

What is the draft Digital Competition Bill? | Explained

How is an ex-post framework different from an ex-ante framework? Why does the draft Bill encourage an ex-ante competition regulation? What framework does the European Union follow? What are systemically significant digital enterprises?

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The story so far: In February 2023, the Ministry of Corporate Affairs (MCA) constituted a Committee on Digital Competition Law (CDCL) to examine the need for a separate law on competition in digital markets. The CDCL deliberated on the issue for a year and came to the conclusion that there was a need to supplement the current ex-post framework under the Competition Act, 2002 with an ex-ante framework. It laid out this ex-ante framework in the draft Digital Competition Bill.

What is an ex-ante framework?

The Competition Act, 2002 is the primary legislation concerned for preventing practices that have an adverse effect on competition. It establishes the Competition Commission of India (CCI) as the national competition regulator. As with competition law in all other jurisdictions, the Competition Act, 2002 is based on an ex-post framework. This means that the CCI can use its powers of enforcement only after the anti-competitive conduct has occurred.

In the case of digital markets, the CDCL has advocated for an ex-ante competition regulation. This means that they want the CCI's enforcement powers to be supplemented such that it allows it to pre-empt and prevent digital enterprises from indulging in anti-competitive conduct in the first place.

Ex-ante competition regulation is unusual. The European Union is the only jurisdiction where a comprehensive ex-ante competition framework, under the Digital Markets Act, is currently in force. The CDCL agrees with this approach because of the unique characteristics of digital markets. First, digital enterprises enjoy economies of scale and economies of scope, that is, reduction in cost of production per unit as the number of units increase and reduction in total costs of production with increase in number of services respectively. This propels them to grow rather quickly as compared to players in the traditional market. Second, this growth is aided by network effects — utility of the digital services increases with the increase in the number of users.

In this context, given that markets can tip relatively quickly and irreversibly in favour of the incumbents, it was found that the extant framework provided for a time consuming process, allowing offending actors to escape timely scrutiny. Therefore, the CDCL has advocated for preventative obligations to supplement the ex-post facto enforcement framework.

What is the draft's basic framework?

The draft Bill follows the template of the EU's Digital Markets Act. It does not intend to regulate all digital enterprises, and places obligations only on those that are "dominant" in digital market segments. At present, the draft Bill identifies ten 'core digital services' such as online search engines, social networking services, video sharing platform services etc.

The draft Bill prescribes certain quantitative standards for the CCI to identify dominance of digital enterprises. These are based on the 'significant financial strength' test which looks at financial parameters and 'significant spread' test based on the number of users in India. Even if the digital enterprise does not meet quantitative standards, the CCI may designate an entity as a "systemically significant digital enterprise (SSDE)" based on qualitative standards.

The primary obligation of SSDEs is to not indulge in anti-competitive practices. These require the SSDE to operate in a fair, non-discriminatory and transparent manner with its users. The draft Bill prohibits SSDEs from favouring its own products on its platform over those of third parties (self-preferencing); restricting availability of third party applications and not allowing users to change default settings; restricting businesses users of the service from directly communicating with their end users (anti-steering) and tying or bundling of non-essential services to the service being demanded by the user. SSDEs also cannot cross utilise user data collected from the core digital service for another service and non-public data of users cannot be used to give unfair advantage to the SSDE's own service.

What has been the response?

The overriding sentiment towards the draft Bill has been one of opposition. First, there is considerable scepticism on how well an ex-ante model of regulation will work. This stems in part from the fact that it seems to be transposed from the EU to India without taking into account differentiating factors between the two jurisdictions and the lack of evidence of it actually working well there. This is compounded by concerns of its potential negative effects on investments for start-ups in India and that they might be deterred to scale up to prevent meeting quantitative thresholds. Studies have also shown that restrictions on tying and bundling and data usage would negatively impact MSMEs that have come to rely significantly on big tech to reduce operational costs and enhance customer outreach.

Interestingly, a group of Indian start-ups have supported the draft Bill arguing that it would address concerns against monopolistic practices by big tech. However, they have argued for a revision of financial and user based thresholds citing concerns that it may lead to domestic start-ups being brought within the regulatory net.

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