

**DIGITAL COMPETITION BILL: ARE WE READY FOR IT?**

~ Professor (Dr.) Harpreet Kaur\*

**ABSTRACT**

*Indian digital economy is rapidly growing and is expected to account for 20 percent of India's GDP by reaching US\$ 100 billion by 2026. It might transcend the US to become the second largest e-commerce market in the world by 2034. Indian digital economy saw an increase from a meagre 13% to 55% between 2014 and 2024 in usage of phones, networks, and data.<sup>1</sup>*

*All of us would agree to the fact that e-commerce has changed the market paradigm and is completely algorithm driven. With the proliferation of e-commerce and digital platforms, many committees were formed in India to understand the dynamics of digital markets and provide recommendations to regulate practices of entities in such markets. Noteworthy among the recommendations were the recommendations of the Competition Law Review Committee, 2019 and the Parliamentary Standing Committee on Finance, 2022. The Parliamentary Standing Committee recommended for the implementation of a Digital Competition Act. Accordingly, the Ministry of Corporate Affairs established a Committee on Digital Competition Law ("CDCL") which presented a draft Bill on*

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\* Professor (Dr.) Harpreet Kaur is the Vice-Chancellor of National Law University, Jodhpur. She was awarded the Fulbright-Nehru Academic & Professional Excellence Scholarship in 2021 and served as a Fulbright Scholar-in-Residence in 2016.

<sup>1</sup> Prashanth Shivadass, *India: Digital Competition Bill - a value add or deterrent to DPDP A?*, OneTrust: Data Guidance (Apr., 2024), <https://www.dataguidance.com/opinion/india-digital-competition-bill-value-add>  
or#:~:text=India's%20vision%20of%20a%20digital,and%20fast%20paced%20technological%20advancements.

*Digital Competition in 2024. The present research analyses the proposed Digital Competition Bill as recommended by the CDCL. Part I of the research paper will introduce the topic and set the context for undertaking the analysis. Part II discusses briefly the recommendations of the Parliamentary Standing Committee. Part III will analyse important provisions of the Digital Competition Bill and Part IV will conclude with concluding remarks and suggestions.*

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## I. INTRODUCTION

Indian Digital economy is rapidly growing and is expected to account for 20 percent of India's GDP and reach US\$ 100 billion by 2026. It might transcend the US e-commerce market to become the second largest e-commerce market in the world by 2034.<sup>2</sup> Indian digital economy saw an increase from a meagre 13% to 55% between 2014 and 2024 in usage of phones, networks, and data.<sup>3</sup>

All of us would agree to the fact that e-commerce has changed the market paradigm and is completely algorithm driven. With the proliferation of e-commerce and digital platforms, many committees were formed in India to understand the dynamics of digital markets and provide recommendations to regulate practices of entities in such markets. Noteworthy were the recommendations of the Competition Law Review Committee, 2019 and the Parliamentary Standing Committee on Finance, 2022. The recommendations of the Competition Law Review Committee led to the enactment of the Competition (Amendment) Act, 2023. The Parliamentary Standing Committee on Finance in its Report on 'Anti-Competitive Practices by Big Tech Companies' in 2022 recommended for identifying large big tech companies as 'Systemically Important Digital Intermediaries' ("SIDIs") on the basis of revenue, market capitalization, the number of active business as well as end users. The committee also recommended for

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<sup>2</sup> China is the largest e-commerce market, Mark Fairlie, *The 10 Largest E-Commerce Markets in the World by Country*, Business.com (May 14, 2024), <https://www.business.com/articles/10-of-the-largest-e-commerce-markets-in-the-world-b/>.

<sup>3</sup> *Id.*

the implementation of the ‘Digital Competition Act’ to ensure contestability in digital markets.

Following this recommendation, the Ministry of Corporate Affairs established the CDCL to assess the sufficiency of existing provisions in the Competition Act and the need for an *ex-ante* competition law for the digital economy as Competition law in *ex-post* format has been unable to check the growth of digital markets due to their unique features leading to tilting or diverging in favour of a few incumbents.

## **II. THE RECOMMENDATIONS OF THE PARLIAMENTARY STANDING COMMITTEE ON FINANCE**

The Parliamentary Standing Committee on Finance presented its 53rd Report on “Anti-Competitive Practices by Big Tech Companies” to the Lok Sabha on December 22, 2022.<sup>4</sup> This report identified ten main anti-competitive practices by large digital firms and highlighted the necessity of enhancing India's competition framework to tackle such issues. It identified the ten Anti-Competitive Practices (“**ACPs**”) undertaken by large digital enterprises to abuse and consolidate their position in digital markets. Such identified practices are listed below:

- (i) anti-steering provisions (exclusionary behaviour);
- (ii) avoidance of platform neutrality in favour of some incumbents / self-preferencing of its own products or services;

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<sup>4</sup> STANDING COMM. ON FINANCE, FIFTY THIRD REPORT ON ANTI-COMPETITIVE PRACTICES BY BIG-TECH COMPANIES, 2022-23, LOK SABHA, [https://loksabhadocs.nic.in/lssccommittee/Finance/17\\_Finance\\_53.pdf](https://loksabhadocs.nic.in/lssccommittee/Finance/17_Finance_53.pdf).

- (iii) adjacency / bundling and tying of products and services causing additional cost imposition on consumers;
- (iv) data usage (use of non-public data);
- (v) pricing (including predatory pricing)/ deep discounting which may be platform initiated and passed on to the platform vendors;
- (vi) exclusive tie-ups for preferential listing on platforms;
- (vii) search and ranking preferencing due to preferential treatment;
- (viii) restricting third-party applications creating monopoly;
- (ix) advertising policies; and
- (x) practices during acquisitions and mergers

The Committee recommended identifying large incumbents in digital markets as SIDs on the basis of revenue, market capitalisation, and number of active business and end users.<sup>5</sup> The Committee recommended that SIDs should submit annual reports to the Competition Commission of India (“**CCI**”) specifying the measures taken to fulfil prescribed mandatory requirements. The requirements include the obligation of anti-steering provision, neither self-preferencing, nor tie and bundling of other services with their core platform services, price parity agreements or price discrimination. SIDs will be required to notify mergers in digital space where merger enables collection of data. SIDs should permit the

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<sup>5</sup> Geeta Gouri and Swarnim Rai Shrivastava, *Indian Parliament Pushes for Ex Ante Rules on Digital Competition*, Competition Policy International (Feb. 23, 2023), <https://www.pymnts.com/cpi-posts/indian-parliament-pushes-for-ex-ante-rules-on-digital-competition/>.

installation and use of third-party software applications and should not process personal data of the users for the purpose of providing notifiable online advertising services.

The committee also recommended the revamping of CCI rules and introduction of separate digital market unit within the CCI. Such digital market unit will monitor established and emerging SIDs and give recommendations to the central government for designating entities as SIDs. It will also adjudicate cases related to digital markets.<sup>6</sup>

The Committee proposed *ex-ante* regulations for the digital markets as these markets have increasing returns to size, network effects and are algorithmically driven resulting in a dominance of few players in a short period of time. Such anti-competitive practices happen even before policies can be formulated or such practices can be adjudicated. Therefore, it was recommended that competitive behaviour should be evaluated before markets end up being monopolized instead of the *ex-post* evaluation which is done presently by the Commission under the Competition Act.<sup>7</sup> Further, an *ex-post* regulatory approach might not be adequate for swiftly evolving digital markets and recommended the implementation of an *ex-ante* Digital Competition Act. Such an Act would ensure a fair and transparent digital ecosystem. In response to the recommendation, Ministry of Corporate Affairs (“MCA”) appointed a

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

committee February 6<sup>th</sup>, 2023 to look into the requirement for a separate competition law to deal with digital markets.<sup>8</sup>

### **III. THE COMMITTEE ON DIGITAL COMPETITION LAW**

As stated above, a committee was set up by MCA with the objectives of reviewing whether the Competition Act along with its rules and regulations was sufficient to deal with the challenges emerging from the digital economy. The committee was required to examine whether there is a need for an *ex-ante* regulatory mechanism for digital markets through a separate legislation. It was required to study the international best practices in regulation of digital markets. The committee had to review other regulatory regimes, institutional mechanisms and government policies regarding competition in digital markets. The committee considered the practices of leading players or SIDIIs which limited or had the potential of causing harm in digital markets. The committee was also authorized to review other relevant matters, if any in its opinion related to competition in digital markets.

The committee submitted its report in March, 2024 namely, CDCL Report i.e., Committee on Digital Competition Law Report which also includes the proposed draft Digital Competition Bill.<sup>9</sup> The CDCL Report highlighted the technological and economic features of digital markets

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<sup>8</sup> Sourabh Lele, *Digital competition Bill based on standing committee report: Sinha*, BUSINESS STANDARD (Mar. 21, 2023, 9:22 PM), [https://www.business-standard.com/article/economy-policy/digital-competition-bill-modelled-on-standing-committee-on-finance-report-123032101140\\_1.html](https://www.business-standard.com/article/economy-policy/digital-competition-bill-modelled-on-standing-committee-on-finance-report-123032101140_1.html).

<sup>9</sup> MCA, REPORT OF THE COMM. ON DIGITAL COMPETITION LAW, 2024, <https://www.mca.gov.in/bin/dms/getdocument?mids=gzGtvSkE3zIVhAuBe2pbow%253D%253D&type=open>.

which are already known such as network effects and economies of scale. Such features make them prone to concentration and ‘tipping’. The report also noted the time-consuming process in defining the relevant market in digital markets and the ability of large non- dominant digital enterprises to influence the markets. The CDCL recommended for enforcing the Digital Competition Act to regulate identified Systemically Significant Digital Enterprises (“SSDEs”) by imposing *ex-ante* obligations upon them. The competition law framework recommended by CDCL is largely based on the EU competition law. The CDCL Report also included the draft Digital Competition Bill. The Bill introduces several key steps and provisions aimed at curbing anti-competitive behaviour in digital markets. The important provisions of the Bill are discussed in the paper. Before discussing important provisions of the Bill, the need for *ex-ante* regulation has also been summarised below:

#### **A. NEED FOR EX-ANTE REGULATION**

Digital markets have unique characteristics that set them apart from traditional markets, presenting novel challenges for competition policy. Multi-sidedness, network effects, economies of scale, and data-driven advantages can contribute to the concentration of market power, potentially harming consumers through higher prices, reduced innovation, or lower-quality products and services. Speedier and focused interventions are needed to prevent tilting of digital markets. Therefore, *ex ante* regulations are required to achieve such an objective. Digital markets have seen the growth of conglomerates with unprecedented economic power. However, the competition law enforcement so far has been unable to check

the growth of such power. Thus, *ex ante* regulation is also needed imminently to make digital markets more contestable. However, would it be through a new law in a growing market is a big question.

**i.Designation of SSDEs on the basis of Core Digital Services (“CDS”)**

Step I of the Bill provides for the identification of the Core Digital Service if it falls within the ambit of CDS mentioned in schedule 1 of the bill. Any enterprise having a significance presence in any CDS may be designated as SSDE. The central government is given the power to add any new service, alter, and delete any service in the Bill in consultation with CCI without amending the bill. The list includes nine entries namely, online search engines, online social networking services, video-sharing platform services, interpersonal communications services, operating systems, web browsers, cloud services, advertising services and online intermediation services.

**ii. Identification of SSDEs:**

To identify an SSDE, the Bill has proposed a two-pronged test namely, quantitative and qualitative threshold test. The first part of the quantitative threshold gauges the ‘significant financial strength’ based on turnover in India, global turnover, gross merchandise value or global market capitalization in immediately preceding three financial years. Whereas the second part gauges the ‘significant spread’ based on user numbers in immediately preceding three financial years.

The Bill casts a self-reporting obligation on enterprises vis-à-vis their SSDE designation. CCI may designate any enterprise as SSDE in

relation to a Core Digital Service even if it does not meet the threshold criterion. For such designation, such an enterprise must have a significance presence based on a long inclusive list of qualitative criteria. Such an enterprise will be designated as a Systemically Significant Digital Enterprise for a period of three years.

### **iii. Obligations of SSDEs**

SSDEs are required to adhere to various obligations, including the following:

- a. Fair, non-discriminatory and transparent dealing as required under section 10 of the Bill.
- b. Prohibition of self-preferencing: SSDEs are barred from favoring their own products or services, related parties and of third-party business users with whom any manufacturing or sale or products or provision of services has been arranged under section 11 of the Bill on the CDS.
- c. Data usage obligations: SSDEs are restricted from using non-public data of business users to compete with them and must ensure transparency and consent in the cross-use of personal data under section 12 of the Bill. It should also not permit usage of such data by third parties.
- d. Restrictions on third-party applications: SSDEs cannot restrict or impede end users and business users from accessing third-party applications on their platforms under section 13 of the Bill.

- e. Anti-steering policies: SSDEs are prohibited from restricting business users' ability to communicate with end-users or promote offers under Section 14 of the Bill.
- f. Tying and bundling: SSDEs must not require or incentivize users to utilize one or more of its products or services. The restriction is also extended to products or services of its related parties or third parties with whom it has entered into any arrangement for the manufacture or sale of its products or services under section 15 of the Bill.

#### **iv. Enforcement Mechanisms**

The CCI is empowered to conduct inquiries, impose penalties, and issue orders to ensure compliance with the Bill's provisions. Penalties for non-compliance can be substantial, with fines of up to 10% of the enterprise's global turnover. The Bill also provides for settlement proceedings and offering of commitments for contraventions.

#### **v. Exemptions and Government Powers**

The central government has the authority to exempt enterprises from certain provisions in the interest of national security or public interest. Such exemptions can also be extended firstly, for any obligation assumed by India under any treaty, agreement or convention with any other country or secondly, if any enterprise performs any sovereign function on behalf of the central government or a state government.<sup>10</sup> However, such exemptions can be only in respect of activities relatable to the discharge of the sovereign

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<sup>10</sup> Digital Competition Bill, 2024, cl. 38, <https://sansad.in/getFile/loksabhaquestions/annex/1712/AU767.pdf?source=pqals>.

functions. It can also amend the list of Core Digital Services and issue rules and regulations for the effective implementation of the Bill.

**Thresholds and overreach:** As stated above, two pronged quantitative and qualitative threshold tests have been provided by the Bill for identification of SSDEs. The Bill has avoided standard method of designation by not following the traditional method of market dominance and power. The market power and the ability to use the market power have been traditionally followed.

The author is of the opinion that the current threshold method provided by the Bill may lead to excessive designation of enterprises as SSDEs. The quantitative threshold criteria are too broad and simply target big enterprises, which may not be systemic or significant in terms of their impact. The Bill designates enterprises as SSDEs where enterprises do not meet the prescribed thresholds but in CCI's opinion such enterprises may be having a significant presence in any specific Core Digital Service. The Bill lacks clarity in such provisions. Such lack of clarity may result into multiple enterprises being designated as SSDEs.<sup>11</sup> Considering the growth trajectory of the Indian digital economy in this timeline, the statutory mandate ought to be promotional, whereas the Bill proposes to bring in restrictions on all SSDEs, including Indian digital firms.

**Regulatory overlaps:** The CDCL report has concluded that digital markets under the Competition Act may have an ostensible overlap with

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<sup>11</sup> Simone Lobo, *CCLA Submits Comments on India's Draft Digital Competition Bill*, Medianama.com (May 20, 2024), <https://www.medianama.com/2024/05/223-ccia-submits-comments-on-indias-draft-digital-competition-bill/>.

several related laws and rules. For instance, the Foreign Direct Investment (FDI) Policy addresses the practices of self-preferencing and preferential listing. The FDI Policy prevents foreign e-commerce entities from foreclosing competition by entering into exclusive arrangements with vendors. This overlaps with the obligation of SSDEs to be fair and transparent in dealings (Section 10 of the Bill)<sup>12</sup> and section 11 of the Bill (self-preferencing). The Consumer Protection Act, 2019 can be another example which bars the tying and bundling or disclosure of personal information of any consumer to a third party. This overlaps with the obligations mentioned in section 13 (third-party applications) and section 15 (tying and bundling) of the Bill.

It is believed that the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, and the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 undermine competition in the market and deny market access to third-party competitors by preventing consumers from using third-party applications. Installation of third-party applications is restricted. This overlaps with the obligation mentioned in section 13 of the Bill. The Digital Personal Data Protection Act, 2023 overlaps with the obligation of data usage (section 12 of the Bill). The Reserve Bank of India Master Directions on Prepaid Payment Instruments, 2021 addresses any potential risk of anti-steering in

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<sup>12</sup> The Committee was of the view that the list of 10 ACPs provided by the Standing Committee Report was not exhaustive and that the nomenclature of such ACPs could vary from case to case.

the banking industry, and coincides with the obligation mentioned in section 14 of the Bill.

The above-mentioned policies and laws are presently overlapping with all the obligations mentioned in Chapter III of the Bill. From a theoretical perspective, the report well-reasoned the fact that the framework and the objective of the Bill are distinct from the coinciding laws and guidelines. However, it does not provide any roadmap to address the regulatory overlap with other regulations. In a not-so-mature market, these regulatory overlaps along with the lack of regulatory capacity may enhance the cost of doing business and reduce the attractiveness of the investment climate at a macro level. Thus, owing to the Bill's wide impact on India's digital economy, it requires a robust, in-depth, and evidence-based examination of consumers and Indian digital enterprises. For example, for ensuring protection against e-commerce and online markets, new definitions like e-commerce and electronic service provider have been introduced.<sup>13</sup> E-Commerce Rules, 2020 are also added.<sup>14</sup> E-Commerce Rules have defined e-commerce entity, inventory e-commerce entity, marketplace e-commerce entity and platform.<sup>15</sup> Rules have also provided the duties and liabilities of e-commerce entities and inventory e-commerce entities along with duties of sellers. E-commerce entities are prohibited from adopting any unfair trade practice, manipulate prices or discriminate between consumers. It is important to mention here that the E-commerce

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<sup>13</sup> Consumer Protection Act, 2019, No. 35 Acts of Parliament 2019, § 2 (16) & (17).

<sup>14</sup>Consumer Protection (E-Commerce) Rules, 2020, <https://consumeraffairs.nic.in/sites/default/files/E%20commerce%20rules.pdf> (“**E-Commerce Rules, 2020**”).

<sup>15</sup> E-Commerce Rules, 2020, R. 3 (b), (f), (g) & (i).

rules have put several liabilities on both the e-commerce entities and the sellers.<sup>16</sup>

**Enhanced capacity of Competition Commission of India:** The CCI has been provided with a lot of power under the Bill. The central government in consultation with CCI can include new services in the list of Core digital services as and when the need arises. It has the power to frame conduct requirements on the entities designated as SSDEs. The decision of designation of SSDEs comes with huge list of variables and the decision making is left to CCI, therefore, there seems to be a problem of segregation of work. CCI is given the responsibility to designate, evaluate the potential SSDEs without lack of required regulatory capacity.

**Remedies:** Chapter VI of the Bill provides for penalties. It is a well-accepted principle that the proposed remedies should respond to the extent of the abusive practices or the extent of consumer harm when an obligation is violated. Fines imposed should be linked to the economic significance of the abusive practices and the harm imposed on consumers. It seems that the remedial actions provided under the Bill are disconnected from the abusive practices and consumer harm. The CCI has the power to enforce proportionate structural measures like breakup and forced divestiture under the Competition Act. However, the Bill does not provide any such remedy.<sup>17</sup>

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<sup>16</sup> E-Commerce Rules, 2020, R. 4, 5, 6 & 7.

<sup>17</sup> It is also suggested that negative reinforcements may not result into positive outcomes. Other forms of punishment for deterrence should be thought, Tejas Panjiar, *Summary of IFF's submission on the draft Digital Competition Bill*, Internet Freedom Foundation (May 20, 2024), <https://internetfreedom.in/iffs-submission-on-the-digital-competition-bill/>.

#### **IV. IMPACT ON STAKEHOLDERS:**

It is necessary to examine the impact of the present Bill on different stakeholders.

##### **A. IMPACT ON BIG TECH COMPANIES**<sup>18</sup>

1. **Compliance with obligations:** Digital Competition Bill is a hybrid proposal. Some obligations proposed are self-regulating while others will be specified later by regulations framed by CCI. Large digital platforms identified as SSDEs will need to ensure compliance with the Bill's obligations to avoid hefty penalties. This may require substantial adjustments to their business practices and operational frameworks. Apart from it, self-executing requirements are applicable to all businesses alike. Therefore, the need for evidence supporting harm to competition in their enforcement is reduced. It is not clear whether certain obligations will apply or not where the platform shows that its conduct does not result in harm to the competitive process or it was necessary for attaining legitimate outcomes like discrimination prevention or protecting user privacy or non-sharing of other non-public data. It is also necessary to measure the proportionality of the imposed obligations with respect to the cost incurred for the benefit achieved.

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<sup>18</sup> Manish Mishra, *Analysis of India's Draft Digital Competition Bill, 2024: Provisions, Impact on Big Companies, and Industry Reaction*, LinkedIn.com (Mar. 28, 2024), <https://www.linkedin.com/pulse/analysis-indias-draft-digital-competition-bill-2024-impact-mish-a-uzxoc/>.

2. **Market dynamics:** The Bill aims to promote fair competition and level the playing field in digital markets. As a result, dominant players may face increased competition from smaller entities, leading to a more diversified and competitive landscape.
3. **Innovation and consumer benefit:** Companies like Uber have expressed concerns that *ex-ante* law as proposed could stifle innovation and limit consumer benefits. However, proponents argue that such regulations are necessary to prevent anti-competitive behaviour and ensure a fair marketplace for all stakeholders.
4. **Data privacy and security:** The Bill's provisions regarding data usage obligations aim to safeguard the privacy and security of user data. Big companies will need to enhance their data management practices to comply with these requirements.
5. **Legal challenges and appeals:** All companies aggrieved by the CCI's decisions can appeal to the National Company Law Appellate Tribunal and the Supreme Court. It can be assumed that such legal challenges may cause further scrutiny of Bill's provisions and prolong the enforcement process.

#### **B. IMPACT ON START-UPS**

Start-ups' ability to access markets, including export markets rests on digital platforms. Their ability to have cost-effective customer acquisition may be adversely impacted due to excessive restrictions on digital platforms. Start-ups may not have effective alternative avenues to scale in a cost-effective

manner without access to platforms. These challenges need to be factored in before adopting an *ex-ante* law. It is feared that the Bill will bring most technology unicorns and growing startups under its ambit without adequate justification or evidence of causing any competition harm. The Bill will result in more harm than achieving its primary objective to create a level playing field for the market players in the digital ecosystem. It will also increase the cost of compliance stifling innovation and may also impact investments in the startups.<sup>19</sup>

### **C. IMPACT ON CONSUMERS**

As per the Bill, the designated SSDEs cannot intermix or cross use the personal data of consumers collected from different services without their consent. It can increase the consent pop ups for users and hamper the seamless experience of the applications that consumers are currently experiencing. Such consent requirement in India might not work as the consumer awareness is quite low in comparison to European countries. Evidence has shown that when terms and conditions are shown by any digital firm or application which users are required to read and agree, almost all consumers agree to them without reading. Understanding the implications of such agreements is not known to consumers. This might be the case for such consent taking exercise also.

Further, the Bill imposes restrictions on SSDEs on bundling the different products or services, the integrated products and services generate

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<sup>19</sup> Dhanendra Kumar, *Impact of Digital Competition Bill on India's homegrown startup ecosystem*, Business Standard (Jul. 01 2024), [https://www.business-standard.com/companies/startups/impact-of-digital-competition-bill-on-india-s-homegrown-startup-ecosystem-124070101008\\_1.html](https://www.business-standard.com/companies/startups/impact-of-digital-competition-bill-on-india-s-homegrown-startup-ecosystem-124070101008_1.html).

a better user experience, any attempt to disintegrate products, or unbundle them might have implications on convenience, price, and user experience and might increase the cost of the products.

The provisions of the Bill are too broadly worded, and SSDE's are expected to be fair, non-discriminatory, and fair in their dealings. This provision would restrict SSDEs power to enter into exclusive tie-ups and offer discounts to consumers, which might have a negative impact on consumer welfare.

## V. CONCLUSIONS AND SUGGESTIONS

It is always advisable to undertake a cost benefit analysis before implementing any new law or regulation. It was assumed that new Bill will cause financial stress on businesses in view of the dynamic and innovative nature of digital markets. Thus, it was decided to take stakeholder opinions while developing the *ex-ante* regulatory framework and undertake cost benefit analysis of the new regulations' vis a vis its potential benefits. As Bill's expected benefits are unclear and difficult to measure, we should consider the cost of harming consumers and reducing innovation at the least. There is ample evidence from the EU which has demonstrated it to be a real risk. For instance, maps appearing in Google's search results do not link to Google Maps in order to comply with the Digital Markets Act's strict self-preferencing prohibitions.<sup>20</sup>

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<sup>20</sup> Edith Hancock, *'Severe Pain in the Butt': EU's Digital Competition Rules Make New Enemies on the Internet*, POLITICO (Mar. 25, 2024), <https://www.politico.eu/article/european-union-digital-markets-act-google-search-malicious-compliance>.

It is necessary that one should consider its own interests and play to its strengths when deciding to adopt any Bill prepared on the lines of other jurisdictions. For new but rapidly growing industries like e-commerce and other digital markets, it is important to ensure regular investment with industry knowledge. There is ample evidence available to understand that how a few leading platforms' have helped in building the necessary infrastructure in the early stages of development of this sector. Therefore, such investment will be necessary to ensure that consumer benefits continue in future.

A comprehensible equilibrium between clear objectives and the approach to intervention for addressing such objectives is required. For example, clear connection between encouraging competition and market dominance and market power is required. Ambiguities in objectives, concepts and structures that might risk leading to an ineffective regulation and the increasing litigation should be removed. Better delineation of objectives is required with clear definitions of fairness and contestability. For example, contestability might differ for different platform markets and one single approach may not work for all markets. The concept of 'Core Digital Services' should be better clarified why some services are core and others are not. A proper justification for such identification and inclusion is needed. Balance is required to be maintained between regulating platforms using anti-competitive strategies and positive network effects of large platforms. It is necessary that tested measures designed to achieve the objective should be adopted in fast moving digital markets. Such measures

should not lead to unintended consequences like slow technology diffusion.<sup>21</sup>

Guidelines for complying with all obligations by the SSDEs will be required along with the guidelines for identifying particular products of services to which such obligations will be applied. Overall compliance guidelines will be required. The obligations of the Bill will become immediately applicable. No market investigation will be required before intervention. Against self-executing obligations, other options like case by case are being considered by other jurisdictions like UK. In UK, companies with such designation will be subject to a code of conduct that will apply to ‘activity or activities’ that led to the firm being designated as such. India should also examine such options. It is also not clear whether effective regulatory dialogue and an efficiency defence is allowed for SSDEs or not.

As discussed earlier, capacity building of CCI will be required. It will need expertise on the unique and varied market risks and anti-competitive practises, which can only be understood in depth after conducting an extensive digital market study. The Bill has not provided for constitution of any advisory board or committees to assist and advice CCI in this regard. The Bill will impact not only different sectors but also different aspects of digital economy, including user experience, data protection and security. It will also impact supply chains, investments, business costs for MSMEs and consumer affordability. Due to their inextricable relationship with digital

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<sup>21</sup> Matthias Bauer et. al., ‘*The EU Digital Markets Act: Assessing the Quality of Regulation*’, ECIPE, 6-7 (2022), [https://ecipe.org/wp-content/uploads/2022/01/ECI\\_22\\_PolicyBrief-TheEuDigital\\_02\\_2022\\_LY03.pdf](https://ecipe.org/wp-content/uploads/2022/01/ECI_22_PolicyBrief-TheEuDigital_02_2022_LY03.pdf).

counterparts, it will also impact non-digital aspects as a consequence.<sup>22</sup> It is well presumed that any law or regulation will be powerful whenever it will regulate new technological development and market change. The risk that lies here is that if it is poorly designed it will have an outsized negative impact on the economy.<sup>23</sup>

Since the Bill is proposed for the first-time exact prediction about its impact on the platforms, their users, and the wider economy is unknown. Therefore, it is important that we begin from established principles of good regulations and implementation.<sup>24</sup> Worldwide there is a precedence of adoption of soft laws till the time the markets become mature. Mature jurisdictions like USA are also giving voluntary guidelines for regulation of markets. There has been a precedence of imposing self-regulation on entities before bringing hard laws in India in line with international scenario. The Competition (Amendment) Act has added s. 64B for giving extra powers to CCI for adopting soft law approach. It is easy to bring new laws and make the regulators more powerful but the cost benefit analysis before bringing any new law and consequent overlapping impact on different stakeholders along with enforcement issues is required to be assessed.

As we discussed above about regulatory overlaps, coordination ensuring effective cooperation among regulators might also become difficult to

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<sup>22</sup> PTI, *India Inc. raises concerns over draft Digital Competition Bill*, THE HINDU (June 19, 2024, 10:13), <https://www.thehindu.com/sci-tech/technology/india-inc-raises-concerns-over-draft-digital-competition-bill/article68306719.ece>.

<sup>23</sup> MARTINA FRANCESCA FERRACANE & ERIK VAN DER MAREL, REGULATING PERSONAL DATA: DATA MODELS AND DIGITAL SERVICES TRADE (Policy Research Working Paper 9596, World Development Report 2021).

<sup>24</sup> Matthias Bauer, *supra* note 21.

achieve. Coordinated efforts will be required to ensure that all relevant technological innovations including developments in artificial intelligence are aligned with the new law. Consistency in regulatory approach across the relevant legal and regulatory framework is the need. Till the time all the sectoral regulations are implemented in a coherent and complementary manner, fairness in the market and protection of consumers might be difficult to achieve. All the laws which will complement and promote the regulation of digital markets and platforms should be considered comprehensively.

Prediction assessment of impact of the Bill is required to know whether it will be sufficient to deal with challenges of digital market at the same time ensuring level playing field for all market players. It should not create barriers to entry by increasing cost of compliance and impact innovation as stated above. There is no doubt that coordinated and complementary regulatory efforts are required for ensuring fair and contestable digital markets and protection of consumers.