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# The Indian draft digital competition bill and report: a critical perspective

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**ABSTRACT**

This legislative note critically examines India's proposed Digital Competition Bill 2024 ("DCB"), a significant shift towards ex-ante regulation of digital markets. The note analyses the DCB's key provisions, including the designation of Systemically Significant Digital Enterprises, their obligations, and enforcement mechanisms. It draws comparisons with similar legislation in the European Union, United Kingdom, and Germany, highlighting the DCB's alignment with global trends while noting its unique aspects. The note identifies potential challenges in implementation, including regulatory overlap, extraterritorial application, and impact on innovation. It offers recommendations for refining the DCB, emphasizing the need for clearer obligations, enhanced institutional capacity, and a balanced approach that fosters competition without stifling innovation. This analysis provides valuable insights into India's evolving approach to digital market regulation and its implications for the global digital economy.

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## 1. Introduction

India's digital economy has experienced exponential growth in recent years, with the number of active internet users increasing from 499 million in 2018 to over 759 million in 2022.[1] This rapid digitization has led to the emergence of powerful digital platforms that act as gatekeepers in various sectors, raising concerns about market contestability and fair competition. This, in turn, necessitates a more nuanced approach to identifying relevant markets and evaluating the sufficiency of existing competition law.[2]

On 22 December 2022, the Standing Committee on Finance submitted its report to the Indian Parliament.[3] The report highlighted the need to assess the conduct of

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[1]Ministry of Corporate Affairs, Government of India, *Report of the Committee on Digital Competition Law* (2024) [1.19] <https://www.mca.gov.in/bin/dms/getdocument?mds=gzGtvSkE3zIVhAuBe2pbow%253D%253D&type=open> accessed 25 March 2025.

[2]Geeta Gouri and Kalyani Pandya, 'The Indian Competition Law Experience – Its History and Its (Digital) Future' (2020) 4(3) Indian Law Review 276.

[3]Standing Committee on Finance, Lok Sabha, *Anti-competitive Practices by Big Tech Companies*, 2022–23 <https://eparlib.nic.in/bitstream/123456789/1464505/1/17_Finance_53.pdf> accessed 25 March 2025.

platform firms before they take place or ex-ante (as opposed to ex-post, which involves assessing anti-competitive conduct after it has occurred).[4] In response to these challenges, the Indian Government formed the Committee on Digital Competition Law ("CDCL") in February 2023 to study the effectiveness of the Indian Competition Act 2002 ("Competition Act") with respect to digital markets in its current form and "to examine the need for an ex-ante regulatory" toolkit for digital platforms.[5] The CDCL published its Report on 12 March 2024. It proposed an ex-ante framework in the form of the Draft Digital Competition Bill 2024 ("DCB") aimed at preventing anti-competitive practices by large digital enterprises, rather than relying solely on ex-post enforcement.[6]

Since 2016, more than 30 competition authorities around the world have published reports on competition policy in the digital era.[7] Among these, four reports were seen to be particularly significant as they emerged from established competition law jurisdictions,[8] along with the fact that they are not confined to particular digital platforms but use a wider ambit in their analysis and recommendations.[9] These were: the *Final Report by the Committee for the Study of Digital Platforms* by the University of Chicago Booth School of Business,[10] the *Competition Policy for the Digital Era* report by the European Commission,[11] *The unlocking digital competition Report* by the Digital Competition Expert Panel, Government of the United Kingdom ("UK") ("Furman Report"),[12] and *The Digital Platforms Inquiry*, *Final Report* ("ACCC Report") by the Australian Competition and Consumer Commission.[13] The influence of these reports has been substantial, as can be seen from the legislative changes that have already taken place in the European Union ("EU") and the UK,[14] in terms of a separate regime being established to deal with digital markets.[15] They have also influenced other jurisdictions, such as India, to release their own version of a digital market report.[16]

This note critically examines the Draft DCB, by analysing its key provisions, comparing it with international approaches such as that of the EU and the UK, and evaluating its potential impact on India's digital economy.[17] It argues that while the Draft DCB represents

[4]ibid [1].
[5]DCR (n 1) [1.17].
[6]ibid [1.1]–[1.4].
[7]Anush Ganesh, 'Effective Remedies in Digital Market Abuse of Dominance Cases' European Competition Journal <https://doi.org/10.1080/17441056.2024.2440222> accessed 25 March 2025.
[8]Anush Ganesh, 'Pricing Practices in Digital Markets: An Abuse of Dominance Approach' (PhD thesis, University of East Anglia School of Law 2022) <https://ueaeprints.uea.ac.uk/id/eprint/94200/> accessed 6 May 2025.
[9]Filippo Lancieri and Patricia Morita Sakowski, 'Competition in Digital Markets: A Review of Expert Reports' (2021) 26 Stanford Journal of Law, Business & Finance 65.
[10]Luigi Zingales, Fiona Scott Morton and Guy Rolnik, 'Stigler Committee on Digital Platforms' (2019) <https://www.sipotra.it/wp-content/uploads/2020/02/Stigler-Committee-on-Digital-Platforms-Final-Report.pdf> accessed 25 March 2025.
[11]European Commission, 'Competition Policy for the Digital Era' (*Publications Office of the European Union*, 2019) <https://data.europa.eu/doi/10.2763/407537> accessed 25 March 2025.
[12]Jason Furman and others, 'Unlocking Digital Competition: Report of the Digital Competition Expert Panel' (2019) <https://assets.publishing.service.gov.uk/media/5c88150ee5274a230219c35f/unlocking_digital_competition_furman_review_web.pdf>>accessed 25 March 2025.
[13]Australian Competition and Consumer Commission, 'Digital Platforms Inquiry: Final Report' (*Australian Competition and Consumer Commission*, 2019) <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf> accessed 25 March 2025.
[14]Digital Markets, Competition and Consumers Act 2024 (UK).
[15]Oles Andriychuk, 'EU Digital Competition Law: The Socio-Legal Foundations' (2023) 25 Cambridge Yearbook of European Legal Studies 81.
[16]DCR (n 1) ch III.
[17]ibid ch IV.

a significant step towards addressing competition concerns in digital markets, several aspects of the proposed framework require careful consideration for potential refinement to ensure its effectiveness and to avoid unintended consequences for innovation and investment in India's growing digital sector.[18]

Following this introductory section, section 2 of the note contains an overview of the Draft DCB's key provisions, including the criteria for designating Systemically Significant Digital Enterprises ("SSDEs"), their obligations, and the enforcement mechanisms. Section 3 compares the Draft DCB with similar legislation in other jurisdictions, particularly the EU's Digital Markets Act 2022 ("DMA"),[19] the UK's Digital Markets, Competition and Consumers Act 2024 ("DMCCA"), and Germany's amendments to the Act against Restraints of Competition 2017 ("GWB"). Potential challenges in implementing the Draft DCB, including regulatory overlap with existing frameworks, issues of extraterritorial application, and potential impacts on innovation and investment are listed out in section 4 of the note. Section 5 makes recommendations for refining the Draft DCB, focusing on enhancing its effectiveness while mitigating potential negative impacts on India's digital economy. This is followed by a conclusion in section 6.

By critically examining the Draft DCB in this manner, this legislative note aims to contribute to the ongoing discourse on digital market regulation in India and provide insights that may inform the final shape of this crucial legislation.

## 2. The draft digital competition bill of India and its set-up

The main objective of the Draft DCB is to identify SSDEs and "regulate their practices" in providing "core digital services", with a "view to foster innovation, promote competition", and "protect the" interests of "users in India".[20] Similar to the EU's approach of establishing complementary legislation for digital markets,[21] the Draft DCB aims to complement the existing Competition Act 2002 by introducing ex-ante measures to prevent anti-competitive practices before they occur, rather than relying solely on ex-post enforcement.[22]

### *2.1. Designation*

The Draft DCB seeks to "apply to a pre-identified list of core digital services that are susceptible to concentration" similar to the EU's concept of gatekeepers established under Article 3 of the DMA Regulation 2022.[23] The DCB's core digital services list encompasses a wide range of digital services including online search engines, online social networking services, video-sharing platform services, interpersonal communications services, operating systems, web browsers, cloud services, advertising services, and online intermediation services.[24] The Draft DCB recognizes the dynamic nature of digital

[18]Amber Darr, *Competition Law in South Asia: Policy Diffusion and Transfer* (Cambridge University Press 2023).
[19]Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 ('DMA').
[20]DCR (n 1) ch I [1.19]–[1.23].
[21]DMA (n 19) recital 10.
[22]DCR (n 1) ch IV [1.2]–[1.4].
[23]ibid [3.4].
[24]ibid sch I.

markets as it provides flexibility to the Central Government to add new services to this list in response to evolving market dynamics.[25]

In the Draft DCB, SSDEs are defined as enterprises that "have a 'significant presence' in a core digital service in India and the ability to influence the Indian digital market".[26] Under Sections 3(2)(a) and (b), the Draft DCB proposes a dual test for designating SSDEs, comprising both financial (with turnover in India of not less than 440 million euros, a global turnover of not less than USD 30 billion) and user-based criteria (at least 10 million end users or at least 10,000 business users in India).[27] In comparison, in the EU, Articles 3(2)(a) and (b) of the DMA prescribe a minimum turnover of 7.5 billion euros or a fair market valuation of 75 billion euros and 45 million active end users or at least 10,000 business users within the EU.[28]

Both the DMA and the Draft DCB provide for qualitative criteria in their designation processes. Under Article 3(8) of the DMA, the European Commission can designate a provider as a gatekeeper based on a qualitative assessment, even if it does not meet all the quantitative thresholds. Similarly, Section 3(3) of the Draft DCB empowers the Competition Commission of India ("CCI") to designate an enterprise as an SSDE based on qualitative criteria, even if it does not meet the quantitative thresholds.[29] Additionally, while the DMA provides for separate market investigation powers under Article 17, the Draft DCB does not explicitly include such provisions. However, the CCI's general investigatory powers under the Competition Act could potentially be used to support inquiries related to SSDEs, though these powers are not as specifically defined for this purpose as the DMA's Article 17 framework.

### 2.2. Obligations

The Draft DCB imposes several ex-ante obligations on SSDEs, which is akin to the obligations imposed on gatekeepers under Articles 5 and 6 of the DMA. These include the requirement of fair and transparent dealing with end users including business users,[30] prohibition on self-preferencing,[31] prohibition on anti-steering practices,[32] restrictions on data usage and cross-use of personal data,[33] allowing users to set their default settings,[34] the obligation to allow users to port their data,[35] and restrictions on tying and bundling.[36]

While the Draft DCB is guided by principles of fairness, contestability, and transparency,[37] it includes specific rules and obligations for SSDEs across most sections. For example, Section 11 prohibits self-preferencing practices, Section 12 sets provisions

[25]ibid Annexure IV.
[26]ibid Executive summary.
[27]ibid s 3(2).
[28]DMA (n 19) ch II, art 3.
[29]Draft DCB in the DCR (n 1) s 10.
[30]ibid s 10.
[31]ibid s 11.
[32]ibid s 14.
[33]ibid ss 12(1) and 12(2).
[34]ibid s 13.
[35]ibid s 12(3).
[36]ibid s 15.
[37]DCR (n 1) ch III.

on data usage and portability, Section 13 establishes rules on user default settings, Section 14 addresses anti-steering practices, and Section 15 restricts tying and bundling.[38] These detailed rules aim to create certainty for digital market participants. The main exception is Section 10, which adopts a principle-based approach, focusing on fair and transparent dealing obligations.[39]

This mixed approach – combining specific rules with principle-based provisions – appears to balance the need for regulatory certainty with flexibility in addressing evolving market dynamics. The Draft DCB differs from the DMA in several respects, particularly in excluding certain obligations present in the DMA and adopting a principle-based framework in provisions like Section 10 for fair dealing.[40]

### 2.3. Enforcement

To ensure effective implementation, the Draft DCB vests the CCI with significant enforcement powers.[41] These include the authority to designate SSDEs and conduct investigations, impose penalties of up to 10% of global turnover for non-compliance,[42] issue interim orders, and accept settlements and commitments. While these general enforcement powers parallel similar provisions in the DMA, the European framework includes specific market investigation powers for gatekeeper designation under Article 17, which are not explicitly included in the Draft DCB. However, the CCI's general investigatory powers under the Competition Act could potentially support such processes albeit in a less structured manner.

The enforcement framework borrows heavily from the existing Competition Act, providing continuity and leveraging the CCI's existing expertise. The Digital Competition Report recognizes the need for specialized knowledge in digital markets and recommends the establishment of a dedicated "bench within the National Company Law Appellate Tribunal" ("NCLAT")[43] "to ensure timely disposal of appeals against CCI orders".[44]

## 3. Comparison with the DMA and other foreign legislation

### 3.1. Designation

Much like the notion of gatekeepers established under Article 3 of the DMA, the DMCCA established a new pro-competition regime for digital markets, focusing on firms with "Strategic Market Status" ("SMS").[45] The designation criteria for SMS firms include assessment of a firm's global and UK turnover over the relevant period along with an assessment of its substantial and entrenched market power with strategic

[38]Draft DCB in the DCR (n 1) ss 11–15.
[39]ibid s 10; See also Vikas Kathuria, 'Assessing India's Ex-Ante Framework for Competition in Digital Markets' (*ProMarket*, 29 May 2024) <https://www.promarket.org/2024/05/29/assessing-indias-ex-ante-framework-for-competition-in-digital-markets/> accessed 5 January 2025.
[40]See below Section 3.
[41]Draft DCB in the DCR (n 1) ss 4 and 16.
[42]ibid s 28(1).
[43]The NCLAT is currently the appellate body to the CCI.
[44]DCR (n 1) [3.57].
[45]DMCCA (n 14) s 2(1); See also Furman Report (n 11).

significance.[46] The DMCCA's approach fundamentally differs from the Draft DCB's designation framework. While the Draft DCB primarily relies on specific quantitative thresholds (for example, turnover of INR 4,000 million and user-based criteria) with qualitative criteria as a supplementary consideration, the DMCCA emphasizes qualitative assessments of market power and strategic significance as central to the designation process. Under Section 7 of the DMCCA, the Competition and Markets Authority ("CMA") must assess whether a firm possesses substantial and entrenched market power and strategic significance before granting it SMS, with turnover serving as just one supporting element rather than the primary basis for designation.[47]

In the UK, the DMCCA empowers the CMA to set requirements for SMS firms, which can be both "obligatory" and "preventive". These requirements are tailored to address specific competition concerns identified through the CMA's assessment process, allowing for a more targeted regulatory approach.

The user-based thresholds of 10 million end users or 10,000 business users in India are significant in the context of India's large and growing digital user base.[48] These thresholds appear to be lower than the comparable criteria in the EU's DMA, which requires 45 million monthly active end users in the EU.[49] This difference reflects the unique characteristics of the Indian market and the government's intent to cast a wider regulatory net. Interestingly, the DMCCA does not establish a numerical threshold for a minimum number of end users but includes a financial threshold.[50]

Another comparator is the legislative change on digital markets established by Germany (the DMA would apply when more than one EU member-state is involved) which has amended its existing competition law GWB to address digital market challenges.[51] The 10th amendment to the GWB, which came into force in 2021, introduced the concept of "undertakings of "paramount significance for competition across markets" ("PSCAM")".[52] The PSCAM designation process relies heavily on qualitative criteria including the firm's dominant position in one or more markets, financial strength and access to resources, vertical integration and activities in related markets, access to competitively relevant data, and significance for third parties' access to supply and sales markets.[53] This detailed qualitative assessment contrasts with the more quantitative approach of the Draft DCB, which prioritizes turnover and user-based thresholds. However, like the Draft DCB, the PSCAM focuses on firms active in multi-sided markets and networks.[54]

The Draft DCB's definition of core digital services and its quantitative thresholds for SSDE designation provide clarity and predictability, similar to the DMA.[55] However, it

[46]DMCCA (n 14) ss 5, 6, and 7.
[47]ibid s 7; See Draft DCB in the DCR (n 1) ss 3(2) and 3(3).
[48]Draft DCB in the DCR (n 1) s 3(2)(b).
[49]DMA (n 19) art 3(2)(b).
[50]DMCCA (n 14) s 7(2).
[51]Act Against Restraints of Competition ('GWB') in the version published on 26 June 2013 (Bundesgesetzblatt (Federal Law Gazette) I, 2013, 1750, 3245), as last amended by Article 10 of the Act of 27 July 2021 (Federal Law Gazette I, 3274); See DCR (n 1) [4.3]–[4.15].
[52]GWB (n 51) s 19a (1).
[53]ibid s 19a (1).
[54]ibid s 19a (2).
[55]DMA (n 19) art 3.

also incorporates elements of flexibility, such as the power to designate SSDEs based on qualitative criteria, which aligns more closely with the UK and German approaches.[56]

### 3.2. Obligations

In terms of obligations, the DMA and the Draft DCB share many similarities. Both prohibit self-preferencing, require data portability, and restrict certain data usage practices.[57] The DMA provides more detailed implementation requirements. For example, while Section 12(3) of the Draft DCB broadly requires SSDEs to "allow users to port their data", Article 6(9) of the DMA specifies that gatekeepers must provide continuous real-time access, ensure effective portability of data generated through business users' activities, and provide free tools for data transfer. The need to include most of these obligations was influenced by past competition law cases.[58]

One example is the case of *Google and Alphabet v Commission* ("*Google Shopping*"),[59] where Google was found to have unfairly favoured its own comparison shopping service in search results by displaying it prominently while demoting competing services. This case directly influenced the creation of Article 6(5) of the DMA, which specifically prohibits gatekeepers from treating their own products more favourably in ranking services. Another example is the case of *Meta Platforms Inc and Others v Bundeskartellamt* ("*Facebook Germany*"), which addressed Facebook's practice of combining user data across different services without explicit user consent. This case shaped Article 5(2)(a) of the DMA, which now restricts gatekeepers from combining personal data from core platform services with data from other services without providing users a specific choice.[60] As Friso Bostoen's analysis demonstrates, these and other competition law cases provided the foundation for most of the DMA's negative obligations, ensuring the regulation addressed proven competitive harm rather than theoretical concerns.[61]

The UK's DMCCA includes specific conditions that the CMA[62] must adhere to in order to impose conduct requirements.[63] For instance, under Sections 19(5) and 20(2), before imposing any conduct requirement, the CMA must: (a) identify specific adverse effects on competition or consumers, (b) demonstrate the requirement's effectiveness in addressing these effects, and (c) ensure the requirement is proportionate. While this structured approach allows the CMA to tailor obligations to specific competitive concerns and firm behaviours, scholars have noted that these sequential procedural requirements may slow down enforcement compared to more direct regulatory frameworks.[64]

In terms of obligations, the Draft DCB takes a different approach. While Sections 11–15 contain specific rules, Section 10 adopts a principle-based approach for

[56]DMCCA (n 14) s 2; See also GWB (n 51) ss 19a (1) and (2).
[57]DMA (n 19) arts 5–7; See also Draft DCB in the DCR (n 1) ss 10–15.
[58]Friso Bostoen, 'Understanding the Digital Markets Act' [2023] 68 The Antitrust Bulletin 263.
[59]Case C-48/22 P, *Google and Alphabet v Commission* ECLI:EU:C:2024:726. *('Google Shopping')*
[60]Case C-252/21, *Meta Platforms Inc and Others v Bundeskartellamt*, ECLI:EU:C:2023:537.
[61]Bostoen (n 58) 281–86.
[62]The main competition regulator in the UK as of 2024.
[63]DMCCA (n 14) ss 19(5) and 20(2).
[64]Oles Andriychuk, 'UK: Analysing Digital Markets, Competition and Consumers Bill through the Prism of the DMA' (*Concurrences*, September 2023) <https://www.concurrences.com/en/review/issues/no-3–2023/international/uk-analysing-digital-markets-competition-and-consumers-bill-through-the-prism> accessed 25 March 2025.

fair dealing obligations. This hybrid model contrasts with both the DMA's highly detailed obligations and the UK's more procedural approach. Under the DMA obligations are extensively detailed with specific requirements for implementation, whereas the DMCCA emphasizes a case-by-case assessment process wherein obligations are developed based on identified competitive concerns. The German approach under the GWB provides yet another model, focusing on specific prohibited practices while allowing some flexibility in their interpretation.[65]

### 3.3. Enforcement

Section 28(1) of the Draft DCB mirrors Article 30 of the DMA which also allows the European Commission to impose fines of up to 10 % of worldwide turnover on the infringing gatekeeper or core platform service.[66] Under the amended GWB, the Federal Cartel Office (Bundeskartellamt), can impose fines of up to 10% of worldwide turnover.[67] Similarly, the DMCCA includes potential fines of up to 10% of worldwide turnover,[68] aligning with the Draft DCB, GWB, and the DMA.

A specific aspect that concerns the EU and the application of the DMA is of case duplication by the European Commission and national competition authorities of EU member-states when applying the DMA's provisions to gatekeepers while also applying national competition law.[69] This can only be overcome with coordination among enforcement authorities. The situation in India is very different as the CCI is the sole enforcer of competition rules.

One hurdle that may be faced by the Draft DCB as well as other digital market legislation is the joint application of different legislation to the same problems. For instance, data portability requirements under Section 12 of the Draft DCB may overlap with data protection regulations, though currently the Digital Personal Data Protection Act 2023 ("DPDPA") does not contain data portability provisions. Similarly, the regulation of self-preferencing practices under Section 11 of the Draft DCB may intersect with platform neutrality requirements under the Consumer Protection (E-Commerce) Rules 2020. In relation to the DMA, it has been noted that a broader interpretation may allow for harmonization of EU interests which may be common in similar complementary legislation such as the General Data Protection Regulation ("GDPR")[70] and Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU").[71]

Based on the discussion in Section 3 of the note, a comparative summary of different aspects is provided in Table 1:

[65]GWB (n 51) s 19a.
[66]DMA (n 19) art 30.
[67]GWB (n 51) s 81(2).
[68]DMCCA (n 14) s 86.
[69]Konstantina Bania, 'Fitting the DMA in the existing legal framework: the myth of the "without prejudice" clause' [2023] 19(1) European Competition Journal 116; See also Alba Ribera Martinez, 'An inverse analysis of the DMA: applying the Ne bis in idem principle to enforcement' (2023) 19(1) European Competition Journal 86.
[70]Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 September 2016; See also Klaudia Majcher, *Coherence between Data Protection and Competition Law in Digital Markets* (Oxford University Press 2024).
[71]Jasper van den Boom, 'What does the DMA harmonize? – exploring interactions between the DMA and national competition laws' (2023) 19(1) European Competition Journal 57; See also Ganesh (n 7).

Table 1. [72] Comparison table.

| Aspect | India (Draft DCB) | EU (DMA) | UK (DMCCA) | Germany (Amended GWB) |
|---|---|---|---|---|
| Designation Criteria | SSDEs: Quantitative thresholds (turnover, users) and qualitative assessment | Gatekeepers: Quantitative thresholds and qualitative assessment | SMS firms: Qualitative assessment (substantial market power) | PSCAM: Primarily qualitative criteria |
| User Threshold | 10 million end users or 10,000 business users | 45 million end users or 10,000 business users | Not specified | Not specified |
| Key Obligations | Self-preferencing prohibition, data usage restrictions, interoperability | Similar to DCB, more detailed | Tailored to specific firms | Prohibition of specific practices |
| Enforcement Body | CCI | European Commission | Competition and Markets Authority ("CMA") | Federal Cartel Office (Bundeskartellamt) |
| Penalties | Up to 10% of global turnover | Up to 10% of global turnover (20% for repeat offenders) | Up to 10% of global turnover | Up to 10% of global turnover |
| Approach to Obligations | Principle-based, less detailed | Detailed, specific obligations | Flexible, tailored to firms | Specific prohibitions |

## 4. Challenges ahead for effective implementation of the DCB

### 4.1. Overlapping interests with data protection law

The digital economy intersects with various sectors, each governed by its own set of regulations. The Draft DCB acknowledges this complexity, noting that the "regulation of large digital enterprises in India is currently carried out under a host of statutory instruments, the enforcement of which is vested with a multitude of ministries and regulators".[73]

For instance, the Draft DCB's provisions on data usage and portability[74] may overlap with the recently enacted DPDPA.[75] While the Draft DCB focuses on the competition aspects of data usage,[76] the DPDPA primarily concerns the processing of personal data.[77] This potential overlap was recently examined in the CCI's *WhatsApp privacy policy* investigation, where WhatsApp challenged the CCI's jurisdiction to examine privacy-related matters. Both the Delhi High Court and Supreme Court allowed the CCI's investigation to proceed, distinguishing between privacy issues per se and their competition implications. Both courts clarified that while privacy matters fall under data protection law, the competition authority can examine how privacy policies affect market competition.[78] This judicial precedent suggests how similar overlaps under the Draft DCB might be resolved, though regulatory uncertainty may persist for businesses navigating multiple compliance requirements.[79]

[72] See DCR (n 1) ch III [1.1]–[1.4] for an overview of proposed changes in other jurisdictions.
[73] DCR (n 1) ch II [1.1]–[1.2].
[74] ibid; Draft DCB in the DCR (n 1) s 12.
[75] DPDPA.
[76] Draft DCB in the DCR (n 1) s 14.
[77] DPDPA (n 75) s 3.
[78] Competition Commission of India, Suo Moto Case No. 01 of 2021, *In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users* (Order dated 24 August 2023); See also *WhatsApp LLC v Competition Commission of India* 2021 SCC OnLine SC 850; *WhatsApp LLC v Competition Commission of India* 2022 SCC OnLine Del 1436; The order has been stayed by the NCLAT on 23 January 2025 in *WhatsApp LLC v Competition Commission of India and Others*, Competition App (AT) No 1/2025, IA No 280/2025.
[79] See Marco Botta and Klaus Wiedemann, 'The Interaction of EU Competition, Consumer, and Data Protection Law in the Digital Economy: The Regulatory Dilemma in the Facebook Odyssey*' (2019) 64(3) The Antitrust Bulletin 428 for an account of the interplay between different legal regimes in the EU the discussion of which can be transposed to India owing to the similarities in the legislation; See also Ganesh (n 7).

### 4.2. Extra-territorial application

Section 26 of the Draft DCB suggests that the CCI could pass an order against enterprises situated outside of India (for conduct that occurred in India) and thus raises questions about extraterritorial application of the proposed legislation.[80] While such provisions are necessary given the global nature of many digital services, they may face practical challenges in implementation, particularly when it comes to enforcing orders against foreign entities with limited physical presence in India.

Digital enterprises operating globally need to implement technical and operational systems to comply with different regulatory requirements across jurisdictions. For example, Section 12 of the Draft DCB requires SSDEs to allow users to port their data, while also restricting cross-use of data across services. While these requirements apply specifically to Indian users and operations, global digital enterprises may need to design and implement jurisdiction-specific technical solutions to comply with the Draft DCB's requirements for India, the DMA's detailed data portability obligations under Article 6(9) for EU users, and the DMCCA's requirements for UK users.[81] This creates operational complexity, though not necessarily regulatory conflict, as each framework applies within its territorial scope.[82] This implementation challenge is not unique to ex-ante regulation, as global digital enterprises already manage similar jurisdiction-specific compliance requirements under existing competition law frameworks.

An additional complexity arises regarding Indian users accessing digital services from outside India. The Draft DCB's current formulation does not explicitly address whether its protections extend to Indian users when they access services of Indian SSDEs from abroad or how requirements like data portability would apply in such cross-border scenarios.[83] This ambiguity could create uncertainty for both users and service providers, particularly given the increasing mobility of users and the borderless nature of digital services.

### 4.3. Impact on innovation

A significant concern is the potential impact of the Draft DCB on innovation and investment in India's digital economy. This has been an important and ongoing discussion point in the EU as well.[84] The ex-ante nature of the regulation, while aimed at preventing anti-competitive practices,[85] may inadvertently create barriers to innovation, particularly for large digital enterprises designated as SSDEs. These concerns have already been highlighted by commentators since the publishing of the Draft DCB.[86]

[80]Draft DCB in the DCR (n 1) s 26.
[81]DMA (n 19) arts 6(9) and 6(5) and DMCCA (n 14) s 111.
[82]DMA (n 19) art 3(8)(d) which suggests the Commission to take account of activities outside the Union. Also see DMCCA (n 14) s 111.
[83]Draft DCB in the DCR (n 1) s 1(2) on the territorial application of the Act.
[84]Pierre Larouche and Alexandre De Streel, 'Will the Digital Markets Act Kill Innovation in Europe?' (*CPI Columns Europe*, May 2021) <https://www.competitionpolicyinternational.com/wp-content/uploads/2021/05/Europe-Column-May-2021-Full.pdf> accessed 25 March 2025; See also Report by Mario Draghi and Marco Draghi, 'The Future of European Competitiveness' (*European Commission*, 2024) <https://commission.europa.eu/document/download/97e481fd-2dc3-412d-be4c-f152a8232961_en> accessed 25 March 2025.
[85]DCR (n 1) ch I [1.19]–[1.23].
[86]Dirk Auer, Geoffrey A Manne and Viswanath Pingali, 'ICLE Comments on India's Draft Digital Competition Act' (*International Center for Law & Economics*, 22 April 2024) <https://laweconcenter.org/resources/icle-comments-on-indias-draft-digital-competition-act/> accessed 25 March 2025.

The obligations imposed on SSDEs, such as restrictions on self-preferencing[87] and data usage,[88] while intended to promote fair competition, may limit the ability of these enterprises to integrate services or leverage data insights in ways that could lead to innovative products and services. This concern is particularly relevant in the context of India's growing digital economy, where many domestic digital enterprises are still in the scaling-up phase and rely on the existence of large digital platforms which may be designated as SSDEs under the Draft DCB.[89] It is important to note that effective application of the Draft DCB can encourage start-ups who may previously have been deterred by the power of SSDEs.[90] A possibility is to consider an error-cost approach to assess whether the application of the Draft DCB provisions may stifle innovation.[91]

## 5. Recommendations for an effective way forward

The principle-based approach to obligations adopted by the Draft DCB allows for flexibility but may also create uncertainty for businesses. Looking ahead, the success of this new regulatory framework will depend on effective institutional mechanisms and robust enforcement capabilities. As the Digital Competition Report emphasizes, this requires strengthening the CCI's capacity and ensuring efficient disposal of cases through specialized benches.[92] Strengthening the institutional capacity of the CCI, particularly in terms of technical expertise related to digital markets, will be crucial.[93] The development of clear guidelines and regulations,[94] ongoing monitoring of market developments, and a willingness to refine the approach based on emerging evidence will all be essential.

### *5.1. Designation*

The criteria for designating SSDEs are central to the Draft DCB's regulatory approach. While the current criteria, combining quantitative thresholds with qualitative assessments, provide a good starting point, there is room for refinement to ensure that they effectively capture enterprises with significant market influence without overreaching.

Under Section 3(2)(a)(ii) of the Draft DCB, enterprises with a global turnover of USD 30 billion or more may be designated as SSDEs. While the Draft DCB includes a local nexus test through its user thresholds (10 million end users or 10,000 business users in India), these metrics alone may not fully capture the extent of an enterprise's market presence. User numbers, while important, do not necessarily reflect the economic impact or market significance of an enterprise's operations. For instance, a digital service might meet the user threshold through a free service while generating minimal revenue from Indian operations, or conversely have fewer users but substantial revenue impact through business-to-business services.

[87] Draft DCB in the DCR (n 1) s 11.
[88] ibid s 12.
[89] Pınar Akman and others, 'DCI Submission to the India Ministry of Corporate Affairs on the Draft Digital Competition Bill' (*Dynamic Competition Initiative*) <https://www.dynamiccompetition.com/dci-submission-to-the-india-ministry-of-corporate-affairs-on-the-draft-digital-competition-bill/> accessed 25 March 2025.
[90] Larouche and de Streel (n 84).
[91] Ganesh (n 7).
[92] DCR (n 1) ch IV [3.53]–[3.57].
[93] ibid [3.57].
[94] ibid; Draft DCB in the DCR (n 1) s 50.

To address this, consideration could be given, first, to introducing an additional criterion related to the proportion of an enterprise's global turnover derived from Indian operations, similar to the approach in the DMA.[95] This could be adapted to require a minimum percentage of global turnover (for example, 5–10%) to be derived from Indian operations. Such a dual test combining both user numbers and revenue proportion would provide a more comprehensive measure of an enterprise's market presence and economic significance in India.

Second, the user-based thresholds of 10 million end users or 10,000 business users could benefit from more nuanced differentiation across different types of core digital services.[96] For instance, the appropriate user threshold for a search engine platform or social networking service might differ significantly from that for a cloud computing service or an interpersonal communications service.[97] The Draft DCB could empower the CCI to specify different user thresholds for different categories of core digital services through regulations, allowing for a more tailored approach.

### 5.2. Obligations

The prohibition on self-preferencing[98] addresses a crucial concern in digital markets.[99] While there may be lessons to draw from cases like *Google Shopping*,[100] the Draft DCB's ex-ante framework requires a carefully structured approach to implementation. The legislation should establish clear baseline prohibitions while providing the CCI with flexibility to develop specific guidelines. For search services, this could include mandatory disclosure of ranking parameters and clear labelling of affiliated services, drawing from the CCI's decision in *XYZ v Google LLC*.[101] For e-commerce platforms, the Draft DCB could specify requirements for equal display opportunities and transparent criteria for premium placement programmes, building on principles established in the CCI's *FHRAI v MMT* decision.[102]

A key aspect to consider is the pro-competitive effects of certain types of conduct such as tying and bundling which may lead to lower production costs as noted by the Committee on Digital Competition Law.[103] The restrictions on tying and bundling could benefit from clear principles for distinguishing between anti-competitive practices and legitimate product integrations that benefit consumers. While insights can be drawn from the EU's *Google Android* case,[104] the CCI's own orders in the *Google Android*[105] and *Google Play Store*[106] cases

[95]DMA (n 19) art 3(2)(a), which requires undertakings to have a European Economic Area turnover equal to or above EUR 7.5 billion in each of the last three financial years to fall within the definition of gatekeepers.
[96]Draft DCB in the DCR (n 1) s 3(2)(a)(ii).
[97]ibid sch I.
[98]ibid s 11.
[99]Anush Ganesh and Gaurav Pathak, 'Self-Preferencing as a New Theory of Harm: the CJEU's Confirmation in Google Shopping' (2024) 8(4) European Competition and Regulatory Law Review 281.
[100]Case C-48/22 P, *Google and Alphabet v Commission (Google Shopping)*, ECLI:EU:C:2024:726.
[101]Competition Commission of India, Case No. 07 of 2020, *XYZ (Confidential) v Alphabet Inc and Anr* (Order dated 25 October 2022).
[102]Competition Commission of India, Case No. 14 of 2019, *FHRAI v MakeMyTrip India Pvt Ltd (MMT) and Anr* (Order dated 19 October 2022).
[103]DCR (n 1) [3.35]–[3.36].
[104]Case AT. 40099, *Google Android*, Commission Decision of 18 July 2018; See also Case *T*-604/18, *Google and Alphabet v Commission (Google Android)*, ECLI:EU:T:2022:541.
[105]Competition Commission of India, Case No. 39 of 2018, *Mr Umar Javeed and Others v Google LLC & Anr*.
[106]Competition Commission of India, Case No. 05 of 2022, In Re: *Google Play Store* Investigation (Order dated 25 October 2022).

provide directly relevant precedents within India's market context. In these cases, the CCI and the NCLAT addressed various forms of anti-competitive conduct such as self-preferencing, leveraging of dominance from one market to another, and tying arrangements in mobile ecosystems.[107]

One example that can be considered in designing the final legislation is the NCLAT's *Google Android* decision which examined whether the remedies imposed by the CCI were necessary and proportionate to stop the infringements and set aside four remedies relating to access to APIs and pre-installed apps.[108] The disagreement between the CCI and the NCLAT on some of the pre-installation obligation remedies could be addressed through clear ex-ante rules in the form of the Draft DCB. Specific conduct obligations on online platforms relating to default settings which can feed on consumer inertia ought to be addressed.[109]

The provisions on data usage and portability could be strengthened by including more specific requirements on the technical standards for data portability.[110] While the Draft DCB explicitly includes data portability provisions, it remains to be seen how this will interact with potential data portability requirements that may emerge through rules under the DPDPA.[111] This can be done by developing Section 15 of the Draft DCB further to incorporate an obligation similar to Article 6(3) of the DMA which requires that gatekeepers allow end users to easily un-instal software applications.

With the growth of high-tech and digital markets, the assessment of predatory pricing has been a discussion point in recent years.[112] One notable omission in the DMA relates to predatory pricing in any of its 23 obligations under Articles 5 and 6.[113] The nature of some online platforms (low marginal costs and high fixed costs)[114] may require an assessment of new methods for evaluating predatory pricing which could be addressed in the final version of the Indian legislation.

The final legislation needs to account for India's distinct market characteristics and development priorities. These include its large but price-sensitive consumer base, significant rural-urban digital divide with internet penetration at 48.7% (compared to over 89% in the EU),[115] and a nascent but rapidly growing digital startup ecosystem that relies heavily on existing digital platforms. As Geoffrey A Manne argues, importing regulatory frameworks designed for mature digital economies may not address these unique challenges.[116] For instance, while the EU's DMA focuses on constraining established digital platforms,[117]

[107] *Google LLC & Anr v Competition Commission of India & Ors*, Competition Appeal (AT) No. 01 of 2023 (NCLAT).
[108] ibid [169]–[196].
[109] Majcher (n 70).
[110] Draft DCB in the DCR (n 1) s 12.
[111] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1, art 20.
[112] Anush Ganesh and Mohit Yadav, 'Predatory Pricing in High-Tech Markets: Lessons from the General Court's Qualcomm Judgment' [2024] 8(4) European Competition and Regulatory Law Review 285.
[113] Anush Ganesh, 'Predatory Pricing in Platform Markets: A Modified Test for Firms within the Scope of Article 3 of the DMA and Super-Dominant Platform Firms under Article 102 TFEU' European Competition Journal <https://doi.org/10.1080/17441056.2024.2428032> accessed 25 March 2025.
[114] ibid.
[115] DCR (n 1) [3.20].
[116] Geoffrey A Manne, 'European Union's Digital Markets Act Not Suitable for Developing Economies, Including India' *The Times of India* (14 February 2023) <https://timesofindia.indiatimes.com/blogs/voices/european-unions-digital-markets-act-not-suitable-for-developing-economies-including-india/> accessed 6 January 2025.
[117] Pinar Akman, 'Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the E.U. Digital Markets Act' (2022) 47 European Law Review 85.

India's digital economy may require a more nuanced approach that balances competition concerns with the need to encourage digital adoption and innovation, particularly in underserved markets.

### 5.3. Enforcement

The CCI established a Digital Markets and Data Unit ("DMDU") in 2023 and accordingly the CDCL "concluded that an express provision to set up a DMU [Digital Markets Unit] under the Draft DCB is not required".[118] However, it is seen that the CCI needs to take the Government's pre-approval to staff the DMDU, which often is time-consuming.[119] The CCI has realized the importance of DMDU and has now upgraded it into a full-fledged Digital Markets Division ("DMD") headed by an advisor. This is important considering the fact that the Standing Committee on Finance in its July 2023 report stressed on the importance of making DMDU "a robust outfit staffed with skilled experts".[120] Accordingly, the Draft DCB could delegate the power to fix number of personnel required in the DMD to the Commission so that such key appointments do not get stuck in the red-tape of pre-approval from the Government.

The proposed dedicated bench within the NCLAT for appeals against the CCI orders is a positive step.[121] This could be further strengthened by requiring members of this bench to have specific expertise in digital markets and competition law.[122]

## 6. Conclusion

The Draft DCB represents a significant milestone in India's approach to regulating digital markets. It marks a shift from the traditional ex-post enforcement model under the Competition Act, to a more proactive ex-ante framework designed to address the unique challenges posed by large digital enterprises. This transition aligns India with other major jurisdictions such as the EU, the UK, and Germany, which have recently introduced or proposed similar ex-ante regulatory frameworks for digital markets. However, the Draft DCB also raises several challenges that will need to be carefully navigated. The potential for regulatory overlap with existing frameworks, such as the DPDPA 2023, and sector-specific regulations, necessitates careful coordination to ensure coherent and effective regulation.

As India moves forward with the Draft DCB, it has the opportunity to establish a model for effective regulation of digital markets that is tailored to the unique characteristics of its rapidly growing digital economy. The Draft DCB provides a solid foundation, but ongoing dialogue with stakeholders, careful consideration of its impact,

[118]DCR (n 1) ch IV [3.55].
[119]KR Srivats, 'CCI Keen to Undertake "Capacity Building" of Its Digital Markets Unit' (*The Hindu: BusinessLine* 21 May 2024) <https://www.thehindubusinessline.com/economy/cci-keen-to-undertake-capacity-building-of-its-digital-markets-unit/article68200637.ece> accessed 5 January 2025.
[120]Standing Committee on Finance (17th Lok Sabha), Action taken by the Government on the Observations/Recommendations contained in Fifty-Third Report on the subject 'Anti-Competitive Practices by Big Tech Companies, (2023) <https://sansad.in/getFile/lsscommittee/Finance/17_Finance_60.pdf?source=loksabhadocs> accessed 25 March 2025.
[121]DCR (n 1) ch IV [3.57].
[122]ibid [3.55].

and a commitment to balancing the promotion of competition with the fostering of innovation will be key to realizing its full potential.

This analysis demonstrated that while the Draft DCB draws inspiration from international frameworks like the DMA, it also incorporates distinctive elements that reflect India's specific market conditions and regulatory objectives. The Draft DCB's provisions on SSDE designation, core obligations, and enforcement mechanisms represent a thoughtful attempt to address the complex challenges of digital market regulation. However, the success of this framework will depend largely on its implementation, particularly the CCI's ability to develop clear guidelines, build technical expertise, and coordinate effectively with other regulatory bodies.

The note's comparative analysis of the Draft DCB with similar legislation in other jurisdictions revealed both commonalities and important differences in approach. While all these frameworks share the goal of promoting competition in digital markets, their specific mechanisms for achieving this vary significantly. The Draft DCB's hybrid approach, combining specific rules with principle-based provisions, offers potential advantages in terms of both regulatory certainty and flexibility. However, this approach also presents challenges in terms of implementation and enforcement that will need to be carefully managed.

This note contributed to the discussion on the Draft DCB by recommending that it can learn from the good practices and limitations of foreign legislation such as the DMA. The comprehensive analysis of designation criteria, obligations, and enforcement mechanisms provides a foundation for future research and policy development in this area. The note's examination of cases decided by the CCI, NCLAT, and EU courts offers valuable insights into the practical challenges of implementing digital market regulation.

Overall, the Draft DCB represents a bold and necessary step towards ensuring fair and contestable digital markets in India. While challenges remain, it signals India's commitment to addressing the complex competition issues arising in the digital economy. As the global community grapples with similar challenges, India's experience with this new regulatory framework will undoubtedly provide valuable insights for policymakers and regulators around the world.

## Disclosure statement

No potential conflict of interest was reported by the author(s).

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