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Draft Digital Competition Law Bill, 2024 - An Analysis of the Key Recommendations of the Committee Report

In the month of March 2024, the Ministry of Corporate Affairs of India published the Draft Digital Competition Law Bill, 2024, for inviting public comments till April 15, 2024. With the proposed objective of formulating laws to facilitate healthy competition in the era of digitization, the Bill provided a number of provisions aimed at establishing a regulatory strategy to focus on the prevention of anti-competitive conduct. The Bill was also accompanied with a detailed Committee Report, which enlisted certain key recommendations as well as the best international practices, which may be followed to enable an efficient enforcement of the law.

Key Recommendations of the Committee

On the basis of the study conducted alongwith the deliberations of its members, the Committee released a set of key recommendations, which were duly incorporated in the Bill. The recommendations included the following:

Inclusion of Ex-Ante Measures in the Digital Competition Act: Within the digital domain, developments and advancements take place within the span of a few seconds. It was, thus, recommended by the Committee that an ex-post approach may not be sufficient. Through the inclusion of an ex-ante approach, the Committee proposed to facilitate an efficient regulation of large digital enterprises, on the basis of their behaviour and actions.

Scope and Applicability: It was recommended that the scope of the Bill be extended to a 'pre-identified list of core digital data services (CDS)' which was prepared on the basis of the experience held by the Competition Commission of India (CCI) in terms of enforcement experience, market studies, and international practices.

In furtherance to such recommendation, the proposed primary objective of the Bill was specified to be the regulation of identified systematically significant digital enterprises (SSDEs) and their associate enterprises, to foster the environment of innovation, ensure competition, and promote the interests of the service users.

The term 'systematically significant digital enterprises', as proposed by the Committee, has been propounded to designate the companies having a significant presence and an influence in the market. It has been recommended that the applicability of the Bill shall extend only to such SSDEs.

For further regulating the recognition of SSDEs, the Committee proposed a 'twin-test', which included a 'significant financial strength test' and a 'significant spread test'. While the formal test was proposed to include an evaluation based on its turnover, the latter test sought to take into account, the presence of the enterprise in the CDS in India.

Associate Digital Enterprises: A notable recommendation made by the Committee pertaining to the introduction of the term 'associate digital enterprise' within the Bill. It was specified that the Competition Commission of India must be empowered with the authority to designate entities as ADEs, in case they satisfied the scenario where the Holding Company was an SSDE on the basis of its CDS in India and the other subsidiaries were directly or indirectly associated with the same CDS or vice-versa.

In furtherance of such a recommendation, Section 4 of the Bill was introduced, as per which Enterprises are under the obligation to file 'Self-Reports' concerning their qualification as SSDE, within 3 months of the crossing of threshold limits. They have been further obligated to report their subsidiaries as ADEs if the latter are involved in any part of the CDS. Sub-Section (9) has also been introduced which provides the CCI with the power to designate an entity as an ADE, in the circumstances enshrined within the provision.

Obligations, Exemptions, Enforcement, and Remedies: An important element in the Key Recommendations highlighted in the Committee Report is the detailed explanation of the obligations, exemptions, enforcement, and remedies, inculcated within the Draft Bill to bring into effect, the objective of maintaining the principles of transparency, fairness, and contestability within the many procedures under the Act.

Under the head of 'obligations', the Committee has recommended an agile framework for the enforcement of the ex-ante obligations and has proposed the process of inclusion of recommendations to be through a consultative process.

With respect to the exemptions applicable under the Act, it has been recommended that the intricacies bearing the exemptions including the requirements and features must be specified under a set of Regulations framed by the CCI.

For the provisions pertaining to enforcement and remedies, the Committee has proposed the adoption of the framework from the Competition Act, and the capping of the monetary penalty to 10% of the global turnover, respectively.

A need has been highlighted for the CCI to strengthen its Digital Markets and Data Unit's capacity, by the inclusion of technology experts, which will in turn facilitate an efficient adaptation of the framework with the rapid advancement of technologies.

Analysis and Conclusion

Developments in the digital domain, in the era of Artificial Intelligence, have been moving with celerity. In such a case, the pace and form of anti-trust activities have also changed drastically.

The Report of the Committee has taken this unmatched speed of development into account and proposed the adoption of an ex-ante approach, which will, in turn, facilitate an efficient regulation of the digital space activities of enterprises and further aid in an appropriate flow of services to the end-user.

Thus, while the Bill is yet to be tabled, a perusal of the Committee Report and the accompanying Draft raises the expectations with respect to a new era of Competition.

Snippets: Celebrating the Achievements of Legacy

The first quarter of 2024 marked the continuation of the various achievements of Legacy Law Offices LLP, whether in terms of rankings and recognitions of the Law Firm or in that of the various Lawyers. This section seeks to commemorate these achievements.

Chambers & Partners

For the second consecutive year, **Mr Gagan Anand** found recognition in the **Chambers & Partners Global 2024**. These rankings provide a testament to the proven expertise held by Mr Anand in the field of Projects, Energy, & Infrastructure.

"I would rate Gagan as very strong in terms of his level of service, sophistication and commercial awareness."

Legal 500

The outstanding journey of Legacy Law Offices LLP found tremendous recognition in the Legal 500 Asia-Pacific 2024 rankings, where we were ranked as a '**Top-Tier Law Firm**' in the City-Focus Rankings.

The lawyers of the Firm including **Mr Gagan Anand**, **Ms Shalini Munjal**, **Mr Amarendra Gogoi**, and **Ms Eshjyot Walia** were also given the tag of being "Recommended Lawyers" for their contribution to the Projects and Energy practice area.

'The projects and energy practice is unique and well-established. The polished manner in which the team renders services for different projects reflects their expertise in their sector.'

Asian Legal Business India

The Arbitration Partner of Legacy Law Offices LLP, **Mr Ishan Khanna** was recently ranked in the **Rising Star 2024** rankings published by Asian Legal Business India. The list ranked only a few lawyers from all over India, who were under 40 years of age and had achieved heights in their career.

Practice Achievement - IPO

In its continuing feat of successfully handling assignments in the Capital Markets practice area, Legacy Law Offices LLP **acted as Legal Advisor to a Mainboard IPO and SME IPO** of Vibhor Steel Tubes Pvt Ltd and Radiowalla Network Ltd, respectively. These IPOs were held to be highly successful in their segments and reflected the immense expertise and diligence of the team of Legacy.

Uniform Code for Pharmaceutical Marketing Practices, 2024 (The "Code")

On 12 March 2024, the Department of Pharmaceuticals, under the Ministry of Chemicals and Fertilizers, Government of India, issued a policy notification to all pharmaceutical associations. This notification included the 'Uniform Code for Pharmaceutical Marketing Practices, 2024' (hereinafter the "Code") which was enclosed for circulation and strict compliance by the members of all pharmaceutical associations.

The Code sets out a framework to regulate the interactions between pharmaceutical companies and healthcare professionals with an aim to curb unethical practices in the pharma sector. The Code gains significance given that recently 'Patanjali Ayurved' came under fire from the Supreme Court of India, for disseminating certain misleading advertisements about their herbal products.

Major Highlights of the Code

1. Claims & comparisons of drugs

As per the Code, pharmaceutical companies must base their claims about a drug's efficacy only after an up-to-date evaluation of all evidence has been undertaken. Further, the term 'safe' should not be used without appropriate qualification, and it must not be claimed unequivocally that a drug has no side effects, toxic hazards, or risk of addiction.

Furthermore, any drug comparison should be accurate, fair, and verifiable.

When making comparisons, companies must avoid misleading practices such as distortion, excessive emphasis, or omission. Brand names of other companies' products should not be used in comparisons without prior consent from the respective companies. Additionally, other companies, their products, services, or promotions should not be disparaged either explicitly or implicitly.

2. Conduct of medical reps.

The Code sets standards for medical representatives (MRs) and requires them to uphold a high standard of ethical conduct in their duties along with adhering to all relevant provisions of the Code. Since pharma companies are responsible for the activities of their employees, including the MRs, as such they must ensure their MRs comply with the Code. In this regard, the companies shall ensure that appropriate clauses/ provisions are included in the employment contracts that are signed by the companies with the MRs.

3. Free samples

The Code stipulates that free samples of drugs must only be provided to individuals qualified to prescribe the drug where such samples are provided only for the purpose of creating awareness about treatment options and for acquiring experience in dealing with the product.

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When MRs distribute samples, they must hand them directly to the qualified prescriber or someone authorized to receive them on the prescriber's behalf, noting the healthcare practitioner's name and address for record-keeping. Further, sample packs should be restricted to the prescribed dosage for a maximum of three patients undergoing the necessary treatment course, with each healthcare practitioner receiving no more than twelve such sample packs per drug annually.

Each sample should be labelled as "free medical sample not for sale" or bear a similar marking. A company must not supply samples of drugs that are hypnotics, sedatives, or tranquillizers. Additionally, companies should keep records of sample distribution, including details such as the product name, doctor name, quantity of samples distributed, and the date of distribution. The monetary value of samples provided must not exceed two percent of the company's annual domestic sales.

4. Continuing medical education

Although engagement of the pharmaceutical industry with healthcare professionals for Continuing Medical Education (CME), Continuing Professional Development (CPD) or otherwise for conferences, seminars, workshops, etc. has been allowed under the Code, however, such activities or events should be undertaken only through a well-defined, transparent, and verifiable set of guidelines based on which the pharmaceutical industry may undertake the expenditures on such CMEs/ CPDs.

The Code has expressly prohibited conducting such activities or events in foreign locations. Further, all pharma companies must share the details of the events conducted by them, including the expenditures incurred thereupon, on their website.

5. Research support

The Code outlines the protocols for interactions between pharmaceutical companies and healthcare professionals (HCPs) for research purposes. It requires that engagements of HCPs in consultant-advisory roles be for legitimate or bona fide research services under consultancy agreements with either a consultancy fee or honorarium-based compensation, in accordance with relevant regulations in this regard. These engagements must focus on prioritizing patient interests and preserving the integrity of the HCP in compliance with the National Medical Commission (NMC) regulations. Further, studies or research projects must have the necessary approval from the competent authority and, where applicable, be conducted at an authorized site or location.

6. Relationship with HCPs

The Code prohibits pharmaceutical companies and their agents (such as distributors, wholesalers, and retailers) from giving gifts for personal benefit to healthcare professionals (HCPs) or their family members (both immediate and extended). It also bans offering, providing, or promising any monetary advantage or in-kind benefit to anyone qualified to prescribe or supply drugs.

The Code restricts pharmaceutical companies or anyone acting on their behalf from offering travel facilities (both inside and outside the country), accommodations or hospitality (like hotel stay, resort, accommodation, expensive cuisine, etc.) to HCPs or their family members, except when the individual is a speaker at a CME or CPD program.

Furthermore, companies and their representatives are prohibited from providing cash payments or monetary grants to any HCP or their family members under any circumstances.

Further, in cases where the Code does not explicitly address interactions with HCPs, the guidelines established in the Indian Medical Council (Professional Conduct, Etiquette, and Ethics) Regulation of 2002, with subsequent amendments, will take precedence.

7. Compliance with the Code

Any violations of the Code will be handled by an Ethics Committee for Pharma Marketing Practices (ECPMP) established within each pharmaceutical association to ensure oversight and accountability of its members. On an individual level, the Chief Executive Officer of a pharmaceutical company shall be responsible for ensuring compliance with the Code. Furthermore, companies must submit annual self-declaration with the association for uploading on their website confirming their adherence to the Code.

Once it is confirmed that a member has violated the Code, the ECPMP may recommend any one of the following actions against the erring entity/ company: (a) suspension or expulsion from the association, (b) a formal reprimand, along with publishing full details of such reprimand, or (c) the enforcement of corrective measures.

The Code provides for an appellate authority i.e. Apex Committee for Pharma Marketing Practices (ACPMP) which shall be headed by the Secretary, Department of Pharmaceuticals. The ACPMP, amongst other things, shall review the decisions of the ECPMP and ensure fairness in the application of the Code.

Conclusion

Although the Code largely preserves the contents of the previous code (the UCPMP 2015) with certain modifications, nonetheless the implementation of the Code shall represent a major advance in the regulation of pharmaceutical marketing practices in India.

About the Author

Mr Pradyun Chakravarty is the Principal Associate Advocate of the General Corporate Practice Team and is a diligent lawyer and an avid author.

He forms an essential part of the team and is associated with various prestigious projects being undertaken by the Law Firm at a national and international level.

Snippets: Celebrating the Women of Legacy

Legacy has always taken immense pride in its work towards diversity, equity, and equality. It has been a continuing endeavour of the management of the Law Firm, not only to uphold the three main principles but to also promote the same, as and when an opportunity presents itself.

With the celebration of Women's Day in March 2024, such an opportunity was brought before Legacy, furthering which, we wish to take an opportunity to celebrate the various achievements of the Women associated with the Firm.

Our Co-Managing Partner

Ms Shalini Munjal has been a beacon for excellence and precision in Legacy Law Offices LLP, since her very inclusion in Team Legacy in June 2010.

Being a proven Corporate Lawyer, Ms Munjal has attained various rankings and recognitions before prestigious global legal directories.

In one such recent feat, she was tagged as a "Recommended Lawyer" in the Legal 500 Asia-Pacific Rankings 2024, for her contribution to the practice area of Projects, Infrastructure, & Energy.

During the previous quarter, Ms Munjal was also appointed as a Legal Expert for a set of **16 Eco-Tourism Projects,** 3 of which are being undertaken in the State of Tamil Nadu while the rest are being developed in Himachal Pradesh.

'Shalini Munjal is a highly experienced and meticulous lawyer. Her expertise, in addition to the strength of her team, has proven to be quite beneficial for all projects.'

There is nothing more which can be stated about the excellence exhibited by Ms Munjal.

Our Senior Partner

Ms Sadiqua Fatma is a proven litigator, who has handled various high stake arbitrations and litigations during the vast span of her career. Being a highly experienced Advocate, Ms Fatma has also been empanelled with a number of Public Sector Organizations, many of whom are filled with high praise about her work.

During the previous quarter, Ms Fatma initiated her work as a Lead Litigator on behalf of the Railways and Logistics Sector Undertaking of the Central Government, in a complex arbitration concerning a nationally important project.

Sadiqua Fatma gives personal attention to every client and is very soft-spoken and considerate. The legal knowledge she possesses is unmatchable and unbeatable

In continuation with her practice, Ms Fatma has been handling the case with great precision and is rendering services pertaining to the drafting and filing of documents as well as representing the interests of the company, before the Dispute Adjudication Board.

Our New Partner

The legal knowledge and expertise possessed by **Ms Eshjyot Walia** are unmatched and have been highly affirmed by the senior management of Legacy. In light of these qualities, Ms Walia has also been promoted to the position of a Partner, and will now be heading a team of lawyers in the practice pertaining to Contract Management and Commercial Law Practice.

The expertise held by Ms Walia has also resulted in her appointment as a Legal Expert for a prestigious project being undertaken in the State of Himachal Pradesh, which involves Capacity Building and Identification of Gaps within the existing laws.

In the previous quarter, Ms Walia has also been ranked as a Recommended Lawyer in the Legal 500 Asia-Pacific 2024 rankings.

Celebrating New Additions

During the previous quarter, Legacy Law Offices LLP also bore witness to the joining of two diversified lawyers in the Delhi Dispute Resolution Team, both of whom have been adding greatly to the practice.

Partner and Advocate-on-Record

Ms Tanvi Kakar is a freshly registered Advocate-on-Record holding an experience of over 10 years in handling complex dispute resolution and arbitration matters across India. She has been given the charge of a team of lawyers and is leading the team with great expertise and skill.

Principal Associate Advocate Turned Associate Partner

Ms Aparna Banerjee DasGupta has an experience of 10 years and has worked for various public and private sector clients in the Corporate and Dispute Resolution practice areas. Being a distinctively specialized lawyer, Ms DasGupta holds great expertise and has the ability to handle high-stake matters. Having joined as a Principal Associate Advocate, Ms DasGupta has been promoted to the post of Associate Partner.

Enforcement of Foreign Arbitral Awards in India - A Glimpse of the Law

With the dynamically growing global international market, promoting legislation and policies to improve 'Ease of doing business in India' has become pertinent. A significant part of this development is rooted in a developed pro-arbitration regime and enforcement mechanism. Growing interaction in the global market has instigated disputes within such transactions that demand time-efficient and quick resolution.

Arbitration as an alternative dispute resolution mechanism has proved effective and has ensured the timely resolution of disputes pertinent to international deals and transactions. The pro-arbitration regimes adopted worldwide have proved to be a potent way of curbing and ensuring the resolution. However, the overall feasibility of the arbitration mechanism in the International scenario is measured through the enforcement mechanism of foreign arbitration awards adopted by different countries.

A uniform arbitration regime provides a viable option for resolving disputes between parties governed within different jurisdictions and legal frameworks. Availing the benefits of a time-bound resolution method of arbitration allows the parties to agree and submit to a non-biased judicial mechanism that is binding onto them but also provides them with the flexibility to decide the terms and conditions by which they intend to be governed.

Part II of the Arbitration and Conciliation Act, 1996, governs the enforcement of foreign arbitral awards in India and provides a defined procedure. However, the enforcement of foreign arbitral awards in India is available through dual avenues provided within the Arbitration and Conciliation (Amendment) Act, 2015, i.e., within the New York Convention [1] or the Geneva Convention[2].

The mechanism for enforcing foreign arbitral awards in India also varies depending on whether the following arbitral award was pronounced by a signatory nation (either of the New York Convention or Geneva Convention) or within a reciprocating nation, as notified and published by the Government of India in the Official Gazette. Currently, the notified reciprocating countries include Aden, Bangladesh, Federation of Malaya (now Malaysia), Fiji Colony, Hong Kong, New Zealand, Cook Islands and Western Samoa, Papua New Guinea, Republic of Singapore, Trinidad and Tobago, United Kingdom of Great Britain and Northern Ireland, and UAE.

A smooth interplay between international arbitration practices and domestic legislation is necessary to ensure the implementation of foreign arbitral awards in India. According to the current legal framework of India, foreign arbitral awards are treated as civil decrees after satisfying the enforcement criteria provided within Chapters I and II.

They are enforceable as civil decrees under Section 49 and Section 58 of the Arbitration and Conciliation (Amendment) Act, 2015, for the New York Convention and the Geneva Convention, respectively. The real-world cases/cross-border disputes in the current arbitration regime provide insight into India's complex and intermingled foreign arbitral award enforcement regime.

Subsequently, once the Competent Court is satisfied that the award is enforceable, it can execute the foreign arbitral award as a decree similar to its order. However, the judgment debtor can challenge the foreign arbitral award under the head 'Appealable orders' on the grounds mentioned under Sections 50 and 59 of the Act for enforcement of foreign awards under the New York Convention and the Geneva Convention, respectively.

Other than grounds for challenging the arbitral award, Sections 47 and 56 of the Act also necessitate the submission of the original/certified copy of the arbitral award, original arbitration agreement or duly certified copy, evidence certifying that the following award is foreign for enforcement of foreign arbitral award under the New York Convention, and further provides for production of documents including original/certified copy of the award, evidence proving that the award is final, was made in pursuance of matter that can be submitted to arbitration and is done in conformity with law prescribed thereof for enforcement of awards under the provisions of Geneva Convention.

The finalization of the Foreign Arbitral Award is just the beginning of another execution process that necessitates the engagement and overview of competent Indian Courts.

The decree-holder is expected to approach the competent Court (the jurisdiction within which the subject matter or assets lie) by filing an execution decree and pitching to enforce the foreign arbitral award in India.

In addition, the party in whose favour the judgment was pronounced progressively faces many other legal challenges and hurdles that may affect the time-bound enforcement or enforcement of foreign arbitral awards within India, likely defeating the whole purpose of resorting to arbitration. As pointed out by the Courts of India over the period, some of the other challenges faced by parties asking for enforcement of foreign arbitral awards include invalidity or incapacitation of parties or agreement as according to the subject jurisdiction, the result of unilateral arbitration proceeding with another party not aware of the same, arbitration addresses a dispute not capable of being submitted to arbitration, the subject matter does not fall within the ambit of arbitration in India, etc.

With such diverse legal challenges faced by parties looking to execute foreign arbitral awards in India, the system highlights several loopholes and an urgent need to reform and adapt new and evolving practices to ensure timely enforcement/execution of foreign arbitral awards in India. India can adopt pro-arbitration practices and reformation regimes for countries with simplified yet time-bound foreign arbitral award enforcement mechanisms. Adoption of unanimous and parallel interpretation mechanisms will also provide better clarity to the parties and the Courts and will further clarify the enforcement scenario for parties looking to resort to foreign arbitration in India.

Snippets: Relevant Judgements Pronounced in the Past 90 Days

- Failure to prove the existence of a Legally Enforceable Debt - Acquittal in a case under Section 138 N.I. Act

In a recent judgment pronounced by the Hon'ble Supreme Court of India, in the case of *M/s Rajco Steel Enterprises vs. Kavita Saraff & Anr. (Equivalent Citation: 2024 INSC 288)*, the acquittal of the accused under Section 138 of the Negotiable Instruments Act, 1881, was upheld.

The Hon'ble Court found that the petitioner failed to show that the cheques were advanced towards a legally enforceable debt. It was also observed that the High Court reported an absence of any proof pertaining to the debt being reflected in the Balance Sheet of the Petitioner.

In light of such, the Hon'ble Court upheld the acquittal of the Accused.

"It cannot be held that these findings were perverse, or based on no evidence. No point of law is involved in this set of cases, that would warrant our interference."

- Arbitral award suffered from the Vice of Perversity and Patent Illegality - Liable to be Set Aside

In a curative petition filed in relation to the case of *Delhi Metro Rail Corporation vs. Delhi Airport Metro Pvt Ltd (2024 INSC 292)*, the Hon'ble Court relieved DMRC of its liability to pay INR 8,000 crores, as awarded by the Arbitrator.

The dispute in question pertained to the construction, operation, and maintenance of the Delhi Airport Metro Express Ltd. The Respondent instituted an arbitration on the grounds of the failure of DMRC to cure the defects highlighted by DMAEPL, within the curing period under the concession agreement.

In the curative petition, the Petition alleged that the Ld. Arbitrator failed to take a number of facts into account, which resulted in a patently illegal award.

Upon considering the various judgments passed in the case by the Arbitrator, the Single Judge Bench and the Division Bench of the High Court of Delhi, and the Bench of the Supreme Court, the Hon'ble Bench, in its curative jurisdiction, held that "*While the cure notice contains allegations about the line not being operational, there is evidence on the record indicating that the line was in fact running. Even if we were to accept that the finding of the arbitral tribunal that the defects were not completely cured during the cure period is a factual finding incapable of interference, it is clear from the record that DMRC took steps towards curing defects which led to the eventual resumption of operations. The award contains no explanation as to why the steps which were taken by DMRC were not 'effective steps' within the meaning of the termination clause.*"

The award was thus, set aside.

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Specialist advice must be sought about specific circumstances.

Contact Details

DELHI
Legacy House, D-18,
Nehru Enclave, Kalkaji,
New Delhi- 110019, India
T +91 114 1752507-08
F +91 114 1752509

CHANDIGARH
Legacy House, #333,
Sector 4, MDC,
Panchkula- 134114, India
T +91 172 4801333, 4802333
F +91 172 2559335

Also at
| Solan | Kurukshetra | Mumbai | Mohali |
Representative Office in Saudi Arabia

www.legacylawoffices.com