

Data Dominance and its Dynamics

In today's digital landscape, data has emerged as a critical driver of success, setting the most prosperous companies apart. With an unprecedented volume of data generated daily, the significance of leveraging data efficiently cannot be overstated. Over the past few years, the creation, consumption, and storage of data have skyrocketed, with estimates predicting it to reach a staggering 180 zettabytes by 2025. Leading technology giants have been early adopters, harnessing the power of data to make informed decisions and mitigate risks.

Data analysis has also brought about transformative changes across various industries, from healthcare, where patient data informs personalized treatment plans, to finance, where predictive analytics aids in assessing credit risks and customizing investment strategies.

The aforesaid developments in data have resulted into data dominance. Data dominance involves not only who is hoovering up the most data but also encompasses who dominates the supply of hardware, talent and systems that process the world's infinite supply of raw information.

Now having mentioned about data governance, it is important to comprehend the meaning of dominant firms. The firms that benefit in the digital economy are those that can both amass large volumes of data and analyse them to create a competitive advantage. They have substantial data that can be deployed behind the most profitable business models. The platforms like social engines and networking sites provide several services to users for free. These platforms sell the data to advertising agencies, who then use this data to

analyse consumer behaviour and buying patterns and lure consumers with personalised and relevant advertisements.

Thus, the menace of data dominance can be associated to the mushrooming of social media platforms which took birth as a communication tool in catalysing social interactions between individuals through the medium of internet, gradually evolved into a complex ecosystems of digital interactions between a diverse range of stakeholders, including advertisers, digital entertainment service providers, and anyone seeking to connect with individual social media account holders.

While social media platforms may have achieved their positions of economic success through their investments in innovative technologies and their pursuit of shrewd business strategies, there has been a growing discomfort amongst competition authorities and policymakers over in the ways in which they have reinforced their economic positions in online markets, as well as how they have wielded their outsized degree of market power they have acquired within a relatively short span of time.

In light of the fact that majority of jurisdictions are showing proclivity towards ex-ante approach instead of ex-post approach in studying the behaviour of large digital enterprises, It engenders curiosity to reconnoitre the emerging international practice pertaining to ex-ante legislative instruments and policy reforms pertaining to digital markets in select international jurisdictions. In this regard, the following jurisdictions have been discussed in the ensuing table – EU, UK, Germany and Japan.

S. No.	Jurisdiction	Relevant ex-ante legislative instruments and policy reforms	Status
1.	EU	The DMA (Digital Markets Act, 2022) was introduced through the Digital Services Act Package in December 2020. It is the most significant ex-ante instrument introduced in the EU to address anticompetitive conduct by large digital undertakings designated as 'Gatekeepers' providing 'core platform services'. Both prohibitory and mandatory ex-ante obligations are imposed on Gatekeepers.	The DMA came into force on 1 st November 2022.
2.	UK	Post the report of the Digital Competition Expert Panel constituted by the Government of the UK headed by Professor Jason Furman, and the report of the Competition and Markets Authority ("CMA") on its market study on Online Platforms and Digital Advertising, a need was felt to institute a robust ex-ante regime to regulate digital markets in the UK and establish a Digital Markets Unit within the CMA, respectively. The Draft DMCC (Digital Markets, Competition and Consumers Bill, 2023), which was introduced before the UK Parliament on 25 th April 2023, focuses on large undertakings engaged in digital activities having a UK nexus. Undertakings fulfilling certain criteria may receive a 'Strategic Market Status' ("SMS") in respect of a digital activity from the CMA. The Draft DMCC imposes obligatory and preventive conduct requirements on SMS entities which are ex-ante in nature.	The Draft DMCC is currently at the draft stage and is awaiting passage in the UK Parliament.
3.	Germany	The ARC (Act Against Restraint of Competition, 1958), which follows an ex-post approach in regulating anticompetitive conduct of dominant entities in Germany, has been amended considerably to allow for ex-ante intervention. The 10 th Amendment to the ARC ("10 th Amendment") imposes obligations on undertakings which are active to a significant extent on multi-sided markets and networks and which may be regarded as being of 'paramount significance for competition across markets' ("PSCAM").	The 10 th Amendment came into force in 2021. The 11 th Amendment came into force in November 2023.

		PSCAM entities are prohibited from engaging in certain kinds of anti-competitive conduct. The 11 th Amendment to the ARC (“11 th Amendment”), effective from 7 th November 2023, introduces significant changes: it grants the Bundeskartellamt or the Federal Cartel Office (“FCO”) authority to enforce remedies upon companies post sector inquiries regardless of the company infringing competition laws; allows the FCO to skim off profits made from competition law infringements; and facilitates the implantation of the DMA in Germany.	
4	Japan	The TFDP Act is an ex-ante instrument which was introduced to ensure transparency and fairness in the conduct of Specified Digital Platforms in Japan. The Ministry of Economy, Trade, and Industry (“METI”) published the SDP Guidelines and the Ordinance No. 1 in 2021 (“Japan Ministerial Ordinance / JMO”) which lay down certain measures to be complied with by Specified Digital Platform providers. METI’s cabinet orders have specified four separate business classifications, along with thresholds for designation as Specified Digital Platforms.	The TFDP Act came into force on 1 st February 2021. The SDP Guidelines are also currently in force.

Source: *Report of the Committee on Digital Competition Law*

With reference to India, the Committee on Digital Competition Law was constituted by the Ministry of Corporate Affairs to review the existing regime under the Competition Act, 2002 and to evaluate the need for an ex-ante competition framework for digital markets in India. The Committee came out with a report and Draft Digital Competition Bill, 2024.

The Committee held consultations with key stakeholders and examined both the domestic legal framework and the international regulatory practices for regulation of digital services. The Committee also observed that the current ex-post framework under the Competition Act, 2002 needs to be supplemented to better address concerns related to alleged anticompetitive practices of large digital enterprises.

The Committee recommended that *ex-ante* measures be introduced to complement the current ex-post framework by identifying large digital enterprises with a ‘significant presence’ in India in selected ‘core digital services’ and setting pre-determined rules for their conduct. Since digital markets are dynamic in nature, timely intervention is necessary to prevent anticompetitive conduct.

To key recommendations of the Committee in a nutshell are as under:

1. Recommendation for introduction of *ex-ante* legislation specifically applicable to large digital enterprises, to supplement the Competition Act.
2. With reference to the scope and applicability, the Committee proposes that the Draft Digital Competition Bill should apply to a pre-identified list of Core Digital Services that are susceptible to concentration.
3. The Committee recommended that the Draft Digital Competition Bill should only regulate enterprises which have a ‘significant presence’ in the provision of a Core Digital Service in India and the ability to influence the Indian digital market. The Committee further recommended designating such enterprises as “Systemically Significant Digital Enterprises” (SSDEs).
4. The Draft Digital Competition Bill has prescribed the thresholds and criteria for designating an enterprise as SSDE.
5. In light of the fact that in some cases, compliance may be required from multiple digital enterprises in a group

that are engaged in providing a core digital service, the Committee recommended that notifying enterprises should identify all other enterprises within its group involved in the provision of a core digital service. These enterprises should be designated as ADEs (Associate Digital Enterprises) under the proposed framework.

6. The Committee has recommended an agile and principle-based framework of ex-ante obligations under the Draft Digital Competition Bill. The specificities of the obligations as applicable to each Core Digital Service would be specified through regulations drafted by the CCI through a consultative process.
7. The Committee has recommended that the grounds for exemption from complying with the ex-ante obligations should be provided for in the statute itself.
8. The Committee has recommended for borrowing of the procedural framework from the Competition Act for the purposes of the Draft Digital Competition Bill. The Committee also strongly advises that the CCI must strengthen the capacity of its Digital Markets and Data Unit with experts from the field of technology to keep pace with the rapid evolution of digital markets.
9. The Committee has proposed for a monetary penalty for noncompliance with ex-ante obligations is restricted to a maximum of 10% of the global turnover of the SSDE in line with the penalty regime under the Competition Act.

REFERENCES:

- <https://www.rolandberger.com/en/Insights/Publications/From-Data-to-Dominance-Accelerating-Business-Growth-with-a-Data-Office.html>
- <https://link.springer.com/article/10.1007/s40319-023-01302-1>
- <https://www.smartinsights.com/social-media-marketing/social-media-strategy/new-global-social-media-research/>
- <https://gorrissenfederspiel.com/en/abuse-of-dominance-quarterly-newsletter-q1-2024/>
- <https://www.mca.gov.in/bin/dms/getdocument?mds=zGtvSkE3zIVhAuBe2pbow%253D%253D&type=open>