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DIGITAL COMPETITION BILL, 2024: A REVIEW

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ABSTRACT

The ecosystem around us is no more natural, it has turned digital. The extensive use of technology and the rapid expansion of digital businesses have profoundly impacted Indian society and the economy. Digitalization has significantly transformed how consumers interact with each other and with providers of goods and services. This shift offers numerous pro-competitive benefits, such as fostering innovation and the creation of new products and services through market contestability and fair practices. The current ex-post framework under the Competition Act, 2002, feels to have become inefficient as markets are now not traditional but digital. It is therefore, The Ministry of Corporate Affairs established the Committee on Digital Competition Law to review the current regime under the Competition Act, 2002, and assess whether an ex-ante framework would solve the problem or not. The Committee has drafted this Digital Competition Bill and has engaged in consultations with key stakeholders and analyzed both domestic legal structures and international regulatory practices for digital service regulation. This research paper seeks to review the whole landscape behind the changes into the Indian Competition Law jurisprudence.

Keywords: Digitalization, Ex-ante, Market, antitrust, Competition Act, Digital Competition Bill.

I. Introduction

The digital economy has emerged as a cornerstone of the 21st century, reshaping how countries operate, compete, and grow.¹⁶⁸ This shift towards digitalization is driven by the rapid advancement of technologies such as the internet, artificial intelligence, and blockchain, which have revolutionized various sectors including finance, healthcare, education, and commerce. Countries around the world, with the help of their tech-giants are increasingly leveraging these technologies to enhance economic growth, improve public services, and foster innovation. The digital economy not only boosts productivity and efficiency but also creates new opportunities for businesses and individuals alike. In India, the digital revolution is particularly pronounced. The government's

ambitious Digital India initiative aims to transform the country into a digitally empowered society and knowledge economy. The Unique Payment Interface (UPI) has proved to be one of the significant milestones which has transformed the whole economy into digital one. These initiatives focus on providing digital infrastructure as a utility to every citizen, delivering governance and services on demand, and enabling the digital empowerment of citizens. As a result, India has seen a significant increase in internet penetration, mobile connectivity, and digital literacy. The proliferation of smartphones and affordable data plans has further accelerated the adoption of digital services across urban and rural areas.

Big tech giants such as Google, Amazon, Facebook, and Microsoft have played a pivotal

¹⁶⁸ ELENA G. POPKOVA, ARTEM KRIVTSOV, ALEKSEI V. BOGOVIZ, *THE INSTITUTIONAL FOUNDATIONS OF THE DIGITAL ECONOMY IN THE 21ST CENTURY* (De Gruyter 2021).

role in this digital transformation worldwide.¹⁶⁹ These companies provide essential platforms and services that facilitate digital interactions, commerce, and communication. For instance, Google's search engine and cloud services, Amazon's e-commerce platform, Facebook's social media network, and Microsoft's software solutions have become integral to the daily lives of millions of Indians. These platforms have not only made it easier for businesses to reach consumers but have also enabled individuals to access information, connect with others, and engage in online transactions. However, the dominance of these tech giants raises significant concerns about market competition and data privacy. Their control over vast amounts of data and their ability to influence market dynamics can stifle competition and innovation. Smaller companies and startups often find it challenging to compete with these established players, leading to a concentration of market power in the hands of a few. This concentration can result in anti-competitive practices, such as predatory pricing, exclusive agreements, and the preferential treatment of their own services over those of competitors.

The need for government regulation in the digital economy is therefore crucial. Effective regulation can ensure fair competition, protect consumer interests, and promote innovation. In India, the Competition Act, 2002¹⁷⁰ proved to have become old and ineffective in regulating this digital market. As during the past decade, there has been a drastic shift of the company's business mode from offline to completely online. The government has recognized these challenges and has introduced measures to address them. The Digital Competition Bill, 2024, is one such initiative which aims to curb anti-competitive practices by big tech companies and promote a balanced digital marketplace by ex-ante regulation. This bill includes provisions for data protection, consumer rights, and the regulation of digital platforms to

prevent abuse of market power. The digital economy is a driving force behind the transformation of countries in the 21st century. In India, the digital revolution has been facilitated by government initiatives and the contributions of big tech giants. However, the dominance of these companies necessitates robust government regulation to ensure fair competition, protect consumer interests, and address data privacy concerns. By striking a balance between innovation and regulation, India can continue to thrive in the digital age and create a sustainable and inclusive digital economy.

II. Historical Context

The introduction of the New Economic Policy in 1991 paved the way for globalization for Indian market. Economic reforms shifted their focus towards de-licensing and de-regulation of various industries and fostering competition amongst market players. It was in the year 1999, the High-Level Committee on Competition Policy and Law, chaired by Shri S.V.S Raghavan (which was named, Raghavan Committee), was constituted to reform the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act). The Raghavan Committee submitted its report in 2000 wherein it noted that the MRTP Act had become antiquated, and was inadequate for promoting competition in Indian markets and addressing emerging forms of anti-competitive conduct. It recommended large-scale reforms to bring Indian competition law in line with the new domestic economic policies and global best practices.¹⁷¹ Based on its recommendations, the MRTP Act was repealed and the Competition Act, 2002 was enacted to prevent practices having adverse effect on competition, promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India. The enactment of the Competition Act led to the establishment of the Competition

¹⁶⁹ Alison Beard, *Can Big Tech be Disrupted?* HARVARD BUSINESS REVIEW (Feb. 1, 2022) <https://hbr.org/2022/01/can-big-tech-be-disrupted>.

¹⁷⁰ Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India).

¹⁷¹ Raghavan Committee Report, *V.S. Raghavan Committee Report on Competition Law*, PARLIAMENT OF INDIA (Oct. 23, 2024, 02:21 PM) <https://rsdebate.nic.in/handle/123456789/2081>.

Commission of India (CCI) and the Competition Appellate Tribunal, which was later replaced by the National Company Law Appellate Tribunal. The Competition Act in anti-competitive matters adopts an ex-post approach in prohibiting anti-competitive agreements under its Section 3¹⁷² and abuse of dominance under its Section 4.¹⁷³ However, it is to be pointed out that the Competition Act didn't have any provision to prohibit the dominance of an enterprise but rather the abuse of such dominance by an enterprise.

Following a decade of enforcement under the Competition Act, the Ministry of Corporate Affairs constituted the Competition Law Review Committee to review the Indian market competition legislation and suggest some recommendations to revise and amend the basic substantive and procedural provisions of the Competition Act. The committee presented its report in 2019 containing its recommendations for introducing regulatory best practices in the competition law framework. The committee also discussed issues relating to new-age digital markets and 'big data'. The Competition Act was amended and the Competition (Amendment) Act, 2023 was notified in the Gazette of India on 11th April 2023 as per the recommendations of the Report of the Competition Law Review Committee.¹⁷⁴

III. Changes by Competition (Amendment) Act, 2023

The Committee Report recognized that in the context of digital markets, the scope of Section 3 of the Competition Act needed to be expanded in order to fully encompass all forms of anti-competitive agreements and restraints, especially those relevant to digital markets that might not be covered by the agreements recognized under Section 3.¹⁷⁵ Its suggestion to

include "other agreements" under Section 3(4)¹⁷⁶ of the Competition Act in order to broaden its scope was approved and put into effect by the Competition (Amendment) Act, 2023.¹⁷⁷

Because they frequently fall short of the asset and turnover-based thresholds set forth in the Competition Act and because the CCI lacks the authority to evaluate transactions that are exempt from notification requirements, the Competition Law Review Committee acknowledged that the acquisition of smaller, successful start-ups by dominant firms in the digital space tends to evade regulatory scrutiny. In light of the same, the CLRC Report had recommended for the introduction of new thresholds based on broad parameters for merger notification under the Competition Act. This recommendation was also accepted and in effect of this, the Amendment Act, 2023 introduced a deal value threshold of Rs. 2,000 crores for notifying a transaction to the Competition Commission if the entity has acquired has 'substantial business operations' in India. The Amendment Act, 2023 has also expanded the scope of 'relevant market' under Sections 19(6)¹⁷⁸ and 19(7)¹⁷⁹ of the Competition Act by specifying factors such as the nature of services and costs associated with switching demand or supply.¹⁸⁰

IV. Committee Report on Digital Competition Bill 2024

The government of India recently noticed the inefficiencies of Competition Act, 2002 and questions raised on the jurisdiction of Competition Commission of India in handling the instances of data privacy violations which impact market in multiple cases.¹⁸¹ To keep

¹⁷² Competition Act, 2002, § 3, No. 12, Acts of Parliament, 2003 (India).

¹⁷³ Competition Act, 2002, § 4, No. 12, Acts of Parliament, 2003 (India).

¹⁷⁴ Avaantika Kakkar, Kirthi Srinivas, *2023 Amendments to Indian Competition Law: Bringing Down The Hammer on Anti-competitive Conduct (Part 2)*, KLUWER COMPETITION LAW BLOG (Oct. 23, 2024, 2:30 PM) <https://competitionlawblog.kluwercompetitionlaw.com/2023/05/04/2023-amendments-to-indian-competition-law-bringing-down-the-hammer-on-anti-competitive-conduct-part-2>.

¹⁷⁵ Ministry of Corporate Affairs, *Report of Competition Law Review Committee (2019)*, GOVERNMENT OF INDIA (Oct. 22, 2024, 11:34 PM).

¹⁷⁶ Competition Act, 2002, § 3(4), No. 12, Acts of Parliament, 2003 (India).

¹⁷⁷ Competition (Amendment) Act, 2023, No. 9, Acts of Parliament, 2023 (India).

¹⁷⁸ Competition Act, 2002, § 19(6), No. 12, Acts of Parliament, 2003 (India).

¹⁷⁹ Competition Act, 2002, § 19(7), No. 12, Acts of Parliament, 2003 (India).

¹⁸⁰ Ministry of Corporate Affairs, *Report of the Committee on Digital Competition Law (2023)*, GOVERNMENT OF INDIA, (Oct. 23, 2024, 03:09 PM).

¹⁸¹ Danish Khan, Aakrit Aditya Sharma, *Competition Commission of India's jurisdiction Across All Sectoral Boundaries*, SCC ONLINE TIMES BLOG (Oct. 21, 2024, 10:50 PM), <https://www.sconline.com/blog/post/2024/09/20/competition-commission-of-india-jurisdiction-across-all-sectoral-boundaries>

pace with growing violations of Competition Law by tech-giants and digital businesses, the Parliamentary Standing Committee on Finance presented the 53rd Report on “Anti-Competitive Practices by Big Tech Companies” before the Lok Sabha on 22nd December 2022. The Committee identified ten (10) common anti-competitive practices (ACPs) used by major tech firms and assessed the need to enhance India’s competition framework to counter such behaviours. Among those 10 ACPs, one was Data usage (use of non-public data) to whose explanation it was mentioned that using personal data for consumer profiling to offer targeted online services and products, thus raising data privacy concerns, constitutes a valid anti-competitive practice. And on this very much ACP, the entire Digital Competition Bill 2024 is based. The Committee Report recognized that the dynamics of digital marketplaces are supported by strong network effects and growing returns to scale. This frequently results in a ‘winner-takes-most’ scenario in which a dominant firm implements methods that reduce market contestability, hence reinforcing its power. As a result, digital markets run the risk of being irrevocably polarised in favour of the incumbent. Following the Standing Committee Report’s recommendation, the Ministry of Corporate Affairs, again constituted the Committee on Digital Competition Law Committee to review whether existing provisions in the Competition Act are sufficient to address the challenges in the digital economy and to examine whether an ex-ante digital competition law is required or not.¹⁸²

V. Ex-post and Ex-ante, Explained

Ex-post framework refers to an approach where analysis, evaluation, or regulation occurs after an event has taken place.¹⁸³ Competition Act, 2002 is one such ex-post regulatory framework under which the CCI is empowered to address the anti-competitive concerns after the actual

violation of the provisions of Act have taken place. Therefore, the CCI deals with anti-competitive agreements and abuse of dominance after such contraventions have occurred.¹⁸⁴ Ex-post method of application can be termed as a traditional way to function. However, the Standing Committee noted that the current ex-post framework under the Competition Act, 2002 was conceived with a view to ensuring contestability and fairness in traditional markets, at a time when it was not possible to imagine the current scale of digitalisation where the market is so dynamic that certain aspects of the ex-post framework, including the time-consuming nature of enforcement proceedings, may not be appropriate for today’s digital markets, considering the unique characteristics of such markets. Recent times have also seen widespread stakeholder concerns about potential anti-competitive behaviour of large enterprises providing digital services. This often leads to a ‘winner-takes most’ outcome where a leading player adopts strategies that curtail market contestability, which reinforces its strength. As such, digital markets bear the risk of becoming irreversibly polarised in favour of the incumbent.¹⁸⁵ It was therefore, the Standing Committee Report observed that an ex-post approach may not be sufficient to remedy such conducts in fast-paced digital markets.

Ex ante is a Latin term that means “before the event.” In economics, finance, and planning, ex ante refers to the prediction or estimation of future events, such as economic indicators, investment returns, or policy effects, before they actually occur.¹⁸⁶ The Standing Committee recommended that the behaviour of large digital enterprises should be monitored ex-ante, with an emphasis on preventing such anti-competitive conducts from occurring. It further

¹⁸² *Id.* at 8.

¹⁸³ Quickonomics, *Definition of Ex Post*, QUICKONOMICS.COM (Apr. 28, 2024, 07:15 PM) <https://quickonomics.com/terms/ex-post>

¹⁸⁴ Saket Sharma, *Competition Through Evolution, Not Pre-Selection: A Case Against Ex-Ante Regulations in India* NATIONAL LAW SCHOOL BUSINESS LAW REVIEW (Oct. 20, 2024, 9:24 PM) <https://www.nlsblr.com/post/competition-through-evolution-not-pre-selection-a-case-against-ex-ante-regulations-in-india>.

¹⁸⁵ *Id.* at 8.

¹⁸⁶ Quickonomics, *Definition of Ex Ante*, QUICKONOMICS.COM (Apr. 28, 2024, 9:36 PM) <https://quickonomics.com/terms/ex-ante>.

recommended the introduction of a 'Digital Competition Act' to create a fair, transparent, and contestable digital ecosystem.¹⁸⁷ The Digital Competition Act is proposed to be an ex-ante regulation under which the CCI will keep an eye on significant market enterprises, particularly those which are dominant in market and will timely measure their activities and if they are found to be going towards a violation, then to take action on them. It is put forth that before the market irreversibly tips, the CCI can make a prompt and successful intervention with the support of a series of well-crafted ex-ante actions. The Committee further notes that the implementation of such a de novo ex ante framework should neither impede small businesses' access to incentives and possibilities for innovation, nor should it subject them to extra compliance requirements. The Committee suggests establishing a system for inter-regulatory interaction and bolstering the CCI's ability to regulate technical aspects of digital marketplaces. Both the Standing Committee and the Committee on Digital Competition Law have relied upon the emerging global usage of ex-ante regulations. However, there does not exist a global consensus on the usage of ex-ante regulations to regulate digital markets. In fact, the usage of the same is at a very nascent stage and is widely criticised.¹⁸⁸

VI. Key Provisions of The Digital Competition Bill, 2024

Ex-ante Regulation

The Committee has suggested that the Competition Act be supplemented by ex-ante regulation that applies exclusively to major digital firms. An ex-ante rule like this should guarantee that the CCI steps in before instances of anticompetitive behaviour occur and that the actions of big digital companies are proactively monitored. Annexure IV of the report contains a draft of the law (Draft DCB),

which has been produced and thoroughly discussed by the Committee.¹⁸⁹

Scope and Applicability

The Committee suggests that a predetermined list of Core Digital Services that are vulnerable to concentration should be included under the Draft Digital Competition Bill (DCB). The Committee suggests that this list be created using market research, new international practices, and the CCI's enforcement expertise. Such a list is suggested as a Schedule to the Draft DCB in order to enable rapid updates by the Central Government, taking into account the speed at which digital marketplaces are developing.¹⁹⁰

Regulation of digital enterprises

The Committee has put forth that only companies with a "significant presence" in offering a Core Digital Service in India and the capacity to impact the Indian digital market would be subject to regulation once the Digital Competition Bill is passed. Such businesses should be designated as "Systemically Significant Digital Enterprises" (SSDEs), according to the Committee's recommendation.¹⁹¹

Thresholds and criteria for designation as SSDEs

If an enterprise passes two tests that demonstrate "significant presence," it is classified as an SSDE:

(a) the "significant financial strength" test, which includes quantitative indicators of economic power, such as gross merchandise value, global market capitalization, India-specific turnover, and global turnover

¹⁸⁹ Dipak Mondal, Digital Competition Law panel seeks ex-ante anti-trust rules for digital firms, THE NEW INDIAN EXPRESS (Mar. 13, 2024, 08:55 AM) <https://www.newindianexpress.com/business/2024/Mar/13/digital-competition-law-panel-seeks-ex-ante-anti-trust-rules-for-digital-firms>.

¹⁹⁰ Sonal Verma, Sonjuhi Kaul, *Decoding India's Digital Competition Bill 2024: Navigating Market Regulation In Comparison To The EU's Digital Markets Act*, MONDAQ (Apr. 15, 2024) <https://www.mondaq.com/india/antitrust-eu-competition/1451852/decoding-indias-digital-competition-bill-2024-navigating-market-regulation-in-comparison-to-the-eus-digital-markets-act>.

¹⁹¹ Vikram Jeet Singh, Ayan Sharma, *A Deep Dive into India's Digital Competition Bill, 2024*, LEXOLOGY.COM (May 16, 2024) <https://www.lexology.com/library/detail.aspx?g=5722a078-1839-4ece-aec9-49336ff53b6c>.

¹⁸⁷ *Id.* at 8.

¹⁸⁸ Saket Sharma, *supra* note 17.

(b) the “significant spread” test, which assesses how present an enterprise has been in the provision of a Core Digital Service in India based on the number of end users and business users.

Businesses are required under the Draft DCB to evaluate their own performance in meeting these requirements and submit the results to the CCI. Furthermore, the Draft DCB envisions residuary powers for designation in the form of “qualitative” requirements for identifying certain businesses as SSDEs that are able to significantly impact the market in which they operate but do not fulfil the quantitative standards.¹⁹²

Associate Digital Enterprises

The Committee suggests that when enterprises offering Core Digital Services belong to a larger group, the designation should not be confined to a single entity within that group. Depending on how different entities within the group participate in providing the Core Digital Service, two scenarios are proposed: firstly, the holding enterprise is designated as a Systemically Significant Digital Enterprise (SSDE), and other entities in the group directly or indirectly involved in the same service are designated as Associate Digital Enterprises (ADEs) to the SSDE. Secondly, the most directly involved non-holding enterprise is designated as an SSDE, while its holding company and other group entities involved in providing the same service are designated as ADEs. The Committee also recommends that the Competition Commission of India (CCI) be granted the flexibility to identify the appropriate entities for SSDE and ADE designations.¹⁹³

Obligations

Under the Draft DCB, the Committee suggests an ex-ante duties structure that is flexible and grounded in principles. Regulations created by the CCI following a consultation process would outline the specifics of the duties as they relate to each Core Digital Service. The Committee

suggests that the regulations may impose varying obligations on various SSDEs and ADEs based on variables like their business models and user bases, acknowledging that not all of them offer the same Core Digital Service and have the same level of influence on the market in which they operate.¹⁹⁴

Exemptions

The Committee suggests that the Act explicitly specify the reasons for exemption from fulfilling the ex-ante responsibilities. Regulations created by the CCI should outline the characteristics of these exclusions, taking into consideration the specific Core Digital Service and associated business models of SSDEs and their ADEs. The Committee also suggests adding a clause that exempts some business classes from the Competition Act’s application, akin to Section 54¹⁹⁵ of the Act.¹⁹⁶

Enforcement

Given that the CCI would be responsible for enforcing both of these laws, the Committee suggests using the Competition Act’s procedural structure for the Draft DCB. Additionally, the Committee strongly recommends that in order to keep up with the rapid expansion of digital markets, the CCI should bolster the capabilities of its Digital Markets and Data Unit with technological expertise. In order to guarantee prompt resolution of appeals against the CCI’s rulings, especially those pertaining to digital markets, the Committee further suggests creating a distinct bench within the National Company Law Appellate Tribunal.¹⁹⁷

Remedies and Punishment

In accordance with the Competition Act’s penalty system, the Committee suggests that the maximum monetary penalty for violation with ex-ante duties be 10% of the SSDE’s worldwide revenue. Furthermore, the Committee suggests that the “global turnover”

¹⁹² *Id.* at 13.

¹⁹³ *Id.* at 13.

¹⁹⁴ *Id.* at 13.

¹⁹⁵ Competition Act, 2002, § 54, No. 12, Acts of Parliament, 2003 (India).

¹⁹⁶ *Id.* at 13.

¹⁹⁷ *Id.* at 13.

cap be determined in proportion to the total group turnover where the SSDE is a member of a group of businesses. The Committee also suggests that the CCI assess the exact amount of the punishment while taking the Draft DCB's penalty guidelines into consideration. In addition to the aforementioned, specific sanctions have been established for violations brought on by inaccurate reporting and the vicarious culpability of important management figures.¹⁹⁸

VII. Conclusion

When enacted the, this Digital Competition Bill 2024 will surely work 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, with an objective to foster innovation, promote competition, protect the interest of users of such services in India. As data privacy has evolved into a critical non-price competition parameter, driving today's digital economy, it has become increasingly essential to regulate this sector through comprehensive government legislation. The absence of robust regulatory frameworks which could regulate this digital market can lead to numerous issues, including unfair competitive practices, exploitation of consumer data, and potential breaches of privacy. Proper legislation, like Digital Competition Act is vital to ensure check on antitrust behavior by tech giants, data privacy is maintained, fostering consumer trust and promoting fair competition among businesses. By establishing clear guidelines and standards, legislation can help prevent misuse of personal data, mitigate risks of data breaches, and ensure that all entities operating within the digital economy adhere to best practices for data protection. This regulatory oversight not only protects individual privacy rights but also contributes to the overall stability and integrity

of the digital marketplace, encouraging innovation while safeguarding public interests.

¹⁹⁸ *Id.* at 13.