

Discussion on “Report of the Committee on Digital Competition Law”

I. Brief summary and opening views

- Symbiotic relationship between ex-ante and ex-post models of intervention in promoting contestability in markets.
- Sectoral regulators: ex ante regulation: setting the rules of the game.
- Competition regulator: ex post regulation: umpire of the game.
- Ex post regulation: time consuming, irreversible damage caused already, narrow/case specific remedies (deterrence doubted).
- Ex ante regulation: error costs high.
- Whether the ex- ante framework for digital enterprises should be subsumed within the Competition Act or whether a de novo ex-ante competition legislation is required. The Competition Act is sector-agnostic by design - therefore, separate Act.
- Digital enterprises do not fall under the purview of a specific sector or a statute, although aspects of their operations are regulated in a fragmented manner by a host of different ministries.
- Scope and applicability: Draft Bill to apply only to Systemically Significant Digital Enterprises (SSDE).
- Draft DCB to apply to an inclusive and pre-identified list of Core Digital Services that are susceptible to concentration and anti-competitive behavior, set out in Schedule I of the Draft Act. Core services in Australia: digital news publishers, SK: app stores (Germany, UK : service agnostic).
- Identifying SSDEs: quantitative thresholds and qualitative criteria.
- Quantitative threshold: dual test **(a)** ‘the significant financial strength’ test which comprises quantitative thresholds serving as proxies for economic power, i.e., an entity’s Indian turnover, global turnover, gross merchandise value, and global market capitalisation, and which should be fulfilled consistently for a period of three financial years, and **(b)** the ‘significant spread’ test including the number of business users and end users of the Core Digital Service,

which should also be fulfilled consistently for a period of three financial years.

- SSDE = Any of the several thresholds under test **(a)** + either of the business users and end users thresholds under test **(b)**.
- Inspired partly by IT Rules which apply to ‘Significant Social Media Intermediary’, currently standing at fifty lakh registered users. However, the IT Rules do not distinguish between end and business users. The Committee felt that for the purposes of the Draft Bill, ‘end users’ and ‘business users’ should be defined separately. Recommended 1,00,00,000 (one crore) end users and/or 10,000 (ten thousand) business users in India for the purposes of the significant spread test.
- Turnover in India = 4,000 crores
- Global turnover ~ 25,000 crores
- Gross merchandise value = 16,000 crores
- Market capitalisation ~ 62,000 crores
- Seems to be intended against MNCs. Protectionist by design?
- Qualitative criteria under section 3(3).

II. The Draft Act : Salient Provisions

2 (3) “Business user” means any natural or legal person supplying or providing goods or services, including through Core Digital Services;

(6) “Core Digital Service” means any service specified in Schedule I of the Act;

(8) “End user” means any natural or legal person using Core Digital Services other than as a business user;

(17) “Systemically Significant Digital Enterprise” means an enterprise designated as such by the Commission under Section 4 of the Act;

3 (2) An enterprise shall be deemed to be a Systemically Significant Digital Enterprise in respect of a Core Digital Service, if:

(a) it meets any of the following financial thresholds in each of the immediately preceding three financial years:

(i) turnover in India of not less than INR 4000 crore; OR

(ii) global turnover of not less than USD 30 billion; OR

(iii) gross merchandise value in India of not less than INR 16000 crore; OR

(iv) global market capitalisation of not less than USD 75 billion, or its equivalent fair value of not less than USD 75 billion calculated in such manner as may be prescribed;

AND

(b) it meets any of the following user thresholds in each of the immediately preceding three financial years in India:

(i) the core digital service provided by the enterprise has at least one crore end users; OR

(ii) the core digital service provided by the enterprise has at least ten thousand business users.

Provided that if the enterprise does not maintain or fails to furnish data mentioned in clause (a) or (b), it shall be deemed to be a Systemically Significant Digital Enterprise if it meets any of the thresholds stipulated in clause (a) or (b).

3 (3) The Commission may designate an enterprise as a Systemically Significant Digital Enterprise in respect of a Core Digital Service, even if it does not meet the criteria set out under sub-section (2), if the Commission is of the opinion that such enterprise has significant presence in respect

of such a Core Digital Service, based on an assessment of information available with it, and based on any or all of the following factors:

(i) volume of commerce of the enterprise;

(ii) size and resources of the enterprise;

(iii) number of business users or end users of the enterprise;

(iv) economic power of the enterprise;

(v) integration or inter-linkages of the enterprise with regard to the multiple sides of market;

(vi) dependence of end users or business users on the enterprise;

(vii) monopoly position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;

(viii) barriers to entry or expansion including regulatory barriers, financial risk, high cost of entry, marketing costs, technical entry barriers, barriers related to data leveraging, economies of scale and scope, high cost of substitutable goods or services for end users or business users;

(ix) extent of business user or end user lock in, including switching costs and behavioral bias impacting their ability to switch or multi-home;

(x) network effects and data driven advantages;

(xi) scale and scope of the activities of the enterprise;

(xii) countervailing buying power;

(xiii) structural business or service characteristics;

(xiv) social obligations and social costs;

(xv) market structure and size of the market; and

(xvi) any other factor which the Commission may consider relevant for the assessment.

5 (1) An enterprise shall not directly or indirectly segment, divide, subdivide, fragment or split services through contractual, commercial, technical or any other means in order to circumvent the thresholds stipulated under clause (a) or clause (b) of sub-section (2) of Section 3.

(3) Without prejudice to the penalty which may be imposed under sub-section (2) of Section 28, if the Commission is of the opinion that an enterprise may have contravened sub-section (1), the Commission may pass an order designating the enterprise as a Systemically Significant Digital Enterprise.

8 (1) A Systemically Significant Digital Enterprise shall not engage in any behavior that undermines effective compliance with the obligations under this Chapter and the rules and regulations framed hereunder, regardless of whether that behavior is of a contractual, commercial or technical nature, or of any other nature, or consists in the use of behavioral techniques or interface design.

9 (1) A Systemically Significant Digital Enterprise shall establish transparent and effective complaint handling and compliance mechanisms as may be specified.

18 (1) Any enterprise, against whom any inquiry has been initiated under sub- section (1) of Section 16 for contravention of this Act, may for settlement of the proceeding initiated for the alleged contraventions, submit an application in writing to the Commission in such form and upon payment of such fee as may be specified.

(2) An application under sub-section (1) may be submitted at any time, in a manner as may be specified, after the receipt of the report of the Director General under sub-section (7) of Section 16 but prior to the passing of an order under sub-section (1) of Section 17.

(7) No appeal shall lie under Section 34 against any order passed by the Commission under this section.

19 (1) Any enterprise, against whom any inquiry has been initiated under sub- section (1) of Section 16 for contravention of Chapter III and the rules and regulations framed thereunder, may submit an application in writing to the Commission, in such form and on payment of such fee as may be specified, offering commitments in respect of the alleged contraventions stated in the Commission's order initiating an inquiry under sub-section (1) of Section 16.

44. Act to have overriding effect- The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

45. Application of other laws not barred- The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.

7(5) The Commission may, while framing regulations, subject the conduct requirements to one or more of the following factors which may impede the

Systemically Significant Digital Enterprise's and its Associate Digital Enterprise's compliance with such conduct requirements:

...

(d) prevention of unlawful infringement of pre-existing intellectual property rights

38. Power of the Central Government to exempt enterprises - The Central Government may, by notification, exempt an enterprise from the application of one or more provisions of this Act, the rules or regulations framed thereunder, or any provision thereof, and for such period as it may specify in such notification:

(a) in the interest of security of the State or public interest;

(b) in accordance with any obligation assumed by India under any treaty, agreement or convention with any other country or countries.

(c) if it performs a sovereign function on behalf of the Central Government or a State Government, only in respect of activities relatable to the discharge of the sovereign functions

III. Miscellaneous information/ thoughts

- Richard Posner posits that if the probability of detection of a violation is x/y , the compensatory component in the total damages should at least be x/y (assuming the legal system does not want to disincentivize complaints by plaintiffs); the remainder $(y-x)/y$ could be in the nature of penalties, fines, etc. However, in cases of violations where the probability of detection is almost 1 due the public nature of information (mergers and acquisitions or bundling and tying etc.), what should the optimal break-up between

compensatory and punitive damages be? Should compensatory damages (in addition to costs, of course) be awarded at all?