

Address by  
**Hon'ble Ms. Justice Hima Kohli**  
Judge, Supreme Court of India, on the  
occasion of the  
***Multi-stakeholder Roundtable Discussion***  
titled  
**“Taking Stock: Evaluating the Progress of India’s  
Draft Digital Competition Bill, 2024”**  
organised by  
**Esya Centre**  
On Saturday, the 16<sup>th</sup> July, 2024  
**Magnolia Hall, India Habitat Centre, New Delhi**  
at 04.30 PM to 06.00 PM

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***Total 1713 words***

***Speaking Time : 14.5 Minutes (approx.)***

1. Good Evening, Ms. Ravneet Kaur, Chairperson, CCI, Mr. Niranjan Reddy, Senior Advocate, Member of Parliament, Mr. Govil, Secretary, Ministry of Corporate Affairs, Mr. Rohit Kumar Singh, Former Secretary, Ministry of Corporate Affairs, Mr. Karnal Singh, Former Director, ED, Mr. Gopal Jain, Senior Advocate, representatives from the Ministry of Corporate Affairs, Ministry of Electronics and Information Technology (MeiTY) and allied ministries, leaders of the Industry, Members of the Civil Society, Academicians, distinguished participants.

## INTRODUCTION

2. **India is the world's 2<sup>nd</sup> largest Internet Market with 881 million users**<sup>1</sup>. Some of the significant problems noticed recently in the digital markets are<sup>2</sup> - preferential pricing, deep discounting, anti-steering, bundling and tying, accumulation of big data and its usage, network effects, exclusive tie-ups, search and rank preferencing, restricting third-party applications, advertising policies, etc. The **53rd Report of the Parliamentary Standing Committee on Finance (PSC), released in December 2022** recognised the unique dynamics of digital markets, which, it stated, are characterised by **strong network effects and concentration**. The apprehension expressed is that due to the **accumulation of big data and network effects**<sup>3</sup>, a robust competitive edge is created in favour of Big Tech for their consolidation and growth, **which has the potential to hamper the growth of homegrown technology**. Further, due to the swift evolution of digital markets, the current competition law framework may not be prompt in addressing the anti-competitive conduct by large digital enterprises. The market is evolving and moving so fast that by the time any probe is completed, the purpose and point of it becomes a little bit of a lost cause. The Committee, among other things, recommended introducing ex-

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<sup>1</sup> <https://timesofindia.indiatimes.com/technology/tech-news/india-to-become-worlds-third-largest-ecommerce-market-by-2030/articleshow/109669019.cms>

<sup>2</sup> [https://www.business-standard.com/companies/start-ups/impact-of-digital-competition-bill-on-india-s-homegrown-startup-ecosystem-124070101008\\_1.html](https://www.business-standard.com/companies/start-ups/impact-of-digital-competition-bill-on-india-s-homegrown-startup-ecosystem-124070101008_1.html)

<sup>3</sup> **A network effect** occurs when the value of a good or service increases the more people use it. Think of smartphones: It's easier to connect with friends when they are already on the service you are using, and it's easier for developers to release a mobile app on an operating system that already has a lot of users.

ante obligations and formulating a '**Digital Competition Act**' to ensure a fair, transparent, and contestable digital market.

3. After this Report, in **February 2023**, the Ministry of Corporate Affairs (MCA) constituted a **Committee on Digital Competition Law (CDCL)** to examine the need for a separate law on competition in digital markets. The **Digital Competition Bill** aims to regulate digital markets by **introducing an ex-ante framework** (seeking to prevent anticompetitive harms **pre-emptively**), which is atypical in competition law. This framework is inspired by the **Digital Markets Act (DMA)** of the **European Union (EU)** and the **Digital Markets, Competition and Consumers Bill (DMCC)** of the **UK**<sup>4</sup>.

#### **KEY PROVISIONS OF DCB**

4. The DCB prescribes ex-ante regulations to regulate potential anti-competitive conduct in digital markets. The DCB prescribes strict behavioural remedies for mitigating possible anti-competitive practices of **Systemically Significant Digital Enterprises (SSDES)**. SSDEs are large digital enterprises that provide certain **Core Digital Services (CDS)** which are susceptible to concentration. The DCB aims to identify SSDEs and regulate their conduct to meet objectives such as contestability, fairness and transparency. The CDCL Report defines CDS as "**a digital service that is especially susceptible to concentration and anti-competitive**

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<sup>4</sup> <https://www.thehindu.com/sci-tech/technology/what-is-the-draft-digital-competition-bill-explained/article68386341.ece>

**behaviour”**. The susceptibility is determined by the **Competition Commission of India's (CCI)** enforcement experience, market studies and emerging international practices.

5. The CCI has the power to initiate an inquiry on contravention of obligations by an SSDE/ADE on its own accord or on receipt of information or upon reference from a State or Central Government. The CCI can impose a penalty for such contravention of up to **10% of global turnover** in the preceding financial year. The Central Government has the power to exempt any enterprise from provisions of the DCB for public interest, state security, compliance with any treaty or performance of sovereign functions. It also has the power to supersede the CCI in certain situations, a move that gives it control over a quasi-judicial body.

### **DCB IN COMPARISON WITH EU's DMA AND UK's DMCC**

6. The Bill draws inspiration from the EU's DMA and the UK's DMCC. It follows ***a broad principle-based approach, where general principles are set forth and specific requirements are detailed through subordinate legislation***. This approach is similar to the UK's DMCC, which also uses a broad principle-based approach.

#### **6.1 EU's Digital Markets Act (DMA):**

The DMA is a comprehensive ex-ante competition framework that regulates digital markets in the EU. It places obligations on digital enterprises that are deemed dominant in their respective markets. The DMA focuses on preventing anti-competitive practices such as self-preferencing and restricting third-party applications.

6.2 This Regulation applies to core platform services provided or offered by gatekeepers to business users established in the EU or end users established or located in the Union, irrespective of the place of establishment or residence of the gatekeepers and irrespective of the law otherwise applicable to the provision of service.

On 06.09.2023, the European Commission designated for the first time 06 gatekeepers namely, Alphabet, Amazon, Apple, ByteDance, Meta & Microsoft. As of May, 2024, in all, 24 core platform services provided by all gatekeepers have been designated.

### **6.3 UK's Digital Markets, Competition and Consumers Bill (DMCC):**

The DMCC was a proposed bill in the UK that has recently become an Act on 24<sup>th</sup> May, 2024. It is UK's version of EU's DMA. It follows a broad principle-based approach, similar to the Digital Competition Bill of India. The DMCC sets forth general principles and delegates the task of detailing specific requirements to subordinate legislation.

## **7. DISTINGUISHING FEATURES OF DCB and DMA:**

- a) The DCB does not list virtual assistants as a core digital service<sup>5</sup>.
- b) The DCB does not explain what an SSDE is, unlike EU's DMA, which sets out the characteristics of a "gatekeeper" in Article 3(1).

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<sup>5</sup> <https://www.promarket.org/2024/05/29/assessing-indias-ex-ante-framework-for-competition-in-digital-markets/>

- c) DCB follows a "broad principles" model, while the DMA uses a more detailed, rules-based approach.
- d) The DCB leaves more discretion to the Competition Commission of India (CCI) in designating firms and enforcing the law, whereas the DMA has more standardized obligations for designated "gatekeepers".
- e) DCB can be said to be a more flexible regime than the DMA.

## 8. PROS AND CONS

8.1 There are several arguments for and against the proposed legislation. In favour of the legislation, it is being said that:

- a) The ex-ante framework will ensure that the **competition regulator can work faster** to regulate firms in the sector; pre-emptive intervention would reduce economic harm from anti-competitive practices.
- b) Restrictions on self-preferencing and data usage rights, would **improve consumer choice, transparency**, and overall consumer experience.
- c) **It will open up access and increase the range of players** who can participate in digital markets, which would bolster innovation.
- d) **Promote fair pricing for consumers** and more control over their personal data.
- e) By borrowing from the EU's DMA and UK's DMCC, the Digital Competition Bill of India, aligns with emerging global trends in digital market regulation.

8.2 Arguing against the legislation it has been pointed out that:

- a) There is significant opposition to the Bill, particularly from industry stakeholders who fear that the **ex-ante framework/prescriptivist norms will stifle innovation and market growth.**
- b) Companies are also understood to be **concerned about the broad definition** — both quantitative and qualitative — **of who a significant platform could be.** Unlike EU's DMA which specifically names the 'gatekeeper' entities, that decision in India's draft law has been left to the discretion of the CCI. Companies apprehend that **it could lead to arbitrary decision making**, which could potentially also impact start-ups.
- c) The ex-ante framework **imposes heavy compliance costs**, which **may shift the focus from innovation to regulatory adherence.**
- d) **The threshold may increase the compliance burden of younger homegrown startups** and potentially **stifle innovation.** Such roadblocks could deter private equity and venture capitalists from investing in these startups<sup>6</sup>.
- e) **Risk of creating an ad hoc regime** that gives too much discretion to regulators as well as uncertainty for many digital firms<sup>7</sup>. Digital economies need sector specific codes.

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<sup>6</sup> [https://www.business-standard.com/companies/start-ups/impact-of-digital-competition-bill-on-india-s-homegrown-startup-ecosystem-124070101008\\_1.html](https://www.business-standard.com/companies/start-ups/impact-of-digital-competition-bill-on-india-s-homegrown-startup-ecosystem-124070101008_1.html)

<sup>7</sup> Information Technology and Innovation Foundation Comments

- f) The DCB has **no provision for regulatory dialogue with the SSDEs**. In the peculiar context of an ex-ante framework, participative regulation is deemed a necessity and has been adopted by the EU. This allows the European regulator to work with gatekeepers to identify harms, mitigate them, and fine-tune DMA obligations. The DCB, however, places reliance on the CCI to unilaterally craft compliance requirements for CDSs.
- g) **Transparency has been stated as an objective** in Clause 10, but **not elaborated**, leaving it broad and vague. In theory, this principle *leaves enormous scope for the CCI to cast several obligations regarding transparency on an SSDE*, such as ensuring objective ranking, charging equitable and non-discriminatory onboarding fees, restricting unfair contractual terms, objectivity in deplatforming etc<sup>8</sup>.
- h) **Calculation of penalties would be looked at from the perspective of global turnover**. A lot of big companies have far greater turnovers globally than what they would have in India, which would have a big financial impact on them.

## **Conclusion**

9 Since its publication, the DCB has undergone extensive consultation. By 15<sup>th</sup> May, 2024, stakeholders have submitted numerous responses to the Ministry of Corporate Affairs. Following this, line Ministries have begun consultation with various stakeholders on the potential impacts on businesses, economic interests, and

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<sup>8</sup> <https://www.promarket.org/2024/05/29/assessing-indias-ex-ante-framework-for-competition-in-digital-markets/>



consumer welfare. For instance, the Ministry of Electronics and IT engaged with industry associations and think tanks, while other ministries, like Information and Broadcasting and Micro, Small, and Medium Enterprises, have consulted stakeholders specific to their sectors. An **Inter-Ministerial consultation process** on the DCB is also anticipated soon.

10. The impact of the Bill on various sectors and domains of the digital economy, including user experience, data protection and security, supply chains, investments, business costs and consumer affordability would have to be seen. Before finalizing industry consultation, it is crucial to carefully consider concerns voiced by companies and allied associations to thread the needle between promoting a competitive environment without deterring innovation, allaying concerns of all stakeholders and being on the lookout for the burgeoning lessons from the other antitrust regulators. The bedrock of any legislation is the Constitution of India. Modern legislations must be in line with constitutional principles of checks and balance and meet the standards of a society governed by the Rule of Law.
11. Given this extensive consultative process, it is time to take stock of the progress made so far. This roundtable aims to assess the feedback received from non-government stakeholders, evaluate the clarity achieved on key issues, and determine the way forward. Key areas of focus include the necessity of ex-ante digital competition regulation need to factor in Indigenous circumstances, should it be in sync with policy

goals, criteria for inclusion and exclusion of core digital services, standards for determinations, consumer impact and is it case of overlap or over regulation.

Thank You for your attention, I look forward to the discussions from the participants and the insights that will emerge from this roundtable.