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EVENT REPORT

COMPETITION LAW IN THE DIGITAL AGE

ADAPTING TO NEW REALITIES



EVENT REPORT

Competition Law in the Digital Age
ADAPTING TO NEW REALITIES

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EXECUTIVE SUMMARY

Aiming to add to the ongoing discourse on policy and regulatory approaches to addressing competition issues in digital markets, The Dialogue hosted an international conference on 6th July 2023, in hybrid mode, on the theme of “**Competition Law in the Digital Age: Adapting to New Realities**”. The conference was attended by a diverse group of stakeholders including industry bodies, civil society, academicians, and government bodies. A few clear recommendations emerged from the discussions. These recommendations are likely to benefit policymakers who are evaluating Indian digital markets and charting out the future of regulatory and policy interventions in the space.

Key takeaways:

- a. Digital markets have led to a paradigm shift in the competition landscape since they are characterised by features like economies of scale, data wealth and network effects. Regulators are resultantly looking to address these unique nuances of new-age markets through a mix of traditional methods and technology-specific regulations.
- b. It is crucial to gather more empirical evidence before adopting any specific approach to regulation. While the EU's DMA is considered a reference point, it is still evolving and may not be reliable as the sole basis for India's regulations. Therefore, India should conduct its research and collect relevant data to develop regulations tailored to its unique context and needs in the digital market.
- c. Digitalization has enabled MSMEs to establish a robust online presence, reach a wider consumer base, and reduce entry costs into established markets. As a result, MSMEs have more resources to invest in innovation, leading to increased exports and the introduction of innovative products and services in other jurisdictions.
- d. The process of formulating regulations must balance the goals of protecting consumers, ensuring fair competition and fostering innovation. Overly restrictive or ambiguous regulations may dissuade businesses from investing in research and development.
- e. Different models of ex-ante regulations have different pros and cons. For instance, where the UK model allows a more tailored approach and involvement of industry experts, it can also be more time-consuming. The suitability of models being adopted internationally needs to be seen in light of India's own market and policy realities.
- f. A co-design process involving industry, academia, think tanks and other stakeholder groups should be adopted to shape regulations and ensure wider participation and engagement. This collaborative approach would enable regulators to stay updated with industry developments and create more effective and responsive regulations for the digital market.



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INTRODUCTION

The rapid evolution of digital markets has necessitated a deeper understanding of their implications on competition, innovation and consumer welfare. Resultantly, several jurisdictions across the world are re-evaluating their competition frameworks. The same enables regulators to craft agile interventions into digital markets while mitigating risks of under and over-enforcement.

India is no outlier. In 2018, India established the Competition Law Review Committee (CLRC) to review the extant competition law framework in light of new age markets. In 2020, the Competition Commission of India (CCI) released a market study on e-commerce in India wherein it identified certain concerns and proposed self-regulatory measures for digital platforms.¹ In 2022, the Parliamentary Standing Committee on Finance (PSC) tabled its report on ‘Anti-Competitive Practices by Big Tech Companies’, delineating ten anti-competitive practices (ACPs) with a recommendation to explore framing a Digital Competition Act (DCA).² Subsequently, in 2023, the Committee on Digital Competition Law (CDCL) was constituted to assess the need and feasibility of an ex-ante framework and come up with a draft Digital Competition Act (DCA).

A comparative assessment of competition reform priorities across the globe puts India alongside other jurisdictions such as the UK, EU, USA, Australia, and Japan, which are currently evaluating or have recently adopted new legislation specifically targeting digital markets.

To further advance the discourse between experts from multiple jurisdictions on the subject, The Dialogue hosted an international conference on 6th July 2023, in hybrid mode, on the theme of **“Competition Law in the Digital Age: Adapting to New Realities”**. The conference provided a platform to engage in discourse on the broader objectives sought to be achieved through such reform processes. It allowed sharing of experiences between stakeholders from different jurisdictions to identify best practices, highlight principles, and discuss frameworks that facilitate healthy competition, consumer welfare, market innovation, and growth of investments.

Kindly note that the views summarized in this report do not represent the views of the speakers’ organization or The Dialogue.

The conference consisted of the following sessions:

- a. **Opening Sessions**
- b. **Panel 1: Encouraging Innovation in Digital Markets through Competition Law**
- c. **Panel 2: Assessing the Consumer Welfare Standard and Ensuring Consumer Protection**
- d. **Panel 3: Regulation of Digital Markets through Competition Law**

¹ Market Study on E-Commerce In India- Key Findings and Observations, Competition Commission of India [2020] <https://www.cci.gov.in/economics-research/market-studies/details/18/6>

² Standing Committee on Finance, Seventeenth Lok Sabha, Anti-Competitive Practices by Big Tech Companies, Fifty Third Report [December 2022] https://loksabhadocs.nic.in/lssccommittee/Finance/17_Finance_53.pdf

1. OPENING SESSION

The session witnessed keynote addresses by government and inter-governmental stakeholders, including:

- a. **Ms Payal Malik, Advisor (Economics), Competition Commission of India**
- b. **Mr Antonio Capobianco, Deputy Head, OECD Competition Division.**
- c. **Ms Teresa Moreira, Head, Competition & Consumer Policies Branch, UNCTAD.**

1.1. Transitions in the Competition Landscape

The session commenced with a discussion on the manner in which increased digitalisation has led to a paradigm shift in the competition landscape. Unlike brick-and-mortar markets, digital markets are characterised by special features, including economies of scale, data wealth, network effects, economies of scope and multi-sidedness. These features have introduced two-fold transitions in the competition landscape. Firstly, they have enabled some platforms to create dependency of business users and consumers on them by enabling the collection and exploitation of data on a massive scale. Secondly, they have led to a major shift in consumer interactions in these markets. On the one hand, consumer choices have witnessed a drastic change, while on the other hand, the consideration paid by consumers has also changed from price to non-price forms such as data. In light of these major shifts, the panellists highlighted the need for a broader understanding of consumer interests and consumer welfare.

It was observed that these major changes had led countries to deliberate on legislation to regulate digital markets. The speakers touched upon the examples of the United Kingdom (UK), the European Union (EU), and India. The UK recently introduced the Digital Markets, Competition and Consumer Bill (DMCC) to regulate digital competition and to empower the Competition and Markets Authority (CMA) to take action against businesses that abuse their positions of strength in digital markets. The EU enacted the Digital Markets Act (DMA) to introduce an ex-ante regime to regulate entities classified as ‘gatekeepers’. The Indian lawmakers have also set up the CDCL to ascertain the need for a separate law to regulate competition in digital markets.

1.2. Challenges Faced by Regulators

The speakers highlighted several key challenges faced by regulators in regulating the digital marketplace. Firstly, finding a delicate balance between regulation and innovation proves to be a complex task. While they acknowledged that regulations could potentially have implications for the innovation of businesses, the primary goal of antitrust laws remains to benefit the public by ensuring a competitive market. Another significant challenge lies in the technical complexities associated with understanding anti-competitive behaviour in digital markets. Due to the constantly evolving nature of the digital space, regulators may require more expertise to effectively address technology-driven issues.

This potentially poses a hurdle in identifying and addressing instances of anti-competitive conduct. Moreover, the issue of transparency was emphasized during the discussion. In many digital services, particularly those involving black box algorithms, the reasons behind specific system responses may remain undisclosed. This lack of transparency makes it exceedingly difficult to assign accountability in cases where detrimental outcomes arise.

1.3. Manner of tackling the challenges

The speakers suggested that to overcome the aforementioned challenges, the current competition laws were inadequate and therefore recognised the need to blend the traditional methods with more technology-specific regulations. Towards the same, the speakers suggested the need for (i) adoption of a multifarious approach by ensuring cooperation at all levels: including national and international cooperation; (ii) understanding the dynamic nature of competition issues in digital markets; (iii) equipping regulators with the necessary expertise in technology-driven issues and (iv) striking a balance between pro-active regulations and innovation. Additionally, the importance of consultative meetings and adopting adaptive approaches to regulation was emphasised. Moving forward, a co-design process involving industry, academia, and think tanks would help shape regulations effectively and ensure wider participation and engagement.

2. PANEL 1

Encouraging Innovation in Digital Markets through Competition Law

The panel engaged in a discussion about the implications of novel competition frameworks in the context of fostering innovation in the digital marketplace. While competition policies have traditionally aimed to promote innovation and support startups, the evolving nature of digital markets has prompted a re-evaluation or fine-tuning of this approach. The panel explored various topics, including the impact of the digital economy on micro, small, and medium enterprises (MSMEs), the need for empirical evidence in decision-making, the increased compliance burden and costs associated with competition regulations, and the differing approaches taken by the EU and UK.

The moderator for the panel was **Ms Nisha Kaur Uberoi**, Partner & National Head of Competition Law Practice, Trilegal. The other panellists included:

- a. **Dr Viswanath Pingali, Associate Professor of Economics, IIM Ahmedabad**
- b. **Dr Christophe Carugati, Affiliate Fellow, Bruegel**
- c. **Mr Amal Sivaji, Director, Public Policy, Swiggy**
- d. **Mr Vinod Kumar W., President, India SME Forum**
- e. **Dr D. Daniel Sokol, Professor of Law & Business, USC Gould School of Law**

The following themes emerged from the discussion of this panel:

2.1. Impact of Digital Economy on Micro, Small and Medium Enterprises (MSMEs)

The panel extensively discussed the transformative effects of transitioning MSMEs to the online realm, particularly in terms of innovation. The digitalization of markets has presented MSMEs with several advantages. Firstly, some of the experts emphasized that the digital landscape has facilitated the establishment of a robust online presence for MSMEs, enabling them to be easily discovered by a vast consumer base.

This level of visibility would have been challenging to achieve through alternative means. Secondly, digitization has significantly reduced the entry costs that MSMEs traditionally faced when entering well-established markets. As a result, these enterprises now possess more resources to invest in product and service innovation. Thirdly, enterprises with even lower turnovers have performed quite well, as digitization has allowed them to venture into increased exports and bring their innovative products and services to other jurisdictions.

2.2. Need for empirical evidence

During the discussion on the need for ex-ante regulations to regulate competition in India's digital markets, a few of panellists expressed the importance of gathering more empirical evidence before adopting any specific approach. They noted that while the EU's Digital Markets Act (DMA) is seen as a reference point for such regulations, it is still evolving in phases, making it unreliable as the sole basis for India's regulations. Some of the speakers raised concerns about the potential threat to innovation if untested regulations were implemented, citing the example of China where excessive government regulations hindered business innovation.

Additionally, experts referred to existing literature demonstrating the adverse impact of excessive regulations on market innovation. Consequently, it was advocated that prior to enacting such regulations, reliance should be placed on empirical evidence and experimentation. It was also crucial to have a clear understanding of the problems that the regulations aimed to address and their specific objectives.

A few panellists further emphasised the need for a cost-benefit assessment of new legislation. Platforms offer substantial advantages by lowering costs for market players thus enabling entry of new entities. However, if regulations are implemented that raise costs for these platforms, there may be far-reaching effects, impacting market competition and the potential for new businesses to succeed. Therefore, due consideration should be given to the potential trade-offs and unintended outcomes of such regulations on market dynamics and competition.

2.3. Increased compliance burden and costs

The speakers emphasized that businesses already devote significant time and resources to meet existing compliance requirements. Introducing a new law to regulate them could add to their compliance obligations, potentially limiting their capacity and resources to innovate and enhance their offerings. They pointed out that the Digital Services Act in the EU was projected to impose compliance costs ranging from 13 to 16 million Euros on EU entities.

This suggests that a similar approach in India could lead to increased costs for businesses. Such trends could negatively impact the ease of doing business, particularly for startups. The speakers underscored the importance of avoiding a one-size-fits-all regulation for diverse businesses, as this could potentially do more harm than good to the ecosystem.

2.4. Difference in approaches adopted by the EU and UK

The experts engaged in discussion comparing two prominent models of ex-ante regulation: the UK model represented by the DMCC Bill, and the EU model represented by the DMA. Some experts believed that the UK model could be more suitable for digital markets due to its tailored approach and involvement of industry experts. They believed that this approach would allow regulators to effectively balance innovation and competition in the market.

On the other hand, a few discussants viewed the EU model as a better option to address issues emerging in new-age markets. They highlighted that the EU model provides a comprehensive set of robust tools to combat potential anti-competitive behaviour and enables a streamlined and expedited process. In contrast, the UK model was seen as more time-consuming, since it involves discussions between the Competition and Markets Authority (CMA) and industry experts regarding the regulation of digital markets.

3. PANEL 2

Assessing the Consumer Welfare Standard and Ensuring Consumer Protection

The consumer welfare standard has long served as a guiding principle for competition jurisprudence in prominent jurisdictions. However, there is a growing debate surrounding its suitability for digital markets. The rise of the neo-Brandeis school in the United States, among others, has drawn attention to the trend of considering additional factors beyond consumer impact when assessing anti-competitive behaviour.³

In the panel discussion, the role of the consumer welfare standard in shaping competition policy was explored. The panel deliberated on how India could adapt its laws to ensure the welfare of consumers, taking into account the evolving dynamics of digital markets.

The panel was moderated by **Mr Kazim Rizvi**, Founding Director of The Dialogue and hosted the following speakers:

- a. **Mr S. Niranjan Reddy, Hon'ble Member of Parliament**
- b. **Mr Ashutosh Chadda, Director & Country Head, Government Affairs & Public Policy, Microsoft**
- c. **Mr Allan Asher, Chair, Fairer Future AU**
- d. **Dr Aurelien Portuese, Research Professor, George Washington University; International Associate, Freshfields**
- e. **Ms Hemangini Dadwal, Partner, AZB & Partners**
- f. **Dr Oles Andriychuk, Professor, Newcastle University of Law School & Director of the Digital Markets Research Hub**

The major points of discussion that emerged from the discussion of this panel are as follows:

3.1. Significance of consumer welfare in competition policy

The panellists highlighted the noticeable shift from the price being the sole criterion to assess consumer welfare to other non-price factors such as consumer choice, innovation and personal data becoming increasingly important in competition law analyses. The panel recognized the notable changes in consumer preferences and their expectations regarding products/services and how they are delivered. In light of these shifts, it was emphasized that a broader understanding of consumer welfare is necessary, one that addresses market monopolization rather than solely relying on narrow price-based analyses. However, some of the speakers also acknowledged the vibrant startup economy in India and the continued significance of price in the welfare of Indian consumers. They argued that price remains a major obstacle for low-income families in accessing desired products or services. Thus, the discussion highlighted the need to strike a balance between considering diverse factors that shape consumer welfare and acknowledging the ongoing relevance of price for certain segments of the Indian population.

³ The Neo-Brandeisian scholars argue that the conventional consumer welfare standard, which primarily focuses on maximizing consumer welfare through efficiency and lower prices, is inadequate in addressing the complexities of today's digital economy and can sometimes fail to protect consumers from other negative consequences of market power, such as reduced innovation, decreased quality, or potential threats to privacy and data security. See Hovenkamp, Herbert J., "Is Antitrust's Consumer Welfare Principle Imperiled?" (2019). Faculty Scholarship at Penn Carey Law. 1985. https://scholarship.law.upenn.edu/faculty_scholarship/1985

The panel unanimously agreed on the importance of aligning consumer protection and competition laws. They referred to the landmark case *Reiter v. Sonotone*, where the U.S. Supreme Court stated that antitrust laws should be interpreted as prescriptions for consumer welfare. It was strongly emphasized that competition laws should not be formulated in a way that is adverse to consumer interests. Consequently, the experts recommended that regulators should adopt a comprehensive understanding of the term "consumer" and the various elements encompassed within consumer welfare. This approach ensures that competition laws are designed and implemented with the ultimate goal of safeguarding consumer interests and well-being.

3.2. Ensuring consumer welfare in India

The speakers emphasized the need for Indian lawmakers to thoroughly understand the unique requirements of the Indian landscape before adopting any specific approach regarding ex-ante laws. Towards this, it is important first to identify the problems and challenges faced by the Indian competition regime, the entities sought to be regulated and the goals to be achieved by such action. Some of the discussants cautioned against overly restrictive or burdensome regulations for digital markets in India, as such measures could stifle innovation, resulting in limited consumer choices.

The experts called for a light and dynamic regulatory approach that encourages innovation while allowing agile interventions when necessary. They reiterated the importance of relying on empirical evidence to devise this dynamic framework, as highlighted in earlier discussions. Furthermore, they emphasized that any enacted laws or regulations should maintain a strong focus on consumer interests, as the ultimate aim of ensuring fair competition and innovation is to protect consumers.

Regarding India's consideration of the EU's DMA as a potential model, some of the panellists clarified that India was not planning to blindly follow the DMA approach. Instead, India is studying various approaches and models to craft a blended approach that suits its specific needs. It was noted that India may adopt a more protectionist and rigorous approach to safeguard the interests of MSMEs without compromising consumer welfare. The panel unanimously stressed the importance of aligning the law with India's requirements, challenges, and long-term goals. On the other hand, some speakers expressed concerns about systemic market failures, the dominance of large firms, and market tipping in digital marketplaces, which they believed warranted legislative intervention. They emphasized that India could not afford to wait solely for empirical evidence, as significant harm may already be done by the time a law is enacted.

4. PANEL 3

Regulation of Digital Markets through Competition Law

Numerous jurisdictions have taken steps to adopt or are contemplating the implementation of ex-ante frameworks in response to the distinct challenges presented by digital markets. These ex-ante regulations differ in structure, with some countries opting for sector-specific regulations while others adopt a sector-agnostic approach. Considering these developments, the discussion primarily centred on evaluating the sufficiency of the current legal landscape, emphasizing the importance of approaching digital competition policy carefully and exploring various models of ex-ante laws.

The panel was moderated by **Mr Deepak Maheshwari**, Public Policy Consultant and hosted the following speakers:

- a. **Dr Shubhashis Gangopadhyay, Founding Dean, Indian School of Public Policy and Managing Trustee, India Development Foundation**
- b. **Ms Shruti Hiremath, Senior Associate, Clifford Chance, London**
- c. **Mr Krisztian Katona, Vice President, Global Competition and Regulatory Policy at the Computer and Communications Industry Association**
- d. **Dr Amar Patnaik, Hon'ble Member of Parliament and Member of the Standing Committee on Finance**

The discussion during this panel revolved around the following themes:

4.1. Assessing the Adequacy of the Current Legal Landscape

The experts highlighted that India has witnessed a significant change in the structure of markets. The Competition Act, being a 2002 legislation, was crafted to tackle issues of competition arising out of physical markets. Since then, the market structure has changed significantly with the evolution in the functioning of the markets and the market participants. In order to tackle these structural changes, the Standing Committee on Finance came out with its 53rd report suggesting ex-ante legislation subsequent to which the government set up the CDCL Committee to assess whether India needs a separate regulation to regulate these markets. Additionally, the Competition (Amendment) Act 2023 was introduced.

It was highlighted that during consultations for policy changes, certain stakeholders had maintained that the aforesaid amendment to the Competition Act, 2002 coupled with the CCI's suo moto power was sufficient to address the issues of competition over digital space. However, certain stakeholders expressed concern that small and medium enterprises were suffering due to the dominance of large technology companies. Additionally, the prolonged nature of investigations under the 2002 Act allowed companies to reap benefits and reach a position of strength. Thus, a need was felt to revamp the Act and also equip the CCI with a special wing to tackle issues arising out of these markets. While the inadequacies of the present Act were stressed by some panellists, it was highlighted that any action under the proposed regulations should be directed to instances of abuse of dominance and not to dominance per se.

4.2. Need for a Cautious Approach to digital competition policy

Some of the speakers voiced the need for ex-ante provisions to expedite regulatory actions against big tech companies, as the current regime may cause harm to competition while cases remain pending. The panel stressed the importance of considering the experiences of different types of businesses, including Kirana stores, when formulating potential regulations. However, some experts expressed concerns that an ex-ante regime could stifle firms' capacity to innovate and highlighted that India's economy differs from those of more proactive jurisdictions, particularly due to its focus on the startup ecosystem.

They emphasized that policymakers in emerging economies must consider their country's bandwidth and resources before following the path of other jurisdictions. The panellist cited the example of the UK, where scaling up to 200 staff members might be required for its competition agency's digital markets unit. Thus, a customised approach for India that takes into account its specific problems and needs was recommended. Certain speakers highlighted that not all issues stemming from digital players should be automatically classified as competition law matters. They emphasized that many of the harms caused by technology companies are unrelated to competition law, but there is a tendency to employ the competition toolkit as a solution for these issues. Thus, competition regulators are often tasked with addressing problems that may lie outside their expertise.

4.3. Different models of ex-ante laws

On the question of which approach India should adopt for its competition law and policy, the panel reached a consensus that India needs a tailored law designed specifically for its digital markets. They emphasized that India should not proactively follow the approaches of other jurisdictions, but rather identify its unique problems, resources, and objectives to shape its approach. It was noted that the Standing Committee on Finance's report was based on the Indian context and recommended a principle-based approach for India, considering the EU's DMA as one of several reference points and not the sole point.

Some of the speakers also delved into a discussion on the UK model of regulating competition in digital markets. It was elucidated that the UK approach is a principle-based approach wherein the government would regulate only a code of conduct for the entities. Ultimately, it would be the country's competition regulator that will sit down with digital companies to decide how they wish to regulate the markets. This tailored approach was contrasted with the more prescriptive EU model. The panel acknowledged the advantages of the UK model, such as its customization, but also pointed out that the process could be time-consuming. Additionally, it was noted that the UK Bill does not allow companies to seek a merit-based judicial review, raising concerns about the principles of natural justice.

Regarding the suitability of the UK model for India, the panellists agreed that the situations in the UK, EU, and India differ. For instance, some homegrown companies performing extremely well in India which may not be the case with the EU and UK. Further, India supports innovative models like ONDC and UPI in India that contributes to fostering competitiveness. Thus, it was suggested that India should first ascertain whether it requires ex-ante regulations, and if it does, how to devise these in the law.

4.4. Audience Interaction

On the question of whether India was moving towards a less progressive competition regime, it was clarified by an expert that the aim of inculcating ex-ante provisions is to bolster the regulation of digital marketplaces. India was not heading back to the regressive regime when MRTP Act was in prevalence, rather, the possibility of ex-ante provisions is being discussed to ensure that there is no abuse of

dominance by big tech companies over these markets. The law would step in only when there is an abuse of dominance and not for dominance, per se.

With regards to the question of whether an ex-ante approach would enable the prioritisation of competition law matters by NCLAT, the speaker highlighted that the very objective of proposing ex-ante regulations was to reduce the time of suffering for the consumers. They highlighted the importance of establishing a strong connection between consumer authorities and competition authorities to efficiently compensate affected consumers, as seen in certain jurisdictions. Further, it was discussed that the concept of initiating class action suits on behalf of consumers had not gained prevalence in India yet and that this could also help in remedying consumer grievances.

Lastly, on the question of whether there should be a research secretariat to provide evidence-based support to the members of the parliament, the response highlighted that the new parliament house with separate buildings for research support is under consideration by the government. Currently, there also exists a system of giving centralized advice to the Members of Parliament.

5. KEY TAKEAWAYS

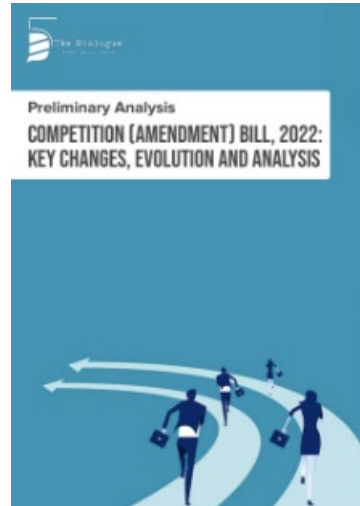
The following key takeaways emerged from the international conference:

- a. Digital markets have led to a paradigm shift in the competition landscape since they are characterised by features like economies of scale, data wealth and network effects. Regulators are resultantly looking to address these unique nuances of new-age markets through a mix of traditional methods and technology-specific regulations.
- b. It is crucial to gather more empirical evidence before adopting any specific approach to regulation. While the EU's DMA is considered a reference point, it is still evolving and may not be reliable as the sole basis for India's regulations. Therefore, India should conduct its research and collect relevant data to develop regulations tailored to its unique context and needs in the digital market.
- c. Digitalization has enabled MSMEs to establish a robust online presence, reach a wider consumer base, and reduce entry costs into established markets. As a result, MSMEs have more resources to invest in innovation, leading to increased exports and the introduction of innovative products and services in other jurisdictions.
- d. The process of formulating regulations must balance the goals of protecting consumers, ensuring fair competition and fostering innovation. Overly restrictive or ambiguous regulations may dissuade businesses from investing in research and development.
- e. Different models of ex-ante regulations have different pros and cons. For instance, where the UK model allows a more tailored approach and involvement of industry experts, it can also be more time-consuming. The suitability of models being adopted internationally needs to be seen in light of India's own market and policy realities.
- f. A co-design process involving industry, academia, think tanks and other stakeholder groups should be adopted to shape regulations and ensure wider participation and engagement. This collaborative approach would enable regulators to stay updated with industry developments and create more effective and responsive regulations for the digital market.

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[Analysis: Parliamentary Committee on Finance's 52nd Report on Competition \(Amendment\) Bill 2022.](#)



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