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Event Report

Digital Competition Dialogues

STAKEHOLDER CONSULTATION ON DRAFT DIGITAL COMPETITION BILL
AND THE CDCL REPORT: EXPERT OPINION



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Stakeholder Consultation on Draft Digital Competition Bill and the
CDCL Report: Expert Opinion

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1 INTRODUCTION

The Ministry of Corporate Affairs (MCA) recently published the report of the Committee on Digital Competition Law (CDCL/Committee), along with the proposed Digital Competition Bill 2024 (DCB). Discussions on the subject date back to 2022, when the Parliamentary Standing Committee on Commerce addressed the necessity for regulatory frameworks for digital markets.

In December 2022, the Parliamentary Standing Committee on Finance released its 53rd report, which proposed implementing a new legislation known as the Digital Competition Act. Subsequently, a few months later, the MCA established the CDCL to scrutinise the subject matter and publish a draft law. This leads us to the current juncture, whereby the Committee has ultimately released its report along with the draft bill. The consultation period for filing the comments is until April 15th.

Towards this, The Dialogue is organising a series of consultations and briefings to catalyse more engagement with the industry, civil society, and other relevant stakeholders. The first briefing and consultation took place on **March 21, 2024**, with the following panellists:

- **Prof Viswanath Pingali**, Associate Professor, IIM Ahmedabad & Senior Fellow Economics, The Dialogue
- **Mr Rahul Rai**, Partner and Co-founder, Axiom5 Law Chambers
- **Dr Aditya Bhattacharjea**, Sr. Professor (Retd.), Delhi School of Economics
- **Ms Modhulika Bose**, Counsel, P&A Law Offices

The discussion was held under Chatham House Rules, and the views summarised in this report do not represent the views of the speakers' organisation or The Dialogue.

2 THEMES

2.1. TIMELINE FOR CONSULTATION

2.1.1. Timeframe and Depth of Engagement

It was argued that the 30-day timeframe provided for public consultation is quite limited. If the time period increases, it will give the relevant stakeholders the opportunity to provide valuable insights to the Ministry. Additionally, it should be kept in mind that considering the dynamic nature of the sector and the constantly evolving technology landscape and business models, no specific timeframe would be sufficient. Fresh perspectives and insights will continue to emerge after the initial consultation.

2.1.2. Stakeholder Involvement and Perspectives

Considering the diverse perspectives and stakeholders involved, there is a need for a broader scope of consultation. Various groups, including gig workers, must be considered, especially regarding their complaints and issues with platform-based employment. The insights and experiences of individuals involved in services like cab aggregation and food delivery are crucial and differ significantly from conventional observations. Their perspectives must be integrated into the legislative process for comprehensive outcomes.

The law's conceptualisation diverges significantly from conventional principles, requiring a comprehensive examination of global events and trends. The committee's report provides insights from other countries, which must be contextualised for the Indian context. The involvement of diverse stakeholders ensures a comprehensive overview of challenges and ideas, contributing to robust legislation. It's emphasised that comprehensive perspectives from nationwide and various stakeholders must be consolidated before presenting the law to Parliament.

2.1.3. Regulatory Complexity and Alignment

The regulatory landscape is complex, with overlapping and potentially conflicting legislation under development. Harmonisation of various bills and alignment with existing laws is essential. The process involves internal reconciliation across ministries and departments and consultation with Parliamentary Standing Committees. Further, legal obligations must be customised for different entities and business models, with room for refinement. The Indian Competition Act and the amendments implemented last year also went through a thorough deliberative process.

2.2. INTER-REGULATORY MECHANISMS

2.2.1. Regulatory Overlap and Harmonisation

The discussion sheds light on the caution exercised by the Competition Commission of India (CCI) concerning jurisdictional areas of regulators. Further, there is concern regarding the potential conflicts between the Digital India Act (DIA) and the DCB, necessitating reassessment to prevent such conflicts. The panel acknowledges the need to prevent conflicts between these legislations to ensure smooth implementation.

Concerns regarding sequencing and alignment are raised, emphasising the importance of a comprehensive approach to address overlaps. Integrating mechanisms outlined in the Competition Act with the DCB requires inter-regulatory communication and coordination. However, the current mechanisms lack clarity regarding integrating input from various regulatory entities, compromising the feasibility of reconciling discrepancies before implementation.

It was suggested that besides the current inter-regulatory consultation mechanism as outlined in the Competition Act and facilitated by the DCB, there's a possibility to explore another mechanism. This mechanism could involve referring personnel from other ministries, like the Ministry of Electronics and Information Technology (MeitY), to the digital markets unit at the CCI. Once implemented, this unit could either solely or jointly assume the responsibility for enforcing the aforementioned law.

2.2.2. Policy Uncertainty and Stakeholder Engagement

Policy uncertainty is a significant challenge that can affect the industry's capacity for long-term planning and investment, particularly for foreign direct investment (FDI). While more resilient, domestic firms face challenges in adapting to policy ambiguities. Additionally, inconsistencies between different actions may lead to forum shopping practices by domestic firms, further

complicating regulatory enforcement and delaying penalty implementation. The challenges foreign firms face in adapting to local policies and clarifying competition law guidelines were also emphasised. Stakeholder engagement is crucial to consolidate perspectives and ensure a comprehensive understanding and consideration of potential drawbacks.

2.2.3. CCI's Role and Challenges

The CCI's cautious approach and challenges in addressing regulatory overlaps are emphasised. Consideration before initiating disputes is highlighted as an area that requires more attention and understanding. Panelists suggested more deliberation on regulatory processes and mechanisms for effective enforcement, including engagement with nodal authorities for the DPDP Act. Enforcement challenges, including delays in penalty implementation and coordination among different departments and ministries, are highlighted. Despite penalties being levied, the CCI's collection remains low, emphasising the need for better coordination and alignment of mechanisms outlined in the Competition Act with the DCB.

2.2.4. Learning from International Practices and Insights

Limited insights from European practices, particularly the Digital Markets Act (DMA), are noted as potential lessons for India. However, caution should be observed while deriving lessons, considering the difference in European and Indian realities. In Europe, the DMA's enforcement unit benefits from personnel experienced in handling disputes with the European Commission's enforcement authority under the Digital Services Act. The need to learn from such experiences with regulatory enforcement and mechanisms in Europe is highlighted to inform the interaction between the DCB and DIA. Furthermore, given the recent compliance offered by the designated gatekeepers in the EU, the panel believed that observing the result of the DMA & whether it achieves the desired objective could be fruitful.

2.3. CAPACITY BUILDING OF THE CCI

2.3.1. Enhancing CCI's Capacity

The discussion emphasised enhancing the CCI's capacity, particularly regarding human resources. Despite the significant progress made by the authority since competition enforcement began in 2009, there's a recognition of the need to expand the bench strength. The implementation of capacity development initiatives within the commission was proposed. However, the focus should be on increasing bench strength and enhancing the training of current personnel to meet the growing complexity of cases.

2.3.2. Challenges of Understaffing and Technical Expertise

The CCI faces understaffing issues, as highlighted by the comparison with the UK Competition and Markets Authority (CMA). A shortage of competition law and economics expertise is exacerbated by limited relevant education on these subjects in India. This scarcity leads to a lot of talent being absorbed by the private sector, posing challenges for the commission in recruiting and retaining skilled personnel. There's a need to prioritise building capacity to support laws related to digital markets. Moreover, the importance of technical knowledge from the industry, particularly the IT sector, is recognised in supplementing government agencies' expertise.

2.3.3. Rotational Assignments and Continuity in Staffing

The panel highlighted the role of the DG office in examining contraventions outlined in the DCB. The impact of a regular rotation of case officers on the office's capability is highlighted, emphasising the need for stability and continuity in staffing. It's suggested that existing CCI staff should be adequately supported to work diligently on digital market appeals, providing an opportunity to evaluate various business models.

2.4. NATURE OF OBLIGATIONS

2.4.1. Significance of Competition Law

The panel prompted a comparison of the significance of competition law in the United States and India. There's an acknowledgement of the limited institutional capacity in emerging economies like India, highlighting the importance of understanding bundling agreements through the lens of trust-building efforts.

2.4.2. Regulatory Strategy and Autonomy

The panel discussed the intent of the DCB behind devising a principle-based framework. The intent was to circumvent the drawbacks of the DMA design, which allows equal treatment of all entities and models. The responsibility for enforcing rules lies with the CCI, which will research core digital services, identify pain points, and develop dos and don'ts and prescriptive norms based on these findings. However, the primary drawback is recognised: the significant autonomy granted to regulators. However, as a common law nation with a strong foundation in administrative law principles, there will likely be an understanding of the scope of delegation and appropriate circumstances for exercising delegated power.

3 AUDIENCE INTERACTION

On the scope of Schedule 1 concerning Core Digital Services (CDS), the panel noted the entrenched position of major digital platforms in the market and the challenges confronting them. Enterprises are required to fulfil specified financial and usage criteria outlined in the legislation. Additionally, the Act includes qualitative criteria for designating platforms failing to meet specified levels. Uncertainty remains regarding the extent to which designated platforms will be subject to obligations in the future, but it's preferred that they be addressed within the statute. Despite no voiced competition concerns around certain services presently, the possibility of their emergence in the future remains, possibly hindered by affected parties lacking the capacity, expertise, or resources to file complaints under the Competition Act.

Regarding tying and bundling in digital markets, the panellists discussed the potential impact, noting that they could be beneficial in some cases and detrimental in others. For example, the initial Word version lacked a

document comparison function, but it has since been integrated into the software. It's essential to ascertain whether this feature is included in the bundled version or if it's an intrinsic part of the software. If eliminating tying and bundling is deemed unnecessary, assessments should be customised to each service, identifying positive and negative instances. Therefore, a highly tailored approach is essential to evaluate the unique characteristics of each service comprehensively.

In the context of allowing expertise from the private sector to the Commission, the panellists addressed the possibility of potential regulatory capture. They noted the presence of designated cooling-off periods and opportunities for transition through a revolving door policy. While the potential for regulatory capture exists, establishing a framework of checks and balances can effectively mitigate its impact and could, therefore, enhance the CCI's capacity.



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