



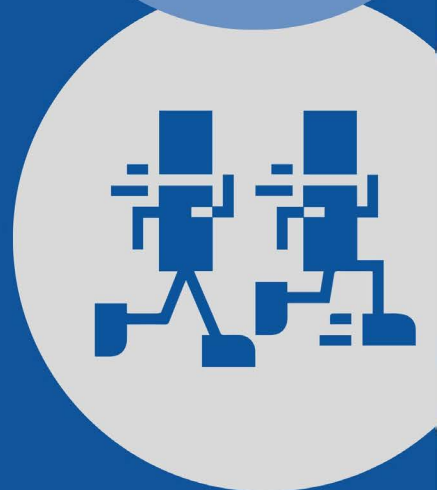
The Dialogue™

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Primer

# 53RD REPORT OF THE STANDING COMMITTEE ON FINANCE AND A POTENTIAL EX-ANTE COMPETITION LAW REGIME



# PRIMER | 53RD REPORT OF THE STANDING COMMITTEE ON FINANCE AND A POTENTIAL EX-ANTE COMPETITION LAW REGIME

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# I. ABBREVIATIONS

<b>MCA</b>	<b>Ministry of Corporate Affairs</b>
<b>DCA</b>	<b>Digital Competition Act</b>
<b>DMA</b>	<b>Digital Markets Act</b>
<b>CCI</b>	<b>Competition Commission of India</b>
<b>ACPs</b>	<b>Anti-Competitive Practices</b>
<b>SIDIs</b>	<b>Systemically Important Digital Intermediaries</b>
<b>DMU</b>	<b>Digital Markets Unit</b>
<b>DVT</b>	<b>Deal Value Threshold</b>
<b>FY</b>	<b>Financial Year</b>
<b>DG</b>	<b>Director General</b>
<b>OECD</b>	<b>Organisation for Economic Co-operation and Development</b>
<b>UK</b>	<b>United Kingdom</b>
<b>EU</b>	<b>European Union</b>
<b>EC</b>	<b>European Commission</b>
<b>S&amp;C</b>	<b>Settlements &amp; Commitments</b>

## II. INTRODUCTION

The Parliamentary Standing Committee on Finance (the Committee) recently released its 53rd report on 'Anti-Competitive Practices by Big Tech Companies' (the Report). Thereafter, the MCA constituted a new committee to, among other things, analyse the need for a new ex-ante framework for digital markets and draft a new DCA. These developments come at a time when both the national and international jurisprudence on competition is undergoing significant transformation. Nationally, the Competition (Amendment) Bill, 2022 (the 2022 Bill) has been introduced which seeks to strengthen the extant framework to deal with the peculiarities of digital markets.

Internationally, jurisdictions like the EU are adopting an ex-ante framework like the DMA with the intention to ensure fairness and contestability in digital markets. In this background, the Committee's report becomes significantly relevant. For the Report, the Committee took oral evidence from various stakeholders including the Competition Commission of India (Commission), industry organisations and technology companies. On the basis of these submissions and past CCI cases, the Committee delineated ten ACPs and made subsequent recommendations aimed at effectively addressing these ACPs. The Committee's recommendations have been briefly provided in the next section.

# III. COMMITTEE'S RECOMMENDATIONS

The Committee made 10 key recommendations that have now formed the basis for a proposed ex-ante competition law in the country.

- a. The behaviour of certain important platforms needs to be evaluated *ex-ante*. Under the current *ex-post facto* framework, action can be taken against an enterprise only when anti-competitive conduct has been established by the authority. However, under an *ex-ante* framework, enterprises would have to ensure that they are complying with the listed conditions as soon as the framework comes into force.
- b. For this purpose, the Committee recommends that the government should consider and introduce a **DCA** to ensure a fair, transparent and contestable digital ecosystem.
- c. The CCI and the government should identify **SIDIs** i.e., leading players or market winners that can negatively influence competition in the digital ecosystem.
- d. The Committee recommends that SIDIs should not engage in specific anti-competitive activities that have the potential to distort competition in the market. These include:

<b>Anti-Steering Provisions:</b> App stores prevent app developers from offering modes of payment to end-users other than the ones provided by the app store.	<b>Pricing /Deep Discounting:</b> Platforms offer huge discounts and often below-cost pricing in a non-transparent manner. Resultantly, the ability of sellers to decide prices and make profits is impaired.
<b>Self Preferencing:</b> Platforms perform dual roles, i.e., of a marketplace and also of a seller listing their products or services on the platform.	<b>Exclusive Tie-ups:</b> Platforms enter into agreements with brands to sell the latter's products exclusively on the platform.
<b>Bundling and Tying:</b> The use of the platform's core service is conditioned on the purchase of another subsidiary service.	<b>Search and Ranking Preferencing:</b> Digital companies rank certain results higher on the results page, due to bias in favour of sponsored results or self-fulfilled products.
<b>Data Usage:</b> Market leaders amass a hoard of personal data over time, leading to tracking, profiling and leveraging of data to strengthen their position in the primary and allied markets.	<b>Third-party Applications:</b> Users are restricted from the installation and effective use of third-party applications.
<b>Killer acquisitions:</b> Large firms buy startups, with the intention to disallow them from growing, without being subjected to merger control scrutiny.	<b>Advertising Policies:</b> Companies engage in the consolidation of the digital advertising supply chain, leading to market concentration, self-preferencing and conflict of interest.

- e. A specialised **DMU** should be established within the Commission, to closely monitor SIDIs, provide recommendations to the Central Government on designating SIDIs, review compliance and adjudicate on digital market cases.

In light of the developments, The Dialogue has analysed the significant development, i.e., the proposition to include an ex-ante framework on the basis of 3 crucial parameters: i) Need; ii) Feasibility and iii) International Guidance. On the basis of these 3 parameters, we have made certain recommendations that can potentially guide the future of ex-ante frameworks in the Indian context.



# IV. NEED FOR AN EX-ANTE FRAMEWORK

The need for a proposed DCA needs to be evaluated in light of sufficiency of proposed and existing frameworks to satisfy the concerns that have been raised by the committee's report.

## 4.1. UPDATED COMPETITION FRAMEWORKS

- The current Indian merger control framework requires the parties to the combination to seek the CCI's nod beforehand thus resulting in *ex-ante* enforcement. However, over time, the efficiency of the assets and turnover-based thresholds to regulate digital markets has not been ideal. In the past few years, various deals that could have had anti-competitive concerns have not been notified to the CCI. Furthermore, unlike its international counterparts, the CCI lacks the power to assess non-notifiable transactions in certain cases.<sup>1</sup>
- To guard against this challenge, the 2022 Bill has proposed a new DVT criteria, wherein transactions over a value of Rs. 2000 crores with an Indian nexus will also be notified to the CCI. In digital markets, the companies are usually asset-light due to the majority of operations being undertaken on the internet.<sup>2</sup> However, the DVT will potentially allow the CCI to scrutinise a combination irrespective of the asset size.

## 4.2. TIMELY RESOLUTION OF VIOLATIONS OF SECTIONS 3 AND 4

- While *ex-ante* enforcement in merger control already exists in the Indian competition framework and is now being updated to suit the needs of digital markets, a similar framework currently does not exist for antitrust enforcement. Allegations pertaining to sections 3 and 4 of the Act, i.e., anti-competitive agreements and abuse of dominant position are analysed *ex-post facto*, with remedies and penalties being imposed after an investigation.
- Various ACPs identified in the Report are currently being looked into by the Commission on a case-to-case basis. Currently, a few of the ACPs are either being investigated by the CCI or have already been subjected to a final order.<sup>3</sup> The extant approach i.e., case to case analysis allows the parties to justify their conduct and show consequential pro-competitive effects, if any, arising from the conduct.
- However, a major challenge associated with investigations is their prolonged nature that enables continuing anti-competitive conduct. A quick analysis of final orders passed in 2022 shows that the CCI took 1074 days i.e., almost 3 years on average to issue a final order from the date of its *prima facie*

<sup>1</sup> Ministry of Corporate Affairs, *Report of Competition Law Review Committee*, p.129 (2019).

<sup>2</sup> OECD, *Start-ups, killer acquisitions and merger control – Note by Germany - DAF/COMP/WD(2020)20*, [https://one.oecd.org/document/DAF/COMP/WD\(2020\)20/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)20/en/pdf)

<sup>3</sup> The issue of self-preferencing is being looked at by the CCI (Case No. 40/2019) in an investigation while anti-steering provisions have been subjected to a *prima facie* order and a final order (Case No.07/2020).

order. An S&C mechanism, as proposed by the 2022 Bill, can ensure quicker interventions in the ongoing anti-competitive conduct. A study that analysed 84 cartel cases in the EU found that the settlement procedures brought down the duration of settled cases by around 9 months.<sup>4</sup>

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<sup>4</sup> Kai, H. & Ulrich, L., *The Settlement Procedure in the European Commission's Cartel Cases*, Journal Of Antitrust Enforcement (2017) <https://academic.oup.com/antitrust/article-abstract/5/3/458/2876106?redirectedFrom=fulltext>

# V. FEASIBILITY OF EX-ANTE FRAMEWORKS IN INDIA

- In addition to the need, the feasibility of a proposed ex-ante framework in India also needs to be discussed in the context of proposed laws in the country and the CCI's bandwidth to effectively implement the proposed framework.

## 5.1. PROPOSED FRAMEWORKS

- The Indian ex-ante framework, if implemented, will be expected to operate in consonance with other proposed frameworks that seek to regulate digital markets in multiple ways. These include the Draft Digital Personal Data Protection Bill, 2022 and the Indian Telecommunications Bill, 2022. Simultaneously, a Digital India Bill is also being proposed by the government. A new ex-ante framework, built from scratch, may need to ascertain means to avoid overlap and overregulation for stakeholders.
- Further, several important overlaps exist in the domain of consumer protection law as well. For instance, the Proposed Amendments to the Consumer Protection (E-commerce) Rules, 2020 seeks to prohibit self-preferencing and a few other practices that an ex-ante framework seeks to regulate including deep-discounting,<sup>5</sup> data manipulation to control prices,<sup>6</sup> manipulating search results<sup>7</sup> and listing their own sellers.<sup>8</sup>

## 5.2. BANDWIDTH OF THE REGULATOR

- The Report recommends that a DMU be set up within the CCI itself to deal with the cases concerning digital markets. A DMU could equip the Commission with the tools required to adequately deal with the concerns related to digital markets. At the same time, the establishment of the unit may also considerably stretch the bandwidth of the Commission, considering the CCI's limited existing capacity.
- The CCI's bandwidth needs to be analysed in the light of 3 parameters: financial resources, workload and the required personnel. On the financial end, the CCI's funding has not increased substantially over the years. For FY 2019-20, the CCI was allocated Rs. 55 crores which came down to Rs. 46 crores for FY 2020-21 and stayed the same for FY 2021-22.<sup>9</sup> It may be required to analyse the extent to which the CCI's financial might be required to be enhanced to effectively run a dedicated unit for digital markets.

<sup>5</sup> Proposed Amendments to the Consumer Protection (E-commerce) Rules, 2020 ('Draft Rules'), Clause 5(16).

<sup>6</sup> Draft Rules, Clause 5(14)(a).

<sup>7</sup> Draft Rules, Clause 5(14)(c).

<sup>8</sup> Draft Rules, Clause 6(6)(b).

<sup>9</sup> Competition Commission of India, *Annual Report 2021-22*, <https://www.cci.gov.in/public/images/annualreport/en/annual-report-2021-221671704224.pdf>;

Competition Commission of India, *Annual Report 2020-21*, <https://www.cci.gov.in/public/images/annualreport/en/20-211665122051.pdf>;

Commission of India, *Annual Report 2019-20*, <https://www.cci.gov.in/public/images/annualreport/en/annual-report-2019-201665121534.pdf>

- Insofar as the appointment of required staff is concerned, there are multiple concerns which need to be considered. As of March 2022, out of the 195 staff members allowed, 69 positions were unfilled.<sup>10</sup> Furthermore, the Chairperson's post has been lying vacant since October 2022. The government started inviting applications in July and after a long and tedious process, the selection committee shortlisted 3 names. However, consequently, the names were scrapped and the whole appointment process was started afresh.
- Furthermore, the other two full-time members of the CCI may retire from their posts in the near future. Accounting for the same, the CCI has recently invited applications for 3 full-time members.<sup>11</sup> Multiple personnel challenges, therefore, may require the attention of the government, before beginning work on a new DMU within the CCI.
- The limited personnel capacity has led to the low bandwidth of an overworked commission. Earlier, the Standing Committee on Finance's 52nd Report on the Competition (Amendment) Bill, 2022 had noted that the Commission has limited resources and reduction in timelines for approval of merger notifications, as proposed by the 2022 Bill, would overburden the Commission.<sup>12</sup> Furthermore, as per the CCI Annual Report 2021-22, 64 cases were pending before the DG for investigation. Recently, the Commission was also given the charge of the National Anti-Profiteering Authority. The increasing burden associated with new ex-ante regulations and a DMU for an already overworked CCI could potentially lead to a delay in justice delivery and inefficient internal mechanisms.

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<sup>10</sup> Competition Commission of India, *Annual Report 2021-22*, <https://www.cci.gov.in/public/images/annualreport/en/annual-report-2021-221671704224.pdf>.

<sup>11</sup> Ministry of Corporate Affairs, *Notice inviting applications for filling up 3 posts in the Competition Commission of India (2023)* <https://www.cci.gov.in/images/career/en/inviting-applications-for-filling-up-03-posts-of-member-in-the-competition-commission-of-india1674551526.pdf>

<sup>12</sup> Ministry of Corporate Affairs, *Standing Committee on Finance's 52nd Report on Competition (Amendment) Bill 2022*, p.25, [https://loksabhadocs.nic.in/lssccommittee/Finance/17\\_Finance\\_52.pdf](https://loksabhadocs.nic.in/lssccommittee/Finance/17_Finance_52.pdf)

## VI. LESSONS FROM OTHER JURISDICTIONS

It can be witnessed that multiple countries have recently begun experimenting with ex-ante frameworks in various capacities. A few of these jurisdictions have been mentioned below.

No.	Country	Framework	Timelines
1.	UK	Digital Markets, Competition and Consumer Bill	The Bill is expected to be released for public consultation this year. <sup>13</sup>
2.	Japan	The Act on Improving Transparency and Fairness of Digital Platforms	The Act was passed on May 27, 2020, and became effective on February 1, 2021. <sup>14</sup>
3.	South Korea	Act on Fair Intermediary Transactions on Online Platform	The Bill was introduced in September 2020 and is yet to be passed. <sup>15</sup>
4.	Australia	Interim Reports on Digital Platform Services Inquiry	The competition authority has released reports discussing a suitable framework. However, no bill has been released yet. <sup>16</sup>
5.	EU	DMA	The Act came into force on November 1, 2022 and will start applying from May 2, 2023. <sup>17</sup>

Currently, there is limited evidence available internationally on ex-ante frameworks. There exist multiple documents by the governments detailing the rationale and proposed frameworks on the subject. These include: OECD's discussion paper on Ex-ante regulation and Competition in Digital Markets,<sup>18</sup> Australian Competition & Consumer Commission's interim report on Digital Platform Services,<sup>19</sup> UK's Impact Assessment<sup>20</sup> etc. However, it needs to be kept in mind that there is little to no evidence available on the effectiveness of these frameworks within the relevant discussions.

<sup>13</sup> Alan Davis, *UK government set to publish Digital Markets, Competition and Consumer Bill*, Pinsent Masons (2022), <https://www.pinsentmasons.com/out-law/news/uk-government-digital-markets-competition-consumer-bill>

<sup>14</sup> Japan Ministry of Economy, Trade and Industry, *Making the Digital Market Easier to Use: The Act on Improving Transparency and Fairness of Digital Platforms* (TFDPA), <https://www.meti.go.jp/english/mobile/2021/20210423001en.html>

<sup>15</sup> Kim Gene-Oh et al., *KFTC Issues Public Notice on Proposed Enactment of the Fair Online Platform Intermediary Transactions Act*, Kim & Chang, [https://www.kimchang.com/en/insights/detail.kc?sch\\_section=4&idx=22155](https://www.kimchang.com/en/insights/detail.kc?sch_section=4&idx=22155)

<sup>16</sup> Thomas Jones et al., *Upping the ante: Australian Government consults on ex-ante regulation of digital platforms*, Lexology, <https://www.lexology.com/library/detail.aspx?g=4f42442f-3bc8-4f22-9708-2db99bc9a962>

<sup>17</sup> European Commission, *Digital Markets Act*, Press Release, (2022) [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_22\\_6423](https://ec.europa.eu/commission/presscorner/detail/en/IP_22_6423)

<sup>18</sup> OECD, *Ex Ante Regulation and Competition in Digital Markets - OECD Competition Committee Discussion Paper* (2021), <https://www.oecd.org/daf/competition/ex-ante-regulation-and-competition-in-digital-markets-2021.pdf>

<sup>19</sup> Australian Competition and Consumer Commission, *Digital platform services Inquiry - Interim report No. 5 – Regulatory reform*, <https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20September%202022%20interim%20report.pdf><sup>17</sup> European Commission, *Digital Markets Act*, Press Release, (2022) [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_22\\_6423](https://ec.europa.eu/commission/presscorner/detail/en/IP_22_6423)

<sup>20</sup> U.K. Department for Business, Energy and Industrial Strategy, *Impact Assessment - A new pro-competition regime for digital Markets* (2021), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1003915/DMU\\_Impact\\_Assessment.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1003915/DMU_Impact_Assessment.pdf)

- It is possible, however, for policymakers in India to refer to the policymaking process that has gone behind these frameworks, including the impact assessment reports that have been conducted internationally. For instance, the U.K. authorities released an impact assessment giving an estimate of different kinds of costs that an ex-ante framework would entail. These include not only the compliance cost for companies but also the reviewing and legal costs for the competition authorities.<sup>21</sup>
- In the EU, a multi-step process was followed before releasing its proposal for the DMA in December 2020.<sup>22</sup>
  - **Consultation process:** The EC conducted a public consultation on the DMA, which ran from June to September 2020,<sup>23</sup> with various stakeholders including companies and civil society organisations.
  - **Impact assessment:** An impact assessment was conducted in December 2020, evaluating the potential economic and social impacts of the proposed law.<sup>24</sup>
  - **Internal review:** Throughout 2021 and 2022, an internal review process involving the EC,<sup>25</sup> the European Parliament and the Council of the EU was done to finalise the proposal before its release.
- These frameworks may potentially provide a roadmap that India can pursue before coming out with a draft DCA. It should be kept in mind, however, that in the absence of concrete evidence of the performance of ex-ante frameworks internationally, it may not be prudent to rush into enacting a new law.

<sup>21</sup> U.K. Department for Business, Energy and Industrial Strategy, *Impact Assessment - A new pro-competition regime for digital Markets* (2021), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1003915/DMU\\_Impact\\_Assessment.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1003915/DMU_Impact_Assessment.pdf)

<sup>22</sup> European Parliament, *Digital Markets Act 2020/0374(COD)*, [https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2020/0374\(COD\)](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2020/0374(COD))

<sup>23</sup> European Parliament, *Digital Markets Act - Briefing*, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690589/EPRS\\_BRI\(2021\)690589\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690589/EPRS_BRI(2021)690589_EN.pdf); European Commission, *Summary Report on the open public consultation on the Digital Services Act Package*, <https://digital-strategy.ec.europa.eu/en/library/summary-report-open-public-consultation-digital-services-act-package>

<sup>24</sup> European Commission, *Impact assessment of the Digital Markets Act*, <https://digital-strategy.ec.europa.eu/en/library/impact-assessment-digital-markets-act>

<sup>25</sup> European Economic and Social Committee, *Digital Markets Act - Timeline*, <https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/digital-markets-act/timeline>

## VII. PRELIMINARY RECOMMENDATIONS

While The Dialogue will continue to analyse the proposed Indian ex-ante frameworks with more literature over the course of time, we are providing certain preliminary recommendations that may be considered by policymakers. These include:

- Consider the sufficiency of the changes brought by the 2022 Bill to tackle the challenges sought to be resolved by an ex-ante framework. Notably, the effectiveness of the S&C framework and the updated jurisdictional thresholds should be extensively analysed post their implementation.
- To avoid thematic and jurisdictional overlaps as well as regulatory burden for stakeholders, the scope and mandates of proposed frameworks for digital markets need to be ascertained effectively. The development of a DCA and its scope can only be appropriately defined once other policy developments are settled by the government.
- The regulator's bandwidth in terms of finances, personnel and workload needs to be taken into account before setting up a DMU. It is essential that the CCI is able to effectively perform its existing functions in a time-bound and sustainable manner before it is mandated to govern on the basis of a new framework.
- Lessons from international jurisdictions, at this stage, can only be drawn with respect to the policymaking strategy for a potential ex-ante framework, including conducting an impact assessment of a potential law. However, drafting and implementation of a law should proceed only once evidence of the success and challenges of international ex-ante frameworks is present.

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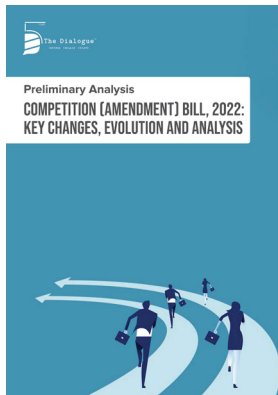


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