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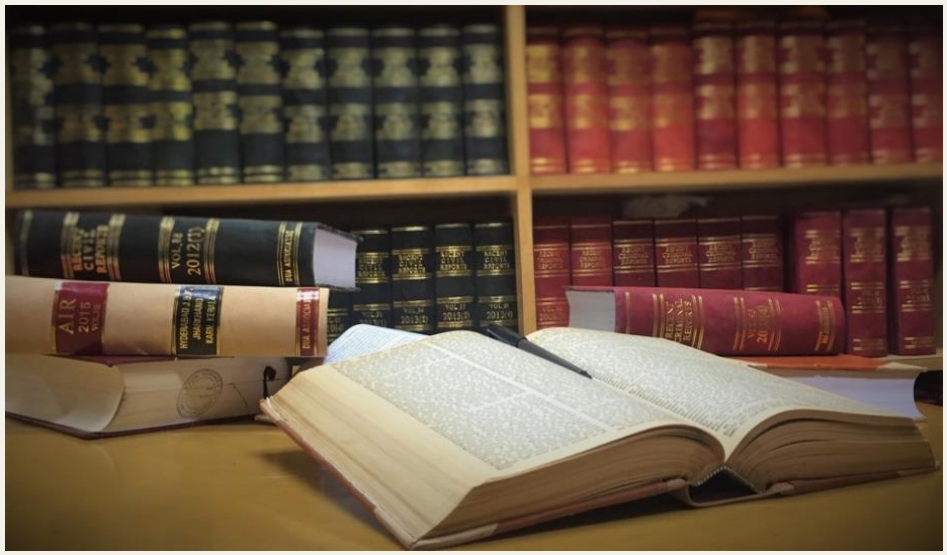
DUA ASSOCIATES

IN BRIEF – DIGITAL COMPETITION BILL



The Ministry of Corporate Affairs has recently published the Report of the Committee on Digital Competition Law. The Committee was set up on February 6, 2023, to examine the need for an ex-ante regulatory mechanism for digital markets in India. The Committee has recommended a new Digital Competition Act to regulate the conduct of large digital enterprises. The proposed law will provide for ex-ante regulation of the conduct of large digital enterprises before instances of anti-competitive conduct transpires. Some of the major recommendations of the Report are as under:

a. Introduction of a Digital Competition Act with ex-ante measures:

The Committee has recommended the introduction of an ex-ante legislation, i.e., the Digital Competition Act, specifically applicable to large digital enterprises, to supplement the Competition Act, 2002 (Competition Act). Such an ex-ante law should ensure that the behavior of large digital enterprises are proactively monitored and that the Competition Commission of India (CCI) intervenes before instances of anti-competitive conduct transpire. A draft of the legislation (Draft DCB) has been included in the report.

b. Scope and applicability:

The Committee has proposed that the Draft DCB should apply to a pre-identified list of 'Core Digital Services' that are susceptible to concentration. The Committee has recommended that this list is drawn up on the basis of the CCI's enforcement experience, market studies, and emerging global practices.

c. Regulation of digital enterprises with 'significant presence':

The Committee has recommended that the Draft DCB should only regulate enterprises which have a 'significant presence' in the provision of a Core Digital Service in India and the ability to influence the Indian digital market. The Committee has recommended that such enterprises be designated as 'Systemically Significant Digital Enterprises (SSDEs).

d. Thresholds and criteria for designation as SSDEs:

The Committee has proposed that an enterprise is deemed an SSDE, if it passes a twin test demonstrating 'significant presence': (a) the 'significant financial strength' test which comprises quantitative proxies of economic power, i.e., India-specific turnover, global turnover, global market capitalization and gross merchandise value; and (b) the 'significant spread' test which evaluates the extent to which an enterprise has been present in the provision of a Core Digital Service in India, on the basis of the number of end-users and business users. The Draft DCB obligates enterprises to self-assess their fulfilment of these thresholds and report the same to the CCI. Additionally, the Draft DCB envisages residuary powers for designation in the form of 'qualitative' criteria for designating certain enterprises as SSDEs that do not meet the quantitative thresholds but nonetheless have the ability to significantly influence the market in which they operate.

e. Enforcement:

The Committee has recommended borrowing the procedural framework from the Competition Act for the purposes of the Draft DCB.

f. Remedies:

The Committee proposes that a monetary penalty for non-compliance with the ex-ante obligations is restricted to a maximum of 10% of the global turnover of the SSDE, in line with the penalty regime under the Competition Act.

Some of the specific conduct which has been mandated/ prohibited under the Draft DCB are as under:

a. Fair and Transparent Dealing:

SSDEs are obliged to operate in a fair, non-discriminatory and transparent manner with end users and business users.

b. Self-Preferencing:

SSDEs cannot, directly or indirectly, favor their own products, services or lines of business.

c. Data Usage:

SSDEs cannot, directly or indirectly, use or rely on non-public data of business users operating on their Core Digital Service to compete with such business users on the identified Core Digital Service of the SSDEs. Further, without the consent of the end users or business users, SSDEs cannot:

- intermix or cross use the personal data of end users or business users collected from different services including their Core Digital Service; or
- permit usage of such data by any third party.

d. Restricting third-party applications:

SSDEs cannot restrict or impede the ability of end users and business users to download, install, operate or use third-party applications or other software on its Core Digital Services and it must allow end users and business users to choose, set and change default settings.

e. Anti-steering:

SSDEs cannot restrict business users from, directly or indirectly, communicating with or promoting offers to their end users or directing their end users to their own or third-party services, unless such restrictions are integral to the provision of the Core Digital Service of the SSDEs.

f. Tying and Bundling:

SSDEs cannot require or incentivize business users or end users of the identified Core Digital Service to use one or more of the SSDEs' other products or services.

It is important to note that there are significant similarities between the Draft DCB and the extant Competition Act. The Draft DCB is enforced by the CCI. Similarly, the Draft DCB mandates the CCI to draft regulations specifying the conduct requirements by the large digital enterprises. Further, Section 3(3) of the Draft DCB, which provides the criteria for designating an enterprise as 'Systemically Significant Digital Enterprises' (essentially a large digital enterprise) borrows heavily from Section 19(4) of the Competition Act, which gives the factors to be considered for treating an enterprise as a dominant enterprise. The designation of Associate Digital Enterprise under the Draft DCB relies on the definition of 'group' under the extant law. Even some of the prohibited conduct under the proposed law are already covered by the prohibitions under the extant law. The obligation of 'fair and transparent dealing' under the proposed law already stands covered by prohibition on dominant enterprises to indulge in unfair and discriminatory conduct under the Competition Act. Similarly, the settlement and commitment provisions under the proposed law are identical to settlement and commitment provisions introduced recently to Competition Act. The powers of the CCI and procedure for inquiry and investigation under the proposed law are also identical.

Similarity in the provisions in the proposed law and extant competition law, begs the question – what is the requirement of a new law? Competition law in India is yet to achieve the desired stability and legal certainty. With limited judgements from the Supreme Court of India, many questions of law remain yet to be settled. Practice and procedures are still evolving. A significant milestone was achieved with Competition (Amendment) Act, 2023, when many of the lessons, interpretations and practices evolved since the implementation of the Competition law in India in 2009, were incorporated in the extant law. In this scenario, when the extant law is still evolving, introducing the proposed law may add to the confusion and lead to potential conflict in interpretation and implementation of the two statutes, thereby undermining the legal certainty regarding the competition law in India that has been achieved till date. It will be simpler to incorporate provisions for ex ante regulation of large digital enterprises in the extant competition law and let these provisions benefit from the legal certainty provided by the precedents/ judgements of various legal forums till date.

It is also worth noting that the CCI has already successfully prosecuted anti-competitive conduct in various cases in the digital market.

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