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DIGITAL COMPETITION BILL, 2024 | IS *EX-ANTE* REGULATION THE NEXT BEST THING SINCE SLICED BREAD OR A FRANKENSTEIN IN THE MAKING?

1. INTRODUCTION

1.1. On March 12, 2024, the Ministry of Corporate Affairs released a report prepared by the Committee on Digital Competition Law ("**CDCL**") which, among other things, recommended an introduction of an *ex-ante* legislation specifically applicable to large digital enterprises, to supplement the Competition Act, 2002 (as amended) ("**Competition Act**") ("**CDCL Report**"). In this regard, the CDCL Report comprised a draft Digital Competition Bill, 2024[1] ("**DCB**"), inviting public comments until April 15, 2024.

1.2. The origin behind the drafting of the DCB can be traced back to the 53rd (fifty three) report presented by the Parliamentary Standing Committee on Finance on '*Anti-Competitive Practices by Big Tech Companies*' before the Lok Sabha on December 22, 2022 ("**PSC Report**"). The PSC Report identified ten predominant anti-competitive practices[2] by large digital enterprises and recommended that the behaviour of these digital enterprises be monitored *ex-ante*, with an emphasis on *prevention before cure*.[3]

1.3. The recommendations of the PSC Report led to the constitution of CDCL, which was tasked to:

(i) review whether existing provisions in the Competition Act and the rules and regulations framed thereunder were sufficient to deal with the challenges emerging from the digital economy;

(ii) examine the need for an *ex-ante* regulatory mechanism for digital markets through a separate legislation;

(iii) study the international best practices on regulation in the field of digital markets;

(iv) study other regulatory regimes/institutional mechanisms/government policies regarding competition in digital markets;

(v) study the practices of leading players/intermediaries which limit or have the potential to cause harm in digital markets; and

(vi) study any other relevant matters related to competition in digital markets.

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[1] The CDCL Report along with the draft Digital Competition Bill, 2024, is available at: https://www.mca.gov.in/bin/dms/getdocument?mds=gzGtvSkE3zIVhAuBe2pbow%253D%253D&type=open.

[2] The anti-competitive practices identified were: (i) anti-steering provisions; (ii) platform neutrality/self-preferencing; (iii) adjacency/bundling and tying; (iv) data usage (use of non-public data); (v) pricing/deep discounting; (vi) exclusive tie-ups; (vii) search and ranking preferencing; (viii) restricting third-party applications; (ix) advertising policies; and (x) acquisitions and mergers.

[3] An *ex-post* regulatory approach envisages intervention in a market after the occurrence of an anti-competitive conduct. Such an approach is fact-specific and relies on available market information for evidence of abuse. An *ex-ante* regulation, on the other hand, aims to identify and regulate specific areas/issues in a market before the occurrence of any anti-competitive conduct. They may specify codes of conduct for market participants and seek to guide stakeholder behaviour through regulatory intervention.

1.4. Based on its detailed assessment, the CDCL concluded that the current *ex-post* framework under the Competition Act was not suitable 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. For instance, despite the Competition Commission of India ("**CCI**") passing several orders since 2019 wherein *prima facie* evidence of anti-competitive behaviour in digital markets was inferred and an investigation was directed to be conducted[4], final orders by the CCI have only been passed in three instances.[5] Of these cases that were decided by the CCI, one case is pending adjudication before the Supreme Court of India[6] and the remaining before the National Company Law Appellate Tribunal ("**NCLAT**").[7]

1.5. Additionally, the complexity of delineating the 'relevant market' and assessing the dominance of digital enterprises added substantially to the time taken for redressal of grievances against such enterprises.

1.6. According to the CDCL, by the time the authorities investigate and decide on the anti-competitive practices undertaken in the digital markets, the market conditions 'tip' irreversibly in favour of the dominant enterprises. Given this, the CDCL concluded that the *ex-ante* framework under the DCB would act as the new tool to strengthen and supplement the CCI's existing *ex-post* powers in the digital markets. Although the *ex-ante* framework would still likely be subjected to judicial interventions, it would be a much more efficient market correction mechanism compared to the existing *ex-post* interventions. Further, given that this framework is an extension of the existing competition laws in India, it would be regulated by the existing Indian competition law authority, i.e., the CCI.

1.7. Unsurprisingly, many large digital stakeholders such as Amazon, Google, Meta, Flipkart, Uber, are not in favour of the introduction of *ex-ante* regulations in India, especially considering the dynamic nature of digital markets. There is also a fear that the introduction of such regulations may cast a chilling effect on innovation and technological advancement in the market.

1.8. Set out below are the key features of the DCB to help us arrive at our own conclusions on whether the DCB as it stands today is a boon or a bane.

2. SALIENT FEATURES OF THE DCB

2.1. Identification of Core Digital Services

The CDCL recognised that there could be higher error costs that may be associated with an *ex-ante* competition framework and opined that the scope of the DCB should apply only to clearly identified digital

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[4] *In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users*, CCI order dated 24 March 2021 in Suo Moto Case No. 01 of 2021; *Kshitiz Arya v. Google LLC*, CCI order dated 22 June 2021 in Case No. 19 of 2020; *Together We Fight Society v. Apple Inc. & Ors.*, CCI order dated 31 December 2021 in Case No. 24 of 2021; *Digital News Publishers v. Alphabet Inc.*, CCI order dated 7 January 2022 in Case No. 41 of 2021; *National Restaurant Association of India v. Zomato Limited*, CCI order dated 4 April 2022 in Case No. 16 of 2021; and *Vijay Gopal v. Big Tree Entertainment Pvt. Ltd. (BookMyShow)*, CCI order dated 16 June 2022 in Case No. 46 of 2021.
[5] *XYZ v. Alphabet Inc. & Ors.*, CCI order dated 25 October 2022 in Case No. 07 of 2020; *Mr. Umar Javeed v. Google LLC,* CCI order dated 20 October 2022 in Case No. 39 of 2018; and *Federation of Hotel & Restaurant Associations of India v. MakeMyTrip India Pvt. Ltd.*, CCI order dated 19 October 2022 in Case No. 14 of 2019.
[6] *Google LLC v. CCI*, Civil Appeal No. 4098 / 2023.
[7] *Alphabet Inc v. CCI,* NCLAT, Competition Appeal (AT) No. 4 of 2023 and *Oravel Stays v. CCI,* NCLAT, Competition App. (AT) No. 55 of 2022.

services that are susceptible to market concentration to avoid unintended chilling effects. Further, the CDCL took note of the different approaches adopted internationally to determine the applicability of *ex-ante* competition instruments and concluded that the DCB should apply to an inclusive and pre-identified list of Core Digital Services ("**CDS**") that are susceptible to market concentration and anti-competitive behaviour.

The current list of CDS' identified in the DCB comprises: (i) online search engines; (ii) online social networking services; (iii) video-sharing platform services; (iv) interpersonal communications services; (v) operating systems; (vi) web browsers; (vii) cloud services; (viii) advertising services; and (ix) online intermediation services.[8]

The CDCL recommended that this list be guided by CCI's enforcement experience, market studies, as well as emerging international practices. Additionally, being cognizant of the dynamic nature of digital markets, the CDCL also suggested that the list of CDS' be provided as a schedule to the DCB to accord flexibility for the Government of India to add new digital services from time to time.

2.2. **Identification of Systemically Significant Digital Enterprises**

The DCB suggests that each enterprise engaged in the business of CDS and meeting the following financial[9] and user thresholds in each of the preceding three financial years would be considered as a Systemically Significant Digital Enterprise ("**SSDE**"):

Part A:

(i) turnover in India[10] of not less than INR 4,000 crore (four thousand crore) (approximately USD 0.48 billion); OR
(ii) global turnover[11] of not less than USD 30 billion (thirty billion); OR
(iii) gross merchandise value in India[12] of not less than INR 16,000 crore (sixteen thousand crore) (approximately USD 1.92 billion); OR
(iv) global market capitalisation[13] of not less than USD 75 billion (seventy five billion), or its equivalent fair value of not less than USD 75 billion (seventy five billion);[14]

AND

[8] The list of CDS' has been set out at Schedule I of the DCB and the definition for each CDS provided therein. A bare reading of each definition leads one to believe that these have been defined broadly to include varied aspects of online services.
[9] 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.
[10] "Turnover in India" includes revenue derived in India from the sale of all goods and provision of all services, whether digital or otherwise, by the enterprise.
[11] "Global turnover" includes revenue derived from the sale of all goods and provision of all services, whether digital or otherwise, by the enterprise.
[12] "Gross merchandise value" means the total value of goods or services, or both, sold by, or through the intermediation of, the enterprise through all the CDS it provides.
[13] "Global market capitalisation" means market capitalisation of the enterprise calculated at the global level.
[14] The values of "turnover in India", "global turnover", "gross merchandise value" and "global market capitalisation" shall be calculated in the manner as would be specified. Similarly, "end-users" and "business-users" for each CDS shall be identified and calculated in the manner as would be specified.

Part B:

(i) the CDS provided by the enterprise has at least one crore (ten million) end-users in India; OR
(ii) the core digital service provided by the enterprise has at least 10,000 (ten thousand) business-users in India.[15]

Notably, the DCB empowers the CCI to demarcate any enterprise as an SSDE even if it doesn't meet any of the thresholds above if the CCI believes that such enterprise has a significant presence in respect of a CDS, based on an assessment of the information available with it considering any/all of the qualitative factors set out in the DCB.[16]:

2.3. **Self-Reporting**

An enterprise shall, within a period of 90 (ninety) days of meeting the SSDE thresholds would be required to inform the CCI that it fulfils the criteria to qualify as an SSDE in one or more CDS. Further, the enterprise would also have an obligation to identify and inform the CCI of all other enterprises within its group involved in the provision of CDS such that they may be considered as Associate Digital Enterprises ("**ADE**").[17]

Upon completion of the identification process between the enterprise and the CCI, such enterprise shall be designated as an SSDE for a period of 3 (three) years.[18]

2.4. **Obligations on SSDEs and ADEs**

Once designated, the SSDE must comply with all the obligations applicable to the CDS it provides. By default, all the obligations will also apply to the ADE. However, in some cases, depending on several factors including the specific nature of services being provided by the SSDE or ADE in relation to the CDS, the CCI may reduce their compliance burden or specify differential obligations through regulations.[19]

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[15] In the event, that an enterprise does not maintain or fails to furnish data as prescribed, then it shall be deemed to be an SSDE if it meets any of the thresholds mentioned in Part A **or** Part B above.

16 These factors are: (i) volume of commerce of the enterprise; (ii) size and resources of the enterprise; (iii) number of business users or end users of the enterprise; (iv) economic power of the enterprise; (v) integration or inter-linkages of the enterprise with regard to the multiple sides of market; (vi) dependence of end users or business users on the enterprise; (vii) monopoly position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise; (viii) barriers to entry or expansion including regulatory barriers, financial risk, high cost of entry, marketing costs, technical entry barriers, barriers related to data leveraging, economies of scale and scope, high cost of substitutable goods or services for end users or business users; (ix) extent of business user or end user lock in, including switching costs and behavioural bias impacting their ability to switch or multi-home; (x) network effects and data driven advantages; (xi) scale and scope of the activities of the enterprise; (xii) countervailing buying power; (xiii) structural business or service characteristics; (xiv) social obligations and social costs; (xv) market structure and size of the market; and (xvi) any other factor which the CCCI ay consider relevant for its assessment.

[17] The process of identification and designation of SSDEs and ADEs including revocation and redesignation have been set out in detail at Sections 4 and 6 of the DCB.

[18] The DCB empowers the Government of India to exempt certain enterprises or classes of enterprises from the purview of the DCB, in a manner analogous to Section 54 of the Competition Act.

[19] Please refer to Section 7(3) of the DCB for details on differential obligations.

Some of the obligations imposed on the SSDEs are aimed at preventing anti-competitive practices. These would include:

S. No.	Business activity by SSDE/ADE	Allowed	Not Allowed
1.	Self-preferencing own products, related party products or third-party products (where the SSDE has an arrangement with such third-party).		✓
2.	Direct/indirect use or reliance on non-public data of business-users operating on its CDS to compete with such business-users on the identified CDS of the SSDE.		✓
3.	Intermixing cross-usage of business-users and end-users' personal data.	✓ (with consent)	
4.	Permit usage of business-users and end-users' personal data by third parties.	✓ (with consent)	
5.	Restrict or impede the ability of end-users and business-users to download, install, operate or use third-party applications or other software on its CDS.		✓
6.	Allow end-users and business-users to choose, set and change default settings.	✓	
7.	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 integral to the provision of the CDS of the SSDE)
8.	Require or incentivise business-users or end-users of the identified CDS to use one or more of the SSDE's other products or services; or those of related parties or third parties with whom the SSDE has arrangements for the manufacture and sale of products or provision of services alongside the use of the identified CDS.		✓ (unless usage of such products or services integral to the provision of the CDS)

2.5. **Inquiry/Investigation of contravention[20]**

The process of inquiry and investigation in relation to any contravention by an SSDE or an ADE would be along the same lines as conducted under the Competition Act. However, the CCI will not entertain any complaint unless it is filed within 3 (three) years from the date on which the cause of action has arisen, or where the CCI has condoned the delay of the complainant after recording reasons for the same.[21]

[20] The details on CCI's power to cause an inquiry and the powers granted to the CCI and the Director General (CCI), have been set out at Chapters IV and V of the DCB.
[21] The details on the limitation period for initiation of an inquiry have been set out at Section 30 of the DCB.

Notably the CCI would be able to investigate an enterprise based outside India or any conduct being undertaken outside India if they contravene the provisions of the DCB.

Similarly, the process of settlements and commitments offered under the Competition Act as well as those of appeals would equally be available to an SSDE or an ADE under the DCB.

2.6. **Penalties**

The DCB provides for the following penalties on a contravening enterprise. This, of course, is in addition to the CCI's ability to impose a cease-and-desist or a modification of conduct order on the contravening SSDE/ADE.

S. No.	Contravention	Penalty
1.	Failure to comply with the obligations under the provisions of the DCB	**10%** (ten percent) of the SSDE/ADE's global[22] turnover in the preceding financial year.
2.	Attempting circumvention from being designated as SSDE/ADE	**10%** (ten percent) of the SSDE/ADE's global turnover in the preceding financial year.
3.	Failure to self-report to the CCI	**1%** (one percent) of the global turnover of the contravening enterprise.
4.	Failure to provide information, or providing incorrect, incomplete or misleading information as sought under the provisions of the DCB	**1%** (one percent) of the global turnover of the contravening enterprise.
5.	Failure to comply with the orders or directions of the CCI	**INR 1,00,000** (approximately USD 1200) for each day during which such non-compliance occurs subject to a maximum cap of **INR 10 crores** (approximately USD 1.2 million).
6.	Continued non-compliance including failure to pay the penalty for non-compliance	**Imprisonment for up to three years** or fine up to **INR 25 crore** (approximately USD 3 million) or both.
7.	Liability of the individuals in-charge of the SSDEs/ADEs found to be in contravention of the provisions of the DCB	**10%** (ten percent) of the average income for the last three preceding financial years.

3. WAY FORWARD

3.1. As has been detailed in the CDCL Report, the DCB appears to be a culmination of the CDCL's assessment of existing or proposed *ex-ante* regulations in various jurisdictions such as European Union, United Kingdom, Germany, United States of America, Australia, Japan, South Korea, and China. While the efforts of the CDCL are laudable, it bears well to not lose sight of the fact that, unlike these jurisdictions, India is a developing economy, which is just starting to enjoy the fruits of internet penetration in the form of a growing digital economy and a robust start-up ecosystem. Thus, any over-zealousness by India to introduce a similar *ex-ante* law (to maintain pace with its foreign counterparts) may be counterproductive

[22] While the DCB does not specifically suggest this, the CDCL has recommended that 'global turnover' cap be calculated in relation to the turnover of the entire group of enterprises.

and may even have unintended consequences. This zeal further appears hasty when considered in the context of the *ex-ante* regulations of the European Union which are at a nascent stage themselves (having been enforced only in 2022) and facing teething issues of their own.

3.2. As such, any policy formulation initiative must be guided not only by the need to regulate the anti-competitive conduct of big tech companies but also take into account: (i) benefits accrued to the public by the products/services of such big-tech companies; and (ii) the cost of over-regulation of local as well as global big tech companies may be very high as it could potentially lead to disincentivizing such companies from innovating in the first place, likely to the detriment of consumers. Thus, introducing any similar *ex-ante* law at this moment (which has not been tested in developed economies by more deeply rooted and sophisticated agencies), may not be a prudent decision. Instead, India should wait and take the advantage of learning externalities and experience of the jurisdictions which have introduced an *ex-ante* law, so that Indian consumers do not end up with a medicine that is worse than the disease.

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