

Comments to the Draft Digital Competition Bill, 2024

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Introduction

This submission is a response by researchers at the Centre for Internet and Society India (CIS) to the draft Digital Competition Bill, 2024, published by the Committee on Digital Competition Law (CDCL), Ministry of Corporate Affairs (MCA), (hereafter “**draft DCB**” or “**draft Bill**”).¹

We would like to thank the Ministry of Corporate Affairs for soliciting public comments on this important legislation and are grateful for this opportunity.

At the outset, CIS affirms the Committee’s approach to transition from a predominantly *ex-post* to an *ex-ante* approach for regulating competition in digital markets. The Committee’s assessment of the *ex-post* regime being too time-consuming for the digital domain has been substantiated by frequent and expensive delays in antitrust disputes, a fact that has also recently drawn the attention of the Ministry of Corporate Affairs.² And not just in India, the *ex-post* regime has been found to be too time-consuming in other jurisdictions as well, as a consequence of which many other countries are also moving towards an *ex-post* regime for digital markets. This also allows India to be in harmony with both developing and developed countries, which makes regulating global competition more consistent and efficient.^{3 4} In fact, “international cooperation between competition authorities” and “greater coherence between regulatory frameworks” are key in facilitating global investigations and lowering the cost of doing business.⁵

Moreover, by adopting a principles-based approach to designing the law’s obligations, the draft Bill also addresses the concern that *ex-ante* regulations, due to their prescriptive nature, tend to be sector-agnostic.⁶ The fact that these principles are based on the findings of the Parliamentary Standing Committee’s (PSC) Report on ‘Anti-Competitive Practices by Big Tech Companies’ only lends them more evidence. The draft DCB empowers the Commission to clarify the Obligations for different services, also provides CCI with the flexibility to undertake independent consultations to accommodate varying contexts and the needs of different core digital services.⁷ We do however have specific comments regarding implementing some of these provisions, that will be elaborated in the subsequent sections.

Although discussed in more detail later, we, fundamentally, agree with the Committee’s decision to rely on Anti-Competitive Practices (ACPs) as the foundation for the draft Bill’s

¹ *Report of the Committee on Digital Competition Law*, Ministry of Corporate Affairs, Government of India, March 2024, available [here](#), p. 151

² *Corporate Affairs Ministry To Review CCI’s Performance Amid Delay In Antitrust Probes*, Inc42, February 2024, available [here](#)

³ *Report of the Committee on Digital Competition Law*, Ministry of Corporate Affairs, Government of India, March 2024, available [here](#), p. 36

⁴ *Summary of Discussion of the Roundtable on Ex Ante Regulation and Competition in Digital Markets*, Organisation for Co-operation and Development, October 2022, available [here](#),

⁵ *Global Competition Law and Policy Approaches to Digital Markets*, United Nations Conference on Trade and Development, 2024, available [here](#), p. 57

⁶ *Deep Dive: How will ex-ante regulations impact Indian companies*, Medianama, July 2023, available [here](#)

⁷ *Report of the Committee on Digital Competition Law*, Ministry of Corporate Affairs, Government of India, March 2024, available [here](#), p. 110

obligations.⁸ Evidence suggests that for markets that incentivise enterprises to compete through innovation including the core digital services identified in the draft DCB, it is essential to include price as well non price parameters of competition during antitrust action.⁹ In fact, in recent cases, including *Umar Javed & Others vs Google LLC & Google India Private Limited* and *XYZ (Confidential) vs Google LLC & Others*, the Competition Commission of India (CCI) has already uncovered potential harms posed by ACPs such as ‘tying and bundling’ and ‘anti-steering’.^{10 11 12}

However, we would also like to emphasise that adequate enforcement of an *ex-ante* approach requires bolstering and strengthening regulatory capacity. Therefore, to minimise risks relating to underenforcement as well as overenforcement, CCI, its Digital Markets and Data Unit (DMDU), and the Director General’s (DG) office will have to substantially increase their technical capacity. A comparison of CCI’s current strength with its global counterparts that have adopted or are in the process of adopting an *ex-ante* approach to competition regulation reveals a stark picture. For example, the European Union (EU) had over 870 people in its DG COMP unit in 2022, and its DG CONNECT unit is expected to hire another 100 people in 2024 alone.^{13 14} Similarly, the United Kingdom’s Competition and Markets Authority (CMA) has a permanent staff of 800+, the Japan Fair Trade Commission (JFTC) has about 400 officials just for regulating anti-competitive conduct, and South Korea’s KFTC has about 600 employees.^{15 16 17} In contrast, CCI and DG, combined, have a sanctioned strength of only 195 posts, out of which 71 remain vacant.¹⁸ Bridging this capacity gap through frequent and high-quality recruitment is, therefore, the need of the hour. Most importantly, there is a need to create a culture of interdisciplinary coordination among legal, technical, and economic domains.¹⁹

Moreover, as we come to rely on an increasingly digitised economy, most technology companies will work with critical technology components such as key infrastructure, algorithms, and Artificial Intelligence to business models that are based on data collection

⁸ *Report of the Committee on Digital Competition Law*, Ministry of Corporate Affairs, Government of India, March 2024, available [here](#), p. 27

⁹ “Antitrust, however, should not approach innovation competition by exclusive reliance on traditional models of perfect and imperfect competition. Antitrust should not evaluate competitive conduct and industry performance based solely on price competition and static technology.” *Antitrust and Innovation Competition*, Spulber, D., *Journal of Antitrust Enforcement*, 2023, available [here](#), p. 316

¹⁰ *Umar Javed & Others vs Google LLC & Google India Private Limited*, Competition Commission of India, October 2022, available [here](#)

¹¹ *XYZ (Confidential) vs Google LLC & Others*, Competition Commission of India, October 2022, available [here](#)

¹² *Ex-ante Regulation in Digital Markets in India: Some Practical Considerations*, Ghosh, G. and Gupta, S., June 2023, available [here](#), p. 14-19

¹³ *Annual Activity Report*, DG Competition, 2022, available [here](#), p. 4

¹⁴ *Sneak peek: how the Commission will enforce the DSA & DMA - Blog of Commissioner Thierry Breton*, Press Statement, European Commission, July 2022, available [here](#)

¹⁵ *Annual Report and Accounts 2022/23*, Competition and Markets Authority, July 2023, available [here](#), p. 78

¹⁶ *Annual Report on Competition Policy Developments in Japan*, Directorate for Financial and Enterprise Affairs, Competition Committee, OECD, 2021, available [here](#), p. 11

¹⁷ *Annual Report on Competition Policy Developments in Korea*, Directorate for Financial and Enterprise Affairs, Competition Committee, OECD, 2021, available [here](#), p. 8

¹⁸ *Annual Report 2022-23*, Competition Commission of India, 2023, available [here](#), p. 76-77

¹⁹ *Best Practices in Building Tech Capacity in Law Enforcement Agencies - Technology Blog*, Federal Trade Commission, March 2024, available [here](#)

and processing practices.²⁰ Consequently, there will be a need to bolster CCI's capacity in the technical domain by hiring and integrating new roles including technologists, software and hardware engineers, product managers, UX designers, data scientists, investigative researchers, and subject matter experts dealing with new and emerging areas of technology.²¹ Therefore, we recommend CCI to ensure that the proposed DMDU has the requisite diversity of skills to effectively use existing tools for enforcement and is also able to keep pace with new and emerging technological developments.

The next section provides our detailed comments on specific clauses of the draft DCB. These submissions are structured across the following six categories: i) Classification of Core Digital Services; ii) Designation of a Systemically Significant Digital Enterprise (SSDE) and Associate Digital Enterprise (ADE); iii) Obligations on SSDEs and ADEs; iv) Powers of the Commission to Conduct an Inquiry; v) Penalties and Appeals; and vi) Powers of the Central Government. In addition to these suggestions, the document highlights three important gaps in the draft DCB – limited representation from workers' groups and MSMEs, exclusion of merger and acquisition (M&A) from the discussions, and lack of a formalised framework for inter-regulatory coordination.

Detailed Comments

1. Classification of Core Digital Services

I. Identifying services to be included in Schedule I

While deciding the scope and applicability of the draft DCB, the Committee mainly relies upon the EU's Digital Markets Act(DMA), which identifies ten 'Core Platform Services' that are prone to anti-competitive effects.²² This is also evident from the fact that all the Core Digital Services listed in the draft Bill's Schedule I are also present in DMA's Article 2.^{23 24} However, we would like to point out that, along with global evidence that points towards their network effects, these services are also vulnerable to anti-competitive conduct in India's context, as well. In doing so we rely on CCI's enforcement experience, market studies, and existing literature from scholars and academics.

For instance, app stores, which fall under Online Intermediation Services under the Draft Bill, have been subject to frequent investigations by the CCI frequently, including an ongoing challenge to the billing policies of Google Play Store, which

²⁰ *Best Practices in Building Tech Capacity in Law Enforcement Agencies - Technology Blog*, Federal Trade Commission, March 2024, available [here](#)

²¹ *Best Practices in Building Tech Capacity in Law Enforcement Agencies - Technology Blog*, Federal Trade Commission, March 2024, available [here](#)

²² *Digital Markets Act*, Official Journal of the European Union, September 2022, available [here](#), p. 28

²³ *Digital Markets Act*, Official Journal of the European Union, September 2022, available [here](#), p. 28

²⁴ *Report of the Committee on Digital Competition Law*, Ministry of Corporate Affairs, Government of India, March 2024, available [here](#), p. 191-192

controls over 95% of the app market.²⁵ ²⁶ Despite the evolving nature of this case's proceedings, the Play Store had, earlier this year, delisted over 200 Indian apps that failed to meet its updated payment guidelines - a move that it later rolled back, albeit partially.²⁷

Similarly, licensing agreements like the Mobile Application Distribution Agreement (MADA) and the Anti-Fragmentation Agreement (AFA) forcing developers and manufacturers to buy Google Mobile Services as a bundle have also seen frequent challenges from both business users and end users.²⁸ ²⁹ This dominance in app stores was, in fact, found to help further entrench Google's dominance in yet another core digital service: Online Search Engines. Subsequently, in 2022 CCI fined Google INR 1338 crore (roughly \$160 million) and concluded that, among other things, "Google has leveraged its dominant position in the app store market for Android OS to protect its position in online general search in contravention of Section 4(2)(e) of the Act."³⁰ Google has appealed against the order at the Supreme Court.³¹

A similar trend has emerged in CCI's dealings with e-commerce entities, especially online marketplaces and aggregators, which are classified as Online Intermediation Services in Schedule I. For example, a 2021 market study by the CCI on competition in the e-commerce industry underlined the strong role played by network effects in ensuring success.³² The study also summarised the major challenges relating to competition in the industry faced by business users – including, among others, concerns regarding platform neutrality, deep discounting, and exclusive agreements.³³ This finding has also been confirmed in several cases, most prominently in *Delhi Vyapar Mahasangh vs Flipkart Internet Private Limited (and its affiliates) & Amazon Seller Services Private Limited (and its affiliates)* wherein CCI has ordered a *prima facie* investigation into the latter's deep discounting and preferential listing practices.³⁴ ³⁵

²⁵ *Towards Regulating App Stores*, The Quantum Hub, May 2022, available [here](#), p. 1

²⁶ *NCLAT asks Google and CCI to respond to firms challenging Play Store billing policy*, Livemint, May 2024, available [here](#)

²⁷ *Over 200 apps delisted by Google, claim app developers as government meets warring parties to find resolution*, The Times of India, March 2024, available [here](#)

²⁸ *Ex-ante Regulation in Digital Markets in India: Some Practical Considerations*, Ghosh, G. and Gupta, S., June 2023, available [here](#), p. 15

²⁹ *Towards Regulating App Stores*, The Quantum Hub, May 2022, available [here](#), p. 2

³⁰ *Press Release No. 55/2022-23: CCI imposes a monetary penalty of Rs. 1337.76 crore on Google for anti-competitive practices in relation to Android mobile devices*, Competition Commission of India, October 2022, available [here](#), p. 3

³¹ *Tech-giant Google challenges NCLAT order in Supreme Court*, The Times of India, June 2023, available [here](#)

³² *Market Study on E-commerce in India: Key Findings and Observations*, Competition Commission of India, January 2020, available [here](#), p. 11

³³ *Market Study on E-commerce in India: Key Findings and Observations*, Competition Commission of India, January 2020, available [here](#), p. 20-28

³⁴ *Delhi Vyapar Mahasangh v. Flipkart Internet Private Limited and its affiliated entities & Amazon Seller Services Private Limited and its affiliated entities*, Case No. 40 of 2019, Competition Commission of India, January 2020, available [here](#)

³⁵ While the proceedings of the case are ongoing, both the Karnataka High Court and the Supreme Court of India have denied staying the Commission's investigations. *Delhi Vyapar Mahasangh vs Flipkart Internet Private Limited and Another (CCI) & Amazon Seller Services Private Limited vs Competition Commission of India (Karnataka High Court)*, Analysis of Competition Cases in India, CUTS International, March 2020, available [here](#), p. 4, 5

Network effects also play a prominent role in other core digital services including 'Online Social Networking Services' and 'Interpersonal Communications Services'. For example, the Commission is currently pursuing a suo-moto investigation against WhatsApp LLC and Facebook, Inc. for the former's change in its 2021 privacy policy, also referred to as WhatsApp's "take it or leave it policy".³⁶ In fact, in its 2021 order, CCI observed that *"the conduct of WhatsApp in sharing of users' personalised data with other Facebook Companies, in a manner that is neither fully transparent nor based on voluntary and specific user consent, appears prima facie unfair to users."*³⁷

Although video-sharing platforms classified as another core digital service do not enjoy 'direct network effects' like communication services, they continue to depend on indirect network effects to grow. This is because multi-sided markets such as those serviced by video-sharing platforms – are not only dependent on the growth experienced by any one user group, say, content consumers. In reality, value in such markets is created when positive changes on one side, for instance, increasing content consumers lead to positive shifts on another side – for example, simultaneous growth among content creators.³⁸ At its core, this multi-sided "positively reinforcing" relationship comprises the indirect network effects discussed here.

To illustrate this with the help of an example, YouTube, which has recently been classified as a Gatekeeper under the DMA, has always relied on the interdependence that exists between the three markets that it serves: "(i) users (i.e. subscribers or end-user consumers), (ii) content/service providers, and (iii) advertisers".³⁹ ⁴⁰ With four out of five internet users in India consuming YouTube, the enterprise's dominant position is evident in the control it wields over content policies.⁴¹ For instance, a 2021 change in YouTube's monetisation policy enabling the firm to place ads on all forms of content was met with strong pushback by Indian content creators.⁴² This was particularly true for small-scale creators, especially those not part of the YouTube Partner Program, which prevented them from generating revenue from these curated ads.⁴³ Combined with the fact that YouTube's creator economy contributed over INR 10,000 crore to India's GDP in 2021, it is all the more important that video-sharing platform services be covered under the ambit of the draft Bill.⁴⁴

³⁶ While the proceedings of the case are ongoing, both the Delhi High Court and the Supreme Court of India have denied staying the Commission's investigations. *Suo Moto Case No. 01 of 2021 - In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users*, Competition Commission of India, March 2021, available [here](#)

³⁷ *Suo Moto Case No. 01 of 2021 - In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users*, Competition Commission of India, March 2021, available [here](#), p.18

³⁸ *How do entrepreneurs create indirect network effects on digital platforms? A study on a multi-sided gaming platform*, Ojala, A. and Lyytinen, K., Technology Analysis & Strategic Management, April 2022, available [here](#), p. 888

³⁹ *Digital Markets Act: Commission designates six gatekeepers*, Press Release, European Commission, available [here](#)

⁴⁰ *Network Effects and Efficiencies in Multisided Markets*, Shelanski, H., Knox, S., and Dhillia, A., Organisation for Economic Co-operation and Development, November 2017, available [here](#), p. 2-3

⁴¹ *Four out of five Internet Users in India consume YouTube, show report*, Business Standard, September 2023, available [here](#)

⁴² *YouTube's New Monetisation Policy Flawed: Indian Creators*, The Quint, June 2021, available [here](#)

⁴³ *YouTube's New Monetisation Policy Flawed: Indian Creators*, The Quint, June 2021, available [here](#)

⁴⁴ *A Platform for Indian Opportunity: Assessing the economic, societal, and cultural impact of YouTube in India in 2021*, Oxford Economics, 2021, available [here](#), p. 5

However, it is not clear why the Committee chose to exclude the ‘virtual assistants’ (VA) category, which is present in DMA but not in the draft DCB. In fact, since the Committee aims to identify “Core Digital Services that are susceptible to concentration”, it may be all the more necessary that virtual assistants should be a part of this pre-identified list.⁴⁵ The concentrated power of platforms like Google, Amazon, Apple, and Meta in the VA market indicates that data-driven network effects and an early mover advantage play an important role.⁴⁶ Moreover, by establishing themselves as ‘gatekeepers’ of information, these entities control not just the end users’ access to knowledge, but also the downstream popularity and visibility of complementary business users.⁴⁷

Therefore, we submit that the Committee includes ‘Virtual Assistants’ as a Core Digital Service in Schedule I. This change would make the draft DCB more comprehensive and in line with the existing and emerging evidence from India and global markets and regulatory tailwinds.

2. Designation of an SSDE and ADE

I. Defining ‘Business users’ under Section 2

In Section 2(19), the draft DCB categorises users of Core Digital Services as ‘business users’ and ‘end users’.⁴⁸ Although these categories are well-articulated for offline markets, their definitions for multi-sided digital markets need further discussion. For example, many digital enterprises that function as online platforms often rely on gig workers to connect small-scale sellers and MSMEs with last-mile consumers. In this context, while it is easier to identify the consumer as the end user, a plain reading of the text suggests ‘business users’ would include both the sellers and such platform gig workers under the proposed definition of the term (Section 2(3)).⁴⁹

On the other hand, the draft Bill’s reliance on the Digital Markets Act (DMA) to define ‘business users’ and calculate the relevant threshold values suggests that the reading of the term might be limited to sellers alone. If this is, indeed, the case, then the interests of platform gig workers – who are often treated as ‘independent’ contractual workers should also be integrated into this bill.

This is important because these platform gig workers are at the receiving end of exploitative practices by dominant platforms. To cite an example, Urban Company is an online platform connecting consumers with ‘partners’ on its platform, who are, in essence, gig workers. These workers provide consumers with a wide range of services,

⁴⁵ *Report of the Committee on Digital Competition Law*, Ministry of Corporate Affairs, Government of India, March 2024, available [here](#), p. 16

⁴⁶ *Is Your Digital Assistant Devious?*, Stucke, M., UTK Law Faculty Publications, August 2016, available [here](#), p. 14

⁴⁷ *Bridging differing perspectives on technological platforms: Toward an integrative framework*, Gawer, A., November 2010, available [here](#), p. 1241

⁴⁸ *Report of the Committee on Digital Competition Law*, Ministry of Corporate Affairs, Government of India, March 2024, available [here](#), p. 153

⁴⁹ *Report of the Committee on Digital Competition Law*, Ministry of Corporate Affairs, Government of India, March 2024, available [here](#), p. 152

including “beauty treatments, haircuts, massage therapy, cleaning, plumbing, carpentry, appliance repair, painting”.⁵⁰ Bundled with its role as a marketplace is also the firm’s product line, which it frequently pushes its gig workers to buy from such as beauty products for beauticians.⁵¹ In fact, women gig workers on the platform have also alleged that the platform often deducts payments for its products, despite instances of the gig worker not ordering these products.⁵²

Consequently, we submit that the definition and composition of ‘business users’, as proposed under Section 2(3) of the draft DCB, be clarified further. Addressing this gap would allow a more concise reading of the ACPs and the subsequent obligations under the draft Bill.

If, however, platform gig workers are excluded from the updated definition of ‘business users’, we submit that the Committee conduct a subsequent round of consultation with platform workers and reflect their interests in the Bill in a manner that is mutually agreeable.

II. Calculating threshold values under Section 3

Although the CDCL report shares some rationale behind arriving at the threshold values for ‘Turnover in India’, ‘Global Turnover’, and ‘Global Market Capitalisation’, it does not provide a similar explanation for ‘Gross Merchandise Value’ (GMV).⁵³ This metric is also not included in the DMA, which is frequently referred to across the CDCL report.⁵⁴ Consequently, it is unclear how the Committee arrived at the threshold value of INR 16,000 crore for GMV – approximately, USD 1.95 billion.^{55 56} **To ensure that the bill affects only ‘systemically significant’ enterprises, we submit that the draft DCB be updated to reflect a more transparent, detailed, and representative calculation of the GMV threshold value.**

III. Identifying threshold values specific to each Core Digital Service

In calculating the quantitative threshold values to ‘catch’ influential digital entities, the Committee acknowledges the possibility of specifying these values differently for each Core Digital Service.⁵⁷ However, as noted in the report, the process for calculating these values for each of the services remains a significant challenge for

⁵⁰ *Who we are*, About Us, Urban Company, available [here](#)

⁵¹ *Urban Company is caught between angry customers and angrier partners*, The Ken, July 2023, available [here](#)

⁵² *‘We’re being pushed into poverty’: Voices of women who took on the unicorn start-up Urban Company*, Scroll.in, January 2022, available [here](#)

⁵³ *Report of the Committee on Digital Competition Law*, Ministry of Corporate Affairs, Government of India, March 2024, available [here](#), p. 102-103

⁵⁴ *Digital Markets Act*, Official Journal of the European Union, September 2022, available [here](#)

⁵⁵ *Report of the Committee on Digital Competition Law*, Ministry of Corporate Affairs, Government of India, March 2024, available [here](#), p. 103

⁵⁶ For comparison, popular e-commerce entities like Amazon India and Flipkart recorded a GMV of over USD 15 billion in 2022 alone. *GeM closes in on Amazon, Flipkart in gross merchandise value*, Business Standard, December 2022, available [here](#)

⁵⁷ *Report of the Committee on Digital Competition Law*, Ministry of Corporate Affairs, Government of India, March 2024, available [here](#), p. 105

CCI.⁵⁸ On the other hand, Section 3(4) of the draft Bill allows for these values to be reviewed every three years to reflect the market’s rapidly changing dynamics.⁵⁹ We believe that this feature allows for the emergence of better calculation methods and increased market visibility in the coming years, thereby simplifying the calculation of thresholds for each Core Digital Service.

Therefore, we submit that the draft DCB be modified to empower CCI to calculate quantitative thresholds for each Core Digital Service as necessary, while the stipulated values can continue to act as uniform starting points for short-term implementation. Combined with the three-year review provided under Section 3(4), this change would allow the Commission to conduct large-scale market studies and public consultations, to calculate service-specific thresholds and improve the law’s scope and effectiveness.

3. Obligations on SSDEs and ADEs

I. Lack of well-defined obligations for each of the core digital services

Chapter III of the Draft DCB delves into obligations on SSDEs and their ADEs and Clause 7 (3) provides CCI with the discretion to subject SSDEs providing core digital services to differential obligations based on (i) the nature of the market; (ii) the number of users in India; and (iii) “such other factors as it deems fit”.⁶⁰ Furthermore, Clause 7(5)(f) also includes “such other factors” as may be prescribed for consideration while laying down factors that may impede compliance with conduct requirements.⁶¹ We believe it is important to describe these factors as narrowly as possible and to avoid using vague terminologies including “such other factors”.

Therefore, we submit that obligations on SSDEs and ADEs should be a part of the Draft DCB and not subordinate legislative instruments to avoid issues of under-compliance, and regulatory unpredictability. For instance, the DMA, in Articles 5, 6, and 7 provides a well-defined list of obligations for gatekeepers. Similarly, it is important to clearly identify a set of mandatory obligations for each of the core digital services in the principal legislation and to determine factors such as what is “integral” to a core digital service, among other things.⁶²

This is not to suggest that we disagree with the Committee’s assessment that the specific conduct requirements must be framed in consultation with various stakeholders including business users, end users, civil society organisations, market

⁵⁸ *Report of the Committee on Digital Competition Law*, Ministry of Corporate Affairs, Government of India, March 2024, available [here](#), p. 105

⁵⁹ *Report of the Committee on Digital Competition Law*, Ministry of Corporate Affairs, Government of India, March 2024, available [here](#), p. 155

⁶⁰ *Report of the Committee on Digital Competition Law*, Ministry of Corporate Affairs, Government of India, March 2024, available [here](#), p. 160

⁶¹ *Report of the Committee on Digital Competition Law*, Ministry of Corporate Affairs, Government of India, March 2024, available [here](#), p. 161

⁶² *Report of the Committee on Digital Competition Law*, Ministry of Corporate Affairs, Government of India, March 2024, available [here](#), p. 163, 164

players of all sizes, and relevant government departments.⁶³ On the contrary, we **recommend that this consultation process should be a part of the drafting process, and not a post-facto measure, to articulate and define conduct requirements for each of the core digital services within the Draft DCB, itself.**

To this end, we would also like to emphasise the importance of Section 21(3) which empowers the Commission to call experts and conduct market studies, particularly for specifying obligations under Section 7.⁶⁴ **We also recommend that this proposed consultation process must be carried out in a time-bound manner to minimise delays and to accommodate dynamism of digital markets.**

II. Clarifying the scope of Section 10

Although the CDCL report uses 9 out of 10 ‘Anti-Competitive Practices’ (ACPs) to arrive at the obligations in Chapter III of the draft Bill, not all of these ACPs find a clear mention in the relevant sections.⁶⁵ For instance, on one hand, Sections 11 and 12 of the draft DCB focus specifically on the ACPs pertaining to ‘Self-Preferencing’ and ‘Data Usage’, respectively, allowing these clauses to be read consistently.⁶⁶

This is in contrast to Section 10, titled ‘Fair and Transparent Dealing’, that mandates SSDEs to “operate in a fair, non-discriminatory and transparent manner with end users and business users”.⁶⁷ This difference is also reflected in the fact that obligations under Chapter III do not include all ACPs, either. For example, ‘Deep Discounting’ and ‘Search and Ranking’ are not explicitly mentioned in the draft Bill. While this facet emanates from the principle-based framework allowing more flexibility, adopted by the Committee, it also leaves a wide room for interpreting clauses such as Section 10.⁶⁸

To its credit, the Committee briefly discusses this gap in footnote 652 of its report.⁶⁹ While we agree with the CDCL’s observation that the ten ACPs are not exhaustive, this alone does not prevent the drafted obligations from being more specific. As the prevalence and importance of ACPs beyond the prescribed list grow in the coming

⁶³ *Report of the Committee on Digital Competition Law*, Ministry of Corporate Affairs, Government of India, March 2024, available [here](#), p. 110

⁶⁴ *Report of the Committee on Digital Competition Law*, Ministry of Corporate Affairs, Government of India, March 2024, available [here](#), p. 170

⁶⁵ *Report of the Committee on Digital Competition Law*, Ministry of Corporate Affairs, Government of India, March 2024, available [here](#), p. 109

⁶⁶ *Report of the Committee on Digital Competition Law*, Ministry of Corporate Affairs, Government of India, March 2024, available [here](#), p. 162

⁶⁷ *Report of the Committee on Digital Competition Law*, Ministry of Corporate Affairs, Government of India, March 2024, available [here](#), p. 161-162

⁶⁸ *Report of the Committee on Digital Competition Law*, Ministry of Corporate Affairs, Government of India, March 2024, available [here](#), p. 110

⁶⁹ *Report of the Committee on Digital Competition Law*, Ministry of Corporate Affairs, Government of India, March 2024, available [here](#), p. 229

years, the central government, on CCI's suggestion, can always consider potential amendments or changes.⁷⁰

On the contrary, we submit that the draft Bill's Chapter III obligations encompass the nine identified ACPs in a clear, concise, and specific manner. This could, potentially, be done in addition to Section 10, to account for the CDCL's concern regarding the non-exhaustive nature of the ACPs. In addition to reducing the vagueness of the bill, this would also allow CCI to prepare more comprehensive and consistent regulations for each of the Core Digital Services.

III. Defining 'consent' in Section 12

Section 12(2) of the draft DCB prohibits an SSDE from using the personal data of end users and business users without the latter's consent:

"A Systemically Significant Digital Enterprise shall not, without the consent of the end users or business users:

- (a) intermix or cross use the personal data of end users or business users collected from different services including its Core Digital Service; or*
- (b) permit usage of such data by any third party.*

Explanation.— For the purposes of this sub-section, "consent":

- (1) For end users, shall have the same meaning as assigned to it in the Digital Personal Data Protection Act, 2023 (22 of 2023);*
- (2) For business users, shall have the same meaning as may be specified."*

To begin with, we agree with the Committee's decision to include 'data usage' as one of the obligations under the draft Bill.⁷¹ By underlining the relationship between data protection and competition, the draft DCB reiterates the important role that 'privacy' performs as a non-price parameter of competition in digital markets.⁷² However, translating this understanding into action requires a more robust definition of 'consent' for some valid reasons.

Firstly, the draft Bill relies on the Digital Personal Data Protection Act, 2023 [hereafter DPDPA] to define 'consent' for end users.⁷³ Although it is helpful that the Committee has relied on an existing definition, we would like to reiterate that the DPDPA's treatment of user 'consent' is also limited in many ways. It is important to acknowledge that unlike the General Data Protection Regulation (GDPR), the DPDPA has weak notice requirements. For instance, data fiduciaries are not required to

⁷⁰ It should be noted here that in its report, the Committee also relies on a similar approach elsewhere (footnote 601). *Report of the Committee on Digital Competition Law*, Ministry of Corporate Affairs, Government of India, March 2024, available [here](#), p. 225.

⁷¹ *Report of the Committee on Digital Competition Law*, Ministry of Corporate Affairs, Government of India, March 2024, available [here](#), p. 122

⁷² *Data privacy can take form of non-price competition: CCI study*, The Economic Times, January 2021, available [here](#)

⁷³ *Report of the Committee on Digital Competition Law*, Ministry of Corporate Affairs, Government of India, March 2024, available [here](#), p. 162

inform data principals about third-party data transfers, data retention periods, and whether their data is being transferred extraterritorially.^{74 75}

Similarly, the important role played by deceptive design practices, or ‘dark patterns’, in antitrust law necessitates the draft Bill’s reading of user consent also account for the same.⁷⁶ This assumes even more significance in light of emerging research which has found that dominant platforms routinely employ dark patterns such as pre-ticked checkboxes and misleading buttons to seek user consent.⁷⁷ This could, potentially, be incorporated by relying on other existing policies, such as the 2023 Guidelines for Prevention and Regulation of Dark Patterns to expand the definition of ‘consent’.⁷⁸

Secondly, for business users, the draft DCB adopts an altogether different approach – the specifics of ‘consent’ for business users are left for CCI to decide later, via Section 49(2)(k).⁷⁹ Considering the importance of data and the insights generated therein on competition within the market, it would be prudent to also define ‘consent’ for business users within the Bill. This should be done through an open consultation process with the Ministry of Electronics and Information Technology and other stakeholders. Furthermore, the definition must be harmonised between the two legislative instruments i.e., the DPDPA and the DCB.

In this context, we submit that the Committee i) through an open stakeholder process to define consent for business users within the Digital Competition Bill and ensure that the definition of consent is consistent within the DPDPA and the proposed DCB and ii) incorporates a definition of consent that addresses concerns around dark patterns and coercion, which have clear implications for competition regulation.

4. Power of the Commission to Conduct an Inquiry

I. Inquiring action taking place outside India under Section 26

We appreciate the Committee’s acknowledgement of the fact that digital markets are a globalised phenomenon. Through reliance on established principles of justice across multiple jurisdictions and sectors, the draft DCB has the potential to ‘converse’ with similar regulatory action taking place across the world. This sentiment is also echoed in the draft Bill’s Section 26, which reads as follows:

“The Commission shall, notwithstanding that,

a) an enterprise is outside India; or

⁷⁴ IFF’s first read of the draft Digital Personal Data Protection Bill, 2023, Internet Freedom Foundation, August 2023, available [here](#)

⁷⁵ The Digital Personal Data Protection Act, Explained, Future of Privacy Forum, August 2023, available [here](#)

⁷⁶ FTC Targets “Dark Patterns” in Actions Against Amazon and Publishers Clearing House, Wilmer Hale, August 2023, available [here](#)

⁷⁷ Dark Patterns, the FTC and the GDPR, Blesch, W., TermsFeed, available [here](#)

⁷⁸ Guidelines for Prevention and Regulation of Dark Patterns, 2023, Central Consumer Protection Authority, Government of India, November 2023, available [here](#)

⁷⁹ Report of the Committee on Digital Competition Law, Ministry of Corporate Affairs, Government of India, March 2024, available [here](#), p. 187

b) any other matter or practice or action arising out of an enterprise's conduct is outside India.

have power to cause an inquiry against such enterprise for non-compliance of this Act or rules or regulations framed thereunder, in India, and pass such orders as it may deem fit in accordance with the provisions of this Act.”⁸⁰

However, as appreciable as these objectives are, it is important for the Committee to also account for the feasibility of these measures. Firstly, in comparison to its regulatory counterparts in other countries, the CCI is highly understaffed (as discussed in the ‘Introduction’ section). This capacity gap could potentially limit CCI’s ability to promptly contribute to global investigations, and with a rapidly growing domestic market there is an urgent need to bridge this gap. Lack of sufficient strength in the form of lack of international law experts may also influence inter-jurisdictional transfer of knowledge.⁸¹ Although the accompanying report mentions the need to build this capacity, it does not offer details about enhancing it.

Secondly, CCI’s Digital Markets and Data Unit (DMDU) is empowered to, among other things, act as a nodal point for international deliberations similar to the EU’s DG-COMP unit.^{82 83} And, building the DMDU’s expertise in multi-jurisdictional competition regulation through appropriate recruitments and international collaborations, among other things, is therefore essential to implement Section 26 in letter and in spirit.

To this end, we submit that, based on its assessment of regulatory function in other jurisdictions, the CDCL lays down a set of guidelines for CCI to build this requisite staffing and subject matter expertise gap.

II. Defining a limitation period for inquiry under Section 30

Much like DMA’s Articles 32 and 33, which set limitation periods of five years for imposing and enforcing penalties, Section 30 of the draft DCB also sets a limitation period, albeit of three years, “from the date on which the cause of action has arisen”.^{84 85} However, the draft Bill’s text and the accompanying report fall short of elaborating on the two key elements of this Clause.

- Firstly, the rationale for introducing a limitation period has not been explicitly laid down. Although the DMA and the UK’s Draft DMCC indeed contain statutory limitations in their digital competition policies, this change is a relatively

⁸⁰ *Report of the Committee on Digital Competition Law*, Ministry of Corporate Affairs, Government of India, March 2024, available [here](#), p. 174-175

⁸¹ *Regulatory Cooperation – A Reality Check*, Goldberg, E., M-RCBG Associate Working Paper Series | No. 115, April 2019, available [here](#), p. 33

⁸² *CCI establishes Digital Markets and Data Unit (DMDU) to tackle competition concerns in digital markets*, Medianama, July 2023, available [here](#).

⁸³ *What the Commission is doing: Objectives*, European Commission, available [here](#)

⁸⁴ *Report of the Committee on Digital Competition Law*, Ministry of Corporate Affairs, Government of India, March 2024, available [here](#), p. 178

⁸⁵ *Digital Markets Act*, Official Journal of the European Union, September 2022, available [here](#), p. 53-54

nascent one for the Indian context.^{86 87} It was only in 2023 that the Competition (Amendment) Act was passed to modify the Extant Act and introduce a limitation period for initiating an inquiry.⁸⁸ On plain reading of the text, stark similarity between the phrasing of the ‘limitation period’ sections in the 2023 Amendment and the Draft DCB suggests that the Committee sought to harmonise the two laws.^{89 90} On the other hand, it could also be argued that Section 30 restricts CCI’s powers in investigating anti-competitive practices, which is an outcome that requires further discussion.

- Secondly, based on the information available, the Committee’s rationale for choosing ‘three years’ as the appropriate limitation period for the Indian context remains unclear. As mentioned earlier, the DMA prescribes five years under Articles 32 and 33 and given the relatively nascent state of India’s digital economy, the CDCL’s selection of a shorter duration requires a more elaborate explanation.⁹¹

Consequently, we submit that the Committee provides a detailed and, wherever possible, evidence-based rationale for introducing Section 30 in the draft DCB. This modification would enable all the relevant stakeholders to contribute to the discourse more effectively.

5. Penalties and Appeals

I. Efficacy of penalties as an effective enforcement mechanism

Clause 28(1) of the draft DCB empowers the CCI to impose a maximum penalty of 10% of an entity’s global turnover in the preceding financial year in cases where the SSDE or ADE fails to comply with the obligations laid down under the draft Bill.

One of the primary objectives behind using fines as an enforcement measure is to deter abusive conduct by punishing non-compliance. This objective was also reflected in the case of *Federation of Hotels & Restaurant Associations of India v. MakeMyTrip*, where the CCI stated the following two objectives behind the penalisation of erring entities:

- To reflect the seriousness of the infringement

⁸⁶ *Digital Markets Act*, Official Journal of the European Union, September 2022, available [here](#), p. 53-54

⁸⁷ *Draft Digital Markets, Competition and Consumers Bill (as introduced)*, The UK Parliament, April 2023, available [here](#), p.446-448

⁸⁸ *Competition (Amendment) Act, 2023*, Government of India, April 2023, available [here](#), p. 8

⁸⁹ *Competition (Amendment) Act, 2023*, Government of India, April 2023, available [here](#), p. 8

⁹⁰ *Report of the Committee on Digital Competition Law*, Ministry of Corporate Affairs, Government of India, March 2024, available [here](#), p. 178

⁹¹ *Digital Markets Act*, Official Journal of the European Union, September 2022, available [here](#), p. 53-54

- To ensure that the threat of penalties deters the infringing undertakings from indulging in similar conduct in the future⁹²

At the outset, we would like to state that we agree that the fines should be calculated based on an entity's global turnover, as opposed to only the Indian market. However, we would also like to point out that there is limited evidence on whether 10% of the global turnover will act as a sufficient deterrent. For instance, Google has been fined more than 8 billion euros for infringement of EU competition rules, yet there has been hardly any discernible change in the company's conduct.⁹³

It has also been observed that many companies treat fines as another operating cost. For instance, recently the Dutch competition regulator imposed a €5 million fine for every week Apple failed to comply with an antitrust decision by the regulator. In the end, instead of complying and allowing dating app providers to use alternative modes of payment, Apple accumulated fines worth €50 million, ostensibly indicating how companies perceive penalties as just another cost of doing business.⁹⁴ Economic theory on optimal deterrence suggests that the expected fine should equal the harm caused by the infringement, or the gain to the violator plus a safety margin. Consequently, fines must have a punitive as well as a deterring effect.⁹⁵

However, there is scant evidence domestically or globally to suggest that currently imposed fines deter abuse in the market. For example, in 2019, Facebook (now Meta) was ordered to pay an unprecedented penalty of US\$5 billion, nearly 9% of the company's revenue in 2018 by the Federal Trade Commission (FTC) on account of violating consumer privacy.^{96 97} As such, this was the largest ever penalty imposed on any company on these grounds in the US, and nearly 20 times greater than the largest privacy or data security penalty ever imposed worldwide.⁹⁸ Even before the fine was announced, during its quarterly reports to investors, the company stated "*We estimate that the range of loss in this matter is \$3.0 billion to \$5.0 billion.*"⁹⁹

Even though *prima facie* the penalty appeared massive, it failed to take into account the company's gains from decades of data misuse and though, seemingly significant, the sum was small compared to profits made by Facebook in 2018 (USD 22 billion),

⁹² *Federation of Hotel & Restaurant Associations of India (FHRAI) v. MakeMyTrip India Pvt. Ltd and ors.*, Case No. 14 of 2019, Competition Commission of India, 2019, available [here](#)

⁹³ *Op-Ed: Are the fines fine? A tale of disharmony and opacity of GDPR enforcement*, Lintvedt, N., University of Oslo, May 2023, available [here](#)

⁹⁴ *Dutch regulator rejects Apple's objections to fines*, Reuters, October 2023, available [here](#)

⁹⁵ *Op-Ed: Are the fines fine? A tale of disharmony and opacity of GDPR enforcement*, Lintvedt, N., University of Oslo, May 2023, available [here](#)

⁹⁶ *Facebook's Lackluster \$5 Billion FTC Fine Adds \$10 Billion In Market Value*, Hale, K. July 2019, available [here](#)

⁹⁷ *FTC Imposes \$5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook*, FTC, July 2019, available [here](#)

⁹⁸ *FTC Imposes \$5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook*, FTC, July 2019, available [here](#)

⁹⁹ *Facebook Reports First Quarter 2019 Results*, Meta Investor Relations, April 2019, available [here](#)

and in every subsequent year thereafter (USD 39.1 billion in 2023).^{100 101} Furthermore, it had no deterrent impact on Facebook’s conduct.¹⁰²

It is also worthwhile to note that there has been no overall evaluation of the deterrent impact of fines imposed by competition regulation in India, or elsewhere. For instance, a 2020 report by the European Court of Auditors found that while the European Commission imposed significant fines, it has no assurance of its deterrent effect.¹⁰³

This is not to suggest that monetary fines should not be a part of the enforcement toolkit, but we recommend supplementing them with relevant behavioral and/or structural modifications. Given that dominant digital platforms have integrated across business lines, they both operate a platform and also market their own goods and services on it.¹⁰⁴ This integrated structure enables them to engage in discrimination as well as appropriation of sensitive competitor information derived from data to undermine competition.¹⁰⁵ For instance, in 2018 the CCI found that Google indulged in “search bias”, i.e., the company ranked its services higher than those offered by rivals,” thereby restricting market access to its business users and causing other anticompetitive effects.^{106 107}

It is also important to acknowledge that monetary penalties alone fail to remedy the underlying source of the problem, which is attempts to require a firm to operate in a manner inconsistent with its own profit-maximizing incentives.¹⁰⁸ Owing to their integrated structures, most dominant digital platforms perform a dual role in the market, that of a platform operator and also a platform participant. Examples include Google and Meta functioning as intermediaries for information search and distribution as well as a competitor for sale of digital ads.¹⁰⁹ And it has been observed that this creates an inherent conflict of interest leading businesses to give its own products and services an advantage against other competitors participating on the platform. Needless to say, this has the potential to erode competition in the product market for that product or service.¹¹⁰

The CDCL report, on the other hand, relies predominantly on civil penalties¹¹¹ and discourages behavioral or structural remedies, ostensibly with a view to spur ease of

¹⁰⁰ *Facebook’s \$5 billion FTC fine is an embarrassing joke*, Patel, N., The Verge, July 2019, available [here](#)

¹⁰¹ *Annual revenue and net income generated by Meta Platforms from 2007 to 2023*, Statista, available [here](#)

¹⁰² *Lessons from the FTC’s Facebook Saga*, Chopra, R., The Regulatory Review, September 2022, available [here](#)

¹⁰³ *The Commission’s EU merger control and antitrust proceedings: a need to scale up market oversight (Special Report)*, European Court of Auditors, available [here](#)

¹⁰⁴ *The Separation of Platforms and Commerce*, Khan, L., Columbia Law Review [Vol. 119:973], available [here](#)

¹⁰⁵ *The Separation of Platforms and Commerce*, Khan, L., Columbia Law Review [Vol. 119:973], available [here](#)

¹⁰⁶ *In Re: Matrimony.com And Google LLC*, Case No. 30 of 2012, available [here](#)

¹⁰⁷ *Google fined \$21.1M for search bias in India*, Lomas, N., February 2018, available [here](#)

¹⁰⁸ *The Separation of Platforms and Commerce*, Khan, L., Columbia Law Review [Vol. 119:973], available [here](#)

¹⁰⁹ *The Separation of Platforms and Commerce, Khan, L., Columbia Law Review [Vol. 119:973], available [here](#)*

¹¹⁰ *Conflicts of Interest and Platforms*, Kifer, A. and Prince, J., September 2023), available [here](#)

¹¹¹ The original submission reads “solely on civil penalties”, however we have updated this to “predominantly”, to better reflect the bill and our comments.

doing business.¹¹² However, we submit that experience suggests monetary penalties alone will not act as a sufficient deterrent and the CCI must be empowered to impose additional structural and behavioral remedies, if need be, to ensure compliance and deterrence.

In light of the above, we recommend supplementing civil monetary penalties with behavioral and structural remedies.

We also recommend imposing higher penalties in cases where systemic non-compliance has been observed. This could include charging a progressively higher sum for repeated infringements (DMA caps this to 20% of the global turnover); or a ban for a limited period on the SSDEs from acquiring additional core digital services as articulated in the DMA.^{113 114}

6. Powers of the Central Government

I. Scoping the Government's power to issue directions under Section 39 (1)

Clause 39 (1) empowers the Central government to issue directions and the Commission is bound by such directions on questions of policy. It states that:

*“Without prejudice to the foregoing provisions of this Act, the Commission shall, in exercise of its powers or the performance of its functions under this Act, **be bound by such directions on questions of policy** as the Central Government may give in writing to it from time to time.”*

This is similar to the provision under the extant Competition Act, 2002, with one important difference: the central government's power cannot override the Commission when it comes to policy decisions regarding technical and administrative matters.¹¹⁵ Clause 39(1) of the draft DCB, however, does not explicitly provide that caveat, and the rationale for not doing so is unclear.

Consequently, we submit that considering that competition regulation requires an understanding of technical matters such as conduct assessment, delineation of relevant markets, evaluating a firm's market presence, among others. These complications are further exacerbated in digital markets with many additional variables to consider including but not limited to identification of core digital services and ascertaining sector specific threshold values. Therefore, the central

¹¹² *Report of the Committee on Digital Competition Law*, Ministry of Corporate Affairs, Government of India, March 2024, available [here](#), p. 115

¹¹³ *Digital Markets Act*, Official Journal of the European Union, September 2022, available [here](#), p. 51, 52

¹¹⁴ *Digital Markets Act: Commission designates six gatekeepers*, Press Release, European Commission, available [here](#)

¹¹⁵ Section 55 (1) states that “Without prejudice to the foregoing provisions of this Act, the Commission shall, in exercise of its powers or the performance of its functions under this Act, be bound by such directions on questions of policy, **other than those relating to technical and administrative matters**, as the Central Government may give in writing to it from time to time.” *The Competition Act*, Government of India, 2002, available [here](#)

government should not have the sole power to make policy decisions on such issues and the caveat from extant Competition Act must also be reproduced in the Digital Competition Bill.

Key Omissions

1. Limited Consultations with Business Users and End Users

Although we appreciate the Committee's introduction of an *ex-ante* approach to digital markets, we would also like to highlight some concerns with the adopted consultation process. To begin with, the draft Bill relies disproportionately on the representations made by digital enterprises: over 20 of the 29 stakeholder submissions publicly available in the report are by technology startups, BigTech firms, and industry bodies.¹¹⁶ Moreover, the Committee's rationale for selecting certain stakeholders for consultations, and not others, is also not explained in the accompanying report.

Furthermore, despite the significant role played by business users and end users in digital markets through the data they generate, they have remained largely absent from the consultation process. For instance, although many e-commerce and quick commerce intermediaries made their submissions to the Committee, the concerns of platform gig workers, also impacted by the Draft Competition Bill, were not included. This observation is also true for the ride-hailing industry, which has seen a rapid emergence of numerous unions and rights groups in recent years.¹¹⁷ Organisations like the Indian Federation of App-based Transport Workers and the Telangana Gig and Platform Workers Union, among others, could lend insightful feedback to the Bill's drafting.^{118 119}

Similarly, MSMEs and unorganised enterprises selling different products and services through these intermediaries are also core business users, and their perspectives were also not reflected in the draft Bill. Bridging this gap is all the more necessary because as brick-and-mortar enterprises become increasingly digitised, their reliance on online intermediaries, advertisers, search engines, and other core digital services will only intensify. Although obligations against self-preferencing and data usage could benefit business users, their perspectives would help inform the law's subsequent implementation. This can be achieved

¹¹⁶ *Report of the Committee on Digital Competition Law*, Ministry of Corporate Affairs, Government of India, March 2024, available [here](#), p. 126-150

¹¹⁷ *Cab aggregator unions form national federation*, The Hindu, December 2019, available [here](#)

¹¹⁸ *Gig Workers' Access to Social Security: Writ Petition Summary (The Indian Federation of App-based Transport Workers)*, Supreme Court Observer, December 2021, available [here](#)

¹¹⁹ *As India defers labour codes, social security benefits to gig workers get delayed*, Money Control, April 2021, available [here](#)

by involving organisations like Delhi Vyapar Mahasangh, SEWA Bharat, and others that work with these stakeholders in the consultation process.^{120 121}

Lastly, we would also like to underline the absence of any consumer groups in the submissions considered by the Committee. With the dual role that the end users play in digital markets, as consumers and data ‘generators’, the draft Bill must adopt a contemporary understanding of the ‘consumer welfare standard’ which takes into account non-priced externalities that are of public interest.¹²² Unfortunately, this is impossible to implement unless consumers of digital markets, and their informed representatives for example, Consumer Unity & Trust Society and New India Consumer Initiative, among others are also included in consultations.^{123 124}

Consequently, we submit that the Committee conduct extensive open and consultations with business users and end users on various aspects of the draft Bill, including but not limited to, the law’s *ex-ante* nature, the identified core digital services, the listed obligations, and the adjudication process.

2. Exclusion of M&A review

The Parliamentary Standing Committee (PSC) identified Mergers and Acquisitions as one of the ten ACPs on the grounds that in digital markets, monopolies can stifle dynamic innovation by acquiring potential competitors and by not innovating.¹²⁵ More specifically, the PSC stated *“In the choice between ‘Build versus Buy’, the larger platforms tend to pick the latter, thereby disallowing the smaller firms to grow beyond a certain limit, in the digital markets. While mergers may be vertical or horizontal, it may in fact be conglomerate mergers that are most likely to lead to competition concerns.”*¹²⁶ However, the CDCL does not deal with the issue of anti-competitive mergers under the scope of the draft DCB. In our view, mergers in digital markets vary from traditional markets and therefore must be a part of the Digital Competition Bill.

Established theories of harm lie at the core of any merger review process with the competition regulator relying on them to assess potential harm to competition. Traditionally, in conglomerate mergers, merging parties are neither competitors (horizontal) nor trading relationships (vertical), and these mergers are usually not subject to strict enforcement

¹²⁰ *Delhi Vyapar Mahasangh v. Flipkart Internet Private Limited and its affiliated entities & Amazon Seller Services Private Limited and its affiliated entities*, Case No. 40 of 2019, Competition Commission of India, January 2020, available [here](#)

¹²¹ *Digital Interventions: Enabling informal women workers leverage the gains of technological innovations*, SEWA Bharat, available [here](#)

¹²² *Consumer Welfare Standard: Advantages and Disadvantages Compared to Alternative Standards*, OECD Competition Policy Roundtable Background Note, 2023, OECD, available [here](#), p. 18

¹²³ *Consumer groups to govt: Prescriptive digital competition bill to affect small firms, innovation*, CUTS C-CIER, June 2023, available [here](#)

¹²⁴ *Consultation Paper on Digital Inclusion in the Era of Emerging Technologies*, New India Consumer Initiative, September 2023, available [here](#)

¹²⁵ *Anti-Competitive Practices by Big Tech Companies*, Standing Committee on Finance (53rd Report), Ministry of Corporate Affairs, 2022-23, available [here](#), p.8

¹²⁶ *Anti-Competitive Practices by Big Tech Companies*, Standing Committee on Finance (53rd Report), Ministry of Corporate Affairs, 2022-23, available [here](#), p.8

under the traditional merger control regime.¹²⁷ ¹²⁸ Consequently, traditional conglomerate merger theories of harm focus on the risk that the post-merger firm will bundle or tie the pre-merger firms' products together.

According to a roundtable report released by the OECD's Competition Committee, inherent characteristics of digital markets such as network effects, economies of scale, low marginal costs, and feedback loops have the potential to exacerbate the gaps in such outdated theories of harm.¹²⁹ Consequently, in addition to traditional conglomerate merger theories of harm, such as, post-merger tying or bundling of the pre-merger firms' products, newer theories of harm have emerged specifically in the context of digital markets.¹³⁰

One of these theories of harm includes "platform envelopment", where a platform dominant in one market i.e., 'the origin market', enters another platform market i.e., 'the target market', through a combination, and bundles its original functionality with that of its newly acquired platform in the target market.¹³¹ The targeted platform could be offering complementary products, substitutes, or even unrelated products.¹³² ¹³³ The overarching objective of such a strategy is to leverage shared user relationships and/or common components.¹³⁴ Envelopers capture market share by foreclosing an incumbent's access to users; in doing so, they harness the network effects that previously had protected the incumbent.¹³⁵

Researchers (Condorelli, Daniele; Padilla, Jorge) have used Google's example to explain platform envelopment.¹³⁶ Google entered mobile operating systems by bundling Android with Google Search which are two separate platforms, to *inter alia*, leverage the data generated by users of both platforms. Such data was effectively monetized through Google's online advertising platforms. Consequently, this enabled Google to fund its entry in a way that could not be replicated by other competitors and contributed to its eventual dominance of the mobile operating system market. However, applying envelopment and other foreclosure theories of harm requires an understanding of platform characteristics, the impact of direct and indirect network effects, and the role of data in enabling platform monopolisation.¹³⁷

¹²⁷ *A note on conglomerate mergers: The Google/Fitbit case*, Nakagawa, K. and Matsushima, N., Japan and the World Economy, Volume 67, 2023, 101203, ISSN 0922-1425, available [here](#)

¹²⁸ *Executive Summary of the Roundtable on Conglomerate effects of mergers*, OECD, June 2020, available [here](#)

¹²⁹ *Executive Summary of the Roundtable on Conglomerate effects of mergers*, OECD, June 2020, available [here](#)

¹³⁰ "Tying means that a firm requires its customers to purchase one or more "tied" products if they wish to purchase a "tying" product." *Executive Summary of the Roundtable on Conglomerate effects of mergers*, OECD, June 2020, available [here](#), p. 2

¹³¹ *Harnessing Platform Envelopment in the Digital World*, Condorelli, Daniele; Padilla, Jorge, Journal of Competition Law & Economics, 00(00), 1-45, 2020, available [here](#)

¹³² *Executive Summary of the Roundtable on Conglomerate effects of mergers*, OECD, June 2020, available [here](#)

¹³³ *Harnessing Platform Envelopment in the Digital World*, Condorelli, Daniele; Padilla, Jorge, Journal of Competition Law & Economics, 00(00), 1-45, 2020, available [here](#)

¹³⁴ *Executive Summary of the Roundtable on Conglomerate effects of mergers*, OECD, June 2020, available [here](#)

¹³⁵ *Platform Envelopment*, Eisenmann, T., Parker, G., Van Alstyne, M., Strategic Management Journal, 32(12): 1270-85, 2011

¹³⁶ *Harnessing Platform Envelopment in the Digital World*, Condorelli, Daniele; Padilla, Jorge, Journal of Competition Law & Economics, 00(00), 1-45, 2020, available [here](#)

¹³⁷ *Summary of Discussion of the roundtable on Conglomerate Effects of Mergers*, OECD, Feb 2021, available [here](#)

With the increasing convergence in digital markets, other jurisdictions have updated or are in the process of updating their merger guidelines to incorporate these newer theories of harm. For instance, the Japan Fair Trade Commission (JFTC) amended its merger guidelines in 2019 to address the competitive concerns of conglomerate mergers, especially in digital markets. This implies that for digital markets, the JFTC also considers factors such as direct and indirect network effects in multi-sided markets, and the value of data, among other things.¹³⁸

Similarly, the DMA imposes an obligation on gatekeepers to inform the EC of any intended concentration, where the merging entities or the target provide core platform services or any other services in the digital sector or enable the collection of data.¹³⁹ This would include Germany and Austria,¹⁴⁰ which, similar to India, have incorporated transaction value tests to prevent killer acquisitions in the digital market. We would also like to highlight here that this has been done not to ‘block’ or ‘prohibit’ mergers in the digital space, but to gather information regarding trends in the digital sector as a whole and to minimise type II errors, where anticompetitive mergers are incorrectly cleared.^{141 142} This also provides antitrust authorities with the power to review below-threshold deals, if need be. For instance, in countries such as, China, Brazil, and South Korea, where the competition authority is empowered to do so, there have been instances of scrutinizing sub-threshold deals in the tech sector.¹⁴³

With M&A activity in the digital sector bound to witness an upward trend, we recommend the following:

- **Merger review in digital markets should account for network effects, economies of scale, low marginal costs, and feedback loops which have the potential to exacerbate traditional theories of harm. To avoid dual notification under the extant regime and the DCB, we recommend notification of mergers in the digital space should be under the proposed Digital Competition Bill, and an amendment to that effect may be made.**
- **Alternatively, CCI could publish detailed guidelines for mergers in the digital sector taking into account newer theories of harm, as elaborated above.**

¹³⁸ *Conglomerate effects of mergers – Note by Japan*, OECD, May 2020, available [here](#)

¹³⁹ *Digital Markets Act*, Official Journal of the European Union, September 2022, available [here](#), p. 42

¹⁴⁰ *Revised guidance on the Austrian and German transaction value threshold*, Maria Dreher-Lorje et al. February 2022, available [here](#)

¹⁴¹ “Such information should not only serve the review process regarding the status of individual gatekeepers but will also provide information that is crucial to monitoring broader contestability trends in the digital sector and can therefore be a useful factor for consideration in the context of the market investigations provided for by this Regulation.” Recital 71, *Digital Markets Act*, Official Journal of the European Union, October 2022, available [here](#), p. 19

¹⁴² *Merger control in digital markets: challenges and opportunities*, Duso, T., March 2024, available [here](#)

¹⁴³ It should be noted that CCI does not, currently, have the residuary powers to look at below threshold mergers. *Review of below-threshold mergers creates uncertainty*, Johnston, E., Long, D., Emanuel, L. and Tolley, L., A&O Shearman, February 2024, available [here](#)

3. Lack of a Framework for Inter-Regulatory Coordination

With CDCL acknowledging the prominent role of data in antitrust enforcement,¹⁴⁴ there is bound to be a significant overlap between different regulatory bodies in India particularly between the Data Protection Board and the CCI. While the Commission's Market Study on the Telecom Sector released in 2020 recommended creating formal and informal channels of communication between TRAI, DoT, CCI and the proposed Data Protection Authority (now Data Protection Board under the DPDPA),¹⁴⁵ there has been no effort to formalise such a framework.

Owing to ever-increasing digital convergence, many jurisdictions are establishing frameworks to enhance inter-regulatory coordination. For instance, the UK has established the Digital Regulation Cooperation Forum (DRCF) to minimise inter-regulatory friction, enable collaboration between different regulators, and facilitate capacity development through peer learning.¹⁴⁶ The DRCF, comprising four members namely the Competition Markets Authority, Information Commissioner's Office, the Office of Communications, and the Financial Conduct Authority predominantly seeks to harness collective experience when data, privacy, competition, communications, and content interact and assess gaps in digital regulation.¹⁴⁷

Another alternative is to formalise a framework for such coordination within the bill itself. For instance, the DMA recommends the establishment of a high-level board comprising representatives from the Body of the European Regulators for Electronic Communications (BEREC), European Data Protection Supervisor and European Data Protection Board, European Competition Network, Consumer Protection Cooperation Network, and European Regulatory Group of Audiovisual Media Regulators.¹⁴⁸ One of the objectives of this high-level group is to identify and assess potential interactions between the DMA and other sector-specific regulations.¹⁴⁹

Therefore, in order to avoid regulatory overlaps, **we recommend establishing formal guidelines for coordination between different regulators dealing with digital regulation in India.**

¹⁴⁴ *Report of the Committee on Digital Competition Law*, Ministry of Corporate Affairs, Government of India, March 2024, available [here](#), p. 30

¹⁴⁵ *Market Study on The Telecom Sector in India*, Competition Commission of India, 2021, available [here](#), p.30

¹⁴⁶ *DRCF Terms of Reference (ToR)*, Competition and Markets Authority, September 2022, available [here](#)

¹⁴⁷ *Digital Regulation Cooperation Forum (DRCF)*, Ofcom, available [here](#)

¹⁴⁸ *Digital Markets Act*, Official Journal of the European Union, September 2022, available [here](#), p. 57

¹⁴⁹ *Digital Markets Act*, Official Journal of the European Union, September 2022, available [here](#), p. 58

