

REPORT OF COMMITTEE AND DRAFT BILL ON DIGITAL COMPETITION LAW  
MINISTRY OF CORPORATE AFFAIRS (COMPETITION SECTION)  
IGAP COMMENTS

## INTRODUCTION AND PRELIMINARY COMMENTS

The Indian Governance And Policy Project (*IGAP*) is a premier think-tank dedicated to enhancing governance and policy frameworks in India. Established to address the pressing challenges of policy implementation and institutional governance, IGAP collaborates with various stakeholders, including government bodies, academic institutions, and civil society organizations. Our mission is to foster informed policymaking through rigorous research, expert analysis, and stakeholder engagement.

We welcome the opportunity to submit our recommendations to the Ministry of Corporate Affairs on the Report of the Committee on Digital Competition Law (*CDCL Committee*). The Committee's insights into the dynamic nature of digital markets and the need for a robust regulatory framework resonate with IGAP's commitment to ensuring fair competition and fostering innovation in India's digital economy. Our recommendations aim to refine the proposed Digital Competition Bill (*Draft DCB*), balancing the need for regulation with the imperative to nurture India's burgeoning digital sectors. We believe that a well-structured digital competition law will be pivotal in achieving the government's vision of a trillion-dollar digital economy.

We note that deliberations on substantive provisions of the Draft DCB are at a preliminary stage, and phrasing of clauses may undergo significant revision in subsequent iteration of the draft bill. Further, we also note the recommendation of the CDCL Committee that '*the specificities of the obligations as applicable to each Core Digital Service would be specified through regulations drafted by the CCI through a consultative process.*' As these regulations would have a significant operative impact on the entities regulated under the Draft DCB, it would be necessary to examine the proposed obligations on a case-by-case basis to appreciate their downstream impact on affected digital sectors.

Nonetheless, the CDCL Committee has recommended certain ‘core principles’ in its report for digital competition, which are also incorporated within the Draft DCB. Our comments on these core recommendations are specified below:

#### COMMENTS ON THE REPORT OF THE CDCL COMMITTEE

**1. The Necessity of Ex-Ante Regulation:** The CDCL Committee’s most significant recommendation in the report is the need for an *ex-ante* regulatory framework, akin to the European Union’s Digital Markets Act,<sup>1</sup> to oversee Indian digital sectors, specifically targeting what are termed under the report as systemically significant digital enterprises (*SSDEs*). The CDCL Committee observed that the present *ex-post* enforcement mechanisms under the Competition Act, 2002 were not adequately equipped to address the dynamic and fast-evolving nature of digital markets. The slow processes of the regulator allowed anti-competitive practices to entrench themselves in digital markets, causing significant harm to competition and consumers before any corrective action could be taken.

Moving from an *ex-post* to *ex-ante* regulation for competition is a significant new step in competition regulation in India. This requires the legislative body to premeditate the anti-competitive harm during the stage of drafting the law itself. Legislators have generally refrained from adopting such a strategy for competition regulation thus far, due to the complications involved, as well as potential unintended consequences. *Ex-ante* regulations, if too stringent, can create significant compliance burdens on businesses, diverting resources from innovation to regulatory compliance. For instance, the EU’s General Data Protection Regulation (*GDPR*) has been cited as a hindrance for many kinds of innovative digital business models and startups due to its complex and costly compliance requirements.<sup>2</sup>

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<sup>1</sup> Digital Markets Act Regulation 2022 (EU) 2022/1925, available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R1925>>

<sup>2</sup> Martin, N., Matt, C., Niebel, C. et al. How Data Protection Regulation Affects Startup Innovation. *Inf Syst Front* 21, 1307–1324 (2019), available at <<https://doi.org/10.1007/s10796-019-09974-2>>

In the Indian context, there is a need to harmonize the Draft DCB proposal with the policy roadmap for Digital India, which is targeting \$1 trillion economic value by 2025,<sup>3</sup> and significant growth into the next decade. A conducive regulatory environment with balanced competition measures will form an essential component of this roadmap. **The implementation of ex-ante measures like the Draft DCB must ensure they do not stifle digital and platform-based innovation. The Draft DCB should incorporate clear provisions and regulations to balance regulation with innovation, particularly for emerging sectors like artificial intelligence and Web 3.0 technologies.**

2. **Definition and Designation of SSDEs:** The CDCL Committee recommends identifying SSDEs based on clear quantitative thresholds related to their turnover, market capitalization, and user base. These thresholds may be subject to periodic revision every 3 years. Entities are expected to self-assess whether they surpass the specified thresholds and carry out due diligence obligations accordingly under the Draft DCB if they qualify as SSDEs. These thresholds are provided under Clause 3(2) of the Draft DCB, which states that an enterprise may be termed as an SSDE if in the last 3 financial years, its:

*(i) turnover in India is not less than INR 4000 crore; OR*

*(ii) global turnover is not less than USD 30 billion; OR*

*(iii) gross merchandise value in India is not less than INR 16000 crore; OR*

*(iv) global market capitalisation is not less than USD 75 billion*

**AND additionally,**

*(i) the core digital service provided by the enterprise has at least 1 crore end users; OR*

*(ii) the core digital service provided by the enterprise has at least 10,000 business users.*

While the identification of specific and quantified threshold is notable, the existing turnover and user-based thresholds may be too liberal for the Indian digital environment. In general parlance,<sup>4</sup> public companies with a market capitalization between INR 5,000 to 20,000 crore are often referred to as ‘mid-cap’ companies, as opposed to ‘large-cap’ companies (above INR

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<sup>3</sup> Ministry of Electronics & Information Technology, India’s Trillion-Dollar Digital Opportunity, available at <[https://www.meity.gov.in/writereaddata/files/india\\_trillion-dollar\\_digital\\_opportunity.pdf](https://www.meity.gov.in/writereaddata/files/india_trillion-dollar_digital_opportunity.pdf)>

<sup>4</sup> Available at <<https://groww.in/p/mid-cap-stocks>>

20,000 crore). The base threshold of INR 4,000 crore turnover risks including such medium sized digital companies, and potentially even high growth start-ups within the ambit of the Draft DCB. Further, a user base of 1 crore (or 10 million) may also not be significant in the Indian context, as this approximately comprises 0.7% of the Indian population.<sup>5</sup> For comparison, popular digital services such as Unified Payments Interface (*UPI*) boast of over 300 million active users<sup>6</sup> or approximately 21.4 % of the country's population. The thresholds recommended by the CDCL Committee are also far more generous than those provided under than Europe's Digital Markets Act, which advocates for a '45 million monthly active end users' and 'EUR 7.5 billion' minimum threshold for gatekeeper entities.<sup>7</sup>

Such low thresholds may seek to place significant compliance burden on companies which would otherwise not have a significant competition impact within their digital market. **Hence, a re-consideration and increase in minimum thresholds for SSDEs may be necessary to ensure the resources of the Competition Commission of India (CCI) are focused on entities with the genuine capability to distort digital markets. This will also avoid unnecessary compliance burden on smaller and innovative digital entities.**

**3. Identification of Core Digital Services:** The CDCL Committee has also recommended specific services in which the activities of SSDEs are to be regulated. These have been termed as 'core digital services' and include:

- (i) *online search engines;*
- (ii) *online social networking services;*
- (iii) *video-sharing platform services;*
- (iv) *interpersonal communications services;*
- (v) *operating systems;*
- (vi) *web browsers;*

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<sup>5</sup> Author's calculations

<sup>6</sup> Livemint report, 2 November 2023, available at <<https://www.livemint.com/money/personal-finance/up-and-growing-upi-transactions-at-an-all-time-high-in-october-what-has-made-this-growth-sustainable-11698911883880.html>>

<sup>7</sup> Article 3, Digital Markets Act Regulation 2022 (EU) 2022/1925, available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R1925>>

- (vii) *cloud services;*
- (viii) *advertising services; and*
- (ix) *online intermediation services.*

The inclusion or exclusion of a digital sector from this list carries significant economic implications for the entities involved, as well as the overall digital market. **Hence, the addition of new services to this list should be carried out with utmost scrutiny, and where possible, public consultations.** Presently, the Draft DCB incorporates the list of core digital services under Schedule I, enabling the Central Government to swiftly add, remove or alter services from the list in consultation with the CCI.<sup>8</sup> This provides significant leeway for change in the scope of regulatory impact of the bill. As noted earlier, the implementation of the Draft DCB should be undertaken with due consideration to overall economic impact on the digital economy and innovation. This includes any changes in the list of core digital services.

Additionally, it should be noted that the list includes ‘online intermediation services’ which are defined as ‘*any other digital service, not expressly covered under clauses (a) to (h) of Schedule I, which on behalf of an end user or a business user, receives, stores or transmits electronic record or provides any service with respect to that record...*’.<sup>9</sup> The broad scope of this category, which reflects the definition of ‘intermediaries’<sup>10</sup> under the Information Technology Act, 2000 is too vague a category to be included within the ambit of the Draft DCB. The vague definition would introduce regulatory confusion in self-assessment of SSDE status and carry unintended consequences for companies in new and emerging digital sectors. **It is suggested that all ‘core digital services’ included within the ambit of the Draft DCB be specifically and explicitly mentioned to minimize ambiguity.**

4. **Enforcement Capacity via the Digital Markets and Data Unit:** Lastly, one of the most crucial aspects noted in the CDCL Committee’s report is the need for strengthening the regulatory capacity of CCI to contend with digital markets. The CDCL Committee acknowledges the setup of a Digital Markets and Data Unit (*DMDU*) under the aegis of the CCI to ensure adequate

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<sup>8</sup> Clause 51(1), Draft Digital Competition Bill

<sup>9</sup> Schedule I, Draft Digital Competition Bill

<sup>10</sup> Section 2(1)(w), Information Technology Act, 2000

expertise on digital sectors is developed.<sup>11</sup> The DMDU is a specialized interdisciplinary center of expertise in technology designed to keep pace with developments in digital markets.

The CDCL Committee rightly notes the importance of strengthening the DMDU with experts on emerging technologies to build practices that allow for early detection and disposal of cases pertaining to digital markets. Regardless of the final shape of digital market regulations, it is essential for the CCI to develop requisite expertise via its DMDU on digital market regulation on an urgent basis. **Such expertise would be necessary to ensure that laws such as the Competition Act and Draft DCB are effectively implemented while avoiding the detrimental impacts to digital stakeholders. Additional budgetary outlay may also be considered where necessary, for strengthening this capacity as a national priority.**

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<sup>11</sup> Report available at <<https://www.medianama.com/2023/07/223-cci-establishes-digital-markets-and-data-unit/>>