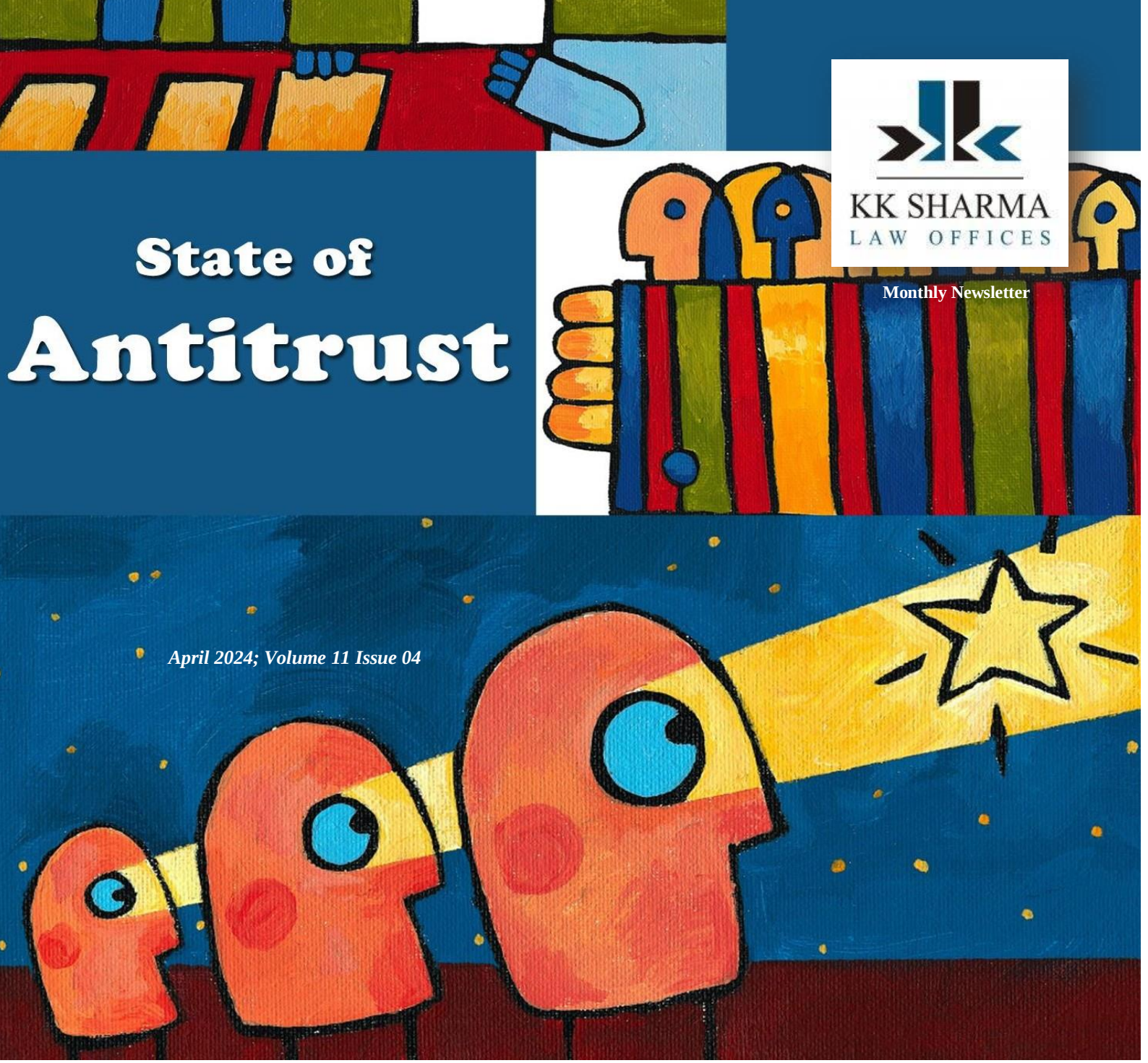

State of Antitrust

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Monthly Newsletter

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Committee on Digital Competition Law Publishes its Report, Releases Draft Digital Competition Bill

The Committee on Digital Competition Law **('CDCL')** has published its report **('CDCL report')** suggesting for a *de novo ex-ante* framework for regulation of digital markets in India, along with a draft version of the Digital Competition Bill, 2024 **('DCB')**. The report was released on 12.03.2024.

The CDCL report originates from the Parliamentary Standing Committee on Finance's – 53rd report on – "*Anti-competitive Practices by Big Tech Companies*" **('PSC report')**, which highlighted ten anti-competitive practices prevailing in the digital market (*namely anti-steering, self-preferencing, tying & bundling, use of non-public data, deep discounting, exclusive tie-ups, search & ranking preferencing, killer acquisitions, restricting third-party applications, advertising policies*). The PSC report further emphasized introduction of *ex-ante* obligations based framework for significant & large digital incumbents, also known as '*Systemically Significant Digital Enterprise*' **('SSDE')**, as connoted by PSC report and CDCL report. Based on these recommendations, the CDCL was constituted on 06.02.2023 and tasked to examine the need of *ex-ante* regulations for digital markets in India.

At the outset, CDCL report analyzed the existing competition law framework in India, recommendations made in the PSC report & other *ex-ante* sector-specific statutes applicable to digital enterprises. The CDCL concurred with the findings made in the PSC report that the present *ex-post* model seems insufficient in early detection & intervention of violation that can prevent irreversible tipping of digital markets towards the incumbent. Further, as the sector-specific statutes are primarily aimed at orderly growth of the sector, these sector-specific statutes' capability is very limited in ensuring fair competition in an *ex-ante* manner.

In the CDCL report, CDCL extensively scrutinized the practice prevailing around the world through analysing anti-trust laws from other jurisdictions (*E.g. – U.S., E.U., Germany, UK, Australia, Japan, South Korea, China, Canada, Singapore & Taiwan*) dealing with the regulation of digital markets.

The CDCL report highlighted the following points regarding regulation of digital markets in India –

1. Competition jurisprudence's inclination has been more towards *ex-post* models over *ex-ante* models considering the risk of false positives associated with the latter models.
2. There exists a symbiotic relationship between ex-ante and ex-post models of intervention, wherein, the former 'set the rules of the game' while the latter 'act as umpires of the game'.
3. The present Competition Act is sector-agnostic by design & works on ex-post intervention based framework. Thus, amending the Competition Act by incorporating a specific chapter related to ex-ante regulations may result in uncertainty.
4. Irreversible market tipping towards the incumbent coupled with removal of competitors can cause an irreparable harm that cannot be remedied ex-post facto.
5. Data as resource, data driven-network effects & economies of scale are the prominent unique features in digital markets. Combined effect of first-mover advantage amplified through aforesaid features, leads to Schumpeterian markets, where entities do not compete in the market, but compete for the market, resulting in a winner-takes-most dynamic.

Considering the abovementioned features of digital markets and enterprises operating in digital markets, the CDCL report made the following recommendations, which were also encapsulated by the draft version of the DCB appended in the CDCL report –

1. In order to obviate unintended chilling effects on innovation & considering the higher costs of error viz. *ex-ante* regulations, scope of the DCB should be limited to certain identified digital markets, to be recognized as '*Core Digital Services*' **('CDS')**, which are susceptible to concentration. Additionally, the list of CDS should be included as Schedule to the DCB to provide ease & flexibility for the Central Government in adding other services in the CDS list;

2. Applicability of ex-ante obligations under the DCB must be restricted to only those enterprises which possess sufficient market power that can influence digital markets, which will be designated as SSDEs.
3. In case of enterprises, which are part of a complexly structured group, comprising of number of enterprises which may have either a direct or indirect role in the provision of the CDS, SSDE designation must also encompass other subsidiaries of the group entity. Thus, CDCL report made two recommendations in that regard – when the parent entity is directly involved or has control over CDS, then parent entity may be designated as SSDE & its subsidiaries as '*Associate Digital Enterprises*' **('ADE')**. On the other hand, when a subsidiary is most directly involved in provision of CDS, then it may be designated as SSDE & its parent company along with other sister concerns as ADE;
4. Ascertainment of SSDE by the CCI should be based on certain Quantitative thresholds and Qualitative criteria:

   Quantitative thresholds should comprise of a "dual test". *Firstly*, "significant financial strength" test, comprising of factors which can serve as proxies for economic power; and *secondly*, "significant spread" test, comprising of metrics related to number of business users and end users of CDS, depicting level of dependence on that SSDE in India. Further, to show persistent position of strength of SSDE over a CDS, data from preceding three financial years must be taken into consideration by the CCI. Recommended base value thresholds: Indian turnover – INR 4000 crore, Global turnover – $30 billion, Gross Merchandise Value – INR 16,000 crore/ $1.95 billion, Global Market Capitalisation – $75 billion, Number of business users & end users – 10,000 & 1 crore, respectively.

   Qualitative criteria containing parameters indicating enterprise's ability to influence digital markets should be utilized in cases when the enterprise falls short of Quantitative thresholds but as per CCI it enjoys a significant presence in provision of CDS in India. Such Qualitative criteria comprises of metrics such as resources of the enterprise, volumes of data aggregated, direct & indirect network effects at play, level of countervailing buyer power available to SSDE's business users & consumers;
5. Similar to the existing combinations' regime, fulfilment of thresholds leading to designation of an enterprise as a SSDE must be on self-assessment basis. Such designation as SSDE will remain valid for three years, unless the market dynamics change significantly;
6. Anti-competitive practices arising out of mergers & acquisitions by the digital enterprises have been adequately dealt with, through introduction of 'Deal Value Thresholds', under the Competition (Amendment) Act, 2023, thus, not to be included in the DCB. Considering the varying degree of competitive harms associated with different anti-competitive practice concerning each CDS and business models, it is recommended that obligations for SSDEs must be devised in the form of regulations, along with exemptions (if any), in the DCB;
7. Enforcement of DCB provisions must be with the CCI and should be based on procedural framework borrowed from the Competition Act, including provisions related to powers of Director General, right to claim compensation, power to issue interim orders and regime of settlements & commitments mechanism;
8. Initiating inquiries, for an alleged violation of its obligations or provisions of the DCB by the SSDE, must be limited to three years from the date when the cause of action arose;
9. Remedies in the form monetary penalties should be in-line with the current trends, as also introduced under the Competition (Amendment) Act, 2023, wherein, the ceiling amount should be capped at 10% of the global turnover of the SSDE. Further, if SSDE is a part of a group then the turnover of the entire group of enterprises must be taken into consideration.

Following the above mentioned observations, the CDCL has devised a draft DCB containing extensive provisions on the working of DCB which comprises of 53 sections & 1 Schedule. The CDCL report should be considered as a milestone in the history of digital markets in India as it's with this legislation, India has finally made its initial step towards a comprehensive regulation of digital markets.

{Report (public version) dated 12.03.2024}

Heard at the BAR

CCI brought amendments to its enforcement regime

The Competition Commission of India **('CCI')**, in the month of March 2024, brought in certain changes aiming to strengthen its regulatory & enforcement framework. The proposed changes include amendments & introduction of new regulations namely –

1. Competition Commission of India (Settlement) Regulations, 2024 on 06.03.2024 **('Settlement Regulations')**;
2. Competition Commission of India (Commitment) Regulations, 2024 on 06.03.2024 **('Commitment Regulations')**;
3. Competition Commission of India (Determination of Turnover or Income) Regulations, 2024 on 06.03.2024 **('Turnover & Income Regulations')**;
4. Competition Commission of India (Determination of Monetary Penalty) Guidelines, 2024 on 06.03.2024 **('Monetary Penalty Regulations')**;
5. Notification for revision of thresholds for grant of de-minimis exemption for combinations on 07.03.2024;

The salient features of the draft version of the above-mentioned regulations have already been covered in comprehensive detail in the previous editions of our newsletter, thus, the same have not been reiterated herein. Only the major changes/amendments, as inserted by the final regulations published in the official gazette or otherwise, have been highlighted herein.

Settlement Regulations

i) Disclosure by the settlement/commitment applicant of the details of other competition authorities which have examined/currently examining the alleged contraventions, and an undertaking & waiver as specified in the settlement regulations; ii) Bar on settlement application from getting considered, if it fails to cover all the contraventions laid down in the investigation report; iii) Revision in the time period for conclusion of settlement application from 120 days to 180 days; iv) Power to issue interim orders during the pendency of the proceedings; v) Reduction in amount of application fee; vi) Prior notice & opportunity to represent before revocation of the settlement order and discretion to resume inquiry;

(Gazette Notification dated 06.03.2024)

Commitment Regulations

i) Disclosure by the settlement/commitment applicant of the details of other competition authorities which have examined/currently examining the alleged contraventions, and an undertaking & waiver as specified in the commitment regulations; ii) Commitment application must be filed within 45 days from date of Section 26(1) order passed by the CCI or prior to the receipt of the investigation report, whichever is earlier; iii) Revision in the time period for conclusion of commitment application from 90 days to 130 days; iv) Reduction in amount of application fee;

(Gazette Notification dated 06.03.2024)

Turnover & Income Regulations

i) Turnover or income, in case of enterprises, include value of sales and other operating revenue as per the audited financial statements of the enterprise; ii) Income, for an individual, is "*gross total income*", excluding income from house property & income from capital gains, in terms of the ITRs filed by the individual; iii) In case of an enterprise, if no audited financial statements are available or, in case of individual no ITRs are available, then the amount as certified by the statutory auditor or a Chartered Accountant, as the case may be, supported by an affidavit will be considered for determining turnover or income.

(Gazette Notification dated 06.03.2024)

Monetary Penalty Regulations

i) Detailed guiding procedure, to be followed, for determination of monetary penalty wherever it is leviable; ii) Calculation of average relevant turnover to be based on relevant turnover of 3 years preceding the year in which investigation report is received by the Commission, or in appropriate cases, preceding the contravention; iii) When determination of relevant turnover is not feasible, only in those cases, CCI may consider the global turnover of the enterprise; iv) Procedure for levying penalties under proviso to Section 27(b), 42, 43, 43A, 44, 45 & 48 of the Competition Act.

(Gazette Notification dated 06.03.2024)

Revision of Thresholds

i) Enhancement of 150% in the value of assets and value of turnover for the purpose of Section 5 of the Competition Act; ii) Revision of threshold for grant of de-minimis exemption, in terms of value of assets – from Rs.350 Cr. to Rs.450 Cr, in terms of value of turnover – from Rs.1000 Cr. to Rs.1250 Cr.

(Gazette Notifications dated 07.03.2024)

MCA releases draft rules on De Minimis Exemption, Green Channel & Exempted Combinations

The Ministry of Corporate Affairs **('MCA')**, on 11.03.2024, released draft rules namely – *Competition Commission of India (De Minimis) Rules, 2024* **('De Minimis Rules')**; *Competition Commission of India (Green Channel) Rules, 2024* **('Green Channel Rules')**; *Competition Commission of India (Exempted Combinations) Rules, 2024* **('Exempted Combinations Rules').** These three sets of rules are open for public comments & suggestions till 10.04.2024.

De Minimis Rules: The new draft De Minimis Rules seeks to revise the assets & turnover thresholds for grant of exemption from notifying combination to the CCI. Under the existing scheme of de minimis exemption, parties to the combination are not required to notify the CCI regarding their combination's transaction when either the asset or turnover of the target are below Rs.350 crores and Rs.1000 crores in India, respectively. The new De Minmis Rules enhances the current thresholds limit to exempt notifying CCI, those combinations wherein, the value of assets are below Rs.450 crores in India or the target's turnover is below Rs.1250 crores.

Green Channel Rules: Under the CCI's Green Channel mechanism enforcement related to combinations, parties to the combination are allowed to file the FORM-I/Short Form Application for notifying the CCI about their combination. Upon filing of the notice by the parties to the combination & acknowledgement thereof by the CCI, the proposed combination "*will be deemed to be approved*" by the CCI, if parties or its affiliates have business operations that do not have any horizontal overlaps, vertical or complementary linkages with each other. The new Green Channel Rules amends the definition of '*Affiliates'* for the purpose of grant of deemed approval under the Green Channel.

Under the new draft Green Channel Rules, for the purpose of merger inquiry by the CCI, an enterprise will be said be an '*Affiliate*' of another enterprise, if that another enterprise has – "*i) 10% or more shareholding or voting rights of the enterprise; ii) right or ability to have a representation on the board of directors of the enterprise either as a director or as an observer; or (iii) right or ability to access commercially sensitive information of the enterprise.*"

Exempted Combination Rules: The draft Exempted Combination Rules seeks to exempt certain types of merger transactions from requirement to comply with Section 6(2), 6(2A) & 6(4) of the Competition Act. The draft Exempted Combination indicates shift of power to grant exemption from notifying combinations from the CCI to the Central Government i.e., Ministry of Corporate Affairs. These rules have been notified under the newly inserted Section 63(2)(ad) of the Competition Act, which gives power to the Central Government to issue rules granting exemption to parties from notifying the CCI in relation to certain types of transactions.

Earlier, the categories of transactions which were exempted from notifying were provided under Schedule I read with Regulation 4 of the Competition Commission of India (Procedure In Regard To the Transaction of Business Relating to Combinations) Regulations, 2011 **('Combination Regulations')**. However, owing to the Competition (Amendment) Act, 2023 this power to exempt has been delegated to the Central Government. The broad contours of the exempted categories are –

1. Acquisition of 25% and 10% of shares of the target by stockbrokers & underwriters and mutual funds, respectively, will be regarded acquisition of shares in the "*ordinary course of business*";
2. Acquisition of additional shares or voting rights by the acquirer already holding 25% shares in the target, and if there are horizontal or vertical or complementary linkages between the parties/group entities/affiliates may be exempted if the transaction exhibit certain circumstances as given under item 3 & 4 of Schedule I of the draft Exempted Combination Rules;
3. All intra-group acquisition transactions will be exempted unlike the existing limited exemption for intra-group acquisitions as given under Item 8, Schedule I of Combination Regulations;
4. All de-mergers are exempted.

(Press Release dated 11.03.2024)

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CCI Initiates AoD Investigation against Google viz. paid-apps on Play Store

The CCI, clubbing 3 separate information(s) filed by People Interactive India Pvt. Ltd. **('PIIPL')**, Mebigo Labs Pvt. Ltd. **('Mebigo')**, and Indian Broadcasting and Digital Foundation **('IBDF')** & its subsidiary Indian Digital Media Industry Foundation **('IDMIF')**, has *prima-facie* found Alphabet Inc., Google LLC, Google India Pvt. Ltd. & Google India Digital Services Pvt. Ltd. **(collectively referred as 'Google')** to be abusing its dominant position in the market for *"licensable OS for smart mobile devices in India and the market for app store for Android smart mobile OS in India"* by charging excessive fees from app developers for paid-apps on Google Play Store **('Play Store')**.

The Informants had alleged that Google has violated various provisions of the Competition Act by: **a)** Section 4(2)(a)(i) – charging excessive commission, between 6% to 26%, from app developers on payments made through Alternative Billing System **('ABS')** an alternative payment option available on the Play Store; **b)** Section 4(2)(a)(ii) – imposing excessive service fee on app developers, for processing payments, without any commensurate service being provided by Google; **c)** Section 4(2)(b)(ii) – restricting development in the app market as the app developers are left with less resources to improve their apps because of the excessive service fee; **d)** Section 4(2)(c) – forcing the app developers to exit the market/ making the entry of new players difficult due to the higher operational cost (excessive service fee); **e)** Section 4(2)(e) – leveraging its dominance in the markets for licensable smart mobile OS and app stores to protect its position in the downstream segment for payment processing.

The CCI, upon perusal, observed that: **i)** Google, in earlier cases, had been held to be dominant in the market for "*licensable OS for smart mobile devices in India and the market for app store for Android smart mobile OS in India*" & the same does not call for intervention; **ii)** Despite CCI not being a price regulator, considering high barriers to entry in the form of network effects & Play Store being a 'must have' app for app developers & phone manufacturers, *prima facie* the market seems not self-correcting & does not enable fair market price determination. Thus, CCI's intervention assumes an important role; **iii)** According to Google's own submissions, it only requires 6% of the revenue share to break-even on the services provided on the Play Store. Thus, based on 6% break-even revenue share, charging service fee at 6% to 26% (in case of ABS), *prima facie*, appears to be substantially disproportionate to the economic value of the services rendered by Google and appears to be an abuse of dominant position; **iv)** App developers don't have sufficient bargaining power vis-à-vis Google and are therefore, forced to accept terms that increase their cost of operation. Further, Google through its virtual monopoly has reaped benefits which would not have been reaped if there was effective competition; **v)** imposition of unfair service fee leads to developers having fewer resources to develop their apps leading to them being forced out of the market due to high operational costs. In view of the above-mentioned, CCI *prima facie* held that Google for contravening provisions of Section 4(2)(a), 4(2)(b) and 4(2)(c) of the Act and directed the Director General to cause an investigation.

Moreover, the Informants also prayed for interim relief under Section 33 of the Act including: a) to direct Google not to mandate the sharing of financial information or payment transaction-related data; b) stop Google from levying any fee, if an in-app purchase is processed through ABS; c) directing Google to not de-list or hamper the visibility of apps for non-adherence to the impugned policies of Google. However, as per CCI, Informants have failed to satisfy the three-fold test as devised under *CCI-SAIL* case by the Supreme Court, namely – *project any higher level of prima facie case warranting positive direction, necessity to issue order of restraint* & *likelihood of irreparable and irretrievable damage being caused to the Informant*. Therefore, CCI denied granting any interim relief to app developers.

{Order(s) dated 15.03.2024 & 20.03.2024}

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An initiative of Kaushal Kumar Sharma, ex-IRS, former Director General & Head of Merger Control and Anti Trust Divisions, Competition Commission of India, former Commissioner of Income Tax

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