

Primus Summary –
Report of the Committee on
Digital Competition Law &

Draft digital competition bill 2024

June 2024

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Executive Summary

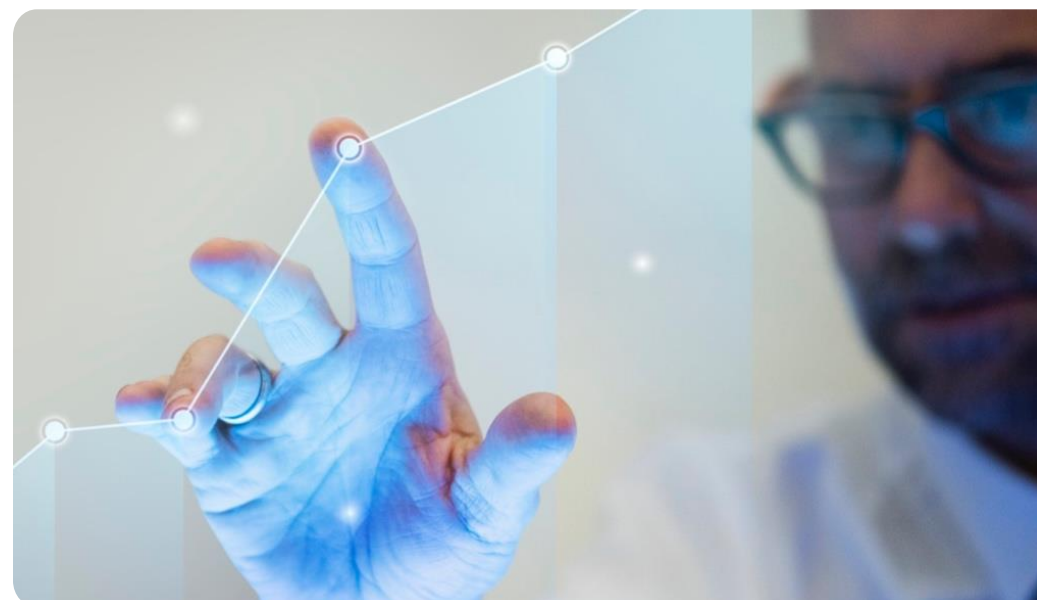
In March 2024, the Ministry of Corporate Affairs released the findings of the Committee on Digital Competition Law (CDCL) alongside the draft Digital Competition Bill 2024. This initiative aims to address the distinct challenges of the digital economy and promote fair competition. The CDCL's extensive examination and the proposed legislation seek to mitigate anti-competitive practices by digital enterprises, fostering a balanced and competitive digital marketplace.

CDCL's Findings and Observations

The CDCL's report underscores the urgent need for a specialized regulatory framework to manage the unique dynamics of the digital market. India, with over 820 million active internet users, presents a rapidly expanding digital ecosystem. However, the Competition Act of 2002 has struggled to keep pace with the digital sector's evolution. The CDCL highlights several key points:

- 1. Existing Legislative Gaps:** The current Competition Act is primarily ex-post, addressing anti-competitive behaviour after it occurs. This approach is inadequate for the fast-paced digital market where pre-emptive measures (ex-ante) are necessary to prevent anti-competitive practices before they harm the market.
- 2. Challenges in Defining Market Dominance:** The CDCL noted that the current framework's reliance on establishing a relevant market and dominant position is time-consuming and often ineffective in rapidly changing digital markets. This process delays interventions and allows anti-competitive practices to entrench.

- 3. Stakeholder Engagement:** The CDCL engaged with a broad range of stakeholders, including government departments, industry chambers, and experts in law, policy, and economics. These consultations revealed widespread support for a new, more proactive regulatory approach tailored to the digital market's unique characteristics.
- 4. Global Comparisons:** The committee studied international models like the European Union's Digital Markets Act and similar frameworks in other jurisdictions. These comparisons helped shape the recommendations for a more effective and comprehensive regulatory regime in India.



Draft Digital Competition Bill 2024

The proposed bill aims to establish a comprehensive regulatory framework specifically targeting Systemically Significant Digital Enterprises (SSDEs). Key provisions include:

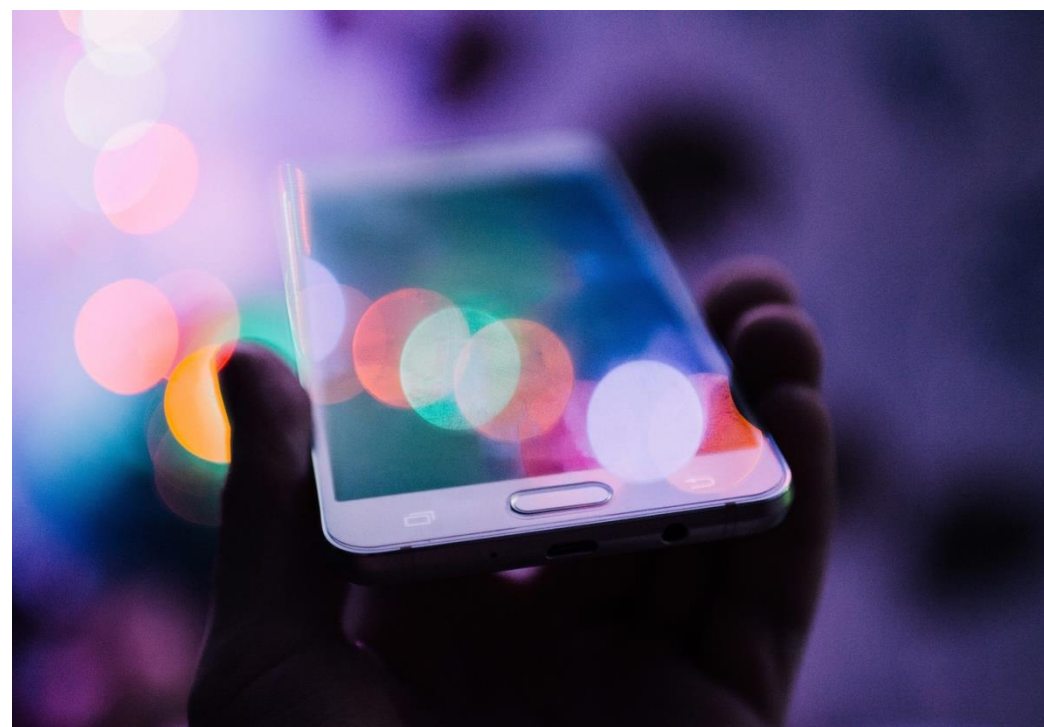
1. **Ex-Ante Regulatory Framework:** This proactive approach aims to prevent ACPs before they occur, contrasting with the reactive ex-post model of the current Competition Act.
2. **Designation of SSDEs:** Enterprises meeting specified financial and user thresholds will be designated as SSDEs and subjected to particular regulatory obligations.
3. **Self-Reporting Obligation:** Enterprises must inform the Competition Commission of India (CCI) within 90 days of meeting the thresholds for SSDE status.
4. **Obligations on SSDEs: These include:**
 - **Fair and Transparent Dealings:** SSDEs must operate fairly and transparently with users and business partners. Example: An e-commerce platform clearly disclosing its terms of service and transaction fees to all sellers and buyers, ensuring that no hidden charges are applied.
 - **Restrictions on Self-Preferencing:** SSDEs are prohibited from favouring their products or services over those of third parties. Example: A search engine must rank search results without any prioritisation of its or related services or products.
 - **Data Usage Limitations:** SSDEs cannot use non-public data of business users to compete with them on the platform. Example: An online marketplace cannot use sales data from third-party sellers to create and promote its competing products.
 - **Prohibition of Anti-Steering:** SSDEs should not restrict business users from communicating with their customers or directing them to other services. Example: An app store allowing apps to inform users about subscription options available on their websites, possibly at lower prices.
5. **Penalties for Non-Compliance:** The CCI can impose substantial fines and penalties on SSDEs and their associates for failing to comply with these obligations. Penalties can reach up to 10% of the enterprise's global turnover for significant violations.
6. **Differential Obligations:** The bill allows the CCI to impose different obligations based on the nature of the digital service provided and the market conditions. This flexibility aims to tailor regulations to the specific needs and dynamics of various digital services.
7. **Appeal and Review Mechanisms:** Enterprises have the right to appeal against CCI decisions to the National Company Law Appellate Tribunal (NCLAT) and, subsequently, to the Supreme Court, ensuring a robust mechanism for legal recourse and review.
8. **International Cooperation:** The bill emphasizes the need for aligning with global best practices and cooperation with international regulatory bodies to manage the cross-border nature of digital markets effectively.
9. **Periodic Review of Regulations:** The CCI is mandated to periodically review the effectiveness of the regulations and make necessary adjustments to address emerging challenges and ensure the regulatory framework remains relevant and effective.

2 Primus' Take

Overall, we believe that ex-ante based obligations, as a code of conduct, may impact some of the big-tech firms operating in the country, on the aspects of innovation and service offerings to consumers. However, the approach going forward should be multi-stakeholder based and collaborative, with productive and continuous engagement. Industry can focus on plausible solutions with right balance of compliance and technology deployment, with the Commission ensuring conducive market dynamics and upholding Gol's priority of 'Ease of Doing Business'.

❖ **Reading with global legislations:** A comparative analysis with the European Union's Digital Markets Act (DMA) and similar legislation in other jurisdictions reveal insights into the approach towards global practices and potential areas for alignment or divergence. For example, the definition of "Core Digital Services" in the Indian bill closely mirrors the "Core Platform Services" under the DMA, suggesting a convergence towards identifying key digital services that demand regulation. However, the financial and user thresholds for SSDE designation in the Indian context are tailored to its market, indicating a nuanced approach to local economic conditions and digital market dynamics. Also, the much-contested ex-ante framework has been an issue of constant debate around its requirement and its implementation in the Indian context, wherein experts have commented that its suitability derived from the EU market is quantifiably untested and calls for further observations. Moreover, jurisdictions like Singapore and Japan have instead only opted for self-regulation and self-reporting model.

❖ If the Commission is going ahead with ex-ante provisions in its final draft, the "differential" obligations mentioned under Section 7 should equate to a graded implementation approach wherein certain anti-competitive practices are enacted and tested before all the required listed obligations. This will also help the Commission to study and rectify any implications in its implementation.



“For India, at this stage of its economic trajectory, to want to adopt an untested DMA styled legislation in terms of the new proposed Digital Competition Bill to govern digital economy players on an ex ante basis may not necessarily yield the desired results. For a free market to thrive and for the stage to be set for India’s future growth story, it is hoped that the CCI’s existing toolkit is further strengthened to overcome the perceived delays in the existing ex post law - by the inclusion of data scientists in its DMDU, quadrupling of its bench strength presence across every major metro and not merely regional advocacy outposts, as well as dedicated fast-track competition benches in the courts to ensure speedy justice in dynamic digital markets. This will obviate from the need to veer towards ex ante regulation and precautionary antitrust which could potentially result in over-regulation and stifling innovation and investment.”



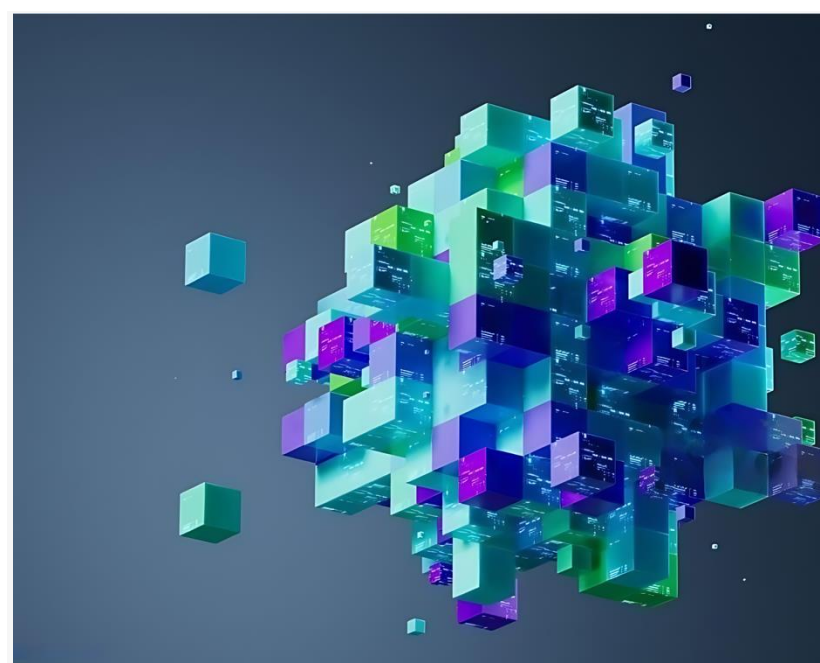
Nisha Kaur Uberoi
Competition Law Expert

❖ It is crucial to highlight that while the digital competition bill can be a game-changer for the digital economy, it will amplify the Commission’s need for enhanced internal capacity and not solely rely on the ex-ante (or similar) provisions. If the foundational motive is faster redressal of competition cases vis-a-vis disposal of proceedings enabling market corrections, the current strength of CCI might not be equipped with to address the same. This can be solved by reforms in resource management both human and technical, using solutions like online dispute resolutions, and building specific focused teams working on the subject matter. Such solutions will also help ensure the bill does not run the risk of being ‘restrictive’ when implemented, which may not be in the best interests of India’s digital aspirations. The establishment of Digital Markets and Data Unit (DMDU) is a step in the right direction.

❖ **Requirement of an economic impact assessment:** This could quantify the potential effects of the bill on market competition, consumer welfare, and innovation. By imposing regulatory obligations on SSDEs and ADEs, the bill aims to deter anti-competitive practices. However, such economic analysis should also consider potential unintended consequences, such as barriers to entry for startups, or stifling

of innovation due to regulatory compliance costs or massive product changes, or even impact on R&D. The said assessment can also be conducted within the scope of the bill (Section 21(3)) where it allows CCI to do research/study with third party organisations.

❖ The requirement of settlement and commitment applications to be filed with no capped deadline in terms of number of days is a shift away from the recent Settlement and Commitment regulations that were published subsequent to the passing of the Competition (Amendment) Act 2023. This reflects that the bill is progressive in nature in most parts. However, the exclusion of further appeal from both these provisions needs further deliberations.



“Compliance with these new rules will require significant resources and investment from Big Techs as they may need to allocate resources to ensure compliance, including monitoring their own behavior and its impacts on the digital market. This may also expose SDEs to parallel investigations under the DCB and the CA as a conduct may be found to be prima facie anti-competitive under both laws. Such investigations may lead to different outcomes as under the CA, the CCI needs to show the effect of the conduct on the market, while in DCA, there is no such requirement. The bigger question is, if found guilty, will the SDE be penalised for the same conduct under both legislations leading to double jeopardy?”



Vaibhav Choukse
Head – Competition Law, JSA

- ❖ The potential impact on users/consumers is still too early to capture. However, with a diverse set of users coming online, many of them new to technology, it is important to ensure that they are supported with protections from scams, malware, and bad actors. This is an important consideration to be taken into account while framing the subsequent rules of the Act. Prescriptive policies should not lead to an outcome which limits products and services that are of the benefit of end-users. For instance, overly restrictive regulations on data sharing between applications could prevent the development of integrated services that allow users to conveniently manage their finances, such as budgeting tools that connect directly with bank accounts.
- ❖ **International Cooperation and Harmonization:** The global nature of digital markets makes it important for the bill to consider its impact on international trade and cross-border digital services. The bill's provisions, such as exemptions for state security or public interest, and the authority to override the Commission, could affect international digital companies operating in India. Future rules and regulations should encourage international cooperation, supporting India's digital economy while honouring international trade agreements. It's

crucial that these rules promote fair use of technology and competition, regardless of whether the technology is global or domestic.

- ❖ **Opportunity for continuous engagement with the CCI:** A critical aspect of the Draft Digital Competition Bill 2024 is the empowerment of the CCI to frame 25 subsequent rules to effectively implement the provisions of the bill and moreover, the pragmatic timeframe of the current bill actually realising into an Act. The approach underscores the dynamic nature of digital markets and acknowledges that a one-size-fits-all regulation cannot address the continuously transforming landscape of digital services and technologies. This marks an opportunity for stakeholders to continuously engage, conduct discussions and share suggestions and inputs on what can be a forward-looking policymaking process.
- ❖ The discretion of the Commission to designate certain enterprises as SSDEs (reference to Section 3(3)), other than the financial and user thresholds, while based on some listed parameters, should adopt an equitable approach and should not be biased towards a certain industry or sector or digital service.

- ❖ **For bundling and tying:** Introducing a proactive regulatory framework alongside existing laws (Sections 3(4) and 4 of the Competition Act) might affect the practice of bundling and tying services, which aren't always detrimental or monopolistic. To support this argument, consider a previous case wherein the regulatory authority dismissed a complaint against a large technology company for integrating video-conferencing service with email application, initially being alleged as an anti-competitive behaviour. The authority concluded that users have the freedom to use either application independently, aren't forced to use the video-conferencing service exclusively, and can opt for any other video-conferencing application, indicating no anti-competitive impact.
- ❖ On the blanket prohibition of self-preferencing, a more liberal approach can be adopted by allowing digital platforms to use self-preferencing with clear disclosures and markers indicating their own products or services. Additionally, setting transparent criteria for search rankings and providing equal opportunities for third-party products to compete can ensure fairness. Implementing periodic audits by an independent authority to monitor compliance and prevent abusive practices can also help maintain a balanced competitive environment.
- ❖ On the Anti-Steering provisions, while it is a welcoming inclusion can have implications for platforms. Illustrating a situation where an e-book platform prevents authors and publishers from directing readers to purchase books through their own websites; Curbing this practice as a proactive step means authors would now be able to include links in their e-books or app descriptions that direct readers to purchase books directly from them, avoiding the platform's fees, and thus leading to revenue-loss. The current anti-steering provision may

also infringe on the legal right of businesses to enter into agreements that dictate the terms of sale and distribution of their products.

- ❖ The discretionary power of the Commission under Section 49(5) which allows it to publish certain regulations without public consultation or even periodic reviewing, vis-à-vis, an exempt from 'transparency', should be based on some definite parameters. This will ensure fairness at some level while keeping the criterion of urgent public interest intact.
- ❖ On "core digital services", certain level of ambiguity needs to be deciphered and further explained:
 - **Interpersonal Communications Service:** This needs clarification regarding services that might use alternate methods for connecting users (e.g., using usernames or unique identifiers instead of phone numbers).
 - **Operating System:** While the definition covers system software, it might be useful to specify whether it includes mobile operating systems, given their significant role in accessing digital services.
 - **Online Intermediation Service:** This category is quite broad, covering everything from web-hosting to food delivery services. Specifying criteria or examples of what does not constitute an online intermediation service might help avoid over-inclusion, especially for platforms that merely facilitate information sharing without engaging in commercial transactions.

- ❖ Finally, the mention of the Commission's ability to consider various factors for assessing the conduct requirements (Section 7(5)) indicates a degree of flexibility in regulatory approaches. This flexibility is crucial for adapting regulations to the rapidly evolving digital landscape and for accommodating the diverse nature of digital enterprises. It suggests that the law is not rigid but rather can be tailored to address specific challenges and needs. Moreover, the consideration of intellectual property rights highlights the law's role in protecting the creative and economic rights of individuals and organizations. This aspect of the Bill ensures that digital enterprises operate in a manner that respects the innovations and creations of others, fostering an environment of fair competition and innovation.



3

Part I: CDCL's Findings and Observations

On March 12, 2024, the Ministry of Corporate Affairs, Government of India, unveiled the report of the Committee on Digital Competition Law (CDCL) including the draft of the Digital Competition Bill, 2024, also inviting comments from the public. This Part I delves broadly into CDCL's observations and study. Part II of this document analyses the bill.

Setting the Context

The evolving paradigm of digital economies has raised several concerns with competition regulators across the world. India being host to over 820 million active internet users, has emerged as a fertile ground for digital market segments to flourish. To ensure a level playing field and fair competition, the government enforced the Competition Act in 2002. However, this act has faced challenges in keeping pace with the transition from traditional to digital markets. To address the growing trend of anti-regulatory practices (ACPs) the CCI felt it was necessary to seek a revision and conduct thorough research on the same. In parallel and in response to these challenges, the Parliamentary Standing Committee on Finance released a report titled "Anti-Competitive Practices by Big Tech Companies" in December 2022. The report highlighted the need for a more comprehensive approach in the form of a separate legislation to specifically address issues which leads to monopolistic practices such as anti-steering, deep discounting, search preferences,

bundling of services, restricting third party applications, amongst others. With big-tech firms increasingly dominating market shares, and a growing consensus to address the issue in a timely fashion, the Ministry of Corporate Affairs constituted the Committee on Digital Competition Law (referred to as the CDCL/Committee in the document) in February 2023.

This committee, comprising government officials from Departments of Commerce, Economic affairs, Consumer Affairs, Promotion of Industry and Internal Trade (DPIIT) and Ministry of Electronics and Information Technology (MeitY) along law firms and professors, examined existing laws and policies governing digital entities and their ACPs, and further on, evaluated the need for a separate legislation. The CDCL engaged with a wide range of stakeholders in the process, including government departments, industry chambers, and experts in law, policy, and economics.

Assessing the Need for Separate Competition Regime for Digital players

Deliberation on Ex-Ante

The fragmented nature of the stated legislations underscores the need for a holistic approach to regulating ACPs in digital markets. It is within this context that the Digital Competition Act, 2024, aims to establish a comprehensive framework for addressing various ACPs and ensuring fair competition in the digital economy.

Within competition jurisprudence, two models traditionally govern the legislative framework: ex-ante and ex-post. Global models have predominantly leaned towards an ex-post competition framework.

Within this framework, broader legislation is enforced, and if any entity violates the mandate, the law is invoked to check for any anti-competitive practices (ACP). Sectoral regulators play a role in creating a broader mandate of do's and don'ts, which the competition authorities then enforce. As outlined earlier, the current competition framework in India is governed by the Competition Act, 2002 ('the Act'). The Act primarily follows an ex-post approach regarding anti-competitive agreements and abuse of dominance, meaning these practices are investigated after a contravention of the Act occurs. The committee constituted for the draft legislation while examining the limitations of such an approach in addressing the evolving challenges of digital markets, highlighted two broad issues under the Act:

1 Evidence-based exercise of delineating dominant position and relevant market: The Committee noted that under the Act, anti-competitive practices can only be carried out by "dominant entities" in their "relevant markets." During an investigation, the Competition Commission of India must first

establish a 'relevant market,' which is essentially an evidence-based and time-consuming exercise. Subsequently, the position of the enterprise being dominant or not is investigated, further prolonging the process.

2 Tiered adjudicatory process with no timelines: The Committee further observed that the adjudicatory process consists of several stages with no defined timelines. It highlighted certain ongoing cases to support this finding.

In summary, the CDCL believes that ex-post enforcement in fast-paced markets may fail to restore competition due to time-consuming investigations, allowing incumbents to entrench their dominance. Such investigations are constrained to specific cases and may fail to address repeated anti-competitive behaviors by digital enterprises. Implementing ex-ante digital competition laws could enhance administrative efficiency by proactively addressing recurring patterns of anti-competitive behavior.

Having established this, the Committee then opined that there is a need for an ex-ante framework to supplement the current ex-post framework. Unlike an ex-post regulatory framework, where violations are investigated after they occur, an ex-ante framework aims to identify market issues beforehand and shape stakeholder behavior and responses through regulatory intervention. The aim of such pre-emptive regulatory interventions is to disallow certain practices from being pursued or prevent situations where certain ACPs would become inevitable.

The Committee deliberated on two divergent methods and reasoned that amending the Competition Act to include ex-ante provisions for regulating digital enterprises could lead to uncertainty and prolonged legal disputes. Integrating a separate chapter specifically for digital regulation might be impractical due to the Act's sector-agnostic nature. Hence, the Committee recommended enacting a de novo (standalone) separate legislation that allows the Competition Commission of India to specifically regulate large digital enterprises in an ex-ante manner.

Indian Regulatory Landscape for Large Digital Enterprises: Efficacy and Gaps

Presently, a variety of fragmented legislations across ministries and regulators govern the functioning of large digital enterprises other than the Competition Act, which have been highlighted by the Committee. These include:

- a) **Policy on Foreign Direct Investment:** The FDI Policy in India aims to boost economic growth by attracting foreign direct investment (FDI), focusing on creating a balanced competitive environment between domestic and foreign e-commerce platforms. The policy addresses anti-competitive behaviors like self-preferencing and preferential listings, prohibiting foreign e-commerce marketplaces from influencing sale prices or engaging in exclusive arrangements with sellers to prevent predatory pricing and maintain market fairness. However, the policy's scope is limited to foreign e-commerce entities, excluding large digital platforms in other sectors and domestic e-commerce companies.
- b) **Data handling and usage:** The Digital Personal Data Protection (DPDP) Act, 2023, and the Draft National Data Governance Framework policy,

regulate the handling, storage and usage of personal and non-personal data. Clarifying the possible overlap, the CDCL stated that while the DPDP Act is concerned with ensuring that a data principal's personal data is protected, the Competition Act seeks to ensure fairness and contestability in the market. These laws, when read together, aim to promote fair competition and prevent anti-competitive behaviour arising from the storage and use of large datasets.

- c) **Consumer protection:** The Consumer Protection Act, 2019, the Consumer Protection (E-Commerce) Rules, 2020, and the Consumer Protection (Direct Selling) Rules, 2021 protect consumers against unfair practices in buying and selling goods and services online. While these laws seek to enhance consumer welfare, competition laws aim to create fair and competitive markets.
- d) **Payment instruments:** The RBI Prepaid Payment Instruments (PPI) Master Direction aims to provide harmonisation and interoperability of PPIs. While this may address any potential risk of anti-steering, the CDCL points out that the RBI PPI Master Direction does not seem to tackle any other ACP likely to be engaged in by large digital enterprises, and also has limited coverage.
- e) **Revision of IT Act:** The proposed and soon to be laid Digital India Act will focus on regulating a wide range of digital enterprises broadly from a user harm and cybersecurity perspective, thus safeguarding consumers and their presence on the internet. It is crucial to align the proposed legislation with evolving and emerging technologies and their subsequent use cases. Any potential overlap will favor the competition law.

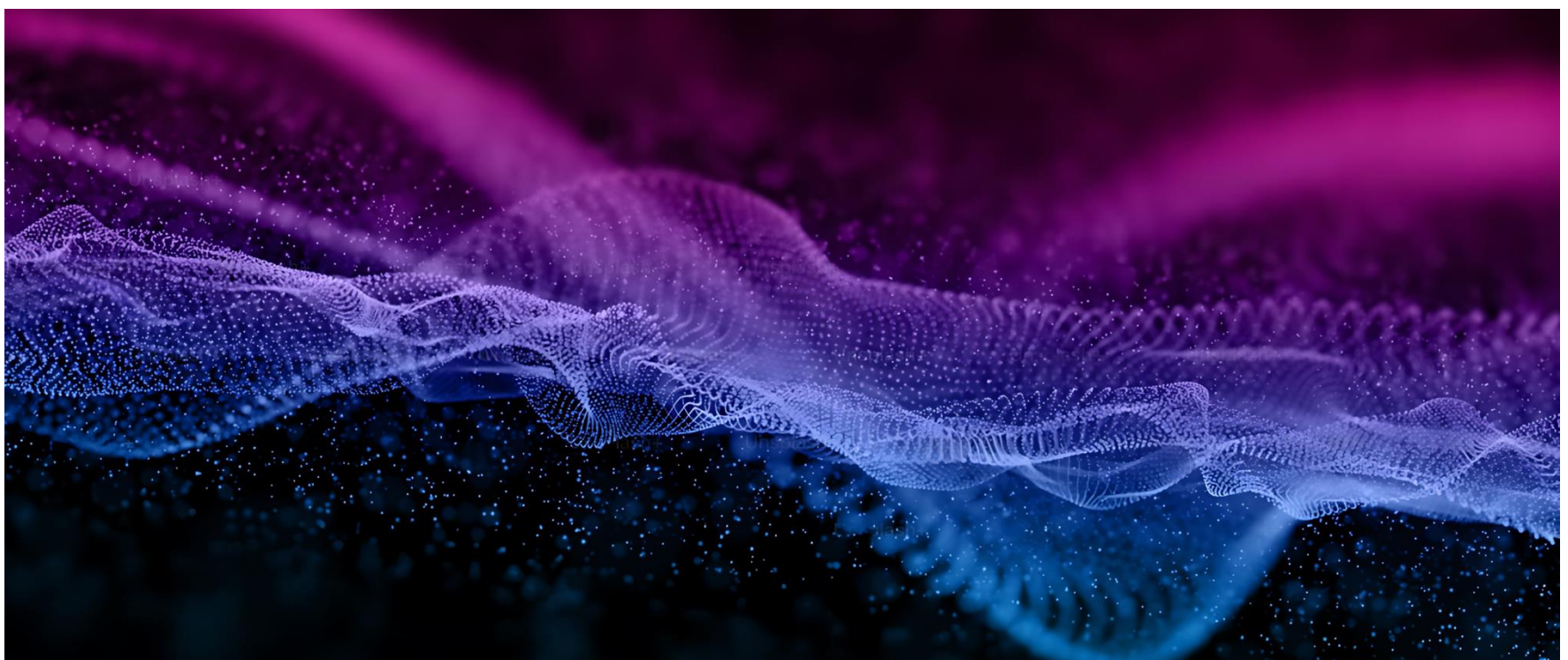
Inputs, Submissions and Commentaries by Industry and Other Stakeholders to CDCL

During the Committee's meetings, members engaged in thorough stakeholder consultations to assess the impacts of ex-ante and ex-post frameworks across various sectors. These discussions reflected the complex interplay of vested interests and concerns within the industry. Many stakeholders expressed support for ex-ante frameworks, citing issues such as self-preferencing, tying and bundling practices, deep discounting/pricing regulations, and data collection and usage by large digital entities. They emphasized the need for a level playing field in the current ecosystem, advocating for a harmonious relationship between the industry and the CCI. However, large industry players and big-tech firms voiced concerns about how an ex-ante framework could stifle innovation and hinder startups. They argued that such a framework, applied before any law is proven, could discourage competition and lead to a cautious market environment.

Immediately after the report was released, big tech giants raised concerns about the potential chilling effects of an ex-ante framework for the e-commerce sector, labeling it premature and excessive,

potentially resulting in overregulation. Despite already being heavily regulated through Foreign Direct Investments (FDI), these companies feared that an ex-ante framework might impose a one-size-fits-all approach that could impede innovation. Few industry bodies supported the ex-ante framework, highlighting the needs to address 'predatory' practices by both foreign and Indian players.

While the parliamentary committee identified unfair practices and Anti-Competitive Practices (ACPs) in the current ecosystem and recommended an ex-ante framework to strengthen digital markets and the CCI, in contrast, the Standing Committee on Petitions (Rajya Sabha) emphasized the importance of finding a middle ground, balancing unique risks and encouraging innovation. They suggested that rules and regulations should be framed through discussions and cost-benefit analysis to prevent unintended consequences. Few other parliamentarians also raised concerns over the efficacy of ex-ante like framework in digital competition. Civil society, including think tanks and academia mostly took a mixed stance.





4

Part II: Draft Digital Competition Bill 2024

The draft bill, attached with the Committee's observations, aims to regulate major digital entities by setting out specific requirements to curb anti-competitive behaviours. Interested parties are invited to submit their opinions and comments on the draft Digital Competition Bill, 2024, by April 15, 2024.

The legislation seeks to prevent Systemically Significant Digital Enterprises (SSDEs), a designation for large digital platforms whose criteria have been detailed in the Bill, from practices such as favouring their own services (self-preferencing), limiting access to third-party applications, enforcing policies that discourage direct dealings (anti-steering policies), exploiting business users' data, and the unfair grouping of products and services.

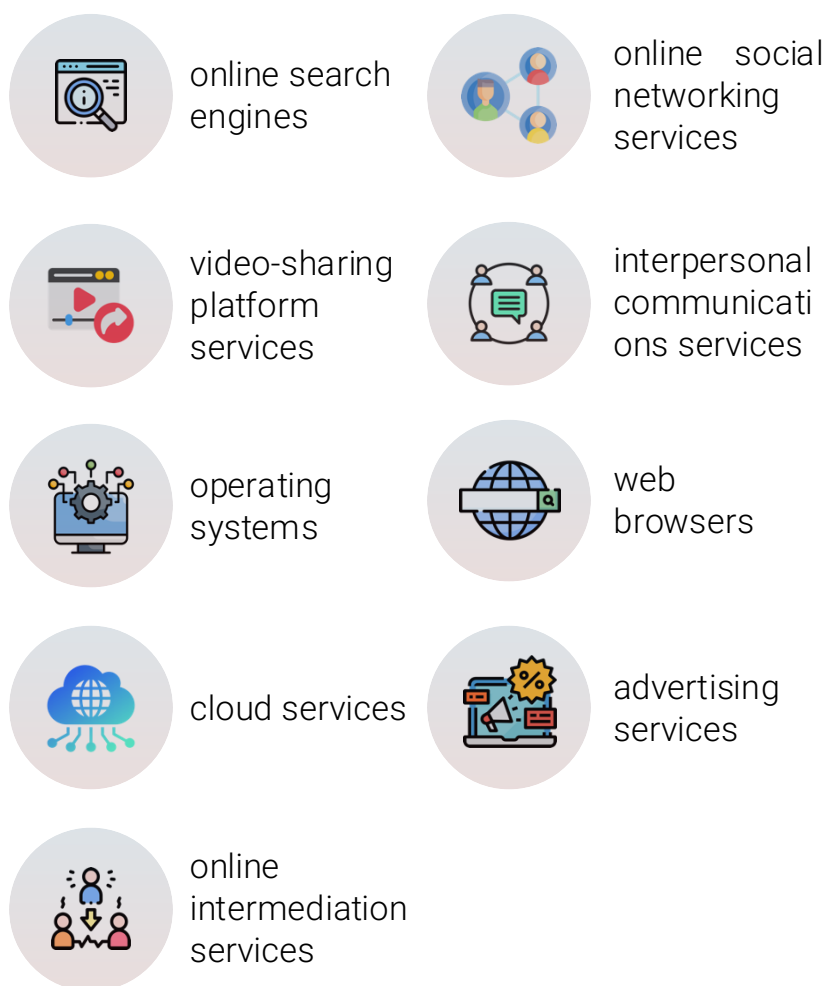
The proactive measures outlined in the bill, are designed to prevent the emergence of monopolistic practices, contrasting with the reactive (ex-post) approach of the current Competition Act 2002 and its amendment in 2023, where the Competition Commission of India steps in only after anti-competitive behaviour has been identified.

The words Commission and CCI has been interchangeably used here; wherein both refers to the Competition Commission of India.



Key Definitions

- **Core Digital Service:** Refers to any service specified in Schedule I of the Act. The list, which CCI may later expand or change (basis an examination request cum consultation by the Central government with the Commission), includes:



which includes web-hosting service providers, payment sites, auction sites, online application stores, e-commerce marketplaces, aggregators

- **End user:** Any natural or legal person using Core Digital Services other than someone supplying or providing goods or services, including through Core Digital Services (the latter is defined as a 'business user').
- **Systemically Significant Digital Enterprise (SSDE):** An enterprise is designated as an SSDE by the Commission under factors such as financial thresholds, user thresholds or if the Commission believes that an enterprise has a significant presence in India based on some parameters (all detailed later).

Designation of a Systemically Significant Digital Enterprise

An enterprise shall be deemed to be a Systemically Significant Digital Enterprise in respect of a Core Digital Service if it meets the following three conditions:

- 1 Following **financial thresholds** in each of the immediately preceding three financial years:
 - turnover in India greater than INR 4000 crore (~USD 482 million), or
 - global turnover greater than USD 30 billion, or
 - gross merchandise value in India greater than INR 16000 crore (~USD 1.9 billion), or
 - global market capitalisation greater than USD 75 billion, or equivalent, in a way later to be prescribed.

Important to note that every three years, starting from when this law gets enforced, the Central Government will, after consulting the Commission, will decide whether to increase, decrease, or keep the same the set limits.

- 2 Following **user thresholds** in each of the immediately preceding three financial years in India:
 - The core digital service provided by the enterprise has more than 1 crore end-users in India, or
 - The core digital service provided by the enterprise has more than 10,000 business users in India.

- 3 The Commission may designate an enterprise as an SSDE, on conditions not listed above, if it is of the opinion that such enterprise has **significant presence** in respect of such a Core Digital Service, based on an assessment of information available and on all or any of the

following factors related to the enterprise – size and resources, number of business users, economic power, dependence of users, monopoly position, data driven advantages, barriers to entry, scale and scope of activities, social obligations, etc, wherein CCI may add more factors which it may consider relevant for assessment.

Self-Reporting Obligation

An enterprise or business must inform the CCI within 90 days after it reaches the specified limits regarding one or more of its Core Digital Services. This involves alerting the CCI about any other businesses within its group that are involved in offering the Core Digital Service, either directly or indirectly. Following this, the CCI has the authority to officially recognize the concerned enterprise as a Systemically Significant Digital Enterprise (SSDE) and specify its Core Digital Services.

Additionally, the CCI can, after 90 days of the law coming into force, direct an enterprise to share relevant information if it has not already done so voluntarily, and can label it as an SSDE if it meets the stated criteria. Also, in this process, if the information received indicates towards that of an SSDE, the Commission may issue show cause notice on why a penalty should not be imposed and why the enterprises still should not be designated as an SSDE. These enterprises will also have multiple opportunities of being heard in its defence.

Who Would be designated as 'Associate Digital Enterprises' (ADE)?

If an enterprise being designated as an SSDE is part of a group, and one or more other enterprises within such group are directly or indirectly involved in the provision of the Core Digital Service in India, the CCI may designate these enterprises as ADEs.

Validity of the Designation

An enterprise shall be designated as an SSDE or an ADE for a period of three years. This will be automatically renewed unless the SSDE submits an application for revocation of designation any time during the last six months before the expiry of the period of designation, stating that it no longer meets the requisite thresholds or if there is a significant change in market dynamics. CCI, after assessing the request within 90 days of its receipt, shall revoke the designation or cancel the request application.

Anti-Circumvention from Designation

An enterprise shall not directly or indirectly segment, divide, subdivide, fragment or split services through contractual, commercial, technical or any other means in order to circumvent the thresholds for its requirement as SSDEs.

Obligations on Systemically Significant Digital Enterprises and their Associate Digital Enterprises

Requirement of SSDEs and ADEs to Comply with the Obligations

Upon designation as a Systemically Significant Digital Enterprise, the enterprise would have to comply with the obligations stated in this section, and the subsequent rules and regulations with respect to the Core Digital Services. The obligations however would not apply the same way to all the Core Digital Services. The CCI will specify the obligations as applicable to each Core Digital Service through differential regulations based on the nature of the market, the number of users in India, and other factors the Commission may deem fit. These differential obligations will again be different for the ADEs.

The requirements prescribed by the CCI will also take into consideration certain conduct requirements which will encompass the manner of complying with such requirements and timelines associated with such compliance. When establishing these conduct requirements, the Commission may acknowledge that certain factors can make it challenging for these enterprises to comply - economic viability of operations, prevention of fraud, cybersecurity, prevention of unlawful infringement of pre-existing intellectual property rights, requirement of any other law in force, and such other factors as may be prescribed. Thus, the Commission may adjust or tailor the regulations to take these factors into account, ensuring that the enterprises can comply.

Anti-circumvention from obligations

An SSDE cannot engage in any behaviour that undermines effective compliance with the listed obligations, regardless of whether that behaviour is of a contractual, commercial or technical nature, or of any other nature, or consists in the use of behavioural techniques or interface design. It shall also not directly or indirectly prevent or restrict users from raising any issue of non-compliance.

Obligations based on Anti-Competitive Practices

SSDEs and ADEs are required to comply with the following obligations with respect to their Core Digital Services:

- **Fair and Transparent Dealing:** An SSDE shall operate in a fair, non-discriminatory, and transparent manner with end users and business users.
- **Self-Preferencing:** An SSDE shall not, directly or indirectly, favour its own products, services, or lines of business, or those of its related parties, or those of third parties with whom it has arrangements for the manufacture and sale of products or provision of services over the products and services offered by third-party business users on its platform.

- **Self-Preferencing:** An SSDE shall not, directly or indirectly, favour its own products, services, or lines of business, or those of its related parties, or those of third parties with whom it has arrangements for the manufacture and sale of products or provision of services over the products and services offered by third-party business users on its platform.
- **Data Usage:**
 - An SSDE shall not, directly or indirectly, use or rely on non-public data of business users operating on its platform to compete with such business users on the platform. Non-public data is explained as any aggregated and non-aggregated data generated by business users that can be collected through the commercial activities of business users or their end users on the SSDE platform's identified Core Digital Service.
 - An SSDE shall not, without the consent of the end users or business users, intermix or cross-use the personal data of end users or business users collected from different services offered by it, or permit usage of such data by any third party.
 - An SSDE should allow business users and end users of its platform to easily port their data, in a format and manner that will be specified.
- **Restricting Third Party Applications:** An SSDE cannot restrict or impede the ability of its users to download, install, operate or use third-party applications or other software on its Core Digital Service, and should allow users the ability to choose, set and change the default settings.
- **Anti-Steering:** An SSDE should 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 provision of the Core Digital Service of the SSDE. The CCI will later specify what entails under and may be considered "integral" to the provision of a Core Digital Service.

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- **Tying and Bundling:** An SSDE should not require or incentivise business users or end users to use one or more of the SSDE’s other products or services, or those of its related parties, or those of third parties with whom the SSDE has different arrangements, alongside the use of the identified Core Digital Service offered, unless the use of such products or services is integral to the provision of the Core Digital Service. Again, the CCI will later specify what may be considered and entails under “integral”.

Commission Conducting an Inquiry

Power of the Commission to inquire into non-compliance of obligations by SSDEs and ADEs

The CCI can order its Director General to conduct an investigation either via its own knowledge, based on information or complaint received from any person, or on reference from the government (Centre or State) or a statutory authority, if it believes there exists a case that an SSDE or ADE is in breach of its obligations under the Act. The DG is to submit the report based on its findings within a time period which will be specified by the Commission. The Commission may forward the report to the “concerned” parties.

If the inquiry concludes that an SSDE or ADE is in contravention of the Act, the CCI may issue all or any of the following orders -

- Directing any enterprise to discontinue such conduct,
- Imposing a penalty,
- Directing the enterprise to modify its conduct in the manner specified in the order of the Commission,
- or any other necessary directives.

CCI may also take action against other enterprises that are part of the same group as the violating SSDE if it believes they have contributed to the contravention. It can also launch an inquiry and pass an order even if an enterprise is outside India or an enterprise’s conduct is taking place outside India.

If the DG report suggests no contravention against the enterprise, the CCI can further scrutinise the same by inviting comments from the government or the statutory authority or the parties concerned, and even conduct subsequent further inquiry if required thereafter.



Settlement and Commitment Provisions

During an investigation or an inquiry, the enterprise under scrutiny has the option to offer a commitment to the CCI any time before the Director General's report is presented to them, or suggest a settlement any time after receiving the report but before a final verdict is made by the CCI. These offers can encompass a monetary contribution, modifications in the behaviour of the SSDE, and any additional conditions that the CCI may deem necessary. The decision to accept or deny a commitment hinges on the nature, gravity and potential impact of the supposed violations, as well as how effective the proposed commitments are likely to be. During the proceedings, the details of which will be specified later, the concerned enterprise will have an opportunity to be heard. However, the provisions of settlement and commitment will not come under the ambit of any further appeal.

Furthermore, the CCI retains the authority to cancel any settlements or commitments if it finds that the enterprise did not provide complete and accurate information, or if there has been a significant alteration in the circumstances.

Power of the Commission to Regulate its own Procedure and Conduct Studies

- In the discharge of its functions, the Commission shall be guided by the principles of natural justice.
- The Commission shall have the same powers as are vested in a Civil Court for summoning people and producing documents.
- The Commission may call upon such experts, from the fields of economics, law, technology, regulation, accountancy, commerce, international trade, or from any other discipline or conduct such studies as it deems necessary to assist the Commission in the discharge of its functions under this Act.

- The Commission will have the authority to request any individual to present specific documents related to their business, such as books, to the Director General, Secretary, or an authorized officer, and to provide information about their products, services, or expertise. This is necessary for the purposes of this Act. It's important to note that the term "document" includes all forms of information held by Systemically Significant Digital Enterprises and their Associate Digital Enterprises, regardless of whether it's stored electronically or in other ways.

Director General Investigating Contraventions

The Bill also details out the processes and manners as for the DG investigating the anti-competitive contraventions. This includes details of evidence gathering and keeping, entering premises of a SSDE or ADE for information verification, or making requisition of services of government or police officer. The Director General may request and keep in his custody any information, books, papers, other documents or records relevant for the inquiry and for a period of one hundred and eighty days and thereafter shall return the same.

Interim Order

Where during an inquiry, the Commission is satisfied that anything that is in contravention of the provisions of the Act or the subsequent rules have been committed and continues to be committed, the Commission may temporarily restrain the party from carrying on such act until the conclusion of the inquiry or until further orders, without giving notice to such party, and wherever it deems it necessary.

Penalties

Penalties for Defying the Obligations

The Commission may impose on a Systemically Significant Digital Enterprise or its Associate Digital Enterprise, penalties not exceeding ten per cent of its global turnover, in the preceding financial year where it finds that they have failed to comply with any of the obligations. The turnover calculation shall be specified later. In some cases during the investigation process, such as failure to self-report SSDE status, not submitting compliance reports to the CCI, or submitting incorrect, incomplete or misleading information during an inquiry, the fine may be up to 1 percent of the enterprise's global turnover.

Failing to follow the CCI's directives can lead to a fine of up to Rs 1 lakh per day of defiance, with a ceiling of Rs 10 crores. If the fine is not paid, the individual could face up to three years in jail, a fine up to Rs 25 crores, or both. Additionally, the CCI has the authority to enlist the assistance of the Income Tax department to facilitate the collection of the penalty.

Contravention by Companies

The CCI may impose a penalty on every person who, at the time the contravention was committed, was in charge of, and was responsible to SSDE or its ADE for the conduct of its business. The penalty can be excused if the concerned person proves that the contravention was committed without his or her knowledge or that he/she had exercised all due diligence to prevent the commission of such contravention. This clause also applies to any director, manager, secretary or other officers of the company if it is proved that the contravention has taken place with their consent, or connivance, or is attributable to any neglect on their part. The penalty for both the situations shall not be more than ten per cent of the average of the income for the last three preceding financial years.

Sum to go to the Consolidated Fund of India

All sums received via penalties, settlement, or for recovery of legal costs by the Commission shall be credited to the Consolidated Fund of India.

Rectification of Orders

The bill also provisions rectifying any mistake apparent from the record either self-acknowledged or brought to notice, wherein the Commission may amend any order passed by it under the provisions of the Act. The Commission shall however not, while rectifying the mistake amend substantive part of its passed order.



Appeals

Appeal to Appellate Tribunal

- An enterprise has the option to challenge the CCI's directives and decisions by submitting an appeal to the National Company Law Appellate Tribunal (NCLAT). This can be done by paying 25 percent of the imposed penalty and must occur within 60 days from the date the directive or decision was received.
- Endeavour shall be made by it to dispose of the appeal within six months from the date of receipt of the appeal.
- The Appellate Tribunal shall send a copy of every order made by it to the Commission and other parties related to the appeal.
- Any person aggrieved by non-compliance of obligations imposed under this Act, by an SSDE or ADE, may approach the Appellate Tribunal or the Supreme Court for compensation in accordance with Section 53N of the Competition Act.

Appeal to Supreme Court

The Central Government or any State Government or the Commission or any statutory authority or any local authority or any enterprise or any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to them. The Supreme Court may, if it is satisfied that the applicant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed after the expiry of the said period of sixty days.

Additional Provisions from the Bill

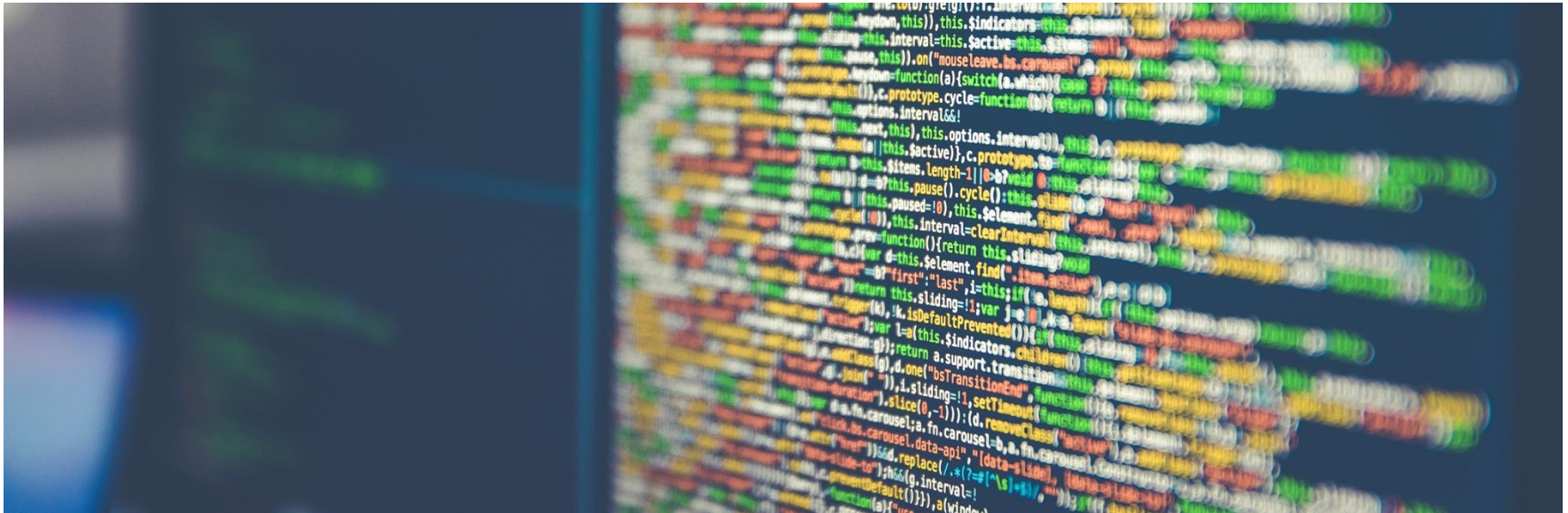
Power of the Central Government to Exempt Enterprises

The Central Government may exempt an enterprise from the application of one or more provisions of this Act, and for such period as it may specify:

- In the interest of security of the State or public interest
- In accordance with any obligation assumed by India under any treaty, agreement or convention with any other country or countries
- If it performs a sovereign function on behalf of the Central Government or a State Government, only in respect of activities relatable to the discharge of the sovereign functions.

Power of Central Government to supersede Commission

The Central Government has the authority to temporarily take over the Commission if it believes the Commission can't perform its duties due to uncontrollable circumstances, has consistently failed to follow the Central Government's directions or fulfil its responsibilities leading to financial or administrative issues, or if it's deemed necessary for public interest. This takeover can last up to six months, as stated in an official notice, which will include the reasons for this action. However, the Commission will be given a fair chance to argue against this takeover before any decision is made. The Central Government in this case, shall reconstitute the Commission by a fresh appointment of its Chairperson and other Members.



Confidentiality

No information relating to any enterprise or person can be disclosed, be it information which has been obtained by or on behalf of the Commission or the Appellate Tribunal for the purposes of this Act, without the prior permission in writing of the concerned enterprise or person.

Power to Make Rules

The Central Government is empowered to establish rules through official notices to implement the Act's provisions. Each rule formulated under this Act needs to be presented to Parliament immediately upon creation and must remain under review for a duration of thirty days. Should both Houses of Parliament decide to amend a regulation, it will then be enforced only in its revised form.

Power to Make Regulations and Process of Issuing Regulations

- The Commission may, by notification, make regulations consistent with this Act to carry out the purposes of this Act.
- The regulations can be of the 25 clauses whose details are to be specified further, including and not exclusive to - separate conduct requirements for each Core Digital Service, how users can carry out data portability, differential obligations for SSDEs, calculation of global turnover, etc.

- The Commission may consult any statutory authority, government body or other entity as the Commission may deem fit, for drafting of the consultation.
- The Commission shall ensure transparency while making regulations under this Act, by:
 - publishing draft regulations along with such other details as may be specified on its website and inviting public comments for a specified period prior to issuing regulations;
 - publishing a general statement of its response to the public comments, not later than the date of notification of the regulations; and
 - periodically reviewing such regulations.

The above is exempted if the Commission is of the opinion that certain regulations are required to be made or existing regulations are required to be amended urgently in public interest or the subject matter of the regulation relates solely to the internal functioning of the Commission.

Power to Issue Guidelines

The CCI may release guidelines related to the provisions of this Act or any rules and regulations established under it. It should be noted, though, that these guidelines should not be interpreted as legal statutes.

Annexure I: A Quick Glance at the Anti-Competitive Practices identified by CDCL

Anti-Competitive Practices identified by the Standing Committee of Finance and further highlighted by CDCL (Note, not every practice listed was incorporated in the final bill. Also, illustrations are by Primus):

Practice	Brief Description (in the context of digital services or products)	Illustration
Anti-steering	Digital platforms preventing users from being directed to more favourable terms or services on other platforms.	An app store preventing apps from directing users to the app's website for subscriptions, which may be cheaper.
Platform neutrality / Self-preferencing	Digital platforms favouring their own services or products over those of competitors in search results or listings.	A streaming service algorithm recommending its own original content more frequently than content from other producers.
Adjacency / Bundling and tying	Packaging services or products together, making the purchase of one conditional on the purchase of another within digital environments.	A software suite requiring the purchase of an additional service for enhanced functionality that is not optional.
Data usage (use of non-public data)	Using proprietary customer data to gain a competitive edge over rivals without customer consent or in ways not transparent to users.	A social media platform using user data to tailor and promote its own products without explicit user consent.
Pricing / Deep discounting	Offering products or services at significantly lower prices than the competition, sometimes at a loss, to gain market share.	An e-commerce platform selling products at a loss to outcompete smaller online retailers, potentially driving them out.
Exclusive tie-ups	Exclusive agreements that restrict sellers or service providers from offering their goods or services on other platforms.	A video streaming service securing exclusive rights to stream certain movies, preventing other platforms from offering them.
Search and ranking preferencing	Altering search or ranking algorithms to favour certain products, services, or platforms over others.	An online marketplace manipulating search results so that its private label products appear before others.
Restricting third-party applications	Platforms limiting the ability of third-party apps or services to operate or integrate with their system.	A smartphone OS limiting third-party messaging apps' functionality while promoting its own messaging service.
Advertising policies	Creating rules and guidelines that preferentially benefit the platform's own products or discriminate against certain advertisers and limit their potential to reach consumers.	An online ad platform prioritizing its own advertisements in prime slots over those purchased by external advertisers.

Annexure II: Emerging Global Practices – Insights from the EU, UK, and Germany

The CDCL, for its report, has studied various global practices regulating digital enterprises from the competition prism. We share insights from three such jurisdictions that played a role in the Committee’s study for the formulation of the bill.

	European Union (EU) - Digital Markets Act, 2022 (DMA)	United Kingdom (UK) - Digital Markets, Competition and Consumers Bill, 2023 (DMCC)	Germany - Amendment to the Act Against Restraint of Competition, 1958 (ARC)	India – Draft Digital Competition Bill, 2024
Status:	The DMA came into force in November 2022, but with subsequent phase-wise implementation.	The DMCC received Royal Assent in May 2024.	The 10th Amendment came into force in 2021. The 11th Amendment came into force in November 2023.	Draft bill proposed. <i>(this information is as of June 2024)</i>
Scope:	Targets large undertakings designated as 'Gatekeepers'.	Regulates large undertakings in the digital market with a UK nexus, and on fulfilling certain criteria, these undertakings may receive a 'Strategic Market Status' (SMS) for a digital activity.	The 10 th Amendment introduces an ex-ante regulatory framework under Section 19a, focusing on large digital companies. Additionally, it extends protection to entities dealing with those digital companies possessing 'relative market power' but are not necessarily dominant - a provision previously restricted to small and medium-sized enterprises.	Will regulate market conduct of Core Digital Services of Systemically Significant Digital Enterprises and Associate Digital Enterprises.
Designation / Nexus Criteria:	Eligible entities must provide at least one of the ten 'core platform services' listed in the DMA.	Digital activities are deemed to have a UK nexus if they meet specific conditions related to user presence, business operations or trade impact in the UK.	When evaluating an undertaking's PSCAM (<i>undertakings of paramount significance for competition across markets</i>) status, key factors considered include its dominance in markets, access to sensitive data, financial strength and resources, vertical integration, facilitation of third-party access to markets, and influence on third-party business activities.	Enterprises must meet laid conditions of size, reach and other conditions.
Regulatory Authority:	European Commission.	Competition and Markets Authority (CMA).	The Bundeskartellamt or Federal Cartel Office (FCO).	Competition Commission of India (CCI).

Regulatory Focus:	Aims to regulate gatekeepers to ensure fair competition, innovation, and protection of user rights.	Broadly defines digital activity and aims to regulate various digital services provided over the internet, ensuring fair competition and addressing market effects in the UK.	Addresses concerns regarding large digital companies' market dominance, with a specific focus on multi-sided markets and networks.	Will regulate and mandate SSDEs and ADEs to oblige on the use of third-party applications, data usage, preferences, bundling.
Other Key Features:	<p>Allows for the addition of newer digital services to the list based on market investigations.</p> <p>Focuses on gatekeeper designation, obligations for designated platforms, and potential expansion of regulated services based on market dynamics.</p>	Defines digital activity broadly, encompassing services provided over the internet, digital content provision, or any other activity related to digital services. Aims to protect competition and address potential market distortions.	Introduces an ex-ante regulatory approach, extends protection to entities dealing with companies with 'relative market power,' and grants compensation for data access. Identifies these companies as PSCAM.	<p>Provides considerable opportunities for the enterprises to be heard on various provisions, from designation to inquiry and appeal.</p> <p>Picks certain ACPs (and not all) to likely market-test them first.</p> <p>Is significantly detailed on its provisions of process of inquiry.</p>
Ex-ante Obligations	Gatekeepers are subject to both restrictive and compulsory ex-ante requirements.	The bill enforces ex-ante obligatory and preventive conduct requirements & standards on SMS undertakings.	The 10th Amendment prohibits specific behaviors for PSCAM entities, including self-preferencing, hindering competitors' operations, anti-competitive tying, unfair terms, and hindering interoperability and data portability. The FCO can also prevent PSCAM entities from obstructing fair evaluation of services and requesting disproportionate benefits from competitors.	The bill enforces ex-ante obligatory and preventive conduct requirements and standards post SSDE declaration.

Exemptions	Gatekeepers can request suspension of specific obligations if their economic viability is endangered due to exceptional circumstances beyond their control. The European Commission (EC) may exempt a Gatekeeper from obligations on grounds of public health or security, upon request or suo motu. Both suspensions and exemptions are limited and subject to yearly review.	SMS entities may seek exemption from obligations by demonstrating countervailing benefits that outweigh detrimental impacts on competition. Exemptions are contingent upon conduct benefiting users, indispensability, proportionality, and ensuring competition is not hindered.	Ex-ante obligations under Section 19a are subject to an objective justification test. PSCAM entities must objectively justify their conduct to the FCO, with the burden of proof on the entity. Failure to provide justification establishes a rebuttable presumption against the entity.	Exemptions may be provided, from case-to-case basis to enterprises engaged in providing critical support to the government (such as the enforcement of any legal right or claim) or enterprises providing a Core Digital Service which has been designated as Critical Information Infrastructure (on grounds of public interest and performance of sovereign function). Moreover, the government can, basis Sec 7(5), also go to the extent of exempting SSDEs on some of the obligations if the same infringes or impacts their IPR, or cyber-security, or other factors stated in the sub-clause.
Penalties	<p><i>Non-compliance:</i> Up to 10% of worldwide turnover.</p> <p><i>Repeated infringement:</i> Up to 20% of turnover.</p> <p><i>Minor contraventions:</i> Up to 1% of turnover.</p> <p><i>Daily non-compliance:</i> Up to 5% of daily turnover.</p>	<p><i>Non-compliance:</i> Fixed- Up to 10% of total turnover inside and outside the UK of the SMS entity or group that the SMS entity is part of. Daily- Up to 5% of turnover.</p> <p><i>Investigative requirements:</i> Fixed- Up to 1% of turnover. Daily- Up to 5% of turnover.</p> <p><i>Individuals:</i> Fixed- GBP 30,000. Daily: GBP 15,000.</p>	<p><i>Negligence:</i> Up to EUR 1 million.</p> <p><i>Serious breaches:</i> Capped at 10% of total turnover in preceding business year.</p>	<p><i>Non-compliance:</i> Up to 10% of global turnover.</p> <p><i>Ignoring CCI directions:</i> Daily- Rs 1 lakh, capped at Rs 10 crores. Failure to pay penalties may lead to imprisonment or additional fines, with the Income Tax department assisting in recovery.</p> <p><i>Company officials:</i> Up to 10% of 3-year average income.</p>



PASSION

for providing solutions to help clients achieve their goals

RESPECT

for all and alternate viewpoints

INTEGRITY

of thoughts and actions

MASTERY

of our chosen subject to drive innovative and insightful solutions

US

representing the Primus collective, where each individual matters

STEWARDSHIP

for building a better tomorrow

Navigating India



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