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DIGITAL COMPETITION BILL 2024: AN OVERVIEW

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INTRODUCTION

With globalization and rapid digitalization over the past few decades, India has witnessed significant growth in its digital market. With over 759 million active internet users, the Indian digital market is poised to become one of the largest globally. This growth has created new business opportunities across various sectors and for digital enterprises. However, it has also raised concerns about anti-competitive practices, market contestability, and fair market practices. This article analyzes the anti-competition law framework in India, especially in light of recent developments.

In India, the Competition Act 2002 ("**Competition Act**") aims to inter alia '*promote and sustain competition in the market*'. The Competition Act is designed to be *ex-post*, i.e., regulatory intervention occurs after anti-competitive conduct is identified. On December 22, 2022, the Parliamentary Standing Committee on Finance submitted its 53rd Report on "Anti-Competitive Practices by Big Tech Companies" to the Lok Sabha. The report highlighted that the ex-post regime might be ineffective for the fast-evolving digital markets, suggesting a need for a proactive ex-ante approach to prevent anti-competitive conduct. The standing committee recommended the enactment of a separate ex-ante legislature to create a fair and competitive ecosystem in India.

To address these concerns, the Ministry of Corporate Affairs (MCA) formed a Committee on Digital Competition Law ("**Committee**") to examine the existing competition law framework and explore the need for an ex-ante regulatory framework for digital markets through separate legislation.

DIGITAL COMPETITION BILL

On 12th March 2024, the Committee presented its report along with the draft Digital Competition Bill 2024 ("**DCB 2024**"). The DCB 2024 aims to establish ex-ante competition regulations to ensure fair practices with end-users and business users.

Applicability: The DCB 2024 shall apply to the entities designated as systemically significant digital enterprises ("**SSDE**") and associate digital enterprises ("**ADE**"). An entity can be

designated as SSDE which is engaged in the core digital services (“**CDS**”). The CDS means the services as listed in Schedule I of the DCB 2024. The government shall periodically review the market and update the list to meet the changing market dynamics. To strike a balance between certainty and flexibility, the DCB 2024 is not made sector agnostic. Instead, the DCB 2024 will be applicable to a pre-defined list of SSDE and CDS that are more likely to exhibit anti-competitive behavior.

Thresholds for Significant Presence: To ‘catch’ enterprises influencing the digital market, the Committee recommended the introduction of a quantitative threshold to categorize an entity as SSDE. The DCB 2024 introduces a dual test for assessing the significant presence of such enterprises to be called SSDE: (i) ‘significant financial strength’ test whereby the significant presence of an enterprise is examined based on its ‘*Indian turnover*’, ‘*global turnover*’, ‘*gross merchandise value and global market capitalization*’ or ‘*equivalent fair value, at an enterprise or group level*’ for a consecutive three financial years; and (ii) ‘significant spread’ test whereby the significant presence of an enterprise is examined based on the number of ‘*business users*’ and ‘*end users*’ of its CDS in a consecutive three financial years.

An enterprise should be deemed SSDE when it fulfills the following requirements:

SIGNIFICANT FINANCIAL STRENGTH	
CRITERIA	THRESHOLD
Turnover in India	Not less than INR 4000 crore
Global Turnover	Not less than USD 30 billion
Gross Merchandise value in India	Not less than INR 16000 crore
Global Market Capitalization	Not less than USD 75 billion or its equivalent fair value of not less than USD 75 billion
SIGNIFICANT SPREAD	
End Users of CDS	At least 1,00,00,000 (one crore)
Business Users of CDS	At least 10, 000 (ten thousand)

Even if an enterprise does not meet the above criteria, it may be designated as SSDE if such enterprise has a significant presence of any CDS. The factors including the following shall be considered to ascertain whether an enterprise has a significant presence for any CDS:

- (i) The volume of commerce of the enterprise;
- (ii) size and resources of the enterprise;
- (iii) number of business users or end users of the enterprise;
- (iv) the economic power of the enterprise;
- (v) integration or interlinkages of the enterprise with regard to the multiple sides of the market; etc.

Self-Reporting: As per the DCB, the enterprises are required to self-assess their fulfillment of the criteria mentioned hereinabove and notify the CCI in such manner and format as may be prescribed.

Associate Digital Enterprises (ADEs): The Committee observed that SSDE may belong to a group of companies, wherein other group entities may, directly or indirectly, be involved in the CDS. Therefore, the compliance of DCB will also be required from other entities within the same group that are engaged in the CDS. The CCI may designate such entities belonging to the group of any SSDE as associate digital enterprises (ADE). The ADE is mandated to comply with the DCB in the same manner as applicable to the SSDE.

Anti-circumvention: As per the DCB, the enterprises are prohibited to, directly or indirectly, circumvent the requirement of DCB by *segmenting, dividing, subdividing, fragmenting, or splitting its services* through contractual, commercial, technical, or any other means.

Revocation or re-designation: The SSDE is required to notify the CCI to revoke its resignation. Within ninety days of receipt of an application for revocation, the CCI may revoke the designation or dismiss the application and require such enterprise to continue as SSDE. Unless revoked or expired without re-designation, an enterprise may continue to be deemed as SSDE for three years.

Obligations of SSDE and ADE: The SSDE and ADE are required to comply with the following:

- (i) to comply with DCB and the rules framed thereunder;

- (ii) The ADE is required to comply with all the obligations applicable to SSDE. Non-compliance shall be subject to the penalties;
- (iii) to operate in a fair, non-discriminatory, and transparent manner with its end users and business users;
- (iv) to neither, directly nor indirectly, favor its own products, services, or lines of business of its related parties;
- (v) to neither, directly nor indirectly, use or rely on non-public data of business users to compete with them. The SSDE shall not, without consent of end users or business users, cross-use their personal data or permit usage of their data by any third party;
- (vi) to not restrict or impede the usage of any third-party applications by the end users or business users. It shall also allow the end users and business users to choose, set, and change default settings;
- (vii) The SSDE shall not restrict business owners from promoting offers to their end users or directing their end users to their own or third-party services; or
- (viii) The SSDE shall not require or incentivize its business users, or end users to use the services of its related parties.

CCI: Under the Competition Act, the CCI appoints the Director General to investigate any contraventions. The Committee has recommended that the CCI should enhance its technical capacity, including within the Director General's office, to facilitate the early detection and timely disposal of cases. Additionally, the Committee suggested the establishment of a separate bench within the National Company Law Appellate Tribunal to ensure the timely resolution of appeals.

Penalties: The Competition Act stipulates behavioral remedies and substantial monetary penalties to address anti-competitive practices. Recognizing the central government's efforts to decriminalize various corporate offences to promote ease of doing business, the Committee recommended that violations under the DCB be addressed through civil penalties. For calculating the ceiling on penalties, the Committee proposed using the global turnover of enterprises and recommended capping the penalty at 10% of the global turnover of SSDE.

INDUSTRY'S TAKE ON DCB

Major tech companies like Google, Meta, Amazon, Uber, and Flipkart will be affected by the DCB, potentially impacting their business models and market presence in India. The Internet and Mobile Association of India (“**IAMAI**”) views the DCB as an *“unfair imposition on digital companies”, will make business “untenable” for them, and can “dry up venture investments in tech startups”*¹.

Tech giants have criticized the DCB, urging the government to reconsider it, arguing that the regulations *could* negatively impact their business models, data usage, and partnerships, leading to increased user costs. The industry suggests strengthening the existing competition law instead of introducing an ex-ante framework, which could hinder the ease of doing business and foreign investments in India. IAMAI further contends *the current ex-post framework is well-tested and relies on evidence of abuse thereby avoiding the risk of false positives. The proposed ex-ante regulations can dry up venture investments in tech start-ups, as the thresholds under the draft bill would act as a ceiling to the potential scalability of businesses*².

CONCLUSION

The proposed DCB 2024 represents a significant shift in India's approach to regulating its digital market, aiming to proactively address anti-competitive practices and ensure fair market dynamics. While the bill seeks to enhance the regulatory framework, it has sparked considerable debate among industry stakeholders. The success of the DCB will depend on its implementation and the balance it strikes between regulation and fostering innovation and growth in India's burgeoning digital economy. As India navigates this transition, continuous dialogue between policymakers, industry, and other stakeholders will be crucial to achieving a fair and competitive digital market.

¹<https://www.indiabusinesstrade.in/blogs/indias-digital-competition-bill-impacts-on-investments/#:~:text=According%20to%20the%20Internet%20and,venture%20investments%20in%20tech%20startups%E2%80%9D>.

² <https://www.news18.com/explainers/why-are-big-tech-companies-jittery-about-digital-competition-bill-how-different-it-is-from-the-eu-law-8892385.html>