

**NEED FOR REDEFINING COMPETITION IN THE DIGITAL AGE: THE  
INTERSECTION OF MARKET REGULATION AND DATA PRIVACY IN THE  
DRAFT DIGITAL COMPETITION BILL**

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**ABSTRACT**

*In the digital age, the traditional parameters of market competition are being upended by the growing dominance of digital platforms and the centrality of data as a driver of market power. This article examines the urgent need to redefine competition regulation by exploring the intersection of market regulation and data privacy and how shifts in competition have introduced new challenges, particularly in the context of the Draft Digital Competition Bill, 2024 (“DCB”). While DCB fairly addresses this intersection, it can be improved to further address the particular complexities arising out of such intersection, specifically with respect to the handling of data.*

*Through statutory analysis, doctrinal research, case studies, and a comparative study of global regulatory frameworks such as the European Union’s Digital Markets Act and the United States’ Federal Trade Commission Act, the article assesses the key provisions of DCB. It identifies both its potential to foster a balanced and privacy-conscious competitive environment and its shortcomings, such as inconsistent classification of digital platforms and limited scope on global operations. The analysis concludes with recommendations for strengthening DCB, including the introduction of a tiered SSDE classification system, real-time monitoring, stronger data usage regulations, and collaboration with technical experts for data portability standards.*

*The research demonstrates that while DCB is a significant step toward regulating digital markets, however, further alignment with data protection laws and global regulatory practices is essential to creating a fair, transparent, and innovation-friendly digital economy.*

**Keywords:** *Digital Market, Digital Competition, Innovation, Market Regulation, Data Privacy*

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## I. INTRODUCTION

*“People who combine together to keep up prices do not shout it out from the housetops. They keep it quiet. They make their own arrangements in the cellar where no one can see.”*

- Lord Denning (*RRTA v. W.H. Smith and Sons Ltd*)<sup>1</sup>

This observation laid the philosophical groundwork for antitrust law, a principle rooted in the need to curb tendencies that hinder market competition. Yet, the dynamics of digital market power demand a profound re-examination of this age-old issue. In a world where data has become the most valuable commodity, the traditional levers of competition law that focused on price-fixing, mergers, and monopolies have grown increasingly insufficient. Big Tech firms no longer need to conspire in “cellar” and can make their “arrangements” without leaving a trace. Their ability to impact market dynamics stems from the control over data and exploitation of sophisticated technologies. While extensive discourse has surrounded traditional antitrust tools, limited literature has addressed the unique digital challenges that laws like the Draft Digital Competition Bill, 2024 (“**DCB**”) attempt to tackle.

The dynamics of market power in the digital age are fundamentally different: traditional tools fall short as data replaces price as the new axis of control. The rise of digital markets and platform economies has presented new challenges that traditional competition law cannot adequately address. Traditional antitrust enforcement now faces the complex task of regulating Systemically Significant Digital Enterprises, enterprises that provide Core Digital Services (“**CDS**”) in India and have a significant presence and significant financial strength in the country. DCB, India’s response to this global shift, is designed to impose *ex-ante* regulations that pre-emptively addresses the monopolistic behaviours of these digital giants. Furthermore, numerous competition authorities from various countries, including Argentina, Colombia, Pakistan, Russia, and Turkey, have highlighted the complexities of applying traditional competition tools to address emerging issues in the digital economy.<sup>2</sup>

As digital platforms increasingly rely on user data, privacy concerns become inseparable from competition regulation. The problem at hand is not merely one of market dominance but also the emerging data asymmetry between users and the platforms they engage with. This asymmetry stems from the fact that platforms have the capacity to gather, analyse, and monetize vast amounts

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<sup>1</sup> *Registrar of Restrictive Trading Agreements v WH Smith & Son* (1969) EWCA Civ J0626-2.

<sup>2</sup> United Nations Conference on Trade and Development, *Competition Law, Policy and Regulation in the Digital Era*, UNCTAD (28 April 2021) TD/B/C.I/CLP/57, 3.

of user data, while users are often limited in both the understanding and control of how their data is being used. This is highlighted by Uber, that possesses detailed data on rider demand, pricing algorithms, and route efficiency as against its drivers which creates the asymmetry. This asymmetry allows Uber to control driver behaviour, set fares, and manage workforce flexibility while drivers remain largely uninformed about how these systems operate. Such imbalances create significant power differentials, allowing platforms to dominate labour and profit dynamics at the expense of their users' autonomy.<sup>3</sup>

Data is not just a byproduct of these digital interactions, it has become the very fuel of competition, raising serious questions about both consumer welfare and privacy. DCB represents a pivotal step in tackling the dual concerns of fair competition and data privacy in a world where the lines between markets and personal information are increasingly blurred.

The paper is structured to explore the transformation of competition from traditional markets to digital platforms. It begins by analysing the fundamental shifts in competition dynamics, with a particular focus on the transition from market share to data control as the primary determinant of market power. The next section provides a detailed analysis of DCB, discussing its key provisions, potential shortcomings, and offering suggestions for improvement. This is followed by a comparative assessment of antitrust frameworks in the European Union (“EU”) and the United States (“US”). The paper then addresses the practical challenges in implementing digital competition laws and finally concludes with a synthesis of findings and recommendations.

## II. SHIFTS IN COMPETITION FROM TRADITIONAL MARKETS TO DIGITAL PLATFORMS

With changing times, the shift from traditional to digital market structures has profoundly transformed how businesses operate, how consumers interact with markets, and how regulators enforce competition laws. This transformation presents unique challenges for regulators tasked with balancing market efficiency, consumer welfare, and innovation, particularly in digital platforms dominated by large tech companies.

In *traditional markets*, competition was primarily driven by the production and sale of physical goods or services. Businesses operated within clearly defined market boundaries, and their competitive position relied on factors such as price, production capacity, and distribution networks. Market power was defined by the ability of a company to influence prices, limit output, or exclude

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<sup>3</sup> Alex Rosenblat, Luke Stark, ‘Algorithmic Labor and Information Asymmetries: A Case Study of Uber’s Drivers’ (2016) 10 International Journal of Communication <<https://ijoc.org/index.php/ijoc/article/view/4892>> accessed 28 October 2024.

competitors from the market through such means as controlling production and distribution.<sup>4</sup> Regulatory scrutiny focused on market share, revenues, and efficiency, with antitrust laws designed to prevent monopolistic practices like price-fixing or collusion between large players.<sup>5</sup> Competition was largely confined to specific geographic areas or industry sectors, and dominance was measured by revenue and market share.

In contrast, *digital markets* operate in a globalized, highly interconnected space, often transcending physical boundaries. Here, products are frequently intangible, such as software, data, or digital services, and platforms serve as intermediaries connecting multiple sides of a market. For instance, platforms like Google or Amazon mediate transactions between users, advertisers, and third-party sellers.<sup>6</sup> Unlike traditional markets, competition in digital platforms hinges on factors like user engagement, data accumulation, and technological capabilities, with a particular emphasis on network effects.<sup>7</sup> Digital platforms benefit from network effects, where the value of the service increases as more users join, leading to rapid scalability.<sup>8</sup>

A major difference between traditional and digital markets lies in the role of *multi-sided platforms*, that acts as an intermediary to connect sellers and buyer enabling them to provide free services while generating revenue through targeted advertising.<sup>9</sup> For example, social media platforms like Facebook create an ecosystem where advertisers can reach users based on highly targeted data. As a result, market power in digital spaces is no longer accurately measured by market share or revenue alone. Instead, the *control over data* has become a key determinant of market dominance.

Unlike traditional firms, digital firms like Google, Facebook, and Amazon often provide free services, making it difficult to assess dominance through these conventional metrics. By controlling vast amounts of user data, these companies gain a competitive edge that enhances services, personalizes experiences, and improves targeted advertising. This competitive advantage creates a

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<sup>4</sup> CFI Team, 'Market Power' (CFI) <<https://corporatefinanceinstitute.com/resources/economics/market-power>> accessed 28 October 2024.

<sup>5</sup> The Competition Act, 2002.

<sup>6</sup> Viktor Mayer-Schonberger, Thomas Ramge, 'A big choice for big tech: Share data or suffer the consequences' (2018) 97 (5) *Foreign Affairs*, 48-54.

<sup>7</sup> Aneta Podkalicka, 'Mediatized marketplaces: Platforms, places, and strategies for trading material goods in digital economies' (2023) 29 (5) *Sage Journals* <<https://doi.org/10.1177/13548565231192103>> accessed 25 October 2024.

<sup>8</sup> 'What is Network Effect?' (*Wharton Online*, 17 January 2023) <<https://online.wharton.upenn.edu/blog/what-is-the-network-effect/>> accessed 20 October 2024.

<sup>9</sup> Juan Manuel Sanchez-Cartas, Gonzalo Leon, 'Multi-sided Platforms and Markets: A Literature Review' (2021) 35 (2) *Journal of Economic Surveys* <<https://doi.org/10.1111/joes.12409>> accessed 18 October 2024.

feedback loop: as a company accumulates more data, it can enhance algorithmic precision and deepen user engagement.<sup>10</sup>

This shift has rendered traditional competition metrics, such as market share, insufficient for assessing dominance in digital markets. In the digital economy, data is no longer a byproduct of business operations but has instead become essential to competitive advantage.<sup>11</sup> Companies that control and analyse data at scale can refine their products and services, target consumers with greater precision, and create barriers to entry for competitors. Unlike traditional markets, where power was measured by production capacity or geographic reach, in the digital world, data ownership becomes the defining feature of market power.

*Network effects* are pivotal in digital markets, where a product or service grows in value as more people use it, thereby reinforcing a platform's dominance. Google's dominance in the search engine market is driven by its ability to collect vast amounts of data on users' search queries, preferences, and behaviour. The more searches Google processes, the better its search algorithm becomes, making it difficult for competitors to match its relevance and accuracy.<sup>12</sup> This is a prime example of how data, rather than traditional metrics like price or output, has become the defining asset in digital competition. This is called the network effect, where a product or service becomes more valuable as more people use it, creating a positive feedback loop that reinforces a platform's dominance.

Similarly, Facebook's large user base attracts advertisers, generating revenue that the company reinvests into improving services.<sup>13</sup> This cycle strengthens its market position, making it difficult for competitors to challenge. Facebook's dominance over rivals like MySpace is a prime example, as more users joining the platform increased its value, enhanced its data collection, and refined its advertising targeting.<sup>14</sup> Another example is, ride-sharing platforms like Uber, where network

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<sup>10</sup> Cristian Santesteban, Shayne Longpre, 'How Big Data Confers Market Power to Big Tech: Leveraging the Perspective of Data Science' (2020) 65 (3) *The Antitrust Bulletin* <<https://journals.sagepub.com/doi/10.1177/0003603X20934212>> accessed 20 October 2024.

<sup>11</sup> Jaideep Ghosh, 'Big Data Analytics: A field of Opportunities for Information Systems and Technology Researchers' (2016) 19 (4) *Journal of Global Information Technology Management* <<https://ideas.repec.org/a/taf/ugitxx/v19y2016i4p217-222.html>> accessed 20 October 2024.

<sup>12</sup> Michael Liedtke, 'Google's search engine dominance is at the centre of the biggest US antitrust trial in decades' (*Los Angeles Times*, 11 September 2023) <<https://www.latimes.com/business/story/2023-09-11/googles-internet-search-monopoly-legal-showdown-us-regulators>> accessed 20 October 2024.

<sup>13</sup> Aditya Shastri, 'Decoding the Business Model of Facebook: A Comprehensive Guide' (*IIDE*, 24 July 2024) <<https://iide.co/case-studies/business-model-of-facebook/>> accessed 18 October, 2024.

<sup>14</sup> *ibid.*

effects mean that more drivers attract more riders, and more riders attract more drivers, creating a reinforcing cycle of value.<sup>15</sup>

These dynamics are further exemplified in social media, e-commerce, and ride-sharing services. Social media platforms, such as Facebook, offer free services to users while generating revenue from advertisers who pay for targeted ads based on user data like demographics and online behaviour. The platform's value grows with its user base, attracting more advertisers in a cycle that enhances its market dominance.<sup>16</sup> Similarly, e-commerce platforms like Amazon connect buyers and sellers, enabling buyers to access a vast selection of products while providing sellers with exposure to Amazon's large customer base. This interconnection, powered by data-driven recommendations and optimized pricing, solidifies Amazon's position as a dominant platform.<sup>17</sup> In ride-sharing, platforms like Uber link drivers and passengers in a dynamic multi-sided market where each group increases the platform's value for the other; more drivers reduce passenger wait times, while more passengers increase drivers' earnings. Uber further utilizes data on locations and user preferences to optimize routes, pricing, and the overall experience for both parties, reinforcing its market presence.<sup>18</sup>

#### A. Exploitation of Technological Capabilities

Besides the large datasets, sophisticated technologies have become a tool of hampering the market competition. In 2018, the European Commission (“EC”) fined Google €4.34 billion for anti-competitive practices in relation to its Android operating system. Google had required device manufacturers to pre-install its search app and Chrome browser as a condition for licensing the Play Store.<sup>19</sup> This case underscores how platform dominance, through control of operating systems and pre-installed apps, can stifle competition in adjacent markets.

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<sup>15</sup> *ibid.*

<sup>16</sup> Willian Fitzgerald, ‘Analysis of Facebook’s Corporate Strategy: AN Instagram and WhatsApp Perspective’ (*LinkedIn*, 13 December 2021) <<https://www.linkedin.com/pulse/analysis-facebooks-corporate-strategy-instagram-fitzgerald-phd/>> accessed 15 October 2024.

<sup>17</sup> Daniel Pereira, ‘Amazon Marketing Strategy Case Study’ (*The Business Model Analyst*, 1 October 2024) <<https://businessmodelanalyst.com/amazon-marketing-strategy/>> accessed 16 October 2024.

<sup>18</sup> Aashi Verma, ‘Use of Data Analytics by Uber to Enhance Supply Efficiency and Service Quality’ (*Pickl.ai*, 25 September 2024) <<https://www.pickl.ai/blog/use-of-data-analytics-by-uber-to-enhance-supply-efficiency-and-service-quality/#:~:text=By%20analysing%20user%20behaviour%20and%20location%20data%2C%20Uber,efficiency%20but%20also%20improves%20the%20overall%20rider%20experience.>> accessed 16 October 2024.

<sup>19</sup> Commissioner Vestager, ‘Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google’s search engine’ (*European Commission | Newsroom*, 18 July 2018) <<https://ec.europa.eu/newsroom/comp/items/631884/>> accessed 19 October, 2024.

As sophisticated technology like algorithms have become essential tools for businesses to optimize operations, automate decision-making, and enhance customer experiences, it has introduced a new form of anti-competitive behaviour, algorithmic collusion.<sup>20</sup> Unlike traditional collusion, which requires explicit coordination, algorithmic collusion occurs when independent companies' algorithms, designed to maximize profits, inadvertently or purposefully engage in collusive behaviour without direct human intervention.<sup>21</sup> Algorithms can respond to competitors' pricing patterns, adjust prices in real-time, and optimize decisions based on observed market behaviour, leading to *de facto* price-fixing or market manipulation.<sup>22</sup>

This phenomenon presents significant challenges for regulators and competition authorities, as traditional antitrust frameworks are ill-equipped to detect or address algorithm-driven coordination.

Real-world cases, such as e-book price-fixing investigated by EC, reveal concerns about algorithms facilitating price alignment.<sup>23</sup> Similarly, on platforms like Amazon, third-party sellers using similar algorithms sometimes experience unintentional price synchronization, where competitive algorithms adapt to maintain higher price points.<sup>24</sup> Also, ride-sharing platforms like Uber and Ola employ surge pricing algorithms that, while independent, often lead to price harmonization in response to demand spikes, particularly during major events.<sup>25</sup>

Competition in digital markets, influenced by multi-sided dynamics and network effects, emphasizes factors beyond traditional price and product competition, such as user engagement, data accumulation, technological capabilities, and scale. Platforms rely heavily on user engagement to attract and retain active participants,<sup>26</sup> as seen with social media's (Instagram's threads) feature updates, which increase platform value for advertisers. Data accumulation, a key competitive advantage, allows platforms to refine user experiences, as demonstrated by Amazon and Netflix's

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<sup>20</sup> Ezrachi, A & Stucke, 'M. E, Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy' (2016) Harvard University Press < <https://www.jstor.org/publisher/hup>> accessed 19 October, 2024.

<sup>21</sup> *United States of America v David Topkins* 201 US 3 (2015).

<sup>22</sup> Ezrachi (n 20).

<sup>23</sup> 'E-books: European Commission ends probe' (*BBC News*, 13 December 2012) <<https://www.bbc.com/news/business-20713446>> accessed 20 October 2024.

<sup>24</sup> Emilee Hargis, Rebecca Nelson, Stephen Scannell, David Schwartz, 'The FTC and State Case Against Amazon Highlights Risks and Impacts from Using Pricing Algorithms' (*JDSUPRA*, 24 October 2024) <<https://www.jdsupra.com/legalnews/the-ftc-and-state-case-against-amazon-4610598/>> accessed 26 October 2024.

<sup>25</sup> *Samir Agrawal v CCI* (2021) 3 SCC 136.

<sup>26</sup> Andrea S Patrucco, Daniel Trabucchi, Tommaso Buganza, Laurent Muzellec, Sebastien Ronteau, 'Technology-enabled multi-sided platforms in B2B relationships: A critical analysis and directions for future research' (2024) 122 *Industrial Marketing Management* | Elsevier, paras A2-A11.

personalised recommendations.<sup>27</sup> Technological capabilities enable these platforms to harness machine learning and AI for optimized pricing, real-time demand matching, and user experience enhancements. Scale, combined with network effects, creates barriers to entry in multi-sided markets, where larger platforms become increasingly valuable to all participants. This self-reinforcing loop makes it difficult for new competitors to disrupt the dominance of major players like Facebook, Google, and Amazon, which benefit from strong network effects and the ability to leverage vast user data to continually enhance platform offerings.<sup>28</sup>

### **B. Challenges Posed by Digital Markets**

Digital markets, while beneficial for consumers and businesses, present distinct challenges that complicate competition. One major challenge is the significant barrier to entry created by network effects and economies of scale that dominant platforms enjoy. New entrants, such as a social media network or search engine, struggle to compete with established players like Facebook or Google, as these platforms have vast user bases that attract more users, creating a cycle of dominance reinforced by data access. Data concentration intensifies this challenge, as major platforms like Google and Amazon continuously amass extensive data, enabling them to enhance services and outcompete smaller rivals.<sup>29</sup> This concentration also raises privacy concerns, as a handful of platforms control personal information about billions of users, amplifying risks around data security and misuse. Moreover, multi-sided platforms employ unique pricing strategies where one side of the market may be subsidized to draw users, as seen with Google's free search for users, which is funded through advertiser revenue.<sup>30</sup> Such pricing models can distort markets and create complex regulatory challenges when assessing the impact of platform dominance on competition. Additionally, algorithmic collusion, often occurring without explicit human agreements, makes detecting collusion harder under traditional antitrust law. Firms can claim that algorithmic behaviours are unintentional outcomes of market dynamics, complicating the task of proving intent in a setting where machines, not people, drive key decisions.

Data accumulation and privacy issues further exacerbate the challenges in digital markets. Platforms like Google and Meta rely on extensive data collection for profiling and behavioural

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<sup>27</sup> *ibid.*

<sup>28</sup> 'What Are Network Effects? | HBS Online' (*Business Insights Blog*) <<https://online.hbs.edu/blog/post/what-are-network-effects>> accessed 16 October 2024.

<sup>29</sup> Andrei Hagiu, Julian Wright, 'When Data Creates Competitive Advantage' (*Harvard Business Law Review | Magazine*, January – February 2020) <<https://hbr.org/2020/01/when-data-creates-competitive-advantage>> accessed 20 October 2024.

<sup>30</sup> James Clayton, 'Tech giants Facebook, Google, Apple and Amazon to face Congress' (BBC, 29 July 2020) <<https://www.bbc.com/news/technology-53571562>> accessed 21 October 2024.



targeting, creating detailed user profiles often without clear user consent.<sup>31</sup> This practice raises concerns around privacy, surveillance, and even discriminatory pricing, as algorithms segment users based on purchasing behaviours, potentially leading to differential pricing that affects some groups more than others. The lack of transparency in data collection practices erodes trust, as users are often unaware of the full extent of data collected, its purposes, and who else may access it, raising ethical questions about consent. Furthermore, defining markets in multi-sided environments is complex: Google, for example, could be viewed as both a search engine and an advertising platform, complicating competitive assessments.<sup>32</sup> Traditional antitrust tools focused on price and output measures are often inadequate for these platforms, where services might be free but data control and network effects have significant competitive implications. Data-driven algorithms further entrench market power, as large platforms with extensive data access use sophisticated pricing algorithms that smaller competitors cannot match, limiting competition and stifling innovation. These dynamics make it essential for regulators and policymakers to evolve frameworks that ensure fair competition, transparency, and equitable access to the benefits of digital innovation.

### III. DRAFT DIGITAL COMPETITION BILL, 2024

In response to rising concerns about anti-competitive practices in the digital economy, the Parliamentary Standing Committee on Finance proposed the introduction of the Digital Competition Act in December 2022.<sup>33</sup> This led to the formation of the Committee on Digital Competition Law (CDCL) by the Ministry of Corporate Affairs that explored various laws, including the Consumer Protection Act, the Digital Personal Data Protection Act, and the Proposed Digital India Act, to address anti-competitive practices (ACPs) by digital enterprises.<sup>34</sup>

The CDCL subsequently proposed DCB, which aims to proactively regulate digital markets as India's digital economy approaches a projected \$1 trillion by 2025-26.<sup>35</sup> The DCB advocates for an *ex-ante* regulatory approach, akin to the EU's model, to prevent anti-competitive behaviour by Systemically Significant Digital Enterprises ("**SSDEs**"). This approach contrasts with the traditional *ex-post* enforcement of the Competition Act, 2002, which addresses anti-competitive

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<sup>31</sup> Jullanar Alwazir, 'Google and Facebook, the Data Collecting Companies' (*Medium*, 14 May 2019) <<https://medium.com/jullanar-alwazir/google-and-facebook-the-data-collecting-companies-42dd5cb0e016>> accessed 17 October 2024.

<sup>32</sup> James Clayton (n 30).

<sup>33</sup> Parliamentary Standing Committee on Finance, Fifty-Third Report, *Anti-Competitive Practices by Big Tech Companies* (Lok Sabha Secretariat 2023).

<sup>34</sup> Report of the Committee on Digital Competition Law, Ministry of Corporate Affairs, Government of India, 2024.

<sup>35</sup> *ibid*.

behaviour only after it has occurred, often resulting in delays that fail to keep pace with the rapid shifts of the digital economy.

With a forward-looking approach, the DCB aims to foster innovation, protect consumer interests, and maintain competitive digital markets in India. It allows the Competition Commission of India (“CCI”) to adapt the regulatory framework dynamically, issuing directions, exemptions, and modifications in response to the evolving digital landscape.

### A. Key Provisions of DCB

#### i. Designation of Systemically Significant Digital Enterprises

DCB introduces the concept of SSDEs under Section 3, to regulate large digital platforms operating in India.<sup>36</sup> This marks a significant shift from traditional Competition Act, 2002, which primarily focused on market share, dominance, and anti-competitive practices. In contrast, DCB acknowledges the unique dynamics of the digital economy, where platforms like e-commerce, social media, and search engines derive their power from vast networks of users and data, rather than just financial metrics.

An enterprise may be designated as an SSDE if it has a significant presence in providing CDS within the country.<sup>37</sup> To determine this, DCB lays out a series of financial and user-based thresholds, which must be met over the previous three financial years.<sup>38</sup>

Under the financial thresholds, an enterprise can be classified as an SSDE if it meets one of the following criteria: a turnover in India of at least INR 4000 crore, a global turnover of at least USD 30 billion, a gross merchandise value in India of at least INR 16,000 crore, or a global market capitalization of USD 75 billion or more. Additionally, the enterprise must also meet user thresholds, with at least one crore (10 million) end users or 10,000 business users in India. These thresholds aim to capture the scale of digital enterprises both in financial terms and their reach within the Indian market.<sup>39</sup>

User thresholds reflect the critical role of platform dominance in the digital space, where control over users, rather than revenue alone, is a major indicator of market power. Section 3(3) enables CCI to evaluate an enterprise’s significance based on more than just financial thresholds or user

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<sup>36</sup> Draft Digital Competition Bill 2024, s. 3.

<sup>37</sup> *ibid*, s. 3(1).

<sup>38</sup> *ibid*, s. 3(2).

<sup>39</sup> *ibid*, s. 3(2).

numbers. It introduces factors such as the volume of commerce, number of users, network effects, and barriers to entry, providing tools to understand the specific characteristics of digital markets.<sup>40</sup>

Network effects, for example, highlight how platforms grow rapidly by attracting users, creating a self-reinforcing cycle of growth and dependence. Similarly, data-driven advantages acknowledge the importance of controlling large datasets, which is key to maintaining market power in the digital age, something traditional competition laws didn't fully address.<sup>41</sup>

DCB grants CCI discretionary power to designate an enterprise as an SSDE, even if it does not meet specific financial or user thresholds allowing CCI to consider other factors like an enterprise's economic power, the extent to which users depend on it, and the presence of network effects or high barriers to entry.

ii. Self-Reporting Obligation and Designation of SSDEs

DCB introduces a self-reporting process in Section 4 for enterprises meeting thresholds to be designated as SSDEs.<sup>42</sup> This process ensures that major digital businesses are transparently identified for regulatory oversight.

Sub-section 1 requires enterprises that meet the financial and user thresholds under Section 3(2) to notify CCI within 90 days. Notifications must include detailed information about their CDS and any Associate Digital Enterprises (“ADE”) (group entities involved in providing these services).<sup>43</sup> This allows CCI to track and monitor enterprises with significant market influence, promoting transparency and accountability.

Once notified, CCI is empowered by sub-section 3 to designate the enterprise as an SSDE, subjecting it to the rules of Chapter III aimed at ensuring fair competition and consumer protection.<sup>44</sup> If an enterprise fails to self-report, Sub-section 4 enables CCI to proactively request information from suspected SSDEs to ensure no entity evades oversight.<sup>45</sup>

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<sup>40</sup> *ibid*, s. 3(3).

<sup>41</sup> *ibid*, s. 3(2).

<sup>42</sup> *ibid*, s. 4.

<sup>43</sup> *ibid*, s. 4(1).

<sup>44</sup> *ibid*, s. 4(3).

<sup>45</sup> *ibid*, s. 4(4).

Under sub-sections 5 and 6, enterprises can respond to a show cause notice if CCI decides to designate them as an SSDE. After reviewing the enterprise's defence, CCI can either finalize or revoke the designation, providing procedural fairness.<sup>46</sup>

Sub-section 7 allows CCI to designate an enterprise as an SSDE based on available data if it fails to provide required information.<sup>47</sup> The SSDE status lasts for three years, with re-evaluation afterward, as per Sub-section 8.<sup>48</sup> CCI can also designate ADEs within a group as SSDEs under Sub-section 9, preventing businesses from avoiding regulation through subsidiaries.<sup>49</sup>

iii. Anti-circumvention of designation

Section 6 introduces measures to prevent enterprises from circumventing thresholds for being designated as SSDEs. CCI can request information if there is suspicion of such circumvention, and if confirmed, impose penalties and proceed with SSDE designation.<sup>50</sup> This provision ensures that digital platforms with significant market power, cannot exploit legal loopholes to evade oversight.

iv. Revocation or re-designation of SSDE status

Section 7 provides a mechanism for revocation or re-designation of SSDE status. Enterprises can apply for revocation during the final six months of their designation if they no longer meet the SSDE thresholds or after one year if market dynamics have significantly changed. CCI must assess such requests within 90 days, and the enterprise remains designated during this review period. If no decision is made within the three-year designation period, the enterprise is automatically re-designated.<sup>51</sup> This process introduces flexibility, ensuring that enterprises are not indefinitely subjected to SSDE obligations if market conditions shift, crucial in the evolving digital economy.

v. Obligation for SSDEs and ADEs

Section 8 outlines the responsibilities that arise upon the designation of an enterprise as a SSDE. Once designated, an SSDE is required to comply with specific obligations as identified by CCI in

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<sup>46</sup> *ibid*, s. 4 (5), 4 (6).

<sup>47</sup> *ibid*, s. 4(7).

<sup>48</sup> *ibid*, s. 4(8).

<sup>49</sup> *ibid*, s. 4(9).

<sup>50</sup> *ibid*, s. 6.

<sup>51</sup> *ibid*, s. 7.

its designation order.<sup>52</sup> DCB extends these obligations to ASDEs and their non-compliance shall result in the same penalties as those imposed on the SSDE.

CCI holds the authority to establish separate conduct requirements for each CDS, tailored to the nature of the service, the number of users in India, and other relevant factors.<sup>53</sup> This allows for differentiated obligations enabling a more nuanced regulatory approach. For instance, a dominant social media platform might be subjected to stricter obligations than a smaller marketplace platform, depending on their user base and market influence.

Additionally, this section mandates CCI to consider factors like economic viability, cybersecurity, fraud prevention, intellectual property rights, and compliance with other legal frameworks while drafting the conduct requirements.<sup>54</sup> These considerations ensure that the obligations imposed on SSDEs and their associates are balanced against practical constraints and the broader legal environment.

vi. Reporting and Compliance Requirements

Section 9 mandates SSDEs to implement transparent complaint-handling mechanisms, allowing consumers, business users, and stakeholders to raise concerns about their operations. SSDEs must also regularly report to the Commission on compliance measures, ensuring regulatory oversight and enabling early identification of potential non-compliance for corrective action.<sup>55</sup>

vii. Fair and Transparent Dealing Obligations

Section 10 mandates SSDEs to operate fairly, non-discriminatorily, and transparently when interacting with end users and business users<sup>56</sup> and avoid practices that unfairly disadvantage smaller businesses or manipulate search algorithms. This ensures that dominant platforms do not distort competition or harm businesses relying on their services.

viii. Prohibition of Self-Preferencing

Section 11 prohibits SSDEs from favouring their own products, services, or those of related parties (affiliated companies) or third-party businesses with whom they have specific arrangements.<sup>57</sup> This

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<sup>52</sup> *ibid*, s. 8.

<sup>53</sup> *ibid*.

<sup>54</sup> *ibid*.

<sup>55</sup> *ibid*, s. 9.

<sup>56</sup> *ibid*, s. 10.

<sup>57</sup> *ibid*, s. 11.

rule addresses self-preferencing, a common issue in digital platforms where enterprises control both the marketplace and the competition, ensuring a level playing field for all participants.

ix. Data Usage Provisions

Under Section 12, SSDEs are explicitly prohibited from using or relying on “non-public data: from business users that operate on their CDS to gain a competitive advantage against those users.”<sup>58</sup> Non-public data includes both aggregated and non-aggregated data generated through the commercial activities of business users and their end users.<sup>59</sup> This prohibition serves to protect business users from potential exploitation by larger platforms that might misuse their access to sensitive data to compete unfairly.

Additionally, the provisions specify that SSDEs must not intermix or cross-use personal data collected from various services, including their CDS, without obtaining explicit consent from end users or business users.<sup>60</sup> This ensures that user data is handled with care and transparency, thereby fostering trust between users and digital platforms. Moreover, SSDEs are not allowed to permit third parties to utilize this data without appropriate consent, reinforcing the importance of data privacy and user control in the digital marketplace.<sup>61</sup>

By directly addressing data usage, DCB acknowledges the role of data as a critical asset in the digital economy.

x. Provisions on Restricting Third-Party Applications

Section 13 establishes the ability of SSDEs from restricting users’ ability to download, install, and use third-party applications on their CDS. It also requires SSDEs to allow users to modify default settings.<sup>62</sup> This ensures a competitive digital environment where users have the freedom to access diverse applications without interference from dominant platforms curbing monopolistic practices and enhancing consumer choice and satisfaction.

xi. Anti-Steering Provisions

DCB also includes anti-steering provisions that prevent SSDEs from restricting business users from directly communicating or promoting offers to end users. SSDEs are also prohibited from

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<sup>58</sup> *ibid*, s. 12.

<sup>59</sup> *ibid*, s. 12, explanation.

<sup>60</sup> *ibid*, s. 12(2)(a).

<sup>61</sup> *ibid*, s. 12(2)(b).

<sup>62</sup> *ibid*, s. 13.

funneling users exclusively to their own products or services, unless necessary for the CDS.<sup>63</sup> This ensures fair competition by allowing business users to market their offerings freely without SSDE interference.

xii. Tying and Bundling Regulations

Another significant aspect addresses the practices of tying and bundling, which can undermine competition. SSDEs are prohibited from requiring or incentivizing users to use additional products or services, whether from the SSDE or its affiliates, alongside CDS.<sup>64</sup> This regulation protects consumer choice and prevents dominant platforms from leveraging their market power to force bundled services. The definition of “integral” services shall be set by CCI to adapt to evolving market and technological conditions.<sup>65</sup>

xiii. Grounds for Exemption

CDCL acknowledges that not all digital enterprises should be subject to stringent *ex-ante* obligations. Instead, certain classes of enterprises can be exempted based on their specific business models and market positioning. Thus, the authority to frame regulations specifying grounds for exemption lies with CCI which will assess the features of the enterprises involved.<sup>66</sup> This is crucial for maintaining a balance between regulating dominant players and allowing smaller or emerging digital enterprises to grow without excessive compliance burdens.

Strategic exemptions also ensure that innovation in the digital sector isn't stifled by overly rigid regulations. This measured approach to exemption could be seen as an effort to align regulation with the fluid nature of digital markets.

xiv. Enforcement Mechanisms

CCI is the principal enforcement body under the proposed DCB. To address the complexities of digital markets, which operate at the intersection of competition law and technology, CDCL recommended bolstering the CCI's capacity by integrating more technology experts within its Digital Markets and Data Unit.<sup>67</sup> This would enable the CCI to better evaluate and regulate digital

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<sup>63</sup> *ibid*, s. 14.

<sup>64</sup> *ibid*, s. 15.

<sup>65</sup> *ibid*, s. 15.

<sup>66</sup> CDCL Report (n 34), ch. IV, 3(C)(II).

<sup>67</sup> CDCL Report (n 34), ch. IV, 3(D).

enterprises that use sophisticated algorithms, data analytics, and machine learning for business strategies.

Additionally, to expedite the disposal of disputes, a special bench within the National Company Law Appellate Tribunal has been recommended.<sup>68</sup> This is a significant measure, considering the importance of swift resolution as prolonged litigation or delayed enforcement could result in irreversible market distortions and consumer harm.

xv. Remedies and Penalties

The remedies for non-compliance are stringent, with the CCI empowered to impose monetary penalties of up to 10% of the SSDE's global turnover.<sup>69</sup> This is essential as global turnover ensures that large multinational digital companies operating in India are held accountable for their actions, without being able to limit their liability to just local operations.

Additionally, DCB stipulates penalties for incorrect reporting and also holds key managerial personnel liable.<sup>70</sup> This provision is aimed at ensuring compliance at both the enterprise and individual levels, deterring attempts to evade accountability.

CCI is also authorized to conduct inquiries, issue orders, and impose penalties.<sup>71</sup> This broad remit allows it to be proactive in curbing anti-competitive practices, consistent with the *ex-ante* framework, and grants aggrieved parties the right to seek compensation for damages caused by non-compliance.

#### **IV. GLOBAL COMPARISONS OF DIGITAL COMPETITION REGULATION**

As digital platforms continue to grow in power, regulatory efforts worldwide have aimed at addressing their dominance and ensuring fair competition. This comparison examines how EU, US and India approach digital competition regulation, particularly in relation to Big Tech companies.

##### **A. EU's Approach**

In recent years, EU has taken proactive steps to regulate the behaviour of large digital enterprises, addressing anti-competitive practices and promoting fair market competition. These efforts have

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<sup>68</sup> CDCL Report (n 34), ch. IV, 3(D).

<sup>69</sup> DCB (n 36), s. 28.

<sup>70</sup> DCB (n 36), s. 29.

<sup>71</sup> DCB (n 36), s. 16, 17.



included both *ex-post* and *ex-ante* measures, with the Treaty on the Functioning of the European Union, 2012 (“TFEU”) providing the traditional legal framework for competition enforcement, and new legislation like the DMA serving as *ex-ante* regulatory tools designed specifically for the digital economy.<sup>72</sup> These measures aim to balance competition in a rapidly evolving digital landscape, tackling challenges posed by the dominance of major digital platforms or Gatekeepers.

The *ex-post* framework under the TFEU has been a foundational tool for addressing competition issues. Article 101 prohibits practices that restrict competition, while Article 102 addresses abuse of dominant positions by companies.<sup>73</sup> In the past decade, EC has levied significant fines against major tech firms for anti-competitive conduct. For example, Google has faced multiple fines for prioritizing its services over competitors (EUR 2.42 billion for Google Shopping, EUR 4.34 billion for restrictions on Android, and EUR 1.49 billion for AdSense practices).<sup>74</sup> Similarly, Amazon faced charges regarding the use of marketplace sellers’ non-public data and was subject to voluntary commitments.<sup>75</sup> However, *ex-post* enforcement has been criticized as too slow to address the rapid shifts in digital markets, where dominance can quickly become entrenched, prompting the need for faster, proactive interventions.

To address the limitations of *ex-post* enforcement, the EU introduced the DMA in 2022 as part of the Digital Services Act package.<sup>76</sup> The DMA targets Gatekeepers, large digital platforms that have a significant impact on the EU market and act as gateways for businesses to reach consumers.<sup>77</sup> The DMA introduces a mix of prohibitive and mandatory *ex-ante* obligations on these Gatekeepers, aiming to pre-emptively curb anti-competitive behaviour.

The DMA establishes strict rules for large digital companies, designated as “Gatekeepers,” that meet specific criteria, including an annual turnover of at least EUR 7.5 billion in the EU or a market valuation of EUR 75 billion, along with a user base of 45 million monthly active users and

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<sup>72</sup> The Treaty on the Functioning of the European Union 2012 C 326/49; 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 (Digital Markets Act).

<sup>73</sup> TFEU (n 72), art. 101, 102.

<sup>74</sup> ‘Google loses €2.4bn EU antitrust case over its shopping service’ (*euronews*) <[www.euronews.com/my-europe/2024/09/10/google-loses-24-bn-eu-antitrust-case-for-favouring-its-own-shopping-service](https://www.euronews.com/my-europe/2024/09/10/google-loses-24-bn-eu-antitrust-case-for-favouring-its-own-shopping-service)> accessed 24 October 2024.

<sup>75</sup> BBC News, ‘Amazon charged with abusing EU competition rules’ (*BBC Home - Breaking News, World News, US News, Sports, Business, Innovation, Climate, Culture, Travel, Video & Audio*, 10 November 2020) <[www.bbc.com/news/business-54887650](https://www.bbc.com/news/business-54887650)> accessed 24 October 2024.

<sup>76</sup> DMA (n 72).

<sup>77</sup> ‘Digital Markets Act’ (*Digital Markets Act (DMA)*)

<[https://digital-marketsact.ec.europa.eu/index\\_en#:~:text=The%20Digital%20Markets%20Act%20\(DMA\)%20establishes%20a%20set,example%20online%20search%20engines,%20app%20stores,%20messenger%20services.](https://digital-marketsact.ec.europa.eu/index_en#:~:text=The%20Digital%20Markets%20Act%20(DMA)%20establishes%20a%20set,example%20online%20search%20engines,%20app%20stores,%20messenger%20services.)> accessed 23 October 2024.

10,000 business users in the EU.<sup>78</sup> These Gatekeepers, who provide core platform services like online search, social networking, or app stores, are subject to obligations tailored to reduce the risk of market abuse before it occurs. The EC designates Gatekeepers based on both quantitative and qualitative thresholds, re-evaluating these designations every three years to adapt to shifting market dynamics.<sup>79</sup>

The DMA places various ex-ante obligations on Gatekeepers to curb anti-competitive practices. For instance, it prohibits tying and bundling services, restrictive default settings, and self-preferencing. Gatekeepers must ensure interoperability with third-party applications, provide business users access to their own data, and offer data portability for end-users.<sup>80</sup> Exemptions to these obligations are available in cases concerning public health, security, or economic viability.<sup>81</sup> The EC enforces these provisions through market investigations, imposing fines of up to 10% of global turnover for non-compliance, with repeated offenses subject to penalties of 20%.<sup>82</sup> Furthermore, Gatekeepers must notify the EC of any mergers involving digital services, and the EC has the authority to block future mergers if a Gatekeeper demonstrates systematic non-compliance, reinforcing the Act's commitment to maintaining fair competition in the digital market.<sup>83</sup>

Comparatively, India's DCB seeks to address similar challenges posed by large digital enterprises. Both legislative frameworks aim to regulate the dominance of Gatekeepers in digital markets to ensure fair competition, protect consumers, and promote innovation. However, the DCB, being in the draft stage, can incorporate key lessons and provisions from the DMA to enhance its effectiveness in managing the unique complexities of digital markets which is discussed elaborately in the next section.

## **B. US's Approach**

US has a well-established set of antitrust laws, primarily designed for traditional markets but increasingly adapted to tackle the unique challenges posed by the dominance of large digital platforms. The three foundational laws, namely, the Sherman Act, the Clayton Act, and the Federal

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<sup>78</sup> 'What Are the Digital Services Act (DSA) and Digital Markets Act (DMA)? - IT Governance Blog En' (*IT Governance Blog En*) <[www.itgovernance.eu/blog/en/what-are-the-digital-services-act-dsa-and-digital-markets-act-dma](http://www.itgovernance.eu/blog/en/what-are-the-digital-services-act-dsa-and-digital-markets-act-dma)> accessed 22 October 2024.

<sup>79</sup> *ibid.*

<sup>80</sup> *ibid.*

<sup>81</sup> *ibid.*

<sup>82</sup> *ibid.*

<sup>83</sup> *ibid.*

Trade Commission Act (“FTCA”) form the core of US antitrust enforcement.<sup>84</sup> The Sherman Act, which prohibits trade restraints and monopolistic practices, is foundational but was originally crafted with traditional markets in mind, and thus doesn’t explicitly address digital-era dominance forms like data control.<sup>85</sup> The Clayton Act complements the Sherman Act by focusing on mergers and acquisitions that might harm competition or foster monopolies, a critical factor in digital markets where tech giants often acquire smaller companies in areas like artificial intelligence, social networking, and cloud computing.<sup>86</sup> The FTCA established the Federal Trade Commission (FTC), which, alongside the Department of Justice (DOJ), has expanded its role to investigate and regulate major digital players, such as Meta, Google, and Amazon, as they face accusations of monopolistic behaviour.<sup>87</sup> Together, these acts provide an *ex-post* enforcement structure, addressing anti-competitive practices only after they occur, contrasting with the EU’s pre-emptive *ex-ante* approach.

In recent years, the growing influence of tech platforms has led to intensified scrutiny and several high-profile investigations targeting the market practices of companies like Google, Meta, and Amazon. Recognizing the limitations of traditional antitrust laws in curbing the potential abuses of digital platforms, US policymakers have proposed a series of legislative reforms. One of the key initiatives is the American Innovation and Choice Online Act (“AICO”), which aims to prevent large platforms, known as Covered Platforms, from engaging in discriminatory practices. Key provisions include banning self-preferencing, where platforms might unfairly prioritize their own products; prohibiting data misuse, such as leveraging non-public user data to benefit platform-owned services; and outlawing anti-competitive tying and bundling. Additionally, the AICO seeks to prevent platforms from restricting data portability, ensuring that users can move their data to other providers if desired. In comparison to the DMA, which addresses similar self-preferencing and data-sharing concerns, the US framework employs penalties such as fines of up to 15% of US revenue and even the possibility of divestitures in serious cases.<sup>88</sup>

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<sup>84</sup> CDCL Report (n 34).

<sup>85</sup> ‘Sherman Antitrust Act’ (LII / Legal Information

*Institute*) <[www.law.cornell.edu/wex/sherman\\_antitrust\\_act#:~:text=Sherman%20Antitrust%20Act%20of%201890%20is%20a%20federal,interests%20in%20restraint%20of%20foreign%20or%20interstate%20trade.](http://www.law.cornell.edu/wex/sherman_antitrust_act#:~:text=Sherman%20Antitrust%20Act%20of%201890%20is%20a%20federal,interests%20in%20restraint%20of%20foreign%20or%20interstate%20trade.)> accessed 26 October 2024.

<sup>86</sup> ‘Britannica Money’ (*Encyclopaedia Britannica | Britannica*) <[www.britannica.com/money/Clayton-Antitrust-Act](http://www.britannica.com/money/Clayton-Antitrust-Act)> accessed 24 October 2024.

<sup>87</sup> ‘The Antitrust Laws’ (*Federal Trade Commission*) <[www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws#:~:text=Congress%20passed%20the%20first%20antitrust%20law,%20the%20Sherman,which%20created%20the%20FTC,%20and%20the%20Clayton%20Act](http://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws#:~:text=Congress%20passed%20the%20first%20antitrust%20law,%20the%20Sherman,which%20created%20the%20FTC,%20and%20the%20Clayton%20Act)> accessed 22 October 2024.

<sup>88</sup> American Innovation and Choice Online Act HR 3816 (Introduced on 18 October 2021).

Another major reform is the Ending Platform Monopolies Act (“EPM”), which directly addresses conflicts of interest by forbidding Covered Platforms from owning both an online marketplace and other competitive businesses. To ensure fair competition, this act prohibits private labelling, preventing platforms from favouring their own products over those of third-party sellers. If a platform’s control over different lines of business creates conflicts of interest, courts can mandate divestiture to restore competitive balance. Similar to the AICO, the EPM imposes steep penalties for violations, reinforcing the principle that platforms should not leverage their power in one market to unfairly expand into other areas. This approach emphasizes structural remedies, similar to India’s DCB, which is also considering measures to address conflicts of interest within multi-sided digital platforms.<sup>89</sup>

The Open App Markets Act (“OAM”) addresses the specific influence of app stores controlled by tech giants like Apple and Google. The OAM ensures that developers have fair access to app store markets by prohibiting app store owners from requiring the use of in-app payment systems, imposing restrictive pricing terms, or limiting access to development tools. By mandating that app developers have timely and fair access to essential operating system interfaces and tools, the OAM fosters a more competitive and innovative mobile app environment. Collectively, these reforms represent a significant shift in US antitrust policy, aiming to adapt traditional regulatory frameworks to address the complexities and challenges of digital markets in an era dominated by powerful tech platforms.<sup>90</sup>

Across these regulatory frameworks, certain trends emerge, such as the emphasis on preventing anti-competitive self-preferencing, prohibiting data misuse, and addressing conflicts of interest within multi-sided platforms. However, notable differences persist, particularly regarding enforcement strategies: the EU’s *ex-ante* DMA contrasts with the US’s *ex-post* focus, although recent legislative proposals reflect a shift in the US toward a more proactive stance. The DCB in India, still in draft form, is poised to adopt lessons from both the DMA and US initiatives, seeking to safeguard digital competition, although each jurisdiction’s approach remains shaped by its unique market conditions and regulatory philosophies.

## V. ANALYSIS OF DIGITAL COMPETITION BILL

### A. Analysis and Potential Shortcomings

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<sup>89</sup> Ending Platform Monopolies Act HR 3825 (Introduced on 06 November 2021).

<sup>90</sup> Open App Markets Act HR 5017 (Introduced on 08 November 2021).

DCB presents a substantial regulatory framework for managing the influence of significant digital enterprises, but it also raises certain legal ambiguities and operational challenges that may impact its effectiveness. One major issue lies in the classification of SSDEs under Section 3(2). DCB requires that digital entities meet both financial and user-based thresholds to qualify as SSDEs. However, a proviso allows for classification if only one threshold is met, creating inconsistency that could result in legal disputes and delay the regulatory process. Furthermore, the DCB grants broad discretionary powers to CCI in designating SSDEs, allowing it to consider a wide range of factors. This flexibility ensures that influential digital enterprises are appropriately regulated, yet it also introduces subjectivity. Decisions may become unpredictable, potentially causing uncertainty for digital companies regarding their SSDE status and risking regulatory overreach where entities that do not meet financial or user thresholds are scrutinized. Without clearer guidelines for applying this discretion, CCI's decisions could be perceived as arbitrary or excessively interventionist, complicating compliance for businesses.

Another limitation of the DCB is its primary focus on the Indian market, which may enable multinational digital platforms with low turnover in India but significant global influence to avoid scrutiny. This oversight risks missing the broader economic implications of global digital platforms. Additionally, DCB grants CCI authority to classify SSDEs even when information is incomplete or withheld, a necessary measure to prevent evasion but one that introduces the possibility of subjective decision-making. Such discretionary power could cause reputational harm to an enterprise before it has the opportunity to respond or defend itself. Moreover, the DCB's lack of real-time monitoring mechanisms creates room for enterprises to exploit loopholes, particularly by fragmenting services to avoid classification as SSDEs. Without robust oversight between reporting cycles, regulatory evasion remains a possibility, weakening DCB's enforcement potential.

The scope of the DCB is further limited by its exclusion of key digital services, such as cybersecurity and digital identity verification, from its list of CDSs. These omissions mean that significant areas of digital infrastructure may remain unregulated, potentially undermining comprehensive oversight of the digital economy. Additionally, DCB's heavy reliance on self-reporting for SSDE designation and market power changes, without active real-time monitoring, could delay the detection of non-compliance or anti-competitive practices. This dependence on enterprises' self-disclosures limits the CCI's ability to respond swiftly to market changes or anti-competitive behaviour, as proactive regulatory mechanisms are absent.

The DCB also encounters challenges in cross-border enforcement, as many SSDEs operate on a global scale, making it difficult for India's regulatory framework to manage compliance across jurisdictions. The absence of provisions for resolving conflicts with other nations' regulations weakens the DCB's ability to control multinational enterprises effectively. Furthermore, DCB's broad definition of "non-public data" could cause confusion, inadvertently stifling innovation and collaboration among business users. Data portability requirements, while intended to support consumer choice, introduce technical difficulties, particularly in achieving standardized data formats across various platforms. Addressing these challenges with clearer definitions, well-defined guidelines, and stronger monitoring mechanisms could enhance the DCB's capability to regulate the rapidly evolving digital marketplace more effectively.

### **B. Proposed solutions to address shortcomings**

To address current ambiguities and better regulate digital platforms, DCB could benefit from a tiered classification system for SSDEs. Presently, Section 3(2) of the DCB requires digital platforms to meet both financial and user-based thresholds to qualify as SSDEs, yet a proviso allows for classification if only one threshold is met. This inconsistency could be resolved by introducing a tiered classification. Tier 1 SSDEs would meet both thresholds, marking them as dominant players in the market, while Tier 2 SSDEs would include entities meeting only one threshold but still exhibiting significant influence. Such a structure would enhance regulatory precision by enabling CCI to appropriately classify and monitor digital platforms, reducing potential for disputes and litigation while ensuring comprehensive oversight of key players in the digital economy.

Given the global nature of digital platforms, the DCB's focus on the Indian market alone may limit its effectiveness. To address this, the DCB could expand CCI's scope to assess digital platforms' global market power and its impact on Indian users and businesses. This would ensure accountability for multinational platforms with minimal local turnover but significant global influence, aligning DCB with the realities of a globally interconnected digital economy. Additionally, cross-border regulatory cooperation is essential for effective enforcement. Engaging with international bodies like the **International Competition Network (ICN)** and the **Organisation for Economic Co-operation and Development (OECD)** could help India harmonize its regulations with those in other jurisdictions, enhancing enforcement consistency and fostering a more coordinated approach to regulating global digital enterprises.

The DCB could also introduce real-time monitoring and automated data-sharing mechanisms to enhance regulatory oversight. By deploying monitoring tools, the CCI would be able to continuously assess digital platforms, gaining timely insights into their activities and market positions. Automated data-sharing protocols would further enable swift intervention, shifting the regulatory approach from reactive enforcement to proactive market oversight. This setup would prevent companies from exploiting gaps between reporting cycles, as CCI would be able to detect anti-competitive practices more efficiently. Real-time oversight, complemented by periodic third-party audits and anonymous whistleblower mechanisms, would strengthen accountability and discourage circumvention, ensuring compliance in an ever-evolving digital landscape.

To improve data portability and interoperability, the DCB could incorporate provisions similar to the US Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act and the EU's DMA. These measures allow consumers to switch services without losing their data,<sup>91</sup> lowering entry barriers for new platforms and fostering competition.<sup>92</sup> By collaborating with technical experts to establish data standards, the DCB could make data portability seamless across platforms, empowering users and enhancing market fluidity.

*Additionally*, clearer definitions of non-public data, such as distinguishing between personal and proprietary business data, would provide businesses with the necessary guidance to comply with the law while protecting user privacy.

The DCB could also adopt stricter regulations on data usage to prevent anti-competitive exploitation of consumer information. Large platforms like Jio and Google, which collect extensive user data, could potentially misuse this data to reinforce their market position.<sup>93</sup> Following the approach of AICO, the DCB could restrict platforms from using non-public consumer data to gain a competitive edge.<sup>94</sup> By imposing such limitations, the DCB would encourage fair competition and protect consumer privacy from manipulative practices by dominant players.

Stricter merger and acquisition (**M&A**) controls are another area where the DCB could adopt lessons from international frameworks like the US Clayton Act and EPM.<sup>95</sup> In the digital economy,

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<sup>91</sup> Augmenting Compatibility and Competition by Enabling Service Switching Act (ACCESS) 2021.

<sup>92</sup> DMA (n 72), art. 6(7).

<sup>93</sup> 'The ugly truth: tech companies are tracking and misusing our data, and there's little we can do' (*The Conversation*) <<https://theconversation.com/the-ugly-truth-tech-companies-are-tracking-and-misusing-our-data-and-theres-little-we-can-do-127444>> accessed 23 October 2024; 'Is Big Data turning the wheels at Reliance Jio – inside the youngest mobile operator's big data strategy' (*AIM*) <<https://analyticsindiamag.com/ai-origins-evolution/big-data-turning-wheels-reliance-jio-inside-youngest-mobile-operators-big-data-strategy/>> accessed 26 October 2024.

<sup>94</sup> AICO (n 88).

<sup>95</sup> EPM (n 89).

large platforms frequently acquire smaller competitors in emerging fields such as social media, e-commerce, and cloud services to maintain their dominance. To counteract this trend, the DCB could impose M&A notification requirements for significant platforms, especially when acquisitions involve digital services that could reduce competition. This scrutiny would be essential in India to prevent market consolidation by dominant players like Jio and Flipkart, ultimately preserving a competitive digital ecosystem.

The regulation of app store operations is also crucial for fostering fair competition in digital markets. Inspired by the Open App Markets Act (OAM) in the US, the DCB could address unfair practices by app stores, such as mandating the use of proprietary in-app payment systems or enforcing restrictive pricing policies. By allowing developers greater freedom in monetizing their apps, the DCB would encourage innovation and create a more competitive app ecosystem in India, reducing the power of major app store platforms like Google Play and Apple's App Store.<sup>96</sup>

Additionally, integrating data transparency and control measures within the DCB, in alignment with India's Digital Personal Data Protection Act, 2023, could enhance consumer protections. Drawing from the DMA's approach to data transparency, the DCB could impose strict obligations on platforms to prevent the misuse of non-public data for anti-competitive purposes. By ensuring that user and business data is not exploited, the DCB would safeguard user privacy while supporting a level playing field for competitors.

To ensure compliance, the DCB could implement a robust penalty structure. Inspired by the DMA's enforcement model, which allows for fines of up to 20% of a company's global turnover for repeated violations,<sup>97</sup> the DCB could introduce similar deterrents to prevent non-compliance among large digital enterprises. This penalty framework would be particularly effective in deterring violations by globally dominant platforms, underscoring the importance of compliance to maintain market fairness and consumer trust.

Lastly, as emerging technologies like AI and blockchain transform the digital landscape, the DCB must remain adaptable. Including provisions that allow for the regulation of new digital services, similar to the DMA's adaptable approach, would keep the DCB relevant in an evolving market. By staying responsive to technological advancements, the DCB would not only effectively address current market dynamics but also foster an environment conducive to innovation. This forward-

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<sup>96</sup> OAM (n 90).

<sup>97</sup> DMA (n 72), art. 30.



looking framework would support the development of a robust, competitive digital economy in India.

## VI. CONCLUSION

The rapidly evolving digital economy has reshaped the foundations of competition, calling for a fundamental re-evaluation of traditional regulatory norms. With the rise of digital platforms, data has emerged as the most valuable asset, challenging conventional metrics of market power and demanding a more sophisticated regulatory approach. The shift from traditional markets to digital platforms has brought complexities such as network effects, data accumulation, collusion, and challenges in antitrust enforcement, which are inadequately addressed by traditional competition regulations. As digital platforms continue to gain dominance by exploiting technological capabilities and data-driven business models, the need to redefine competition regulation is urgent.

DCB marks a significant step towards addressing these challenges, proposing a regulatory framework that takes into account the unique dynamics of digital markets. Its provisions, which focus on Self-Designated Digital Entities, prohibition of self-preferencing, anti-steering, data usage, and third-party application operations, reflect a forward-thinking approach to curbing platform dominance and fostering a competitive environment. However, DCB also highlights areas where further development is required. Key shortcomings include inconsistent SSDE classification, broad discretionary powers of the CCI, and limited focus on global operations, which could undermine its effectiveness in a borderless digital economy.

In drawing global comparisons, particularly with EU's DMA and US' Regulations, it is clear that DCB has the potential to create a more balanced, privacy-conscious, and competitive digital landscape, but it must integrate more stringent data usage regulations, cross-border collaboration mechanisms, and real-time monitoring of platform activities. Lessons from global counterparts emphasize the need for stricter merger and acquisition controls, enhanced data portability standards, and robust protections against conflicts of interest, particularly in digital services and app store operations.

To truly transform the regulatory landscape, competition norms must be revisited and reshaped to reflect the intersection of market regulation and data privacy. DCB presents an opportunity to redefine the contours of market power, ensuring that data accumulation does not translate into unchecked dominance. Stronger regulations on data transparency and control are crucial, as is the inclusion of emerging technologies in the regulatory framework. Further alignment with data

protection laws will not only protect consumer welfare but also promote innovation by ensuring that data is handled responsibly.

Therefore, the future of competition regulation will depend on a more holistic approach, one that integrates competition, privacy, and technological innovation. By addressing the gaps in the current framework and implementing the proposed solutions DCB could usher in a new era of market fairness and data accountability. Ultimately, the evolving digital landscape requires a regulatory structure that not only safeguards competition but also promotes trust, privacy, and sustainable innovation, ensuring a level playing field for all market participants.