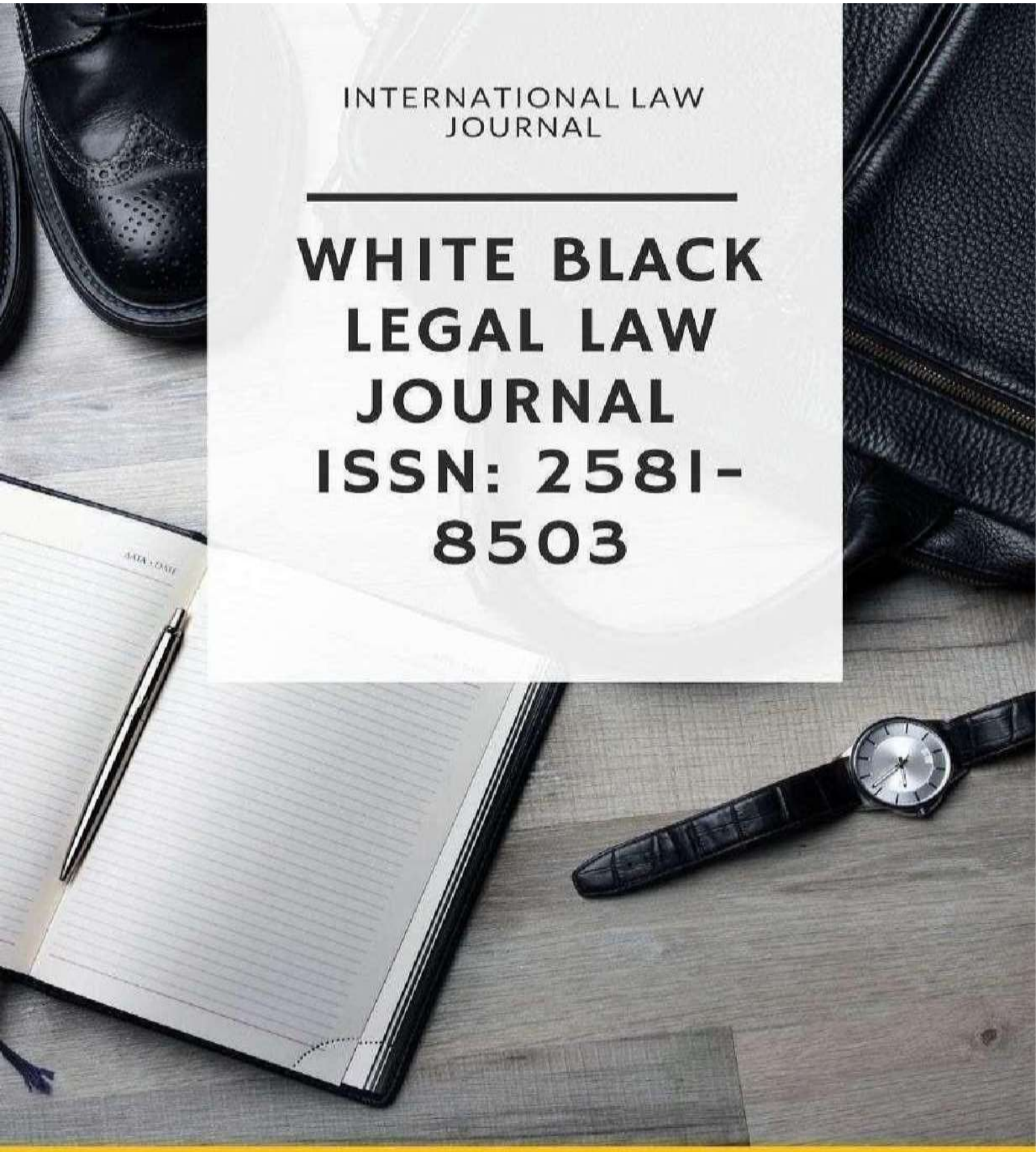

INTERNATIONAL LAW JOURNAL

WHITE BLACK LEGAL LAW JOURNAL

ISSN: 2581-8503

Peer - Reviewed & Refereed Journal

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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

NAVIGATING THE DIGITAL FRONTIER: REGULATION OF DIGITAL MARKETS UNDER THE COMPETITION ACT, 2002 AND CRITICALLY ANLYZING THE NEED OF DIGITAL COMPETITION ACT

AUTHORED BY - SHRIHAAN BAGHEL

Abstract

With the technological development in India, the digital markets witnessed a rapid increase in anti-competitive by big business and organizations. The authorities with recent developments on ex-ante measures and new principles are trying to set new precedents and bring in a proactive framework for the regulation of digital markets in India. The focus of this paper is to understand the important elements of these new developments and the need for developing laws tailored to the regulatory needs of the digital markets.

Keywords: competition, relevant market, data, CCI, core digital services, systematically significant digital enterprise, associated digital enterprise, obligations, settlement, compromise, deal value transaction, control, leniency, enterprise

INTRODUCTION

Technological developments have made life easier. We can negotiate business transactions, shop, order food, book travel tickets etc via online platforms. In this connection, to strengthen digitalization, govt of India has launched 'Digital India'[1] program in the year 2015, with a broad vision to transform India into digitally empowered society. This programme as well as the recent covid crisis paved way to increase in online platforms. On one hand, these all aspects have ignited rise in the online platforms and digital transactions. On other hand, competition authorities facing challenges to regulate or meet the pace of growing digital markets.

Indian Competition law regime begin with, the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP). MRTP ensured that economic power is not concentrated in few dominant hands.

[1] Digital India, https://csc.gov.in/digitalIndia Accessed on February 2024

However, new economic reforms made the said Act redundant, hence Competition Act 2002 was enacted with the purpose of preventing anti-competitive practices in the markets, to promote fair competition ensuring freedom of trade and to protect interests of consumers. On 11 April 2023, President of India has given assent to new amending enactment i.e., Competition Act, 2023 which amends several provisions of Competition Act 2002.[2]

Recently, there were issues concerning anti-competitive practices by online platforms (Amazon and Flipkart), food delivery apps (Swiggy), online travel agents(Make my trip), WhatsApp, etc. It is a need of an hour to control such anti competitive practices in digital area. In furtherance of this goal, Ministry ofCorporate affairs has appointed a Committee on digital competition law to examine the need for having a separate law regulating competition in digital markets.

A ray of hope in Indian digital competition law regime has emerged, to regulate anti-competitive behaviour of dominant enterprises in digital markets and also to maintain fair competition.

This chapter spells light on Indian Competition law regime relating to abuse of dominance in Indian digital markets. Subsections of this chapter relate to abuse of dominance in Indian digital markets, discusses prima facie case, relevant market, also has reference to cases, market study on e-commerce by CCI. Further, involveselaborative discussion on WhatsApp and Facebook saga-case law, brief discussionon emerging digital competition bill under the subsection 'Road to digital competition bill'. At last, this chapter ends with brief summary and conclusion.

To begin with, Indian legal system does not have separate digital competition law.But there are ongoing discussions for having separate competition law governing digital markets. This being the background, CCI is dealing with digital competitioncases by applying Indian Competition Act 2002 and also referring to EU and US, other competition law regimes.[3] CCI has availed wide discretion, however, it lacked consistency and certainty in interpretation and application of law.

In *Matrimony v Google*[4], the Matrimony, provides online platform for prospectivemarriage alliance. It alleged against Google that, Google is creating uneven level playing field by favouring its own services and partners, which is in contraventionof Section 4 of Competition Act. It has been noted

[2] The amended provisions relate to new limits of merger control, changes in penalty, Changes in compositionof CCI etc.
[3] Bhattacharya, Shilpi and Khandelwal, Pankhudi, Indian Competition Law in the Digital Markets: An Overview of National Case Law (July 29, 2021).
[4] C.Nos 7 & 30 of 2012

that, along with Google's searchservices, it also provides vertical services such as YouTube, Google news, Googlemaps. Google started to mix the vertical services along with its search results. For example- When a user search for a song on Googles, he receives links to video of that song on YouTube.

Also, it was alleged that, Google's own sites mainly appear on search results and additionally, acquisition of software products by Google, to assist in its vertical integration shows its tendency to avoid competition.

The Commission observed that, although the Act does not point towards a market share threshold, beyond which dominance can be presumed.[149] However, Google'smarkets share which is more than its nearest competitor, in the relevant market clearly evidences its dominance.

Yet, Commission differed on the point of 'denial of market access'. There was no evidence to show that, two distribution agreements amounted to denial of market access and further, the distribution deals with Mozilla's Firefox, Apple's safari arenot having exclusiveness since they only mention that default search service on their browser shall be Google .[5]

It is important to note, the Commission's observation made in paragraph 203 of theorder that, Commission is aware of the fact that any intervention related to technology markets should be carried out with caution because it may lead to denialof benefits of innovation to consumers. It may also affect the economic welfare andeconomic growth of the country.

Ultimately, Commission held, Google has dominant position and contravened provision of Section 4 of Competition Act 2002, by unfair imposition of search services on users and also by prohibiting publishers 'under negotiated search intermediation agreements' from using search services offered by competing search engines. It imposed fine amounting to 5 % of average turnover generated from operations in India for the financial years of 2013, 2014, 2015.[6]

In the above-mentioned case (Matrimony v Google), at Paragraph 33 of the 'DissentNote'[152] by two members of the Commission discuss that we are witnessingincrease in online platforms and dominance by itself, not of antitrust concern. Theyfurther add that, "Competition agency should intervene, when evidence shows thatthe dominant firms exploit its market power causing detriment

[5] Arora, Himanshu, Bharat Matrimony v. Google India and others (March 30, 2019).

[6] Dissent Note by Mr. Sudhir Mittal and Justice. G.P.Mittal, https://www.cci.gov.in/antitrust/orders/details/746/0 pp.167-190, Accessed on February 2024

to consumers"[153] and however, in the present case, there is no evidence to have complete understanding of the conduct. Dissenting members opined that Google was not contravening Article 4 of the Competition Act because the investigation has not brought evidence or analysis showing complete understanding of market as well asthe conduct concerned.

We gather from above discussion that, although Google was subjected to penalty, the above discussion leads to CCI's preference in providing a leeway to innovation,technology. Dissenting members also mention that, unless there is evidence of exploitation of dominant power, consumers should be left to enjoy the benefits of innovation.

Conversely, CCI in a recent order in *Federation of Hotels & Restaurant Associationof India & Ors. V Make my trip India Pvt Ltd*., provided primacy to level playing field, giving all players equal opportunity to participate in digital markets and compete on merits.[7]

In the absence of a separate legislation or specified legal framework governing digital markets, CCI is attempting to have its own jurisprudence on digital markets.

Prima facie case

As per Section 26 of the Competition Act, CCI directs investigation to be carried out by Director General(DG) only if the prima facie case is made out by having reference to material produced before it.

Number of cases have been closed at preliminary review because CCI didn't intendto interfere with innovative markets.[8]

In *Vinod Kumar Gupta v WhatsApp*[9], CCI found that the entity is a dominant entity, but dropped the case, by observing that there is no abuse of dominant position. It failed to take account of the network effects enjoyed by the dominant entity WhatsApp, making hard for the user to switch towards other platforms. Network effects also act as a barrier to entry since the rivals or new entrants have to entice great mass to switch from existing platform.

Market study on e-commerce by CCI

[7] Bhattacharya, Shilpi and Khandelwal, Pankhudi, Indian Competition Law in the Digital Markets: An Overview of National Case Law (July 29, 2021).

[8] Bhattacharya, Shilpi and Khandelwal, Pankhudi, Indian Competition Law in the Digital Markets: An Overview of National Case Law (July 29, 2021).

[9] CCI case No.99 of 2016

To thoroughly understand functioning of e-commerce and its consequences on competition, CCI has launched a study in April 2019. The study has been useful tounderstand relevant market, assessment of market power, rationale behind conductetc. It has identified following issues-

1. Platform neutrality- platforms have private label products and such products are directly in competition with different brands in same product categories. They perform the task of marketplace as well as competitor. Further, some of platforms have 'preferred sellers' who enjoy preferential treatment from platforms. These have adverse impact on competition.[10]

2. Unfair contract terms- platforms determine, revise the contract terms unilaterally,which is harmful to the business users. For example-online food ordering listing onplatform is coupled with mandatory bundling of delivery services. Restaurant whowishes to register on platform, have to register for the delivery service of platform.This incurs extra cost to the restaurant, they have little access to the orders via platform.[11]

3. Price parity clauses- restricting the seller from setting lower price on other platforms.

4. Exclusive agreements- Exclusive agreements takes place, in which a product is launched only on single platform and platform list only one brand in a product category.[12]

5. Discounts- platform provide discounts on price set by seller, to attract customers.Seller is not having control over the price offered to the customer and also there isno criteria for setting discounts.

On the basis of the above study, enforcement priorities on CCI, are to ensure competition on merits, increased transparency, fostering coherent business relationship between stakeholders.[13]

Previously, CCI with an intention to encourage digital markets, did not interfere incases relating to unfair terms and treated them as objectively justified. Nonetheless,CCI has in few cases changed its approach, by holding discounts, arbitrary Commissions on businesses as prima facie cases of

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[10] Market study on e-commerce in India-key findings & observations, https://www.cci.gov.in/economics-research/market-studies/details/18/6 Accessed on 14.05.2023

[11] Market study on e-commerce in India-key findings & observations, https://www.cci.gov.in/economics-research/market-studies/details/18/6 Accessed on 14.05.2023

[12] Market study on e-commerce in India-key findings & observations, https://www.cci.gov.in/economics-research/market-studies/details/18/6 Accessed on 14.05.2023

[13] Anshuman Sakle; Nandini Pahari, "The Interaction between Competition Law & Digital and E-CommerceMarkets in India," Indian Journal of Law and Technology 16, no. 2 (2020): 18-37 https://heinonline.org/HOL/Page?handle=hein.journals/indiajoula16&id=192&collection=journals&index= Accessed on February 2024

unfairness.

Road to digital competition Bill

Many legal systems across the globe are introducing ex-ante regulations to regulategatekeepers in digital markets. To maintain effective competition in digital markets, Parliamentary Standing Committee on Finance through its 53rd report, recommended for having ex-ante regulation.

The report mentions that Indian digital ecosystem is growing, and its digitaleconomy is expected to reach USD 1 trillion by 2030. Also, Anti-competitive practices have been identified and global regulations i.e. DMA of EU, American Innovation and Choice Online Act, USA, Open APP Market Act, USA, 10thAmendment of German Competition Act, The Ending Platform Monopolies Bill, USA, have been discussed in the report.[14]

Recently Committee on digital competition law has been formed to understand need for ex-ante regulation and also to study international best practices in the field of digital markets. The Committee was under an obligation to submit a report, also draftDigital Competition Act within three months.[15] There was much delay but finally the report was submitted on 27 February 2024 with a draft digital competition bill.

The Competition (Amendment) Bill, 2023 has introduced new concepts for regulation of combinations in digital markets and in the draft digital competition bill the committee has proposed many new parameters and principles to prevent abuse of dominance and identify dominant players. Going forward we are going to look at the different important aspect in both the legislative documents.

ANTI-COMPETITIVE PRACTICES AND CORE DIGITAL SERVICES

The Standing Committee Report on 'Anti-Competitive Practices by Big Tech Companies' recognised that the current pace at which the digital markets are evolving the current ex-post regiem may be rendered ineffective against market consolidation and thus acknowledged the need for an ex-ante legislation to maintain competitive balance.[16]

[14] Fifty third report, https://loksabhadocs.nic.in/lsscommittee/Finance/17_Finance_53.pdf Accessed on February 2024
[15] Order (Comp 06/11/2022-Comp-MCA) made on 06.02.2023
[16] Standing Committee Report on 'Anti-Competitive Practices by Big Tech Companies', P. 31

The committee then provided ten Anti-competitive employed by the dominant enterprises to secure competitive advantage and consolidate their position in the digital markets.

- Anti-steering: Exclusionary behaviour that hinders business users and consumers from switching to thirdparty service providers.
- Platform neutrality / Self preferencing: A digital enterprise according favourable treatment to its own products on its own platform, thus creating a conflict of interest.
- Adjacency / Bundling and tying: Combining or bundling core or essential services with complementary offerings, thus forcing users to buy related services.
- Data usage (use of non-public data): Using personal data for consumer profiling to offer targeted online services and products, thus raising data privacy concerns.
- Pricing / Deep discounting: Predatory pricing strategies, or intentionally setting prices below cost price to exclude competitors.
- Exclusive tie-ups Exclusive agreements with business users or sellers, thus preventing them from dealing with other enterprises.
- Search and ranking preferencing: Controlling search ranking to prioritise sponsored or own products and reducing the visibility of other products.
- Restricting 3rd party applications: Restricting users from accessing or utilising third-party applications.
- Advertising Policies: There appears to be increasing market concentration, consolidation, and integration across many levels in the ad-tech supply chain which gives the incumbent platform an unfair edge over the market.[17]
- Anti-competitive mergers and acquisitions: Combinations has seen an increasing trend, it has significant role in market share and also great potential for adverse effect on startups.

The Committee on Digital Competition Law (CDCL), tasked with evaluating the suitability of current laws and putting forth ideas suited to the problems of the digital economy, was established

[17] Standing Committee Report (2022), P. 1

in response to this report. The CLDC in its report then introduced the Draft Digital Competition Bill, 2024.

The bill is still in its early stages but the ramifications are immense, it seeks to redefined the future of the digital markets and its stakeholders.

The committee emphasized the need for identification of digital services to enable swift regulatory responses. It took a two-prong approach for determination and employed: i) market specific approach; and ii) market agonatic approach.

The market specific approach entails that pre-identifying services and marketplaces promotes clarity for both regulators and market participants. Such clarity is especially crucial when it comes to the parties' responsibility to notify the regulator and conduct a self-evaluation. On the other hand, the market agonistic approach method makes it possible to respond more quickly to the dynamic nature of the digital markets and is therefore more adaptable.

Following such it weas determined there would be application of a comprehensive and predetermined list of Core Digital Services that are vulnerable to anti-competitive behavior and concentration; this list should be informed by market research, CCI's enforcement experience, and new international standards. Additionally, in order to give the Central Government freedom to occasionally introduce new digital services, the list of Core Digital Services is supplied as a Schedule to the Draft DCB, acknowledging the dynamic nature of digital marketplaces.

The Draft DCB includes in its first Schedule "Core Digital Service" as follows:

a) online search engines;

b) online social networking services;

c) video-sharing platform services;

d) interpersonal communications services;

e) operating systems;

f) web browsers;

g) cloud services;

h) advertising services; and

i) online intermediation services.[18]

SYSTEMATICALLY SIGNIFICANT DIGITAL ENTERPRISE AND ASSOCIATED DIGITAL ENTERPRISE

The Committee recommends that businesses that demonstrate a "significant presence" in shaping the digital market and offering a "Core Digital Service" be subject to regulations. 'Systemically Significant Digital Enterprises' (SSDEs) would be the designation given to these businesses. The criteria would pertain to both, qualitative and quantitative, which could include metrics like turnover, market capitalization, and user base size, and aspects like market dominance, network effects, and impact on competition.

The dual test demonstrates significant presence as observed in the different internation anti-trust legislations. The approach adopted in the draft bill for designation as SSDEs translates into two test:

- Significant financial strength test
- Significant spread test

the "significant financial strength" test, includes quantitative limits, which are applicable irrespective of the core digital service, of economic power, which are, gross merchandise value, gross market capitalization, turnover particular to India, and global turnover.

The "significant spread" test measures the number of end users and business users to determine how prevalent an enterprise is in India when it comes to offering a Core Digital Service. It is suggested that businesses evaluate if they have met the aforementioned requirements on their own and report to the Competition Commission of India (CCI). Furthermore, even in cases where a business fails to exceed the quantitative limits but still has the power to majorly impact on the market, the CCI may nevertheless designate it as an SSDE based on qualitative factors.[19]

Section 3 of the draft digital competition bill provides for designation on enterprises as SSDEs, it is

[18] Schedule I of the draft Digital Competition Bill

[19] "Call For Inputs On Draft Digital Competition Bill, 2024, Mar. 26, 2024, available at: https://community.nasscom.in/communities/public-policy/call-inputs-draft-digital-competition-bill-2024.

also stated in the CLDC report that the financial base limits are to be revised every three years[20]. It is also proposed that, the SSDE designation may remain valid for 3 years unless there is a significant change in the market[21].

An enterprise shall be deemed to be a Systemically Significant Digital Enterprise in respect of a Core Digital Service, if:

(a) it meets any of the following financial thresholds in each of the immediately preceding three financial years:

(i) turnover in India of not less than INR 4000 crore; OR

(ii) global turnover of not less than USD 30 billion; OR

(iii) gross merchandise value in India of not less than INR 16000 crore; OR

(iv) global market capitalisation of not less than USD 75 billion, or its equivalent fair value of not less than USD 75 billion calculated in such manner as may be prescribed; AND

(b) it meets any of the following user thresholds in each of the immediately preceding three financial years in India:

(i) the core digital service provided by the enterprise has at least one crore end users; OR

(ii) the core digital service provided by the enterprise has at least ten thousand business users.[22]

Section 3(2) of the draft digital competition bill provides that, if the Commission is of the opinion that such enterprise has significant presence in respect of such a Core Digital Service, it may designate the enterprise as a SSDE pursuant of the perusal of information available and certain enumerated factors volume of commerce of the enterprise, size and resources of the enterprise, number of business users or end users of the enterprise, economic power of the enterprise, etc.[23]

The definition of enterprise under the competition act or the draft digital competition bill does not

[20] Section 3(4) of the Digital Competition Bill, 2024
[21] Section 4(8) of the Digital Competition Bill, 2024
[22] Section 3(2) of the Draft Digital Competition Bill, 2024
[23] Section 3(3) of the Digital Competition Bill, 2024

include groups. In order to account for scenarios where compliance and encfrocement of anti-circumvention laws may be required from multiple enterprises, the concept of *Associate Digital Enterprises*(AECs) was introduced.

Two scenarios were considered:

- The holding company is classified as an SSDE, and other group companies that are either directly or indirectly participating in the provision of the same Core Digital Services are designated as Associate Digital Enterprises (ADEs) by the SSDE.
- An enterprise that is not holding and is primarily involved in delivering the Core Digital Service is classified as an SSDE, and its holding company and other group entities that are also involved in providing the same Core Digital Services are classified as ADEs. When choosing which businesses to designate as SSDE and ADE, it is advised that the CCI exercise discretion.

For the purpose of defining SSDEs or ADEs, list every business that is directly or indirectly involved in providing a Core Digital Service, particularly in the case of huge digital conglomerates with international operations. Businesses who are required to inform by virtue of their designation as an SSDE, are obliged to list all other businesses in their group that are either directly or indirectly involved in the delivery of a Core Digital Service, which will be designated as ADE. Such designation of ADE will be in effect till the corresponding designation of SSDE is not revoked.[24]

According to the Bill, corporations would have ninety days to inform CCI via the designated form that they satisfy the requirements to be classified as "Systematically Significant Digital Enterprises" in relation to one or more of their Core Digital Services.

Following receipt of the data, the CCI may issue an order defining the company's core digital services and classifying it as a "Systematically Significant Digital Enterprise".[25]

OBLIGATIONS AND PENALTIES

In the prohibition of the ACPs, It is pertinent to note that not all ACPs have the same degree of anti-

[24] Section 4 of the Digital Competition Bill, 2024
[25] ibid

competitive effect. Regulations may be created by the CCI to specify particular duties that apply to every Core Digital Service separately. Depending on several aspects like the size of the user base of ADEs and SSDEs and their business structures, CCI may specify different requirements for the ACPs.

The draft Competition Bill, 2024 will state certain broad-based obligations, applicable to all the SSDEs and ADEs irrespective of the Core Digital Service.

The broad based obligations are as follows:

- Fair and Transparent Dealings: SSDEs is required to handle business and end users equally, transparently, and without bias.
- Self preferencing: SSDE must not favor their own or related parties products over other CDS users, whether directly or indirectly.
- Data Usage: SSDEs can't use business users' non-public data to compete or cross-use/share personal data without consent.
- Restrict 3rd party apps: SSDEs must let users freely install third-party apps and change default settings.
- Anti-steering: SSDEs can't restrict businesses from communicating offers to their users, unless necessary for the platform's operation.
- Tying and bundling: SSDEs can't compel or incentivise users to use additional products or services unless essential for the CDS.
- Anti-circumvention from obligations: SSDEs cannot engage in undermining behaviour towards effective compliance regardless of such being of a contractual, commercial or technical nature, or of any other nature. Also they cannot restrict any user from raising issue(s) of non-compliance.
- Reporting and Compliance: SSDEs must establish complaint handling and compliance mechanisms and report measures taken for compliance.
- Requirement of compliance: The SSDEs and their corresponding ADEs must comply with the obligations provided, and are subject to the same penalties for non-compliance. However,

CCI may subject ADEs to different obligations.[26]

In view of the recent efforts of the Central government, the it is observed that it pertinent to maintain a balance between ease of doing business and deterrence, therefore it was recommended that contraventions of the draft digital competition bill should be met primarily with civil penalties.

In case of non-compliance with a directive to stop, halt, penalize, or alter behavior, as well as any interim or extraterritorial conduct orders. Pennalty of one lakh rupees for every day that this kind of non-compliance happens, up to a total of ten crore rupees. If the aforementioned amount is not paid, there might be a three-year prison sentence, a fine of up to Rs. 25 crore, or both.

In the case of Non-compliance with Chapter III's requirements as well as any ensuing rules and regulations. Penalty upto 10% of SSDE or ADE's global revenue in the 3 fiscal year before the discovery of the contravening action.

SETTLEMENTS AND COMPROMISE

Corporations that are being investigated for violations under the Act under section 16 may apply to the Commission for a settlement by following certain guidelines. After the receipt of DG's report, but before the Commission makes a final order under section 17(8), this application may be submitted.

Depending on the seriousness and other requirements of the violation(s), the Commission may approve the settlement offer. The Commission may rejects the application and moves on with the investigation if it determines that the proposed settlement is unsuitable or if an agreement has not been reached in the allotted period.

There is no appellate process for orders the Commission issues under this clause. The process for applying for Commitments is likewise comparable. There are two main distinctions, though. First, an offer for commitments may only be made following the Commission's prima facie approval of an inquiry order, but prior to the party receiving the DG report. Second, while a commitment offer might not have a financial component, a settlement proposal might.[27]

[26] Chapter III of Digital Competition Bill, 2024
[27] Section 18 of the Digital Competition Bill 2024

RECENT DEVELOPMENTS FOR COMBINATIONS CONTROL IN INDIAN

Deal Value threshold

The amending Act added the Deal Value Threshold ("DVT") to the pre-existing asset and turnover-related thresholds[28]. The implementation of this criterion is anticipated to serve as a catalyst for the CCI's goal of fostering and maintaining fair competition in the economy, which will give producers a level playing field and enable the markets to function in the best interests of consumers.[29]

It entails the value of any transaction, in connection with acquisition of any control, shares, voting rights or assets of an enterprise, merger or amalgamation that exceeds INR 2000 crore must provide a new notification in this regard.[30]

Provided that the enterprise which is being acquired or taken control of or merged or amalgamated has such substantial business operations in India, as specified by the regulations.[31]

There was a growing possibility of killer acquisitions, which necessitated raising the threshold. A killer acquisition occurs when larger company buys out a target company with the intention of ending the target's innovative endeavors and reducing competition. Acquisitions of cutting-edge targets by companies that are superior in utilizing technology in the early phases of product creation in order to reduce possible competition at that time.[32] This is especially true for innovation-driven sectors like the pharmaceutical and internet markets. The merger of Facebook and WhatsApp, which was disregarded in favor of the previous criteria for alerting the CCI, is thought to be the first example of such a deal in India.[33]

The Amendment Act explains the value of transaction as every valuable consideration, whether

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[28] The Competition Act, 2002 (12 of 2003) Section 5
[29] Competition Commission of India, 'About Us'
<https://www.cci.gov.in/aboutus#:~:text=Our%20goal%20is%20to%20create,the%20welfare%20of%20the%20consumers>
[30] Competition (Amendment) Act, 2023
[31] ibid
[32] Colleen Cunningham, Florian Ederer and Song Ma, 'Killer Acquisitions' (2021) 129(3) Journal of Political Economy 649–702
<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3241707>
[33] Rupin Chopra and Apalka Bareja, 'Impact of Deal Value Threshold on Tech Industry – Competition Law'

direct or indirect or deferred for any acquisition, merger or amalgamation[34]. The insertion of DVT has increased the CCI's power to regulate anti-competitive combinations, and which is exercisable in ex-ante as well as ex-post manner[35].

Control

The Competition Amendment Act redefined "control" under Section 5 of the competition act and makes it clear that "the ability to exercise material influence", in any context over an enterprise's or group's management, affairs, or strategic commercial decisions, either alone or in concert with them, is the applicable standard.

Three forms of control were recognized by CCI's decision-making process:

- Material Influence: At the lowest level of control, known as "material influence," an investor might have an impact on a company's management and operations by means other than shareholding. The CCI is required to determine such elements, which may include participation on the board, veto/special powers, and financial and structural arrangements[36].
- De jure: By virtue of holding 50% of voting rights
- De facto: By holding controlling stake in the organization, which may be less than 50% of voting rights.

The Committee observed that specifics on what would be considered "material influence" could be found in subordinate laws, such as rules or other directives issued by the regulatory body. Because this is the CCI's present practice, the Committee has decided to keep the "material influence" criteria in the definition of control. Nonetheless, the Committee has suggested that relevant rules clearly define the parameters of what qualifies as "material influence"[37].

However, due to the CCI's inconsistent interpretations of what constitutes "control", the rigorous standards for classifying control as outlined in legislation and regulations have been watered down.The judgemnt of Eithad Airways v. Jet Airways introduced ambiguity, by deviation from the *de minimus* statutory exemption and deeming 24% stake as controlling stake, where Etihad had the

[34] Competition (Amendment) Act, 2023
[35] ibid
[36] Lion Meadow Investment Limited case
[37] Standing committee report on Competition (Amendment) Bill, 2022

right to nominate two directors, out of the six shareholder directors, including the Vice Chairman, in the Board of Directors of Jet Airways[38].

In Ultratech case, the CCI defined 'material influence' as the lowest level of control, which includes things like special rights, shareholding, knowledge, representation on the board, and structural and financial arrangements[39]. Further, in Meru cabs case, the CCI recognized that certain minority Shareholders may have "material influence" on investments made by active investors. These demonstrate that there isn't a numerical assessment of the power that a party, or even a minority, can exercise stakeholder can exercise control over the business of the company. Therefore, the influence of one entity over another is shaped by a variety of elements and circumstances, and is not exclusively associated with majority ownership[40].

Without a defined threshold, firms may elect to inform the CCI even in circumstances when the amount of impact is minor, producing an increase in notifications, administrative difficulties, and transaction delays. This contradicts the purpose of expediting the merger approval process and minimizing regulatory costs.

Settlement & Compromise and Leniency Plus

Under the Settlement and Commitment framework (also known as the "S&C framework") for the businesses that have been charged with using anti-competitive behavior. Companies may settle the claimed violation or make obligations regarding it in the manner specified under the aforementioned framework[41]. This is incorporated under Section 48A and 48B of the Competition Act, 2002.

Section 48A of the Act provides a regulatory framework that enables companies that the Director General is investigating to file an application and pay the necessary fee for the settlement of the alleged violation under Section 3(4) or 4 of the Competition Act, 2002. However, report from the General is required before making such an application. The CCI has the authority to determine the seriousness of the situation and may further its investigation if it is dissatisfied with the settlement. Companies that are the subject of a Director General investigation are further permitted by Section

[38] Notice u/s 6(2) of the Competition Act, 2002, given by Etihad Airways PJSC and Jet Airways (India) Ltd. (2013) Combination Registration No. C-2013/05/122 <http://164.100.58.95/sites/default/files/C-2013-05-122%20Order%20121113.pdf>
[39] Builders Association of India v. Cement Manufacturers' Association
[40] Meru Travel Solutions Pvt. Ltd. v. Uber India Systems Pvt. Ltd.
[41] ibid

48B to submit application and pay the required fee. Commitments regarding the alleged violations listed in the Commission's order made in accordance with Section 26(1) should be included in this application. After the CCI's order is issued in accordance with Section 26(1), but prior to the receipt of Director General's report in accordance with Section 26(4) of the Act, the offer for commitments is acceptable.[42] The act's framework also provides for monetary penalties and behavioural remedies.

According to Section 48C of the Act, the Commission may rescind the orders issued under Section 48A and Section 48B of the Act, if it finds after investigation that the full and accurate information was not provided by the applicant or that there has been a major change. [43]

Since the CCI permits party leniency under Section 46 of the Act, offenses related to cartelization are not covered by the S&C framework.

Section 53B of the Act is not applicable to appeals under the S&C framework. Because appellate jurisdiction has been eliminated, the CCI finds it easier to collect the fines. In the past, when the appellate jurisdiction was exercisable, though the Appellate tribunal would mostly reaffirm the findings of the CCI, there were often grievances of delayed rulings.

Section 46 of the Act, which provides for leniency in the competition act, 2002 and states that, "The Commission may, if it is satisfied that any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated section 3, has made a full and true disclosure in respect of the alleged violations and such disclosure is vital, impose upon such producer, seller, distributor, trader or service provider a lesser penalty as it may deem fit, than leviable under this Act or the rules or the regulations."

The main goal behind the leniency clause was to expose the market's cartels and discourage businesses from anti-competitive behaviour. Importantly, few crucial requirements need to be included by the CCI in its orders before exploring the lesser penalty regulations. These include that the information be of a "vital disclosure", that the applicant's cooperation be sincere, comprehensive, and prompt, and that the pertinent evidence not be tampered with or manipulated, to name a few.

In the instance of the "Cartel case of Zinc-carbon dry cell manufacturer," the Commission assessed a one-hundred-percent reduction on the total fine. Panasonic itself filed the leniency application that

[42] Competition Act, 2002
[43] ibid

exposed the conspiracy including Eveready Industries, Indo National, and Panasonic India to fix pricing through collusive bidding for zinc-carbon dry cell batteries in India. Panasonic was then given total immunity because the revelation created a new cartel. Subsequently, leniency applications were also made by the other two undertakings. But according to the Commission, the evidence the Director-General seized was "independently sufficient," and the evidence they provided did not significantly add value. Nevertheless, because both businesses fully cooperated with the Commission during the inquiry, the Commission waived 30% and 20% of the fines. The Commission's decision in this case is at odds with its own Brushless DC Fans Case, where leniency was awarded for collaboration "in conjunction with," rather than only on the basis of value addition supplied by the applicants.[44]

Entities were charged with bid-rigging and collusive bidding in the Nagrik Chetna Manch case. The 1st and 3rd applicants received a 50% reduction in their fine because their cooperation helped the Commission expose the current cartel. Following this, three other applicants received a reduction in the penalty for their assistance, added value, and priority status. It is important to note that the Commission reduced the penalty for OP-2's cooperation during the investigation, even though it acknowledged that the value added by OP-2 was "minimal." Even though OP-1 cooperated fully and disclosed all relevant information, clearance was yet refused. Additionally, OP-7 was refused discount because to the investigation's **insignificant value enhancement** (based on its evidence).

The rulings of the commission are inconsistent in its approach in identifying parameters for "significant value addition". It is an important tool to gain cooperation in cartel cases.

Benefit of the simultaneous implementation of the S&C framework with the Act's Section 46 leniency mechanism has proven beneficial against cartels and has speed up the process of resolving disputes. However, there are some inconsistencies associated with S&C and Leniency systems that need to be carefully considered.

The industry-friendly framework is a positive step towards speeding up dispute resolution. It is imperative to implement measures that support the Competition Commission of India (CCI) in guaranteeing that the company charged with anti-competitive practices fulfills its obligations and remains accountable.

[44] suo-moto-case-no-0220161652433627.pdf (cci.gov.in)

NEED FOR DIGITAL COMPETITION LAW IN INDIA

The main aim of the competition law is to ensure efficient markets and fair competition by avoiding collusions, the abuse of dominance and anti-competitive combinations. The digital economy poses particular challenges to the existing competition law in practice.

First, the existing competition law focuses on price, but the platforms usually **charge for free** to attract users. And some basic concepts in competition law are difficult to apply when regulating the platforms. In this section, only the problems relevant to the research aim will be mentioned. Due to the multi-sided nature of the platforms, the primary problem is the **definition of the relevant market**. Traditional competition law is designed in asymmetry to the economic regulations. To be more specific, traditionally, the SSNIP test would be applied in order to define the *relevant markets*. However, the test is not designed to take into account the zero-price-side of the market, where users pay with their data and thus, the competition law is not effective to solve the market power issues identified within the digital markets. Since SSNIP is not applicable in zero-pricing, there are proposals for applying the SSNDQ (Small but Significant Non-transitory Decrease in Quality)Test. However. There is the problem of quantification, its not easy to quantify the quality of a particular product. Another proposal is to apply the SSNIC (Small but Significant Non-transitory Increase in Costs) which takes in to account information and attention costs, but has not been utilized till date.

In addition, due to the **cost structure** of the tech companies[45], with nearly zero marginal costs of distribution, platforms can accept low or no returns on one side of the market in order to accumulate more general users and exploit the business users on the other side(s). In addition, there are also some interpretive issues which mainly caused by the multi-sided nature of the platforms and questions such as "*what is the position of platform in the vertical chain[46]?"* can be asked. For example, for Facebook, the buyers and suppliers are worth to be discussed in order to identify the substantial market power. Moreover, the present competition law concerns only with the abuse of dominant position or market

[45] Based on the economic methodology and use the concept about substitute in order to identify whether it is competing in the same market. The SSNIP test can be applied to supply-side substitution by postulating whether the price increase would be rendered unprofitable by the suppliers moving to produce the product. See G.Niels, 'The SSNIP Test: Some Common Misconceptions', 2004, Comp Law 267; Bellamy and Child, n.16, 4.055-4.062.

[46] Related to vertical integration. It allows a company to streamline its operations by taking direct ownership of various stages of its production process rather than relying on external contractors or suppliers.

power. As discussed, platforms tend to be "winner-takes-all", thus, the **dominant position itself becomes an issue** for themselves are the (only) owners of the market[47] and the present competition measurement cannot deal with this kind of situation.

Lastly, for digital platforms, the problems of **data-driven abuse** are worth to be addressed and it is asking for a more flexible approach in assessment for abuse of dominance in the digital economy. Currently, the EU is addressing these problems with an indirect approach by mainly focusing on consumer welfare and interact with the data protection law[48].

However, the competition authorities have paid more attention to the **innovation competition** with the rise of the digital business, and they try to **use data as a non-price parameter** in assessing competition. This is because the digital economy has applied a dynamic competition paradigm and innovation plays a crucial role in the competition of the platforms. It could have important consequences in finding dominance of a multi-sided undertaking. For example, innovation would explain the limited role of traditional market power indicators like market shares and concentration levels in evaluating market power. Therefore, the digital competition policies are increasingly focused on the value brought by innovation and how these values are captured, shared, and generated, where the three processes are intrinsically linked. Moreover, since *price* cannot be used as a parameter in accessing the competition efficiently, the focus of competition authorities switches to innovation competition and focus on the *data*, including the access and the usage of the data. Additionally, in **digital market combinations,** the appraisal of the value of a company is heavily based on the data or business innovation. Combination of such organizations is not covered by the conventional asset or turnover thresholds used to assess their effect on competition. The traditional asset-based approach of valuation will not provide appropriate results, since these business hold value nit in physical assets but in intangible assets.

The policymakers rethink **the role of data**, and they already attempted to place it in the competition law practice. For instance, at the national level, the Germany amended its Competition Act (the GWB) to explicitly mention access to data as one of the factors in the assessment of market power and added

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47 "Becoming the owners of the infrastructures of society." See N. Srnicek, 'Platform capitalism', Polity press, 2017, p.92.

48 Competing for the market instead of competing in the market, see section 3.2. Through the improvement of the productivity and the introduction of new products or services, see J. Sidak, D. Teece, "Dynamic competition in antitrust law", Journal of Competition law & Economics, 2009 (5).

new thresholds in respect of merger notifications[49]. Taking a specific legal case as an example, the *Bundeskartellamthas* ruled that Facebook abused its dominance by improperly combining user data from WhatsApp. In this case, the **relevant factors**, such as access to competitively relevant data, economies of scale based on network effects, user behavior, and the power of innovation-driven competitive pressure, are considered in its market power assessment. This case has indicated that there is a tendency that in regulating the digital economy, the competition law enforcement needs to integrate the interface between competition law, consumer protection, and data protection. At the EU level, the Commission's Report has also recognized the significance of data and access to data, which may play a role in future competition policies development and market power assessment[50].

There are certain inherent peculiarities to the digital platforms, they are multi-sided in nature and provide distinct yet similar services to both business and end uses, also there is the same side network effect & zero-pricing strategies and they have access to vast repositories of consumer data. This enables not necessarily dominant enterprises but enterprises which can carry great influence in the market. Considering the pace of digital markets, such markets have a higher propensity to tip greatly in favour of the dominant enterprise. Therefore, the present ex-post model may not be sufficient for early detection and intervention in digital markets.

Overall, the traditional competition law has the following inefficiency in regulating the platforms. First, the traditional competition law concept of a "market" does not fit the platforms' business model, where consumers ostensibly provided with free services are in reality paying with their data or where the users themselves provide the content of the service. Second, for the platforms, the **dominant position** is becoming the issue that policymakers are supposed to address instead of focusing on the abuse of the dominant position. Lastly, the competition for the tech companies is focused on innovation competition and tries to apply **data as a non-price parameter**, instead of the price, in accessing competition. Accordingly, additional conceptual tools need to be developed to access restrictions on competition[51] and prevent data-driven abuse.

[49] Which are designed to catch transactions involving companies with significant competitive potential but which at present have little or no turnover. This is often the case with new companies with innovative business models and thus, prevent "killer acquisitions".

[50] Bundeskartellamt Decision B6-22/16 of 6 February 2019 on Facebook: 149, 159, 160, 165, 169, 170, 173, 175, 179, 194, 224, 237, 238, 239, 240, 241, 286, 289, 290, 294.

[51] Refers to both vertical and horizontal competitions. Platforms either try to acquire or innovate by themselves to conduct horizontal and vertical integrations at the same time in order to occupy more market shares or having more relevant markets.

CONCLUSION

Abuse of dominance and the ineffectiveness of merger regimes in digital markets is gaining attention in every economy. Consumers and business groups have preferred the on transition from traditional marketsto digital markets. Also, it provides a leeway to dominant undertakings to act ruthlessly in the market. Although, existing competition law regimes regulate abuse of dominance and combination transactions but lack its rules with regard to the dynamics of digital markets. Indian legal system is combating abuse of dominance and abusive combination practices in the constantly evolving digital markets. Indian digital sector has been developed, there are rampant anti-competitive practices by big tech or dominant entities. Without well-defined legal framework on digital market, CCI is trying at its best possibility, to handle anti- competitive behaviours of the dominant groups. Notably, CCI has decided a numberof cases relating to digital markets such as WhatsApp, Facebook, Google cases. However, with the recent development on ex-ante measures and new principles the authorities are trying to set new precedents and bring in a proactive framework for the regulation of digital markets in india.

Market study on e-commerce had positively boosted CCI's approach. CCI has with a proactive Suo moto approach, changed its attitude towards digital sector anti-competitive cases. CCI is efficiently handling and maintaining a balance in market.

Keeping in mind, the recent developments, CCI orders, Market studies, it is obvious that the Indian legalsystem is in immediate need of a digital competition bill. There is a hope to succeedon this aspect, since the Ministry of Corporate Affairs along with Committee on digital competition law are working together to have a digital competition law, regulating dominant undertakings, controlling their abuse of dominance and regulating combination to ensure fair competition in digital markets. There is an expectation that, soon India will have its own Digital Competition Regime.

Recommendations-

1. Important terms should not have inconsistencies in their meanings, such as 'control' in Section 5 of the Competition Act, 2002 and 'significant value addition' in adjudication of leniency cases.

2. Enforcement of the Digital Competition Framework should not be such that in spirit it becomes another face of 'license raj', where the market players are subject to strict control and the free and fair workings of the markets are hindered.