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ANTI-TRUST CONCERNS EMERGING FROM ALGORITHMIC SELF-PREFERENCING: FAIR PLAY OR FOUL PLAY?

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ABSTRACT

The digitalization of markets in India has led to the rapid growth of e-commerce and the proliferation of disruptive technologies like Artificial Intelligence. However, concerns have emerged regarding algorithmic self-preferencing, where e-commerce platforms prioritize their own products through subtle algorithmic manipulations. This practice raises antitrust concerns because it leads to market distortions and consumer welfare issues. While existing laws address some aspects of anti-competitive behavior, they often fall short in regulating digital ecosystems comprehensively. To address these challenges, the Draft Digital Competition Bill, 2024 proposes regulations specifically targeting algorithmic self-preferencing by Systemically Significant Digital Enterprises (SSDEs). This essay explores the nuances of algorithmic self-preferencing, analyzes current regulatory frameworks, and evaluates the implications of the proposed bill. While the bill represents a significant step towards regulating digital competition, it must strike a balance between curbing anti-competitive practices and fostering innovation in the digital economy. The essay emphasizes the need for careful consideration of stakeholder interests and potential revisions to the bill to ensure effective regulation in India's evolving digital landscape.

ANTI-TRUST CONCERNS EMERGING FROM ALGORITHMIC SELF-PREFERENCING: FAIR PLAY OR FOUL PLAY?

INTRODUCTION

In the recent times, India has established itself as one of the biggest and swiftly-growing digital markets across the world. Digitalisation has taken the country by a storm leading to a spurt in the growth of fields such as e-commerce and introduction of disruptive technologies like Artificial Intelligence.

A new form of competitive concern in digital markets is algorithmic self-preferencing. E-

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commerce companies perform a dual role – as an intermediary wherein they facilitate transactions between buyers and sellers and as a seller themselves wherein they offer their own goods and services on the platform. As a result, they have the incentive and ability to give differentiated treatment to their own goods compared to rivals. This is popularly known as self-preferencing. The problem with using algorithms for such practices is that enterprises defend their conduct by stating that algorithms are fully automated in nature and there is no human interference. If their products are successful, it is purely on merit. However, since these algorithms are not always accessible to the public, it is difficult to determine whether they have tweaked it to suit their interests or if they are feeding it non-public internal seller data to gain a competitive edge.[1]

From a traditional and historical perspective, self-preferencing is not a new phenomenon. In fact, it is a routine industry practice for supermarkets to display their products more prominently while placing their competitors' product in the back. So, what is the harm in algorithmic self-preferencing in digital markets? The answer stems from the very nature of digital markets. Since this market is characterised by, network effects, winner-takes-all approach and endogenous sunk costs, self-preferencing can cause the market to irrevocably tip in favour of one market player.[2]

INDIAN LAWS ON ALGORITHMIC SELF-PREFERENCING: NAVIGATING THE REGULATORY TERRAIN

Self-preferencing is not an isolated anti-competitive practice. In fact, it is an umbrella term which encompasses a wide variety of practices which can be regarded as anti-competitive. Self-preferencing can occur through exclusionary conduct, tying and bundling, leveraging dominant position to enter into secondary market, entering into horizontal and vertical agreements, imposing unfair conditions on other sellers etc. Therefore, the whole gamut of activities that can be regarded as self-preferencing is covered by both Section 3 and Section 4 of the

[1] Guillauma Duquesne, 'What Constitutes Self-Preferencing and its Proliferation in Digital Markets' (*Global Competition Review*, 8 December 2023), <https://globalcompetitionreview.com/guide/digital-markets-guide/third-edition/article/what-constitutes-self-preferencing-and-its-proliferation-in-digital-markets#:~:text=As%20such%2C%20the%20Court's%20judgment,not%20a%20very%20clear%20concept> accessed 1 December 2025.

[2] Jonathan Jacobson and Ada Wang, 'Competition or Competitors: The Case of Self-Preferencing' (2023) 38(1) Antitrust <https://www.wsgr.com/a/web/bW8aKf3yEkMqwKUwDCRi6D/jacobson-fall23.pdf> accessed 1 December 2025.

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Competition Act, 2002. [3]

Under the Foreign Direct Investment Policy ("**FDI")**, foreign e-commerce entities engaged in online marketplaces are restricted from providing services such as logistics, warehousing, and advertising only to business users in which they have equity participation or common control, ensuring impartiality and a level playing field.

However, FDI Policy has limitations. It does not extend its regulatory reach to encompass large platform enterprises operating in multi-sided digital markets such as search engines, social media platforms, and digital advertising. Furthermore, the policy only applies to foreign-funded e-commerce entities operating in India, leaving domestic e-commerce platforms unaffected by its regulations**.**[4]

While the Competition Act, 2002 has ex-ante regulations, anti-competitive conduct of tech-giants reveal that a lot of such practices are slipping out of the Competition Commission of India's ("**CCI")** radar thereby necessitating a stronger regulatory framework. The anti-competitive contours of algorithmic self-preferencing is examined further in the following sections.

BREAKING DOWN THE CODE: EXAMINING THE INTRICACIES OF ALGORITHMIC SELF-PREFERENCING

Algorithms are the invisible hands that shape the landscape of online markets. These algorithms are designed to optimize user experience and drive engagement. Therefore, they wield immense influence over search results, product recommendations, and pricing strategies. By subtly tweaking the parameters of these algorithms, businesses can ensure that their offerings receive preferential treatment, appearing more prominently in search results and recommendations thereby increasing their visibility and likelihood of being chosen by consumers. Algorithms governing ad placement allow companies to secure prime advertising real estate within their own platforms.[5]

[3] Manjushree (n 1).
[4] Dr. Manoj Govil, 'Report of the Committee on Digital Competition Law' (*Ministry of Corporate Affairs*, 2024), <https://www.mca.gov.in/bin/dms/getdocument?mds=gzGtvSkE3zIVhAuBe2pbow%253D%253D&type=open > accessed 1 December 2025.
[5] Mikaela Pyatt, 'Rulemaking to Bar Self-Preferencing by Technology Platforms' (2023) 26 STAN TECH. L. REV. 143 <https://law.stanford.edu/wp-content/uploads/2023/01/Publish_26-STLR-143-2023_Rulemaking-to-Bar-Self-Preferencing_Pyatt_Reduced.pdf> accessed 1 December 2025.

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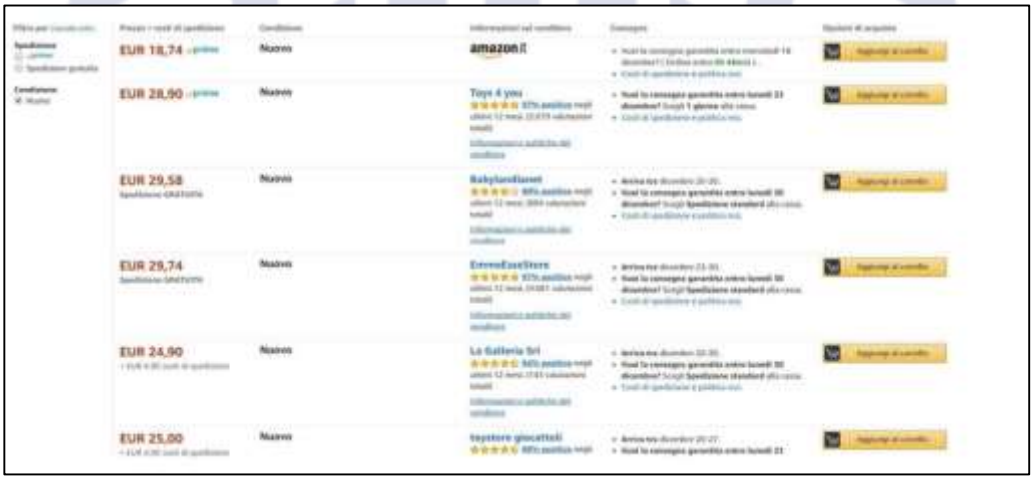
Algorithms facilitate personalized targeting, enabling companies to tailor promotions and discounts to individual users based on their browsing history, purchase behavior, and demographic information. This level of customization not only enhances user experience but also serves as a powerful tool for self-preferencing as companies can strategically incentivize consumers to opt for their products or services over competitors'.[6]

Consider the example of Amazon which has a private label called Cloudtail in which it has 24% shareholding. Coincidentally, it is also the largest seller on the e-commerce platform. Amazon has created a class of sellers called preferred sellers who exclusively use Amazon's logistical services called Fulfilled by Amazon ("**FBA**") It is alleged that Amazon gives special treatment to preferred sellers by giving them exclusive deals, discounted fees, access to global retail tools. As a result, they always feature at the top of search results. It is often only the preferred sellers that the Amazon 'buy now' button recommends.[7] **(Exhibit I).**

Exhibit I – Amazon website in Europe where 'Prime' Sellers are listed first despite other sellers offering better prices



Source - Amazon FBA, A-528, Decision of 9 December 2021, Italian Competition Authority

Similarly, such practices are evident in other platforms such as Swiggy, Zomato, Oyo and Make My Trip as well.

[6] Federico Etro, 'e-Commerce Platforms and Self-Preferencing' (2023) Working Paper N. 07/2023 DISEI <https://www.disei.unifi.it/upload/sub/pubblicazioni/repec/pdf /wp07_2023.pdf> accessed 1 December 2025.

[7]Madhavi Singh, 'Amazon's Competition Investigation in India: A Case for Expansion of Investigation and Grant of Interim Relief' (2021) 17(1) IJLT <https://www.ijlt.in/journal/amazon%E2%80%99s-competition-investigation-in-india%3A-a-case-for-expansion-of-investigation-and-grant-of-interim-relief> accessed 1 December 2025.

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THORIES OF HARM ROOTING FROM SELF-PREFERENCING: AN ASSESSMENT

Amazon indirectly coerces sellers into using FBA services. Otherwise, it decreases the visibility of sellers. It is a marketing slogan that *"Jo dikhta hai, wo bikhta hai"* (Only what is visible is sold). Coercion in digital markets should not be interpreted in conventional sense. Since digital markets are characterised by network effects, tying in such markets is not solely impacted by price characteristics[8] Thus, thresholds for coercion must be kept low.[9] In ***the Microsoft Case*** it was held that "coercion could still exist when the consumer is not required to use it or is entitled to use the same product supplied by a competitor of the dominant undertaking"[10] A mere nudge in the form of pre-installation of apps is coercion in digital markets. Even if using two services together is not mandatory, consumer inertia achieves the same results. Consumer inertia refers to the tendency of consumers to stick with familiar purchasing patterns and resisting exploration of new options due to convenience or habit.[11]

The use of search preference algorithms by platforms has adverse effects on the relevant market. Such algorithms may favor a select few retailers, granting them heightened visibility and access to consumers compared to merchants using alternative logistics services. This could incentivize third-party merchants to avoid utilizing other logistics services thereby consolidating market power. Algorithmic search biases can lead to market foreclosure by distorting competition. This discourages third-party retailers from selling on competing e-commerce platforms, as doing so would entail either duplicating logistics costs or investing in expensive multi-channel management services offered by the platform.[12] It also hinders innovation of integrated logistics operators due to reduced competition. Non-integrated delivery operators also face challenges in improving their offerings as they struggle to achieve sufficient delivery scale.[13]

[8] 'ABUSE OF DOMINANCE IN DIGITAL MARKETS' 44 (Organization for Economic Co-operation and Development, 2020), 44; Case 333/94, Tetra Pak International SA v. Commission, [1996] ECR I-5951.
[9] Nora Lampecco, 'Degree of Coercion in Tying and the Risks of a High Threshold: The Indian Google Meet Case as an Illustration' (*Kluwer Competition Law Blog*, 30 Jule 2021), <https://competitionlawblog.kluwercompetitionlaw.com/2021/07/30/degree-of-coercion-in-tying-and-the-risks-of-a-high-threshold-the-indian-google-meet-case-as-an-illustration/> accessed 1 December 2025.
[10] Case T-201/04 - Microsoft v. Commission, ECLI:EU:T:2007:289, ¶ 850-69
[11] Matthew Bennett, 'Integrating Consumer Behaviour Insights in Competition Enforcement – Background note' Organization for Economic Co-operation and Development, DAF/COMP (2022)8, (24 June 2022), <https://one.oecd.org/document/DAF/COMP(2022)8/en/pdf.> accessed 1 December 2025.
[12] Tianxin Zou and Bobby Zhou, 'Self-Preferencing and Search Neutrality in Online Retail Platforms' (*SSRN*, 2 April 2023) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3987361> accessed 1 December 2025.
[13] Amazon FBA, A-528, Decision of 9 December 2021, Italian Competition Authority, ¶ 702.

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FROM CODE TO COURTROOM – JUDICIARY'S INTERPRETATION OF ALGORITHMIC SELF-PREFERENCING

The issue of self-preferencing by dominant digital platforms has been at the forefront of antitrust scrutiny worldwide. Notable cases in both the European Union (EU) and India shed light on its implications for competition and consumer welfare. In the EU, landmark cases such as ***Google Shopping Case***[14] have set significant precedents regarding self-preferencing. The European Commission's investigation into Google's comparison-shopping service found that the tech giant abused its dominant position by favoring its own service in search engine results over rival services. By positioning and displaying its own service more prominently, Google's conduct was deemed capable of extending its dominance into related markets, potentially stifling competition and innovation. The subsequent ruling by the General Court upheld the Commission's decision. It affirmed that self-preferencing by dominant firms can constitute a stand-alone abuse of dominance if it leads to anticompetitive effects and deviates from normal competitive behaviour.

In India, the CCI in ***Google Search Bias Case***[15] found Google guilty of abuse of dominance in three main areas: the display of 'universal results' in fixed positions in search engine results pages (SERPs), manipulation of the search algorithm to favor its own vertical services, and imposing unfair conditions in syndication/intermediation agreements with website publishers. Google's actions were deemed anticompetitive as they diverted traffic from competitors' pages, restricted choice for website publishers, and leveraged its dominant position in the online search market. To remedy these breaches, CCI issued a cease and desist order, directed Google to display disclaimers and remove restrictive clauses, and imposed a penalty of INR 135.86 crores.

In the ***Google Play Store Billing Case***[16]**,** Google's requirement for app developers to exclusively use its billing system for in-app purchases was found to impose unfair conditions, potentially limiting developers' choices and stifling competition in the app marketplace.

Objective justification plays a pivotal role in determining the legitimacy of dominant platforms' conduct. While both Google and Amazon have presented efficiency arguments to defend their

[14] Case T-612/17 – Google and Alphabet v. Commission, ECLI:EU:T:2021:763.
[15] Matrimony.Com Limited Informant v. Google LLC, Case No. 07 and 30 of 2012 (CCI).
[16] XYZ v. Alphabet Inc and Others, Case No. 07 of 2020.

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self-preferencing practices, competition authorities have often deemed these arguments insufficiently substantiated or not directly linked to the conduct under scrutiny. However, the acceptance or rejection of such arguments may vary depending on the specifics of each case, as seen in the ***Google Street Maps Case***.[17] In this case, Google's exclusive positioning of its mapping service was considered a technical improvement benefiting consumers and was objectively justified by the court.

Currently, Flipkart and Amazon's anti-competitive conduct due to algorithmic self-preferencing *inter alia* is under investigation in ***In Re: Delhi Vyapar Mahasangh and Flipkart Internet Private Limited and ors.*** case.[18]

DISSECTING THE DRAFT DIGITAL COMPETITION BILL, 2024: IMPLICATIONS FOR INDIA'S DIGITAL ECONOMY

The last decade witnessed a revolution in terms of new and emerging business models which largely operate online. Increasing presence of businesses in the online market has created competitive concerns. Traditional antitrust frameworks across the world faced a challenge in dealing with the unique characteristics of digital market such as network effects, non-price competition, algorithms, multi-sided market etc. The Parliamentary Standing Committee's report titled "Anti-Competitive Practices by Big Tech Companies" in 2022 identified at least ten practices regarded as anti-competitive in the virtual space. This raised alarm bells for framing a new law specifically dedicated to regulating competition in the online market.[19] **(Exhibit II)**

As a result, the "Committee on Digital Competition Law" was constituted by the Ministry of Corporate Affairs and it was tasked with the mandate of developing an ex-ante law for digital competition. The committee published its report on March 2024 and the report also included a Draft Digital Competition Bill. ("**DCB**").

[17] Streetmap.EU Ltd v. Google Inc, [2016] EWHC 253 (Ch).
[18] Case No. 40 of 2019.
[19] Bhoomika Agarwal and Others, 'Brief – Report of the Committee on Digital Competition Law and Draft Digital Competition Bill 2024' (*The Dialogue*, 3 April 2024), <https://thedialogue.co/wp-content/uploads/2024/04/Brief-Report-of-the-Committee-on-Digital-Competition-Law-and-Draft-Digital-Competition-Bill-2024.pdf> accessed 1 December 2025.

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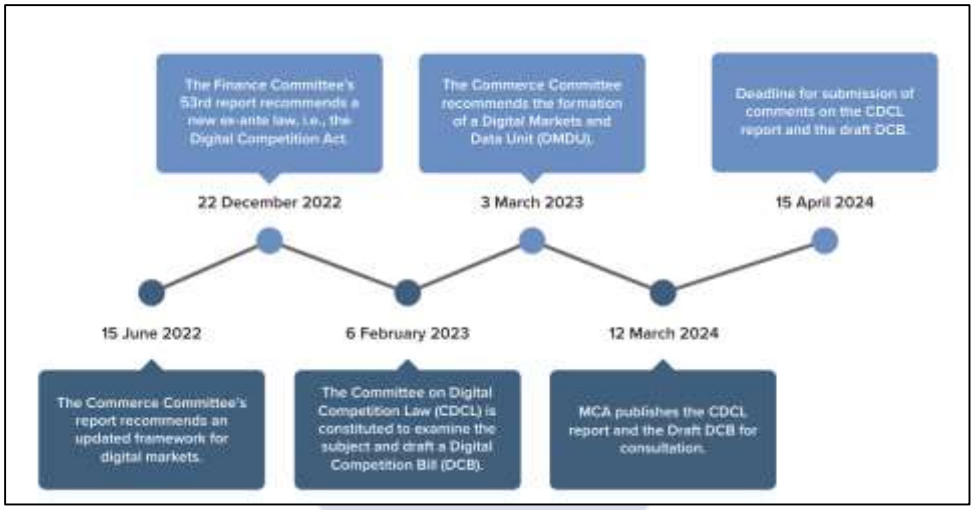
Exhibit II – Evolution of the DCB, 2024



Source - Bhoomika Agarwal and Others, 'Brief – Report of the Committee on Digital Competition Law and Draft Digital Competition Bill 2024' (*The Dialogue,* 3 April 2024), <https://thedialogue.co/wp-content/uploads/2024/04/Brief-Report-of-the-Committee-on-Digital-Competition-Law-and-Draft-Digital-Competition-Bill-2024.pdf> accessed 1 December 2025.

While the DCB has various Sections regulating different aspects of digital competition, the analysis in this essay is restricted to the Sections pertaining to self-preferencing.

1. **Definition of SSDE**

   The bill classifies certain enterprises providing Core Digital Services as either Systemically Significant Digital Enterprise ("**SSDE**") or Associate Digital Enterprises. Section 3 lays down the criteria for designating an enterprise as an SSDE. The bill provides for both quantitative and qualitative tests that an enterprise has to satisfy to become SSDE. The quantitative test is "Significant financial strength" wherein global turnover, India-specific turnover, global merchandise value, global market capitalization etc. is taken into account. If the enterprise in question is part of a group, then it is not viewed in isolation but the entire group of enterprises is evaluated as a whole. This is a commendable step because it ensures that digital enterprises which have large customer base but lack financial strength are not casted out of the net.[20]

   The qualitative test is also called the "Significant spread test" wherein the CCI can determine if an enterprise is SSDE. The factors laid down for assessing such enterprises resemble the factors in Section 19(4) of the Competition Act, 2002. Section 19(4) lay down the factors for determining if an enterprise is dominant for the purposes of Section

[20] Section 3, Draft Digital Competition Bill, 2024.

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4. Size and resources of enterprise in question, countervailing buyer power, market structure and size, barriers to entry etc. are examples of few factors. The list is not exhaustive.

2. Self-Preferencing

Section 11 is titled "Self-Preferencing" and prevents an SSDE from favouring its own goods and services or those of its related parties. It also cannot favour the products of third-parties with whom it has made arrangements for providing certain services or selling products. A key element of this Section is the use of the words "directly or indirectly." SSDEs cannot adopt any indirect means of favouring products as well.[21] Similarly, Section 15 prohibits SSDE from requiring or incentivising consumers to use the products of SSDEs or its related parties or third parties with whom it has made arrangements. It tackles self-preferencing by way of tying and bundling.[22]

However, Section 15 exempts tying and bundling to the extent that it is integral for providing core digital service. SSDEs can only justify the service from a pure functional perspective. It cannot disguise its anti-competitive practices in the name of consumer benefit.

Section 12 prevents SSDEs from using non-public data of business users functioning on their Core Digital Service to compete with them on the same platform. The Section also defines non-public data to mean "any aggregated and non-aggregated data generated by business users that can be collected through the commercial activities of business users or their end users, on the identified Core Digital Service of the Systemically Significant Digital Enterprise"[23] This Section addresses violations to platform neutrality.

3. Exemptions

The bill provides for two kinds of exemptions – those provided by the Central Government and the following grounds as mentioned in the bill:

(a) "Economic viability of operations;
(b) Prevention of fraud;
(c) Cybersecurity;
(d) Prevention of unlawful infringement of pre-existing intellectual property rights;
(e) Requirement of any other law in force; and

[21] Section 11, Draft Digital Competition Bill, 2024.
[22] Section 15, Draft Digital Competition Bill, 2024.
[23] Section 12, Draft Digital Competition Bill, 2024.

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(f) Such other factors as may be prescribed"

If the SSDE qualifies for any of the above-mentioned exemptions, it need not comply with the obligations laid out in the bill.[24]

But for the exemptions, if an enterprise fails to comply with the provisions of the bill, it is liable for penalty "not exceeding ten per cent of its global turnover in the preceding financial year" to the year SSDE defaulted.[25]

THE DCB, 2024 – A CRITICAL PERSPECTIVE

The current ex-post system to regulate anti-competitive conduct by digital enterprises is not effective as time is of the essence in digital markets. Ex-post mechanism involves a hierarchical adjudicatory process and in-depth fact-finding procedure. Moreover, defining the relevant market for conduct arising in the digital space is a complex process owing to the multi-sided nature of the enterprises. The entire procedure is time-consuming and cumbersome and by the time it is over, the market would have already tipped in the dominant enterprise's favour.[26]

Although the Competition Act, 2002 serves as an ex-ante framework, it does not comprehensively address the nuances of anti-competitive practices in the digital space thereby letting few practices slip through the cracks. So far, an attempt has been made to squeeze modern anti-competitive practices within traditional definitions of competition law. This exercise served as a quick fix and proved to be effective but only to a limited extent. Digital competition regulation evolved within the traditional competition law framework in a haphazard manner with poorly defined terms. Therefore, the DCB is a welcome change.[27]

However, caution must be taken to ensure that it does not stifle innovation and cause a chilling effect. Tech-Giants such as Google, Amazon and Meta have expressed their discontent with

[24] Section 7, Draft Digital Competition Bill, 2024.
[25] Section 28, Draft Digital Competition Bill, 2024.
[26] Avimukt Dar, 'Digital Competition Bill, 2024 | Is Ex-Ante Regulation The Next Best Thing Since Sliced Bread or a Frankenstein in the Making' (*Mondaq*, 11 April 2024) < https://www.mondaq.com/india/antitrust-eu-competition-/1449578/digital-competition-bill-2024-%7C-is-ex-ante-regulation-the-next-best-thing-since-sliced-bread-or-a-frankenstein-in-the-making#:~:text=Based%20on%20its%20detailed%20assessment,process%20involved%20in%20ex%2Dpost> accessed 1 December 2025.
[27] KR Srivats and Siddharth Cherian, 'Draft Digital Competition Bill: A boon or a bane?' (*The Hindu Business Line*, 26 March 2024) <https://www.thehindubusinessline.com/multimedia/audio/draft-digital-competition-bill-a-boon-or-a-bane/article67990827.ece> accessed 1 December 2025.

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the proposal of an ex-ante regulation for digital competition.[28]

However, not all forms of self-preferencing is anti-competitive. Ultimately, the rule of reason test is adopted to determine if the pro-competitive effects outweighs the anti-competitive effects. If the answer is in the affirmative, the practice is legitimate in nature. But the bill does not account for these nuances and lays in general terms that SSDEs should not favour its own products. Well-defined regulations need to come into force to ensure that the bill does not curb legitimate practices as well.

A major shortcoming of this bill is that it is not based on any theory of harm. The self-preferencing clause will be effective in the context of an intermediary platform. However, mandating it on all SSDEs is counterproductive because it wrongly implies that dominant enterprises do not have a right to promote and advertise their own products.

The clause on restricting use of non-public seller data seem to be inspired from Amazon's anti-competitive conduct. However, bad experiences with a few enterprises is not a justification to enforce blanket prohibitions on all SSDEs. Various MSMEs bank on algorithmic visibility to gain new consumers and generate sales. By preventing such practices, a major sector of Indian business entities will take a massive hit causing irreparable economic ramifications. [29]

The definition of core digital services as given in Schedule I does not account for Generative AI enterprises such as ChatGPT, GenAI etc.

Although the idea of a dedicated law for regulating digital competition is appealing, it needs to be executed properly. The bill is currently open for public comments and due to repeated requests, the Ministry of Corporate Affairs has extended the deadline till May 15, 2024. After due stakeholder consultation, it is hoped that the concerns of the public are taken into account and changes are made in the bill. This bill is merely a first step in heralding a new age of antitrust enforcement. A closer watch needs to be kept to examine further developments in the

[28] Surabhi, 'Digital Competition Bill: Here's how it can affect the Big Tech companies' (*Business Today*, 13 March 2024) <https://www.businesstoday.in/technology/news/story/digital-competition-bill-heres-how-it-can-affect-the-big-tech-companies-421317-2024-03-13> accessed 1 December 2025.
[29] Anupam Sanghi, 'Why blindly emulate digital competition regulations from other countries?' (*Bar and Bench*, 4 May 2024) <https://www.barandbench.com/columns/why-blindly-emulate-digital-competition-regulations> accessed 1 December 2025.

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bill. Until then, all hope is not lost.[30]

FINAL THOUGHTS

The emergence of algorithmic self-preferencing in India's digital markets poses significant challenges to competition and consumer welfare which requires robust regulatory responses. While traditional antitrust frameworks offer some recourse, the evolving nature of digital markets demands a more nuanced approach. The Draft Digital Competition Bill, 2024 represents a step towards addressing these challenges, yet it must navigate a delicate balance between curbing anticompetitive practices and fostering innovation. As the bill undergoes public scrutiny and potential revisions, it is imperative to consider the diverse interests of stakeholders and ensure that any regulatory intervention strikes a judicious balance between promoting fair competition and preserving entrepreneurial freedom in the digital economy.

[30] PTI, 'Govt. extends deadline for comments on draft digital competition bill till May 15' (*Economic Times*, 9 April 2024) <https://m.economictimes.com/news/india/govt-extends-deadline-for-comments-on-draft-digital-competition-bill-till-may-15/articleshow/109173437.cms> accessed 1 December 2025.