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With new tech antitrust bills being tabled in the United States and legislations to regulate digital markets coming in effect in Europe, the Indian Parliament too has taken significant steps to examine and legislate anti-competitive practices in the digital markets. The Standing Committee on Finance's report on "Anti-Competitive Practices by Big Tech Companies" was adopted on December 19, 2022. The Committee report proposed *ex ante* regulations, a new digital competition law to curb anti-competitive practices in digital markets in India.[1]

The committee has asked digital market entities to desist from practices like "anti-steering," "deep discounting," "self-preferencing," "search & ranking preferencing" and other practices that will impact competition in the market.

A new classification of "Systemically Important Digital Intermediaries" ("SIDIs") has been proposed. This would comprise of leading entities that can negatively influence competitive conduct in the digital ecosystem as based on their revenue, market capitalization and number of active business and end users.

Apart from saying that the government should consider and introduce a Digital Competition Act to ensure a fair and transparent digital ecosystem, the panel has pitched for revamping the Competition Commission of India ("CCI") and the creation of a specialized digital markets unit within CCI.

The observations and recommendations by the Committee are discussed as below:

1. Traditional Physical Markets v. Digital Markets and Need for *Ex Ante* Regulation

Unlike traditional physical markets, digital markets have increasing returns to size, driven by learning and network effects (utility of users growing with number of users on the platform). As a result, such markets may be dominated with a few leading players emerging in a short period. This happens even before policies can be formulated and anti-competitive practices are adjudicated. The Committee recommended that competitive behavior needs to be evaluated before markets end up monopolized instead of the *ex post* evaluation done presently.

2. Defining Systematically Important Digital Intermediaries (SIDIs)/Digital Gatekeepers

The Committee recommended that India must identify the leading players in digital markets that can negatively influence competitive conduct. They should be categorized as Systemically Important Digital Intermediaries ("SIDIs") based on their revenue, market capitalization, and the number of active businesses and end users. SIDIs should annually submit a report to the Competition Commission of India ("CCI") detailing the measures taken to comply with various mandatory obligations.

3. Anti-steering Provisions

Anti-steering provisions are clauses wherein a platform prevents its business users from steering its customers to offers other than those provided by the platform. The Committee recommended that SIDIs should not make access to their platform conditional on the purchase/use of other products or services that are not part of or intrinsic to the platform.

4. Self-Preferencing/Platform Neutrality

An entity may have the dual role of providing the platform and competing on the same platform. Self-preferencing is a practice wherein a platform favors its own services or the services of its subsidiaries. The Committee noted that a lack of platform neutrality can lead to a negative effect on downstream markets. It recommended that SIDIs must not favor their own services over

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those of their competitors when mediating access.

5. Bundling and Tying

Many digital firms force consumers to buy related services. The Committee noted that this creates asymmetry in pricing and leads to the removal of competition from the market. It also enables leading players to leverage their market power in one core platform to another. It opined that SIDIs should not force businesses or end users to subscribe to any further services for being able to use their core platform service.

6. Data Usage

The Committee noted that market leaders who have access to the personal data of users tend to get bigger while new entrants struggle to acquire users and user data. It recommended that SIDIs should not process the personal data of end users who use services of third parties, if such parties use the core services of the SIDI. They should also not combine personal data from the relevant core service of the platform with personal data from any other core services of the platform. Personal data from the relevant core service of the SIDI should not be cross-utilized in other services provided separately by the platform. End users should not be signed into other services of the platform unless he has been presented with a specific choice to which he has consented.

7. Mergers and Acquisitions

The Committee recommended that the SIDIs should notify the Commission of any intended concentration, where the merging parties or the target operates in the digital space or where the merger enables collection of data irrespective of whether or not it is notifiable to the Commission.

8. Pricing and deep discounting

The Committee recommended that a SIDI should not limit business users from differentiating commercial conditions on its platform, including price, increased commissions, delisting, and other equivalent terms and conditions.

9. Exclusive Tie Ups

The Committee has recommended that the SIDIs should not prevent business users from offering the same products or services to end users through third-party online intermediation services or through their own direct online sales channel at prices or conditions that are different from those offered through the online intermediation services of the platform, so that fair market conditions prevail.

10. Search and Rank Preferencing

The Committee recommended that a SIDI must provide to any third-party undertaking at their request, with access to fair, reasonable and non-discriminatory terms to ranking, query, click and view data in relation to free and paid search generated by users on its online search engines. Further, a SIDI should not treat the products, services or lines of business of platform more favorably relative to those of another business user in a manner that is inconsistent with neutral, fair, and non-discriminatory treatment of all business users.

11. Third-party Applications

The Committee noted that gatekeeper entities have been found to restrict the installation or operation of third-party applications. It observed that SIDIs should allow and technically enable the installation and use of third-party software applications. Such software applications or software application stores should be accessible by means other than the relevant core services of the platform. However, data should not be transferred to the government of a foreign adversary from SIDIs.

12. Advertising Policies

The Committee recommended that a SIDI should not process, for the purpose of providing online advertising services, personal data of end

users using services of third parties that make use of the core services of the platform.

13. Revamping CCI

The CCI regulates market competition in India. The Committee opined that CCI should be strengthened to address anti-competitive behavior in digital markets. It suggested the creation of a specialized digital markets unit in CCI. This unit would: (i) monitor established and emerging SIDIs, (ii) give recommendations to the central government on designating SIDIs, and (iii) adjudicate on cases related to digital markets.

14. Need for a Digital Competition Act

The Committee observed that India needs to enhance its competition law to address the needs of the digital market. Economic drivers of this market facilitate a few players in dominating the ecosystem. The Committee recommended that the government should introduce a Digital Competition Act to ensure a fair, transparent, and contestable digital ecosystem.

In response to the recommendation, the Ministry of Corporate Affairs (MCA) issued an order on February 6th, 2023, establishing a panel of 16 members ("Panel") that will be chaired by the MCA Secretary to look into the requirement for a separate competition law to deal with digital markets. This panel consists of experts from NASSCOM, Niti Aayog, Department of Commerce, Economic Affairs, Consumer Affairs, Ministry of Electronics and Information Technology, Department of Promotion of Industry and Internal Trade, as well as seasoned antitrust practitioners. The mandate of the panel will be to look into the existing provisions of the Competition Act, 2002 and rules framed thereunder and see whether they are enough to deal with antitrust issues arising out of the digital economy.

If the suggested competition rules are legislated, the antitrust scenario in India shifts from ex-post to ex-ante assessment for the regulation of digital markets, thereby making it similar to the placement of Digital Markets Act and Digital Services Act in Europe. This will, however, be a bold step, if taken, given the history of Indian competition law regime. The existing law leans in favor of the Consumer Welfare Standard i.e. it empowers the CCI to intervene only when there is an Appreciable Adverse Effect on Competition in the relevant market. The Panel is to submit its report along with a draft legislation on Digital Competition within 3 months.

It will also be interesting to see how the ex-ante rules will co-exist with the present competition law of India. Will the scope of ex-ante regime include both unilateral conduct and merger control for the digital markets would be a question before the panel. As far as the acquisition of start-ups by the big tech companies is concerned, the Competition Amendment Bill 2022 has already introduced the Deal Value Threshold that will avoid the potential competition concerns slip through the Commission's existing merger control regime.

So far as the effectiveness of existing CCI regime stands, contraventions have been found against the big tech and a couple of them are in fact appealing against the hefty penalties that have been levied over them. On the other hand, CCI has also advocated for self-regulation in their market studies concerning digital markets. Additionally, the Government has already taken initiative for creating open access platform in the form of Open Network for Digital Commerce (ONDC) for start-ups, mom-pop stores, groceries, etc. to benefit from platform neutrality. Moreover, there is a Personal Data Protection Bill, about to be enforced, that will assuage the data access and privacy concerns. Therefore, the real challenge before the new panel established by the MCA is to assess whether bringing more rules in the regulatory gamete will help protect the digital consumer or pose the risk of over-regulation.