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ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated 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

REDEFINING FAIR PLAY: ANTI-TRUST AND COMPETITION LAWS IN THE DIGITAL AGE AND THE DRAFT DIGITAL COMPETITION BILL.

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Abstract

Monopoly, characterized by the dominance of a single company in a market, often leads to reduced competition, higher prices, and lower-quality products, impacting economies and democracies negatively. In India, monopolies can stifle innovation, concentrate economic power, and undermine democratic processes. The digital era's expansion has further complicated the landscape, with major tech companies exhibiting monopolistic tendencies. The proposed Digital Competition Bill seeks to regulate Systemically Significant Digital Enterprises (SSDEs) to prevent anti-competitive practices. It introduces ex-ante regulations to ensure fair competition and protect consumer interests. However, concerns have been raised about the bill's restrictive nature, potential impact on investment, and the balance between regulation and innovation. While aiming to curb monopolistic behavior, the bill's success will depend on its ability to maintain a competitive market environment without stifling growth in India's digital economy.

***Keywords:** Monopoly, Digital Competition Bill, competitive market environment, India's digital economy.*

Concept of monopolies and competition in general and in Indian industry

A monopoly is characterized by a single company providing a specific good or service, resulting in a lack of competition in the market and no close substitutes for the product. This market structure allows monopolies to control prices and create obstacles for potential competitors. Monopolies can have several negative impacts on the Indian economy and democracy. Economically, monopolies

often reduce competition, leading to higher prices and lower quality products or services. Without the pressure of competition, monopolistic firms have little incentive to innovate or improve efficiency, which can hinder economic growth and technological progress. This lack of competition can also result in the inefficient allocation of resources, as monopolies may focus more on maximizing profits than on consumer welfare¹.

From a democratic standpoint, monopolies can concentrate economic power in the hands of a few, potentially leading to excessive political influence. This concentration of power can undermine democratic processes, as monopolistic companies may use their financial resources to lobby for favorable regulations, policies, or political outcomes that benefit their interests rather than the public. This influence can erode public trust in democratic institutions and create an unequal playing field where smaller businesses and individual voices are marginalized.

Additionally, monopolies can restrict consumer choices and reduce market diversity, weakening the economy's vibrancy and resilience. In a diverse and populous country like India, where a dynamic market is crucial for job creation and economic opportunities, the restrictive effects of monopolies can increase inequality and social discontent. Therefore, preventing monopolistic practices is vital for maintaining a competitive, fair, and democratic economy that benefits all citizens. Crony capitalism can severely harm not only the economy but also the democratic political system. This is why economists advocate for preventing monopolies, which can be effectively regulated through laws like antitrust or competition laws.²

The liberalization policies, also known as LPG (Liberalization, Privatization, and Globalization) policies, introduced in 1991, allowed successful Indian companies to grow significantly. While some large companies have made substantial contributions to India's economic growth and development, not many businesses could survive the intense competition, highlighting the need for antitrust legislation like the Competition Act, 2002. This act was implemented to promote and

¹ *India seeing multiple monopolistic trends: Prevention Better Than Cure*. The Economic Times. (n.d.). <https://economictimes.indiatimes.com/markets/stocks/news/india-seeing-multiple-monopolistic-trends-prevention-better-than-cure/articleshow/79821185.cms?from=mdr>

² Megha Rani Ahuja & Ganesh (2023, January 6). *A study of Technological Advent and its impact on competition in India*. Economic and Political Weekly. <https://www.epw.in/engage/article/study-technological-advent-and-its-impact>

sustain competition in the Indian market, prevent anti-competitive practices, protect consumer interests, and ensure the freedom of trade. These protections support essential fundamental rights under the Indian Constitution, including the freedom of trade (Article 19(1)(g)), the right to life and livelihood (Article 21), and the right to equality (Article 14).

Impact of Internet and Technology on digital marketplace

The advent of the digital era, along with the increasing development and usage of the internet, artificial intelligence, and other related technologies, has significantly impacted personal lives and brought about a remarkable transformation in Indian businesses. Startups have leveraged social media platforms and websites for advertising and marketing, enabling them to reach a wider audience not only within India but also globally. According to market intelligence firm Redseer Strategy Consultants, India's internet industry is projected to grow substantially, potentially reaching a valuation of \$5 trillion by 2030.

India boasts the world's second-largest internet user base, with approximately 780 million internet users. A significant portion of this user base is expected to continue to emerge from tier-2 cities. E-commerce is one of the most prominent sectors driving India's internet economy. The ease of access, convenience, and competitive pricing offered by online platforms have attracted a large consumer base, significantly boosting the growth of online retail. Major players like Flipkart and Amazon, along with numerous local startups, have revolutionized the shopping experience in India. E-commerce is anticipated to play a crucial role in India's economic growth and job creation. The country's digital transformation has been further supported by the rapid development of digital payment systems and fintech innovations. The introduction of the Unified Payments Interface (UPI) has revolutionized transactions in India, making digital payments more seamless, secure, and inclusive. The widespread use of digital wallets, payment apps, and mobile banking has accelerated the adoption of cashless transactions, integrating millions into the formal financial system. Fintech startups have flourished, offering innovative solutions in lending, insurance, investment, and financial inclusion, thereby contributing to the expansion of India's internet economy. India's internet economy has become a fertile ground for startups and entrepreneurial ventures. The country has experienced a surge in tech startups across various sectors, including e-commerce, fintech, health tech, edtech, and food delivery services. Government initiatives like

"Startup India" and growing investor interest have made India a hub of innovation and entrepreneurship. With a young and dynamic workforce and a growing startup ecosystem, India is positioning itself as a key player in the global digital economy.

The rapid expansion of the digital marketplace poses significant queries regarding monopoly power, a crucial topic of discussion in antitrust debates.³ The problem now affects more than a few big online retailers. Owing to the growing significance of information technology, as well as the frequent convergence of large fixed costs, economies of scale, network effects, and international marketplaces, the platform business model might be the direction of future developments. Similar to how Lyft and Uber upended the taxicab industry and Netflix and Hulu upended the movie business, a number of sectors, including financial services, professional services, healthcare, and education, may experience change and disruption as a result of internet-based platform business models.

Need for new legislation

Big digital firms, which are presently governed inconsistently in India, have been a major force behind the digitisation movement. The Competition Commission of India (CCI) has documented instances of anti-competitive conduct, including unilateral discriminatory rules and unfair commercial practices, by major digital businesses like as Google, MakeMyTrip-Go, and Oyo. During its thorough examination of India's competition laws, the Competition Law Review Committee (CLRC) brought attention to these new issues in digital markets.⁴ The CLRC therefore suggested changes to the Competition Act of 2002, including adding "data" to the definition of "price" and adding "network effects" as a standard by which to judge an enterprise's dominance. In order to assess whether a new antitrust framework is necessary, the CLRC also recommended taking a cautious approach and conducting recurring examinations of worldwide trends in digital market legislation. Ten prevalent anti-competitive practices (ACPs) used by Big Tech corporations were identified in December 2022 by the 53rd Parliamentary Standing Committee Report. The

³ Robert W., T. W., Hugh H. Macaulay (n.d.). *Antitrust reform in the digital era: A skeptical perspective*. <https://businesslawreview.uchicago.edu/print-archive/antitrust-reform-digital-era-skeptical-perspective>

⁴ Bhandari, K. (n.d.). *Assessing the "new" approach to Antitrust Law: An indian antitrust experiment*. Carnegie Endowment for International Peace. <https://carnegieendowment.org/posts/2024/04/assessing-the-new-approach-to-antitrust-law-an-indian-antitrust-experiment?lang=en>

report acknowledged that these ACPs are made possible by certain features of digital marketplaces, such as robust network effects and economies of scale. The study pointed out that these tactics frequently lead to a "winner-takes-most" situation in which markets lean in favour of powerful incumbents. Because of drawn-out enforcement procedures that start only after harm has been done, the Competition Act's ex-post framework—which steps in after an event occurs—might not be enough to stop these results. Thus, the creation of a distinct ex-ante competition rule tailored to digital marketplaces was suggested by the 53rd Parliamentary Report.

In light of this, the Competition Act and other existing framework were evaluated in February 2023 by the Committee on Digital Competition Law (CDCL) to determine their suitability for regulating digital markets. In addition, the CDCL examined international best practices and, on March 12, 2024, produced a draft bill to put its recommendations into effect. Important findings and suggestions made by the Committee consist of:

1. The Committee stated that the Competition Act of 2002's ex-post framework does not provide prompt resolution of anti-competitive behaviour by digital companies. This highlights the need for ex-ante regulation of digital competition. The observation was made that the irreversible market tipping in favour of giant digital companies, which results in permanent domination, might not be adequately addressed by this paradigm. The Committee suggested that the Digital Competition Act be passed, giving the CCI the authority to regulate big digital businesses ex ante and solely focus on those that have a sizable amount of clout in the Indian digital market.
2. Digital firms that have gained impact swiftly are known as Systemically Significant Digital firms (SSDEs). This is because of particular properties of digital markets. Several features enable huge incumbents to enter related markets: network effects raise the utility of a service as more users use it; economies of scale enable incumbents to offer services at lower costs than new entrants; and the collecting of user data. The Committee suggested ex-ante regulating organisations that provide some essential digital services, like search engines, social networking services, operating systems, and web browsers, as SSDEs since they are vulnerable to market concentration.

3. Using both quantitative and qualitative criteria, the Committee suggested thresholds for classifying firms as SSDEs. A two-pronged test based on notable financial strength (market capitalisation, turnover, gross merchandise value, etc.) and notable spread (number of business and end users of the main digital service in India, for example) could be used to determine the quantitative threshold. After reporting to the CCI, businesses reaching these thresholds would be classified as SSDEs. The resources of the digital organisation and the amount of aggregated data could be utilised as qualitative factors for designation in the case that the quantitative standards do not apply to them.
4. The Committee observed that several digital companies that are part of a group that offers a core digital service may need to comply. It was suggested that in order to classify them as ADEs under the suggested framework, notified companies should list any other businesses in their group that are engaged in delivering essential digital services.
5. As suggested by the Committee, the draft Digital Competition Bill, 2024 forbids SSDEs from carrying out specific activities. utilising non-public data of business customers on their platform for competition with them, favouring their own goods or services, preventing users from utilising third-party apps, and pressuring or rewarding users to use other SSDE goods or services are a few examples. Regulations may impose varying duties on various SSDEs and ADEs according to user base and business style.
6. The proposed Bill gives the Director General—appointed under the 2002 Act—the authority to look into any violations at the CCI's request. The Committee suggested improving the CCI's technological capabilities for case resolution and early identification, especially within the Director General's office. It also recommended creating a distinct bench within the National Company Law Appellate Tribunal to expedite the processing of appeals.
7. The 2002 Act penalises anti-competitive behaviour with large fines and behavioural remedies. The Committee observed that in an effort to facilitate commercial dealings, the federal government had decriminalised a number of corporate offences. It suggested that civil sanctions be used to resolve infractions under the draft Bill. The Committee recommended using the global turnover of firms to determine the penalty ceiling and setting it at 10% of the global turnover of SSDEs.⁵

⁵ *Committee reports*. PRS Legislative Research. <https://prsindia.org/policy/report-summaries/digital-competition-law>

Key provisions of the proposed legislation

The Digital Competition Bill aligns with global trends in digital market regulation, reflecting similar legislative approaches seen in the European Union's Digital Markets Act (DMA) and Digital Services Act (DSA). Both of these European laws aim to regulate major tech companies and foster fair competition, focusing on preventing unfair practices by gatekeepers and enhancing consumer protections.⁶

Under Clause 2(17) of the bill, the term "Systemically Significant Digital Enterprise" (SSDE) refers to a company identified by the regulatory Commission, as per Section 4 of the Act, as having a major impact on the digital economy or system due to its scale, influence, or activities. This designation emphasizes the enterprise's critical role in the digital ecosystem and may necessitate additional oversight or regulation. Clause 3 outlines the criteria for an enterprise to be classified as an SSDE under Section 4. To qualify, the enterprise must have a significant presence in offering a Core Digital Service in India and meet at least one of the following financial thresholds over the past three financial years: a turnover in India of INR 4000 crore, a global turnover of USD 30 billion, a gross merchandise value in India of INR 16000 crore, or a global market capitalization of USD 75 billion. Additionally, it must have at least one crore end users or ten thousand business users of its core digital service in India. If the enterprise does not maintain or provide this data, it can still be classified as an SSDE if it meets any of the financial or user thresholds. The Commission may also designate an enterprise as an SSDE based on various factors such as commerce volume, size and resources, user numbers, economic influence, market integration, user dependency, monopoly status, barriers to entry, user lock-in, network effects, and market structure. The Central Government will review these thresholds every three years. The bill also defines key terms like "turnover in India," "global turnover," "gross merchandise value," and "global market capitalization," with these metrics calculated for the entire group if the enterprise is part of one.

Chapter III outlines the obligations for Systemically Significant Digital Enterprises (SSDEs) and their Associate Digital Enterprises (ADEs) once designated under the law. These entities must adhere to specific regulations and requirements related to their Core Digital Services as identified

⁶ Report of the Committee on Digital Competition Law. (n.d.). <https://www.mca.gov.in/bin/dms/getdocument?mids=gzGtvSke3zIVhAuBe2pbow%3D%3D&type=open>

by the Commission. ADEs are required to comply with the same obligations as SSDEs, and non-compliance can result in similar penalties. The Commission will establish conduct requirements tailored to each Core Digital Service, considering factors like market nature, user numbers, and other relevant aspects. Differential obligations may be applied to SSDEs and ADEs based on these factors. Compliance with these regulations deems the enterprise compliant with the obligations in this chapter. SSDEs must avoid any behavior that undermines compliance, including contractual, commercial, technical actions, or the use of behavioral techniques or interface designs. They cannot prevent users from raising non-compliance issues. SSDEs are also required to establish transparent complaint handling and compliance mechanisms and report their compliance measures to the Commission. The chapter emphasizes fair and transparent dealings, prohibiting SSDEs from favoring their own products or services over third-party offerings on their platform (self-preferencing). They are also restricted from using non-public data from business users to compete with them and must obtain user consent for data use, including intermixing or cross-use of personal data. Data portability must be facilitated for users.

Furthermore, SSDEs cannot restrict the download, installation, operation, or use of third-party applications on their Core Digital Services, and must allow users to set and change default settings. They are prohibited from restricting business users from communicating with end users, promoting offers, or directing end users to other services, unless these restrictions are integral to the Core Digital Service. Finally, SSDEs cannot require or incentivize the use of other products or services alongside the Core Digital Service unless it is integral to the service provision. The Commission may specify what constitutes "integral" in these contexts.

Chapters III through VIII of the legislation outline a comprehensive framework for regulating Systemically Significant Digital Enterprises (SSDEs) and their Associate Digital Enterprises (ADEs). Chapter III specifies the obligations these enterprises must follow, such as maintaining fair dealings, preventing anti-competitive practices, and ensuring data protection and user choice. Chapter IV grants the Commission the authority to conduct inquiries into these enterprises, assessing compliance and investigating potential violations. Chapter V details the powers of the Commission and the Director General, including the ability to request information, conduct investigations, and enforce regulations. Chapter VI outlines the penalties for non-compliance,

which can include fines and other sanctions. Chapter VII provides the framework for appeals and the powers of the Appellate Tribunal to review decisions made by the Commission. Chapter VIII, labelled as Miscellaneous, includes provisions for delegated legislation, granting the Central Government authority to issue additional regulations and guidelines. It also asserts the Act's overriding effect over other laws, allowing the Central Government to exempt certain enterprises, issue directions, and even supersede the Commission if necessary. This chapter ensures the government retains ultimate oversight and control over the regulatory framework's implementation and enforcement.

Impact of the Digital Competition Bill on Indian markets

Major technological businesses in India, including global behemoths like Google, Amazon, and Facebook as well as well-known regional players like Reliance Jio and Flipkart, would be greatly impacted by the government's implementation of the Digital Competition Bill. These businesses are worried about how the law would affect their ability to conduct business. The measure goes after powerful digital platforms that have a lot of market share and frequently act as gatekeepers by managing services or vital infrastructure that other companies rely on. The measure aims to prohibit these gatekeepers from abusing their dominating positions to stifle competition by regulating them. The proactive, or ex-ante, regulatory strategy of the law has drawn criticism from groups and industry leaders, including the Internet and Mobile Association of India (IAMAI). They contend that this might burden digital businesses excessively and make running their businesses more difficult. There are also worries that strict laws may discourage innovation and make it more difficult for these businesses to make investments in cutting-edge products and services.

The following are the main issues with the bill:

1. **Restrictive Nature:** The ex-ante approach of the measure is criticised for perhaps being unduly restrictive. It runs the risk of impeding innovation and lawful business operations by enforcing restrictions prior to any anti-competitive activity. Businesses may be reluctant to invest in new technologies or pursue novel business opportunities out of concern for potential regulatory backlash.
2. **Industry Opposition:** Prominent IT firms and industry associations have expressed opposition to the measure, claiming that it might make doing business more difficult. They

think that businesses may find it more difficult to compete globally and run their operations effectively as a result of the growing regulatory load.

3. Unbalance in Regulation: Stakeholders and experts warn that although regulation is important, it should be reasonable and not unduly onerous. Fostering a fair and competitive market without impeding innovation or deterring investment should be the goal.

One major area of concern with the law is how it would affect investments in the Indian tech sector. India's tech sector has drawn a sizable amount of funding from both local and foreign investors. Stricter rules, though, could alter the current investment environment. The ex-ante regulatory approach in the law, according to the IAMAI, is a "unfair imposition on digital companies," raising the possibility of a "dry up" in venture financing for internet startups and possibly making company operations unfeasible. High regulatory risk settings are typically avoided by investors since they can have an impact on overall company conditions and returns on investment. There is concern that higher compliance expenses and possible regulatory scrutiny may discourage investors from supporting Indian digital firms. These laws could be detrimental, especially for startups.⁷ Even though the measure seeks to level the playing field, new and rising enterprises may face substantial obstacles due to the increased regulatory requirements. Startups may find it difficult to negotiate complicated regulatory frameworks since they frequently have little resources, which could impede their ability to expand and innovate. On the other hand, others contend that the measure would promote a more steady and predictable market climate, which eventually might draw in more long-term investments. The measure might potentially foster a more positive market dynamic that benefits a broader spectrum of stakeholders by guaranteeing equitable competition and prohibiting monopolistic practices.

Conclusion

With the goals of protecting consumers and fostering fair competition, the Digital Competition Bill is a major step towards regulating India's digital markets. Still, there is disagreement over how it might affect investments and the larger tech sector. Achieving the ideal mix between rules and

⁷ Goyal, T. (2024, July 9). *What is the Draft Digital Competition Bill?: Explained*. The Hindu. <https://www.thehindu.com/sci-tech/technology/what-is-the-draft-digital-competition-bill-explained/article68386341.ece>

market flexibility would be critical to India's digital competition going forward. In order to make sure that rules are efficient, fair, and supportive of a flourishing digital economy, legislators must interact with industry stakeholders and experts as the Bill advances. The DCB's introduction and subsequent implementation of ex-ante actions seem to be proactive enforcement tactics. The DCB is now being offered for stakeholder input before being presented to the Parliament for approval. To prevent any unrest, the SSDEs will need to create comprehensive criteria for self-regulation if they are approved. The government needs to make sure that companies' concerns are properly addressed because of the harsh fines and some opposition.

The bill intends to avoid monopolistic practices and advance consumer welfare by focussing on Systemically Significant Digital Enterprises (SSDEs). Ex-ante regulations, however, have sparked worries that they may impede innovation and place undue restrictions on companies, especially those that are just getting started. The effect of the law on the dynamics of investment and the viability of operations for digital enterprises is still a matter of debate. The goal of the measure is to make the market more equal, but it's important to find a balance between regulation and promoting technical advancement. The ability of the Digital Competition Bill to safeguard consumers and encourage fair competition without impeding the innovation and dynamism that define India's digital economy will ultimately determine its level of success.

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