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Written Comments

REPORT OF THE COMMITTEE ON DIGITAL COMPETITION LAW AND THE DIGITAL COMPETITION BILL, 2024

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REPORT OF THE COMMITTEE ON DIGITAL COMPETITION LAW AND THE DIGITAL COMPETITION BILL, 2024

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Executive Summary

The document provides comprehensive comments on the Report of the Committee on Digital Competition Law ('the Report/ CDCL report') and Digital Competition Bill, 2024, ('DCB/the Bill') highlighting key areas of concern and offering recommendations for modification. Divided into chapters, the report systematically examines the preliminary definitions, the designation of enterprises, obligations imposed on these enterprises, the powers granted to the Competition Commission of India (CCI), and on the respective chapters of the report, among others.

Below are the key recommendations outlined in the report:

Need to consider alternate modes of interventions

a. The DCB may involve high error costs and capacity demand for the CCI. Further, it may have unintended consequences for the economy and may not be effective in regulating competition in digital markets. Therefore, the current ex-ante law, i.e., the DCB, should be reconsidered.

b. In light of these concerns, the Government may consider alternative modes of intervention, including co-regulation methods, increased capacity of the CCI and/or relying on recent changes to the Competition Act, 2002.

Need for increased consultations and evidence

c. If implementing a new ex-ante law to regulate digital markets, i.e., the DCB is the approach sought to be followed by the Ministry of Corporate Affairs (MCA), it is crucial that the same is done **only after** collecting **i)** sufficient evidence about its potential efficacy and unintended consequences; and **ii)** inputs of a wide group of relevant stakeholders, including Micro, Small, and Medium Enterprises (MSMEs), startups, gig workers, non-technology companies, think-tanks and civil society.

d. These initiatives could take multiple forms including **i)** another round of invitation of comments post incorporation of inputs received to this e-consultation; **ii)** public consultation meetings with industry and policy stakeholders; **iii)** conducting impact assessment studies and/or **iv)** referring the Bill to the Parliamentary Standing Committee on Finance for further deliberation and collection of stakeholder inputs.

Definition of Business User & End User

e. The definition of end users does not account for differences between the business models of various **Core Digital Services** (CDS). These differences should be given due consideration and the definition should be updated accordingly.

f. The definition of business users is broad and encompasses entities supplying or providing goods or services, ***including*** through CDS. Additionally, it does not account for the differences between the business models of various CDS. The definition should be restricted to include those entities engaged in transactions facilitated exclusively by CDS, not including through CDS. Further, it should account for differences in the business models of various CDS.

Designation of a Systemically Significant Digital Enterprise (SSDE)

g. Financial strength thresholds are too low and there is a need for a mechanism to determine more realistic numbers tailored to the Indian context.
h. The proposed end user & business user thresholds are too low. There is need for additional research to ensure that the numbers decided upon are neither too high nor too low.
i. In the presence of a quantitative threshold, there is no requirement of a qualitative threshold for designation.
j. Considering thresholds at a group level where the entity is a part of a group may lead to incorrect assessments of financial strength. Hence, the need for computation parameters to be limited to entities involved in CDS.
k. With regards to designation of Associate Digital Enterprises (ADE), the term *'directly or indirectly'* involved should be further clarified in the Bill. The definition needs to be clarified to specify the extent and nature of involvement required for an entity to be designated as an ADE. Further, clear and specific criteria are necessary for designation of ADEs should be provided.

Obligations on Systemically Significant Digital Enterprises and their Associate Digital Enterprises

l. The CCI may have capacity constraints on formulating & implementing regulations and therefore focus should be on alternative interventions requiring less capacity. Further, the DCB allows the CCI to impose differential obligations on SSDEs offering the same CDS. However, lack of specified criteria for determining when and how the CCI can apply such differential obligations may lead to significant arbitrage and distortions in regulated services. Therefore, specific guidance for how differential obligations will be decided should be included.
m. Exemptions which enable companies to exhibit objective justifications, consumer benefit and/or pro-competitive effects of the conduct should be incorporated in the clause.
n. The obligation on fair & transparent dealing is too broad and guidance on parameters of the obligation are required to ensure certainty.
o. The obligation on self-preferencing lacks clarity on the term *"related parties"* and does not take into consideration the pro-competitive effects of self-preferencing. Hence, there is a need for more clarity on the term *"related parties"* and taking into consideration the pro-competitive effects.
p. The data usage obligation consists of prohibition on intermixing and cross usage without explicit consent, which overlaps with the Digital Personal Data Protection Act (DPDPA). Furthermore, the issue of portability of data of business users may conflict with the intention of the DPDPA. Therefore, the obligations on consent requirements and data portability should be removed.
q. There is a lack of clarity on the term "*integral*" in anti-steering. Hence, clarity on the term "integral" is being sought along with pro-competitive effects to be considered for this obligation.
r. The term "*incentivise*" in the tying & bundling clause may inadvertently hinder SSDEs' ability to offer value addition to services. Therefore, the word "*incentivise*" should be removed.

Power of the Commission to Conduct an Inquiry

s. There is a lack of clarity regarding procedures when similar proceedings are underway under both Competition Act, 2002, and the DCB. Hence, sufficient clarity should be provided on the same.
t. The Bill lacks clarity on certain aspects of the settlement and commitment mechanism including admission of guilt and third party consultation. The consultation process allows the CCI to solicit feedback from third parties regarding settlement or commitment applications. However, this entails sharing

confidential documents and submissions, potentially harming a party's interests. Additionally, the bill doesn't clarify whether choosing the commitment or settlement mechanism implies admission of guilt for the applicant. Adequate safeguards should be established to ensure confidentiality of the proceedings. Additionally, clarity should be provided on whether submission of application would constitute as admission of infringement.

Powers of the Commission and Director General

u. While the report acknowledges the necessity for an inter-regulatory mechanism, the Bill lacks a framework for such a mechanism. There is a need for an inter-regulatory consultation mechanism to ensure certainty as well as avoid overlaps and conflicts.

v. *Legal advisors* are included within the definition of 'agent' thereby allowing them to be examined under oath by the DG, which may infringe upon attorney-client privilege. There is a need to omit legal advisors from the definition of "agent" to safeguard this privilege.

Penalties

w. Penalties are calculated based on total global turnover. Penalty should rather be imposed on *'relevant turnover'* of the enterprise.

Miscellaneous

x. The Bill grants the Central Government broad discretionary power to exempt enterprises on grounds of public interest. However, the provision lacks clear guidance on defining *"public interest,"* leading to potential divergent interpretations. Therefore, sufficient guidance may be required within the provision.

y. The Bill should provide an opportunity for enterprises to consult with the CCI during the designation process, especially when designation is based on quantitative thresholds. Additionally, an opportunity should be provided to show why an enterprise may not be designated despite meeting quantitative thresholds. Furthermore, the Bill should establish a comprehensive consultative process for the CCI to engage with diverse stakeholders while formulating regulations.

z. There is a need to further strengthen the regulatory process by providing adequate scope for consultation with diverse stakeholders under clause 49.

Schedule I

aa. The report lacks rationale for including certain services under Schedule 1. The standard should be limited to sectors with clear evidence of competition bottlenecks, rather than those where there is a *'risk of concentration'* . Alternatively, a careful and transparent assessment process must be established to determine sectors that are at a risk of concentration before adding a service to the list of CDS.

bb. The comprehensive procedures inherent to ex-ante frameworks may cause prolonged timelines and therefore, alternative approaches to intervention may be considered. If the current approach is to be followed, capacity building of the CCI should be ensured before the law is passed.

Indian Regulatory Landscape For Large Digital Enterprises - Efficacy And Gaps

cc. The Report delineates overlaps with several policy instruments but does not provide guidance as to their resolution. Similarly, it recommends establishment of inter-regulatory consultation mechanisms but does not provide guidance on the same. Establishing inter-regulatory consultation

mechanisms should be prioritised before the law is tabled in Parliament, to avoid regulatory overlaps and conflicts.

Emerging International Practice

dd. The report discusses various international digital market regulatory models but does not provide rationale for reliance on certain models and not others. A more balanced assessment of global models is recommended for a comprehensive understanding of regulatory strategies applicable to India's digital landscape.

A Fit-For-Purpose Competition Regime For The Indian Digital Economy

ee. The Report lacks specific measures for capacity enhancement of the CCI and Digital Markets and Data Unit (DMDU), but does not provide concrete steps towards the same. Capacity enhancement of the CCI and the DMDU should be prioritised before the law is passed.

Report of the Committee on Digital Competition Law: Annexures III

ff. The consultation process for the bill and report lacked sufficient inclusivity, by not including key stakeholders in the discussion. Hence, there is a need for an open and inclusive framework for consultation, prioritising diverse stakeholder engagement.

A. Introduction

In December 2022, the Parliamentary Standing Committee on Finance released its 53rd report[1] recommending a new ex-ante law, i.e., the Digital Competition Act (DCA). Subsequently, the MCA constituted the Committee on Digital Competition Law (CDCL/Committee) with the mandate to assess the need and feasibility of an ex-ante framework and develop a draft DCA.

The Committee released its report recommending an ex-ante framework for the regulation of digital markets along with the DCB 2024.[2] The previous deadline for the report was 15 April 2024. However, a one month extension (15 May 2024) for the submission was provided.

This submission solely reflects the opinion of The Dialogue and does not represent the views of our fellows, advisors or consultants.

The Dialogue has been actively engaged in fostering discussions and catalysing engagement on the subject of digital competition law and policy. Our comments on the Bill and the Report are based not only on **secondary research** but also insights gleaned from a **series of discussions** on the subject. These discussions involved a diverse array of participants, including industry stakeholders from technology and non technology sectors, global experts from international organisations, the European Union (EU), the United Kingdom (UK), Australia and the United States (US), lawyers, academics, economists and civil society organisations. A few of our efforts in this direction are provided below:

a. **Virtual Roundtable Discussion (March 2023):** We hosted a virtual roundtable titled *"Future of Competition Policy in Digital Markets,"* to discuss ex-ante regulations featuring esteemed speakers and engaging a diverse group of stakeholders, including global experts.[3]
b. **Digital Markets and Gaps in The Indian Competition Regime (May 2023)**: This working paper discusses the extent of policy and regulatory gaps in the Indian competition framework in the context of digital markets and makes preliminary observations for the way forward.[4]
c. **International Conference (July 2023):** We organised an international conference on *"Competition Law in the Digital Age: Adapting to New Realities"* bringing together diverse stakeholders including industry bodies, civil society, academics, and government bodies from across the world including the United Nations Conference on Trade and Development (UNCTAD) and the Organisation for Economic Co-operation and Development (OECD).[5]

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[1] *Anti-Competitive Practices by Big Tech Companies,* 53rd Report, Standing Comm. on Fin., Ministry of Corporate Affairs(2022-2023), https://loksabhadocs.nic.in/lsscommittee/Finance/17_Finance_53.pdf.
[2] *Report of the Committee on Digital Competition Law*, Ministry of Corporate Affairs, Government of India (2024), https://www.mca.gov.in/bin/dms/getdocument?mds=gzGtvSkE3zlVhAuBe2pbow%253D%253D&type=open.
[3] *Future of Competition Policy in Digital Markets*, The Dialogue (Mar. 21, 2023), https://thedialogue.co/wp-content/uploads/2023/03/Event-Report-Future-of-Competition-Policy-in-Digital-Markets.pdf.
[4] *Digital markets and gaps in the Indian digital markets and gaps in the Indian competition regime,* The Dialogue (May 22, 2023), https://thedialogue.co/wp-content/uploads/2023/05/FINAL-Digital-Markets-and-Gaps-in-the-Indian-Competition-Regime_forprints.pdf.
[5] *Competition Law in the Digital Age: Adapting to New Realities*, The Dialogue (Aug. 10, 2023), https://thedialogue.co/wp-content/uploads/2023/08/Designed1008-EVENT-REPORT-Adating-to-new-realities1.pdf. https://thedialogue.co/wp-content/uploa.

d. **Research Report: Indian Policy Instruments and Objectives of the Proposed Digital Competition Act: Implications, Challenges, and Way Forward (February 2024):** This research paper delves into the objectives of a potential digital competition framework, highlighting its overlaps, conflicts, and potential implications within the broader regulatory landscape and other policy instruments. The paper addresses challenges presented by these overlaps and conflicts and offers recommendations for policymakers.[6]
e. **First Briefing and Consultation on the DCB and the Report (March2024):** We organised a briefing and consultation session to kickstart engagement with industry, civil society, and other stakeholders on the DCB and the CDCL Report.[7]
f. **Brief – Report of the Committee on Digital Competition Law and Draft Digital Competition Bill, 2024 (April 2024):** This brief provides a brief overview of the CDCL Report, synthesised with the draft DCB, to catalyse enhanced understanding of the framework.[8]
g. **Industry Roundtable on the DCB and the Report (April 2024):** We conducted an industry roundtable, inviting stakeholders from various technology and non technology sectors including online social networking, cloud services, fintech, mobility aggregation, and more, to provide inputs and recommendations on the DCB.

These engagements contribute to the ongoing discourse and facilitate a more inclusive and informed approach to addressing competition issues in digital markets. Relying on these initiatives and secondary research, we have provided our detailed comments on the Bill and the Report, which are provided below.

[6] *Indian policy instruments and objectives of the proposed digital competition act: implications, challenges, and way forward*, The Dialogue (Feb. 1, 2024), https://thedialogue.co/wp-content/uploads/2024/02/Indian-Policy-Instruments-and-Objectives-of-the-Proposed-Digital-Competition-Act-Implications-Challenges-and-Way-Forward.pdf.
[7] *Stakeholder Consultation on Draft Digital Competition Bill and the CDCL Report: Expert Opinion,* The Dialogue(Mar. 28, 2024), https://thedialogue.co/wp-content/uploads/2024/03/Digital-Competition-Dialogues-First-Stakeholder-Consultation-Expert-Opinion.pdf.
[8] Bhoomika Agarwal, Aman Mishra & Saksham Malik, *Brief – Report of the Committee on Digital Competition Law and Draft Digital Competition Bill, 2024*, The Dialogue (Apr. 3, 2024), https://thedialogue.co/publication/brief-report-of-the-committee-on-digital-competition-law-and-draft-digital-competition-bill-2024/.

B. Need to Explore Alternate Forms of Interventions

1. Challenges with an ex-ante digital competition law

The DCB is an ex-ante law which seeks to impose conduct requirements on SSDEs through regulations based on principles enshrined in the Bill itself. The Report acknowledges the high error costs associated with ex-ante regulations and suggests that such regulations should be deployed cautiously, supported by overwhelming evidence of harm and negative externalities.[9] In the past, similar regulations internationally have led to unintended consequences, for example, negative impact on investments. Reportedly, General Data Protection Regulation (GDPR) has adversely affected startup investments in the EU. Furthermore, it is believed that similar provisions in the Digital Markets Act (DMA) are likely to yield comparable outcomes.[10]

Further, according to a report, implementing ex ante regulation could cause a Gross Domestic Product (GDP) loss of approximately 85 billion EUR and a reduction of consumer welfare by 101 billion EUR, due to decreased productivity and after considering other control variables.[11] It must also be noted that out of 29 stakeholders who were invited to provide inputs, only 14 expressed that they are in support of an ex-ante law.

Lastly, ex-ante frameworks may also require substantial investments in capacity and personnel. In the European context, it is contended that the EU requires approximately 25 million euros ($26 million) to begin recruiting external staff for enforcing Digital Services Act (DSA) and DMA. Regulators also caution that the EC planned hiring of 230 individuals is insufficient to enforce the DSA and DMA effectively.[12] In the UK, the government has been actively working towards strengthening the Digital Market Unit (DMU) by allocating substantial financial and personnel resources. In 2021, the Competition and Markets Authority (CMA) allocated £4.80 million to establish the DMU, followed by £6.26 million in 2022 to develop the DMU further.[13] The CMA also increased its personnel from 786

[9] CDCL report, para 3.2 at p. 103.

[10] https://truthonthemarket.com/2024/03/12/the-broken-promises-of-europes-digital-regulation/ Dirk Auer, *The Broken Promises of Europe's Digital Regulation,* Truth on the Market (Mar. 12, 2024), https://truthonthemarket.com/2024/03/12/the-broken-promises-of-europes-digital-regulation/.

[11] Hosuk Lee-Makiyama & Badri Narayanan Gopalakrishnan, *Economic Costs of Ex ante Regulations*, ECIPE, (Oct. 2020), https://ecipe.org/publications/ex-ante/.

[12] Jillian Deutsch, *Europe Passed New Tech Rules. That Was the Easy Part*, Bloomberg (Aug. 2, 2022, 4:15 PM IST), https://www.bloomberg.com/news/newsletters/2022-08-02/europe-will-face-challenges-enforcing-new-tech-bills-dma-and-dsa.

[13] Competition & Markets Authority, Annual Report and Accounts 2021/22, HC 366, CMA/2022/02 (UK) (last visited May 15, 2024), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1097032/Annual_Report_CE.pdf.

individuals in 2021-22 to 813 during 2022-23, partly owing to the growth of the DMU.[14]

2. Alternative modes of intervention

In light of the various concerns that exist regarding the efficacy and capacity demand of ex-ante frameworks, the Government may consider alternative modes of intervention in digital markets. These interventions may include relying on existing frameworks or curating novel solutions. For instance, recognizing the need for the CCI to intervene fast in markets, the government has recently notified a set of amendments to the Competition Act, 2002, which can enable the CCI to intervene swiftly through mechanisms such as settlements and commitments, which exists in addition to the pre-existing existing practice of issuing interim orders in cases.

Further, the government could explore novel alternative light-touch interventions to resolve bottlenecks in digital markets. For instance, a **"co-regulation" model may empower operators to implement voluntary measures within a regulatory structure**. Integrating such a strategy could foster a more dynamic regulatory environment, balancing competition and innovation in the digital sphere.

Another approach to consider is **sectoral regulation,** as practised by the Telecom Regulatory Authority of India (TRAI), which introduces ex-ante rules only in specific sectors after careful consideration.[15] This method guards against the potential error costs of pre-emptive regulations, preserving space for innovative models. A model similar to this, which intervenes only in identified sectors after collecting evidence of structural competition harms may be considered.

[14] Competition & Markets Authority, *Annual Report and Accounts 2022/23,* HC 1460, CMA/2023/02 (UK) (last visited May 15, 2024),https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1174610/Annual_Report_and_Accounts_2023_Designed_Version_FINAL_27.07.23.pdf.

[15] The Telecommunication Interconnection Regulations, 2018, No. 1, Telecom Regulatory Authority of India notification dated 1st January, 2018, https://www.trai.gov.in/sites/default/files/Regulation_TIR_02012018.pdf.

C. Need for more consultation and evidence collection

1. Insufficiency of existing consultations and evidence

If implementing a new ex-ante law to regulate digital markets, i.e., the DCB is the approach sought to be followed by the MCA, it is crucial that the same is done **only after** collecting **i)** sufficient evidence about its potential efficacy and unintended consequences; and **ii)** inputs of a wide group of relevant stakeholders, including MSMEs, startups, gig workers, non technology companies and civil society. It must be noted that the Committee consulted only 29 stakeholders which included major tech companies, industry bodies, law firms and think tanks. However, there was a lack of representation from various sectors that are included in the list of Core Digital Service (CDS).

For instance, there was limited to negligible representation from the cloud services and payment providers. Further, various companies from non-technology sectors, which will certainly be impacted by the law, were not consulted. Various other perspectives, i.e., consumer bodies, gig workers, civil society organisations and think tanks received little to no representation. In the context of evidence collection, the Report does not undertake assessments with respect to the law's potential impact on costs, resources, markets and the economy. There is also a gap in analysis that can ensure that the law will not overlap or conflict with other frameworks. Notably, even though various overlaps and conflicts are highlighted, the manner in which these can be resolved, i.e., the nature of inter-regulatory consultation mechanisms have not been discussed.

2. Scope for more consultations and evidence

To undertake the aforementioned exercises of intensified evidence and stakeholder input collection, the **MCA should dedicate significant time and undertake proactive initiatives**. Undertaking these initiatives gradually and meaningfully, before the law is tabled in the parliament, can ensure that **i)** representative and inclusive consultations are held with different sections of the ecosystem, ensuring a truly representative policymaking process; **ii)** assessments of the impact of the law on the economy, regulatory capacity, market dynamics and consumer welfare inform the proposed law; and **iii)** unintended consequences of the law can be pre-emptively avoided, ensuring a truly effective framework with minimum scope for error.

These initiatives could take multiple forms including i) another round of invitation of comments post incorporation of inputs received to this e-consultation; ii) public consultation meetings with industry and policy stakeholders, similar to those organised by Ministry of Electronics and Information Technology (MeitY) on the Digital India Act (DIA); iii) conducting impact assessment studies and/or iv) referring the Bill to the Parliamentary Standing Committee on Finance for further deliberation and collection of stakeholder inputs.

D. Comments on the Draft Digital Competition Bill, 2024

Chapter 1: Preliminary

1. Definition of End Users

1.1. Relevant Parts:

a. Bill: Clause 2(8)
b. Report: Chapter IV, Paras 3.19 - 3.20

1.2. Key Consideration: The DCB's definition specifies that end users encompass any natural or legal person other than a business user engaging with CDS. It does not consider that the nature of end users vary across different markets. For example, in e-commerce, purchasers of goods may be considered end users, while on search engines, visitors to the website or search results may be regarded as end users.

1.3. Relevant Research and Inputs:

a. The 'Annex' at the end of the DMA provides further clarity on the definition of "end users".[16] This annex outlines the methodology for identifying and calculating 'active end users' and 'active business users' for each core platform service. For instance, in online intermediation services, 'active end users' include unique users who engage with the service at least once in a month.

1.4. Recommendation: The definition of end-user should be updated by keeping in mind the differences between the business models of the identified CDS.

2. Definition of Business Users

2.1. Relevant Parts:

a. Bill: Clause 2(3)
b. Report: Chapter IV, Paras 3.19 - 3.20

2.2. Key Consideration: The definition of "business user" within the DCB presents a broad scope by encompassing entities supplying or providing goods or services, ***including*** through CDS. Therefore, the definition will not only include business users who use the CDS but potentially business users utilising other services as well. Further, it does not account for the differences in the business models involved in various CDS. An unduly expansive scope of the definition may lead to inaccurate assessments of the local spread of an entity.

2.3. Relevant Research and Inputs

a. According to the DMA, a "business user" means any natural or legal person acting in a commercial or professional capacity who uses essential platform services to provide goods or services to end users.

b. Furthermore, the DMA Annexe also includes specific business user definitions for each

[16] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022, on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), https://eur-lex.europa.eu/legal-content/EN/TXT/?toc=OJ%3AL%3A2022%3A265%3ATOC&uri=uriserv%3AOJ.L_.2022.265.01.0001.01.ENG.

identified core platform service. For instance, in the case of video-sharing platforms, a business user will include the *"Number of unique business users who provided at least one piece of audiovisual content uploaded or played on the video-sharing platform service during the year."*

2.4. Recommendation: The definition should be restricted to include those entities engaged in transactions facilitated *exclusively* by CDS, not *including* through CDS. Furthermore, the definition should take into consideration and be updated keeping in mind the differences in business models of various CDS.

Chapter 2: Designation of a Systemically Significant Digital Enterprise

3. Significant Financial Strength Test

3.1. Relevant Parts:

a. Bill: Clause 3(2)(a)

b. Report: Chapter IV, Paras 3.15 - 3.18

3.2. Key Consideration: The quantitative thresholds to assess financial strength are too low and may end up covering companies that pose no evidenced risk of concentration or structural anti-competitive conduct in digital markets. The Report has relied on international frameworks for various parameters, with insufficient analysis to contextualise them to India's domestic realities. There is no methodical analysis to decide these thresholds.

3.3. Relevant Research and Inputs:

a. During our stakeholder consultations, concerns were raised regarding the adequacy of quantitative thresholds. Stakeholders emphasised that the financial strength test thresholds, including that INR 4000 Crores for Indian turnover, may be too low.

b. Additionally, stakeholders pointed out a lack of clarity regarding the computation of these figures and the Committee's decision-making process in setting these numbers.

3.4. Recommendation: Thresholds should be set through a research oriented process that keeps in mind India's domestic realities. The process should also ensure that the thresholds do not inadvertently cover entities that do not pose risk of concentration or structural competition harms.

4. Significant Spread Test

4.1. Relevant Parts:

a. Bill: Clause 3(2)(b)
b. Report: Chapter IV, Paras 3.19 & 3.20

4.2. Key Consideration: The Committee's suggested base values of *one crore* end users or *ten thousand* business users might be too low. For instance, the threshold of one crore (10 million) end users does not indicate significant presence in an online user base of 751.5 million.[17] This figure represents only 0.75% of India's internet users. Given India's demographics and population size, the thresholds proposed by the Bill may be relatively easier to cross, potentially diluting the efficacy of the 'significant spread' test in identifying SSDEs.

4.3. Relevant Research and Inputs:

a. During our stakeholder consultation it was highlighted that due to the low threshold, certain firms from specific sectors with no competition concerns may be designated as an SSDE simply because they meet the numerical thresholds.

[17] Simon Kemp, *Digital 2024: India*, DataReportal (Feb. 21, 2024), https://datareportal.com/reports/digital-2024-india#:~:text=The%20state%20of%20digital%20in%20India%20in%202024&text=There%20were%20751.5%20million%20internet,percent%20of%20the%20total%20population.

b. Furthermore, it was highlighted that there is a lack of clarity on the manner of computation of these figures.

4.4. Recommendation: Thresholds should be set through a research oriented process that keeps in mind India's domestic realities. The process should also ensure that the threshold does not inadvertently cover entities that do not pose risk of concentration or structural competition harms.

5. Qualitative Thresholds

5.1. Relevant Parts:

a. Bill: Clause 3(3)

b. Report: Chapter IV, Paras 3.32 - 3.33

5.2. Key Consideration: Clause 3(3) of the DCB grants the CCI significant discretion via qualitative criteria for designating an enterprise as an SSDE for a CDS. However, in the presence of quantitative designation that can routinely be revised, a qualitative criteria may not be required.

5.3. Relevant Research and Input: The DMCC states that the CMA may not designate an undertaking as having SMS in respect of a digital activity unless the turnover condition is met in relation to the undertaking thus limiting the discretion of the authority to avoid ambiguity.[18]

5.4. Recommendation: Emphasis should be on the quantitative criteria and qualitative criteria should be removed.

6. Enterprise is a Part of a Group

6.1. Relevant Parts:

a. Bill: Clause 3 Explanation 7

b. Report: Chapter IV, Para 3.28

6.2. Key Consideration: This provision states that where the enterprise is a part of a group, then the values of "turnover in India", "global turnover", "gross merchandise value", "global market capitalisation", "number of end users" and "number of business users" shall be computed with reference to the entire group. The group entity threshold is too broad as it potentially encompasses unrelated entities while computing these parameters. This broad approach may distort assessments of financial strength and significant spread, especially when unrelated entities within the group that are not involved in CDS are included while computing various thresholds such as turnover, business users, end users, etc.

6.3. Recommendation: Computation of parameters should be done only keeping those entities in consideration that are involved in the provision of the CDS, not the entire group.

7. Associate Digital Enterprises

7.1. Relevant Parts:

a. Bill: Clause 4 (9)

b. Report: Chapter IV, Paras 3.27 - 3.31

7.2. Key Considerations:

a. As per the DCB, if an enterprise has been designated or might be designated as an SSSDE and it is part of a group, and one or more other enterprises within such group are directly or indirectly involved in the provision of the CDS in India, then the Commission may pass an order designating them as ADEs. However, the term *"directly or indirectly"* while designating entities as ADEs within the DCB is overly unclear. This ambiguity can lead to uncertainty in determining which entities within a group qualify as ADEs.

[18] Digital Markets, Competition and Consumers Bill, Bill 294, § 2(1), § 5, § 6 (UK 2023).

b. Section 4(9) of the Draft DCB grants CCI authority to designate ADEs but lacks a framework for the designation process. Due to significant variations in business models, absence of a mechanism to determine ADEs may lead to uncertainty and arbitrage.

7.3. Relevant Research and Inputs: Concerns related to lack of clarity on designation of ADEs were highlighted in our stakeholder consultations.

7.4: Recommendation:

a. The term 'directly or indirectly' involved should be further clarified in the Bill. The definition needs to be clarified to specify the extent and nature of involvement required for an entity to be designated as an ADE. Further, clear and specific criteria necessary for designation of ADEs should be provided.

Chapter III: Obligations on Systemically Significant Digital Enterprises and their Associate Digital Enterprises

8. Conduct Requirements to be set out through Regulations

8.1. Relevant Parts:

a. Bill: Clause 7

8.2. Key Consideration:

a. Delegating the power to create obligations for SSDEs to subordinate legislation will require substantial capacity enhancement for the CCI to formulate and implement detailed regulations.

b. The DCB allows the CCI to impose differential obligations on SSDEs offering the same CDS. However, lack of specified criteria for determining when and how the CCI can apply such differential obligations may lead to significant arbitrage and distortions in regulated services.

8.3. Relevant Research and Inputs: Our discussions emphasises on the need for capacity building of the CCI as well as the need for certain and clear guidance on obligations under the Bill.

8.4: Recommendation:

a. Consider alternative intervention approaches requiring less capacity to avoid over-reliance on regulation-based frameworks. Alternatively, if regulation remains the chosen route, prioritise comprehensive capacity building on personnel and technical expertise before implementing the law.

b. Specific guidance for how differential obligations will be decided should be included.

9. Exemptions from Obligations

9.1. Relevant Parts:

a. Bill: Clause 7
b. Report: Chapter IV, Paras 3.42 to 3.45

9.2. Key Consideration: Clause 7 (5) states that the Commission while creating regulations for conduct requirements may consider factors that could hinder compliance by SSDEs and their ADEs. These factors include economic viability, fraud prevention, cybersecurity, protection of intellectual property rights, existing legal requirements, and any other prescribed factors. However, exemptions that allow for entities to exhibit potential pro-competitive effects, objective business justifications and/or consumer benefit are missing.

9.3. Relevant Research and Inputs: In the UK, countervailing exemptions are provided under section 29 of the DMCC. The exemption applies if the conduct in question benefits users or potential users of the digital activity, outweighs any detrimental impact on competition, is indispensable and proportionate to realising those benefits, and does not eliminate or prevent effective competition.

If representations made by the undertaking lead the CMA to consider that the exemption applies,

the CMA must close the conduct investigation. As a result, the undertaking is treated as if the conduct did not breach the conduct requirement.

9.4. Recommendation: Exemptions which enable companies to exhibit objective justifications, consumer benefit and/or pro-competitive effects of the conduct should be incorporated in the clause.

10. Fair and Transparent Dealing

10.1. Relevant Parts:

a. Bill: Clause 10
b. Report: Chapter IV, Paras 3.34 - 3.40

10.2. Key Consideration: The fair and transparent dealing provision within the DCB is unduly broad, lacking specific parameters to guide its application. Without clear boundaries, the provision may cause uncertainty and arbitrary application for SSDEs.

10.3. Recommendation: Sufficient guidance should be added to demarcate the parameters of the obligation to ensure certainty regarding conduct requirements for SSDEs.

11. Self-Preferencing

11.1. Relevant Parts:

a. Bill: Clause 11
b. Report: Chapter IV, Paras 3.34 - 3.40

11.2. Key Consideration: The provision addressing self-preferencing within the DCB lacks clarity regarding the meaning of "related parties". Additionally, while self-preferencing is typically viewed as anti-competitive, there are instances where it can have pro-competitive effects, such as promoting innovation and efficiency.

11.3. Relevant Research and Inputs:

a. Imposing far-reaching conduct rules on all platforms, irrespective of market power, could not be justified, given that many types of conduct – including potentially self-preferencing – may have pro-competitive effects.[19]

b. Papers have shown that self-preferencing behaviour by digital platforms does not necessarily harm competition. For example, arguments exist where self-preferencing behaviour by search engines for advertising may not be harmful to consumers and may provide better content to consumers by reducing the nuisance costs due to excessive advertising.[20]

11.4: Recommendation: The meaning of the term *'related parties'* should be clarified. Further, the obligation should consider the potential pro-competitive effects of self-preferencing and reflect this in the law itself. This addition is important, given the limited scope of exemptions from obligations provided by the Bill.

12. Data Usage

12.1. Relevant Paragraph:

a. Report: Chapter IV, Paras 3.34 - 3.40

b. Bill: Clause 12 (2) & clause 12 (3)

12.2. Key Considerations:

a. Clause 12(2) of the DCB states that an SSDE shall not intermix or cross use the personal data of end users or business users collected from different services including its CDS; or permit usage of such data by any third party, , without the consent of the end users or business users. By incorporating privacy-related obligations into competition legislation, there is a risk of

[19] Heike Schweitzer et al., "*Competition Policy for the Digital Era*," Working Paper No. 6, Research Institute for Law and Digital Transformation (2019), https://www.rewi.hu-berlin.de/de/lf/oe/rdt/pub/working-paper-no-6.
[20] Alexandre de Cornière & Greg Taylor, Integration and Search Engine Bias, 45 Rand J. Econ. 576 (2014), http://www.jstor.org/stable/43186472.

overlapping mandates and potential confusion regarding enforcement and compliance.

b. Clause 12(3) of the DCB mandates the SSDEs to allow portability of data of end-users & business users of its CDS. The DPDPA omitted the right to data portability due to concerns regarding security, compliance burden, and technical interoperability.[21] Therefore, in case this provision is enforced, then the CCI will be required to specify certain technical standards which come under the Data Protection Board, leading to regulatory conflict.

12.3. Relevant Research and Inputs:

a. In our stakeholder consultation, concerns about overlapping mandates and inter-regulatory mechanisms were discussed. The discussion highlighted issues such as regulatory overlap and limited harmonisation, particularly concerning potential interaction between the DPDPA and the DCB.

b. Section 4 of the DPDPA states that a person may process the personal data of a data principal only in accordance with the provisions of this DPDPA and for a lawful purpose, for which the data principal has given her consent; or for certain legitimate uses.[22]

c. Considering the overlap between the data protection law & the DMA, the EU was inclined towards having a balanced approach to harmoniously deal with various legislations, which entails setting up a high-level group, inclusive of bodies such as the European Data Protection Board, to ensure coherence and complementarity in implementing the DMA.[23]

d. Studies indicate that GDPR enforcement, mandating user consent for data processing, has adversely affected startup investments in the EU. Furthermore, it is believed that similar provisions in the DMA are likely to yield comparable outcomes.[24]

12.4: Recommendations:

a. Provisions regarding consent and data portability should be dealt by data privacy laws and not competition frameworks. Their removal may be considered.

b. If data usage requirements are intended to be kept as a part of the law, inter-regulator consultation mechanisms should be prioritised before the law is passed to avoid overlaps.

c. The sub-clause on data portability should be omitted.

13. Anti-steering

13.1. Relevant Parts:
a. Bill: Clause 14
b. Report: Chapter IV, Paras 3.34 - 3.40 & Footnote 654[25]

[21] The Digital Personal Data Protection Act, 2023, No. 22, Act of Parliament, 2023 (India).
[22] The Digital Personal Data Protection Act, 2023, § 4(1), No. 22, Acts of Parliament, 2023 (India).
[23] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022, on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), paras. 36, 64, 65, 72, 93, arts. 7(8), 13(5), 15(1), 40, 46(1)(g), https://eur-lex.europa.eu/legal-content/EN/TXT/?toc=OJ%3AL%3A2022%3A265%3ATOC&uri=uriserv%3AOJ.L_.2022.265.01.0001.01.ENG.
[24] Dirk Auer, *The Broken Promises of Europe's Digital Regulation,* Truth on the Market (Mar. 12, 2024), https://truthonthemarket.com/2024/03/12/the-broken-promises-of-europes-digital-regulation/.
[25] Footnote no. 654, CDCL report. "Certain Committee members expressed views that obligations relating to interoperability should be excluded from the ambit of the Draft DCB or that anti-steering provisions should only regulate app-stores. *Some members also sought clarity on the scope of the term 'integral' to provision of Core Digital Services in the context of the provision on anti-steering in the Draft DCB. The Committee felt that the CCI should be allowed the discretion to frame the related conduct requirements as it deems fit, pursuant to stakeholder consultations, in due course of time.*"

13.2. Key Consideration: As per the anti-steering provision under the DCB, an SSDE shall not restrict business users from, *directly or indirectly*, communicating with or promoting offers to their end users, or directing their end users to their own or third party services, unless such restrictions are integral to the CDS of the SSDE. Therefore, precise delineation within the bill itself is needed to define the circumstances under which restrictions on steering end users towards certain services can be deemed *"integral"* to the provision of a CDS. Furthermore, anti-steering is not, *per se* , anti-competitive and may have pro-competitive effects, which might require further consideration in the provision.

13.3. Relevant Research and Inputs: In the US, in the case of *Ohio v. American Express Co*., anti-steering provisions in its contracts with merchants were challenged under the Sherman Antitrust Act. The Supreme Court ruled that while steering might discourage using Amex cards, it's not necessarily anti-competitive.

The Court applied a *"rule of reason*" framework and found no evidence that Amex's provisions harmed consumers or stifled competition. Increased merchant fees reflected the value of Amex's services, not an ability to charge excessively. Additionally, the market saw increased output and improved quality, indicating a lack of anti competitive behaviour.[26]

13.4: Recommendations: The term *'integral'* should be clarified within the law itself. Further, the obligation should consider the potential pro-competitive effects of anti-steering and reflect this in the law itself. This addition is important, given the limited scope of exemptions from obligations provided by the Bill.

14. Tying and Bundling

14.1. Relevant Parts:

a. Bill: Clause 15
b. Report: Chapter IV, Paras 3.34 - 3.40

14.2. Key Consideration: The provision regarding tying and bundling within the SSDE mandates restrictions on *incentivising* business users or end users to utilise additional products or services alongside the identified CDS. However, the term "*incentivise"* may inadvertently hinder SSDEs' ability to offer services that benefit MSMEs, startups and consumers.

14.3. Relevant Research and Inputs: The Commission has opined that tying arrangements may have pro-competitive effects. In fact, there is some suggestion in the literature that the earlier tying arrangement between the iPhone and the service providers in other jurisdictions may have spurred wireless service providers to invest in innovation in mobile devices. Such innovation has resulted in an explosion of new mobile devices and continued growth of the mobile communications industry. It has not caused the disastrous results on competition or the formation of double monopolies that some have feared. Hence, the belief that the tying arrangement has caused serious harm is misplaced.[27]

14.4: Recommendation: As tying & bundling may have pro-competitive effects therefore, the term *'incentivise'* should be removed from the clause.

Chapter IV: Power Of The Commission To Conduct An Inquiry

15. Power to inquire into non-compliance by SSDEs and ADEs

15.1. Relevant Paragraph:

a. Bill: Clause 16

[26] Ohio v. American Express Co., 138 S. Ct. 2274 (2018).
[27] Sonam Sharma v. Apple Inc. USA, 2013 SCC OnLine CCI 25.

b. Report: Chapter IV, Para 3.31

15.2. Key Consideration: The Bill allows the Commission to initiate a proceeding for non-compliance under the Bill. The proceedings would follow the same procedure as provided under the Competition Act, 2002. However, the Bill does not clarify the course of action to be undertaken when a proceeding under the Competition Act, 2002 is already going on against the same entity for similar conduct. Additionally, the Report provides that the CCI, which might lead to uncertainty for market players, may resolve overlaps in proceedings and penalties on a case-by-case basis. The absence of any guidance in the Bill on this may lead to overlapping interventions and uncertainty for SSDEs and ADEs.

15.3: Recommendation: The Bill itself should provide sufficient clarity about the course of action to be followed if the same entity is subjected to interventions on similar issues under the Act and the DCB.

16. Settlements & Commitments

16.1. Relevant Parts:

a. Bill: Clauses 18 and 19
b. Report: Chapter IV, 3.53

16.2. Key Considerations:

a. Third-party consultation*:* Clauses 18(4) and 19(4) enables the CCI to seek objections and suggestions from third parties on settlement/ commitment applications. However, this would include disclosing a party's confidential documents and submissions to external parties, which might prove detrimental to a party's interests. It is necessary to ensure that the information disclosed by the parties during the commitment & settlement proceedings shall be utilised in a confidential manner and confidentiality shall be maintained throughout the process.

b. Admission of guilt: The Bill does not explicitly provide whether opting for commitment or settlement mechanism essentially means that an applicant has contravened the law.

16.3. Relevant Research and Inputs:

a. Third-party consultation: The EU's guidelines on settlement procedure do not provide for a third-party consultation. Rather, to preserve the confidentiality of the documents, even the complainant is excluded from accessing settlement submissions.[28] In regards to commitment procedure, the Commission can publish a concise summary of the case and the main content of the commitments and invite third parties to submit their observations. Provided that the publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.[29]

b. Admission of guilt: In the UK, the law clearly requires the CMA to issue an infringement decision even in settlement cases.[30] Further, if the party decides not to go ahead with the settlement, then the CMA cannot use the admissions as

[28] Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, O.J. C 167, 1 (2008), https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A52008XC0702%2801%29.
[29] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, O.J. L 1, 1 (2003), art. 27, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32003R0001.
[30] The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014, 2014 No. 458, rule 9(5), https://www.legislation.gov.uk/uksi/2014/458/made; Also see, Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8, para. 14.26, https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases#withdrawal-from-the-settlement-procedure-following-settlement.

evidence against any of the parties to the proceedings.[31]

16.4. Recommendations: Clarity should be provided on whether the submission of application would constitute as admission of infringement. Additionally, adequate safeguards should be deployed to ensure the confidentiality of the proceedings.

Chapter V: Powers of the Commission and Director General

17. Reference by Statutory Authority

17.1. Relevant Parts:

a. Bill: Clause 22

b. Report: Preface, page 5

17.2. Key Consideration: The Report does a commendable job of identifying potential overlaps with other legislations and highlights the necessity of establishing an inter-regulatory mechanism to ensure better coordination and harmonisation of laws. However, the Report and the Bill do not provide a framework for an inter-regulatory mechanism. Relying solely on reference mechanisms may prove insufficient, as these mechanisms have inherent limitations. One notable limitation lies in the narrow scope of reference mechanisms, which often fail to capture the diverse perspectives necessary for informed decision-making. Furthermore, there may not be reciprocal obligations of other regulators pertaining to references, further limiting the efficacy of the mechanism.

17.3. Relevant Research and Inputs:

a. The EU's DMA establishes a high-level group comprising other regulators such as the European Data Protection Supervisor, the European Data Protection Board, civil society, and experts. This group can recommend implementing and enforcing the DMA or promoting consistency across various regulatory frameworks. Specifically, it can analyse how the DMA interacts with sector-specific rules enforced by national authorities and submit an annual report to the Commission highlighting any issues and suggesting ways to achieve consistent approaches across disciplines.[32]

b. Similarly, in the UK, four regulators—Competition and Markets Authority, Information Commissioner's Office (ICO), Financial Conduct Authority, and Office of Communications—have established a Digital Regulation Cooperation Forum (DRCF) to support regulatory coordination and cooperation on online services and digital markets.[33]

c. Another notable instance is the Financial Stability and Development Council (FSDC), comprising the Governor of the RBI and representatives from various financial sector regulators, primarily mandated to enhance inter-regulatory coordination.[34]

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[31] Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8, para. 14.26,https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases#withdrawal-from-the-settlement-procedure-following-settlement.

[32] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022, on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), art. 40, https://eur-lex.europa.eu/legal-content/EN/TXT/?toc=OJ%3AL%3A2022%3A265%3ATOC&uri=uriserv%3AOJ.L_.2022.265.01.0001.01.ENG.

[33] *Digital Regulation Cooperation Forum Launch Document*, Competition & Markets Authority (July 1, 2020), https://www.gov.uk/government/publications/digital-regulation-cooperation-forum.

[34] F*inancial Stability Report,* Reserve Bank of India (March 2010), https://rbidocs.rbi.org.in/rdocs/PublicationReport/Pdfs/IFSR250310F.pdf.

d. Scope of responsibility for each Ministry is delineated by the government under the Government of India (Allocation of Business) Rules, 1961. As per the Rules, MeitY is responsible for all policy matters for information technology; electronics; and internet.[35] Allowing the CCI to look into data usage practices of companies may lead to jurisdictional conflict.

17.4: Recommendations: An inter-regulatory consultation mechanism preceding the enactment of the law should be established. For instance, establishing consultative bodies encompassing various stakeholders can ensure that diverse perspectives are considered from the outset. Exploring the establishment of committees or councils to facilitate close collaboration among representatives of different regulators is also worth considering. India already has examples of councils or committees serving this purpose. Additionally, integrating mechanisms like the high-level committee within regulatory frameworks, as seen in the DMA can be explored.[36]

18. Definition of "agent"

18.1. Relevant Part:

a. Bill: Clause 24(7) r/w Explanation (a) to Clause 24(13)

18.2. Key Consideration: The Bill confers the DG with the power to examine on oath the parties' legal advisors (defined under the term "agents"). This may be particularly concerning, considering that legal advisors are bound by attorney-client privilege.

18.3. Relevant Research and Inputs:

a. Section 126 of the Indian Evidence Act 1872, which provides for the scope of privilege attached to professional communication between legal advisors and clients, prohibits lawyers from disclosing any correspondence they may have had with a client and from revealing the details of any documents they may have in their possession as part of their work for the client.

b. In the U.S., attorney-client privilege enjoys significant protection when considered in the domain of antitrust law.[37] Notedly, the scope of attorney-client privileges varies across jurisdictions in the EU, where this privilege is largely limited. The Court of Justice of the EU has said that legal professional privilege represents a limitation on the EC's investigatory powers and that those powers are exercised for combating the most serious infringements of EU competition law, including price-fixing cartels.[38]

18.4: Recommendation: It is suggested that the words 'legal advisors of' should be omitted from the explanation of the term "agent".

Chapter VI: Penalties

19. Penalties

19.1. Relevant Parts:

a. Bill: Clause 28

[35] The Government of India (Allocation of Business) Rules, 1961, Rashtrapati Bhavan, New Delhi (January 14, 1961), https://cabsec.gov.in/writereaddata/allocationbusinessrule/completeaobrules/english/1_Upload_1187.pdf.
[36] *Digital Markets Act: Commission creates High-Level Group to provide advice and expertise in implementation,* European Union(March 23, 2023), https://digital-strategy.ec.europa.eu/en/news/digital-markets-act-commission-creates-high-level-group-provide-advice-and-expertise-implementation.
[37]Working Party No. 3 on Cooperation and Enforcement, *Treatment of Legally Privileged Information in Competition Proceedings – Note by the United States*, OECD (November 26, 2018), https://www.justice.gov/atr/page/file/1312766/dl?inline; Also see, *Attorney-Client Privilege in Global Antitrust Enforcement,* Department of Justice (May 30, 2018), https://www.justice.gov/opa/speech/file/1066916/dl.
[38] Patrick Doris & Steve Melrose, *Privilege European Union* (2016), www.gibsondunn.com/wp-content/uploads/documents/publications/Doris-Melrose-Know-how-EU-Privilege-GIR-November-2016.pdf.

b. Report: Chapter IV, Para 3.62

19.2. Key Consideration: The penalty will be calculated based on global turnover under the Bill. The Bill defines global turnover as *'revenue of the enterprise derived from the sale of all goods and provision of all services'*. This contradicts the Indian jurisprudence on turnover, which has been interpreted to include relevant turnover.

19.3. Relevant Research and Inputs:

a. USA's American Innovation and Choice Online Act imposes a civil penalty of 15 per cent of the total United States revenue for the period of time the violation occurred.[39]

b. In *Excel Crop Care Ltd. v CCI*,[40] the Supreme Court held that the fines should be on the relevant turnover instead of the company's total turnover. The Court had observed that the penalty imposed cannot be so disproportionate that it might end up endangering the company and economy.

c. In the Competition Commission of India (Determination of Monetary Penalty) Guidelines, 2024, penalty is to be calculated on the basis of relevant turnover. The Guidelines defines relevant turnover to include the turnover derived by an enterprise directly or indirectly from the sale of products and/or provision of services, to which the contravention relates.[41] Where the determination of relevant turnover is not feasible, Guidelines allow the Commission to consider the global turnover, derived from all products and services.

19.4: Recommendation: The penalty should be calculated based on relevant turnover rather than an enterprise's total turnover.

Chapter VIII: Miscellaneous

20. Power of the Central Government to Exempt Enterprises

20.1. Relevant Parts:

a. Bill: Clause 38
b. Report: Chapter IV, Para 3.48

20.2. Key Consideration: The Bill allows the central government to exempt an enterprise on the grounds of public interest or security of the state amongst other grounds. The provision lacks adequate guidance, leaving ambiguity regarding the definition and application of the concept of "public interest." This ambiguity opens the door to divergent interpretations, as evidenced by the evolving landscape of public interest considerations over time.

20.3. Relevant Research and Inputs: In Harakchand Ratanchand Banthia v. Union of India, the SC held the clause imposing conditions for the grant of renewal of licences were uncertain, vague and unintelligible. One of the conditions included 'public interest'. The court struck down the clause and held that it did not provide any objective standard, norm, or guidance for defining *"public interest"*. The court held that such a clause imposed unreasonable restrictions on the fundamental right to carry on business.[42]

20.4: Recommendations: Sufficient guidance on the meaning of 'public interest' should be provided defining clear parameters and objectives within the provision.

[39]S. 2992, American Innovation and Choice Online Act, 117th Cong. § 3(c)(5)(B) (2021-2022), https://www.congress.gov/bill/117th-congress/senate-bill/2992/text.
[40] Excel Crop Care Ltd v Competition Commission of India & Ors (2017) 8 SCC 47.
[41] The Competition Commission of India (Determination of Monetary Penalty) Guidelines, 2024, Rule-2(h), No. 01, The Competition Commission of India, 2024, https://www.cci.gov.in/images/whatsnew/en/the-competition-commission-of-india-determination-of-monetary-penalty-guidelines-20241709736785.pdf.

[42]Harakchand Ratanchand Banthia v. Union of India, (1969) 2 SCC 166, Para 21.

21. Power to make regulations and process of issuing regulations

21.1. Relevant Parts:

a. Bill: Clause 49

b. Report: Chapter IV, 3.41 to 3.45

21.2. Key Consideration: There are limited opportunities for input collection, primarily during the designation process and subsequent public consultations.

a. *Consultation during designation process:* The Bill does not provide opportunities to potential SSDEs to consult with or make submissions to the CCI during the designation process, especially when designation is based on quantitative thresholds. These opportunities may be needed to gain clarity on aspects like the scope of thresholds, i.e., the way various parameters can be computed. Further, it can allow entities to submit to the CCI why they do not enjoy significant financial strength or spread in the market despite meeting quantitative thresholds, and therefore should not be designated as an SSDE.

b. *Strengthening public consultation process during regulation making:* The Bill does a commendable job of laying down the procedure for inviting public comments on subsequent regulations to be framed under clause 49. However, there is a need to strengthen the process further by providing adequate scope for consultation with diverse stakeholders.

21.3. Relevant Research and Inputs:

a. The DMA provides an opportunity to an enterprise to rebut the presumption of designation despite meeting the quantitative thresholds.[43] For example, recently, Microsoft's Bing was exempted from being designated as a gatekeeper despite them satisfying the quantitative criteria.[44]

b. The TRAI follows a comprehensive consultation process to gather input from stakeholders on regulatory matters, from publishing comments for counter-comments to organising open house discussion with diverse stakeholders. [45]

21.4: Recommendations: The Bill should provide an opportunity for enterprises to consult with the CCI during the designation process, especially when designation is based on quantitative thresholds. Additionally, an opportunity should be provided to show why an enterprise may not be designated despite meeting quantitative thresholds. Furthermore, the Bill should establish a comprehensive consultative process for the CCI to engage with diverse stakeholders while formulating regulations.

Schedule I

22. List of Core Digital Services

22.1. Relevant Parts

a. Bill: Schedule 1

b. Report: Chapter IV, Para 3.2 - 3.6

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[43] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022, on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), art. 3(5)., https://eur-lex.europa.eu/legal-content/EN/TXT/?toc=OJ%3AL%3A2022%3A265%3ATOC&uri=uriserv%3AOJ.L_.2022.265.01.0001.01.ENG.

[44]Commission Decision, C/2024/806 (12 February 2024), relating to a decision pursuant to Article 17(3) of Regulation (EU) 2022/1925, Cases DMA.100015 – Microsoft – Online Search Engines, DMA.100028 – Microsoft – Web Browsers, DMA.100034 – Microsoft – Online Advertising Services (notified under document number C(2023) 6078), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52024DMA100015&qid=1715764349663.

[45]*Allocation of Spectrum Resources for Residential and Enterprise Intra-telecommunication Requirements/Cordless Telecommunication Systems (CTS*), Template for Comments on TRAI Consultation Paper No. 9/2011 (Dec. 26, 2011), https://www.trai.gov.in/sites/default/files/ascon261211_2.pdf.

22.2. Key Consideration: Schedule 1 to the Bill identifies nine digital services as CDS based on their susceptibility to concentration. The Report provides that the list of CDS has been defined based on concentration risk. The criteria of *"risk of concentration" i*s notably broad, encompassing sectors where no evidence of anti-competitive conduct has been observed by the CCI. Many services listed under this criterion have not exhibited any competition concerns in the country, like match making or cloud services.

Further, even if the aforementioned criteria is followed, it should not be applied without empirical evidence or sector-specific studies of the *'risk of concentration'*. Implementing such measures without proper evidence could adversely affect the ease of doing business and cause uncertain impacts on numerous services.

Additionally, the definition of online intermediation services is excessively broad and non-exhaustive, potentially encompassing any platform that connects two sides of the internet. This expansive definition could encompass a significant portion of the market, including sectors that have not experienced any competition concerns.

22.3. Relevant Research and Inputs:

a. The list is similar to the one provided in the EU's DMA. However, it is important to be cognizant of the fact that the EU's market realities differ significantly from India. For example, despite having a huge user base, nearly 48 percent of Indians do not access the internet.[46] Additionally, India has a burgeoning startup ecosystem. India has emerged as the 3rd largest ecosystem for startups globally with over 1,12,718 DPIIT-recognised startups.[47] Therefore, it is imperative to be mindful of the impact the Bill may have on the startups' growth.

b. Under the EU's DMA, the EC is required to conduct a market investigation for the purpose of examining whether one or more services should be added to the list of core platform services. During these investigations, the Commission can consult third parties, including businesses and end-users affected by the services under scrutiny. Within 18 months of initiating the investigation, the Commission must publish its findings in a report. This report is then submitted to the European Parliament and the Council, potentially accompanied by legislative proposals to amend the existing regulation.[48]

c. The CCI's advocacy efforts, market study initiatives, and the DMDU provide valuable resources that can be utilised to gather evidence before incorporating a sector into the schedule. The DMDU is tasked with leading market studies into matters related to digital markets.[49] Furthermore, the CCI has previously conducted notable market studies on sectors like e-commerce and cab aggregation.

d. Assessment of whether or not a sector is at a risk of concentration is complex and requires comprehensive evidence. For instance, market share of largest entities is not the sole criteria for determining the risk of concentration and other factors as prescribed in the section 19(4) of the

[46] Deepak, M., Mansi, K., Aarti, R., Krithika, R., and Mayank, *State of India's Digital Economy (SIDE) Report, 2024,* IPCIDE, ICRIER (Feb., 2024), https://icrier.org/pdf/State_of_India_Digital_Economy_Report_2024.pdf.
[47] *Startup Ecosystem in India,* Invest India, (https://www.investindia.gov.in/indian-unicorn-landscape#:~:text=Startup%20Ecosystem%20in%20India,as%20of%2003rd%20October%202023).
[48]Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022, on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), art. 19, https://eur-lex.europa.eu/legal-content/EN/TXT/?toc=OJ%3AL%3A2022%3A265%3ATOC&uri=uriserv%3AOJ.L_.2022.265.01.0001.01.ENG.
[49] *Anti-Competitive Practices by Big Tech Companies,* 53rd Report, Standing Comm. on Fin., Ministry of Corporate Affairs(2022-2023), https://loksabhadocs.nic.in/lsscommittee/Finance/17_Finance_53.pdf.

Competition Act may also be looked at while assessing the risk of concentration. For example, a sufficient number of players are present in the cloud service market as evidenced by the fact that 21 providers were recently empanelled by the MeitY,[50] even though a few players may have high market shares. Therefore, hurried addition of sectors to the list of CDS should not be done, without concrete evidence.

22.4: Recommendations: The standard should be limited to sectors with clear evidence of competition bottlenecks, rather than those where there is a *'risk of concentration'*. If the latter standard is to be followed, services that do not show clear risk of concentration should not be included in the list at this stage to avoid unintended consequences. A careful and transparent assessment process must be established to determine sectors that are at a risk of concentration before adding a service to the list of CDS.

[50] *GI Cloud (MeghRaj),* Ministry of Electronics and Information Technology, https://www.meity.gov.in/content/gi-cloud-meghraj.

E. Report of the Committee on Digital Competition Law: Chapter II

1. The time-consuming nature of investigation and enforcement proceedings

1.1. Relevant Parts of the Report: Chapter II, Para 2.3 to Para 2.11

1.2. Key Consideration: The report states that the present ex-post framework is not designed to facilitate timely and speedy redressal of anti-competitive conduct by digital enterprises given the extensive fact-finding and a tiered adjudicatory process involved in ex-post enforcement proceedings. While the DCB eliminates the requirement for assessing relevant markets and dominance, the comprehensive procedures outlined in the Bill could still cause timelines similar to those seen in traditional competition law frameworks. In the absence of enhanced CCI capacity, there is a risk that the current framework will also lead to prolonged interventions.

1.3. Relevant Research and Inputs:

a. The DMA in the EU broadly includes the following key timelines: After the Act takes effect, any entity meeting the specified thresholds informs the Commission within 2 months.[51] Once notified, the Commission has 45 working days to designate the entity as a gatekeeper.[52] The gatekeeper must then produce a compliance report within 6 months of being designated.[53] If a gatekeeper is found non-compliant, the Commission has 12 months from the start of proceedings to issue a non-compliance decision.[54] This implies that it may take approximately two years for the Commission to address anti-competitive behaviour from the designation process to the non-compliance decision.

1.4: Recommendations: Alternative approaches to intervention may be considered. One potential approach is implementing sector-specific guidelines or codes of conduct tailored to address the unique challenges of digital markets. For example, the Australian Competition and Consumer Commission has recommended sector

[51]Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022, on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), art. 3(3), https://eur-lex.europa.eu/legal-content/EN/TXT/?toc=OJ%3AL%3A2022%3A265%3ATOC&uri=uriserv%3AOJ.L_.2022.265.01.0001.01.ENG.

[52]Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022, on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), art. 3(4), https://eur-lex.europa.eu/legal-content/EN/TXT/?toc=OJ%3AL%3A2022%3A265%3ATOC&uri=uriserv%3AOJ.L_.2022.265.01.0001.01.ENG.

[53] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022, on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), art. 3(10), art. 11, https://eur-lex.europa.eu/legal-content/EN/TXT/?toc=OJ%3AL%3A2022%3A265%3ATOC&uri=uriserv%3AOJ.L_.2022.265.01.0001.01.ENG.

[54]Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022, on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), art. 29, https://eur-lex.europa.eu/legal-content/EN/TXT/?toc=OJ%3AL%3A2022%3A265%3ATOC&uri=uriserv%3AOJ.L_.2022.265.01.0001.01.ENG.

specific code of conducts.[55] If the current framework is sought to be implemented, significantly building the capacity of the Commission before the law is passed should be prioritised to ensure that the law does not cause long timelines for intervention.

2. Sector-Specific Instruments Governing Large Digital Enterprises

2.1. Relevant Parts of the Report: Chapter II, Para 3.1. to 3.30

2.2. Key Consideration:

a. The Committee thoroughly analyses potential overlaps between the DCB and existing sector-specific policy instruments. However, it determines that while most of the other laws and policies in the country do pose certain overlaps with the DCB, they have a narrower scope than the proposed law and are, therefore, limited in their impact on ensuring fair competition in digital markets. Despite the Committee's diligent efforts, several questions about resolving conflicts and overlaps between the DCB and other policy instruments remained unanswered. For instance, while the scope of the FDI Policy may be narrow and limited to only certain foreign entities, the overlaps that do exist between the policy and the proposed DCB, i.e., regulating self-preferencing by foreign e-commerce platforms, were not addressed. Similar problems can be seen in other frameworks.

b. Further, the overlaps with DIA were not considered in the absence of the draft DIA. However, the report does not provide sufficient information on whether or not it considered the consultations organised on May 23, 2023, and March 9, 2023, wherein the MeitY shed light on critical components of the DIA. These consultations highlighted significant overlaps between the objectives of the DIA and the DCA, including regulating fair trade practices, preventing market concentration, and addressing digital market distortions.

c. The Committee has proposed implementing a mechanism for inter-regulatory consultations. However, the committee does not provide any guidance as to how this may be implemented. The constitution of these mechanisms should be prioritised.

2.3. Relevant Research and Inputs:

a. Some mechanisms that can be established to work towards resolving overlaps and ensure greater coordination include the following.[56] *Firstly,* enhancing ministerial coordination that can foster a 'whole of government' approach. *Secondly*, forming coordination committees can promote collaboration among regulators, ensuring regulatory coherence and consistency. Examples like the Financial Stability and Development Council (FSDC) and the Forum of Indian Regulators showcase successful models that facilitate the sharing of best practices and strategies to address emerging regulatory challenges.

b. Establishing high-level committees, as seen in the DMA, can provide expertise and advice for the coherent implementation of regulations. The EU's DMA establishes a high-level group comprising of other regulators such as the European Data Protection Supervisor, the European Data Protection Board, civil society, and experts. This group can offer recommendations related to implementing and enforcing the DMA or promote

[55] *Digital platform services inquiry,* ACCC (Sept., 2022), https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20September%202022%20interim%20report.pdf.

[56] *Indian policy instruments and objectives of the proposed digital competition act: implications, challenges, and way forward*, The Dialogue (Feb. 1, 2024), https://thedialogue.co/wp-content/uploads/2024/02/Indian-Policy-Instruments-and-Objectives-of-the-Proposed-Digital-Competition-Act-Implications-Challenges-and-Way-Forward.pdf.

consistency across various regulatory frameworks. Specifically, it can analyse how the DMA interacts with sector-specific rules enforced by national authorities and submit an annual report to the Commission highlighting any issues and suggesting ways to achieve consistent approaches across disciplines.[57]

c. Similarly, in the UK, four regulators—Competition and Markets Authority, Information Commissioner's Office (ICO), Financial Conduct Authority, and Office of Communications—have established a Digital Regulation Cooperation Forum (DRCF) to support regulatory coordination and cooperation on online services and digital markets.[58]

2.4: Recommendations: Establishing inter-regulatory consultation mechanisms should be prioritised before the law is tabled in Parliament, to avoid regulatory overlaps and conflicts.

[57]Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022, on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), art. 40, https://eur-lex.europa.eu/legal-content/EN/TXT/?toc=OJ%3AL%3A2022%3A265%3ATOC&uri=uriserv%3AOJ.L_.2022.265.01.0001.01.ENG.
[58]*Digital Regulation Cooperation Forum Launch Document*, Competition & Markets Authority (July 1, 2020), https://www.gov.uk/government/publications/digital-regulation-cooperation-forum.

F. Report of the Committee on Digital Competition Law: Chapter III

1. Rationale for reliance on certain international models

1.1. Relevant Parts of the Report: Chapter 3

1.2. Key Consideration: The Report acknowledges various international models for digital market regulation, including frameworks from the EU, UK, USA, and other emerging tech economies like Australia, Japan, China, and South Korea. However, it lacks thorough reasoning for considering or not considering various models for the DCB. For example, the Bill prescribes a list of CDS similar to the list of core platform services prescribed under the EU's DMA. However, the Bill does not provide a reason for adopting this approach. Similarly, the report details the co-regulation model adopted by Japan, however, it does not explain the reason for not relying on the same.

1.3. Relevant Research and Inputs:

a. Japan's Improving Transparency and Fairness of Digital Platforms Act adopts a "co-regulation" approach that stipulates the general framework under laws and leaves details to businesses' voluntary efforts. The Act stipulates that the government should secure the minimally-necessary commitments from digital platform providers, on the basis that such providers must take voluntary and proactive efforts toward improving the transparency and fairness of their digital platforms

b. In August 2022, the KFTC formed and launched an "Online Platform Self-regulatory Body" and established self-regulatory measures through discussions between the government and market participants, such as platform operators, online stores, and consumers. In November 14, 2023, the State Council approved a partial amendment to spread a legal basis for platform self- regulation to respond quickly and actively to the needs of platform users.

1.4. Recommendations: A thorough evaluation of international models and their suitability for the Indian context should be done to ensure that different regulatory approaches are given due consideration.

G. Report of the Committee on Digital Competition Law: Chapter IV

1. Capacity building

1.1. Relevant Parts of the Report: Chapter IV, Para no. 3.55

1.2. Key Consideration: The CDCL report strongly recommends enhancing the capacity of the CCI, especially its newly constituted DMDU, by integrating technology sector experts to navigate the swiftly evolving digital landscape effectively. However, the report does not outline specific measures for the Commission to bolster its capacity.

Given that the Committee has recommended a principle-based framework that will require detailed analysis, it would be of utmost importance to enhance the capacity and resources of the CCI and DMDU. Further, there is very limited information available regarding the functioning and composition of the DMDU in the public domain, resulting in uncertainty about the unit's capacity to undertake initiatives on digital markets.

1.3. Relevant Research and inputs:

a. 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 focus should be on increasing bench strength and enhancing the training of current personnel to meet the growing complexity of cases.[59]

b. On the resources 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.[60] 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.

c. 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.[61] Furthermore, as per the CCI Annual Report 2021-22, 64 cases were pending before the DG for investigation. The Commission was also given the charge of the National Anti-Profiteering Authority.

1.4: Recommendations: Capacity building of the CCI and the DMDU should be undertaken before the Bill is tabled in the Parliament. Further, in the interest of transparency, there should be more information provided in the public domain regarding the DMDU's initiatives and functions. This can ensure certainty among stakeholders about the unit's capacity to analyse digital markets.

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[59] *Digital Competition Dialogues - Stakeholder Consultation on Draft Digital Competition Bill and the CDCL Report: Expert Opinion*, The Dialogue, p. 4 (Mar. 28, 2024), https://thedialogue.co/wp-content/uploads/2024/03/Digital-Competition-Dialogues-First-Stakeholder-Consultation-Expert-Opinion.pdf.
[60] *Annual Report 2019-20*, CCI (Mar.31, 2020), https://www.cci.gov.in/public/images/annualreport/en/annual-report-2019-201665121534.pdf; *Annual Report 2020-21*, CCI (Mar.31, 2021), https://www.cci.gov.in/public/images/annualreport/en/20-2116651220 51.pdf; *Annual Report 2021-22*, CCI (Mar.31, 2022), https://www.cci.gov.in/public/images/annualreport/en/annual-report-2021-221671704224.pdf;
[61] *Annual Report 2021-22*, CCI (Mar.31, 2022), https://www.cci.gov.in/public/images/annualreport/en/annual-report-2021-221671704224.pdf;

H. Report of the Committee on Digital Competition Law: Annexures

1. Annexure 3

1.1. Relevant Paragraph/ Section: Annexure 3

1.2. Key Consideration: The consultation process primarily involved a limited set of stakeholders, large tech companies, industry bodies etc. as indicated in the report. However, it did not invite the perspectives of non-technology companies that are likely to be affected, small startups, MSMEs, various think tanks, and gig workers, among others. It must also be noted that only 29 stakeholders were invited to provide inputs.

1.3. Relevant Research and inputs:

a. Considering the diverse perspectives and stakeholders involved, there is a need for a broader scope of consultation. Various groups, including gig workers, MSMEs, think tanks, non-technology companies and civil society organisations must be consulted.

b. The involvement of diverse stakeholders ensures a comprehensive overview of challenges and ideas, contributing to robust legislation.[62] Additionally, inspiration can be sought from other frameworks like Digital India Act where several stakeholder consultations are being undertaken and the DPDP Act where the Bill was referred to the Joint Parliamentary Committee and underwent significant consultations.

1.4. Recommendations: A more inclusive consultation process, involving a broader range of stakeholders, is necessary to ensure comprehensive and equitable input. Various initiatives mentioned above can be leveraged for this purpose.

[62] *Digital Competition Dialogues - Stakeholder Consultation on Draft Digital Competition Bill and the CDCL Report: Expert Opinion*, The Dialogue, p. 4 (Mar. 28, 2024), https://thedialogue.co/wp-content/uploads/2024/03/Digital-Competition-Dialogues-First-Stakeholder-Consultation-Expert-Opinion.pdf.

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