

INDIA POLITICAL ECONOMY PROGRAM POLICY COMMENT

**INDIA'S PROPOSED DIGITAL
COMPETITION FRAMEWORK**
THE LICENSE RAJ BY ANOTHER NAME

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Abstract

India's proposed digital competition framework aims to regulate large digital firms. Modeled after the European Union (EU) Digital Markets Act, the proposed framework risks stifling innovation and investment. The framework uses arbitrary thresholds to determine which firms to regulate. It imposes vague, sweeping prohibitions on firms' business practices. It grants the Competition Commission of India excessive discretionary power to impose unclear and yet to be defined obligations on such firms. The framework targets successful digital firms, echoing mistakes from India's License Raj; in doing so, it contradicts India's goal of attracting foreign investment and will hamper digital market growth. We argue that, instead of blanket ex ante regulations, India should consider targeted data privacy standards and avoid prematurely imitating EU policies.

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On the cover: Pillar of Ashoka (detail) at Sanchi, Madhya Pradesh, India. The pillars of the emperor Ashoka the Great (268–232 BC), renowned for their polished sandstone and intricate carvings, were dispersed throughout the Indian subcontinent and carried imperial edicts promoting moral and ethical conduct. The Lion Capital of Ashoka, which tops the pillar at Sarnath, Uttar Pradesh, has been adopted as India's national emblem. Twenty of the pillars of Ashoka still survive.

One of India’s policy goals is to become a digital powerhouse, creating a robust digital public infrastructure, leading in the production of IT services exports, and fueling innovation. India Stack has already revolutionized service delivery by providing a unified platform for businesses, developers, and government agencies to build digital solutions. It has enabled paperless and cashless service delivery, significantly reduced costs, and improved access to services for citizens. The Unified Payments Interface (UPI), built on India Stack, has changed how Indians transact. In 2023, Indians made a record 118 billion digital payments.¹

Another policy goal is to boost domestic manufacturing capabilities across strategic sectors to create spillovers. In electronics, Dixon Technologies, an Indian contract manufacturer, has scaled production to manufacture 45 million smartphones and 40 million feature phones annually for six of the top seven global brands since entering the mobile phone manufacturing business in 2015–16.² Apple’s contract manufacturers have expanded their Indian facilities, with Foxconn investing US\$2.7 billion and directly employing more than 150,000 people.³ Three new semiconductor manufacturing facilities with a total investment of US\$15.2 billion have been approved, including the US\$11 billion Tata Electronics–PSMC joint venture in Gujarat, which is expected to generate more than 20,000 direct and indirect skilled jobs.⁴ Samsung’s semiconductor research

1. Shivangi Acharya, “India Allows Restriction-Free Imports of Laptops, Tablets in Policy Dilution,” *Reuters*, October 19, 2023.

2. “Dixon Is Becoming India’s Foxconn,” *Mint*, May 26, 2024.

3. Vaamanaa Sethi, “Foxconn Gets Nod to Infuse \$1 Billion More in Apple India Plant: Report,” *Mint*, December 13, 2023; Jocelyn Fernandes, “Apple’s Indian Ecosystem Directly Employs over 1,50,000 People after PLI Scheme, Says Report,” *Mint*, April 1, 2024.

4. “Tatas’ Gujarat Semiconductor Fab Will Create over 20K Jobs,” *Rediff*, February 29, 2024; Archana Rao, “India’s Semiconductor Sector Welcomes Three New Manufacturing Units,” *India Briefing*, March 13, 2024.

division alone employs 4,500 people, and a new research facility that it has set up will employ 1,600 more.⁵

Despite these positive developments, challenges loom large. Foreign direct investment (FDI) equity inflows have been on a downward trend in recent years, falling from US\$64.68 billion in FY 2019/20 to US\$46 billion in FY 2022/23. The computer software and hardware sector, which attracts the highest FDI inflows among all industries, has seen inflows decline sharply from US\$26 billion in FY 2020/21 to US\$14.5 billion in FY 2021/22 to US\$9.39 billion in FY 2022/23.⁶ Overall, capital formation in the private sector has declined from 2011 until recently. This decline in private capital formation and net FDI inflows as a percentage of GDP is largely attributed to policy inconsistencies, regulatory uncertainties, and disastrous policies such as retroactive taxation.⁷ The announcement of import restrictions on laptops and tablets, though later eased, sent mixed signals about India's business environment, especially to the electronics sector. Premature intervention in regulating artificial intelligence has raised concerns about the government's ability to balance innovation and regulation.⁸

Against this backdrop, the proposed digital competition framework, titled the Draft Digital Competition Bill, 2024,⁹ is the latest government policy in this space, and it contradicts the above goals. While aimed at promoting competition and curbing the dominance of leading companies in the digital market, the law threatens to hamper firms that aspire to become global technology leaders. Industrial-targeting policies have largely failed in developing countries, and the few success stories in Asia have one thing in common—letting go of the losers and encouraging the winners, as determined by global trade and competition.¹⁰ India's proposed digital competition policy is designed to do the opposite—punish the winners, or the systemically significant digital enterprises (SSDEs), as they are referred to in the new framework.

5. Bhavana G. Pisale, "Samsung Semiconductor Opens a New R&D Facility in India," *Investment Monitor*, February 29, 2024.

6. Naina Bhardwaj, "India FDI Inflow in FY 2023: Latest Data Analysis on Investment Landscape," *India Briefing*, June 7, 2023.

7. Shruti Rajagopalan, "An Economic Puzzle of the Modi Years: The Hype Is Not Followed by Investment," *Substack*, April 9, 2024.

8. Jyoti Panday and Mila T. Samdub, "Promises and Pitfalls of India's AI Industrial Policy," in *AI Nationalism(s): Global Industrial Policy Approaches to AI*, ed. Amba Kak (New York: AI Now Institute, March 2024).

9. Government of India, Ministry of Corporate Affairs, *Report of the Committee on Digital Competition Law*, Annexure IV.

10. Arvind Panagariya, *Free Trade and Prosperity: How Openness Helps the Developing Countries Grow Richer and Combat Poverty* (New York: Oxford University Press, 2019).

The proposed framework is a heavy-handed attempt to regulate digital markets. It imposes arbitrary and ambiguous punitive obligations—which are yet to be completely known—on large digital firms, disregarding sound competition law principles and risking the stifling of innovation and investment. The framework is an attempt to imitate the flawed ex ante regulations of the European Union (EU) without considering India’s unique circumstances, policy goals, stage of development, and aspirations.¹¹

Moreover, the Competition Commission of India (CCI) currently lacks the capacity to comprehensively assess competition in digital markets. Rather than address this issue, the proposed framework grants CCI broad discretion to intervene in digital markets without meaningful safeguards. This approach risks crushing India’s emerging digital economy under the weight of onerous obligations rather than fostering innovation and growth.

Think of the digital landscape in India as a forest where a few tall trees—the global technology giants—have grown to impressive heights. The government, concerned that these towering trees will hinder the growth of saplings, lacks the tools to accurately measure and trim them. Instead of investing in the necessary pruning and measuring tools to discern whether the tall trees are palms or sprawling banyans, the government proposes a heavy-handed ex ante framework. This approach risks burning the entire forest to give the saplings a better chance, causing irreparable damage to innovation, investment, and growth.

What Did India Do in the Past?

India’s economic policy history is a stark reminder of the consequences of such restrictive policies. The License Raj, a byzantine system of controls inherited from World War II and worsened by subsequent socialist policies, suffocated industrial productivity for decades. Draconian restrictions, such as the Monopolies and Restrictive Trade Practices Act of 1969 and the Foreign Exchange Regulation Act of 1973, discouraged businesses from scaling up and drove away multinational companies. In addition, reserving specific sectors exclusively for small-scale enterprises prevented the growth of industries in which India held a competitive advantage. By 1990, as many as 836 items were reserved for production by small-scale enterprises, rendering Indian manufac-

11. Shruti Rajagopalan and Alexander Tabarrok, “Premature Imitation and India’s Flailing State,” *Independent Review* 24, no. 2 (2019): 165.

turing uncompetitive in world markets and stunting employment growth and innovation.¹²

Déjà Vu

The proposed digital competition framework risks repeating these mistakes, potentially stifling innovation, deterring FDI and collaborations among companies, and limiting the growth potential of domestic digital enterprises.¹³ This is especially true because the framework offers no clarity on how exactly it will regulate the digital markets, and instead much is left to CCI to issue specific regulations and clarify different aspects of the framework. The proposed framework so far tells us only a few things.

First, the law will apply only to a preidentified list of nine so-called core digital services, such as search engines and social networking that are “susceptible to concentration” and not actually concentrated or causing harm.

Second, only firms with a significant presence—the SSDEs—in such services will be regulated. A firm is considered to have a significant presence if, in the preceding three financial years, (1) its turnover in India has not been less than Rs 4,000 crore¹⁴ or its global turnover has not been less than US\$30 billion, or (2) its gross merchandise value in India is not less than Rs 16,000 crore,¹⁵ or (3) its global market capitalization is not less than US\$75 billion, and its core digital service has 10 million end users or 10,000 business users.

Third, an SSDE will be obligated to self-report that it meets the above criteria and is designated as an SSDE. It must also report any other companies in its corporate group that provide a core digital service; those companies will be deemed associate digital enterprises. Upon designation as an SSDE, an enterprise must meet the obligations that CCI will specify for governing the core digital service.

Finally, SSDEs will be prohibited from (1) self-preferencing (for example, Google cannot give preference to its apps, such as Google Pay or Google Music, on Android phones); (2) restricting end or business users from downloading third-party applications via the SSDEs’ core digital service (for example, Google users

12. Rakesh Mohan, “The Road to the 1991 Industrial Policy Reforms and Beyond: A Personalized Narrative from the Trenches,” in *India Transformed: 25 Years of Economic Reforms*, ed. Rakesh Mohan (Washington, DC: Brookings Institution Press, 2018).

13. Government of India, Ministry of Corporate Affairs, “Draft Digital Competition Bill, 2024.”

14. 40,000 million.

15. 160,000 million.

should be able to download any application from the Play Store); (3) anti-steering (for instance, Google cannot compel users to use only Google Pay to make payments on the Play Store); (4) tying and bundling (for example, Google cannot provide the Android OS to phone manufacturers on the condition that they also preinstall Google Mobile Services and Google applications, including Google Search and Google Maps); and (5) using nonpublic data from business users on their core digital service to compete with those users, using personal data from different services, or allowing third parties to use such data without user consent.

What Does the Proposed Framework Mean for India's Digital Markets?

The proposed digital competition framework raises several concerns regarding its approach and potential impact on innovation and competition in India's digital markets.

Arbitrary thresholds and the anti-bigness bias

The proposed framework is explicitly opposed to big business and, in the hands of pernicious officials, could easily launch a targeted campaign against large global technology firms. It singles out and imposes restrictions on a select group of large digital firms solely on the basis of their revenue, market capitalization, and user base.

This approach contradicts the government's stated goals of promoting large-scale knowledge transfers, FDI, and innovation-driven economic growth. The bill preemptively prohibits large and efficient digital platforms from leveraging their scale and technological innovations. This prohibition applies even when such actions benefit consumers by providing better services and expanded access. Instead of promoting competition, the bill protects *some* competitors.

The thresholds proposed for designating a company as an SSDE are arbitrary. They are not tied to any analysis of the market power or ability of that company to harm consumers or impede competition. Just as a palm tree does not create the same ecological benefits or cast the same shadow on saplings as a sprawling banyan tree, not all big businesses are alike, yet this bill would have them be regulated identically simply because of their similar size.

More fundamentally, by disregarding standard competition law principles, such as the need to identify the relevant market and then assess market dominance, the bill risks creating an unlevel playing field that favors some incumbents

while hampering the ability of others to compete if the latter happen to be affiliated with an SSDE—that is, if they are deemed associate digital enterprises.

For example, the bill could restrict Google’s YouTube Music while exempting Spotify in India, even though they compete fiercely. Globally, Spotify has a larger market share in music streaming. The arbitrary line between the apps makes little economic sense and could hinder YouTube Music’s ability to compete and innovate in the Indian market because establishing dominance under the terms of standard competition law is immaterial under the proposed framework.

Vague regulations and unchecked discretion

The proposed framework suffers from vagueness and would give excessive discretion to CCI. It would be left to CCI to specify regulations regarding core digital services. The government could also seek CCI’s recommendations on whether to expand or contract the list of core digital services over time, but it is uncertain what such recommendations would be based on, creating the risk of arbitrary intervention (clause 51[1]).

The bill obligates SSDEs to self-report whether they meet certain criteria and obligations that CCI would later specify, but leaving these crucial details to be determined later injects further uncertainty.

Moreover, CCI would have sweeping discretion to designate a firm as an SSDE, even if the firm does not meet the quantitative thresholds. Such designation would be based on a qualitative assessment of 16 broad factors, such as “integration with multiple sides of [a] market” or “any other factor” that CCI deems relevant (clause 3[3]). Such unchecked discretion would create more regulatory uncertainty, raise concerns about abuse of authority, and undermine the purpose of having ex ante quantitative thresholds. It would grant CCI an unrestricted ability to intervene in digital markets without meaningful safeguards.

As a result, India risks being seen as a market in which digital policy is opaque and unpredictable. Global digital firms would not invest in India, and Indian consumers and startups would suffer from reduced choice, investment, and innovation. A law with such far-reaching implications must have explicit and nonarbitrary provisions.

Blanket prohibitions ignore procompetitive benefits

Under clauses 11 through 15, the proposed framework’s blanket prohibitions on self-preferencing, tying, and bundling, among others, ignore the procompetitive

justifications and consumer benefits of these practices in digital markets. For instance, Google's promotion of Google Pay in the Play Store may represent self-preferencing. However, this integration streamlines the user experience and leverages the security features of Google's Android OS. Furthermore, India's digital payments market is robust and competitive, with UPI, which is regulated by the Reserve Bank of India, being the most interoperable system. Apps such as PhonePe compete with Google Pay on the UPI platform. In this context, it is unclear how Google's self-preferencing substantially harms consumers or competition in the broader digital payments market.

Google's market advantage in the mobile OS market is due to its very early entry into the Indian market, a vast user base, and app compatibility. However, these are outcomes of Google's early initiatives, ongoing innovation, and effectiveness in attracting developers. The mobile OS market is characterized by strong network effects, so the platform's value increases as more users and developers join. Google's success in building a large ecosystem is not due to anticompetitive practices. In fact, Google has faced stiff competition in various markets, even from its own products. For example, Google Play Music, Google's music and podcast streaming service, was eventually shut down because of competition from Apple Music, Spotify, and YouTube, the latter being a subsidiary of Google. This example demonstrates that Google's success is not guaranteed and that the company must continually innovate and compete to maintain its position in the market. Penalizing Google for leveraging these legitimately earned advantages punishes success and risks, thereby deterring innovation. In fact, India is benefiting from the efficiencies these firms created by competing on the global stage.

The mobile OS market is dynamic, with high-stakes competition. This intense global and local competition incentivizes continual innovation and feature development, ultimately benefiting consumers. Furthermore, Google's dominance in the mobile OS market has not translated into unassailable positions in other markets. In artificial intelligence, for instance, Google faces stiff competition from new firms, such as OpenAI, despite Google's head start in amassing vast data troves and its technical prowess.

Similarly, e-commerce platforms such as Amazon and Flipkart often engage in arrangements in which sellers featured on these platforms agree to participate in the platforms' sale periods. Although such practices might raise reasonable concerns, an outright ban fails to consider their consumer benefits. In a country like India, where price sensitivity is high, these deep discounts make products more affordable and accessible to a broader range of consumers. Moreover, the short-term nature of these discounts, typically offered during

sale periods or promotional campaigns, suggests that they are more likely to be procompetitive rather than anticompetitive because they are unlikely to have a lasting impact on market dynamics or to create barriers for other businesses. Prohibiting these arrangements without an ex post, case-by-case assessment of their impact on competition and consumers could deprive shoppers of these benefits and hurt small businesses that rely on these platforms for visibility and sales.

These examples underscore the need for a nuanced approach to assessing competition in digital markets instead of taking a simplistic approach in the proposed framework.

Penalty on global turnover

Just as retroactive taxation of Vodafone¹⁶ has become a cautionary tale for foreign investors, the penalty on global turnover (capped at 10 percent) in the proposed framework under clause 28 risks becoming the new exemplar of Indian regulatory overreach.¹⁷

The penalty seems unduly harsh and punitive. To illustrate, if digital firms were penalized under this law in 2024, Apple would have to pay US\$38.6 billion, Google would pay about US\$30 billion, Amazon would pay about US\$57 billion, and Meta would pay US\$13.4 billion. The total of those penalties is almost the same as the allocation for infrastructure development in India's Interim Union Budget for 2024.¹⁸ This could turn into pure predatory extraction. If CCI chose to enforce the proposed penalty, it would set back Indian investment for years.

The global turnover provision also raises concerns about extraterritorial jurisdiction. Imposing a penalty based on a company's worldwide revenue rather

16. In 2007, Vodafone acquired a stake in Hutchison Essar through an offshore deal. The Indian tax authorities demanded capital gains tax on this deal. In the legal dispute that ensued, the Supreme Court ruled in Vodafone's favor in 2012. However, the government amended the Income Tax Act to apply the tax retroactively to 1962, effectively overriding the Supreme Court's verdict. This led to significant policy uncertainty, deterring foreign investment and resulting in a decline in gross fixed capital formation as a percentage of GDP. In 2020, Vodafone won an international arbitration against India in this matter. Subsequently, the Indian government introduced the Taxation Laws (Amendment) Act, 2021, which nullified existing tax demands under certain conditions and exempted transactions before May 28, 2012, from future tax claims. See Rajagopalan, "An Economic Puzzle."

17. Global turnover means revenue of the enterprise derived from the sale of all goods and provision of all services, whether digital or otherwise, and when an enterprise is part of a group, shall include the revenue derived from the sale of all goods and provision of all services, whether digital or otherwise, of such group. Explanation 1 to clause 28, Draft Digital Competition Bill 2024.

18. Manoj Kumar, "Highlights: India Plans to Spend \$134 Bln on Infrastructure, Narrow Fiscal Gap—Interim Budget," *Reuters*, February 1, 2024.

than the company’s India-specific operations would be viewed as overreach. It would deter foreign companies from investing or expanding their presence in India.

Moreover, the ambiguity surrounding the application of the penalty compounds the issue because there are no clear guidelines or regulations on how global turnover would be calculated when determining the penalty. This is particularly relevant for large multinational corporate groups with substantial global operations and revenue streams because the proposed framework would unfairly penalize the entire group for the actions of a single constituent enterprise.

Although such groups may provide digital services, some of which may not even be covered in the list of core digital services under the proposed framework, they risk facing massive arbitrary fines because the base of global turnover will include revenue derived from the sale of all goods and provision of all their services, “whether digital or otherwise.”¹⁹ For example, if YouTube Music were found to be contravening obligations imposed under the proposed framework, the penalty could be based on not only its global turnover but also the global turnover of the parent company, Google. This penalty could also deter investment and expansion plans in India.

A cauldron of excesses

Across 18 clauses of the bill, there are 36 instances in which CCI or the government would be given powers to legislate beyond the bill itself. Whereas some powers concern standard procedural aspects related to forms and fees, many critical aspects of the law would also be defined and refined over time through delegated legislation. Although this might allow for flexibility and adaptability, it would also introduce significant uncertainty for businesses and other stakeholders. The broad discretionary powers given to CCI could lead to an unpredictable regulatory environment, making it difficult for companies to plan and operate with confidence and increasing their compliance burden.

Excessive delegated legislation. This paper has shown how CCI could designate firms as SSDEs on the basis of broad and undefined qualitative criteria (clause 3[3]) and specify separate conduct requirements for each core digital service through regulations (clause 7[3]). Important criteria in determining the thresholds for identifying SSDEs—such as “turnover in India,” “gross merchandise value,”

19. Explanation 1 to clause 28, Draft Digital Competition Bill 2024.

“global market capitalization,” or “end users” and “business users” for each core digital service—or the base for calculating penalties (“global turnover”) would all be identified and calculated according to regulations that CCI would specify later. CCI would also have the power to issue regulations on other aspects of SSDEs:

- The framework would prohibit SSDEs from cross-using the data collected from end users or business users across different services unless consent is secured. Consent from end users would be determined by the Digital Personal Data Protection Act of 2023. For business users, CCI would define consent in new regulations (clause 12).
- When regulating an SSDE’s activities, be it tying or bundling services or engaging in anti-steering measures, if CCI found them to be integral to providing a core digital service, then it would not prohibit them. What counts as integral would also be later specified by CCI (clauses 14 and 15).
- CCI would determine how SSDEs establish transparent compliance mechanisms (clause 9). In addition to complying with unclear and as yet unspecified obligations, SSDEs must operate a complaint-handling mechanism. In seeking to understand what these mechanisms entail and how they should function, and in interpreting and acting on the requirements that CCI would specify later, enterprises would bear a heavy burden.

Excessive enforcement. In addition to the excessive penalty standards, the framework would impose burdens on SSDEs that pursue dispute resolution through adjudication. For example, clause 34(5) mandates that SSDEs that wish to challenge the penalty imposed and file an appeal before the appellate tribunal must first deposit 25 percent of the penalty amount. Although SSDEs might be able to afford such a deposit, the requirement would place an undue financial burden on them, further undermining confidence in India’s environment for digital businesses. It would affect business operations by requiring significant cash reserves, thereby increasing the cost of doing business. This provision might also deter legitimate appeals, forcing companies to accept penalties without contest because of the high cost of appeal.

From permissionless innovation to license raj

India’s digital landscape—and the entrepreneurs and startups in it—has witnessed remarkable growth and innovation in recent years, thanks largely to

a permissionless innovation approach.²⁰ This approach has been particularly successful in developing digital public infrastructure, such as UPI, which has revolutionized digital payments in the country. For instance, the Open Network for Digital Commerce exemplifies the permissionless innovation approach. It allows businesses to freely participate and compete in the digital marketplace, using India Stack, without requiring permissions or licenses.

UPI, which is in the banking sector, is regulated by the Reserve Bank of India. But before any mandate from the Reserve Bank, UPI was already designed for complete interoperability, as embedded in its protocol. Developed by the National Payments Corporation of India, UPI is an open platform that allows users to transfer money instantly between bank accounts using a mobile app. The platform has been embraced by a wide range of players, from established giants such as Google Pay and PhonePe to smaller startups and fintech companies, fostering innovation and competition in digital payments.

The success of UPI can be attributed to its design, which has encouraged participation and innovation from diverse players. By setting open standards and fostering interoperability, UPI reduced barriers to entry and enabled new business models to emerge. This benefited consumers by providing them with more choice and convenience and helped expand financial inclusion in the country. The interoperability, not any ex ante competition regulation, created a level playing field between global giants such as Google Pay and smaller Indian startups.

The proposed framework risks stifling such innovation by imposing permits on digital markets. In addition to the blanket prohibitions under clauses 11 through 15, the bill would impose on SSDEs obligations that have not been drafted yet. Such potentially arbitrary obligations could create a rigid and burdensome regulatory environment that hampers experimentation and innovation. This is particularly concerning in the context of emerging technologies such as artificial intelligence, the internet of things, and self-driving cars, which have the potential to transform industries and create new opportunities for growth and development.

Consider a scenario in which Tesla wants to set up a gigafactory in India to produce self-driving cars. The gigafactory would be a manufacturing unit and a digital factory, integrating advanced technologies such as robotics, machine learning, and data analytics into the production process. However, under the vague scope of the proposed framework and under possible subsequent

20. Adam D. Thierer, *Permissionless Innovation: The Continuing Case for Comprehensive Technological Freedom* (Arlington, VA: Mercatus Center at George Mason University, 2016).

regulation, the gigafactory could be subject to ex ante regulation, creating uncertainty and compliance burdens for the company.

Furthermore, the bill's prohibitions on bundling and tying could limit Tesla's ability to integrate its various products and services, such as its charging infrastructure, software updates, and future ride-sharing possibilities, into a seamless and convenient user experience. This could harm consumer welfare and discourage the company from investing and innovating in the Indian market.

The bootleggers and Baptists of digital regulation

Like all regulations, the proposed digital competition framework is the result of demands from special interest groups, as economist Bruce Yandle argued in his bootleggers-and-Baptists theory of regulation.²¹ Yandle developed this theory while analyzing Sunday liquor sale prohibitions in the southern United States. According to Yandle, both bootleggers and Baptists benefit from such prohibitions. Baptists advocate for prohibitions on moral grounds because the prohibitions align with their religious beliefs. Bootleggers, who operate illegally, benefit from elimination of competition and from increased alcohol prices.

Despite their different motivations, these strange bedfellows seek the same policy outcome. Their combined efforts make it easier for political actors to enforce the prohibition. The moral reasoning provided by the Baptists helps obscure the bootleggers' commercial interests. In the context of regulation of digital markets in India, a similar alliance seems to be emerging between groups with ostensibly noble intentions and those with vested commercial interests.

A quick perusal of the Digital Competition Law Committee's report reveals that supporters of ex ante regulation include the Newspaper Association of India and the Federation of Hotel & Restaurant Associations of India. These groups are akin to bootleggers because they advocate for regulations to address perceived unfair practices by large digital platforms to protect the interests and profits of their businesses.

The Newspaper Association argues that a digital competition law is necessary to prevent the spread of inaccurate information and to ensure fair competition in the digital news space. This stance is likely motivated by the competition between large platforms such as Google and Meta and the traditional

21. Bruce Yandle, "Bootleggers and Baptists—the Education of a Regulatory Economist," *Regulation* 7, no. 3 (1983): 12–16.

news industry by aggregating content and diverting web traffic and ad revenue from news publishers.²²

Similarly, the Federation of Hotel & Restaurant Associations of India advocates ex ante regulation to address the allegedly anticompetitive practices of online travel and food-service aggregators. The association has raised concerns about the commissions, deep discounts, and use of consumer data by these platforms. It sees these practices as detrimental to the interests of small hotels and restaurants, which are struggling to compete with the aggregators.²³

MakeMyTrip, an online travel agency, is also advocating ex ante regulation, arguing that regulations should primarily target “large horizontal platforms that have created economy-wide ecosystems,”²⁴ such as Google, and that the thresholds for designating “gatekeepers” should be set at the high levels seen in the EU. This suggests that MakeMyTrip’s support for regulation is motivated more by its own commercial interests than by a genuine concern for fair competition. By targeting players such as Google, which have a significant presence in the digital advertising and search markets, MakeMyTrip might be seeking to protect its position in the online travel space and prevent the entry of large global players.²⁵ Ultimately, this may harm—not protect—the interests of the Indian consumer.

X (formerly known as Twitter), despite being a large global digital platform and often dubbed the world’s public square, also supports such ex ante regulation because of its relatively small user base (only 8 percent) in India compared with that of giants such as Meta. X may thus be seeking to prevent larger platforms from leveraging their dominant positions.²⁶

Several think tanks play the Baptist role, engaging with the proposed framework in good faith and supporting it even though it would not directly benefit them. They are struggling to resolve global issues concerning data privacy, artificial intelligence, and the way large firms leverage data. They engage in what Rajagopalan and Tabarrok call “premature elite imitation,” in which the

22. Government of India, Ministry of Corporate Affairs, *Report of the Committee on Digital Competition Law*, 143–44.

23. Government of India, Ministry of Corporate Affairs, *Report of the Committee on Digital Competition Law*, 137–38.

24. Government of India, Ministry of Corporate Affairs, *Report of the Committee on Digital Competition Law*, 143.

25. Government of India, Ministry of Corporate Affairs, *Report of the Committee on Digital Competition Law*, 143.

26. Government of India, Ministry of Corporate Affairs, *Report of the Committee on Digital Competition Law*, 148.

Indian policy elite looks to the Western world to borrow regulations that might not be compatible with India's policy goals or state capacity.²⁷

Premature imitation of flawed EU regulations

India's proposed digital competition framework closely imitates the EU's Digital Markets Act (DMA) without fully considering India's unique circumstances, such as early stage of development, challenges in scaling firms, goals to increase the number of jobs in the technology sector, and the state capacity to regulate firms. This could be detrimental to the development of India's digital economy, especially considering the damage already caused by the DMA within just two months of its operation in the EU.

The proposed framework mirrors the DMA in several key aspects. Both target specific core digital services; establish quantitative thresholds to determine which digital firms will be regulated (dubbed "gatekeepers" under the DMA); explicitly prohibit certain business practices, such as self-preferencing and tying; and calculate penalties on the basis of global turnover. However, India's framework is worse than the DMA because the DMA specifies the obligations of gatekeepers, while the Indian framework leaves it to the regulator to outline the specific obligations of SSDEs. The Indian framework also includes qualitative criteria that give the regulator more discretion in designating firms as SSDEs even if they do not meet the quantitative thresholds.

The EU's overregulation is already damaging its digital markets. Google has had to remove useful search features for flights, hotels, and local businesses to comply with the DMA, making it harder for many European companies to reach customers directly. Clicks from Google ads to hotel websites have decreased by 17.6 percent. Apple must now present users with 12 browser options on a "choice screen" instead of favoring its default browser on iOS, even though users did not ask for this kind of choice and have always been free to choose their preferred browser.²⁸

Moreover, the EU's General Data Protection Regulation has chilled the app market. After the regulation was implemented, the number of apps exiting the market increased. The entry of new apps decreased by 47 percent, and the number of successful new entrants decreased by more than 40 percent. The

27. Rajagopalan and Tabarrok, "Premature Imitation."

28. Dirk Auer, Geoffrey A. Manne, Viswanath Pingali, Lazar Radic, and Mario A. Zúñiga, "ICLE Comments on India's Draft Digital Competition Act," International Center for Law and Economics, April 22, 2024.

combined market share of the apps that disappeared was about 3.3 percent, indicating that the disappearances were concentrated among marginal apps.²⁹

India’s digital landscape and goals differ significantly from those of the EU. Although both strive to foster innovation and safeguard consumers, the EU’s digital economy is more mature and more concerned with regulating entrenched players to ensure a level playing field. India, on the other hand, has made significant strides in leapfrogging conventional infrastructure limitations by embracing digital solutions, but it needs to further strengthen this process to fully unlock its digital market potential. To achieve this objective, India needs to create a favorable business environment, attract consistent investment, and nurture its growing digital talent pool by integrating with global businesses. By copying the DMA and introducing more ambiguity without clearly stipulating how the law will be implemented, the proposed framework risks hindering the pursuit of these objectives.

Ex ante regulation should be reserved for extreme cases— not for digital markets

Ex ante regulation is typically employed in sectors with catastrophic and irreversible potential risks, such as nuclear energy or chemicals. In those sectors, failures can lead to widespread harm to public health, safety, and the environment. Therefore, stringent ex ante regulation, including rigorous safety standards, licensing requirements, regular inspections, and outright and strict liability for violations, are justified to prevent such disasters.

In contrast, digital markets do not pose direct risks to public health or safety. The primary issues in digital markets relate to market dominance, anticompetitive practices, and consumer protection, such as data privacy and security. Although these issues are significant, they do not cause the same level of immediate, catastrophic, and irreversible damage to public health and safety as nuclear meltdowns or chemical spills do. Thus, the rationale for stringent ex ante regulation in digital markets, based on preventing catastrophic outcomes, is weaker.

Moreover, expansion of digital markets has the potential to deliver significant consumer benefits, including increased access to information, products,

29. Rebecca Janßen, Reinhold Kesler, Michael E. Kummer, and Joel Waldfogel, “Impacts of the European Union’s Data Protection Regulations” (NBER Working Paper No. 30028, National Bureau of Economic Research, Cambridge, MA, July 2022).

and services; lower prices; and greater convenience. Overly prescriptive ex ante regulation could slow the pace of digital innovation and limit these benefits.

Data, security, and privacy are the real issues

The concerns in digital markets that do need to be addressed are data collection, security, and privacy, which standard competition law might not effectively cover. Even in this area, clear standards and penalties for violations should exist without onerous compliance requirements like those of the EU law.

India should consider an approach tailored to its context rather than blindly following the EU, Chinese, or US model.³⁰ This would involve setting high-level legal principles for data protection while embedding those principles in the protocols of digital platforms. This approach would allow for innovation within the constraints of the protocols instead of mimicking the heavily regulated EU framework.

For instance, data obligations could be proportionate to the data a company collects and stores rather than to its market share. A small firm that leverages large amounts of user data can still wield significant power depending on the nature of the data, making market share an inadequate metric. This nuanced understanding of digital markets should inform the regulatory process.

Doubling down on the anti-bigness bias in the ex post competition law

The proposed digital competition framework builds on the anti-bigness bias of the existing competition law, particularly evident in the enforcement of section 4 of the Competition Act of 2002, which deals with ex post abuse of dominance cases. Narla discusses the problems with the anti-bigness bias inherent in the Competition Act.³¹ Unfortunately, rather than addressing the shortcomings of the current regime, the bill doubles down on this flawed approach, risking further harm to India's digital economy.

The institutional bias against large firms is apparent in several recent cases. For example, in a case involving Uber, the Supreme Court of India ordered an investigation into alleged predatory pricing even though CCI initially dismissed

30. Rahul Matthan, *The Third Way: India's Revolutionary Approach to Data* (New Delhi, India: Juggernaut, 2023).

31. Shreyas Narla, "Anti-big, Anti-global? India's Competition Law and Policy for Dominant Enterprises" (Mercatus Center Paper Series, Mercatus Center at George Mason University, Arlington, VA 2024).

the complaint. The court’s decision was based on Uber’s apparent financial strength and ability to offer low prices rather than a thorough assessment of its market power or the effects of its pricing strategy on competition and consumers. This approach equates size with dominance and wrongdoing, disregarding the procompetitive aspects of Uber’s business model, such as greater convenience and affordability for riders.

The problem is compounded by the design of section 4 itself, which presumes certain conduct by dominant firms to be abusive without requiring evidence of harm to competition or consumers.³² This has led to a spate of investigations and penalties against major digital platforms such as MakeMyTrip, Google, and Apple for practices including exclusive agreements, preferential treatment of certain sellers, bundling of services, and self-preferencing. Although some of these practices may warrant scrutiny, the overbroad and presumptive approach of the current law risks limiting innovation and investment. The proposed framework is akin to section 28 of the Competition Act of 2002, which empowers CCI to break up dominant firms to prevent them from abusing their dominance.

Conclusion

The current version of the proposed law should not be passed. It would swiftly kill India’s advantage in technology and digital services.

Although some concerns surrounding data privacy and use are valid, these should be addressed through targeted standards and regulations that promote transparency and user consent—not through blanket prohibitions that could destroy the foundations of India’s digital success. India should have a very targeted data privacy framework for these large digital firms and leave all other regulations to the existing competition law framework, which already grants the

32. Although the recent appellate tribunal’s order in *Google LLC & Ors. v. CCI & Ors.* (Competition Appeal (AT) No. 01 of 2023) held that section 4 requires an analysis of the effects of a dominant firm’s actions to establish abuse of dominance, the plain language of the provision still treats certain actions by dominant firms as abuse per se. The tribunal relied on the 2019 Competition Law Review Committee’s suggestion that no amendment to section 4 is necessary because the decisional practice has evolved to incorporate effects-based analysis. However, this practice has been inconsistent and, until upheld by the Supreme Court, the Google 2023 order does not conclusively resolve the issue that section 4, as currently drafted, warrants a formalistic assessment of abuse of dominance. The point on inconsistent decisional practice was in fact flagged in the dissent note of a member of the committee. Furthermore, CCI’s investigations in digital markets were ordered before the Google 2023 order and were presumptive of abuse based on narrow relevant market definitions that inflated the finding of dominance. See Narla, “Anti-big, Anti-global?”

government extensive powers to regulate large firms. Its regulatory approach should be precise, akin to pruning trees rather than starting a forest fire to deal with overgrowth.

Oddly, the firms endangered by the proposed law are among the ones the government is going to great lengths to attract investment from. The left hand does not seem to know what the right hand is doing: the mandate for the commerce and finance ministries is to attract investment, while the proposed ex ante regulatory framework punishes those who invest.

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