



## Explainer

# WHY DCB'S EX-ANTE APPROACH MAY NOT BE RIGHT TO ADDRESS BIG TECH CONCERNS

BY NIMITT DIXIT

In March, the Committee on Digital Competition Law in India released its report, which included the draft Digital Competition Bill, 2024 (DCB). However, the proposed regulatory approach envisioned in the DCB is raising more concerns than it aims to alleviate. Legal experts and policy groups say it increases compliance, stifles innovation, reduces market access for smaller companies and fails to address the key issue: Delays in the Competition Commission of India's (CCI) investigation mechanism and adjudication process.

### ▶ WHY IS THE EXISTING COMPETITION ACT BEING OVERHAULED?

Citing the inadequacy of the ex-post, or the post-violation investigation, mechanism under the current Competition Act (CA) in dealing with the increasing pace of digital

markets, the committee's report has suggested a new law, the DCB, to monitor anti-competitive conduct of certain "systematically significant digital enterprises" (SSDEs), in an ex-ante manner i.e. regulation of conduct to prevent any potential anti-competitive conduct.

The committee found that the CA is not designed to facilitate speedy redressal of anti-competitive conduct given the extensive fact-finding and tiered adjudicatory process, leading to prolonged enforcement proceedings. It noted that because of the prolonged proceedings, there is a possibility of the markets tipping in favour of the dominant digital player.

### ▶ IS A NEW LAW NEEDED TO GOVERN DIGITAL MARKETS?

But instead of creating a new

law, these issues could easily be addressed within the scope of the CA legal experts say.

"The existing competition law framework is sufficiently broad and malleable to address concerns arising in the digital economy, and the introduction of the ex-ante legislation is likely to create legal uncertainty and operational challenges for digital players," says Akshay Nanda, a New Delhi-based competition partner at Saraf and Partners.

"It is the delay by the appellate bodies in final adjudication of competition cases and prolonged litigation that needs to be addressed, which may also become a similar challenge under the new ex ante legislation," Nanda adds.

Market tipping concerns can be effectively addressed by re-examining the power given to the CCI to pass interim orders during the course of an investigation.

"The report does not discuss or deliberate on how the power to pass interim orders is inadequate to address the issue of the market tipping in favour of the large digital player during the course of an investigation," Nanda explains.

The DCB's focus is rightly on ensuring fair competition in the digital market by preventing abuse of dominance. However, its recommendations suffer from a lack of extensive stakeholder discussions and a failure to understand the need for regulatory freedom for innovation-led market growth, which is the lifeblood of the tech industry.

"The introduction of the ex-ante digital competition law could stifle innovation by imposing overly burdensome regulation on digital companies. Any regulatory intervention that hampers innovation could have far-reaching consequences, stifling creativity, and impeding breakthrough developments in technology and services," Nanda says.

Furthermore, the law may have unintended consequences that make market access a lot harder for smaller tech players, who rely on potential SSDEs like Google, for targeted advertising,

identification services and discoverability.

▶ **WHAT WILL BE ITS EFFECT ON THE LARGER TECH MARKET?**

A survey by New Delhi-based policy think tank Esya finds that 61 percent of surveyed MSMEs indicate that limitations placed on targeted advertising of large digital platforms under the DCB will have a negative impact on them. It also found that 6 out of 10 MSMEs would be negatively affected by restrictions on sign-in services of digital platforms. This ratio is twice as high as that of those in favour of such restrictions.

Nanda also questions whether the suggested ex-ante regulation could really lead to the changes intended in the tech space. "Many customers of the large digital platforms are satisfied with the services, ecosystems and possibilities that these platforms offer."

Google, which follows a near-identical law, the Digital Markets Act (DMA), in the European Union,

reported early responses to DMA compliance. While traffic to a small number of successful digital intermediary services increased, direct engagement with a wide range of businesses like airlines, hotels, local merchants and restaurants significantly decreased.

The DCB also increases compliance burdens, and "digital enterprises will be required to make significant operational and strategic changes to their internal infrastructure and business models," Nanda says.

"This may involve enhancing internal governance structures, implementing monitoring, and reporting mechanisms, and engaging with regulatory authorities to address compliance concerns and inquiries. While the proposed law aims to promote innovation by fostering a more competitive digital ecosystem, compliance requirements may influence the direction and pace of innovation initiatives," he adds. 