
NAVIGATING NEW FRONTIERS: COMPETITION LAW AND DIGITAL MARKETS IN LIGHT OF THE DIGITAL COMPETITION BILL 2024

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ABSTRACT

The rapid evolution of digital markets has posed unprecedented challenges to traditional competition law frameworks. With the proliferation of tech giants, platform economies, and data-driven business models, existing regulatory mechanisms have often struggled to keep pace with the dynamic nature of the digital economy. This paper, titled *"Navigating New Frontiers: Competition Law and Digital Markets in Light of the Digital Competition Bill 2024,"* explores the intersection of competition law and digital markets in the context of the recently proposed Digital Competition Bill 2024.

The paper begins by examining the current state of the digital economy in India, highlighting various initiatives undertaken since 2015 to transform the country into a digitized economy. It underscores the critical role of data in digital markets and explores the issue of dominance within these markets, analysing different methodologies employed by various jurisdictions to determine such abuse. The paper also elaborates on the economic principles unique to digital markets, which set them apart from traditional physical markets.

Further, the study delves into the impact of mergers and acquisitions within the digital sector, particularly focusing on their implications for startups and MSMEs. It addresses the challenges related to Mergers and Acquisition in digital markets and discusses the evolution of digital laws in the European Union, with a specific focus on the EU Digital Markets Act. The paper also explores recent amendments to M&A regulations aimed at addressing the challenges posed by the digital economy.

In conclusion, the paper argues for the necessity of the Draft Digital Competition Bill and assesses whether the Indian digital markets are prepared for such ex-ante regulations. It evaluates whether the existing framework is capable of addressing anti-competitive practices in digital markets and considers the concerns raised by various stakeholders regarding the Bill. This research seeks to provide insights into the effectiveness in navigating the complexities of the digital market landscape.

DIGITAL ECONOMY-

India has made remarkable strides in digitalising its economy in recent years. Digitisation of economy is not a luxury but a necessity. Digitisation of services helps in improving overall health of industries and economy around the world. The digital economy comprises a wide range of digital services which bridges the divide between the Business, government and digital consumers. These include E-commerce platforms such as Amazon and Myntra, Digital payment systems, social media networks such as Instagram, Digital Advertising and Marketing, Online education, OTT platforms and more. With global shift towards digitization, it became imperative for India to modernize its traditional systems of functioning. In 2015 the government of India launched 'Digital India' Initiative to improve digital Literacy and Infrastructure in the country. The initiative changed the digital markets of India in more than one way, it brought with it a wave of digitisation in the economy. Various E-Governance initiatives such as Digital locker, My Gov, implementation of digital payment infrastructure such as UPI and BHIM had eased the functioning of economy and has changed the course of transactions and functioning of economy. It has encouraged Internet penetration, transparency, accuracy and easiness of various services and businesses. Another focal point with the initiative was that of 'Startup India and Make in India '. It encouraged Tech driven enterprises fostering an ecosystem of innovation and entrepreneurship which lead to increase in foreign investment in the digital sector.

The state of India digital economy report 2024 published by Indian Council for Research on International Economic Relations ranks India as third largest digitised economy. There are several indicators at play to highlight a country's digital success. India has embraced digitization and transformed into digital economy. The ICRIER measured digitization in India by using CHIPS framework, Connect, Harness, Innovates, Protect and Sustain. India ranks second in Connect and third in Harness and Innovate¹. The Digitization of economy largely depends on a country's capability and readiness to integrate various regions through digital services. With rolling out of Digital India quite was done on this front. It connected parts of India with various government initiatives. Innovation is crucial for driving economic growth and securing a stronger competitive edge. To innovate, India measures up on its performance under AI and start-ups. India on the other hands performs poorly in indicators such as Protect

¹ Deepak, M., Mansi, K., Aarti, R., Krithika, R., and Mayank, M. (2024). *State of India's Digital Economy (SIDE) Report, 2024*. Delhi: IPCIDE, Indian Council for Research on International Economic Relations (ICRIER).

and sustain. Digitization of economy comes with its own backdrops. India's efforts to safeguard against adverse impacts of such transformation lacks. It has failed to bring in appropriate and adequate framework and policies to protect end consumers from negative impacts of digitization.

DATA: NEW ECONOMIC CURRENCY DRIVING DIGITAL TRANSFORMATION

Data in digital market is double-edge sword ; while it drives innovation and fuels technological developments, it also presents significant risk to competition within those markets. Data is an asset to business and companies around the world. With the multi-sided characteristics of digital markets, data plays a significant role in catering to needs of various users on different side of platforms. Data creates a feedback loop where insights from data collected are extracted and used in technological advancement and then these advancements lead to more data. With data being an asset, one must not be blindsided by ill-effects it can have on competition. A company possessing a large amount of data holds market dominance, wielding the power to potentially exploit it. . Extraction of a certain set of data poses significant ethical and privacy challenges while also enabling companies to engage in anti-competitive practices. They are not only one to suffer, emerging startups or mid-size companies with limited resources often do not have access to such large volume of data. This exacerbates market imbalance as dominant tech firms use their market control to exclude competitors. For instance, Facebooks 72% market share in India restricts entry and success for other companies. Tech giants such as Instagram, Google, Facebook, Amazon hold substantial portions of India's digital market. They face allegations of anti-competitive behaviour and abuse of dominance not only in India but also in numerous jurisdictions world-wide. The Economist has pointed out the dominance of Facebook, Google, Amazon, and Apple concerning the amount of data they have and proposed a phrase: "BAADD (too big, anti-competitive, addictive, and destructive to democracy²).

What makes data collection important ? It is the exclusivity features it poses such as Versality, Accessibility, Scalability and Interconnectivity. Data allows diverse types of applications and analysis. Data can also be fine -grained providing detailed insights of consumers. Interconnectivity helps in understanding and analysis various needs and preferences of users at different ends of platforms. The Exclusivity of data drives companies to invest significant

² Ankit Srivastava and Divyansha Kumar, *Digital Economy, Data, and Dominance :An Indian Perspective*, Vol2, (2021), CCI(Jour)

capital in developing free services, as the data collected from consumers is immensely valuable³. These data gives competitive advantage for these companies as they are exclusive and not readily available. It is often said that nothing is truly free; the cost to consumers in this case is their personal data. This data is more valuable and profitable for the companies than any fee they might charge consumers. The collection of data provides user preferences, enabling companies to quickly adapt and respond to new trends. Search engines platform like Google and Social media platforms like Facebook and Instagram greatly benefit from this capability.

Data and dominance are centre to anti-trust issues, as control over data provides businesses with market power and competitive advantage, enabling them to indulge in anti-competitive practices and stifle competition. While data is crucial for growth of digital sector there has been an emerging need to protect them. After persistent efforts, the Digital Data protection bill was finally introduced in 2023. 'Consent' has been at core of the legislation. The bill requires users consent for collecting and processing data. Data fiduciary can consent to the use of their data and also has right to withdraw this consent. They wield significant power over their personal data. Such data needs to be deleted once the work is done. The act represents a positive development, yet it could potentially lead to jurisdictional overlaps between Competition commission of India and Data protection board. These jurisdictional overlaps could either compromise individuals' privacy or hinder innovation. Restricting data could stifle innovation, while granting excess control over data may risk breaches.

Data has been coined as currency in digital markets. It is rightly said so as the so-called 'free services' provided by digital enterprise are offered in exchange for users data instead of monetary consideration. The debate over jurisdictional overlap centres on the collection and processing of user-provided data. Digital markets operate differently from physical markets, with the exchange of data for services being central to their functioning. Section 7 of Digital Data Protection bill 2023 discusses the consent of data principals⁴. Data Principals are user whose data has been collected. The bill provides data principals with opt-out systems, ensuring that data is processed only with their consent. While this does not violate any provisions in Data Protection Bill, it may be seen as violating by CCI. If data Fiduciaries choose not to provide data, companies may deny services, which competition authorities view as anti-

^{3 3} Ankit Srivastava and Divyansha Kumar, *Digital Economy, Data, and Dominance :An Indian Perspective*, Vol2, (2021), CCI(Jour)

⁴ The Digital Personal Data Protection Act, 2023, Section 7, The Gazette of India, August 11, 2023

competitive practices. These conflicting views and jurisdictions often end up harming digital enterprises. The evolving regulatory challenges in overseeing big tech firms are centred at the convergence of competition regulation and data protection

ABUSE OF DOMINANT POSITION IN DIGITAL MARKETS

As stated by the Chairman of the Competition Commission of India, “Digital markets are epicentres of technological innovation but lately they have become zones of entrenched and unchecked dominance⁵. This sentence highlights the dual nature of digital markets :they are both hubs of innovation and areas where dominant firms stifle competition. Digital markets are driving forces for innovation and technological development but recently the digital market has become the place of dominance. Technologically developed companies and business abuse their position in market with help of data. The abuse of dominant position is well defined in Section 4 of Competition law 2002. It states that Dominance per se is not prohibited, abuse of dominance is. It is based on the premise that ; a company can achieve market dominance due to various factors such as consumer preference and high demand. However, if the company leverages this dominance to engage in abusive or anti-competitive practices that hurt consumers, such practices are prohibited.

Jurisdictions such as European union and USA rely on Quantitatively approach while India depends on Qualitative approaches for determining dominance in the market. India adopts holistic and pragmatic approach in determining dominance in the market unlike other jurisdiction where majority of countries who determine dominance based on ‘Bright line test’⁶It simply means a business dominance in market is solely determined based on its market share If a business share increase more than 50% a company is said to be dominant. Competition commission of India considers broad sets of factors while determining dominance such as Market share, size and resource, entry barriers, dependence of consumers and market dynamics. In recent judgment Google LLC & Anr vs Competition Commission of India & others 2023 ⁷, Google was fined for abuse of dominance in market, CCI considers several factors such as market dominance, user choice, data sharing, effect on consumers, control over app distribution and so on. In technological driven market relying solely on market share to assess dominance is very narrow perspective. To determine dominance in digital market it is

⁵ Ashok Kumar Gupta, CCI Chairperson, *Centre for Digital Future*(2021), CCI, 2-3

⁶ Cyril Shroff and Avantika Kakkar, *The Asia-Pacific Antitrust Review* (2019), Global Competition Review

⁷ Google LLC v. Competition Commission of India, (2023), SCC 88(India)

essentially to consider set of factors and not only market share, it hinders consumer choices and preferences as platforms such as Amazon, Instagram, Facebook are preferred by majority of consumers in every country. Relying solely on market share to assess dominance can stifle innovation and slow technological transformation by large business. Unlike traditional markets, digital markets are characterised by features such network effects and data driven - dynamics.

The formalistic approach and effect-based approach are two methodologies used in determining dominance in the market ⁸. Countries around the world use either of them, both are entirely different approaches but are used to determine the dominance in the market. These where significant in physical market and moving forward so will be in Digital markets. To balance innovation and competition the digital markets, the CCI has signal shift in its approaches and mechanisms. The strategies employed in these markets needs a broader perspective to accommodate the technological advancements brought by such business. India's anti-trust and competition law has formalistic approach. Formalistic approach or per se approach is one which depends on pre-determined rules and regulations rather than examining actual impact on other hand effect-based approach or rule of reason is one where actual impact of actions are considered. Traditionally India had a formalistic approach towards determining dominance but recently the Indian markets have seen a shift, it has become more inclined towards Effect based approach, this is due to increase in digital markets across countries. These digital markets need to be assessed case by case and hence effect-based approach was considered more appropriate.

The section 4 of Indian competition act does not require CCI to consider anticompetitive effects for purpose of infringement. However in recent judgement of Google LLC & Anr vs Competition commission of India & others, the NCLAT held that CCI must conduct an 'effect analysis' to determine dominant position. This decision was significant because the rise of tech companies and increase in their anti-competitive practices it will help CCI understand the impact on competition, consumers and market. . For growth and innovation in digital market it is important that these markets need more detailed understanding and context specific analysis

⁸ James Mancini, *Abuse of Dominance in Digital Markets*, Organisation for Economic Co-operation and Development, (2020), 7-9

then the laid down rigid rules. The dynamics, characteristics and nature of these digital markets are very different and complex.

ECONOMIC PRINCIPLES IN DIGITALS COMPETITION AND MARKETS -

MULTI SIDED MARKETS -

Unlike physical markets, multi markets in digital markets play huge role. Multi-sided markets are platform that connect different user groups at opposite side of platform facilitating interactions and creating mutual value. In multi-sided market value of one group depends upon the activity of another, hence on such platforms all user groups are interdependent on each other. Another key feature of such markets are platform pricing and subsidies. One side of market is subsidized which in turns attracts another⁹. These markets operate based on the diversity and preferences of their users with different user groups joining platform to achieve distinct objectives. These objectives can vary but can be fulfilled solely from interdependence and cross side network effects. In India this diversity could be seen in various markets, it can be E-commerce platforms such as E-bay and amazon, social media platforms such as Instagram and Facebook, Cab services like Ola and uber, payment platforms such as pay pal, job market places such as LinkedIn and so on. Almost all digital markets are multisided markets as they attract and connect users from different spectrum and bits of society. To illustrate let's consider social media platforms such as Instagram, where Users of Instagram are on one side and Advertisers on other. In such case more Instagram users will attract more advertisers and sellers, who are trying to reach a large audience. Thus users of Instagram make the platform more beneficial and profitable to advertisers on other side of markets. Additionally, platform pricing is structured so that Instagram users access the platform for free, while advertisers bear significant cost. Same is the case with payment platforms where more consumers using services will encourage more merchants to accept it. Similar in case of ride sharing services like Ola and uber more consumers using the platform will attract more drivers to join the platform and vice versa. Users at one end of platform will benefit users on another end of the platform.

The Competition commission of India will have to thoroughly study multi-sided markets to effectively regulate digital markets. This will involve redefining market definitions and adopting a broad approach when assessing anti-competitive agreements and abuse of dominant

⁹ *Journal of Antitrust Enforcement*, Volume 5, Issue 1, April 2017, Pages 100–129,

position in digital markets. The commission must understand various dynamics and interdependencies among different user groups in these markets to regulate them properly. These markets are complex yet powerful structures that benefit various stakeholders. The commission will need to strike a balance between fostering competition and encouraging innovation while regulating these markets.

NETWORK EFFECTS –

Digital markets are founded on complex structures such as network effects, switching cost, access to data etc. Dominance in these markets is concern for competition regulators worldwide, as it has been scrutinized and analysed. Dominance in any form can be detrimental to consumer. Network effects and data are critical factors in determining dominance of enterprise in digital markets. Network effects and data reinforce each other. A larger user base generates more data, thereby strengthening network effect. Network effects are those where a platform becomes more valuable with increase in number of users. More the users, more the platform becomes significant and dominant in market. Network effects can be direct or indirect in case of direct value of platform increases simply by increase in users on other hand indirect network effects is one where value of platform depends on two or more user groups or value of platform increase due to growth of complementary products.

Section 4 of competition act clearly draws a line between market dominance and abuse of that dominance. Digital platforms like Google and Apple have crossed these lines, primarily due to their vast user base, which grant them significant power to do so. Have you ever wondered why tech giants like Google and Facebook are indispensable ?. The prime reason is the vast user base they serve. Network effects are crucial in accumulating and maintaining these extensive user bases. Strong network effects can lead to dominance in the market, Google and apple are examples of such. . Business across the globe have leveraged network effects to establish dominant position in the market. Network effects in digital market creates positive feedback loop as users of one side of platform depends on users on other side of platforms. Network effect can be categorised as significant characteristics or a requirement in digital markets. Network effects in itself cannot be considered as a factor of abuse of dominance or anti-competitive practices. The CCI in case of All India Vendors association VS Flipkart India Private limited and Others ¹⁰it acknowledged the significance of network effects in digital

¹⁰ All India Online Vendors Association v. Flipkart India Private Limited(2018), CCI Case No. 20 of 2018

platforms. However, it emphasized that determining a dominant position or anti-competitive practices requires considering network effects in conjunction with other factors. It also agreed that the advantage gained by incumbents due to network effects may be difficult to breach.

TYPES OF ANTI -COMPETITIVE PRACTICES IN DIGITAL MARKETS-

Anti -competitive practices in digital markets are different in those of physical markets due to unique features digital markets are made up of. The prime being Network effects and multi-sided nature of these markets. Another important factor in differentiating them is Data. Digital markets are data sensitive as oppose to physical markets that are price sensitive. Anti -competitive practices in physical markets are centred around price factors where the one in digital markets are centred to data analysis.

Anti-Steering provisions

Anti-steering provisions by entities are used to prevent business users from moving out of the platform and using other alternatives. Tech companies prominently associated with ‘App Stores’ indulge in such practices, Google and Apple to name the few¹¹. Anti-steering practices restricts entry of new players and stifles with consumer choice. These usually deal with pre-installed apps or payment systems. These makes access to platform conditional and Restrictive. The standing committee report made a recommendation that SIDI should not make access to their platform conditional on the purchase/use of other products or services that are not part of or intrinsic to the platform¹². Google and Apple have been accused a lot of times by various jurisdictions against manipulative and conditional practices by them.

Data Usage –

Data plays a significant role in growth of digital markets. Data collection and analysis is what a lot of business in digital markets rely on. Data is at core of the services they provide. Data is an asset to this business; data collection improves efficiency and innovation but it also leads to privacy concerns. Control over data lead to lot of anti-competitive practices such predatory pricing strategies, sharing of data, favouring of services and so on. This personal data provided

¹¹ Ministry of corporate affairs, *Anti-competitive Practices by Big tech Companies*, Standing Committee on Finance, 53(2022-2023),

¹² Ministry of corporate affairs, *Anti-competitive Practices by Big tech Companies*, Standing Committee on Finance, 53(2022-2023),

by users are misused and often used by companies to give themselves a competitive advantage. They use data collected for core services and use it in other services provided by them. The standing committee report recommended that SIDs should not process the personal data of end users who use services of third parties, if such parties use the core services of the SIDI. End users should not be signed into other services of the platform unless he has been presented with a specific choice to which he has consented¹³. Companies who have established dominance in the digital markets often exploit the user data, driving startups and small companies out of competition. These small entities typically lack the resources to obtain and utilize user data efficiently. This monopolistic control over data frequently results in market monopolisation affecting competition in various ways

Bundling/Tying –

Bundling is an anti-competitive practice which pushes an approach of take it or leave it to the users. Bundling of services means the core service is tied up with any other service provided by the business. It means for a user can get access to core service only if he opts to accept the complementary product or service. For instance, a mobile OS encouraging its Users to use its own search engine. Microsoft bundles its productivity software such as Word, Excel, PowerPoint, Outlook etc. Similarly, Amazon bundles various services such as Prime Video, Prime Music, Prime reading etc on one subscription. Tying and bundling of services provides convenience and cost saving but on other hands it restricts the consumer choice and stifles competition. The tying and bundling of services by big tech companies such as Google and Amazon reduce competition in software markets, driving small players out of market. The Committee noted that this creates asymmetry in pricing and leads to the removal of competition from the market¹⁴. In the case of Federation of Hotel & Restaurant Association of India vs Make my trip India Pvt Ltd, GOIBIBO and OYO¹⁵ the CCI imposed penalty of 223. 48 Crores and 48 lakhs on Make my Trip India and 168Crores and 88Lakhs on OYO was imposed for indulging in anti-competitive practices

Restricting Third Party Applications-

¹³ Ministry of corporate affairs, *Anti-competitive Practices by Big tech Companies*, Standing Committee on Finance, 53(2022-2023)

¹⁴ Ministry of corporate affairs, *Anti-competitive Practices by Big tech Companies*, Standing Committee on Finance, 53(2022-2023),

¹⁵ Federation of Hotel & Restaurant Associations of India v. MakeMy Trip India Pvt. Ltd. (MMT), CCI 58

Third party applications are software programmes developed by companies other than original provider of operating systems. They are not affiliated with platform provider. Third Party Applications can provide better and specialised services which are not available from platforms native applications. They can drive innovation as there is constant pressure on them to compete with native platform applications. Digital Gatekeepers such as Google and Apple are the one involved most of the times. Both are guilty of violating and restricting third party applications. Apple store attracts 65million average weekly visitors and google play has 2. 5billion monthly users, which constituted significant portion worldwide. Both are dominate force and have been blamed of for restricting third party applications and stifling with competition. Consumer choices are restricted and they are forced to put up with applications as offered by native platforms, thus a lot of times these platforms end up abusing their position.

MERGERS AND ACQUISITION IN DIGITAL MARKETS

Startups and Innovation are pivotal for advancement of digital markets and they are deeply interconnected. In India, startups have significantly contributed to the digitization process, driving innovation and growth in the digital market. They often address gaps and inconsistencies in services provided by established tech giants, continuously pushing the envelope to offer new and improved solutions. As startup ecosystem continuous to evolve, interactions with big techs companies are becoming increasingly common Mergers and Acquisitions play a crucial role in digital markets by enabling companies to acquire innovative technologies and platforms, thereby fostering growth and technological advancement. It helps in diversifying, create synergies that can increase overall value proposition. They support startups growth by providing access to essential resources, facilitating market expansion and helping them stay competitive. However, while mergers and acquisitions can drive significant benefits, they also come with downsides. It is crucial for regulatory authorities to navigate challenges to prevent M&A from becoming a disruptive force in digital markets

“It is better to buy than to compete. ” This quote by Mark Zuckerberg evidences a rising trend in the digital economy over the last decade¹⁶. This trend is diverted towards a term popularly known as” killer acquisitions”. Competition authorities find killer acquisitions challenging to regulate for two main reasons. Firstly, these acquisitions often do not meet the statutory

¹⁶ Mikah Roberts, *Killer Acquisitions and the Death of Competition in the Digital Economy*, 24 Tenn. J. Bus. L. 61 (2022)

notification thresholds of antitrust laws, and therefore do not come under the scrutiny of the authorities. Secondly, at the time of the transaction, such acquisitions are frequently not perceived as anti-competitive because they involve different classes of products or services¹⁷. It refers to large tech giants having dominance in market to take over nascent competitors, this reduces competition and helps The Tech giants to maintain their dominance. It disrupts innovation and competition in digital markets. Zomato acquired Uber eats for \$350million in 2021¹⁸. This is considered as a killer acquisition by Zomato as led to elimination of significant competitive rival Uber eats. Mergers and Acquisitions create significant barriers for new entrants by consolidating resources and user bases within combined entity. In 2019 Zomato held 40% market share, while Uber Eats had between 10% and 15%, following Zomato's acquisition of Uber Eats, their combined market share exceeded 50%. This merger effectively led to duopoly in the market, with Zomato and Uber Eats dominating the industry and reducing competition for new players.

Mergers and Acquisitions in today's age are faced with lot of challenges, it has become difficult for regulators to assess and intervene. According to competition law Assets and turnover are crucial factors for evaluating mergers and acquisitions across jurisdictions. While these criteria have been effective in physical markets, they are less effective in rapidly evolving digital markets. Big tech companies have escaped scrutiny of various high value deals because parties involved may have low turnover or assets. As a result, it has become challenging for authorities to object to these deals because they often do not align with existing rules and frameworks governing Mergers and Acquisitions. But these deals have created havoc in digital markets affecting growth of startups, competition and innovation. In 2014 Facebook acquisition of WhatsApp did not require CCI approval as at that time WhatsApp didn't have significant asset and turnover in India, this did not trigger the threshold limit for CCI. It did not require approval for CCI but was subject to approval of various International regulatory authorities. Both Facebook and WhatsApp have huge user base in India, their acquisition hit digital markets in various ways. It led to increased market concentration, data dominance and reduced competition, as the merged companies gain access to vast amount of shared data, raising concern over user privacy. Regulators worldwide need to reassess their approach to mergers

¹⁷ Vishnu Bandrupalli, *The need for an Ex-Post Assessment Framework to Tackle Killer Acquisitions in India*, 2022, India Corp Law

¹⁸ *Zomato Acquires Uber Eats in an all- stock deal for \$350 million*, Hindustan Times Tech, August 20, 2022

and acquisitions. It is essential to introduce new requirements and frameworks, as the current ones have proven inadequate for addressing the complexities of today's digital markets.

DIGITAL MARKET ACT –

With growing anti-competitive behaviour by tech giants worldwide, there is an urgent need to address and curb these behaviours. For over a decade, jurisdiction across the globe have been striving to establish comprehensive framework to regulate competition in digital markets. The European Union has been at the forefront of this efforts with the implementation of the GDPR(General Data Protection Regulation). This regulation focuses on data protection and privacy, significantly impacting tech giants like Google, Facebook, Apple as data is very significant factor in digital markets, controlling it help control these tech giant. Although the regulations faced several challenges including Compliance cost and Enforcement issues, European Union took another significant step in 2022 by implementing Digital markets act. This legislation targets large digital enterprises classified as gatekeepers. Its aim is to ensure healthy competition in market and prevent tech giants from abusing their dominant positions. Digital Markets Act have paved way for other jurisdictions, such as United Kingdom and India to follow suit. Influenced by the EU legislation, these countries are now developing their own regulations to ensure fair competitions in digital markets.

The word ‘gatekeepers ‘ is designated to certain digital platforms as they provide important gateway between business and consumers in relation to core platform services. The latest groundbreaking piece of EU regulations impose rules on these certain digital platforms categorised as gatekeepers. The European Union has classified six gate keepers – Alphabet, Amazon, Apple, Bytedance, Meta, Microsoft. The European Commission will designate gatekeeper platforms in mid-2023, and compliance enforcement will begin around mid-2024.

¹⁹Digital Market Act entails a shift from ex-post anti-trust intervention to ex-ante regulation. The prime difference being in ex-post regulation addressing anti-competitive behaviour after it has occurred whereas in ex-ante regulation means setting rules and guidelines to prevent anti-competitive behaviour before it happens. Jurisdictions across the world have considered ex-ante regulations as best to address anti-competitive behaviour in digital space. Alongside the classification of gatekeepers, the EU has also defined ‘core platform services. These are the

¹⁹ European Union, Digital Markets Act (DMA), Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector, [2022] OJ L 265/1.

services that gatekeepers utilize to engage in anti-competitive practices. They are classified as follow- i) online intermediation services (e. g. marketplaces and app stores); (ii) online search engines; (iii) social networking sites; (iv) video sharing platform services; (v) number-independent interpersonal electronic communication services; (vi) operating systems; (vii) cloud services; and (viii) advertising services.²⁰ The regulations establish specific quantitative thresholds that companies must meet. Companies operating core platform services that meet these thresholds - turnover, market capitalisation, consumer users, business users- are required to notify the commissions. Additionally, commission set forth regulations for smaller companies that maybe classified as emerging gatekeepers based on foreseeable market developments. The quantitative thresholds for a company to fall within the DMA's scope are set at €7. 5 billion in annual turnover and €75 billion in market capitalisation. In addition, companies would also need to provide a CPS in at least three EU countries and have at least 45 million monthly active end users, established or located in the EU in the last financial year, as well as at least 10 000 active business users established in the EU²¹.

Digital markets act lays down certain Obligations and prohibitions which gatekeepers are required to comply with. Article 5 imposes set of set of requirements. It lays down strict provision regarding end users' personal data, it restricts combing and cross -using of personal data and has kept consent at centre of data sharing. It also introduced parity clauses, it refers to contractual provisions require business users such as App develops to offer their products or services at same price and conditions on gate keeper platform. It also prohibits Tying, Bundling and anti-steering provisions. The cost of non-compliance has been kept high by the commission. Gatekeepers failing to comply will be subject to fines (up to 20 % of worldwide turnover for repeated offences), as well as to structural remedies in cases of systematic non-compliance (a fixed-term ban on acquiring other companies).

COMPETITION (AMENDMENT) ACT 2023-A LANDMARK SHIFT FOR MERGERS AND ACQUISITION

As markets evolve, competition laws must adapt to stay effective. The act established specific threshold limits for mergers and acquisition, requiring that transaction meeting these limits be

²⁰ European Union, Digital Markets Act (DMA), Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector, [2022] OJ L 265/1.

²¹ European Union, Digital Markets Act (DMA), Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector, [2022] OJ L 265/1.

notifies to CCI. These threshold limits were determined by the way of assets and turnover of a companies entering into transaction. These threshold limits where revised and notified by the CCI periodically based on economic conditions, market dynamics and market conditions. This is done to accommodate to changes in the economy. With the shift from physical to digital markets, where data plays a crucial role in assessing a company's market dominance, relying solely on assets and turnovers is no longer sufficient. In the digital sector, data can be more indicative of a company's influence and competitive position than monetary valuation of a company. Huge tech giants entering into mergers and acquisitions have sometimes evaded scrutiny from CCI because their assets and turnover figures did not meet the threshold limits. Despite this, these companies have access to vast amounts of data, which can be sufficient to dominate the market and potentially abuse their dominate position. This situation underscores the growing need to consider non-price factors, such as data, when evaluating competitive dynamics and regulatory oversight.

The recent amendment introduced the provision of "deal values threshold". Submissions from Parliamentary committee in its reports clarified that deal value threshold was introduced focusing on digital and new -age markets, where the target entities may have minimal assets and turnover, but may possess significant potential in terms of data, technology, innovation, etc ²². The deal value threshold will trigger the notification to CCI in case where the value of transaction exceeds INR 20billion or 2000 crores ²³. Deal value refers to total financial worth assigned to a transaction such as merger or acquisition. It takes under consideration cash, stock, debt and other financial instruments paid to acquiring company. The deal value threshold limit provides a clearer understanding of a significant impact a transaction can have on the market and economy. In contrast, relying solely on assets and turnover as thresholds does not fully capture the potential effects of a deal, especially in sectors where factors like data and market influence are crucial. It as also laid down that de minimis exemption will not apply where deal value threshold will be breached. This change has been considered instrumental as with its introduction the competition authorities can better capture and scrutinize transactions that may have anti-competitive effects.

²² Ministry of Corporate Affairs, *The Competition (Amendment) Bill, 2022*, Standing Committee on Finance, 52(2022-2023)

²³ The Competition (Amendment) Act, 2023, Section 6, The Gazette of India, April 11, 2023

DRAFT DIGITAL COMPETITION BILL 2024-

India's Ministry of Corporate Affairs released the Draft Digital Competition Bill on March 12, 2024. Since then, it sparked considerable debate among various market stakeholders, with numerous comments pouring in regarding its necessity, effectiveness, and overall impact. The framework of bill draws inspiration from the EUs Digital market act. The bill introduced several measures aimed at regulating competition in India's digital market. The bill proposes to introduce ex-ante regulations to regulate digital markets, ex-ante regulations are proactive measures taken to prevent anti-competitive behaviour before it occurs. These are pre-defined rules and regulations which companies need to comply with. Although there has been a longstanding need for such regulation, the market may not yet be prepared to fully adapt to these new rules. Digitalization in India began much later than in most developed countries, such as EU and USA. It truly took off in 2015 with introduction of several initiatives as under the Digital India act. Although India is recognised as the third largest digital economy, the parts of country still remain to be fully digitalised. The digital economy relies heavily on investment and technological upgrades, with innovation playing a crucial role. Indian markets still need to adopt to advanced technologies to keep pace with the digitalization seen in developed countries. Stakeholders are concerned that the bill may stifle innovation and negatively impact the growth of digital markets. Startups and MSMEs in India, which have only recently begun to flourish, could also see their growth hindered by the bill. To understand why bill has been facing significant backlash from various stakeholders it is essential to understand the crucial aspects and their potential effects.

The bill has provision of identifying Systematically Significant Digital Enterprises (SSDEs).

²⁴These are basically identifying large digital enterprises. The bill lays down various Quantative and Qualitative thresholds to identify SSDEs. These thresholds a are broad and diverse, effectively encompassing a wide range of companies, beyond just the major tech giants. Moreover, the CCI also have power to designate any enterprise as SSDEs if it deems fit so. It also has a provision to designate Associate Digital Enterprise (ADE) covering a lot more companies ²⁵. With being classified as SSDEs and ADE the companies will have to comply with endless obligations. This would increase the regulatory burden and compliance cost

²⁴ Ministry of Corporate Affairs, *Report of the Committee on Digital Competition Law – Draft Digital Competition Bill, 2024, Annexure 4*, 150-192

²⁵ Ministry of Corporate Affairs, *Report of the Committee on Digital Competition Law – Draft Digital Competition Bill, 2024, Annexure 4*, 150-192

diverting the company's investment from development, upgradation and innovation. Moreover, threshold limits are significantly low, extending even to various startups and MSMEs, potentially hampering their growth. The bill fails to incorporate a crucial aspect from the EU rules concerning SSDEs. According to the EU rules, SSDEs are given an opportunity to argue why they should not be categorised such. However, the Indian draft lacks this provision. Additionally, the threshold limits in the bill are much higher compared to those in Indian draft

Duplicity of Proceedings and penalties is another major concern among the stakeholders. Once the company assess themselves there it fits into any threshold limits it will have to notify CCI within 90 days, if the company fails to do so it will be penalised with 10% of its annual turnover²⁶. However, the bill has been vague whether a company being categorised as SSDE would also be given a label of dominant enterprise, because once a company is considered a dominant enterprise it is most likely to fall under section 4 of Competition act 2002 and also under scrutiny of CCI. Given the situation there is a high likelihood that a company might face proceedings under both the Digital bill and competition law parallelly. This duplicity of proceedings and penalties will significantly increase the cost and burden on companies, as penalties imposed under both legislations are substantial. The director general would need to conduct investigations into the company twice using the same extensive procedural norms which would also increase the burden on CCI. Therefore, the law needs to be clearer and more rational. Additionally, the debate over whether a company classified as SSDE should also be classified as dominant is an issue that needs resolution

CONCLUSIONS-

Whether the rules will be implemented or not, it is clear that the bill has generated significant dissent in the market. This dissent has impacted digital investment in India, casting doubt on the bills effectiveness and raising questions about its necessity. It is also evident enough that bills efficiency is in question which contradicts its existence. Drafters must recognise that India's digital markets are distinct and unique. As with other laws, they need to include provisions tailored to the specific characteristics and needs of the Indian market. India will undoubtedly need regulations to govern digital markets in the near future. However, it is equally important to allow these markets to mature before implementing pre-emptive measures.

²⁶ Ministry of Corporate Affairs, *Report of the Committee on Digital Competition Law – Draft Digital Competition Bill, 2024, Annexure 4*, 150-192

The current legislation already substantial provisions for regulating digital markets on ex-post basis. CCI has delivered significant judgements and penalized many companies over time for engaging in anti-competitive practices. The current legislation has addressed various segments of digital market, including E-commerce platforms like Amazon and Flipkart, search engines like Google, cab aggregators like Ola and Uber, food delivery apps like Zomato and Swiggy, social media platforms like Facebook and Instagram, travel agencies like Make my trip and so on. Given the rapid pace of digitalization in India, it is crucial to maintain balance by keeping the market free from overly restrictive regulations and numerous obligations at this stage. One must understand that India's IT sector thrived without stringent regulations or restrictive rules. The early expansion of India's IT sector was characterized by limited government intervention, enabling companies to experiment, innovate, and grow swiftly. While the digital markets are still developing, with much innovation and technology yet to be introduced, the digital sector in India now needs the freedom to grow, innovate and flourish.