how the other 99 domestic and 99 imported services/ service suppliers are affected by the measure. So, under the diagonal test, there could be *de facto* discrimination in the context of NT if even one US digital firm providing a certain core platform service gets designated as a Gatekeeper under the DMA compared to one EU digital firm providing the same service that is not designated as a Gatekeeper.

The WTO adjudicatory bodies have not been entirely consistent in their findings on whether the diagonal test or the asymmetric impact test should be the basis for assessing *de facto* discrimination.[110] However, the most recent intervention on this point was by

[107] With regard to Art. II GATS, see, WTO, *EC-Bananas III* (n 100) 233. With regard to Art. XVII GATS, see, WTO, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 by Ecuador*, Report of the Panel (12 April 1999) WT/DS27/RW/ECU, 6.149.

[108] Lothar Ehring, '*De Facto* Discrimination in WTO Law: National and Most-Favoured-Nation Treatment – or Equal Treatment?' (*The Jean Monnet Centre for International and Regional Economic Justice*, 2001) <https://jeanmonnetprogram.org/archive/papers/01/013201-04.html> accessed 20 November 2024.

[109] Ibid.

[110] Nicolas F Diebold, *Non-Discrimination in International Trade in* Services (Cambridge University Press, 2010) 43; Ehring (n 108).

the AB in *EC-Asbestos*,[111] which rejected the diagonal test used by the panel and noted in its *obiter dictum* that discriminatory effects must specifically disadvantage the group of imported goods as a whole, requiring evidence of asymmetric impact.[112] Similar to AB's position in *EC-Asbestos*, there is greater support for the asymmetric impact test among scholars and commentators.[113]

In view of the foregoing, based on the asymmetric impact test, to establish *de facto* discrimination under the GATS NT and MFN obligations, the US would need to demonstrate that the DMA disproportionately affects US-based digital platforms offering certain core platform services compared to their counterparts from the EU or other Members providing the same services. Specifically, the US must show that a higher proportion of US platforms are designated as Gatekeepers under the DMA compared to platforms from the EU (for NT) or any other Member (for MFN treatment), creating a higher regulatory burden for US digital firms. This argument aligns with the approach of the AB in *EC-Asbestos*, which emphasises the need to assess the discriminatory effects on imports as a whole rather than focusing on isolated cases of disadvantage under the diagonal test.

Given the likelihood of the US challenging *ex-ante* competition regulations like the DMA on grounds of *de facto* discrimination under the asymmetric impact test, an important question arises: can countries implementing such legislation successfully defend the regulatory intent behind these measures—namely, curbing Gatekeepers from distorting digital markets—within the GATS framework? The most apparent recourse for justifying legitimate regulatory objectives under GATS is the general exceptions clause in Article XIV. However, as the following subsection demonstrates, the grounds for exception under Article XIV are narrowly defined and inadequate to address the regulatory needs of the digital economy. This analysis serves as a segue into the longstanding debates over the extent to which the regulatory context can and should be considered within the 'likeness' and 'less favourable treatment' analysis of GATS' non-discrimination obligation. The following subsection delves into these issues, laying the foundation for a more detailed examination of incorporating regulatory context into the 'likeness' and 'less favourable treatment' analysis under Section 5.

4.3 Justifying *Ex Ante* Competition Regulations under the GATS General Exceptions Clause

Based on the structure of the GATS non-discrimination obligation discussed in Section 4.1, it is clear that when *de facto* discrimination stemming from *ex-ante* competition regulation is established, the most straightforward defense for states implementing such regulations would be to justify the regulatory intent under the general exceptions

[111] WTO, *European Communities - Measures Affecting Asbestos and Products Containing Asbestos*, Report of the Appellate Body (12 March 2001) WT/DS135/AB/R.
[112] Ibid., 100.
[113] Diebold (n 110) 44; Ehring (n 108).

provided in Article XIV of the GATS. However, Article XIV provides an exhaustive and narrowly defined list of grounds for justifying potentially GATS-inconsistent measures.[114] Modelled on Article XX of the GATT 1947,[115] these grounds are limited in scope and were drafted at a time when the regulatory challenges posed by the dominance of mega-digital platforms could not have been anticipated. Consequently, it would be difficult to justify *ex-ante* competition regulations under existing grounds, namely *(a)* public morals and public order;[116] *(b)* human, animal or plant life or health;[117] *(c)* the securing of compliance with GATS-consistent laws or regulations;[118] *(d)* the imposition or collection of direct taxes;[119] and *(e)* agreements of double taxation.[120] In sum, the restrictive nature of Article XIV's justifications makes it challenging to align such measures with the evolving need to address competition distortions caused by dominant digital platforms.

Since the general exceptions clause does not cover all legitimate policy objectives that may necessitate distinctions between services and service suppliers, Natens, among others, emphasises the importance of considering the regulatory intent behind a measure under the GATS MFN and NT analysis in order to avoid 'objectionable constraints on regulatory autonomy'.[121] The basis for reading the regulatory context in the non-discrimination obligation stems from the preamble to the GATS, which recognises 'the right of Members to regulate … the supply of services within their territories in order to meet national policy objectives'. Unlike the GATS, the GATT preamble does not explicitly emphasise preserving Members' regulatory policy space. According to Cossy, this reflects the greater political sensitivity of services trade, which is more heavily regulated and inherently complex due to factors like intangibility of services, varied modes of supply, and the inseparability of services from their suppliers.[122] Scholars argue that these dynamics, coupled with the GATS more intrusive impact on regulatory autonomy, warrant greater consideration of the regulatory context in assessing non-discrimination obligation, particularly in cases of *de facto* discrimination.[123] They support a subjective approach to

[114] Van den Bossche and Zduoc (n 94).
[115] Notably, the grounds for exceptions under Article XX of the GATT are broader than those under Article XIV of the GATS. For a comparison of the GATT and GATS general exceptions clauses see, Nicolas F Diebold, 'The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole' (2008) 11(1) Journal of International Economic Law 44 ff.
[116] Article XIV (a) GATS.
[117] Article XIV (b) GATS.
[118] Article XIV (c) GATS.
[119] Article XIV (d) GATS.
[120] Article XIV (e) GATS.
[121] Natens (n 100) 105. See also, Diebold (n 110) 79-80; Robert E Hudec, 'GATT/WTO Constraints on National Regulation: Requiem for an Aim and Effects Test' (1998) 32(3) Int'l Lawyer 626 ff; Frieder Roessler, 'Increasing Market Access Under Regulatory Heterogeneity: The Strategies of the World Trade Organisation' in OECD (ed), *Regulatory Reform and International Market Openness* (OECD 1996) 121–122.
[122] Mireille Cossy, 'Some Thoughts on the Concept of 'Likeness' in the GATS' in Marion Panizzon, Nicole Pohl and Pierre Sauve (eds), *GATS and the Regulation of International Trade in Services* (Cambridge University Press 2008) 339-341.
[123] Ibid. Similarly, Zdouc argues that 'overtly strict interpretations of the GATS non-discrimination clauses – irrespective of possibly *legitimate policies* pursued by national legislators – could in effect undermine sovereign regulatory powers of WTO Member governments to a larger degree than similarly strict interpretations of corresponding GATT provisions'. See, Werner Zdouc, 'WTO Dispute Settlement Practice Relating to the GATS' (1999) 2(2) Journal of International

the non-discrimination obligation and reject overly formalist or positivist interpretations of the NT and MFN obligations that fail to safeguard *bona fide* domestic regulations while targeting protectionist measures.[124]

While there is broad scholarly support for incorporating the regulatory context into the GATS non-discrimination obligation, scholars diverge on how this could be analytically achieved. Natens, Cossy, and Hudec advocate for considering regulatory intent under the 'likeness' test,[125] while Pauwelyn and Trachtman suggest doing so under the 'less favourable treatment' test.[126] WTO jurisprudence has shown signs of evolving toward accommodating regulatory context within the 'less favourable treatment' analysis.[127] However, the AB's most recent ruling on this issue, in *Argentina-Financial Services*, reversed this trend by endorsing a formalist interpretation of the GATS MFN and NT obligations, significantly limiting the scope for considering the regulatory purpose under these provisions.

The AB's turn to formalism in interpreting the non-discrimination obligation in *Argentina-Financial Services* poses significant challenges to the legitimacy of measures like *ex-ante* competition laws, which fall outside the narrowly defined exceptions under Article XIV GATS. Given this context, Section 5 examines the evolution of WTO jurisprudence and scholarly perspectives on incorporating regulatory purpose within the 'likeness' and 'less favourable treatment' tests of the non-discrimination obligation. Building on this analysis, we critique the shortcomings of the AB's ruling in *Argentina-Financial Services* as regards its implications for regulatory interventions to govern the digital economy like the DMA and advocate for the inclusion of regulatory purpose under either the 'likeness' or 'less favourable treatment' test, as suggested by scholars.

5 *Ex-Ante* Competition Regulation and the GATS Non-Discrimination Obligation: Is the Regulatory Context Relevant?

This Section examines the potential for incorporating the regulatory context into the GATS non-discrimination obligation. Section 5.1 focuses on the 'likeness' analysis, while

Economic Law 342. In contrast, Pauwelyn argues that regulatory intent should be interpreted consistently within the non-discrimination obligation of both GATT and GATS. See, Joost Pauwelyn, 'Comment: The Unbearable Lightness of Likeness' in Marion Panizzon, Nicole Pohl and Pierre Sauve (eds), *GATS and the Regulation of International Trade in Services* (Cambridge University Press 2008) 358-396.

[124] Amelia Porges and Joel P Trachtman, 'Robert Hudec and Domestic Regulation: Resurrection of Aim and Effects' (2003) 37(4), Journal of World Trade 784; Hudec (n 121) 633; Aditya Mattoo and Arvind Subramanian, 'Regulatory Autonomy and Multilateral Disciplines: The Dilemma and a Possible Resolution' (1998) 1(2) Journal of International Economic Law 305.

[125] Natens (n 100) 105-138; Cossy (n 123) 327-357; Hudec (n 121) 626 ff.

[126] Joel P Trachtman, 'Lessons for GATS Article VI from the SPS, TBT, and GATT Treatment of Domestic Regulation' (*SSRN*, 2002) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=298760> accessed 17 January 2025 64; Pauwelyn (n 123) 358-369; Diebold also explores the possibility of treating regulatory purpose as an independent and substantive element of the non-discrimination obligation, while acknowledging the legal challenges associated with justifying this approach. See, Diebold (n 110) 83 ff.

[127] Porges and Trachtman (n 124) 788-797; Cossy (n 122) 345-346; Pauwelyn (n 123) 362-367.

Section 5.2 shifts attention to the 'less favourable treatment' test. It also discusses how the AB's conservative ruling in *Argentina-Financial Services* has made it increasingly difficult for states to justify regulatory interventions like the DMA. Furthermore, the Section investigates scholarly proposals to integrate regulatory context into the 'likeness' and 'less favourable treatment' tests, evaluating whether these approaches provide more effective solutions than the AB's ruling in *Argentina-Financial Services*, especially in the context of modern regulatory interventions in the digital economy.

5.1 The 'Likeness' Analysis under GATS: Exploring Pathways to Accommodate Regulatory Autonomy

Greater deference to regulatory autonomy in the 'likeness' analysis would allow countries implementing regulations like the DMA to argue that platforms designated as digital Gatekeepers under the Act are not 'like' other platforms outside its scope. This argument rests on the premise that Gatekeepers, due to their size, access to data, network effects, etc., hold a greater potential to distort digital markets. Therefore, accommodating the regulatory distinctions that define Gatekeepers under the 'likeness' test could justify their separate treatment within the GATS framework. On this basis, Gatekeepers, subject to *ex-ante* competition obligations, would be distinguished from non-Gatekeepers, who remain governed by traditional competition law applied on a case-by-case and *ex-post* basis. Given this context, the following analysis explores the extent to which the 'likeness' test can incorporate regulatory considerations, enabling a more nuanced interpretation of the differential treatment of various service suppliers.

5.1.1 Combined Reference to 'Service and Service Supplier' under the GATS 'Likeness' Analysis

A key distinction in the 'likeness' analysis under the GATS compared to the GATT lies in the scope of comparison. The GATS explicitly references both 'services and service suppliers', whereas the GATT limits its analysis to products, excluding any consideration of the producers.[128] In other words, the GATS extends the 'likeness' assessment beyond the service itself to include the attributes of the entities providing those services.

This understanding aligns with GATS jurisprudence, which has progressively established that the 'likeness' analysis must account for both services and service suppliers. In *EC-Bananas III*, the panel adopted a simplistic approach, stating that 'to the extent that entities provide these like services, they are like service suppliers'.[129] Similarly, in *Canada-Autos*, the panel applied this reasoning to GATS Article II, treating service

[128] Natens (n 100) 106-109.
[129] WTO, *European Communities-Regime for the Importation, Sale and Distribution of Bananas,* Report of the Panel (22 May 1997) WT/DS27/R/USA, 7.322.

suppliers as 'like' if they provide 'like' services.[130] However, it highlighted the case-specific nature of its decision, leaving open the possibility for future panels to develop a more nuanced analysis. Subsequent cases introduced greater nuance. In *China – Publications and Audiovisual Products*, the panel held that if origin alone drives differential treatment, the 'like service suppliers' requirement is met, but a more detailed analysis is needed when other factors are involved.[131] Similarly, *China-Electronic Payment Services* recognised that while 'like' services may imply 'like' suppliers, this presumption is not absolute and requires a case-by-case analysis.[132] Finally, in *Argentina-Financial Services*, the AB clarified the integrated nature of the 'likeness' analysis under Articles II and XVII of the GATS.[133] According to the AB, the 'likeness' test requires considering both the services and the service suppliers in a holistic manner, with the relative weight of each factor depending on the competitive relationship in the specific case.[134] This marked a shift towards a more comprehensive and balanced approach, recognising the interdependence of services and suppliers in assessing 'likeness'.

Building on GATS jurisprudence, commentators argue that the joint reference to services and service suppliers in Articles II and XVII of the GATS necessitates greater consideration of the regulatory context in the 'likeness' analysis compared to the GATT.[135] They contend that without such consideration, the explicit inclusion of 'service suppliers' in the GATS would be rendered meaningless.[136] The inclusion of service suppliers under the GATS, they argue, indicates an intention to allow for a more detailed assessment of the regulatory factors influencing trade in services, distinguishing it from the GATT's narrower focus on products.[137] In essence, commentators suggest that requiring 'likeness' to be assessed for both the service and its supplier under the GATS should allow for differentiation among service suppliers based on the regulatory context.[138]

In the context of *ex-ante* regulatory frameworks like the DMA, this distinction becomes critical. The DMA targets market distortions caused by dominant digital firms, designated as Gatekeepers, by imposing regulatory obligations tailored to their unique market power. Under the GATS 'likeness' analysis, services are assessed for their competitive relationship based on four key factors: *i)* the nature and characteristics of the services, *ii)* their end-use, *iii)* consumer preferences, and *iv)* service classification.[139] Applying these criteria,

[130] WTO, *Canada-Certain Measures Affecting the Automotive Industry*, Report of the Panel (11 February 2000) WT/DS139/R, 8.46.
[131] WTO, *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, Report of the Panel (12 August 2009) WT/DS363/R, 7.975.
[132] WTO, *China-Certain Measures Affecting Electronic Payment Services*, Report of the Panel (16 July 2012) WT/DS413/R, 7.701, 7.705.
[133] WTO, *Argentina – Financial Services* (n 100) 6.29.
[134] Ibid.
[135] Cossy (n 122) 327; Natens (n 100) 106-109; Zdouc (n 123) 295–346; WTO, 'Negotiations on Emergency Safeguard Measures' (Report by the Chairperson of the Working Party on GATS Rules, 2003 S/WPGR/9) 3.
[136] Cossy (n 122) 329-331; Natens (n 100) 106 ff.
[137] Cossy (n 122) 329.
[138] Cossy (n 122) 327-357; Natens (n 100) 105-138; and Hudec (n 121) 626 ff.
[139] WTO, *Argentina-Financial Services* (n 100) 6.32.

services like Google's online search or Meta's messaging platforms could be considered 'like' the same services offered by smaller competitors within the EU or any other Member. However, the explicit reference to service suppliers in the GATS provides an opportunity to incorporate regulatory context into the 'likeness' analysis. Gatekeepers like Google and Meta possess disproportionate market power and a unique ability to influence market dynamics, distinguishing them from other service suppliers even if their services may be 'like'. This distinction—rooted in the dominant market position of the service suppliers rather than the intrinsic characteristics of the services they provide—forms the basis of their classification as Gatekeepers under the DMA. Therefore, their 'unlikeness' arises not from the nature of the services they provide but from their dominant position as service suppliers and its regulatory implications.

Building on the discussion above, a key question emerges: to what extent does WTO jurisprudence permit the consideration of the regulatory context in assessing the 'likeness' of service suppliers under Articles II and XVII of the GATS? The following sub-section delves into this issue, examining the interplay between regulatory autonomy and the interpretation of 'likeness' in the context of GATS.

5.1.2 The Aim and Effects Test under the GATS 'Likeness' Analysis

The aim and effects test, developed under the GATT framework, sought to expand the traditional 'likeness' analysis by incorporating considerations of a measure's regulatory purpose and its market impact.[140] Introduced in the *US – Malt Beverages*[141] case and elaborated in the unadopted *US – Taxes on Automobiles* panel report,[142] this approach was grounded in GATT Article III:1, which prohibits internal measures that aim to 'afford protection to domestic production'.[143] The test was particularly useful in cases of *de facto* discrimination, where measures did not explicitly distinguish products based on origin.[144]

Under the aim and effects test, a panel would assess whether regulatory distinctions had a legitimate aim and whether they produced a protectionist effect favouring domestic products. If a measure's purpose and effect were unrelated to protectionism, regulators could differentiate between products without breaching GATT obligations. As an advocate of the approach, Hudec argued that it provided greater deference to regulatory autonomy while addressing both trade effects and the *bona fides* of regulatory purposes.[145]

[140] Porges and Trachtman (n 124) 784.
[141] WTO, *United States-Measures Affecting Alcoholic and Malt Beverages*, Report of the Panel (7 February 1992) DS23/R.
[142] WTO, *United States-Taxes on Automobiles*, Report of the Panel (11 October 1994) DS31/R, 5.10; Notably, the Panel Report on *US – Taxes on Automobiles* was not adopted by the GATT Contracting Parties, primarily due to the EU's opposition to the aim and effects test. See, Diebold (n 110) 79.
[143] Ibid., 5.7-5.9.
[144] Hudec (n 121) 626-628.
[145] Ibid.

However, the aim and effects test was ultimately rejected by the AB in *Japan – Alcoholic Beverages II* for the following reasons.[146] *First*, the first sentence of Article III:2 of the GATT on 'like products' does not reference the broader policy goals under Article III:1 of not 'afford[ing] protection to domestic production', which was the basis for justifying the aims and effects test.[147] *Second*, allowing aim and effects considerations could undermine the balance struck under Article XX exceptions, which specifically address justifications for trade-restrictive measures.[148] *Third*, the test could introduce undue subjectivity in evaluating regulatory motives, requiring panels to second-guess a regulator's intent.[149]

The rejection of the aim and effects test extended to the GATS in *EC – Bananas III*. The AB explicitly stated that neither Article II nor Article XVII of the GATS provided a basis for considering a measure's aims and effects.[150] It highlighted that, unlike Article III:1 of the GATT, which contains the phrase 'afford protection to domestic production' that formed the basis for introducing the aim and effects test, the MFN and NT obligations under the GATS do not include such a reference. Instead, under the GATS, the AB noted, regulatory considerations are addressed primarily through the general exceptions clause in Article XIV.[151]

Scholars have also expressed concerns about the aim and effects test, criticising it for introducing a subjective theory of 'likeness' that inherently involves making value judgments between economic considerations and other policy objectives as well as places an undue burden on WTO adjudicatory bodies to determine which regulatory purposes are legitimate.[152] Furthermore, identifying the true regulatory purpose of a trade-restrictive measure is particularly challenging, as many measures are designed to pursue multiple policy objectives simultaneously.[153] This inherent complexity, critics argue, undermines the test's practicality and consistency in application.

In sum, the AB in *EC – Bananas III* effectively closed the door to considering the regulatory context in the GATS 'likeness' analysis by invoking the aim and effects test. However, this raises the subsequent question: to what extent can the regulatory context

[146] WTO, *Japan – Taxes on Alcoholic Beverages*, Report of the Appellate Body (4 October 1996) WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R 18.
[147] Ibid., 4.
[148] Ibid.
[149] Ibid., 27-28.
[150] WTO, *EC-Bananas III* (n 100) 241.
[151] Ibid.
[152] William J Davey and Joost Pauwelyn, 'MFN Unconditionality: A Legal Analysis of the Concept in View of its Evolution in the GATT/WTO Jurisprudence with Particular Reference to the Issue of "Like Product"' in Thomas Cottier, Petros C Mavrodis and Patrick Blatter (eds), *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (University of Michigan Press 2000) 38.
[153] Thomas Cottier and Matthias Oesch, *International Trade Regulation – Law and Policy in the WTO, the European Union and Switzerland* (London: Cameron May & Staempfli Publishers 2005) 407; Petros Constantinos Mavrodis 'Regulatory Barriers and the Principle of Non-Discrimination' in World Trade Law: Past, Present, and Future' in Thomas Cottier, Petros C Mavrodis and Patrick Blatter (eds), *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (University of Michigan Press 2000) 130.

still be considered when assessing the 'nature and extent of the competitive relationship' between services and service suppliers under the GATS 'likeness' analysis?

5.1.3 Nature and Extent of Competitive Relationship: Can the Regulatory Context Play a Role?

Having rejected the aim and effects test for determining 'likeness', WTO adjudicatory bodies have endorsed a GATS 'likeness' analysis focusing on the 'nature and extent of the competitive relationship'.[154] Based on the GATT jurisprudence, this approach emphasises that services and service suppliers are considered 'like' if they are in a competitive relationship with each other. For instance, in *China – Electronic Payment Services*, the panel highlighted that Article XVII aims to ensure equal competitive opportunities for like services and service suppliers and that the determination of 'likeness' must be made on a case-by-case basis.[155] This involves examining the specific circumstances of each case and relying on arguments and evidence to assess whether services and service suppliers are 'essentially or generally the same in competitive terms'.[156]

More recently, the AB in *Argentina – Financial Services* further clarified that the criteria traditionally used to assess 'likeness' for goods under GATT could inform the analysis of 'likeness' in relation to services and service suppliers under GATS.[157] Accordingly, the AB ruled that *i)* the nature and characteristics of the services and service suppliers, *ii)* end-use, *iii)* consumer tastes and preferences, and *iv)* classification of services are the key elements of the 'likeness' analysis under GATS.[158] Further, the AB noted that these criteria must be adapted to account for the specific context of services trade, particularly as, unlike GATT, GATS explicitly considers both services and service suppliers.[159] Another significant distinction from the GATT framework is the existence of multiple modes of supply under GATS Article I:2, which adds a unique layer of complexity to the analysis of 'likeness' under GATS.[160] Nevertheless, the AB emphasised that the fundamental objective of the 'likeness' analysis remains consistent with the GATT approach: to determine whether services and service suppliers are in a competitive relationship. Thus, the AB seemed to make room for considering the regulatory context in the 'likeness' analysis but within the framework of assessing the 'nature and extent of competitive relationship' between the services and service suppliers, rather than treating the regulatory context as a self-standing factor in the 'likeness' analysis.[161]

[154] WTO (n 132) 7.697.
[155] Ibid., 7.701.
[156] Ibid., 7.702.
[157] WTO, *Argentina – Financial Services* (n 100) 6.31.
[158] Ibid.
[159] Ibid., 6.34.
[160] Ibid., 6.33-6.34.
[161] Ibid.

The AB's approach in *Argentina-Financial Services* opens the door to considering how the regulatory context may influence the nature and extent of such competitive relationship, particularly in relation to service suppliers. Cossy and Natens note that the regulatory intent may play a role in determining 'likeness' based on the competitive relationship between service suppliers when assessing *i)* the characteristics of service suppliers and *ii)* consumer tastes and preferences.[162] However, how far the regulatory context can be considered when assessing the characteristics of service suppliers and consumer tastes and preferences is moot.

Under the GATS framework, various supplier-related characteristics, such as company size, skills, technological capabilities, and experience, have been proposed as relevant in determining 'likeness'.[163] While the parties in *EC – Bananas III*, *Canada – Autos* and *US-Gambling* invoked these criteria, panels have generally not made them central to the analysis.[164] Cossy argues that such criteria are difficult to apply consistently, as they may not always reflect the competitive relationship between suppliers.[165] For example, why should company size matter if both large and small firms provide competing services? This issue is especially pertinent in the context of the DMA, where dominant platforms like Google and Meta may offer services that are 'like' those of smaller competitors despite their market dominance. In such cases, relying on supplier-related criteria like annual turnover, market capitalisation, and entrenched market position could potentially result in artificially differentiating core platform service providers that offer essentially 'like' services. Although such criteria might hold relevance in an *aim and effects* test—where the regulatory intent behind a measure is integral to the 'likeness' analysis—they appear less pertinent when assessing the competitive relationship between service suppliers based solely on their inherent characteristics.

Similar concerns arise when incorporating regulatory context into the assessment of service suppliers' 'likeness' based on consumer perceptions. In the case of the DMA, it is unclear whether consumers differentiate between services provided by Gatekeepers like Google, Amazon, and Meta and those of non-Gatekeepers due to the dominant market position of the former. In digital markets, consumer choices do not sufficiently reflect such regulatory distinctions. Instead, consumers tend to prefer services like Google for online search, Amazon for e-commerce, and Meta for social networking, driven by factors such as network effects, low price points, and convenience. These preferences are shaped more by the functional attributes of the services than by concerns about the vast consumer data held by these platforms or their significant influence on shaping consumer choice through algorithmic targeting. Natens also highlights that emphasising consumer preferences places an undue burden on consumers, a responsibility that may be

[162] Cossy (n 122) 336-339; Natens (n 100) 121.
[163] Zdouc (n 123) 333; Markus Krajewski, *National Regulation and Trade Liberalization in Services* (Kluwer Law International, 2005) 105.
[164] Cossy (n 122) 336-338.
[165] Ibid.

unreasonably heavy.[166] Moreover, WTO dispute settlement bodies have not relied on consumer preferences when assessing 'likeness' under GATS.[167] This suggests that integrating consumer perceptions into the 'likeness' analysis remains underexplored in GATS practice and it is difficult to conclude that the market dominance of Gatekeepers has a direct bearing on consumer perceptions.

5.1.4 Exploring Approaches to Integrate the Regulatory Purpose under the 'Competitive Likeness' Test

The AB's rejection of the aim and effects test within the 'likeness' analysis underscores the WTO adjudicatory bodies' reluctance to recognise 'regulatory likeness' as a separate criterion beyond 'competitive likeness'. At the same time, justifying regulatory purpose within the 'competitive likeness' framework remains challenging, as discussed in Section 5.1.3, particularly for *ex-ante* competition regulations like the DMA. This prompts Cossy to question whether there is a need for 'something different' under the GATS.[168] In this context, we believe Natens' proposal to integrate regulatory purpose within the 'competitive likeness' test merits closer consideration.

According to Natens, '[c]ombining an assessment of consumer tastes and habits, and the characteristics of the service supplier, in so far as they are relevant to the supply of the service, appears to be the most suitable way to determine the 'likeness' of two service suppliers'.[169] Applying this approach to *ex-ante* competition regulations, such as the DMA, offers a basis to differentiate between Gatekeepers and non-Gatekeepers under the 'competitive likeness' analysis. Gatekeepers are defined by inherent characteristics such as substantial annual turnover, dominant market capitalisation, and entrenched market positions. These attributes grant Gatekeepers unparalleled control over consumer data, which significantly shape the services they supply and set them apart from non-Gatekeepers.

As discussed in Section 2.1, Gatekeepers leverage their control over data to secure major competitive advantages. By using consumer data to improve services, personalise experiences, and optimise targeted advertising, Gatekeepers generate advantages like network effects and customer lock-in.[170] This allows Gatekeepers to establish market dominance and outperform smaller competitors. In contrast, non-Gatekeepers, lacking comparable access to data, cannot replicate these advantages in the services they supply. They are unable to match the same levels of personalisation, operational efficiency, or consumer retention achieved by Gatekeepers. This disparity underscores the critical

[166] Natens (n 100) 118.
[167] Cossy (n 122) 339.
[168] Ibid.
[169] Natens (n 100) 119 ff.
[170] See, Section 2.1.

influence of Gatekeepers' inherent characteristics on the services they supply, highlighting the importance of factoring these elements into the assessment of 'likeness'.

This approach aligns with the AB's acknowledgment in *Argentina-Financial Services* that the 'likeness' analysis under GATS must adapt to the specific context of services trade, including the characteristics of service suppliers. By emphasising the relevance of regulatory purpose within the 'competitive likeness' analysis, WTO adjudicatory bodies can better address modern regulatory initiatives, such *ex-ante* competition regulations. However, it remains to be seen whether future panels will adopt a more expansive interpretation of the 'competitive likeness' test under GATS, as suggested by Natens.

Next, we turn to explore the extent to which the regulatory context can be incorporated into the 'less favourable treatment' test.

5.2 The 'Less Favourable Treatment' Test under GATS: How Relevant is the Regulatory Context?

Similar to the GATT, a measure is considered to result in 'less favourable treatment' under Articles II and XVII of the GATS if it modifies the conditions of competition in favour of domestic services and service suppliers (under NT) or services and service suppliers from another Member (under MFN treatment).[171] A critical question for our analysis is the extent to which the regulatory context could be considered when assessing 'less favourable treatment' under GATS.

Ex-ante regulations, such as the DMA, can be considered to result in 'less favourable treatment' for platforms designated as Gatekeepers because they modify the conditions of competition to their detriment. The DMA imposes pre-emptive obligations on Gatekeepers, meaning these platforms are required to comply with stringent obligations even before any anti-competitive behaviour is identified. This contrasts with traditional competition law, which generally operates on an *ex-post* basis, intervening only after anti-competitive conduct has been detected. This results in additional compliance costs for Gatekeepers.[172] Moreover, under traditional competition law, the relevant market must be defined, and dominance in the said market established before applying competition rules, followed by a case-by-case analysis of whether the conduct harms competition, typically using an effects-based approach that considers the impact on consumer welfare.[173] The DMA, however, sidesteps the requirement of establishing the relevant market and dominance therein. Instead, it applies predefined qualitative and quantitative criteria to designate Gatekeepers regardless of the market context. Additionally, the DMA

[171] Van den Bossche and Zdouc (n 94) 335-338 and 408-412.
[172] European Commission, *Proposal for a Regulation on Contestable and Fair Markets in the Digital Sector (Digital Markets Act)* COM (2020) 84.
[173] OECD, 'Ex-Ante Regulation and Competition in Digital Markets'*(OECD*, 2021) < https://www.oecd.org/en/publications/ex-ante-regulation-and-competition-in-digital-markets_c83e178d-en.html> accessed 16 March 2025.

imposes strict prohibitory and mandatory obligations on Gatekeepers without considering whether the conduct in question benefits consumers. In sum, the *ex-ante* nature of the DMA, along with its broad, non-case-specific obligations, makes it significantly more onerous than traditional competition law, thereby modifying the competitive conditions to the detriment of the designated Gatekeepers.

In light of the above arguments, it becomes crucial to consider whether the regulatory context can be integrated into the assessment of 'less favourable treatment' under Articles II and XVII of the GATS. Taking into account the regulatory intent behind *ex-ante* competition legislations such as the DMA within the 'less favourable treatment' analysis would mean that such measures would not be deemed to modify the conditions of competition to the detriment of Gatekeepers, as their primary objective is to level the playing field in the digital market. This consideration, however, would depend on the absence of any protectionist intent behind these measures.

5.2.1 Resurgence of the Aim and Effects Test under the 'Less Favourable Treatment' Analysis?

To recap, the aim and effects test—allowing for consideration of the regulatory context behind a non-protectionist measure—was introduced as part of the 'likeness' analysis in *US – Malt Beverages*[174] case and elaborated in the unadopted *US – Taxes on Automobiles*.[175] The basis for its introduction was the phrase 'afford protection to domestic production' under Article III:1 of the GATT. One of the significant points of opposition to its application to the GATS non-discrimination obligation was the absence of the phrase 'afford protection to domestic production' under Articles II and XVII of the GATS.[176]

However, scholars have observed a resurgence of the aim and effects test in WTO jurisprudence, albeit under the 'less favourable treatment' analysis, rather than the 'likeness' analysis as previously applied.[177] In its ruling under Article III:4 of the GATT, the AB in *EC – Asbestos* held that 'the term "less favourable treatment" expresses the general principle, in Article III:1, that internal regulations "should not be applied … so as to afford protection to domestic production"'.[178] Some commentators have interpreted this statement as supporting the aims and effects approach.[179] Subsequently, in *Dominican Republic – Import and Sale of Cigarettes*, the AB found that a measure's detrimental effect on imports could be attributed to factors other than origin, thereby allowing consideration

[174] WTO, *United States-Measures Affecting Alcoholic and Malt Beverages*, Report of the Panel (7 February 1992) DS23/R.
[175] WTO, *United States-Taxes on Automobiles*, Report of the Panel (11 October 1994) DS31/R, 5.10.
[176] WTO, *EC-Bananas III* (n 100) 241.
[177] Porges and Trachtman (n 124) 788-797; Cossy (n 122) 345-346; Pauwelyn (n 123) 362-367.
[178] WTO (n 111) 100.
[179] Rob Howse and Elisabeth Türk, 'The WTO Impact on Internal Regulation – A Case Study of the Canada – EC Asbestos Dispute' in Gráinne de Búrca and Joanne Scott (eds), *The EU and the WTO: Legal and Constitutional Aspects* (Hart Publishing 2001) 299.

of the regulatory context.[180] However, in this case, the factors other than origin were not linked to the measure's aim or purpose but were instead tied to economic factors, such as market share.[181] Finally, in the context of *EC – Approval and Marketing of Biotech Products*, Diebold observes that the Panel required the complainant to provide evidence demonstrating that the differential treatment is attributable to origin rather than to a permissible regulatory objective, such as safety.[182] In conclusion, while WTO jurisprudence has neither explicitly endorsed nor rejected the subjective theory of 'less favourable treatment', there are indications that WTO adjudicatory bodies are inclined to move in this direction.[183]

Recognising the jurisprudential shift towards incorporating regulatory purpose within the 'less favourable treatment' test, Pauwelyn identifies several factors that WTO adjudicatory bodies must consider to ensure that only non-protectionist measures withstand scrutiny under this approach. These include the structure, design, and architecture of the regulation; the manner in which the regulation is applied; the impact of the regulation on the group of imported products compared to the group of like domestic products; evidence of a protectionist purpose, which must be objectively established rather than based on subjective intent; and evidence of alternative non-protectionist purposes that justify the regulation and its differential treatment of like products.[184] According to Pauwelyn, fulfilling just one of these criteria is unlikely to suffice; instead, adjudicators must evaluate and balance these factors collectively.[185] Pauwelyn further notes that there should be some link between the regulation and the non-protectionist objective it aims for; however, this connection does not need to meet the strict standard of a 'necessity' test.[186]

In our view, Pauwelyn's proposed framework for ensuring that only non-protectionist regulatory measures pass scrutiny under the 'less favourable treatment' analysis offers a viable model for integrating regulatory purpose within this analysis. In the context of measures such as the DMA, this framework would ensure that only measures aimed at leveling the playing field in digital markets are justified. Specifically, it would ensure that such measures do not modify the conditions of competition to the detriment of Gatekeepers under the pretext of promoting fairness in digital markets.

[180] WTO, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, Report of the Appellate Body (25 April 2005) WT/DS302/AB/R, 96.
[181] Diebold (n 110) 82.
[182] WTO, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, Report of the Appellate Body (29 September 2006) WT/DS291/R, 7.2514; Diebold (n 110) 82-83. See also, Pauwelyn (n 123) 366.
[183] Diebold (n 110) 83.
[184] Pauwelyn (n 123) 366.
[185] Pauwelyn (n 123) 366-367.
[186] Pauwelyn (n 123) 367-369.

5.2.2 The AB Ruling in *Argentina-Financial Services:* A Shift Toward Formalism

The last AB ruling on the issue of integrating the regulatory context under the 'less favourable treatment' analysis was *Argentina – Financial Services*, where the panel and the AB adopted contrasting positions. The panel's approach allowed for consideration of the regulatory context within the 'less favourable treatment' analysis, while the AB reversed the panel's finding, emphasising a stricter interpretation that focused on whether a measure modified the conditions of competition to the detriment of imported services and service suppliers, with little room to accommodate broader regulatory considerations.

The panel in *Argentina-Financial Services* noted that the GATS preamble highlights the importance of the right to regulate while promoting progressive liberalisation in the trade of services.[187] Further, under Article II:1 of the GATS, the concept of 'treatment no less favourable' applies not only to services but also to service suppliers, introducing additional complexities. In light of these factors, the panel concluded that the potential for regulatory distinctions is consistent with GATS obligations.[188] According to the panel, measures that differentiate between service suppliers may not constitute 'less favourable treatment' if they align with legitimate regulatory objectives. This interpretation reflects the dual objectives outlined in the GATS preamble: fostering transparency and liberalisation while respecting the Members' right to regulate service suppliers to meet national policy goals. In sum, the panel supported a nuanced balance for integrating regulatory considerations into the interpretation of 'less favourable treatment' under GATS.[189]

In contrast, the AB in *Argentina – Financial Services* reversed the panel's interpretation of 'treatment no less favourable' under Articles II:1 and XVII of the GATS, clarifying that this legal standard focuses primarily on whether a measure modifies the conditions of competition, rather than requiring an additional inquiry into the regulatory objectives underlying the measure.[190] The AB emphasised that the GATS structure allows Members to retain flexibilities in their commitments, such as through specific market access and NT commitments, as well as exceptions for national policy objectives under Articles XIV of the GATS.[191]

The AB's reasoning underlined that the non-discrimination provisions of the GATS should focus on whether the measure in question modifies the conditions of competition to the detriment of like services or service suppliers of other Members.[192] The regulatory objectives that might justify such a measure should be addressed instead through the

[187] WTO, *Argentina-Measures Relating to Trade in Goods and Services,* Report of the Panel (30 September 2015) WT/DS453/R, 7.232.
[188] Ibid., 7.233.
[189] Ibid., 7.232-7.233.
[190] WTO, *Argentina-Financial Services* (n 100) 6.106.
[191] Ibid., 6.112, 6.114.
[192] Ibid., 6.126.

general exceptions clause. The AB further clarified that while the regulatory context may not directly influence the 'less favourable treatment' analysis, it can still be relevant depending on whether or not the measure in question modifies the conditions of competition.[193] The AB noted in this regard that,

> [S]uch assessment must begin with a careful scrutiny of the measure, including consideration of the design, structure and expected operation of the measure at issue. In such assessment, to the extent that evidence relating to the regulatory aspects has a bearing on conditions of competition, it might be taken into account, subject to the particular circumstances of a case, and as an integral part of a panel's analysis of whether the measure at issue modifies the conditions of competition to the detriment of like services or service suppliers of any other Member.[194]

The AB's interpretation in *Argentina-Financial Services* imposes a narrow view on the role of the regulatory context in the analysis of 'less favourable treatment' under GATS. According to the AB, the regulatory context can only be considered when the measure in question does not modify the competitive conditions to the detriment of imported services or service suppliers. Practically, this scenario would only apply when there is no 'genuine relationship' between the measure and the adverse impact.[195] However, in cases where such a genuine relationship exists—i.e., where the measure directly affects the competitive opportunities of imported services or service suppliers—the regulatory intent would not be considered in determining whether there has been 'less favourable treatment'. Additionally, the AB emphasised that any regulatory objectives must be justified under the general exceptions clause of Article XIV of the GATS.[196] However, as discussed previously, applying this justification to modern *ex-ante* regulations like the DMA is problematic, as the narrow exceptions outlined in Article XIV do not allow Members to adequately address the dynamic and complex realities of the digital economy. Moreover, as argued by Diebold and Pauwelyn, a subjective interpretation of the non-discrimination obligation does not render the general exceptions clause inutile, as it remains applicable in cases of *de jure* discrimination.[197]

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[193] Ibid., 6.127.
[194] Ibid.
[195] Natens (n 100), 129. See, *United States – Certain Country of Origin Labelling (COOL) Requirements*, Report of the Appellate Body (23 July 2012) WT/DS384/AB/R, WT/DS386/AB/R, 270. This principle is also reflected in footnote 10 to Article XVII of the GATS, which clarifies that when the conditions of competition are affected by the inherent competitive disadvantages of the foreign service provider, such treatment does not constitute less favourable treatment.
[196] WTO, *Argentina-Financial Services* (n 100) 6.113-14.
[197] Diebold (n 110) 80; Pauwelyn (n 123) 367-68; Robert L Howse and Donald H Regan, 'The Product/Process Distinction – An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy' (2000) 11(2) European Journal of International Law 266; Donald H Regan, 'Regulatory Purpose and 'Like Products' in Article III:4 of the GATT (With Additional Remarks on Article III:2)' in George A Berman and Petros C Mavrodis, *Trade and Human Health and Safety* (Cambridge University Press 2006) 454–55.

In light of the above, we argue that the AB's formalist approach in *Argentina-Financial Services*, which excludes regulatory objectives from the 'less favourable treament' analysis, may not be fully equipped to address the realities of modern regulatory measures, such as the DMA, which seek to regulate digital markets. Unlike the AB's rigid interpretation, Pauwelyn's approach provides a more nuanced framework to integrate regulatory purpose within the 'less favourable treatment' analysis. By considering factors such as the structure and application of the regulation, its impact on competition, and evidence of non-protectionist objectives, Pauwelyn's proposed approach enables the justification of non-protectionist regulatory measures within the framework of the 'less favourable treatment' analysis. This approach is particularly relevant for justifying measures like the DMA, which aim to level the playing field in digital markets without altering competitive conditions to the detriment of Gatekeepers. In contrast, the AB's narrow focus in *Argentina – Financial Services* fails to adequately account for such legitimate regulatory objectives, prioritising formal criteria over subjective considerations. As a result, it risks undermining the ability of governments to justify important regulatory measures designed to address complex challenges of the digital economy.

6 Conclusion

As more countries experiment with *ex-ante* regulations to govern competition in their digital markets, it is essential that the GATS does not constrain states' ability to adopt such measures, in keeping with the embedded liberalism principle central to the WTO system. This issue necessitates revisiting longstanding debates about the extent to which the GATS permits deference to the regulatory purpose behind measures that may conflict with the non-discrimination obligation.

The GATS preamble acknowledges Members' right to regulate in pursuit of legitimate national policy objectives, a provision that takes on particular significance in the context of services trade. Services, by nature, present complexities—such as intangibility, varying modes of supply, and the challenge of separating services from their suppliers—that distinguish them from goods. However, the GATS general exceptions clause is narrow in scope, offering only an exhaustive list of justifications for potential violations, which fails to address modern regulatory challenges, particularly in the digital sphere. These factors have prompted scholars to call for a broader consideration of the regulatory context when assessing the GATS non-discrimination obligation, particularly in cases of *de facto* discrimination.

However, in its most recent ruling on this issue in *Argentina-Financial Services*, the AB adopted a rigid formalist approach, concentrating solely on the competitive relationship between services and service suppliers while overlooking the regulatory purpose behind such measures. This approach creates challenges for justifying *ex-ante* competition

regulations, which aim to level the playing field in digital markets by pre-emptively regulating dominant platforms.

In contrast, we advocate for reading the regulatory context through the 'likeness' test, as proposed by Natens, or the 'less favourable treatment' test, as suggested by Pauwelyn. According to Natens, factors such as service supplier characteristics or consumer preferences should influence the determination of 'likeness', provided they have a bearing on the nature of the services supplied. Under Natens' approach, Gatekeepers can be distinguished from non-Gatekeepers based on characteristics such as market dominance and control over consumer data. These elements shape the services Gatekeepers offer, enabling them to leverage advantages like personalised services and network effects—advantages that smaller competitors cannot replicate—making Gatekeepers not 'like' non-Gatekeepers.

Pauwelyn's approach, in turn, allows for the integration of regulatory purpose within the 'less favourable treatment' test, evaluating factors such as the regulation's design alongside objective evidence of a protectionist intent. This framework ensures that only non-protectionist regulatory measures pass scrutiny. In the context of regulations like the DMA, it would ensure that measures designed to foster fairness in digital markets are justified provided they do not unduly alter the competitive conditions to the detriment of Gatekeepers.

In conclusion, compared to the AB's approach in *Argentina-Financial Services*, Natens' and Pauwelyn's approaches offer more compelling frameworks for evaluating the regulatory context, ensuring that *ex-ante* competition measures like the DMA can be justified under the GATS without undermining fair competition in digital markets.