Page 1016 - 1024 **DOI:** *https://doij.org/10.10000/IJLMH.119893*

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 8 | Issue 4

2025

India's Digital Competition Bill: The Ex-Ante Imperative

SMRITHI AJITH KUMAR [1] AND ANUGRAHA S MARIA PHILO[2]

ABSTRACT

This paper delves into the evolution of India's competition law framework, tracing its origins from the post-liberalization era to the present discourse surrounding the necessity of ex-ante regulation for digital markets. It highlights the transition from the Monopolies and Restrictive Trade Practices (MRTP) Act, with its limitations rooted in excessive government control and a "per se" approach to market dominance, to the more contemporary Competition Act of 2002, influenced by the Raghavan and Sachar Committees' emphasis on a "rule of reason" approach.

The paper critically examines the arguments presented by the Parliamentary Standing Committee on Finance (PSC) and global competition authorities advocating for an ex-ante framework, particularly in the context of rapidly evolving digital markets characterized by network effects and "winner-take-all" dynamics. It evaluates the perceived inadequacies of ex-post enforcement, the challenges faced by regulators, and the identified gaps within existing legal frameworks.

Specifically within the Indian context, the paper analyzes the rationale for a Digital Competition Act (DCA). While acknowledging the unique challenges posed by digital markets, it scrutinizes the arguments concerning the timeliness of interventions and the effectiveness of redressal under the current Competition Act. The paper also considers the proactive steps taken by the Competition Commission of India (CCI) in addressing anti-competitive practices in the digital space and the recent amendments to the competition law, including the introduction of the Deal Value Threshold (DVT) and provisions on hub-and-spoke cartels.

Ultimately, the paper concludes that while the concerns regarding competition in digital markets warrant serious attention, the Indian context presents a nuanced scenario where the CCI has demonstrated its capacity to intervene. The implementation of an ex-ante framework like the proposed DCA requires careful deliberation, balancing the need for timely action with principles of natural justice and due process. The paper underscores the importance of considering the potential benefits of an ex-ante regime against the backdrop of an evolving and increasingly robust existing competition law framework in India.

[1] Author is a Student at CHRIST (Deemed to be University), Pune Lavasa, India.
[2] Author is an Assistant Professor at CHRIST (Deemed to be University), Pune Lavasa, India.

 [ISSN 2581-5369]

Keywords: *Competition law (India), digital markets, ex-ante regulation, ex-post regulation, competition policy*

I. INTRODUCTION

When India opened its doors in the year 1991, the country had accepted the quest of globalisation by positively opening up its economy, removing controls and resorting to liberalization[3]. Therefore, the chief objective of India was to maximise economic efficiency that is facilitated by a trade policy that is liberal[4]. However, a liberal trade policy alone is insufficient, because trade attracts businesses under a liberal trade policy, but this influx inevitably intensifies competition. Therefore, India realised the need for a sound competition policy that supplements the liberal trade policy. The genesis of this thought made its conception from the observation that liberalisation if unregulated would become a battlefield wherein power would decide the place of an entity within the market. Thence, in its pursuit of globalization, India strategically opened up its economy, removed the existing controls, introduced minimal government intervention, and allowed liberalisation to soak in[5]. However, the country also realised that simply opening up the economy was akin to navigating within a territory without directions, leading to getting lost[6]. Since it is deemed that competition sows the seeds of its own destruction, the country anticipating the throat- cut competition, understood that the competition law was the need of the hour so that dominant businesses does not end up gobbling the thriving businesses by resorting to anti-competitive practices, while simultaneously providing all businesses a conducive environment through limited but effective government oversight.

Driven by the need to address the challenges related to facilitation of business, and trading, the country resolved to enact a competition law. The following decision was majorly instilled by the then Finance Minister, P. Chidambaram in the year 2003 wherein he asserted that: *"A world-class legal system is absolutely necessary to support an economy that aims to be world-class. India needs to take a hard look at its commercial laws and the system of dispensing justice in commercial matters"*[7]. The antecedent of India's competition law framework owes a profound debt to the findings and recommendations of four key committees namely the Hazari

[3] Sarbapriya Ray & Ishita Aditya Ray, Emergence and Applicability of Competition Act, 2002 in India's New Competitive Regime: An Overview, 1 J.L. POL'y & GLOBALIZATION 15 (2011).
[4] Sarbapriya Ray & Ishita Aditya Ray, Emergence and Applicability of Competition Act, 2002 in India's New Competitive Regime: An Overview, 1 J.L. POL'y & GLOBALIZATION 15 (2011).
[5] Ibid.
[6] Ibid.
[7] Chidambaram, P., Law and Commerce: And the Twin shall meet, The Sunday Express, October 26, 2003

 [ISSN 2581-5369]

Committee of 1951, the P.C. Mahanlobis Committee of 1960, the Subimal Dutt Committee of 1967 and the Monopolistic and Restrictive Trade Practices Commission of 1970[8] . The Hazari Committee set up under the chairmanship of Dr. R.K. Hazari in the year 1951 was entrusted with the role of reviewing the industrial licensing procedure under the Industrial (Development and Regulation) Act, 1951[9]. The Hazari Committee report shed light upon the significant flaws within the existing framework, most notably the emergence of the "Licence Raj." The following system had facilitated an environment where influential industrial conglomerates misused their power and financial resources to incentivize government employees through bribery in order to secure the essential business licenses. Following the 1951 committee, the Government appointed the Mahanlobis Committee in 1960 to study the Distribution of Income and Levels of Living , which noted that there was concentration of power within the Indian Economy and that the top 10 percent of the population had cornered as much as 40 percent of the income[10]. The third study was conducted by the Subimal Dutt Committee in the year 1967 which primarily studied the institutional design of the Indian Economy and through its report in the year 1969 reported that 73 big houses-controlled 55.5 percent of programmed capital investment[11].

In 1964, seventeen year following the country's independence, the nascent Indian state established the Monopolies Inquiry Commission (MIC) under the chairmanship of Justice K.C. Das Gupta, the MIC was mandated to investigate into the level and extent of concentrated economic power within the private sector, as well as the prevalence of monopolistic and restrictive trade practices across economic industries[12]. The committee through its report noted that there was a presence of product-wise an industry-wise concentration of economic power and proposed a draft competition bill[13]. The Monopolies and Restrictive Trade Practices (MRTP) Bill, enacted by the Government of India in 1969, became the Monopolies and Restrictive Trade Practices Act. This legislation proved to be a highly debated and controversial piece of legislation, undergoing several significant amendments throughout its lifespan[14]. The MRTP Act, which came into force in 1970, despite its objectives, suffered from inherent limitations and structural weaknesses. Few of the

[8] Himanshu Handa, Evolution of Competition Law in India, 5 Int'l J. Socio-Legal Res. 54 (2016)
[9] Ibid.
[10] Vijay Kumar Singh, "Competition Law and Policy in India: The Journey in a Decade" 5 [2011] SSRN Electronic Journal.
[11] Ibid.
[12] Vijay Kumar Singh, "Competition Law and Policy in India: The Journey in a Decade" 5 [2011] SSRN Electronic Journal.
[13] Himanshu Handa, Evolution of Competition Law in India, 5 Int'l J. Socio-Legal Res. 55 (2016)
[14] Vedantu and Vedantu, "Monopolistic and Restrictive Trade Practices (MRTP) Act" (*VEDANTU*, April 4, 2025) <https://www.vedantu.com/civics/mrtp-act>.

 [ISSN 2581-5369]

significant drawbacks of this legislation was that it imposed excessive government control and bureaucracy upon businesses such as the requirement to obtain prior approval from the central government prior to corporate restructuring regardless of the size of the firm; the "per se" rule followed by the Act which viewed market dominance as inherently negative, irrespective of whether this dominance was being abused or not and many such defects made the Act inadequate to address the needs of a rapidly changing Indian economy[15].

By the late 1990's, it had become evident that the MRTP Act had become obsolete and acknowledging this, the Indian Government enacted the Competition Act in 2002, primarily based on the recommendations of the Raghavan committee and the Sachar Committee[16]. These committees emphasized the need for a modern competition law that went beyond merely controlling monopolies, instead having a competition policy that works based on the "rule of reason". Few of the notable differences between the MRTP Act and the Competition Act, 2002 is that while the MRTP Act focussed on the prevention of concentration of power within the hands of a few, Competition Act swayed away from the following concept and focussed on birthing real competition in the market[17].

II. THE NEED FOR EX-ANTE REGULATION

Ex -ante regulation is a foresighted approach to enforcing Ex-ante regulation establishes rules and standards for business entities in advance to avoid undesired results and impact market conduct, as contrasted with resolving concerns after they take place (ex-post regulation). The last decade has been characterized by rapid digitalization and the emergence of innovative business models, drawing increased scrutiny from regulators worldwide. The growing prominence of digital platforms prompted the Parliamentary Standing Committee on Finance (PSC) in India to examine potential anti-competitive practices in these markets. In its report on 'Anti-Competitive Practices by Big Tech Companies' (December 2022), the PSC outlined ten specific anti-competitive practices (ACPs) and recommended exploring a 'Digital Competition Act' (DCA) to establish ex-ante obligations and prohibitions for 'systemically important digital intermediaries' (SIDIs)[18].

Following this, the Ministry of Corporate Affairs (MCA) formed the Committee on Digital Competition Law (CDCL) to assess the necessity and feasibility of an ex-ante framework and

[15] Shreyaa, "MRTP Act - Monopolistic and Restrictive Trade Practice" (*iPleaders*, August 30, 2018) <https://blog.ipleaders.in/mrtp/>.
[16] Ibid.
[17] Himanshu Handa, Evolution of Competition Law in India, 5 Int'l J. Socio-Legal Res. 55 (2016)
[18] Standing Committee on Finance, Seventeenth Lok Sabha, *Anti Competitive Practices by Big Tech Companies, Fifty Third Report* (Dec. 2022), https://loksabhadocs.nic.in/lsscommittee/Finance/17_Finance_53.pdf.

 [ISSN 2581-5369]

to formulate a draft DCA[19]. This paper discusses the rationales presented by the PSC and global competition authorities for an ex-ante framework, evaluates the need for a DCA in light of these rationales, and analyses the adequacy of India's current competition law framework, including the significant amendments made in 2023, to address competition concerns in the digital market.

III. NEED FOR A NEW LEGAL FRAMEWORK

The primary motivation for an ex-ante framework is the perceived inadequacy of existing competition policy regimes in addressing the unique characteristics of digital markets. The PSC in India, like many international bodies, has distinguished between traditional and digital markets. Digital markets are characterized by increasing returns to scale and network effects, leading to 'winner-take-all' scenarios that can stifle fair competition, reduce innovation, decrease profitability for emerging companies, and ultimately raise prices for consumers[20].

Several countries have acknowledged the limitations of their existing policy frameworks and have either implemented or are in the process of introducing ex-ante frameworks. The common reasons for this shift include:

A. Slow ex-post enforcement of existing laws

The dynamic and fast-moving nature of digital markets presents challenges for timely resolution of anti-competitive concerns. The UK, in its consultation paper on 'A new pro-competitive regime for digital markets,' emphasized that competition enforcement proceedings can be protracted, often taking several years[21]. By the time these issues are addressed, dominant digital enterprises may have further solidified their market position, causing irreparable economic harm.

The Australian Competition and Consumer Commission (ACCC) has also highlighted that the substantial size and financial power of large digital platforms can complicate the enforcement of traditional laws, leading to lengthy legal battles[22]. Similarly, the PSC's report acknowledges the MCA's submissions, noting that the need for extensive evidence and procedural fairness,

[19] The Digital Markets Act: ensuring fair and open digital markets, European Commission, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en.

[20]

[21] UK Government, *A new pro-competition regime for digital markets* (July 2021), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1003913/Digital_Competition_Consultation_v2.pdf.

[22] Australian Competition & Consumer Commission, *Digital platform services inquiry report no. 5* (Sept. 2022), https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20September%202022%20interim%20report.pdf.

coupled with the possibility of judicial review, results in lengthy regulatory interventions[23]. In rapidly evolving digital markets, such delays can render actions expensive and potentially ineffective.

B. Ineffective enforcement by the regulator

The current legal frameworks in many countries may not provide regulators with the necessary tools to effectively counter anti-competitive conduct. For instance, the USA Subcommittee on Antitrust, in its report on 'Investigation of competition in digital markets,' underscored the ineffective enforcement by American antitrust agencies and their failure to prevent dominant entities from further entrenching their market power[24]. The ACCC's report on digital platforms also suggests that the case-by-case approach of traditional laws may be ill-suited to address the systemic misconduct of a single digital platform operating across multiple interconnected services[25].

For example, in the ad tech sector, anti-competitive practices may occur at various stages of the supply chain. In such instances, a single remedy, such as a court order or an order from the Competition Commission of India (CCI), may be insufficient to address the broader misconduct in the long term. Moreover, regulators often struggle to prevent the continuation of misconduct by digital platforms, even after imposing fines. The misconduct itself may go undetected due to the complexity of dynamic markets, insufficient regulatory capacity, or the cross-jurisdictional nature of digital markets, which can create loopholes in detecting anti-competitive behavior. Addressing the underlying structural issues, including the regulator's resources, is crucial.

C. Gaps in current laws

Several countries have recognized shortcomings in their existing legal frameworks and have taken steps to strengthen them. For example, the PSC highlighted the inability of the current framework to prevent attempts to monopolize markets. The USA Subcommittee Report emphasized that the adoption of the 'consumer welfare' standard as the sole objective of antitrust laws has significantly narrowed the scope of the law, hindering the effective resolution of anti-competitive concerns in digital markets[26]. To address these gaps,

[23] Ibid
[24] Sub-Committee on Antitrust, Commercial & Administrative Law, *Investigation of Competition in Digital markets* (July 2022), https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf.
[25] Ibid
[26] Sub-Committee on Antitrust, Commercial & Administrative Law, *Investigation of Competition in Digital markets* (July 2022), https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf.

 [ISSN 2581-5369]

recommendations include codifying rules on structural presumptions in concentrated markets and strengthening vertical merger doctrine.

Some countries have updated their laws to better accommodate digital markets. Canada, for instance, introduced amendments in 2022 to reform its competition law, broadening the definition of 'anti-competitive act' and empowering the Competition Tribunal to consider factors specific to the digital economy, such as network effects[27]. India has also been proactive in updating its competition laws, deliberating an ex-ante framework and amending the existing framework to include provisions on Deal Value Threshold (DVT) and hub-and-spoke cartels.

IV. ANALYSIS OF THE GAPS IN THE INDIAN CONTEXT

The PSC's report highlighted the reasons mentioned above and acknowledged the significant differences between digital and traditional markets. These considerations, among others, formed the basis for recommending an ex-ante regulatory framework. A more detailed analysis of these factors, specifically within the Indian context, is presented below:

A. Timely intervention

The PSC report suggests that the traditional framework is more time-consuming and resource-intensive than a potential ex-ante framework. This is primarily because ex-post evaluations of conduct involve initiating investigations only after the conduct has occurred and its effects on the market are evident[28]. However, the CCI's adjudication timelines are relatively shorter compared to some international counterparts[29]. Moreover, there is no conclusive evidence indicating that implementing an ex-ante framework would substantially reduce the time taken for antitrust regulators to reach a final decision[30].

In the UK, the traditional framework saw lengthy delays. The UK government's new Digital Markets, Competition and Consumers Bill (DMCC Bill) proposes specific timeframes for investigating whether an undertaking should be designated as an enterprise with Strategic Market Status (SMS) and for completing conduct investigations against designated firms[31]. Designating an enterprise as an SMS entity, along with completing a conduct investigation, could consume a period roughly comparable to the average time taken under the traditional

[27] Parliament of Canada, *Bill C-19*, https://www.parl.ca/DocumentViewer/en/44-1/bill/C-19/royal-assent.
[28] Primer: 53rd Report of the Standing Committee on Finance and a potential ex-ante competition law regime, The Dialogue (February 2023); https://thedialogue.co/wp-content/uploads/2023/03/Primer-53rd-Report-of-the-Standing-Committee-on-Finance-and-a-Potential-Ex-Ante-Competition-Law-Regime.pdf
[29] Ibid
[30] Ibid
[31] UK Parliament, *The Digital Markets, Competition and Consumers Bill*, https://publications.parliament.uk/pa/bills/cbill/58-03/0294/220294.pdf.

framework. Therefore, the difference in timelines between the two frameworks may not be substantial[32].

Similarly, under the EU's Digital Markets Act (DMA), the European Commission (EC) has specific procedures and timelines for designating 'gatekeepers' and addressing non-compliance[33]. These timelines are also significant. The ACCC has also acknowledged the time-consuming nature of EC proceedings in major digital market cases[34]. It could be argued that many EC proceedings under the traditional framework have concluded within the timelines set by the EU Digital Market Act.

Comparatively, the average time taken by the CCI to resolve cases is significant. The introduction of a settlements and commitments framework, along with a 'leniency plus' regime, through the Competition (Amendment) Act, 2023, is expected to further expedite the resolution of anti-competitive conduct. Therefore, an ex-ante regime in India may only be beneficial if it can significantly reduce the resolution time, while also upholding principles of natural justice and ensuring that parties have the right to be heard[35].

B. Effective redressal

Antitrust regulators often face the challenge of effectively addressing competition concerns specific to digital markets. This is largely due to the unique characteristics of these markets, which can complicate regulatory enforcement across different jurisdictions. However, the CCI has demonstrated its ability to identify and address competition concerns within the existing legal framework. Some notable instances of CCI interventions under Section 27 of the Competition Act[36], 2002, include cases addressing issues such as unfair advertising policies, exclusive tie-ups, and price parity clauses.

While the CCI has demonstrated its capability to address competition concerns in digital markets, some challenges remain. These include issues with compliance with CCI orders and difficulties in recovering penalties.

C. Effective identification

The CCI has played a crucial role in identifying anti-competitive concerns. However, the dynamic nature of digital markets poses a challenge in accurately identifying all instances of

[32] Ibid
[33] The Digital Markets Act: ensuring fair and open digital markets, European Commission, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en.
[34] Ibid
[35] Standing Committee on Finance, Seventeenth Lok Sabha, *Anti-Competitive Practices by Big Tech Companies, Fifty Third Report* (Dec. 2022), https://loksabhadocs.nic.in/lsscommittee/Finance/17_Finance_53.pdf.
[36] The Competition Act, S 27.

anti-competitive conduct. The CCI has taken proactive steps to address these challenges, as evidenced by its actions in several key cases, demonstrating its active role in identifying and addressing ACPs. These include cases involving abuse of dominant position in operating systems and investigations into anti-competitive agreements in the e-commerce sector.

V. CONCLUSION

The rapid digitalization of the past decade has brought about novel business models and increased scrutiny from global regulators. In India, the Parliamentary Standing Committee on Finance (PSC) has recommended the exploration of a Digital Competition Act (DCA) to address anti-competitive practices in digital markets, leading to the establishment of the Committee on Digital Competition Law (CDCL) by the Ministry of Corporate Affairs (MCA).

While concerns about the effectiveness of current competition policy regimes in addressing the peculiarities of digital markets are valid, the Indian context presents a nuanced situation. The CCI has demonstrated its capability to intervene and address competition concerns, and recent amendments to the existing legal framework, such as the introduction of Deal Value Threshold (DVT) and provisions on hub-and-spoke cartels, reflect India's efforts to adapt to the evolving digital landscape.

The implementation of an ex-ante framework, such as the proposed DCA, warrants careful consideration. While it may offer the potential for more timely interventions, there is no guarantee that it will substantially reduce the time taken for antitrust decisions. It is crucial to balance the need for swift action with the principles of natural justice and the right to be heard.

*****

 [ISSN 2581-5369]