

COMPETITION IN DIGITAL MARKETS IN INDIA AND THE PROPOSED EX-ANTE REGULATORY FRAMEWORK: A LEGAL ANALYSIS OF THE DRAFT COMPETITION BILL, 2024

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Abstract

The global push for digitization leading to a significant expansion of digital platforms across various sectors has introduced new complexities and challenges pertaining to competition regulation in digital markets. There is an increasing need for specialized competition law to promote competition, foster innovation, and safeguard consumer interests in the digital domain. Regulators around the world are currently working on formulating an effective framework to address competition in the digital sphere. There is a growing consensus that traditional methods of ex-post evaluation may not be suitable for assessing the performance of major digital platforms. A significant development in this area is exemplified by the introduction of the Digital Markets Act 2022 by the European Union, which aimed to promote a nascent regime of ex-ante antitrust regulations. Similarly, recognizing the limitations of the existing ex-post framework within the Competition Act, 2002 in addressing concerns pertaining to alleged anti-competitive behaviour of large digital corporations, the Indian authorities have also put forth a proposal for new legislation. It has been recommended by the expert committees to establish a framework for designating certain digital market participants as Systematically Significant Digital Intermediaries (SIDIs), thereby subjecting them to specific regulatory measures under the new law. The proposed bill aims to establish proactive measures to enhance the existing competition regulatory framework by delineating prominent digital corporations with a substantial footprint in India within specific digital sectors, and establishing predetermined guidelines for their operations. This legislation seeks to enforce certain standards on larger corporations depending on their revenue, total merchandise value, user volume, and additional criteria.

Keywords: Ex-ante regulation, Digital Competition, Systemically Significant Digital Enterprises (SSDE)

INTRODUCTION

India is currently acknowledged as a major and swiftly growing digital market on a global scale. The process of digitalization has spurred the growth of sectors such as e-commerce and the development of advanced technologies, such as Artificial Intelligence. This is primarily attributable to the rapid and expansive growth that sometimes transcends national boundaries at an incredibly fast pace. In an ever-changing digital environment, it's becoming increasingly important to maintain fair competition and prevent market conditions from unduly benefiting a small group of powerful companies while disadvantaging smaller businesses and consumers. Over the past decade, regulators and legislators have made efforts to keep pace with rapidly evolving technology. Many argue that strict regulations should be put in place to address harmful behaviours by these large enterprises. Such regulations could also promote transparency in platform design, engagement rules for businesses and users, and the use of private data to distort competition. Implementing proactive regulations is likely to prevent abuse of market dominance by holding enterprises accountable for compliance, allowing regulators to focus on enforcing the law. In such a case, there is merit in amending the competition regulatory framework on an *ex-ante* basis which duly caters to the harmful effects associated with contended practices such as

bundling, tying, self-preferencing and cross-utilisation of data among others.¹ Even if we conceive that the current legislative framework is sufficient to the extent of identifying the anti-competitive practices of digital giants, limitations pertaining to the timing of the intervention² is very crucial. Experts argue that while post-event regulatory measures can alleviate some anti-competitive effects, they are insufficient to counteract the market shifts caused by certain behaviours of large digital platforms. Therefore, proactive measures in the form of pre-emptive regulation may be necessary to remedy and prevent anti-competitive behaviour. Traditional competition law is also considered inadequate due to its case-specific nature and procedural complexities, leading to delays in decision-making, excessive demands on authorities and claimants, substantive standards for establishing infringement, and remedies that do not fully restore competitive processes.³

A digital platform refers to a technology-enabled business model that creates value by facilitating the sharing of information between two or more interdependent organizations. These platforms often connect end-users and producers, enabling them to engage in transactions, and also facilitate the exchange of information among businesses to foster collaboration and the creation of new products and services.⁴ In such environment behemoth wields the capability to establish controlling position over their customers, monopolistically, by leveraging proprietary business data acquired with the help of advanced algorithms, thereby dominating the market. Power of any form and particularly the power to wield the market influencing factors like 'data' is mostly considered as a confidential trade secret and we have limited insight into how such data is used by dominant platforms. This lack of transparency weakens traditional competition law enforcement, which relies on evaluating the positive and negative impacts of business practices (known as rule of reason analysis). In the realm of digital markets driven by power of data, the potential for erecting barriers to entry and driving out new businesses in "winner-takes-all markets" is unrivalled. Unlike traditional markets, competition in digital markets is focused on capturing the market rather than competing within it. Once a player amasses a substantial user base for its product, that product becomes the industry standard, making it extremely challenging for competitors to overthrow it.

Compared to other industries, monopoly wielded by corporations in digital market is enormous and the State and its machinery either lags in detecting monopolistic practice or when such position is discovered it is too late to compensate the damage. Protection against such scenario is challenging under the Competition Act's existing framework which essentially is ex-post framework extending over lengthy enforcement procedures and its machinery set in motion only after the harm is already done. With the sheer volume of its population and internet access available to substantial percentage of the population the digital markets in India is enormous. The emergence of digital markets has led to the rise of companies of unparalleled size and influence compared to those in other sectors. In digital markets, certain entities have emerged as 'gatekeepers' by controlling access to crucial aspects of the digital economy. Despite efforts to enforce competition laws, these companies continue to expand their power.

¹ Carugati, C. (2023). Compliance principles for the Digital Markets Act. Bruegel. <<http://www.jstor.org/stable/resrep54811>> accessed 19 May, 2024.

² Jain, Sumit and Singh, Vikrant, Competition in Digital Markets: An Indian Perspective (June 12, 2024). Available at SSRN: <<https://ssrn.com/abstract=4863926>> accessed 2 July, 2024.

³ See Ibáñez Colomo, P. The draft Digital Markets Act: A legal and institutional analysis (2021). *Journal of European Competition Law & Practice*, 12(7), 561-575. <<https://academic.oup.com/jeclap/article/12/7/561/6357803>> accessed 26 June, 2024.

⁴ Alex Moazed, 'Platform Business Model' <<https://www.an-ohc.com/blo/what-s-a--platformbusiness-model/>> accessed 22 July 2023.

The Competition Act, 2002 was enacted with the objective of promoting competition, reducing abuse of dominant position while adopting an *ex-post*⁵ approach in combating the anti-competitive practices. The technology has given an edge to those who wield the power of money and have the capacity to use the data to create a neo-monopoly which is not expressed in specific terms either in the text of existing laws nor in the precedents. In light of the data consolidation by major digital corporations and the privacy concerns of internet users, it seems that the current reactive approach to intervention may not be sufficient to effectively address the evolving landscape of digital markets. This approach may struggle to promptly identify and rectify the harm caused to fair market competition by the anti-competitive practices of dominant players.

This paper raises the specific issues relating to ever expanding digital markets across various sectors. The challenges in competition regulation in digital markets necessitates the development of specialized competition laws to address anti-competitive practices and safeguard consumer interests. Existing regulatory frameworks may not be adequate to effectively regulate digital markets, leading to the proposal for new legislation in India to address concerns related to anti-competitive behaviour of large digital corporations. One of the foremost reasons of its inefficacy is its inability to prevent anti-competitive combinations and stop them from affecting a large number of populations. The existing law, it is submitted, remains reactionary and consequentialist. The implementation of a specialized regulatory framework for digital markets, may enhance competition, foster innovation, and protect consumer interests in the digital domain.

This paper attempts to answer the following questions:

- What are the key challenges and complexities associated with competition regulation in the digital sphere?
- How can the proposed legislation in India, designating Systematically Important Digital Intermediaries (SIDIs), contribute to enhancing competition and innovation in digital markets?

LITERATURE REVIEW

- The book titled '*Digital Platforms, Competition Law, and Regulation*'⁶ offers a comparative and interdisciplinary view of the challenges that competition law faces in digital markets, highlighting the necessity of maintaining competitiveness in the digital economy to uphold a well-functioning internal market. This book examines the special challenges that the digital economy presents for competition law, stressing the need for tailored regulatory measures to ensure market contestability in platform markets. It advocates for an economic approach to strengthen the effectiveness of competition law in addressing the unique challenges of digital markets while ensuring that regulations do not inadvertently hinder innovation or competition. The book delves into why current regulatory responses, including those in the European Union and other jurisdictions, may be insufficient, addressing procedural, substantive, and other issues that are sparking debates in the antitrust community. It scrutinizes the scope and objectives of digital regulation, the potential impact

⁵ A fact specific *ex-post* regulatory law is only reactionary, which reacts to the action and is consequential to the act in question. The existing regulatory frame work checks the befallen abuse of dominant position and results in irreversible loss to the large number of consumers. The focus of an *ex-ante* regulation is to identify and regulate specific areas/issues in a digital market before the occurrence of any anti-competitive conduct. *Ex-ante* is a regulatory model which works as preventive measure. These regulations may specify codes of conduct for market participants and seek to guide stakeholder behaviour through regulatory intervention.

⁶ Digital Platforms, Competition Law, and Regulation, Eds. Kalpana Tyagi, Anselm Kamperman Sanders and, Caroline Cauffman, Hart Publishing (2024).

of implementing ex-ante rules on market fragmentation, and the suitability of regulatory regimes for substantive assessment in the digital era. Additionally, the book evaluates whether these rules can effectively address contestability concerns in platform markets without compromising other rights like privacy, and their relevance in the current and future digital landscape. It calls for continuous evaluation of regulatory frameworks to adapt to the dynamic nature of digital platforms and the evolving competitive landscape. The book concludes by summarizing the key findings and implications of the discussions on digital platforms, competition law, and regulation, offering insights into the evolving landscape of digital markets and the regulatory responses required to ensure competitiveness and innovation.

- The research paper titled '*Indian Competition Law in the Digital Markets: An Overview of National Case Law*'⁷ presents a thorough analysis of competition law enforcement in digital markets, with a specific focus on the practices of the Competition Commission of India (CCI). It highlights the challenges encountered by the CCI in enforcing competition law in digital markets, particularly in the initial years following its establishment in 2009. The paper explores the evolution of the CCI's approach over time, including the use of market studies and increased enforcement actions in digital markets. This evolution reflects an increasingly sophisticated understanding of the distinct dynamics of these markets. The research paper observes that the CCI has often drawn on frameworks and case law from established jurisdictions such as the EU and the US to guide its decisions. Specific cases have been discussed to illustrate the CCI's endeavours to strike a balance between promoting innovation and ensuring fair competition. A notable concern highlighted in the paper is the inconsistency in the CCI's decisions, attributed to its lack of a robust jurisprudential foundation. This inconsistency could potentially create uncertainty for market participants regarding the application of competition law. The paper recommends that the CCI should establish clearer standards and refrain from prematurely closing cases without a comprehensive understanding of market conditions. It stresses the importance of the CCI enhancing its understanding of concepts like dominance and algorithmic collusion to effectively address the intricacies of digital markets.
- The research paper titled '*An Analysis of Legal Framework Related to Anti-Competitive Behaviour in Digital Markets*'⁸ provides a detailed discussion pertaining to allegations against major online platforms, expressing concerns about fair competition in the digital marketplace. It emphasizes the importance of distinguishing between legitimate growth strategies and those aimed at monopolization. The research paper underscores the challenges faced by the Competition Commission of India (CCI) in addressing competition issues within technology-driven sectors. The author argues that the current legal framework does not adequately evaluate the adverse effects on competition in the absence of clear dominance. This gap has resulted in the closure of several investigations due to insufficient evidence of reduced competition, especially in cases involving major players like Uber and Ola. However, the author observes that the CCI's viewpoint on monopolization is evolving, reflecting a growing recognition of the complexities introduced by rapid technological advancements. Furthermore, the CCI is beginning to tailor its approach to better address the unique challenges posed by e-commerce and telecommunications, which often defy traditional economic theories that prioritize profit maximization. Finally, the literature stresses the need for regulatory authorities to adapt to the rapidly changing industrial landscape driven by

⁷ Indian Competition Law in the Digital Markets: An Overview of National Case Law, [Shilpi Bhattacharya](#) and [Pankhudi Khandelwal](#), <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3897291> accessed 25 July, 2024

⁸ An Analysis of Legal Framework Related to Anti-Competitive Behaviour in Digital Markets, Pooja Shukla - Pooja Shukla, *An Analysis of Legal Framework Related to Anti-Competitive Behaviour in Digital Markets*, 1 Jus Corpus L.J. 559 (2021).

technological innovation. It emphasizes that effective regulation of technology-driven industries is essential for maintaining competitive markets and preventing monopolistic practices.

- The research paper titled '*Competition in Digital Markets: An Indian Perspective*'⁹ discusses various anti-competitive practices that are prevalent in digital markets, such as self-preferencing, bundling, tying, and data cross-utilization. These practices have been the subject of scrutiny in numerous cases involving major tech companies like Google and Amazon. The authors conducted extensive legal research, analysing CCI orders from May 2009 to April 2024 against major tech companies (GAFAM). This involved creating a factual matrix for each case and assessing the CCI's reasoning to evaluate the effectiveness of the Competition Act in addressing anti-competitive behaviour. The research methodology underscores the importance of a qualitative assessment of the CCI's decisions, aiming to maintain objectivity while also recognising the limitations of the current regulatory framework. The literature suggests that while the existing framework can detect anti-competitive practices, there is a need for proactive regulatory interventions to address potential harms before they materialise. Authors recommend for enhancing the CCI's regulatory capacity through increased budgetary allocations and developing safe harbour defences for companies that can demonstrate efficiency.
- In the research paper titled '*Competition Law and Digital Ecosystems: Learning to Walk Before We Run*'¹⁰ author highlights the unique characteristics of digital markets and argues that traditional competition analysis tools may not be suitable for assessing them. He suggested that competition authorities relying on static analysis may not adequately evaluate the dynamic nature of technology-driven digital markets. The author also emphasizes the importance of examining competition within ecosystems and between different ecosystems when making decisions. He notes that technical barriers to entry in the tech sector may not be the sole reason for the dominance of successful platforms; the design of these platforms and their organizational capabilities are equally crucial to their success. Digital enterprises employ various innovative methods to compete and maximize profits, and their differing business models can coexist and compete in digital markets. The author concludes that a blanket ban on large companies would be unwarranted and could stifle business initiatives and innovation, as a case-by-case inquiry is necessary to understand how these companies maximize consumer experiences and benefits with their business practices.

POSITION ACROSS THE GLOBE

European Union

There are some prominent *ex-ante* measures taken by the European Union to strengthen the existing regulation framework of its digital markets. Namely, the General Data Protection Regulation, 2016 (**GDPR**), the Regulation on Platform-to-Business Relations, 2019 (**EU P2B Regulation**), and most notably, the Digital Markets Act, 2022 (DMA), introduced through the Digital Services Act Package.¹¹ The DMA seeks to identify and selectively regulate the behaviour of large digital undertakings, particularly in an *ex-ante* manner. The DMA is a specific Act and applies to only large undertakings that are designated as 'Gatekeepers'. To achieve the objective of compliance, the European Commission (EC) is empowered to implement appropriate structural or behavioural remedies on the Gatekeeper if it

⁹ Competition in Digital Markets: An Indian Perspective, Sumit Jain Vikrant Singh, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4863926> accessed 7 August, 2024.

¹⁰ Jenny, Frederic, Competition Law and Digital Ecosystems: Learning to Walk Before We Run (April 4, 2021). <<https://ssrn.com/abstract=3776274>> accessed 11 June, 2024.

¹¹ The DMA is a new *ex-ante* competition legislation introduced in 2022 to categorically regulate large digital enterprises that act as 'Gatekeepers' in the EU's digital markets.

is determined that the Gatekeeper is preserving, reinforcing, or expanding its Gatekeeper status, and consistently violating one or more obligations under the DMA.

United Kingdom

The Digital Markets, Competition and Consumers Act (DMCC) of 2024 oversees large companies in the digital market involved in digital activities with connections to the UK. This act gives the Competition and Markets Authority (CMA) the authority to designate a 'Strategic Market Status' to companies for specific digital activities they undertake. The DMCC allows the CMA to impose existing obligations on companies with Strategic Market Status, ensuring they comply with 'permitted conduct requirements' focused on fair dealing, open choices, and trust and transparency. Additionally, the DMCC provides the CMA with extensive powers to intervene in pro-competition activities, going beyond simple conduct requirements.

Germany

The Tenth Amendment to the Act against Restraints of Competition for Competition Law 4.0 (ARC-Digital Competition Act) has introduced an ex-ante regulatory framework under Section 19a, specifically targeting large digital companies. The regulation focuses on undertakings that are significantly active on multi-sided markets and networks. Additionally, the amendment includes measures to protect entities that interact with digital companies possessing 'relative market power' without necessarily being dominant. The 10th Amendment regards these undertakings as 'undertakings of paramount significance for competition across markets' (PSCAM). The 10th Amendment outlines certain types of conduct which are strictly prohibited for the PSCAM entities.

BACKGROUND TO THE NEED OF REGULATING DIGITAL COMPETITION IN INDIA

Parliamentary Standing Committee

The 53rd Report on 'Anti-Competitive Practices by Big Tech Companies' was presented by the Parliamentary Standing Committee on Finance to the Lok Sabha in December 2022. The report acknowledged the dominance of large digital enterprises in digital markets, where network effects often lead to a 'winner-takes-most' outcome. The report acknowledged that different kinds of anti-competitive practices are made possible by digital market dynamisms such as strong network effects and economies of scale. The report recommended the establishment of a legal framework for an ex-ante digital competition law, in contrast to the Competition Act 2002's ex-post approach, aimed at proactively addressing anti-competitive behaviour in digital markets. The Report identified different anti-competitive practices (ACPs) commonly used by Big Tech companies as:

Anti- Steering. Large digital corporations, particularly in the app store market, engage in exclusionary practices that obstruct consumers and business users from migrating to third-party service providers offering more cost-effective solutions with enhanced functionality. These actions curb consumer autonomy and constrain app developers from engaging with users and guiding them to superior alternatives beyond the app ecosystem.

Platform neutrality/Self-preferencing. In situations where major digital corporations function as retailers on their own platforms, they might exploit their dominant market position to give preferential treatment to their own products. This can involve manipulating search algorithms to ensure their products receive top placement, thereby attracting more users. Such conduct contravenes the principle

of platform neutrality, which calls for impartial treatment of all business users on a digital platform. Additionally, it creates a conflict of interest due to the dual role of the enterprise as a platform and a business user.

Adjacency/Bundling and tying. Digital products frequently overlap with related hardware or software applications, offering additional functionality. Large digital enterprises may opt to bundle their core products with complementary offerings, presenting them as a package to consumers. This approach limits consumer choice and can stifle competition from smaller firms. Additionally, it allows digital companies to strengthen their position in adjacent markets.

Data usage (use of non-public data). Large digital enterprises harness extensive user data to drive innovation and enhance their products, solidifying their market dominance. The network effects they create result in a continual influx of users and data, perpetuating a lucrative cycle. However, the collection and potential sale of personal data raise privacy concerns and erect barriers to entry for smaller digital enterprises, distorting competition within the market.

Price Drop/Deep Discounting. Large digital enterprises are more likely to engage in predatory pricing tactics, which involve setting prices below cost to exclude competitors from the market. Subsequently, they raise prices to recoup their losses.

Exclusive Tie-ups. Large digital corporations may engage in exclusive agreements with business users or product and service vendors, prohibiting them from dealing with other enterprises and hindering their market access. These exclusive agreements can be categorized into two types: agreements that exclusively introduce a particular product on a platform, and agreements under which a platform offers only one specific brand within a particular product category.

Search and Ranking Preferencing. When consumers use keywords on search engines, they are utilizing terms that match advertisements with their search queries. In some cases, large digital companies may employ non-transparent search algorithms and assert control over search rankings to prioritize sponsored or in-house products. This practice reduces the visibility of products favoured by consumers and may even allow bidding on relevant keywords, including registered trademarks, which enables advertisers to expand their consumer reach. Consequently, this dilutes the brand power of the originally sought-after products and services, compelling companies to invest significantly in safeguarding their intellectual property and outperforming competitors in search results.

Restricting Third Party Applications. Large digital enterprises often restrict users from accessing or using third-party applications other than their own. This may be achieved through exclusionary anti-steering policies, such as limiting the installation of third-party applications.

Advertising Policies. Major digital enterprises seem to hold significant control over every aspect of the advertising technology industry, including demand, supply, and exchange. This has resulted in growing market consolidation, integration, and dominance by established platforms, creating an unfair advantage. These companies often require advertisers to use web crawlers to gather large amounts of consumer data from their websites, allowing for targeted advertising. In addition, dominant digital enterprises with popular search engines or app stores tend to limit third-party apps from advertising on their platforms, citing ambiguous reasons and restricting their consumer outreach.

Competition Law Review Committee

In 2023, the Ministry of Corporate Affairs constituted the Competition Law Review Committee (CLRC). The CLRC advised taking a cautious approach and periodically evaluating global regulatory trends in emerging digital markets before deciding whether a new antitrust framework is necessary for digital markets. The committee suggested refraining from making immediate legislative changes to the Competition Act to regulate digital entities and instead recommended regular assessments of global trends and their policy implications for India. With respect to digital markets, the CLRC Report acknowledged the need to broaden the scope of Section 3 of the Competition Act to encompass all forms of anti-competitive restraints and agreements, particularly those pertinent to digital markets that may not be covered by existing agreements under Section 3.

Committee on Digital Competition Law

In 2023, the Ministry of Corporate Affairs established the Committee on Digital Competition Law (CDCL) with the following objectives: *“(i) to assess the adequacy of existing provisions in the Competition Act and its associated rules and regulations in addressing the challenges arising from the digital economy; (ii) to evaluate the necessity of implementing an ex-ante regulatory mechanism for digital markets through separate legislation; (iii) to analyse international best practices for regulating digital markets; (iv) to examine other regulatory regimes, institutional mechanisms, and government policies related to competition in digital markets that may pose potential risks; and (vi) to investigate any other relevant matters pertaining to competition in digital markets as deemed necessary by the Committee.”* The CDCL Committee observed that the digital marketplace is becoming increasingly dominated by a handful of major enterprises that exert substantial control over the sector. This concentration of power provides these dominant players with significant advantages over other business users and emerging start-ups. The Committee highlighted that certain characteristics such as multi-sided platforms, cross and same-side network effects, zero-cost services, and extensive consumer data repositories have the potential to rapidly strengthen the position of established incumbents. Consequently, smaller digital enterprises and start-ups find themselves increasingly reliant on these large players, leading to a pronounced imbalance in bargaining power and heightened information asymmetry within the digital market. The Committee noted that *“the powers of the CCI under the present ex-post model may not sufficiently enable early detection and intervention required to prevent digital markets from irreversibly tipping.”* The Committee was of the view that *“new tools that strengthen and supplement the CCI’s existing ex-post powers are the need of the hour. Although the ex-ante framework may still be subjected to judicial interventions, it will be a much more efficient market correction mechanism compared to Sections 3 and 4 of the Competition Act which are essentially ex-post interventions.”* The committee identified and emphasised upon the following gaps in the existing regulatory regime making it not suitable for regulation of competition in digital markets:

Time-consuming nature of investigation and enforcement proceedings. The investigations into established companies under the Competition Act, which commence after a violation has taken place, require significant resources and time. During this period, the market may permanently shift in favour of the established company, leading to the expulsion of competitors. The resulting damage is difficult to rectify after the fact.

Narrow Remedies. The investigations conducted after the competition has taken place are focused on the specific claims made in each case. The committee observed that by addressing repetitive instances of anti-competitive behaviour through a digital competition law established beforehand, there would be a substantial increase in administrative efficiency.

Lack of Recognition of Data as a resource. The pivotal role of data defines digital markets, where entities routinely collect, store, and utilize substantial amounts of user-derived data. Data serves as a crucial element of digital platforms' economic models, providing a competitive edge through control. While platforms enhance information flow, connect buyers and sellers, and reduce search costs for consumers, their business models rely on the collection of user data. As a result of the data provided, consumers receive tailored incentives, discounts, and advertising from digital marketplaces. The collection of user data is an invaluable asset for businesses that need extensive data sets to analyse broad population trends. This large-scale data uniquely benefits major established companies when they expand into related markets. As these major players move into adjacent markets, the pooled data they have will put new entrants at a disadvantage, as they cannot compete as effectively without access to this essential input.¹² This access can create obstacles for new entrants in digital markets that lack access to such extensive data, ultimately limiting competition within the market.

Data-Driven Network effects¹³ create a situation where the value of a digital service is not solely dependent on the product itself but also on the network of its users. As the user base of a digital service grows, it becomes increasingly challenging for new competitors to offer a more appealing alternative. This dynamic confers a substantial first-mover advantage on incumbents.¹⁴ Even when a service is offered for free, the company collects valuable user data, which can be leveraged to generate revenue or improve the service. The Committee noted that these factors give established companies a significant edge over new entrants, especially concerning the pricing of digital services. Consequently, a new competitor not only has to contend with the quality and price of its offering but also with the extensive user networks of established firms.

Inability of Sector-Specific instruments to Regulate Large Digital Enterprises. The committee has observed that the regulation of digital enterprises is currently fragmented, given the wide-reaching impact of digital markets across various industries. The existing instruments discussed are insufficient in addressing all the challenges posed by the digital ecosystem from a competition standpoint, resulting in a regulatory gap. While sector-specific instruments intersect with the Indian competition regime at specific points, they do not adequately ensure fair competition in digital markets proactively.

RECOMMENDATIONS OF THE CDCL COMMITTEE AND DRAFT DIGITAL COMPETITION BILL (DCB)

The CDCL Committee determined that due to the distinct and self-reinforcing characteristics of digital markets, linking the CCI's intervention to a post-facto demonstration of 'dominance' could lead to scenarios where large digital corporations, despite having a significant presence and market-influencing capabilities, might evade timely scrutiny. The Committee suggested that the proposed Draft Competition Bill (DCB) should be applicable to a comprehensive and pre-identified catalogue of Core Digital Services that are susceptible to market concentration and anti-competitive conduct. Accordingly, the CDCL Committee recommended that *“a de novo Digital Competition Act that enables the CCI to*

¹² European Round Table for Industry, 'Shaping Competition Policy in the Era of Digitisation' (2018) <https://ec.europa.eu/competition/information/digitisation_2018/contributions/ert.pdf> accessed 1 September 2023.

¹³ 'Network effects' refer to increased utility that a user derives from a service when the number of other users consuming the service increases. See UNCTAD, 'Competition issues in the digital economy' (2019) <https://unctad.org/system/files/official-document/ciclpd54_en.pdf> accessed 8 August 2023.

¹⁴ 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 14 July 2024.

selectively regulate large digital enterprises in an ex-ante manner be enacted. The Committee further notes that the proposed Digital Competition Act should complement and strengthen the existing competition framework governing large digital enterprises by ensuring timely detection, enforcement, and disposal of proceedings in digital markets.” The Committee also emphasised the need to “*strike a fine balance between increased regulation and enabling innovation. Therefore, the Committee urges that such a Digital Competition Act may regulate only those enterprises that have a significant presence and as such, the ability to influence the Indian digital market.*”

The preamble of the draft Digital Competition Bill reads: “*An Act, to identify systemically significant digital enterprises and their associate digital enterprises, and to regulate their practices in the provision of core digital services, keeping in view the principles of contestability, fairness and transparency.*”¹⁵ The Digital Competition Bill takes a proactive, ex-ante approach and aims to curb the dominance of large digital platforms fostering an environment of increased competition that ultimately benefits consumers with better products and services. In addition, the bill aims to ensure a fair playing field for smaller companies and new entrants, allowing them to compete and succeed in absence of anti-competitive practices in the relevant market. These measures also aim to provide consumers with a wide range of choices at fair prices, ultimately boosting their confidence in digital services. Moreover, the bill encourages innovation by creating a level playing field, providing smaller companies and start-ups.

Applicability. The Draft Digital Competition Bill (DCB) will be applicable to 'Core Digital Services', with the Central Government empowered to revise the list as needed. The initial roster outlined in Schedule I of the Bill includes online search engines, social networking platforms, video-sharing websites, messaging services, operating systems, web browsers, cloud services, advertising services, and online intermediary services.

Quantitative Thresholds. The Committee recommendation outlines a dual test to demonstrate significant presence in the context of competition concerns. First, the “significant financial strength” test is based on quantitative thresholds as proxies for economic power, including an entity's Indian turnover, global turnover, gross merchandise value, and global market capitalization or equivalent fair value at an enterprise or group level, consistently fulfilled for a period of three financial years. Secondly, the “significant spread” test comprises metrics relating to the number of business users and end users of the Core Digital Service in India, also to be consistently fulfilled for a period of three financial years. These recommendations have been incorporated into the draft bill.

Qualitative Criteria. The Committee suggested empowering the CCI to intervene when an enterprise does not meet the quantitative thresholds but still appears to have a significant presence in relation to a Core Digital Service. The draft bill includes a set of qualitative criteria for SSDE designation, incorporating factors such as the enterprise's resources, data aggregation volumes, direct and indirect network effects, and its bargaining power with business users and consumers.

¹⁵ Transparency is however, a critical principle in digital markets as the competitive problems in digital markets arise in large part due to the lack of regulatory understanding of business models in digital markets. Specifically, there is a lack of information about the use of data and monetisation of data as well as the design of algorithms. This makes transparency an important principle of digital markets even though it is not a principle that guides traditional competition law. Lack of information and understanding of the drivers of digital markets is also an important reason for ex ante regulations to be introduced for these markets. As consumers are not fully aware of the harms arising from the sharing of data, it is difficult for them to take these into account in their buying decisions in these markets.

Self-reporting by SSDEs. The proposed bill outlines that digital enterprises are required to assess whether they meet specific quantitative thresholds and report their findings to the CCI according to the specified regulations. Following this, the CCI has the authority to classify the enterprise as a SSDE.

Residuary Powers with the CCI. Furthermore, the proposed legislation suggests that the Competition Commission of India (CCI) can classify any enterprise as an SSDE depending upon factors such as “*the economic power of the enterprise, its integration with other markets, the reliance of end-users on the enterprise, barriers to entry, lock-in effects, network effects, social costs etc.*”.

Associate Digital Enterprise (ADE). The proposed legislation takes into account the group entity doctrine in addition to the concept of SSDE when extending its purview to ADEs. If a designated SSDE is part of a group and if one or more other enterprises within that group are involved in providing CDS in India, the CCI may designate these enterprises as ADEs. The Draft Bill specifies that ADEs must adhere to all the obligations applicable to SSDEs. Non-compliance will result in penalties and consequences similar to those that may be imposed on the SSDE.

Obligations of Systematically Significant Digital Enterprises (SSDEs).

- 1. Avoidance of favouritism in product offerings by Systematically Significant Digital Enterprises/No self-preferencing.** An SSDE is prohibited from showing favouritism towards its own products, services, or those of its affiliates, or third parties with whom it has agreements, over the products and services offered by third-party business users on its platform. Similarly, a Systematically Significant Digital Enterprise must refrain from showing bias towards its own products, services, or business lines, as well as those of its affiliates or third parties with whom it has agreements, over those offered by third-party business users on the Core Digital Service in any way.
- 2. Ensuring freedom for users to use third-party apps:** A Systematically Significant Digital Enterprise (SSDE) is prohibited from limiting or obstructing its users' capacity to download, install, operate, or utilize third-party applications or other software on its platform. Additionally, it should enable users to freely choose, configure, and modify default settings. An SSDE should also refrain from restricting or impeding the ability of end users and business users to download, install, operate, or use third-party applications or other software on its Core Digital Services, and must allow them to select, configure, and change default settings.
- 3. No anti-steering policies:** An SSDE must not prohibit business users from engaging with or promoting offers to their end users, or from directing their end users to their own or third-party services, unless such restrictions are essential to providing the Core Digital Service of the SSDE. The CCI will define what qualifies as "essential" to the SSDE.
- 4. No tying and bundling:** An SSDE should not require or provide incentives for business users or end users to use any of the SSDE's other products or services, those of its affiliates, or those of third parties with whom the SSDE has arrangements, in conjunction with the identified Core Digital Service offered by the SSDE, unless such products or services are essential to the provision of the Core Digital Service.
- 5. Preventing enterprises from restricting user communication.** A Systemically Significant Digital Enterprise is prohibited from impeding business users from communicating with or promoting offers to their end users, or from directing end users to their own or third-party services. These restrictions are permissible only if they are essential to providing the Core Digital Service of the Systemically Significant Digital Enterprise.

6. **Prohibiting use of Non-Public data by Systematically Significant Digital Enterprises.** A Systemically Significant Digital Enterprise is prohibited from using or depending on non-public data of business users on its Core Digital Service to gain a competitive advantage over those business users. Additionally, the enterprise cannot share this data with any third party without the consent of end users or business users. Furthermore, the enterprise must facilitate the easy porting of data for both business users and end users of its core digital service in a specified format. The SSDE is also barred from using non-public data of business users on its platform to compete with those business users directly or indirectly. This non-public data comprises both aggregated and non-aggregated data generated by business users through commercial activities on the SSDE's platform.
7. **No cross-use of personal data without consent:** An SSDE must not intermix or cross-use the personal data of end users or business users collected from different services without their consent, nor permit any third party to use such data without proper authorization.
8. **Enabling data portability:** An SSDE should allow business users and end users of its platform to easily port their data, in a format and manner as may be specified.
9. **Fair and Transparent Dealing:** An SSDE should operate in a fair, non-discriminatory, and transparent manner with end users and business users.
10. **Compliance commitments.** An SSDE must not partake in any behaviour that undermines the effective compliance with the aforementioned obligations, irrespective of whether the behaviour is of a contractual, commercial, technical or any other nature, or involves the use of behavioural techniques or interface design. It also may not directly or indirectly hinder users from addressing issues of non-compliance.

Powers of the Competition Commission to inquire. The proposed bill contains provisions outlining the powers of the CCI to investigate instances of non-compliance with obligations by Systemically Significant Digital Enterprises and Associate Digital Enterprises. It stipulates that if the CCI believes there is preliminary evidence, it will instruct the Director General to conduct an investigation to determine if a Systemically Significant Digital Enterprise or an Associate Digital Enterprise has violated any obligations or regulations.

Power to Grant Exemption. The Committee recognized the necessity of empowering the CCI to specify exceptions from obligations based on factors such as economic viability and protection of existing intellectual property rights. This authority would enable the CCI to define specific scenarios in which the conduct of SSDEs could be deemed justifiable. The Committee suggested that grounds for exempting compliance from ex-ante obligations should be formally outlined in legislation. However, the criteria for such exemptions should be tailored to the unique nature of each Core Digital Service, and thus should be left to the expertise of the CCI.

Capacity Building. The Committee recommends that the CCI enhance its technical capacity, particularly within the Director General's office, to facilitate early detection and resolution of cases, agile regulation-making, and other related regulatory functions in digital markets by recruiting experts. Additionally, the Committee suggests establishing a dedicated bench within the NCLAT to expedite the disposal of appeals, especially those concerning digital markets.

Penalty. It was recommended by the Committee that the ceiling on penalties under the Draft DCB should be based on the global turnover of enterprises. The Committee proposed that the penalty in the Draft DCB should be limited to 10% of the SSDE's 'global turnover', in accordance with the Competition Act. In situations where the SSDE is part of a group of enterprises, the Committee

suggested that the cap on 'global turnover' be calculated with respect to the turnover of the entire group of enterprises.

STAKEHOLDERS' RESPONSE

Arguments in favour of the Digital Competition Law

- Large digital companies engage in, among other things, the collection and concentration of data, which could lead to risks of privacy and security breaches. They also use user and seller data to personalize their products according to consumer preferences and may require users to share information in order to use a particular app. Considering data protection issues is important to evaluate potential harm to consumers. These considerations are also crucial for informing mergers and acquisitions in digital markets.
- Current ex-post competition regulations have been ineffective in ensuring that technology platforms can compete with dominant platforms in the digital economy. The ex-ante competition regulations are necessary to address the long-lasting market harm caused by large digital companies, especially due to the time-consuming nature of Competition Commission of India (CCI) investigations. The current competition regime only intervenes once harm has occurred, which is too late for digital markets. The current fines and remedies are not sufficient as deterrents.
- A digital competition law is needed to prevent the spread of misinformation and enhance consumer reach across all digital media platforms.

Arguments against the Digital Competition Law

- The existing regulatory framework empowers the CCI to respond promptly when necessary without burdening the digital sector with excessive regulations. Introducing two simultaneous legislations for all digital businesses would raise regulatory costs for companies.
- The ex-ante approach in the proposed Digital Competition Bill shall operate as an unfair imposition on digital companies. It can make the business environment untenable for them and potentially dry up venture investments in tech start-ups.
- Regulating the e-commerce sector in advance may be premature and excessive, potentially leading to over-regulation and increased compliance costs.
- A new legislation along with existing sectoral regulations could potentially result in over-regulation for Indian start-ups. There is a risk of incorrectly regulating smaller homegrown players that offer digital technology-enabled products and services. Applying the same regulations to all digital businesses and platforms has the potential to hinder innovation in the country.
- There is no global consensus on a regulatory approach to govern digital markets. Many regimes are untested and may have rigid rules that could negatively impact product innovation and consumer benefits, or they are based on extensive engagement with industry participants.
- In a world with multiple centres of power, it is no longer tenable for developing nations to simply adopt the laws and regulations imposed on them by more powerful partners through trade agreements and international organizations.

CONCLUSION

India's draft Digital Competition Bill is a positive step toward addressing anti-competitive practices and dominant position abuses in the digital business space. The Digital Competition Bill represents a significant move towards regulating India's digital markets, with the aim of fostering fair competition and safeguarding consumers. While the provisions of the Draft Competition Bill shall undoubtedly impact the business operations of these companies, it will also empower Indian consumers to make

informed choices without being unduly influenced by targeted marketing tactics. Although monopolies may be unavoidable, the new legislation will work to eliminate unjustified ones by taking pre-emptive action to prevent any potential economic harm resulting from unfair digital competition. However, it is essential to prioritize the attraction and nurturing of investments, rather than imposing regulations that could potentially hinder the rollout of vital infrastructure. In the Indian context, it is imperative to adopt a nuanced approach to ensure that digital markets can maintain their momentum without being burdened by unnecessary compliance requirements that may have detrimental effects. India should customize its ex-ante regulatory approach to align with its unique market conditions. While seeking inspiration from other legal frameworks is common, it's important to take into account the specific characteristics of the Indian market. The identified remedial obligations should be designed to be self-executing and compliance-focused, supported by strict penalties to minimize the necessity for ongoing monitoring and burdensome investigative processes. Therefore, the focus should be on attracting and fostering investment rather than implementing regulations that could hinder the deployment of crucial infrastructure.

As the bill progresses, it is vital for policymakers to engage with industry stakeholders and experts into a continuous market assessment to ensure that the regulations are effective, equitable, and supportive of a flourishing digital economy. The proactive enforcement of ex-ante measures through the introduction of the DCB is a noteworthy initiative. As this new regulatory model gains traction, market participants must determine whether to apply preventive regulation and, if so, under what guidelines. Widely viewed as intrusive and anti-competitive by many, the use of ex-ante measures must be approached with caution. Policy decisions should not be driven solely by public outcry when there has been no substantial change in market dynamics. While the government's initiative to regulate digital competition proactively is commendable, it requires a delicate balance. The goal is to safeguard consumers' interests in the Indian digital market without stifling innovation and the potential for rapid technological progress. It's important to acknowledge the significant demand to make the Indian digital market appealing to new players while also recognizing the rapid growth of digital entities among enthusiastic Indian consumers.