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SCHUMPETER PROJECT ON COMPETITION POLICY

700 K Street NW Suite 600
Washington, DC 20001

COMMENTS OF ITIF

Before the

Government of India

Ministry of Corporate Affairs

(Competition Section)

In the Matter of:	)	
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INNOVATION AND REGULATION IN A CHANGING WORLD: CONCERNS WITH INDIA'S DIGITAL COMPETITION LAW

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INTRODUCTION

On February 6, 2023, the Government of India established the Committee on Digital Competition Law (Committee), an expert group of industry chambers, policymakers, and scholars. The purpose was to review the current provisions of the Competition Act of 2002 and assess whether its provisions are sufficient to deal with concerns associated with the continued growth of the digital economy or if new tools are needed. The creation of the Committee followed the Parliamentary Standing Committee on Finance's 53rd Report on Anti-Competitive Practices by Big Tech Companies.[1]

As reflected in its Report of the Committee on Digital Competition Law (Report), the Committee conducted an extensive study of existing Indian competition law, the surrounding regulatory framework, and the practices of other jurisdictions around the world regarding digital regulation.[2] It concluded that a new ex-ante regime could supplement the ex-post model of the Competition Act to help police digital markets, observing that because "digital markets are dynamic in nature, timely intervention is necessary to prevent anti-competitive conduct."[3]

India's Ministry of Corporate Affairs released the Draft Digital Competition Bill (Bill) on March 12, 2024.[4] The Bill will likely apply to a number of large American technology firms, several Indian companies, as well as other sizable digital firms that do business in India. Like the EU's DMA, the Bill embraces an ex-ante regulatory model that aims to prevent any potentially anti-competitive conduct from occurring by broadly relying on per se rules. However, the Bill follows the UK's DMCC in contemplating company-specific prohibitions, as opposed to industry wide generally applicable rules.

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[1] STANDING COMMITTEE ON FINANCE, SEVENTEENTH LOK SAHBA, MINISTRY OF CORPORATE AFFAIRS, ANTI-COMPETITIVE PRACTICES BY BIG TECH COMPANIES, FIFTY THIRD REPORT (2022).

[2] REPORT OF THE DIGITAL COMPETITION LAW [hereinafter REPORT].

[3] *Id.* at 4.

[4] Draft Digital Competition Bill (Mar. 12, 2024).

The Information Technology and Innovation Foundation (ITIF) appreciates the opportunity to comment on the Bill and specifically discuss its problems with respect to promoting innovation. ITIF is a nonprofit, nonpartisan research and educational institute that has been recognized repeatedly as the world's leading think tank for science and technology policy. ITIF's comment proceeds in five parts.

First, ex-ante regulation in the digital sector should be necessary to remedy market failure. However, market failure does not appear to exist in India's digital markets. On the contrary, India's digital sector is dynamic and growing with the rest of the Indian economy. Moreover, even if market failure may exist, the Bill is not likely to improve digital outcomes relative to the status quo. Indeed, the Report does not sufficiently demonstrate either that India's current and robust ex-post framework is insufficient, or that the benefits of an ex-ante regime will outweigh its harms, and in particular a reduction in the dynamic competition that is often the best corrective to market failure in fast-moving digital markets.

Second, even if the Bill could be facially justified as a response to market failure, its definition of Systematically Significant Digital Enterprises (SSDE) is unsatisfactory. Firstly, its quantitative threshold targets companies simply because of their size, irrespective of whether they have market power—a necessary even if not sufficient condition of market failure. Moreover, it includes a vague and ambiguous qualitative test for qualifying as an SSDE even if quantitative requirements are not met, which risks creating both an ad hoc regime that gives too much discretion to regulators as well as uncertainty for many digital firms. This uncertainty is exacerbated by the Bill's company specific approach to rulemaking, which when taken together raise concerns about regulatory capture and the Bill being used to pick digital winners and losers in India.

Third, the Bill's deleterious effects on innovation risk stifling the economic growth and technological progress India needs to escape the middle-income trap and fully develop into an advanced economy. In particular, by following the EU's model of per se rules, the Bill will ban generally pro-competitive activities such as self-preferencing or bundling products and services without allowing firms to justify their behavior. These heavy-handed provisions will hinder innovation and harm Indian consumers. Additionally, by saddling America's leading digital firms with regulation, the Bill risks not only diminishing future investments in India, but also straining the important relationship between America and India that is crucial toward facing urgent geopolitical challenges that require a pro-innovation business environment amongst America and its allies.

Fourth, and accordingly, ITIF recommends that the Government of India consider stepping back from embracing experimental ex-ante digital governance. At the very least, ITIF suggests a reconsideration of several provisions of the current Bill and their effects with respect to India's digital markets, as well as India's position in a turbulent geopolitical landscape.

A brief conclusion follows.

INDIA DOES NOT NEED DIGITAL REGULATION

As a general matter, ex-ante regulation should be a response to market failure. But as ITIF explained in its most recent Hamilton Index Report, India is one of the top 10 leading producers across key strategically important industries, several of which are high-tech.[5] To be sure, while India's $90 billion dollar IT & Information services industry may not be growing as fast as the overall India's economy, India's digital markets are not the problem.[6] Rather, India's biggest problem is itself: "if India could assure investors of the basics (working infrastructure; a pro-business climate including reasonable taxes, regulations, and trade policy, and a modestly skilled workforce), then the advantages it enjoys as an alternative to China that is large and has low wages should lead to massive foreign investment."[7]

Indeed, India's digital markets are a high point of its economy. According to some measures, the Indian startup economy is the 3rd largest in the world, with over 68,000 startups launched, compared to over 76,000 in the United States.[8] Moreover, a number of these startups have achieved unicorn status, which evinces an ability to scale and challenge large incumbents.[9] This startup growth was also broad, with startups spread across 56 sectors: 13 percent from IT services, 9 percent from healthcare and life sciences, 7 percent from education, 5 percent from agriculture, and 5 percent from food & beverages.[10] To be sure, while Fintech and EdTech continue to especially thrive, new areas are also emerging as growth spots: DeepTech (R&D-focused) startups have seen steady growth, attracting a total of $6.73 billion in funding over a decade, and SpaceTech, a sector undergoing significant transformation due to privatization, has also garnered significant investor interest.[11]

This growth is backed by a well-capitalized venture ecosystem, with a total of $8.4 billion invested in 2023 despite economic headwinds.[12] In fact, consistent with the digital acceleration brought upon by the Covid-19 pandemic, 2020 and 2021 were the peak funding years over the past decade.[13] And, while Bengaluru remains India's leading startup hub, attracting total funding of $70.4 billion in a decade, cities like Delhi-NCR and Mumbai are increasingly following closely behind.[14] In fact, non-metropolitan areas are also emerging as successful startup centers, which bodes well for ensuring economic opportunity across India. For example,

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[5] ROBERT D. ATKINSON AND IAN TUFTS, THE HAMILTON INDEX, 2023: CHINA IS RUNNING AWAY WITH STRATEGIC INDUSTRIES, ITIF (Dec. 2023), https://itif.org/publications/2023/12/13/2023-hamilton-index/.

[6] *Id.* at 89.

[7] *Id.*

[8] Inc42, The State Of Indian Startup Ecosystem Report 2023 by Inc42 Media - Issuu at 11 (2023).

[9] *See* Indian Unicorn Tracker - Inc42 Media (noting 110 unicorns, half of which acquired this status in 2021 or 2022).

[10] Indian Unicorn Landscape - Startups, Growth, FDI, Investors (investindia.gov.in) (last visited 5/13/2024).

[11] *See* Alka Jain, *From 2014 to 2023: How the startup ecosystem is thriving in India despite all odds? Explained*, MINT (Jan. 18, 2024), From 2014 to 2023: How the startup ecosystem is thriving in India despite all odds? Explained | Mint (livemint.com).

[12] *Id.*

[13] *Id.*

[14] *Id.*

Jaipur has secured a prominent position in Fintech funding, attracting $214 million in 2023.[15] Indeed, startups have also played a vital role in job creation, generating around 1 million jobs by 2023, as well as supporting investments in upskilling and education highlight a commitment to empowering India's workforce.[16]

Despite this dynamism, the report raises concerns about market power in digital markets. For example, the report concludes that "digital markets such as consumer data feed-back loops, network effects, and economies of scale quickly pivot the market in favour of incumbent enterprises, making such markets inherently prone to concentration."[17] However, not only are network effects concomitant with consumer benefits, but concentration is not at all an inevitable result of digital competition. First, many of these claimed platform markets do not actually result in winner-take-all or winner-take-most environments that reflect an intrinsic risk of persistent dominance.[18] Rather, many digital markets are characterized by phenomena like multi-homing, where consumers use multiple competing platforms—increasing competition in the market.[19]

Moreover, the existence of market power and network effects does not by itself indicate that market failure exists. As the report acknowledges, the nature of competition in digital markets often takes the form of Schumpeterian "gales of creative destruction."[20] On this understanding of competition, firms compete for the market by creating a new product, only to be challenged by additional "leapfrog competition" that supplants the formerly dominant firm with a still newer product that dazzles consumers.[21] As such, in these dynamic markets market power is very often a feature, not a bug, of competition: size, scale, and scope create the appropriability incentives that allow firms to make the necessary investments in a dynamic competition that makes digital markets work.

Even if real and durable market failure exists, the sort of ex-ante bans contemplated by the Bill are justified only if they will improve upon the status quo. And yet, as the report notes, ex-ante regulation can often chill the very market forces that are best positioned to correct market failure and improve consumer welfare.[22] Indeed, as will be discussed further infra, a number of forms of conduct proscribed by the Bill—self-preferencing, cross-use of data, refusals to deal, and more—often reflect the sort of dynamic conduct that can improve market outcomes. Specifically, incremental innovations driven by product improvements have been

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[15] *Id.*

[16] *Id.*

[17] REPORT at 95.

[18] *See* Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 YALE L.J. at 14 (2021) ("Notwithstanding overwhelming evidence to the contrary, digital platforms are often said to be 'winner take-all' markets.").

[19] *See, e.g.*, Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. EUR. ECON. ASS'N 990, 991-94 (2003); Catherine Tucker, *Network Effects and Market Power: What Have We Learned in the Last Decade*, 32 ANTITRUST 72, 75-76 (2018).

[20] JOSEPH A. SCHUMPETER: CAPITALISM, SOCIALISM, AND DEMOCRACY 81 (1942).

[21] Timothy J. Muris & Joseph V. Coniglio, W*hat Brooke Group Joined Let None Put Asunder: The Need for the Price-Cost and Recoupment Prongs in Analyzing Digital Predation*, THE GLOBAL ANTITRUST INSTITUTE REPORT ON THE DIGITAL ECONOMY 1328–29 (November 11, 2020), http://dx.doi.org/10.2139/ssrn.3733758.

[22] REPORT at 91.

recognized as key drivers of economic growth.[23] However, the report appears to make no findings that the benefits of an ex-ante regime will outweigh these and other harms.

Rather, the report highlights certain limitations of the current ex-post enforcement model. But this is not the same as showing that ex-ante regulation will be an improvement upon the status quo. For example, while the report emphasizes the "complementary relationship between ex-ante and ex-post enforcement," this only proves that the two regimes are not inconsistent—not that the addition of the former will enhance consumer welfare.[24] In fact, precisely because of this complementarity, ex-ante regulation will not wholly eliminate the administrative costs associated with ex-post investigations, which will presumably continue in tandem with an ex-ante regime. Indeed, and as we will discuss further infra, because the conduct proscribed in the Bill is often pro-competitive, the harms from increased or costs from false positives that the ex-ante regime creates are likely to far outweigh any benefits from reductions in administrative costs.[25]

False positives can, in theory, be mitigated by more tailored company-specific rules, as opposed to those that generally apply on an industry-wide basis. To be sure, this is the option the Bill takes, which follows the UK's DMCC in giving regulators more discretion to craft individualized conduct codes for each company. But this decision raises additional issues. First, it risks resulting in the very administrative costs that the ex-ante regime was designed to prevent in the first place. For example, the Bill appears to contemplates extensive non-compliance inquiries that involve high administrative costs in the form of discovery, extensive findings of fact, and adversarial proceedings.[26] Second, as we have explained elsewhere, such an approach can create "the spectre of regulatory capture" and specifically implicates "concerns about disparate treatment, including potentially favoring established players over new entrants."[27] At bottom, rather than address market failures, the Bill risks creating a regime that only increases administrative costs and picks digital winners and losers.

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[23] See, e.g., Daniel Garcia-Macia, Chang-Tai Hsieh, Peter J. Klenow, *How Destructive Is Innovation?* 87 ECONOMETRICA 1507 (Sept. 2019) (finding that most growth comes from incumbents and incremental innovations).

[24] Regarding the consumer welfare standard in India, *see, e.g.*, Nisha Kaur Uberoi & Sanjeev Kumar Sriram, *Evolution of consumer welfare standard in Indian competition regime*, VOL. XI RMLNLU L. REV. 13 (2021), https://rmlnlulawreview.files.wordpress.com/2023/06/evolution-of-consumer-welfare-standard-in-indian-competition-regime.pdf.

[25] The Bill also notes that ex-post investigations often involve "narrow remedies" which "may not effectively address repeated conducts by the same digital enterprise, or similar conducts by different enterprises." REPORT at 92. But this is not necessarily the case: in the United States, ex-post enforcement against large technology companies has been resolved with de facto ex-ante rules in the form of consent orders that prohibit future similar anticompetitive conduct. *See, e.g.*, In the Matter of Motorola Mobility LLC and Google, Inc., FTC File. No 1210120 (July 24, 2013); United States v. Microsoft Corp., 231 F. Supp. 2d 144, 149–50 (D.D.C. 2002), aff'd, 373 F.3d 1199, 1250 (D.C. Cir. 2004).

[26] The Bill appears to create rather extensive reporting and compliance obligation when it obliges SSDEs to establish transparent and effective complaint handling mechanisms. *See* (Chapter III, Section 9).

[27] Robert D. Atkinson, Joseph V. Coniglio and Lilla Nóra Kiss: Comments to the UK Parliament Regarding the Digital Markets, Competition and Consumers Bill, ITIF (Jan. 22, 2024), https://itif.org/publications/2024/01/22/comments-to-uk-parliament-regarding-digital-markets-competition-and-consumers-bill/.

THE DIGITAL COMPETITION LAW WILL HARM INNOVATION

Even if digital regulation for India could be justified in principle, the specific regulatory regime proposed by the Bill raises several major substantive concerns. First, while it is yet unclear how many companies will fall under the scope of the law, a finding of market power does not appear to be a requirement for the quantitative tests. This is in stark contrast to both the EU's DMA and the UK's DMCC, which respectively include some form of market power criterion for the regulation to be applicable. Without such a requirement, the Bill would appear to target companies simply by virtue of being large, which is not at all proxy for the market failure that regulation should be designed to address. Indeed, these concerns are aggravated by the Bill's three-year designation period with automatic renewal, with limited opportunities to revoke the designation, which is itself inapposite with the often transient nature of market power in digital markets.[28]

The Bill's criteria for designating SSDEs are also overly broad with respect to its qualitative trigger, which creates considerable uncertainty as to which digital firms will be covered by the Bill. Specifically, the qualitative criteria detailed in the Bill are subjective and open-ended, and grant the CCI significant discretionary power in determining who will be categorized as an SSDE. Specifically, the Bill not only lists 15 broad factors that it will consider, but an additional catch-all factor that effectively renders the qualitative test not only ambiguous but vague. As such, the lack of clear guidelines on the designation process will likely not just prove problematic for businesses who are unsure of whether they may be subject to the regulation, but further open the gateway to regulatory capture if not also serious due process concerns.

Second, while the Bill contemplates that the precise restrictions will be determined on a company-specific basis, the nature of these restrictions as per se bans for several types of common business conduct will almost certainly chill pro-competitive behavior. Indeed, as threshold matter, the "fair and transparent dealing" prohibition is unlikely to admit of any precise specification. "Fairness" is a notoriously subjective concept that has long been plagued with difficulties when applied to an economic context.[29] Similarly, broad "non-discrimination" provisions are also invariably problematic. For example, price discrimination laws in the U.S. resulted in myriad "practical problems [from] dealing with a vague, complex, and burdensome law."[30]

Where the Bill's prohibitions are more concrete, the potential harm to innovation only becomes more apparent. For example, the Bill bans self-preferencing, or a digital platform prioritizing its own products or services over those offered by third-party businesses on its platform. This type of behavior is not only ubiquitous across the digital economy, but can almost always lead to a better user experience by integrating various products and services and increasing the platform's competitiveness.[31] For example, while often a

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[28] Specifically, the Bill appears to mandate SSDE designation review every three years with a process for revocation that seems cumbersome. Section 6 allows an SSDE to apply for revocation within the last six months of a designation period, but also requires the SSDE to wait at least one year after designation to initiate the process. Further, the Competition Commission of India (CCI) has 90 days to evaluate the request, potentially forcing an SSDE to remain classified for months even if it no longer meets the criteria.

[29] *See, e.g.*, Hal Varian, *Two Problems in the Theory of Fairness*, 5 J. PUB. ECON. 249 (1976).

[30] Timothy J. Muris, *Neo-Brandeisian Antitrust: Repeating History's Mistakes*, AEI Economics Working Paper 2023-02 (Jan. 2023), Muris-Neo-Brandeisian-Antitrust-WP.pdf (aei.org).

[31] *See, e.g.*, Trelysa Long: History Shows How Private Labels and Self-Preferencing Help Consumers | ITIF (Nov. 2022).

target of antitrust scrutiny, Google utilizes things like search defaults on Android to improve user experience, enhance the quality of its search product through increased scale, as well as increase inter-brand competition with rivals like Apple's iOS. A per se ban is thus wholly misplaced for this type of pro-consumer behavior.

Next, the Bill includes prohibitions surrounding "data usage," which it describes in terms of a firm using the non-public data of its users acquired on its platform to help it compete with those users. This type of prohibition, also termed "data misappropriation," is commonly leveled at vertically integrated digital platforms like Amazon, who offer third-party sellers a marketplace where they can sell to millions of consumers, but who are also both a first-party retailer as well as seller of many individual products. However, especially in the case of aggregated data, using data across multiple markets is a crucial way to correct information asymmetries and, in particular, better understand consumer demand. Doing so allows firms like Amazon to offer more relevant products and services to users, which is a practice that is not only endemic to modern brick-and-mortar retailers as well, but perhaps as old as commerce itself. That is, it is a good business practice that firms try to give customers what they want, and not something that should be banned per se.

Another provision in the Bill addresses allegations of large digital platforms restricting users from accessing or utilizing third-party applications on their core services. However, openness to third-party applications does not necessarily foster competition. Rather, it can often dampen it: refusals to deal are almost always procompetitive, with the U.S. Supreme Court making clear that gains from increased access are unlikely to outweigh the costs of diminished innovation, which are particularly acute in digital markets.[32] For example, while it has long been argued that Meta should share its data assets with applications that use its platform and allow for data portability, requiring firms like Meta to deal with their rivals in this way diminishes not only Meta's incentives to invest, but also the incentives for rivals to create new platforms compete with Meta—chilling the dynamic platform competition that is key for digital markets to work.

The Bill also targets anti-steering provisions by preventing firms from restricting business users from "directing their end users to their own or third-party services." To be sure, concerns about these provisions featured prominently in the EU's recent fine against Apple, which alleged that the company limited developers from, for example, "[i]ncluding links in their apps leading iOS users to the app developer's website on which alternative subscriptions can be bought."[33] But Apple's so-called anti-steering policies are critical to safeguarding the integrity of its "walled garden" ecosystem by, among other things, ensuring privacy, security, and user safety. And, while the Bill is careful to note that this ban will exclude "restrictions that are integral to the provision of the Core Digital Service," it is not only unclear how broadly this will be interpreted, but the Bill overlooks that anti-steering provisions can be beneficial to consumers even if they are not necessarily technically or commercially essential to the platform. Procompetitive behavior is still likely to be chilled.

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[32] *See* Verizon Comm'cs v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 407–8 (2004) ("Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.").

[33] Press Release, Commission fines Apple over €1.8 billion over abusive App store rules for music streaming providers (Mar. 4, 202), https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1161.

Finally, the Bill identifies tying and bundling, as well as a platform requiring or incentivizing users to use additional products alongside their core service, as behavior that will be treated as per se illegal. But this type of conditioning behavior, whether contractual (tying) price-based (bundling) or by design (technological tying) is usually not anticompetitive, and often admits of strong procompetitive justifications that benefit consumers. As has long been understood, tying, bundling, and technological integration not only play an important role in preventing inefficiencies associated with free riding, but can benefit consumers through increased convenience and introducing consumers to new offerings, better value, and a more integrated product ecosystem. For digital markets especially, the latter form of technological tying, while found to be anticompetitive in cases like United States. v. Microsoft, it is ever-present throughout the digital economy and typically beneficial for consumers, who benefit from a seamless user experience.[34]

DIGITAL REGULATION IN GLOBAL CONTEXT

The report rightly considers the implications of digital regulation in the context of global trends, but unfortunately provides an incomplete picture. First, the report seems to suggest that the U.S. Congress is in the process of passing legislation aimed at digital platforms, and in particular the American Innovation and Choice Online Act, the Ending Platform Monopolies Act, and the Open App Markets Act.[35] In reality, none of these bills, which are all over two years old, are likely to be enacted into law in this Congress, let alone in any potential future Republican administration. Indeed, a major Republican supporter of increased antitrust enforcement, Ken Buck (R-CO), and a sponsor of the Ending Platform Monopolies Act, has just resigned—a significant setback for getting the necessary bipartisan support for major antitrust legislation aimed at digital firms.[36] In fact, rather than expand the U.S. antitrust agencies' authority, the House Judiciary Committee has recently released a report detailing major dysfunction at the FTC under Chair Khan's leadership.[37]

Furthermore, the Report of the Committee on Digital Competition Law understandably does not discuss the nontheless critical geoeconomic issues that bear upon the Bill, and in particular the state of the critical U.S.-India relationship amidst a rising China seeking techno-economic dominance.[38] Indeed, America and India's tech ecosystems are highly symbiotic: two of the U.S.'s leading technology companies (Microsoft and Google) have Indian CEOs, and by some measures as many as 40 percent of Silicon Valley CEOs or founders are from South Asia or India.[39] On the flip side, the U.S. has drastically increased investment into India as it continues

[34] United States v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001).

[35] REPORT at 77.

[36] Clare Foran, *GOP Rep. Ken Buck to leave Congress at end of next week*, CNN (Mar. 12, 2024), GOP Rep. Ken Buck to leave Congress at end of next week | CNN Politics.

[37] INTERIM STAFF REPORT OF THE COMMITTEE OF THE JUDICIARY U.S. HOUSE OF REPRESENTATIVES, ABUSE OF POWER, WASTE OF RESOURCES, AND FEAR: WHAT INTERNAL DOCUMENTS AND TESTIMONY FROM CAREER EMPLOYEES SHOW ABOUT THE FTC UNDER CHAIR LINA KHAN (Feb. 22, 2024).

[38] *See generally* David Moschella and Robert D. Atkinson, *India Is an Essential Counterweight to China—and the Next Great U.S. Dependency*, ITIF (Apr. 12, 2021), India Is an Essential Counterweight to China—and the Next Great U.S. Dependency | ITIF ("As America seeks to counter a rising China, no nation is important than India, with its vast size, abundance of highly skilled technical professionals, and strong political and cultural ties with the United States.").

[39] Mastufa Ahmed, News: Indian talent crucial for America's tech industry: Silicon Valley Chamber Chief — People Matters (May 6, 2024).

to de-risk from China, and Google alone has committed to invest $10 billion in India's digitization fund. But by engaging in regulation that will invariably and greatly burden America's leading firms, who are already facing overbearing regulatory costs from the DMA, India risks creating frictions in its relationship with the U.S. at a critical time given China's rise and global techno-economic ambitions.

At bottom, India must decide whether it wants to follow the American approach to innovation that gave rise to the large technology companies that are the envy of the world, or the trend of heavy-handed competition policy long taken by Europe, which lacks large digital giants of its own. Ultimately, taking the latter path of stifling American and Indian innovation through regulation will only benefit China, as well as send the wrong signals about the U.S.-India relationship, which is critical to address the challenges posed by China.

RECOMMENDATIONS

ITIF recommends that India strongly consider stepping back from experimental ex-ante digital regulation and at least first analyze the effects of similar regulations in other jurisdictions before embarking on a policy that is not only unnecessary for India, but risks doing tremendous harm to its growing digital economy.

- **Wait and see:** Instead of following in the footsteps of the EU's DMA, which is already proving problematic for both consumers and businesses, India should make it's top priority fostering a business environment that eschews heavy handed regulations and instead looks to fuel the innovation and growth that will continue to drive both its thiriving startup environment and economy more broadly.
- **Minimize regulatory discretion and avoid per se bans:** If India does proceed with digital regulation, in lieu of its current quantitative and qualitative criteria it must clearly define who will be subject to the regulation in a way that is based on some measure of durable market power. It should also abandon per se bans in favor of a more flexible approach that allows firms to offer procompetitive justifications for their behavior.
- **Reconsider the Bill's geopolitical implications**: While the Report of the Committee on Digital Competition Law rightly considers the global context for the Bill, special attention must be paid to the potential ramifications of the Bill on India's relationship with important allies like the United States amidst challenges posed by a rising China. The move toward regulatiory regimes that disporporitionately burden America's leading technology firms, as opposed to a more open innovation environment for American and Indian firms to jointly flourish, will in the long run only aid China's in its quest for techno-economic dominance.

CONCLUSION

The proposed Digital Competition Law comes at a time when India's digital markets are ripe for innovation, not regulation. Unfortunately, rather than allow India's dynamic high-tech and startup ecosystem to continue to flourish, the Draft Digital Competition Bill follows the path of overbearing competition policy taken by the EU, who lacks any leading digital firms. Instead, India should privilege the U.S. model of markets and dynamism that has led to the creation of the high-tech firms that are the envy of the world and which drive innovation and economic growth not just in America and India but around the world.

Thank you for your consideration.

Joseph Van Coniglio, Esq.
Director, Schumpeter Project on Competition Policy
Information Technology and Innovation Foundation

Lilla Nóra Kiss, Ph.D.
Senior Policy Analyst, Schumpeter Project on Competition Policy
Information Technology and Innovation Foundation