

AS PANEL PROPOSES PRE-EMPTIVE REGULATION...

'New Antitrust Law for Tech Cos Should Not Stifle Innovation'

Most experts and tech giants against ex-ante framework

**Banikinkar Pattanayak
& Pranav Mukul**

New Delhi: The proposed digital competition law will help curb potential anti-trust behaviour by large technology companies, but the government must guard against stifling innovation or making compliance one-

rous, said experts in regulatory affairs.

In a report released on Tuesday, a panel led by corporate affairs secretary Manoj Govil suggested a new anti-trust law with an ex-ante framework to regulate large digital players. A number of big technology firms, including Apple, Google, Meta, Amazon and Flipkart, had opposed such an idea in their submission before the committee last year.

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AGAINST

Apple: For light-touch regime

Meta: Move may inhibit innovation

Google: Such regimes are untested

Amazon and Flipkart: Excessive, unsuitable

FOR

X: Carefully define cos to be covered

Nasscom: Focus on competition

CAIT: Address market harm

Gaming body and ADIF: Cos have arbitrary policies, hoard data



Law May Impact Consumer Choice

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Ex-ante regulations aim to disallow certain practices from being pursued. Under the existing ex-post framework, violations are investigated after they take place.

Much depends on the fine prints on obligations that the big digital firms will be subjected to, the experts said. The obligations will be spelt out through subordinate legislation after deliberations with stakeholders, according to the report and a draft Bill prepared by the Govil panel.

The new law, the panel suggested, should apply only to "systemically significant digital enterprises" (SSDE) that have a "significant presence" in India, leaving small firms out of its ambit. The penalty for violations could be as high as 10% of the entity's global turnover, it said.

Pankaj Agarwal, partner (IT Advisory) at consultancy firm Nangia & Co LLP, said the regulatory framework and self-reporting obligations proposed by the draft digital competition Bill might "considerably foster competition and reduce anti-competitive practices followed by global tech giants".

Natasha Treasurywala, partner at law firm Desai & Diwanji, said the recommendations could potentially impact not just innovation and evolution of products by big tech companies but also consumer choice.

Having a new antitrust law for large digital players, on top of the existing one (albeit with an ex-post framework) for all sectors, "could also lead to over regulation", Treasurywala added.

Unnati Agrawal, partner at IndusLaw, called for a balance "between the need for regulation and the unique realities of the Indian economy to avoid unintended consequences so that the consumers do not end up with a medicine that is worse than the disease".

A New Delhi-based lawyer said ex-ante regulations are the need of

the hour "looking at how the entry-level barrier for more digital players has become very high... specifically from the point of view of how much data has been amassed by larger companies".

MIXED VIEWS BY INDIAN FIRMS

In their submissions before the Govil panel last year, home-grown companies such as Oyo, Zomato and Swiggy also expressed reservations about the ex-ante framework, with Zomato offering support under conditions, including tailor-made provisions to suit the Indian context, according to the report. Some others, like Paytm and MakeMyTrip extended greater support to such regulations.

Nasscom is in favour of this legislation. In its submission, the IT industry lobby group said the framework should focus on harms to competition, and not create overlaps by imposing privacy or data protection-related obligations.

Designation of an entity for ex-ante obligations should be based on a combination of quantitative and qualitative factors, it said. The obligations should neither be mutually exclusive nor have an overriding effect. The ex-ante framework must also carry a statutory obligation for the CCI to conduct market studies before identifying a core digital service or specific conduct/obligation with respect to the identified digital service, Nasscom said.

Entities such as the All India Gaming Federation, Asia Travel Technology Industry Association, Confederation of All India Traders, Digital News Publishers Association, Federation of Hotel & Restaurant Associations of India, Indian Council for Research on International Economic Relations, Newspaper Association of India and the National Restaurant Association of India have endorsed the framework for systemically important digital

intermediaries.

Microblogging platform X (formerly Twitter) supported the ex-ante regulations, but said the definition of systemically significant digital enterprises needed to be carefully considered.

Apple India said it didn't endorse ex-ante regulations and was "in favour of a light-touch regime which promotes innovation".

Meta, which owns Facebook, said it "believes in observing and advancing further research before rushing to adopt any variation of the (European Union's) Digital Markets Act" or any of the other ex-ante frameworks being considered currently.

Some large technology players such as Google, Apple and Meta are already facing probes by India's competition regulator for alleged abuse of fair-trade rules.

Google said it was not in favour of ex-ante regulation "except under certain conditions". "The new regime should promote competition and innovation; provide for evidence-based justifications (e.g., pro-competitive) for conduct under scrutiny; provide for separation of powers between rule-making bodies in charge of designation of SIDIs and bodies in charge of enforcement, etc," it said in its suggestions.

Amazon said the ex-ante regulation for the ecommerce sector "may be untimely and excessive" and may lead to "over-regulation".

Among Indian companies, Zomato said if ex-ante regulation is sought to be introduced, it should be conducive to the growth of startups and "should not stifle innovation and/or consumer interest".

Flipkart submitted that a "one-size-fits-all approach" similar to EU's Digital Markets Act would be unsuitable for effective regulation of digital markets "since it remains untested".

(Suraksha P in Bengaluru contributed to this report)