

Deciphering India's Digital Competition Bill 2024: Implications for Big Tech

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Background

Regulations are an important part of any economy and balance the interests of various societal stakeholders, promoting economic efficiency, fairness, and sustainability. While excessive or poorly designed regulations can hamper innovation and economic growth, appropriate regulation is essential for fostering a thriving economy. Today, with the growth of digital markets and the digital economy, regulation has become significant to promote market efficiency and to promote healthy competition between competitors. The majority of the countries to built this balance have come up with different regulations to regulate the digital economy. India too has taken a step into it.

On March 12, 2024, the Committee on Digital Competition Law released a report containing recommendations to regulate big tech companies in India through the Draft Digital Competition Bill, 2024 (the Bill).¹ This 236-page report, submitted to Finance and Corporate Affairs Minister Nirmala Sitharaman, aims to address issues in the digital competition market by facilitating the timely detection of digital competition concerns, ensuring compliance with existing laws, and expeditiously handling proceedings involving entities in the digital market. The Ministry has invited public feedback on the Bill, with the consultation period open until April 15, 2024.

However, within a day of its release, the Bill has sparked concerns within the industry, particularly among major tech players such as Meta, Google, Uber, and Amazon. These companies have raised concerns regarding the necessity of implementing ex-ante regulation for digital markets.² Presently, competition law primarily relies on post-ante regulation, meaning that regulatory intervention occurs only after anti-competitive or unfair practices have been identified. In contrast, the proposed Bill seeks to establish a precautionary regulatory framework.

These concerns highlight the ongoing discussion regarding the suitable regulatory approach to digital markets. While proponents of ex-ante regulation argue that it is necessary to address potential issues before they arise, opponents raise concerns about the potential stifling of innovation and market dynamics. As the public consultation period for the Bill continues, stakeholders from various sectors will likely engage in discussions to refine the proposed regulatory framework and address the concerns raised by industry players.

Let us understand the Bill in detail and its impact on the big tech and digital economy.

What It Means for Big Tech

¹ <https://www.mca.gov.in/bin/dms/getdocument?mds=gzGtvSkE3zIVhAuBe2pbow%253D%253D&type=open>

² <https://www.india.com/business/google-apple-flipkart-amazon-uber-opposes-ex-ante-norms-under-the-digital-competition-law-6784062/>

The Bill introduces the concept of SSDEs.³ As per the Bill, SSDE is an entity providing "core digital services" and which have a turnover in India of at least ₹4,000 crore, a global turnover of at least \$30 billion, a gross merchandise value in India of at least ₹16,000 crore, or a global market capitalization or fair market value of \$75 billion. Additionally, the entity must have had at least 1 crore end users or at least 10,000 business users in India in each of the preceding three financial years. To be designated as an SSDE, companies would need to meet substantial financial and user base thresholds, including minimum turnovers in India and globally, a large user base, and market capitalization or fair market value. This would impact big tech companies like Meta, Google, Apple, Amazon as they often meet these criteria.

Under the Bill, a core digital service refers to 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.

The Commission can also designate an entity as an SSDE for a core digital service if it doesn't meet the specified criteria, but has a significant presence in that service based on factors such as: the volume of its business, its size and resources, the number of users, its economic power, its integration across markets, user dependence, monopoly status, entry barriers, user lock-in, network effects, and other relevant considerations.⁴ This provision allows big tech companies to potentially be designated as SSDEs based on their *market influence*, regardless of whether they meet the precise financial criteria specified in the Bill.

The Bill introduced the concept of self-reporting and an entity has to self-designate itself as an SSDE.⁵ An enterprise must inform the Commission within 90 days of meeting the specified thresholds if it qualifies as a SSDE for one or more of its core digital services. The Commission may then designate the enterprise as an SSDE and identify its core digital services, subjecting it to obligations under Chapter III and related regulations. The Commission can also request additional information from enterprises to assess their eligibility as an SSDE. If an enterprise fails to comply or provides incorrect information, the Commission may still designate it as an SSDE based on available data.

SSDEs must set up clear and efficient complaint handling and compliance systems as outlined.⁶ It must regularly report to the Commission on its efforts to meet the compliance requirements.⁷ The reporting format and frequency will be specified by the Commission. Additionally, SSDEs are required to operate in a fair, nondiscriminatory, and transparent manner.⁸ SSDEs are prohibited from favouring their own products, services, or those of related parties, or third parties with whom they have arrangements, over offerings by third-party business users on their core digital service.⁹ SSDEs are prohibited from using non-public data for competing with other businesses. It cannot mix or share personal data from different services, including its core digital service, without the consent of end users or business users. It also cannot allow third parties to use this data without consent.¹⁰

The Bill proposes hefty penalties for contravention of the provisions which can amount to 10 percent of the global turnover or to an imprisonment of maximum three years.¹¹

Concluding Remarks

³ Clause 3(1) of the Bill

⁴ Clause 3(3) of the Bill

⁵ Clause 4 of the Bill

⁶ Clause 7 of the Bill

⁷ Clause 9 of the Bill

⁸ Clause 10 of the Bill

⁹ Clause 11 of the Bill

¹⁰ Clause 12 of the Bill

¹¹ Chapter VI of the Bill

Ex-ante regulations are based on the premise of anticipating and preventing potential risks or negative outcomes rather than addressing them after they have occurred. This approach aims to proactively manage risks and promote compliance with regulatory objectives. The Committee Report has acknowledged that India's digital economy is still growing, and therefore there can be a likelihood of stifling innovation due to ex-ante regulations. Therefore, to strike a balance the Committee intends to only regulate those enterprises which have a 'significant presence' in India and have the ability to influence the digital market. The significant impact on big tech companies in India is evident, but smaller companies will also be affected, albeit indirectly. For example, a small tech company which depends on Google for advertising services will be indirectly impacted by the manner in which Google will be regulated under the new law.

Also, the Bill mentions that SSDEs are not allowed to bundle/tie up services. For instance, while Tata Neu currently bundles services and offers them on their platform, the new Bill will restrict them from providing bundled services. Instead, they will be required to offer each service independently.

In addition, ex-ante regulations might deter foreign companies from investing in India as they might perceive it as over-regulation. Also, ex-ante regulations might delay the introduction of products in the market, which is seen with Google Bard whose release was delayed in the EU due to ex-ante regulations.

While regulation of the growing digital market is a welcome step, there needs to be a balance that needs to be struck between innovation and regulation. Given that India is a developing economy, the impact of ex-ante regulations might vary from that of developed economies. Therefore, a one-size-fits-all formula might not work for a country like us, and it will be wise to borrow only relevant and applicable regulatory standards.