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## **India's Foray into Ex-Ante Digital Competition Regulation: Draft Digital Competition Bill Unveiled**

## INTRODUCTION

On 12 March 2024, the Ministry of Corporate Affairs, Government of India (MCA) unveiled the Committee on Digital Competition Law (CDCL) Report (Report) and the draft of the Digital Competition Bill (DCB) that the CDCL has proposed. The CDCL was formed on 6 February 2023, driven by the report prepared by the Standing Committee on Finance<sup>1</sup> (Standing Committee Report), which highlighted (i) ten specific anti-competitive practices that digital enterprises engage in; (ii) challenges associated with regulating digital markets in a manner consistent with traditional markets; (iii) suggestions on revamping the Competition Commission of India (Commission), and (iv) introduction of a Digital Competition Act (DCA) to ensure a fair, transparent and contestable digital ecosystem.

Accordingly, the MCA constituted the CDCL and tasked it with reviewing the existing anti-trust regime in India (the Competition Act, 2002) (Competition Act), and evaluating the need for an *ex-ante* competition framework for digital markets in India. Through the course of the year, the CDCL: (i) held in-depth discussions with various stakeholders, spanning big tech companies such as Amazon, Google and PayTM, (ii) analysed the feasibility of a specific regulation for digital markets for India, relying on practices adopted globally, and (iii) deliberated on the extant framework in India, albeit sector-specific, for regulating digital entities, among others.

We briefly discuss the Report and highlight the key aspects of the DCB.

### CDCL's views on the need for an *ex-ante* framework in India

The CDCL observed that digital markets are typically characterized by rapid evolution, network effects and a tendency to transform

into “winner-takes-all” markets. This could have a chilling effect on competition in digital markets, given that these are structured in a way where dominant market players tip the markets in their favour even before fail-safe protocols under the extant competition law framework kick in.<sup>2</sup> Additionally, the CDCL also observed that there are various limitations under the extant framework such as: (i) time-consuming nature of *ex-post* investigations and, (ii) narrow remedies, focussing on addressing case-specific issues without focussing on correcting behaviour on a wider scale, among others.<sup>3</sup>

In light of the aforementioned, the CDCL made the following key recommendations (in line with the Standing Committee Report) which include *inter alia*: (i) introduction of a *de-novo* DCA, enabling the Commission to selectively regulate large digital enterprises, (ii) institution of qualitative and quantitative criteria for designating an enterprise as a Systemically Significant Digital Enterprise (SSDE); and (iii) adoption of a flexible principle-based framework for identification of anti-competitive practices.<sup>4</sup>

### The Draft Digital Competition Bill

The CDCL has aimed to design DCB in a manner where it complements the existing framework, i.e., the Competition Act with a set of *ex-ante* measures. The DCB aims to proactively monitor and regulate the conduct of large digital enterprises, to achieve the desired outcome of ensuring fair competition and consumer protection.

### Key Features of the DCB

1. **Scope and Applicability:** The DCB has a pre-identified list of Core Digital Services<sup>5</sup>, which the Central Government in consultation with the Commission could revise from time to time. A digital enterprise: (i) providing a specific Core Digital Service, and (ii) fulfilling the

<sup>1</sup> Anti-Competitive Practices by Big Tech Companies, 53<sup>rd</sup> Report, Standing Committee on Finance, available [here](#).

<sup>2</sup> Chapter II: Indian Regulatory Landscape for Large Digital Enterprises – Efficacy and Gaps, CDCL Report

<sup>3</sup> Chapter IV: A Fit-For-Purpose Competition Regime for the Indian Digital Economy, CDCL Report

<sup>4</sup> Ibid.

<sup>5</sup> Schedule I, DCB

quantitative or qualitative criteria set out under Section 3 of the DCB, is identified as a SSDE. Interestingly, the DCB also introduces the concept of an Associate Digital Enterprise (ADE), under which group entities of a SSDE / entity proposed to be designated as a SSDE would also under the ambit of the DCB, if such group entities are also engaged in the provision of a Core Digital Service.

2. **Criteria for designation of SSDEs and ADEs:** The DCB seeks to identify enterprises which have a "significant" presence in the provision of a "Core Digital Service" in India. The DCB provides certain quantitative and qualitative thresholds for designating an enterprise as a SSDE<sup>6</sup>:

#### *Quantitative Thresholds*

In the event an enterprise fulfils both of the below criteria in the preceding three financial years, it will be designated as a SSDE:

- (i) **The 'significant financial strength' test:** This test covers thresholds such as global turnover, local turnover, gross merchandise value (local and global) and market capitalization.
- (ii) **The 'significant spread' test:** This test covers thresholds such as the number of end users / business users of a Core Digital Service.

#### *Significant Financial Strength Test (any one of the below metrics need to be met)*

Sr. No.	Thresholds	Value (in INR crore / USD million / EUR million)
1.	Indian Turnover	Greater than INR 4,000 crore or INR 40 billion (~USD 482 million / ~EUR 441 million)
2.	Global Turnover	Not less than USD 30 billion

Sr. No.	Thresholds	Value (in INR crore / USD million / EUR million)
		(~EUR 27.41 billion)
3.	Indian Gross Merchandise Value	Not less than INR 16,000 crore or INR 160 billion (~USD 1.93 billion / ~EUR 1.78 billion)
4.	Global Market Capitalization	Not less than USD 75 billion / or equivalent fair value

#### **AND**

#### *Significant Spread Test (any of the below metrics need to be met)*

Sr. No.	Thresholds	Volume
1.	End Users	1 crore or 10 million
2.	Business Users	10,000

Pertinently, if an enterprise fails to maintain data to analyse the thresholds set out above, the DCB provides that such enterprise will be deemed to be a SSDE provided it meets any one of the thresholds.<sup>7</sup> Additionally, the DCB also empowers the Central Government (in consultation with the Commission) to revise the quantitative thresholds once every three years from the date of the commencement of the DCB.

#### *Qualitative Thresholds*

Additionally, the DCB empowers the Commission to designate an enterprise as

<sup>6</sup> Section 3(2), DCB

<sup>7</sup> Proviso to Section 3(2), DCB

a SSDE, even if it does not fulfil the quantitative thresholds (as set out above), if on qualitative parameters, it is satisfied that an enterprise has “significant presence” in respect of a Core Digital Service. Significant presence is to be adjudged on parameters that include *inter alia*: (i) size and resources of the enterprise; (ii) network effects and data driven advantages; and (iii) extent of business user and end user lock in (including switching costs and behavioural bias impacting the ability to switch or multi-home).<sup>8</sup>

3. **Obligation to self-assess and designate:**

The DCB requires enterprises to self-assess their designation as a SSDE based on the quantitative thresholds set out above. The Commission is also empowered to call for information from any enterprise and assess if it meets the quantitative thresholds or qualitative thresholds. Given that qualitative thresholds are subjective in nature, an entity could be designated an SSDE on that basis only by Commission.<sup>9</sup>

4. **Obligations of a SSDE / ADE under the DCB:**

The DCB prescribes an agile and principle-based framework of *ex-ante* obligations. The DCB contains certain widely-worded obligations which would act as a principle-based framework on which the Commission can frame bespoke regulations with detailed conduct requirements. The Commission can further specify differential obligations for different entities given the nature of market, number of users or any other relevant factor. The obligations listed in the DCB are: (i) fair and transparent dealing with end users and business users; (ii) no self-preferencing vis-à-vis third-party business users; (iii) no restrictions on third-party party applications; (iv) anti-steering; (v) no tying and bundling; and (vi) restrictions on non-public data usage of business user / end user data.<sup>10</sup>

While DCB provides that conduct-based requirements are applicable on both SSDEs / ADEs, keeping in mind the fact that an ADE may not impact the markets in the way that a SSDE can, the Commission has the power to specify differential obligations for an ADE.<sup>11</sup>

5. **Penalties under the DCB:**

In line with the extant penalty regime under the Competition Act, the DCB prescribes penalties for various non-compliances such as: (i) failure to comply with the orders of the Commission; (ii) failure to self-assess and identify as a SSDE; and (iii) failure to comply with the obligations under the DCB and the relevant regulations. The maximum penalty payable under the DCB is 10% of the global turnover of the SSDE. Where the SSDE is a part of a group of enterprises, the global turnover will be determined based on the turnover of the entire group. Additionally, the DCB also prescribes penalties for individuals helping the affairs of the SSDE such as directors, managers, secretary among others.<sup>12</sup>

6. **Investigation by the Director General; Commitment and Settlement Mechanism:**

Aligning with the enforcement framework under the Competition Act, the DCB also emphasises on the importance of the Director General (DG) in investigating potential non-compliances. The DG is compulsorily required to investigate each instance of non-compliance under the DCB on a reference from the Commission. Further, in line with the amendments to the Competition Act, the DCB also envisages a commitment regime<sup>13</sup> and a settlement regime<sup>14</sup>. Aimed at ensuring a quick redressal of non-compliance with obligation proceedings, the DCB provides that the specific SSDE / ADE (subject matter of an inquiry into a failure to comply with the obligations under the DCB and the regulations) can either: (i) submit an application for settlement prior to issuance of a final order on the contravention by the Commission; or (ii)

<sup>8</sup> Section 3(3), DCB

<sup>9</sup> Section 3(4), DCB

<sup>10</sup> Chapter III: *Obligations on Systemically Significant Digital Enterprises and their Associate Digital Enterprises*, DCB

<sup>11</sup> Proviso to Section 7(3), DCB

<sup>12</sup> Chapter VI: *Penalties*, DCB

<sup>13</sup> Section 19, DCB

<sup>14</sup> Section 18, DCB

submit an application offering commitments in relation to the alleged non-compliance prior to receipt of the investigation report by the DG. Akin to the Competition Act, the Commission has the powers to design the procedural framework for the commitment / settlement mechanism and no appeal can lie against a final order of the Commission on the settlement / commitment application.

7. **Interplay between the Competition Act and the DCB:** The DCB does not bar concurrent proceedings for the same conduct under the Competition Act as well as the DCB. However, if parallel proceedings result in multiple penalties for the same conduct, it is expected that the penalty guidelines under the DCB would appropriately temper the penalties following the principles of proportionality.<sup>15</sup>

The DCB relies heavily on the robust procedural framework provided under the Competition Act and as such incorporates the pre-settled framework for enforcing obligations under the DCB. Additionally, much like the Competition Act, the DCB is envisaged to have extra-territorial application i.e., irrespective of whether: (i) the enterprise is present outside India; or (ii) the matter / action arising out of the enterprise's conduct is outside India, the Commission has the power to cause an inquiry against such enterprise for non-compliance of the DCB or the regulations framed thereunder.<sup>16</sup> Interestingly, the appellate tribunal for the purposes of the DCB is the National Company Law Appellate Tribunal ("NCLAT"), which is already identified as the appellate tribunal

for the purposes of the Competition Act.<sup>17</sup> Finally, the DCB also envisages a limitation period of 3 years (calculated from the date on which the cause of action arises) for any information or reference filed by a complainant, with an exception for sufficient cause.<sup>18</sup> This is in line with the amended Competition Act, which also provides an identical limitation period, with an identical exception for sufficient cause.<sup>19</sup>

## COMMENT

The Report and the DCB represent a momentous step forward in India's pursuit of establishing a robust, competitive, and equitable digital ecosystem. The proposed adoption of a customized and tailor-made ex-ante regulatory framework underscores the government's unwavering commitment to addressing the unique challenges prevalent in India's digital markets.

With the DCB set to undergo an extensive public consultation process, voices from across the spectrum, including smaller digital entities, innovators, and larger digital entities potentially designated as SSDEs, will be heard. This consultative process is expected to yield a regulatory framework that not only safeguards fairness and competition but also encourages the proliferation of novel digital offerings, thereby propelling India's digital landscape forward.

- Sagardeep Rathi (Partner), Pranjal Prateek (Partner), Siddharth Bagul (Senior Associate) and Rishabh Vohra (Associate)

For any queries please contact:  
[editors@khaitanco.com](mailto:editors@khaitanco.com)

<sup>15</sup> Chapter IV: A Fit-For-Purpose Competition Regime for the Indian Digital Economy, CDCL Report

<sup>16</sup> Section 26, DCB

<sup>17</sup> Section 34, DCB

<sup>18</sup> Section 30, DCB

<sup>19</sup> Proviso, Section 19(1), Competition Act (as amended by the Competition Amendment Act, 2023)



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