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NEWSALERT

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DIGITAL COMPETITION BILL CONSULTATIONS: INDIA PREPARES TO REGULATE 'GATEKEEPER' PLATFORMS

1. BACKGROUND

1.1. On December 22, 2022, the Standing Committee on Finance ("**Committee**") presented its report titled *'Anti-competitive practices by big tech companies'*,[1] before the lower house of the Parliament, i.e., the Lok Sabha. Given that the anti-competitive practices of big tech companies are increasingly coming under the radar of the competition regulators across the globe, including the Competition Commission of India ("**CCI**"), the Committee, in consultation with various stakeholders, identified certain anti-competitive practices in the digital sector and proposed enactment of a *sui generis* law, namely the Digital Competition Act ("**DCA**") to *ex-ante* regulate the digital market. Pursuant to the Committee's report, the Ministry of Corporate Affairs ("**MCA**"), on February 06, 2023, constituted a 16-member inter-ministerial 'Committee on Digital Competition Law' ("**CDCL**") to assess the need for a separate law on competition in digital markets. [2] The CDCL has been given a mandate of three months to submit its report to the Government including a draft DCA. The key recommendations of the Committee are set out in detail below.

2. OBSERVATIONS AND RECOMMENDATIONS OF THE COMMITTEE

2.1. The Committee observed that digital markets have different characteristics from traditional markets. As they exhibit increasing returns to size,[3] scaling quickly is the best strategy for digital businesses. Typically, digital markets 'tip' quickly and one or two players emerge as leading players/winners in a short span of three to five years. Given that the digital markets 'tip' before policies can be formulated to adjudicate the anti-competitive behaviour, the Committee recommended that competitive behaviour in the digital market needs to be evaluated *ex-ante*, i.e., before the markets end up getting monopolized.

2.2. Accordingly, the Committee: (i) opined that India must identify the small number of leading players or market winners that can negatively influence the competitive conduct in the digital ecosystem as 'Systemically Important Digital Intermediaries' ("**SIDIs**"); (ii) identified 10 anti-competitive practices ("**ACP"**) (as set out below) which must be addressed to ensure efficiency as well as fair competitive conduct in the market; and (iii) recommended the: (a) introduction of DCA to ensure a fair, transparent and contestable digital ecosystem; and (b) establishment of a Digital Markets Unit within the CCI to *inter alia* monitor SIDIs, emerging SIDIs and other digital players not designated as SIDIs, review SIDI compliance and adjudicate on digital market cases, etc.

Systemically Important Digital Intermediaries and Anti-competitive practices

[1] Available at: https://loksabhadocs.nic.in/lsscommittee/Finance/17_Finance_53.pdf.
[2] Available at: https://images.assettype.com/barandbench/2023-02/7e93ae0c-05b9-4565-9b5b-a9a6103ac6ff/Order.pdf.
[3] Driven by learning and network effects.

2.3. SIDI: The Committee opined that SIDIs should be identified based on their revenues, market capitalization, and number of active business and end consumers; and such SIDIs should be subject to *ex-ante* regulation. Further, a SIDI should annually submit a compliance report to the CCI and publish a non-confidential summary of such report on its website.

2.4. Recommendations regarding ACPs:

2.4.1. Anti-steering provisions: The Committee observed that anti-steering provisions[4] restrict users' choice of alternatives. Thus, the Committee recommended that SIDIs should not condition: (i) access to the platform; (ii) preferred status; or (iii) placement on the platform, on the purchase or use of products or services which are not part of or intrinsic to the platform.

2.4.2. Platform neutrality and self-preferencing: The Committee observed that self-preferencing[5]: (i) leads to a negative effect on the downstream markets; and (ii) gives an unfair advantage to the leading player, i.e., the platform itself. As such, the Committee opined that platform neutrality must be ensured at all costs. Accordingly, the Committee recommended that a SIDI must not engage in conducts of self-preferencing when: (a) mediating access to supply and sales market by presenting its own offers in a more favourable manner; and (b) pre-installing its own offers on devices or integrating them in any manner in offers provided by the platform.

2.4.3. Bundling and tying: The Committee observed that many digital companies force consumers to buy related services[6] which results in: (i) information asymmetry; (ii) restriction of consumer choices, ultimately leading to consumers paying higher prices; and (iii) elimination of rival companies. Thus, the Committee recommended that SIDIs should not force business users/end consumers to subscribe to/register with any ancillary services as a condition for being able to use any of the platform's core services.

2.4.4. Data usage: The Committee observed that data collected by various digital companies, needs to be seen as a zero-price or non-price factor that can hamper privacy, and a competitive digital business environment must ensure data privacy. Thus, the Committee recommended that SIDIs should not: (i) process the personal data of consumers (using services of third parties) for providing online advertising services; (ii) combine personal data from relevant core service of the platform with personal data from third-party services; (iii) cross-use personal data from relevant core service in other services; and (iv) sign in consumers to other services of the platform in order to combine personal data, unless a specific choice has been given to the end consumer and consent has been obtained from him.

2.4.5. Mergers and acquisitions: The Committee observed that 'killer acquisition'[7] is one of the frequently faced issues in the digital market. Given that, currently, the CCI reviews transactions

[4] Anti-steering provisions are clauses whereby a platform prevents the business users of the platforms from 'steering' its consumers to offers other than those provided by the platform that may be cheaper or otherwise potentially attractive alternatives in terms of a better interface.
[5] It is a practice whereby a digital platform favors its own services or its subsidiaries (directly/ indirectly) in situations when it has a dual role of providing the platform and competing on the same platform.
[6] For instance: (i) food delivery apps making it mandatory for restaurants to use only their platform's delivery services; (ii) a mobile OS encouraging the user to use its own search engine; and (iii) upstream TV networks earning advertising revenue by offering bundles of channels to downstream distribution companies.
[7] Transactions wherein large companies buy high valued start-ups without being subject to merger control scrutiny.

based on asset and turnover based thresholds, several high value transactions involving big tech companies have escaped the CCI's scrutiny[8] since these transactions did not meet the prescribed thresholds. Accordingly, the Committee recommended that a SIDI should, prior to the implementation of any intended concentration or any agreement/the announcement of the public bid/the acquisition of a controlling interest, inform the CCI of any such concentration (where the merging entities or the target company provide services in the digital sector or enable the collection of data), irrespective of whether it is notifiable to the CCI.

2.4.6. Deep discounting and dynamic pricing: The Committee observed that deep discounting is a common concern peculiar to e-commerce, food delivery, and hotel booking sites. Further, practices such as 'dynamic pricing',[9] bogus sales, and markdowns[10] have: (i) resulted in service providers losing control over the final prices since the authority to determine discount rates rests with the platform; and (ii) impaired the ability of offline players to sell and make profits. Thus, the Committee recommended that SIDIs should not: (a) limit business users from differentiating commercial conditions[11] on its platforms; and (b) prevent business users from offering the same products or services to end consumers through third-party online intermediation services or through their own direct online sales channels at different prices/conditions.

2.4.7. Exclusive tie-ups and parity clauses: The Committee observed that exclusive arrangements[12] by the e-commerce platforms not only hamper the business of other e-commerce platforms but may also lead to losses for brick-and-mortar sellers. Additionally, the inclusion of platform price parity ("**PPP**") clauses[13] results in increased prices for the consumer. Accordingly, the Committee opined that exclusive tie-ups by major digital platforms can: (i) foreclose markets; (ii) restrict competition; and (iii) ultimately lead to increased prices for the consumer. Therefore, the Committee recommended that SIDIs should not prevent business users from offering the same products or services to end consumers through third-party online intermediation services or through their own direct online sales channels at different prices/conditions, so that fair market conditions prevail.

2.4.8. Search and ranking preferencing: The Committee observed that users search using keywords on any platform and receive results based on algorithms. As such, organic search results should list products/services without any bias, i.e., list top selling or highest rated results on the top rather than prioritising any sponsored products. However, if the search results show any other products taking precedence, it indicates search bias in the favour of sponsored products, or orders fulfilled by the platform/marketplace itself. Further, the Committee observed that selecting high-quality, relevant keywords for advertising campaigns can help advertisers reach the right customers at the right time. As such, the Committee recommended that: (i) a SIDI must provide to any third-party offering online search engines with access to fair, reasonable, and non-discriminatory terms; (ii) any query, click, and view data containing personal data should be anonymized; and (iii) a

[8] For instance, Facebook's acquisition of WhatsApp in 2014 for USD 19 billion.
[9] The conduct of tracking consumer demand and preference data and raising prices in situations of high demand.
[10] The conduct of inflating prices and consequently offering a sale or discount.
[11] Including price, increased commissions, de-listing, and other equivalent terms and conditions.
[12] The Committee observed that an e-commerce platform may decide to enter into an agreement with a brand, to allow the sale of the brand's products on its platform, exclusively.
[13] PPP clauses disallow a business user to sell at lower rates on any other platform, except its own.

SIDI should not provide favourable treatment to the products/services/lines of business of its own platform *vis-à-vis* to those of another business user in an unfair and discriminatory manner.

2.4.9. Third-party applications: The Committee observed that gatekeepers restrict the installation or operation of third-party applications and thereby prevent the users from using any application other than their own. In this regard, the Committee recommended that: (i) a SIDI should allow the installation and use of third-party apps/app stores using its own operating system; and (ii) a SIDI should not prevent third-party apps or app stores to be set as default.

2.4.10. Advertising policies: The Committee observed that consumer data can be leveraged for cost-effective targeted advertising, and it has led to: (i) increased market concentration across many levels of the supply chain; and (ii) issues of self-preferencing and conflict of interest. Thus, the Committee recommended that SIDIs should not process the personal data of end consumers (using services of third parties) for providing online advertising services. Further, the Committee opined that regulatory provisions are required to ensure that contracts between news publishers and SIDIs are fair and transparent.

3. MANDATE OF THE CDCL

3.1. The MCA has provided detailed terms of reference to the CDCL i.e.,: (i) review whether the existing provisions in the Competition Act, 2002, and the rules and regulations framed thereunder are sufficient to deal with the challenges that have emerged from the digital economy; (ii) examine the need for an *ex-ante* regulatory mechanism for digital markets through a separate legislation; (iii) study the international best practices on regulation in the field of digital markets; (iv) study other regulatory regimes/ institutional mechanisms/government policies regarding competition in digital markets; (v) study practices of leading players/SIDIs which limit or have potential to cause harm in digital markets; and (vi) any other matters related to competition in digital markets as may be considered relevant by the CDCL. Accordingly, the MCA-appointed CDCL met for its first meeting on February 22, 2023, to begin deliberations on the need for an *ex-ante* law.

4. INDUSLAW VIEW

4.1. The Committee's recommendations come at an opportune time as various governments and competition law authorities across the globe are deliberating on the best model for regulating big tech companies. While most of its recommendations are on the same lines as the ones recently adopted by the European Union by way of the Digital Markets Act and proposed by the United States of America[14] ("**USA**") and the United Kingdom[15] ("**UK**"), it bears well to not lose sight of the fact that, unlike these jurisdictions, India is a developing economy, which is just starting to enjoy the fruits of internet penetration in the form of a growing digital economy and a robust start-up ecosystem. Thus, any over-zealousness by India to introduce a similar *ex-ante* law (to maintain pace with its foreign counterparts) may be counterproductive and may even have unintended consequences.

[14] The proposed laws in the USA are: (i) Open App Markets Bill; (ii) American Innovation and Choice Online Bill; and (iii) The Ending Platform Monopolies Bill.
[15] The proposed law in the UK is Digital Markets, Competition, and Consumer Bill.

4.2. As such, any policy formulation initiative must be guided not only by the need to regulate the anti-competitive conduct of big tech companies but also take into account: (i) benefits accrued to the public by the products/services of such big-tech companies; and (ii) the cost of over-regulation of local as well as global big tech companies may be very high as it could potentially lead to disincentivizing such companies from innovating in the first place, likely to the detriment of consumers. Thus, introducing any similar *ex-ante* law at this moment (which has not been tested in developed economies by more deeply rooted and sophisticated agencies), may not be a prudent decision. Instead, India should wait and take the advantage of learning externalities and experience of the jurisdictions which have introduced an *ex-ante* law, so that Indian consumers do not end up with a medicine that is worse than the disease.

4.3. Further, in a welcome move, the CDCL after its first meeting has decided to hold consultations with news publishers, start-ups, and big tech companies on the proposed DCA.[16] Given that enactment of the DCA will have a significant impact on the Indian competition law regime, the decision to engage with the stakeholders is commendable as it will provide the CDCL an opportunity to understand their feedback and concerns and fine-tune the DCA accordingly. While it remains to be seen how the DCA (if passed into a law) will co-exist with the existing competition law framework, for now, it is hoped that the proposed *ex-ante* law is reflective of the Indian market realities and does not mirror the *ex-ante* laws of the other developed economies.

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[16] Available at: https://www.thehindubusinessline.com/info-tech/digital-competition-act-inter-ministerial-committee-to-hold-consultations-with-start-ups-big-tech-separately/article66560894.ece.